Applying provisions of the Australian Constitution to protect rights from intrusion by State Parliaments

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One of the limitations of the few written rights guarantees in the Australian Constitution is that they typically refer to Commonwealth laws only. Specific examples include the right to trial by jury, right to due compensation if property is confiscated by the government, and freedom of religion. In this article, I argue that it would be desirable to extend these guarantees to protection against State laws taking away these rights. There is no reason in logic to confine them to federal laws only. Extension of rights in this way finds support in the American case law on the extension of that country's Bill of Rights provisions to the States, as well as some Australian jurisprudence concerning s 122 of the Constitution.

INTRODUCTION

This article attempts a very ambitious task. Its purpose is to argue that certain references in the Australian *Constitution*, ostensibly targeted at the federal government and limiting its law-making power, also serve as limits on the law-making power of State governments. The result of this suggestion would be that the rights under consideration would be protected to a greater degree than is currently the position today. In so suggesting, extensive use will be made of the American experience, since the history of some of the jurisprudential development in that country can provide very useful background discussion in the context of the law reform that will be suggested. As always, appropriate differences in textual provision, culture and history, will be acknowledged. This article does not consider the extent to which human rights may be *implied* generally from the text or structure of the *Constitution*, or from the common law. The author has written of these issues elsewhere.[1] Its focus is the possible application of existing *express* rights in the *Constitution* to the States.

This suggestion, of the universality of the express rights provisions that appear in the *Constitution* to Commonwealth and State law alike, has been met with derision by some colleagues with whom the idea has been discussed, including on the basis that the suggestion was "far fetched" and would never be accepted by the High Court. To the author's mind, this reflected a strange mind set; perhaps a positivistic philosophy that academics should only write about things that have actually happened, and should not make any "left field" suggestions as to future law reform. Such a suggestion also ignores the incredible development in law reform over many fronts throughout the common law's history. Would a submission by Lord Atkin to a journal in the 1920s proposing a generalised duty of care have been rejected because the suggestion it contained was "far fetched" During the 1980s, many in Australia would have viewed the concept of common law recognition of native title, an implied freedom of political speech and an implied right to a fair trial to be similarly far-fetched. Things that would "never be accepted by the High Court". Yet all of these things were decided by the High Court in the following decade. In this vein, the author invites readers to consider the following argument about the application of certain provisions in the *Constitution* to limit State laws' invasive of human rights.

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[1] See eg, Gray A, "The Common Law and the Constitution as Protectors of Rights in Australia" (2010) 39(2) *Common Law World Review* 119; Gray A, "Due Process, Natural Justice, Kable and Organisational Control Legislation" (2009) 20 PLR 290; Gray A, "Constitutionality of criminal organisation legislation" (2010) 17 AJ Admin L 213.

AN AMERICAN TALE

It is considered that the American experience regarding the protection of human rights is extremely useful in making the argument alluded to above. Specifically, rights found in the US *Bill of Rights* have progressively been interpreted to be applicable against the States. This article explores in detail how and why this came to be, and consider the extent, if any, to which this experience is relevant to questions of interpretation of the Australian *Constitution*.

As originally enacted, the US *Bill of Rights* (ie, Amendments 1-10[2]) did not apply to the States. Partly, this is evident in the text itself – in the case of the First Amendment, it expressly provides that "Congress shall not" establish a religion, prohibit the free exercise of religion etc. The other articles are not expressly confined to laws passed by Congress, but that is how they were interpreted by early Supreme Court decisions. As has been noted, the *Bill of Rights* reflects principles of federalism, and in particular the concern that the newly created federal government would exert "too much" power at the expense of the States,[3] perhaps at least partly because of the colonies' experience with the "central" British government.[4] The lack of rights protection was one of the stated reasons for the objections of the group known as the "Anti-Federalists" to the original Constitution,[5] together with their distrust of a new federal government that it was feared would be too removed from the people;[6] a promise to introduce a bill of rights after the adoption of the original Constitution helped win the argument for the creation of the new national government over the objections of the Anti-Federalists, who were concerned with States' rights. As a result, it is not surprising that the original *Bill of Rights* was cast so as not to interfere with States' ability to make laws. In fact, one of the leading architects of the Bill, James Madison, did propose with his original fourteenth amendment that the States be obliged to protect equal rights of conscience, trial by jury and freedom of speech, however this proposed amendment did not pass the Senate.[7] He expressed serious reservations about bills of rights then existing in States.[8] There is evidence that Madison believed there was "more danger of … powers being abused by the State Governments than by the Government of the United States", leading him to the conclusion that his proposed fourteenth amendment was the "most valuable amendment in the whole list".[9]

The fact that the *Bill of Rights* as originally created did not apply to the States was confirmed in the Supreme Court decision of *Barron v Baltimore* 32 US 243 (1833). There the question was whether

[2] Alternatively, it could be said Amendments 1-8, since the Ninth Amendment just clarifies that the nomination of rights in express terms should not be taken to mean that other rights are disparaged, and the Tenth Amendment which gives powers not delegated to the US by the Constitution to the States and the people.

[3] Frankfurter F, "Rethinking the Incorporation of the Establishment Clause: A Federalist View" (1992) 105 Harv L Rev 1700 at 1704; Moore V, "The Court Says No to 'Incorporation Rebound'" (2009) 61 Baylor L Rev 818 at 826; Lietzau W, "Rediscovering the Establishment Clause: Federalism and the Rollback of Incorporation" (1990) 39 DePaul L Rev 1191 at 1198; Green S, "Federalism and the Establishment Clause: A Reassessment" (2005) 38 Creighton L Rev 761 at 773; Berger R, "Incorporation of the Bill of Rights: A Reply to Michael Curtis' Response" (1983) 44 Ohio State LJ 1 at 3.

[4] Amar AR, *The Bill of Rights: Creation and Reconstruction* (1998) pp 5-6.

[5] Amar AR, "The Bill of Rights and the Fourteenth Amendment" (1992) 101 Yale LJ 1193 at 1202; Lawson G, "The Bill of Rights as an Exclamation Point" (2000) 33 University of Richmond L Rev 511 at 513.

[6] Amar AR, "The Bill of Rights as a Constitution" (1991) 100 Yale LJ 1131 at 1140.

[7] Amar, n 6 at 1148-1149.

[8] 1 Annals of Congress 439 (Gales J (ed), 1789).

[9] 1 Annals of Congress 440, 755; Brennan Jr WJ, "The Bill of Rights and the States: The Revival of State Constitutions as Guardians of Individual Rights" (1986) 61 NYULR 535 at 536-537. This fear was borne out with the circumstances leading to the American civil war; even in 1965, before the US Supreme Court had completed its revolution of applying the *Bill of Rights* against the States, comments were made about the criminal justice system operative in at least some of the States: "the processes of state criminal administration are designed to ignore or destroy such federal guarantees of civil liberties as free speech, free resort to the ballot, free access to the streets … (referring to the) heavy fisted clumsiness and inefficiency that is characteristic of American state criminal administration … or as the mindless and inevitable, unhappy creature of pervasive bigotry and popular intolerance, tugging along alike state prosecutors, juries and judges … the probability is that the popular organs of state prosecution will never effectively protect federal civil liberties; that they will remain instruments for harassment, not vindication, of persons who dare to exercise freedoms to which the United States is Constitutionally committed, but which

the Fifth Amendment, providing that property not be taken without due compensation, was applicable to legislation of the States, under which the defendant was incorporated. The unanimous court answered the question "no", claiming (at 247) that the question was "of great importance but not of much difficulty". Essentially, the reasoning was that the limitations in the instrument were naturally applicable to the government created by the same instrument, rather than limitations on governments framed by others and for different purposes. The court considered the language of the Bill's provisions, noting that at least in some cases, they were expressly confined to Congress (at 248). Elsewhere in the Constitution specific limits on State laws were introduced; the drafters could have done the same in Arts 1-10 if that had been their intention (at 249). In 1866, the Fourteenth Amendment was added to the Constitution. It provided:

> No State shall make any law or enforce any law which shall abridge the privileges and immunities of citizens of the United States; nor shall any State deprive any person of life, liberty or property, without due process of law; nor deny to any person within its jurisdiction the equal protection of the laws.

