

THE 2003 TERM: THE INACCESSIBLE *CONSTITUTION*

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I INTRODUCTION

In the inaugural presentation in what now can be regarded, if only barely, as a series, Stephen Gageler pointed out that the idea for an annual review of the High Court's constitutional work is imported from the United States, specifically from the *Harvard Law Review's* 'Foreword'.¹ The *Foreword*, accompanied by a survey of leading cases and a statistical analysis of the work of the Supreme Court of the United States during the previous year, is prepared each year by an eminent constitutional law scholar. Stephen Gageler rightly says that the *Foreword* has become 'more formidable' over the years. This phenomenon doubtless reflects both the high standing of the contributors and the wide-ranging nature of the contributions, not all of which are confined to a review of recent decisions of the Supreme Court of the United States.²

I do not wish to encourage odious comparisons. But given the provenance of the series, I think it worthwhile to make some comparisons between the constitutional structures of Australia and the United States. My purpose is not to undertake a comprehensive survey, but to identify some of the influences on the work of the High Court and on the community's understanding of the *Australian Constitution*.

My thesis is that the prosaic form of the *Australian Constitution*, the disparity between its terms and Australia's current constitutional arrangements, the lack of a shared narrative in this country of events leading to Federation and national independence and the absence of a Bill of Rights create serious barriers to community understanding of the constitutional structure. Except for sporadic debates on such matters as the republic or a new preamble, ongoing discussion of constitutional principles in Australia tends to be the province of specialists. We should not be surprised that the Australian people are so reluctant to approve

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1 Stephen Gageler, 'The High Court on Constitutional Law: The 2001 Term' (2002) 25 *University of New South Wales Law Journal* 194.

2 And none the worse for that. See, eg, the stimulating discussion by Justice Aharon Barak, President, Supreme Court of Israel, 'Foreword: A Judge on Judging: The Role of a Supreme Court in a Democracy' (2002) 116 *Harvard Law Review* 16.

change in our constitutional arrangements³ when the principles underlying those arrangements are so difficult to grasp and so little is done to engage the community in a sustained dialogue about our constitutional development.

The inaccessibility of the *Australian Constitution* is a serious defect in our constitutional arrangements. Whether it is an irremediable defect and in particular whether the High Court has a role to play in creating a dialogue with the Australian community is an issue deserving of close consideration.

II THE FORM OF THE CONSTITUTION

A A Prosaic Document

The first point of distinction between the constitutional arrangements in Australia and the United States lies in the form of the two constituent documents. The drafting of the *Australian Constitution* reflects its origins as an enactment of the Imperial Parliament, albeit one approved by the eligible voters of the six Colonies (or at least by those voters who bothered to turn out).⁴ In consequence of its history, the *Constitution*, as Sir Anthony Mason has observed,

is a prosaic document expressed in lawyer's language which, but for its succinctness, would have done credit to a memorandum and articles of association drawn, not for a 19th century corporation, but for a government.⁵

Readers of the document, in the words of Justice French, do not experience 'a significant sense of uplift'.⁶ Indeed, without legal training (or sometimes with it), even diligent readers may have considerable difficulty relating the text of the document to current political institutions and practices, a point to which I shall return.

The *United States Constitution*, by contrast, derives its binding force squarely from 'We the People'.⁷ It seeks not only 'to form a more perfect Union', but to 'secure the Blessings of Liberty to ourselves and our Posterity'. The document itself is remarkably succinct, running to less than 8000 words including the 27 amendments.⁸ It is framed in 'forthright and vivid' language,⁹ yet creates a

3 As is well known, only 8 of 44 proposals for amending the *Constitution* have been approved at a referendum in the manner required by s 128. The last successful amendment was in 1977. The somewhat dispiriting history is recounted in Tony Blackshield and George Williams, *Australian Constitutional Law and Theory* (3rd ed, 2002) 1301–13. An overview of the unsuccessful 1999 Referendum on the Republic and the Preamble appears at 1325–35.

4 The franchise in the Colonies other than South Australia and Western Australia excluded women. Most Aborigines were ineligible to vote. The overall turnout of eligible voters in the 1899 referenda was about 60 per cent. See Helen Irving, *To Constitute a Nation: A Cultural History of Australia's Constitution* (1999) 152–3.

5 Sir Anthony F Mason, 'The Australian Constitution in Retrospect and Prospect' in Robert French, Geoffrey Lindell and Cheryl Saunders (eds), *Reflections on the Australian Constitution* (2003) 8.