Clearly, one of the reasons for the passage of this provision was the events leading up to the civil war, and particularly the way in which State laws were applied in a highly discriminatory manner against African American people.[10] As Professor Tribe put it, the idea that the States were not a threat to liberties as the "level of government closest to the people (was) impossible to maintain after the great battle over slavery had been fought".[11] Bingham, a leading advocate of the Fourteenth Amendment, claimed that the civil war may have been avoided if the States had observed the *Bill of Rights* in the Constitution.[12] Aynes says the States had "proven time and time again they could not be trusted to provide even basic rights".[13]

There was also the ongoing fear that the former confederate States would deny newly freed persons the rights enjoyed by other residents,[14] a fear well-founded given the Jim Crow era post-bellum.[15] Less clear was the ambit of the "privileges and immunities" and "due process" provisions of the Amendment. Specifically, did they have the effect that any or all of the contents of the original *Bill of Rights* now were applicable against the States? Did either or both of them refer to a natural law conception of rights that pre-existed and survived the creation of government?[16] In early cases, the answer was in the negative. So for example in the *Slaughter-House Cases* 83 US 36 (1873), the Supreme Court concluded that the privileges and immunities clause was limited to protecting rights attached to national citizenship such as movement around the nation, habeas corpus and protections on the high seas; it did not otherwise alter the power of States to legislate in respect of human rights.

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its majorities who speak in the state process are not constitutionally built to accept": Amsterdam A, "Criminal Prosecutions Affecting Federally Guaranteed Civil Rights: Federal Removal and Habeas Corpus Jurisdiction to Abort State Court Trial" (1965) 113 Univ of Pennsylvania L Rev 793 at 800-802.

[10] *Slaughter-House Cases* 83 US (16 Wall) 36 at 71 (1873) (Miller J for the majority); Amsterdam, n 9 at 828.

[11] Tribe, *American Constitutional Law* (1978) p 5; Marceau J, "Unincorporating the Bill of Rights: The Tension Between the Fourteenth Amendment and the Federalism Concerns That Underlie Modern Criminal Procedure Reforms" (2008) 98(4) *Journal of Criminal Law and Criminology* 1231 at 1246: "events leading up to the Civil War exposed, once and for all, the fundamental disconnect that may occur when a constitutional democracy founded on notions of certain inalienable rights trusts the protection of those rights entirely to the local populations"; Wildenthal B, "Nationalizing the Bill of Rights: Scholarship and Commentary on the Fourteenth Amendment 1867-1873" (2009) 18 *Journal of Contemporary Legal Issues* 153 at 222; Curtis MK, "The Bill of Rights and the States: An Overview From One Perspective" (2009) 18(3) *Journal of Contemporary Legal Issues* 3 at 19.

[12] 39th Congress (Report by *New York Times*, 10 March 1866, p1).

[13] Aynes R, "Enforcing the Bill of Rights Against the States: The History and the Future" (2009) 18 *Journal of Contemporary Legal Issues* 77 at 112.

[14] Brennan, n 9 at 537.

[15] Moore, n 3 at 827.

[16] Some argue that the privileges and immunities clause was a reference to natural law rights pre-existing the creation of government and the Constitution: Smith D, "Natural Law, Article IV, and Section One of the Fourteenth Amendment" (1998) 47 American University L Rev 351; *Slaughter House Cases* 83 US (16 Wall) 36 at 96-97 (1873) (Field J dissenting); Cooley T, *A Treatise on the Constitutional Limitations Which Rest Upon the Legislative Power of the States of the American Union* (1868).

The court continued for a time with the assertion that the Fourteenth Amendment did not apply the contents of the *Bill of Rights* against the States;[17] however dissents and departures from this position began to be heard. In *Twining v New Jersey* 211 US 78 at 124 (1908), Harlan J (dissenting) found that immunity from self-incrimination was required by the "privileges and immunities" aspect of the Fourteenth Amendment, such that proceedings under State law had to observe it.[18] The court in *Palko v Connecticut* 302 US 319 (1908), though re-asserting the position in *Barron*, acknowledged there could be some link between the Fourteenth Amendment and the first 10.[19] It suggested that "due process" required by the Fourteenth Amendment involved "principles of justice so rooted in the traditions and conscience of our people as to be ranked as fundamental" (at 325). The court in *Gitlow v People of New York* 268 US 652 (1925) assumed that the Fourteenth Amendment protected (first amendment) freedom of speech from State interference.[20] The court in *Chicago, Burlington & Quincy Railroad Co v Chicago* 166 US 226 at 243 (1897) claimed that provisions of the Seventh Amendment could apply to proceedings in a State court. In *United States v Carolene Products Co* 304 US 144 at 152 (fn 4) (1938), Stone J suggested a link between the Fourteenth Amendment and rights referred to in the first 10.

The issue became more pointed within the Supreme Court in its *Adamson v California* 332 US 46 (1947) decision. At issue here was the applicability of the Fifth Amendment right to silence as against Californian criminal law. The majority of the court re-affirmed the *Barron* position that the *Bill of Rights* provisions were not applied to the States by the Fourteenth Amendment. Further rationale for this position was articulated by the majority justices; that it "accorded with the constitutional doctrine of federalism by leaving to the States the responsibility of dealing with the privileges and immunities of their citizens except those inherent in national citizenship" (at 53 per Reed J for the court). Frankfurter J, writing a separate concurring opinion, noted that of all the Supreme Court judges that had considered the question of whether the Fourteenth Amendment had incorporated the first eight amendments against the States, only one, "an eccentric exception" (referring to his colleague Black J), had indicated a belief that it did have this effect. Frankfurter J also alluded to the "relation of our federal system to a progressively democratic society" (at 62), and suggested that if it were intended by the Fourteenth Amendment to achieve what Black J claimed was intended, it was a strange way of expressing it (at 63). He noted that at the time the Fourteenth Amendment was ratified, approximately half of the States did not provide in the manner the Fifth Amendment did for jury trials, and that it obviously had not occurred to those States that by ratifying the Amendment, they would radically change their established criminal processes (at 64). Such a proposal would end the ability of the States to make law reform in this area (at 67). Frankfurter J, as was the orthodox view at the time, preferred instead to cast the due process guarantee to refer to concepts like "immutable principles of justice", "ultimate decency in a civilised society" and "consistency with a truly free society" (at 60-63).[21] Other cases during this era used tests like whether denial of the right would "shock" society's sense of justice,[22] is a fundamental principle of liberty and justice lying at the base of society's civil and political institutions,[23] or is fundamental to the American scheme of justice,[24] rather than consider that "due process" meant (or should be, at base) the rights enshrined in the *Bill of Rights*.

[17] *Twining v State of New Jersey* 211 US 78 (1908); *Palko v Connecticut* 302 US 319 (1937).

[18] The court suggested (99) it was possible that some of the personal rights protected by the first eight amendments might be applied against the States.

[19] *Palko v Connecticut* 302 US 319 at 324 (1908): "the due process clause of the Fourteenth Amendment may make it unlawful for a state to abridge by its statutes the freedom of speech which the First Amendment safeguards against encroachment by the Congress."

[20] *Near v Minnesota; Ex rel Olson, County Attorney* 283 US 697 (1931).

[21] See also reference to "natural equity" and "principle of universal law": *Chicago, Burlington & Quincy Railroad Co v Chicago* 166 US 226 at 236 (1897).

[22] *Twining v New Jersey* 211 US 78 (1908); *Palko v Connecticut* 302 US 319 (1937).

[23] *Powell v Alabama* 287 US 45 (1932).

[24] *Duncan v Louisiana* 391 US 145 at 149 (1968).

In dissent, Black J concluded that one of the chief objects of the Fourteenth Amendment was to make the *Bill of Rights* applicable to the States (at 71-72 (joined by Douglas J)).[25] In so doing he referred to historical works quoting some of the advocates of the Fourteenth Amendment, such as Bingham and Howard, and argued that they intended the section to achieve this purpose.[26] Black J favoured "total incorporation" of the content of the *Bill of Rights* to be applied against the States. He rejected suggestions that the *Bill of Rights* was an "outworn 18th century strait jacket" as *Twining* had found, conceding that the content was designed to address ancient evils, but such evils had typically in times past been evident where excessive power was sought by the few at the expense of the many (at 89).

This was the sign of things to come. During the 1960s, the Warren Court proceeded to extend most[27] of the first eight amendment rights to apply in relation to State laws. Sixth Amendment rights including the right to a speedy trial[28] with an impartial jury,[29] to be confronted by witnesses against a person and have compulsory process for obtaining witnesses in the accused's favour,[30] public trial and notice of charges,[31] and to have the assistance of a legal representative apply to the States.[32] Fifth Amendment right to silence,[33] protection from double jeopardy,[34] right to jury trial and the right not to have property confiscated without just compensation[35] have been applied against the States. First Amendment rights to freedom of speech and thought[36] and assembly,[37] and to freely exercise religion[38] (as well as a provision prohibiting the establishment of religion)[39] have been applied against the States. The Fourth Amendment freedom from unreasonable searches and seizures has also been applied against the States.[40] The Eighth Amendment protection from cruel and unusual punishment, excessive fines and excessive bail was extended to the States in *Robinson v California* 370 US 660 (1962). This "revolution" in the 1960s will from now on be referred to as "partial incorporation", in

[25] Murphy and Rutledge JJ also found the specific guarantees of the *Bill of Rights* should be "carried over intact" into the first section of the Fourteenth Amendment (124).

[26] For example, there are Bingham speeches calling for a reconsideration of the *Barron* precedent making the *Bill of Rights* applicable only against the federal government (Cong Globe, 35th Cong, 2d session 982 (1859), (Cong Globe, 42nd Cong, 1st session 151 (1871), 39th Cong, 1st session 1064-1065 (1866), as well as James Wilson (Cong Globe, 38th Cong 1st session 1202-1203 (1864) and Jacob Howard (Cong Globe, 39th Congress, 1st session 2765-2766 (1866)): Curtis MK, *No State Shall Abridge: The Fourteenth Amendment and the Bill of Rights* (1986) pp 83-84. Curtis canvases 30 different speakers during the 38th and 39th Congress who spoke against the *Barron* precedent (112).

[27] Examples of Amendments that have not been applied against the States to date include the Second Amendment (*Presser v Illinois* 116 US 252 (1886)), the Fifth Amendment guarantee of a grand jury (*Hurtado v California* 110 US 516 (1884)), the Seventh Amendment right to jury trial for suits at common law (*Minneapolis and St Louis Railway Co v Bombolis* 241 US 211 (1916)), and the Ninth Amendment (*Griswold v Connecticut* 381 US 479 (1965)). The Tenth Amendment is clearly not applicable to the States and the Third Amendment has not been the subject of litigation.

[28] *Klopfer v North Carolina* 386 US 213 (1967).

[29] *Duncan v Louisiana* 391 US 145 (1968); *Irvin v Dowd* 366 US 717 (1961).

[30] *Washington v Texas* 388 US 14 (1967); *Pointer v Texas* 380 US 400 (1965); *Klopfer v North Carolina* 386 US 213 (1967).

[31] *In re Oliver* 333 US 257 (1948).

[32] *Gideon v Wainwright* 372 US 335 (1963), overturning *Betts v Brady* 316 US 455 (1942).

[33] *Malloy v Hogan, Sheriff* 378 US 1 (1964).

[34] *Benton v Maryland* 395 US 784 (1969), overturning *Palko v Connecticut* 302 US 319 (1937).

[35] *Chicago, Burlington & Quincy Railway Co v Chicago* 166 US 226 (1897).

[36] *Gitlow v New York* 268 US 652 (1969), overturning *Palko v Connecticut* 302 US 319 (1937).

[37] *De Jonge v Oregon* 299 US 353 (1937).

[38] *Cantwell v Connecticut* 310 US 296 (1940).

[39] *Everson v Board of Education* 330 US 1 (1947).

[40] *Mapp v Ohio* 367 US 643 (1961), overturning *Palko v Connecticut* 302 US 319 (1937).

accordance with most of the literature, referring to the incorporation of part of (most of) the original *Bill of Rights* to be applicable against the States by virtue of the Fourteenth Amendment.[41]

Much has been written on this process of partial incorporation. It has been noted that strong justification for partial incorporation did not appear in many of the cases,[42] perhaps with the notable exception of Black J in *Adamson*, who referred to the historical literature in arguing that the drafters of the Fourteenth Amendment intended that the result would be the application of the *Bill of Rights* to the States, in light of what they had seen during the Civil War and their fears of what would happen in the former confederate States postbellum. Significant support for partial incorporation appears in the academic literature, much of it based on the evidence of what the drafters of the Fourteenth Amendment intended.[43] The point has been made that it would be absurd not to apply the *Bill of Rights* to the States, given that most of the content of the *Bill of Rights* is directed to criminal process, and the States administer the overwhelming quantity of criminal law.[44]

There has also been significant opposition to the notion of incorporating, whether partially or fully, the *Bill of Rights* to apply against the States pursuant to the Fourteenth Amendment.[45] Some of this is based on different views on the evidence of what the drafters of the Fourteenth Amendment intended, or what the ratifiers of the Amendment thought its impact to be. Sometimes the opposition is based on notions of federalism. These arguments are at their strongest when directed against incorporation of the First Amendment against the States, given that the Amendment is expressly confined in its operation to laws passed by Congress.[46] For instance, the court in the *Slaughter House Cases* referred to the "whole theory of the relations of the state and federal government" in rejecting a broad reading of the privileges and immunities aspect of the Fourteenth Amendment,[47] as the majority Justices did in *Adamson*.[48] The court in equal protection cases have referred to the need to leave States free to prescribe their own modes of judicial proceedings,[49] and in early due process cases there was expressed concern to preserve "the full power of the State to order its own affairs and

[41] Of course, this is not to suggest that due process in the Fourteenth Amendment means only those rights expressed in the first eight amendments: Wildenthal B, "Nationalising the Bill of Rights: Revisiting the Original Understanding of the Fourteenth Amendment in 1866-1867" (2007) 68 Ohio State LJ 1509 at 1615; Smith, n 16.

[42] Israel J, "Selective Incorporation: Revisited" (1983) 71 Georgetown LJ 253 at 301.

[43] Crosskey W, "Charles Fairman, Legislative History, and the Constitutional Limitations on State Authority" (1954) 22 University of Chicago L Rev 1; Amar, n 5; Amar, n 4; Baugh R, "Applying the Bill of Rights to the States" (1998) 49 Alabama L Rev 551; Brennan, n 9; Israel, n 42; Wildenthal, n 41; Wildenthal, n 11; Thomas III GC, "The Riddle of the Fourteenth Amendment: A Response to Professor Wildenthal" (2007) 68 Ohio State LJ 1627; Curtis, n 11; Aynes, n 13.

[44] Crosskey, n 43 at 116.

[45] Fairman C, "Does the Fourteenth Amendment Incorporate the Bill of Rights? The Original Understanding" (1949) 2 Stanford L Rev 5; Berger R, "Incorporation of the Bill of Rights in the Fourteenth Amendment: A Nine-Lived Cat" (1981) 42 Ohio State LJ 435; Berger, n 3.

[46] *Elk Grove Unified School District v Newdow* 542 US 1 at 50 (2004) (Thomas J). Frankfurter, n 3; Lietzau, n 3; Poppel S, "Federalism, Fundamental Fairness, and the Religion Clauses" (1995) 25 Cumberland L Rev 247; Green, n 3; Lash K, "The Second Adoption of the Establishment Clause: The Rise of the Nonestablishment Principle" (1995) 27 Arizona State LJ 1085; Cord R, "Interpreting the Establishment Clause of the First Amendment: A 'Nonabsolute Separationist' Approach" (1990) 4 *Notre Dame Journal of Law, Ethics and Public Policy* 731; Snee J, "Religious Disestablishment and the Fourteenth Amendment" (1954) Washington University LQ 371; Duncan R, "Justice Thomas and Partial Incorporation of the Establishment Clause: Herein on Structural Limitations, Liberty Interests, and Taking Incorporation Seriously" (2008) 20 Regent University L Rev 37. In fact, an amendment (Blaine Amendment) was proposed in 1873 specifically to prohibit States from establishing a religion; the motion was defeated; sometimes used to suggest that the Fourteenth Amendment was not intended to apply the *Bill of Rights* against the States because if it were, there would have been no need for the Blaine Amendment: Comment, "The Blaine Amendment and the Bill of Rights" (1951) 64 Harv L Rev 939.

[47] *Slaughter-House Cases* 83 US (16 Wall) 36 at 78 (1873).

[48] *Adamson v California* 332 US 46 at 53 (1947): "it accords with the constitutional doctrine of federalism by leaving to the states the responsibility of dealing with the privileges and immunities of their citizens except those inherent in national citizenship."

[49] *Missouri v Lewis* 101 US 22, 31 (1878).

govern its own people".[50] This is connected with arguments, heard more generally in favour of federalism, that giving more power to the regions is good because it promotes experimentation across different jurisdictions, the flexibility to respond to local interests and concerns etc,[51] rather than a one size fits all system.

Advocates of selective or total incorporation have downplayed the suggested implications for their theory on federalism more broadly:

> To deny the States the power to impair a fundamental constitutional right is not to increase federal power, but rather to limit the power of both federal and State governments in favour of safeguarding the fundamental rights and liberties of the individual. In my view this promotes rather than undermines the basic policy of avoiding excess concentration of power in government, federal or State, which underlies our concepts of federalism.[52]

> (States' role as laboratories does not) include the power to experiment with the fundamental liberties of citizens safeguarded by the *Bill of Rights*.[53]

To like effect are comments by others that some rights are so fundamental that no government should be able to encroach on that right, or that there be limits on such encroachment, regardless of the level of government.[54] The rights contained express universal principles of importance, which overrides federalism arguments.[55] As Israel succinctly puts it, "America (is) too much one country to justify the deference to local diversity that (would produce) a checkerboard of human rights in the field of criminal procedure".[56]

THE AUSTRALIAN CONTEXT

Of course, there must be hesitation and clear thought before any of the above can or should be applied in the Australian context. The history of Australian constitutional development differs greatly from that of the US. The documents were drafted more than a century apart, one reflecting a revolution and the other an evolution. The US adopted a *Bill of Rights* shortly after independence; Australia did not, though some piecemeal rights were included in the Commonwealth *Constitution*. The application of the *Bill of Rights* to the States followed the express adoption of the Fourteenth Amendment in the immediate shadow of the civil war, where the events leading up to it showed very clearly how some

[50] *Twining v New Jersey* 211 US 78 at 106 (1908); Harlan J (dissenting) in *Duncan v Louisiana* 391 US 145 at 175-176, in rejecting the incorporation doctrine, rejected "using the Fourteenth Amendment to put the States in a constitutional straitjacket with respect to their own development in the administration of criminal or civil law", and (dissenting) with Clark J in *Malloy v Hogan, Sheriff* 378 US 1 at 16 (1964) bemoaning the "compelled uniformity, which is inconsistent with the purpose of our federal system and which is achieved either by encroachment on the States' sovereign powers or by dilution in federal law enforcement" and (at 28) the "monolithic society which our federalism rejects" (created by incorporation).

[51] See eg, Brandeis J in *New State Ice Co v Liebman* 285 US 262 (1932): "It is one of the happy incidents of the federal system that a single courageous state may if its citizens choose, serve as a laboratory, and try novel social and economic experiments without the risk to the rest of the country"; Frankfurter J in *Adamson v California* 332 US 46 at 67 (1947).

[52] *Pointer v Texas* 380 US 400 at 414 (1965) per Goldberg J. See also *Duncan v Louisiana* 391 US 145 at 170 (1968) per Black J: "I am not bothered by the argument that applying the Bill of Rights to the States … interferes with our concept of federalism in that it may prevent States from trying novel social and economic experiments. I have never believed that under the guise of federalism the States should be able to experiment with the protections afforded our citizens through the *Bill of Rights*."

[53] *Pointer v Texas* 380 US 400 at 413 (1965) per Goldberg J. See also *In re Oliver* 333 US 257 at 282 (1948) per Rutledge J: "room enough there is beyond the specific limitations of the Bill of Rights for the states to experiment toward improving the administration of justice. Within those limitations there should be no laboratory excursions … This is no time to experiment with established liberties. That process carries the dangers of dilution and denial with the chances of enforcing and strengthening".He expressed concern that in the guise of permitting the States' experimentation, common law principles and institutions would be lost in favour of aspects of civil justice and the "absolutism of continental governments" (at 280). William Brennan has added that "a healthy federalism is not promoted by allowing state officers to seize evidence illegally or by permitting state courts to utilize such evidence … In our modern world, the criminal procedure sanctioned by any of our states is a procedure sanctioned by the United States … experimentation which endangers the continued existence of our national rights and liberties cannot be permitted": Brennan, n 9 at 541, 550.

[54] Poppel, n 46 at 273-274.

[55] Lash, n 46 at 1135; Green, n 3 at 767; Marceau, n 11 at 1242; Amsterdam, n 9 at 802-803.

[56] Israel, n 42 at 316-317.

States were infringing fundamental civil liberties. There is no historical equivalent in the lead up to the ratification of the Australian *Constitution*. The Australian *Constitution* does not contain an express equivalent to the Fourteenth Amendment.[57]

However, the founding fathers in Australia were clearly mindful of the American document, and to a large extent drew from that document in crafting the local version. The great jurist, Sir Owen Dixon, noted that the Australian founding fathers "followed with remarkable fidelity the model of the American instrument of government" and referred to differences between the Australian and American models as being "intangible".[58] Specific examples of this borrowing include the federation model of government itself, the notion of judicial review according to a written *Constitution*,[59] the "reasonably appropriate and adapted" method of testing the validity of federal law,[60] trade and commerce power as compared with the US commerce clause,[61] freedom of interstate trade,[62] and guarantees (such as they are) of trial by jury,[63] freedom of religion[64] and (arguably) just terms in the Commonwealth *Constitution*.[65] Given that both nations are federations, both documents necessarily deal with the relations between different levels of government, and assigns areas of responsibility to both of them. Despite these obvious differences, it is submitted that aspects of the American experience in terms of rights protection from intrusion by State governments are relevant in asking the same question in Australia.

In my summary above of the long path by which most of the US *Bill of Rights* was eventually applied against the States, some specific points are worth reiterating in the Australian context. First, that as originally interpreted, the rights enshrined in the US *Bill of Rights* were not applied to the States, and at least in one case, were expressly confined to laws passed by Congress. This is explicable in terms of it making sense that at the time documents creating the federal government were created,

[57] However, some High Court judges (*Leeth v Commonwealth* (1992) 174 CLR 455 at 487 (Deane and Toohey JJ), 502 (Gaudron J) have accepted the notion of a guarantee of "equality before the law" which might be interpreted to mean something similar to the Fourteenth Amendment. I do not press this argument here in detail, preferring to rely on other arguments.

[58] Dixon O, *Jesting Pilate* (Law Book Co, 1965) pp 102, 104, "Two Constitutions Compared". Several other of Sir Owen Dixon's papers collected in *Jesting Pilate* include this theme: see eg, p 106, "Government Under the American Constitution" (where again he alluded to the founding fathers imitating the American model with fidelity in many respects); p 167, "Marshall and the Australian Constitution" (in a tribute to John Marshall, former US Supreme Court Chief Justice, he spoke of the American model as an "inspiration" to the drafters of the Australian *Constitution*); p 180, "The Honourable Mr Justice Felix Frankenfurter: A tribute from Australia" (in a tribute to theformer US Supreme Court Justice, he noted, "to Australia no small part of the constitutional law of the United States must be of first importance").

[59] *Marbury v Madison* (1803) 5 US 137 (1803); expressly adopted in *Australian Communist Party v Commonwealth* (1951) 83 CLR 1 at 263 (Fullagar J).

[60] *McCullough v Maryland* (1819) 4 Wheat 316 at 421 (Marshall CJ); applied as the fundamental test for constitutional validity of Commonwealth law in many cases, including *Commonwealth v Tasmania* (1983) 158 CLR 1. Sir Owen Dixon paid tribute to the influence of the great American jurist on Australian constitutional development: Dixon, n 58, pp 166-179, "Marshall and the Australian Constitution".

[61] Links between the American and Australian positions here were acknowledged in Winterton, Lee, Glass and Thomson, *Australian Federal Constitutional Law: Commentary and Materials* (2nd ed, 2007) p 172; and in Zines L, *The High Court and the Constitution* (4th ed, 1997) p 55 (referring to the "United States provision, from which the Australian position was clearly taken"); Gray A, "Reinterpreting the Trade and Commerce Power" (2008) 36 ABLR 29.

[62] Commonwealth *Constitution*, s 92, mirroring aspects of the US dormant commerce clause: see eg, *Granholm v Heald* (2005) 125 S Ct 1885; the High Court made use of US jurisprudence in its most recent s 92 decision: *Betfair Pty Ltd v Western Australia* (2008) 234 CLR 318; Gray A, "State Based Business Licensing and Section 92 of the Constitution" (2009) 14(2) Deakin L Rev 165.

[63] See eg, the High Court in *Cheatle v The Queen* (1993) 177 CLR 541 at 556: "one would expect that it was the intention of the framers of our *Constitution* to carry over into s 80 any settled interpretation of the words of that central command in the United States provision"; see also to like effect *Cheng v The Queen* (2000) 203 CLR 248 at 330 (Kirby J).

[64] *Adelaide Company of Jehovah's Witnesses Inc v Commonwealth* (1943) 67 CLR 116 at 127 (Latham CJ).

[65] *Andrews v Howell* (1941) 65 CLR 255 at 282 per Dixon J: "The source of s 51(31) is to be found in the Fifth Amendment of the *Constitution* of the United States, which qualifies the power of the United States to expropriate property by requiring that it should be done on payment of fair compensation"; cf Evans S, "Property and the Drafting of the Australian Constitution" (2001) 29 Fed L Rev 122 at 130 (which claims that the Convention Debates do not support the assertion).

there would be discussion of ways in which that government's powers could be limited, and the fact that at the relevant time most of the States in existence already had rights documents. However, later a view developed that the rights enshrined in the US *Bill of Rights* should be applied to the States. Unfortunately in the US experience, this position was only arrived at after the events surrounding the civil war showed that State governments would interfere with the most basic of rights and freedoms. As a result, the Fourteenth Amendment was introduced, and this was eventually interpreted to mean that (most of) the rights enshrined in the *Bill of Rights* were applicable against the States. The text of the Fourteenth Amendment provides some textual support for such an implication, though as I alluded to above, the question remains a hotly contested one among scholars in terms of what the intention behind the Fourteenth Amendment actually was, whether its ratifiers thought that was its ambit, and ongoing questions about federalism and States' rights.

Australia's position has some similarities but also some marked differences. Australia has never had a document entitled a bill of rights; its *Constitution* does, however, contain some rights which are found in the US *Bill of Rights*. They include the right to trial by jury,[66] expressly stated in the *Constitution* to be confined to trials for Commonwealth offences, freedom of religion is expressly protected from interference by Commonwealth laws (only),[67] and the right not to have property acquired by a government otherwise than on just terms[68] is expressly confined to cases where the Commonwealth is doing the acquiring. The question is that although these rights are expressly in their terms confined to federal laws, can and should they be applicable to State laws. Is the US experience, where this has in fact occurred,[69] instructive in this regard? It must be acknowledged again that this has occurred in the US because of the passage of the Fourteenth Amendment expressly protecting equal protection and due process rights, events which do not direct parallels in the case of Australia. It is also acknowledged that according to the literal wording of the sections of the Australian *Constitution* alluded to above, they are confined in their application to federal laws. However, this is also the position of the First Amendment to the US Constitution; it is confined in its terms to laws passed by Congress; however this has not prevented it being applied against the States by virtue of the Fourteenth Amendment. Acknowledging these challenges for my argument, I now construct an argument as to why rights such as the three I have nominated for discussion purposes should be applied against the States in Australia.

BEYOND LITERALISM: LOGIC AND PRINCIPLE

Let us forget for a moment what the literal words of s 80, s 116 and s 51(31) actually say,[70] and consider whether the right to jury trial, freedom of religion and the right to fair compensation when private property is acquired by the government are fundamental human rights. International legal instruments will confirm for us that these rights are considered to be of some universality,[71] though (of

[66] In the US, the Seventh Amendment.

[67] This right appears in the First Amendment to the US Constitution.

[68] This right is not expressly conferred but has been held to be required by "due process" in the Fifth and Fourteenth Amendment: *Nollan v California Coastal Commission* 483 US 825 (1987).

[69] The right to trial by jury and the right to due compensation if private property is taken for public use were held to be applicable to the States in *Chicago, Burlington & Quincy Railway Co v Chicago* 166 US 226 (1897), and the right to freedom of religion held to be applicable to the States in *Cantwell v Connecticut* 310 US 296 (1940) (this development was controversial given that the text of the First Amendment, which contains the right, is expressly confined to protection from laws of Congress).

[70] It must be remembered, in terms of precedent, that the US Supreme Court ended up applying provisions of the First Amendment against the States, despite that Amendment expressly being confined to laws of Congress: *Cantwell v Connecticut* 310 US 296 (1940) (free exercise); *Gitlow v New York* 268 US 652 at 666 (1925) (speech and press), *De Jonge v Oregon* 299 US 353 (1937) (assembly and petition).

[71] For instance, the right to trial by jury is referred to in the Fifth, Sixth and Fourteenth Amendments to the US Constitution, and is required by *Canadian Charter of Rights and Freedoms*, s 11(f) for serious offences; freedom of religion is recognised in the First Amendment to the US Constitution, *Canadian Charter*, s 2, *European Convention on Human Rights*, Art 9, *International Covenant on Civil and Political Rights*, Art 18, *Universal Declaration of Human Rights*, Art 18; the right to due compensation for confiscation of property is protected by the Fifth Amendment to the US Constitution, see also *Universal Declaration of Human Rights*, Art 17, *Magna Carta*, Art 52, *French Declaration of the Rights of Man and of the Citizen*, Art 17.

course) not absolute. It is submitted that if citizens were asked whether these rights were important rights, the general response would be that they were fundamental in any decent society.

In terms of principle, it is submitted that the question as to whether rights are fundamental in a decent society does not depend, in the case of a federal system, on which level of government happens to be interfering with them. They are either fundamental, and to be considered for legal protection, or are not fundamental. It does not make sense, surely, from a principle point of view, to say for instance that if the Commonwealth charges a person with a particular crime, the *Constitution* requires the trial to be heard by a jury, but that if the State charged the same person with the same crime, the *Constitution* does not require the trial to be heard by a jury. As in the case of religious rights – if it is sensible to us from a principle rather than positivistic viewpoint that the Commonwealth could not prohibit the free exercise of religion or impose a religious observance as a requirement for Commonwealth office – it must be sensible to us that a State government could not do the same thing. And in the property context, if it is wrong for the Commonwealth to take someone's property away without paying them fair compensation, it is surely wrong for a State government to do the same thing.

This conclusion can be supported by legal philosophy. Many writers have focused on the "social contract" governance model, whereby an individual is said to enter into a social contract in order to preserve their liberties.[72] The purpose of government is to ensure the preservation of such liberties. Legislative power derives from the consent of the governed and is a trust for their benefit.[73] If part of the social contract is that the Commonwealth Government must respect rights to jury trial, freedom of religion and property rights, there is no sense in which a different social contract has been entered into with State governments, under which such rights need not be respected. It is surely incoherent for an individual to have contradictory "social contracts" with the Commonwealth Government and with the State governments within the same country.

Support may also be gleaned from the work of Finnis; as part of the concept of practical reasonableness he spoke of justice requiring equality among citizens;[74] on this basis, Finnis would surely not support an outcome where a citizen was guaranteed just terms if one level of government took away their property compulsorily, but not if a different level of government did so, and similarly with jury trial "rights".[75] Members of the High Court of Australia have expressed support for a concept of equality before the law. In *Leeth v Commonwealth* (1992) 174 CLR 455, Deane, Toohey and Gaudron JJ adopted the doctrine of equality before the law,[76] and Brennan J spoke of the offensiveness of the idea that a Commonwealth law would be applied differentially in different States of Australia (at 475).[77] This principle of equality could be used to support a position that fundamental rights, such as jury trial, just terms and freedom of religion, must be applied consistently to both

[72] Locke J, *Second Treatise of Government* (1689) para 93; Jacques-Rousseau J, *The Social Contract* (1920); Finnis J, *Natural Law and Natural Rights* (1980) p149.

[73] Allan T, "Legislative Supremacy and the Rule of Law: Democracy and Constitutionalism" (1985) 44 Cambridge LJ 111 at 129.

[74] Finnis, n 72, p 173: "equality is a fundamental element in the notion of justice … treat like cases alike"; Allan T, *Constitutional Justice: A Liberal Theory of the Rule of Law* (2001).

[75] Later in his work, Finnis states that "it is always unreasonable to choose directly against any basic value, whether in oneself or in one's fellow human beings": Finnis, n 72, p 225.

[76] *Leeth v Commonwealth* (1992) 174 CLR 455 at 487 per Deane and Toohey JJ: "At the heart of the obligation to act judicially is the duty of a court to extend to the parties before it equal justice, that is to say, to treat them fairly and impartially as equals before the law and to refrain from discrimination on irrelevant or irrational grounds." They viewed equality before the law as a principle implicit in the Federal *Constitution* (at 488); Gaudron J spoke of "equal justice" (at 502). In *Kruger v Commonwealth* (1997) 190 CLR 1 at 95, Toohey J also considered the right to equality and claimed that Brennan J in *Leeth* agreed with the right to equality.

[77] In *Kruger v Commonwealth* (1997) 190 CLR 1 at 95, Toohey J claimed that to deny that Brennan J agreed in *Leeth* with a right to equality was to "do less than justice to the reasons of Brennan J".

Commonwealth and State laws alike; since to confer an individual (A) with rights to them in respect of Commonwealth laws, but to deny an individual (B) with rights to them in respect of State laws, is not to treat A and B equally.

The debate about property rights protection involves broad questions about the appropriate balance between individual property rights, and conceptions of the greater common good. Indeed, the fact that some early constitutions in parts of what would later become the US did not protect private property rights from confiscation by the government, but later documents (including the US *Bill of Rights*) did, has been explained philosophically as reflecting a move from a republican philosophy stressing the common good to conceptions of liberalism, where individual interests are paramount.[78] Surely, respect for private property, and resolution of how we balance private property rights as opposed to conceptions of the greater common good, is one that needs to be resolved consistently within a nation. It is frankly nonsense to suggest that a guarantee of just terms if the Australian Government takes private property is justified on the basis of our acceptance of liberalism, but there is no guarantee of just terms if a State does the acquiring, because we believe in the common good trumping individual property rights. Thus, at the level of philosophical principle, it is not coherent that the law in this area should differ according to which level of government is doing the acquiring.

The argument here is that at the level of principle, these protections are eminently sensible, and in conformity with public expectations. At the level of principle, they are worthy of protection, regardless of which level of government happens to seek to interfere with them. Quite apart from the point that rights are not absolute, it is submitted that such laws deserve the same level of (constitutional) scrutiny, regardless of the identity of the government that happens to be passing the law. We do not speak with forked tongue on fundamental human rights in a country such as Australia with one (integrated) common law,[79] and citizens living under one *Constitution*.

Further, in the criminal context where rights such as trial by jury are especially important, the experience in the US, as well as the experience in Australia, is that most criminal law is actually created at the State level, rather than the federal level. As a result, as Crosskey alluded to above, it makes even less sense to adopt a position that rights such as trial by jury only apply at the federal level, where that is clearly the minority of criminal charges, leaving States to decide whether, if at all, they will respect such a right in their criminal processes. We often hear arguments from ardent federalists about the "experimentation" that a strong federal system allows, but the rejoinder is surely that there are some rights that should not be "experimented with" (read restricted further), because they are the fundamental hallmarks of a decent and fair society that we purport to be, reflecting the values of our people.

It is submitted then that, taking off our positivist blinkers for one moment as to what the *Constitution* actually does say, it seems logical and principled to suggest that these kinds of rights are fundamental, and that when a country decides to what extent it wants to protect these rights or balance them against other interests and priorities, the country adopts a uniform position on them. I do not have a problem with States "experimenting" in general areas of social policy or, to a large extent, legal regulation. However, fundamental rights arguably should be immune from this kind of "experimentation".

This point is made in the knowledge that it is not the position that currently exists in Australia; the right to trial by jury is only actually constitutionally respected in respect of federal offences[80] (and even with these, the Commonwealth can in effect direct the proceeding to occur without a jury)[81] and

[78] Treanor W, "The Origins and Original Significance of the Just Compensation Clause of the Fifth Amendment" (1985) 94 Yale LJ 694.

[79] *Lange v Australian Broadcasting Corporation* (1997) 189 CLR 520.

[80] This is according to the literal terms of *Constitution*, s 80.

[81] In essence, this is the position because the High Court has decided that there is no necessity that the Commonwealth proceed "by indictment", yet the s 80 protection only applies where the proceeding is by way of indictment: *R v Archdall and Roskruge; Ex parte Brown* (1928) 41 CLR 128; Simpson A and Wood M, "A Puny Thing Indeed – Cheng v The Queen and the

is routinely abrogated at State level,[82] States are not constitutionally forbidden from interfering with religious freedom, and are not constitutionally prevented from confiscating an individual's property and not paying fair compensation.[83]

PRECEDENT?

I acknowledge the radical nature (in Australian jurisprudence) of this position. No High Court judge has ever, to my knowledge, ever suggested the "nationalisation" of the express provisions in the Commonwealth *Constitution* protecting rights so that they apply to the States. No doubt, the fact the *Constitution* does not expressly state this would be sufficient to convince many that this step should not be taken. Is there authority that indirectly might be utilised in support of such a position? I believe it is possible to draw some support for this argument from High Court decisions, albeit decided in a different context and with different reasoning.

For instance, in the context of State legislation purporting to direct a State court as to the manner of the exercise of its "discretion" to order the continued incarceration of a past violent offender, a majority of the High Court effectively "drew down" principles of the separation of powers from Ch III of the Australian *Constitution* to State courts. They were subject to this principle, at least in the exercise of federal jurisdiction, and although there was no formal separation of powers in State Constitutions. The majority referred to the concept of an "integrated judicial system",[84] and railed against the suggestion of "different grades or qualities of justice"[85] depending on whether judicial power is exercised by State courts or federal courts. This was partly because State courts were part of the judicial system created by Ch III.

Reasoning by analogy, if we have an integrated judicial system, such that a principle underlying the federal *Constitution* (separation of powers) was drawn down to State courts, why not an integrated society in terms of respect for fundamental values such as trial by jury, freedom of religion and protection from confiscation of property without compensation. These are rights expressly enshrined in the Commonwealth *Constitution*, comparable in some ways with the separation of powers clearly enshrined in the Commonwealth *Constitution*. It can be argued that if we should have an integrated judicial system, so too we should integrate at least some of the fundamental legal principles which that legal system should respect. If the court did not approve of different grades or qualities of justice depending on which court is exercising the power, should it be any more comfortable with fundamental legal principles that restrict the power of one level of government but not the other? It is hard to talk of an "integrated legal system", as Gummow J does,[86] when rights are protected at one level of the federal system, but not the other.

Another area in which support might be derived for the position I favour relates to the jurisprudence concerning s 51(31). One unanimous High Court decision had established that s 122

Constitutional Right to Trial by Jury" (2001) 29 Fed L Rev 95 at 103-104; Coper M, *Encounters With the Australian Constitution* (1987) p 326; Williams G, *Human Rights Under the Australian Constitution* (1999) p 107; Gray A, "Mockery and the Right to Trial by Jury" (2006) 6(1) *QUT Law and Justice Journal* 66 at 79-80.

[82] See eg, *Criminal Procedure Act 1986* (NSW), s 132; *Criminal Procedure Act 2009* (Vic), ss 29-30; *Criminal Code 1899* (Qld), s 614; *Criminal Procedure Act 2004* (WA), s 118; *Juries Act 1927* (SA), s 7; Chesterman M, "Criminal Trial Juries in Australia: From Penal Colonies to a Federal Democracy" (1999) 62 *Law and Contemporary Problems* 69 at 74.

[83] *Pye v Renshaw* (1951) 84 CLR 42.

[84] *Kable v Director of Public Prosecutions (NSW)* (1996) 189 CLR 51 at 103 (Gaudron J), 112 (McHugh J) (also spoke of courts administering a single body of common law), 139 (Gummow J) (Gummow J at 143 spoke of an "integrated Australian legal system"). It is true that the majority also focused on whether the law undermined public confidence in the judiciary and whether it conferred functions on the judiciary of such a nature as to compromise the integrity of a court as an independent institution; however these strands of reasoning are not essential for my purposes here so I do not dwell on them further.

[85] *Kable v Director of Public Prosecutions (NSW)* (1996) 189 CLR 51 at 103 (Gaudron J).

[86] See n 84.

was not subject to provisions such as s 51(31). Briefly, the decision had established that s 122 was a plenary power, not qualified by limits that might appear in s 51, a source of different legislative powers.[87]

Despite this case, there had been comments in other cases to the effect that s 122 should not be disjoined from the rest of the *Constitution*, and should be read with other provisions of the *Constitution*.[88] In *Lamshed v Lake* (1957) 99 CLR 133, Kitto J concluded that the *Constitution* had to be treated as a coherent instrument for the government of the nation, not two Constitutions, one for the federation and the other for the States. He spoke of fitting a territory "into the Australian scene, so far as laws are concerned" (at 154).[89] Gummow J concluded in *Newcrest Mining (WA) Ltd v Commonwealth* (1997) 190 CLR 513 that "the *Constitution* should not readily be construed as producing the result that the benefit of the constitutional guarantee with respect to the acquisition of property in what became the Northern Territory was lost" (at 601).[90] He spoke (at 602) of the curious result that would flow whereby an acquisition of property in a city within a State for the purposes of establishing a territory tourism office would not, according to *Teori Tau v Commonwealth* (1969) 119 CLR 564, attract the s 51(31) protection, if the section were held not to apply to actions under s 122.

Finally, in the recent High Court decision of *Wurridjal v Commonwealth* (2009) 237 CLR 309, the court overturned *Teori*. The court found that the s 122 power was subject to the requirement of just terms stated in s 51(31). French CJ (at 348-350), Gummow and Hayne JJ (at 383-386), and Kirby J (at 419) referred with evident approval to comments made in cases such as *Lamshed*, *Capital Duplicators Pty Ltd v Australian Capital Territory* (1992) 177 CLR 248 and *Newcrest Mining* referred to above, confirming that s 122 should be read consistently with other provisions of the *Constitution*, rather than being treated as if it were an entirely separate branch of principle.

It is submitted that some of the reasoning is also applicable to the current argument, at least by way of analogy. It must first be acknowledged that the argument involves an application of comments made above in a different context; that the comments made above were in a context of saying that a power exercised under one head of power in the *Constitution* should not be exercised in a manner inconsistent with another provision of the *Constitution*, rather than the different context of whether an express limitation on Commonwealth power should similarly be directed at the States. It is a different context.

However, if it is a rational objective, as Kitto J mentioned above, that the *Constitution* should be treated as a coherent agreement for the government of the nation, then the requirement that private property should not be acquired by a government other than on just terms[91] is surely one of universality that should be applicable to acquisitions by the federal government and State government alike. If Gummow J did not like the anomalous results that would flow if the requirement of just terms did not apply if the Commonwealth were operating under s 122, surely he cannot like the anomalous results that would follow if the State, rather than the Commonwealth, did the acquiring. It is true that if such a scheme were obviously designed to avoid the constitutional requirement in s 51(31) the High

[87] *Teori Tau v Commonwealth* (1969) 119 CLR 564 at 570 (Barwick CJ, McTiernan, Kitto, Menzies, Windeyer, Owen and Walsh JJ).

[88] *Australian National Airways Pty Ltd v Commonwealth* (1945) 71 CLR 29 at 85 (Dixon J); *Lamshed v Lake* (1957) 99 CLR 133 at 145 (Dixon CJ).

[89] See also *Spratt v Hermes* (1965) 114 CLR 226 at 246 (Barwick CJ), 278 (Windeyer J), 270 (Menzies J); *Australian Capital Duplicators Pty Ltd v Australian Capital Territory* (1992) 177 CLR 248 at 272 (Brennan, Deane and Toohey JJ).

[90] See also *Newcrest Mining (WA) Ltd v Commonwealth* (1997) 190 CLR 513 at 612, where Gummow J concluded, as did Gaudron J (at 561) and Kirby J (at 647), that *Teori Tau v Commonwealth* (1969) 119 CLR 564 had been wrongly decided.

[91] I have not developed the argument that "due process" might require the payment of just terms. This argument has been developed in the context of just compensation in the US in Karkkainen B, "The Police Power Revisited: Phantom Incorporation and the Roots of the Takings 'Muddle'" (2006) 90 Minnesota L Rev 826.

Court may object;[92] however such an arrangement could occur through more subtle means, so as to possibly avoid constitutional difficulty. The court in *Wurridjal* was also accepting of the fact that s 122 should be read consistently with s 51(31) and the *Constitution* as a coherent whole if possible rather than fractured in terms of fundamental principles being applied against one level of government but not another.

To some extent, a comment by French CJ in dicta in *Wurridjal* (at 356) might explain why the founding fathers did not consider that the s 51(31) provision needed to be applied to the States:

> It seems improbable in the circumstances that the drafters of the *Constitution* regarded State Parliaments in the absence of an equivalent constitutional guarantee affecting the States, as likely to acquire private property without compensation.[93]

Indeed, there is evidence of colonial practices in this regard prior to federation in the Convention Debates themselves, with the 1891 draft Bill making reference, at least with some acquisitions, to valuing them in the same manner as that used by the colony when it (compulsorily) acquired property from citizens.[94] There is even questioning during the Convention Debates of the need for what would become s 51(31) at all, with Turner in 1898 doubting the need to include "just terms" in relation to even the untested new Commonwealth Parliament, because "we assume that the Federal Parliament will act strictly on the lines of justice".[95]

This arguably softens any argument that to apply constitutional guarantees such as s 80, s 116 or s 51(31) against the States would somehow be fundamentally contrary to the intention of the founding fathers, to the extent that such intention remains a factor in modern constitutional interpretation today. Arguably, it is not that they were fundamentally against such a proposal when they drafted their provision in such a way, more that their experience had not taught them the need for such protections against State law.[96] The right to just terms is of ancient vintage, shown by *The King's Prerogative in Saltpetre* (1606) 77 ER 1294 (amongst other precedents),[97] where the court required the King to pay damages to the owner of property that the Crown took for its own use. It might have been considered by the founding fathers to be safe from State interference. These days, we know otherwise; we have seen examples with facts in cases such as *Pye v Renshaw* (1951) 84 CLR 58 and *PJ Magennis Pty Ltd v Commonwealth* (1949) 80 CLR 382 that sometimes States do in fact seek to take away someone's property without paying just compensation.

Of course, reliance is not placed here on any support from the founding fathers in terms of their intention to have rights contained in the *Constitution* applied broadly, and across different levels of government.[98] It is conceded they did not intend this to happen, even if partly this was because they assumed the new States would continue to respect rights, such as jury trial and just terms if property

[92] The High Court was alive to this possibility in *PJ Magennis Pty Ltd v Commonwealth* (1949) 80 CLR 382, invalidating a scheme whereby the States, by virtue of an agreement with the Commonwealth, would acquire property. The court insisted that in such cases, the requirement of just terms must apply. Latham CJ observed (at 398) that the scheme seemed "designed to escape from the constitutional limitation [s 51(31)] by using State legislative powers".

[93] The "right" to just terms if an individual's property is taken compulsorily by the government is of ancient vintage: Blackstone W, *Commentaries on the Laws of England* (1765) vol 1, p 139; Ely J, "The Fifth Amendment and the Origins of the Compensation Principle" (1992) 36 *American Journal of Legal History* 1; Ostler D, "Bills of Attainder and the Formation of the American Takings Clause at the Founding of the Republic" (2010) 32 Campbell L Rev 227.

[94] Evans, n 65 at 131.

[95] *Official Record of the Debates of the Australasian Federal Convention*, Melbourne, 1898, p 153.

[96] Similar observations have been made by Sir Owen Dixon, see Dixon, n 58, p 102; J *Australian Capital Television Pty Ltd v Commonwealth* (1992) 177 CLR 106 at 136 (Mason CJ); *Leeth v Commonwealth* (1992) 174 CLR 455 at 484-485; see also Byrnes A, Charlesworth H and McKinnon G, *Bills of Rights in Australia: History, Politics and Law* (2009) p 25; Williams, n 81, pp 37-42.

[97] On some early (17th-18th century) American precedents, see Ostler, n 93 at 228-234.

[98] On the intention of the founding fathers surrounding compulsory acquisition of property, see Dixon R, "Overriding Guarantee of Just Terms of Supplementary Source of Power?: Rethinking s 51(xxxi) of the Constitution" (2005) 27 Syd LR 639; Evans, n 65. I do not engage here in the debate about what the founding fathers intended by the section, how it came to be included in the way in which it was written etc, because I do not believe it is relevant in considering how the section should be interpreted today.

were compulsorily taken by the government, that had in the past been respected by the colonies. The response to an argument that it was not what the founding fathers meant is that, more and more, constitutional law jurisprudence is moving away from an interpretation of the *Constitution* that is based on, of influenced to any great extent by, what the founding fathers might have meant or thought about a particular constitutional issue.[99] This is of necessity; one cannot reasonably expect the founding fathers to have anticipated Australia in the 21st century, what its modern governance might require, and what its pressing challenges would be. Such an argument does not disrespect the founding fathers; I have great admiration for what they did; but what they might have thought or said about an issue more than 110 years ago cannot be the last word on what the *Constitution* means today. Of course, as many famous jurists have observed, the meaning of the *Constitution* is designed to adapt as the society which it regulates changes.[100] In any case, it has been observed of the jurisprudence on s 51(31), including concepts such as acquisition and property, that the High Court has "long since moved beyond what does emerge as the apparently intended operation of s 51(31)".[101]

Another possible argument in favour of extending these rights in respect of State laws is that with federal laws, the need for a head of power naturally circumscribes the ability of the Commonwealth to infringe such rights anyway, and the High Court does, in some cases, take into account the extent to which a Commonwealth law infringes upon fundamental rights and freedoms, in deciding whether the law is "reasonably appropriate and adapted", "sufficiently connected" or "reasonably proportional" to a head of power.[102] Of course, this "control mechanism" is not available in the context of State laws; State Parliaments have plenary power to pass laws for the "peace, welfare and good government"[103] of the State.

CONCLUSION

This article has argued that Australia should adopt a common position on the protection of fundamental rights such as the right to trial by jury, freedom of religion and right to just compensation if property is confiscated. The High Court should be adventurous in this regard, looking beyond the literal words and restrictions of the *Constitution* to reflect the fundamental nature of such rights. It could do so by reference to its jurisprudence elsewhere that has confirmed the integrated nature of the Australian judicial system, and that protections that exist in one part of the *Constitution* should not be able to be circumvented by using another part of the *Constitution*. It can look to the experience of the US in this regard, where protections which originally were only held to be applicable to the federal government were eventually applied to the States, partly due to a recognition that State governments sometimes do act in contravention of fundamental human rights, such that there is no reason in logic or principle that rights protected from interference by one level of government should also not be protected from interference by another level of government.

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[99] *New South Wales v Commonwealth* (2006) 229 CLR 1 (comparing pursuit of the founding fathers' intentions to pursuing a mirage), *Theophanous v Herald & Weekly Times Ltd* (1994) 182 CLR 104 at 128-129 (Mason CJ, Toohey and Gaudron JJ), 171 (Deane J); *Australian National Airways Pty Ltd v Commonwealth* (1945) 71 CLR 29 at 81 per Dixon J: "it is a Constitution we are interpreting, an instrument of government meant to endure and conferring powers expressed in general propositions wide enough to be capable of flexible application to changing circumstances."

[100] The classic line is that "we must never forget that it is a Constitution were are expounding, intended to endure for ages to come, and consequently to be applied to the various crises of human affairs": *McCullough v Maryland* 17 US 316 at 407 (1819); see also *Betfair Pty Ltd v WA* (2008) 234 CLR 418 at 453 per Gleeson CJ, Gummow, Kirby, Hayne, Crennan and Keifel JJ: "it must always be remembered that we are interpreting a *Constitution* broad and general in its terms, intended to apply to the varying conditions which the development of our community must involve" (referring to *Jumbunna Coal Mine NL v Victoria Coal Miners' Association* (1908) 6 CLR 309 at 367-368 (O'Connor)).

[101] Evans, n 65 at 132.

[102] For example, *Davis v Commonwealth* (1988) 166 CLR 79; *Airservices Australia v Canadian Airlines International Ltd* (1999) 202 CLR 133. This principle is explored further in the context of s 51(31) in Allen T, "The Acquisition of Property on Just Terms" (2000) 22 Syd LR 351 at 365-369.

[103] The High Court has declared these are not words of limitation: *Union Steamship Co Ltd v King* (1988) 166 CLR 1. Sometimes, "order" is used in place of "welfare".