6 Justice Robert French, 'The Constitution and the People', in Robert French, Geoffrey Lindell and Cheryl Saunders (eds), above n 5, 60.

7 *United States Constitution*, Preamble.

8 Akhil Reed Amar, 'Foreword: The Document and the Doctrine' (2000) 114 *Harvard Law Review* 26, 45. Two of the amendments, the Eighteenth (Prohibition) and Twenty-first, cancel each other out.

9 *Ibid.*

structure of government that has survived intact into its third century.

In his 2000 *Foreword*, Akhil Reed Amar argues the case for documentarianism as distinct from doctrinalism. The former seeks a reading of the *United States Constitution* that best fits the text, enactment history and structure. The latter, in Professor Amar's view, pays too much heed to judicial precedents that have often departed from the text of the *Constitution* itself. The linchpin of his argument is that the

brevity and bluntness of the document and its intimate relation to the central narrative of the American people make it a brilliant focal point drawing together ordinary citizens coming from all directions.¹⁰

Whether or not one accepts as sound the distinction between documentarianism and doctrinalism, Professor Amar's thesis brings home the centrality of the *United States Constitution* to political and public discourse in that country. It is difficult to imagine anyone writing of the *Australian Constitution* in language comparable to that used by Professor Amar:

in the *Constitution* itself, we can all find a common vocabulary for our common deliberations, and a shared narrative thread – a history of ordinary and ever more inclusive Americans helping to bind us into one people, one posterity. Even if the blood of the Founding Fathers does not literally run in each American's veins, we are all children of the Revolution (and the Civil War, and the Suffrage Movement, and so on), and the *Constitution* is and should be our national bedtime story.¹¹

Unlike the United States and other countries created out of former British colonies, Australians have not had to resort to armed rebellion to secure self-government and independence. The prosaic form of the *Australian Constitution* reflects the fact that this country's constitutional development has been marked by a meticulous legalism. In a famous article written in 1935, Sir Owen Dixon pointed out that, despite their fascination with the *United States Constitution* which 'damped the smouldering fires of their originality', the framers of our own *Constitution* were 'bound to depart altogether from its prototype'.¹² This was because the *Australian Constitution* was not

a supreme law purporting to obtain its force from the direct expression of a people's inherent authority to constitute a government. It is a statute of the British Parliament enacted in the exercise of its legal sovereignty over the law everywhere in the King's Dominions.¹³

In his dissenting judgment in one of the High Court's important recent constitutional decisions, Callinan J observed that the

Australian people have since 1900 proceeded regularly, indeed scrupulously and overtly legally, in collaboration with the Parliament of the United Kingdom along the path to full and independent nationhood.¹⁴

By contrast, in the United States, as Professor Amar says,¹⁵ 'epic events' such as revolution, civil war and the emergence of a mass civil rights movement in

10 Ibid 47.

11 Ibid.

12 Sir Owen Dixon, 'The Law and the Constitution' (1935) 51 *Law Quarterly Review* 590, 597.

13 Ibid.

14 *Shaw v Minister for Immigration and Multicultural Affairs* (2003) 203 ALR 143, 184.

15 Amar, above n 8, 29.

response to the legacy of slavery ‘gave birth to the Constitution’s words’. Perhaps fortunately, whatever the influence of world wars on the Australian psyche, no similar domestic epic events have shaped the language of our own *Constitution*.

It is not surprising, then, that Australia has no grand narrative of events leading to federation or national independence. We have an exhaustive record of the detailed and extended deliberations that resulted in Federation, but we have no *Federalist Papers*. Although the achievements of Sir Henry Parkes, Sir Samuel Griffith and Andrew Inglis Clark were considerable, none of the framers of the *Constitution* has a place in the pantheon of Australian heroes comparable to the standing in the United States of towering, if sometimes flawed, figures such as Thomas Jefferson, Alexander Hamilton and James Madison. We lack the inspiration provided by almost mystical events such as the deaths of Jefferson and John Adams, once bitter rivals but reconciled late in life, within six hours of each other on 4 July 1826, 50 years to the day after the signing of the *Declaration of Independence*.¹⁶ Nor do we have judicial heroes to match John Marshall, whose words echo across centuries and continents.¹⁷

B Legalism in Constitutional Adjudication

It is no coincidence that the ‘lawyer’s language’ of the *Australian Constitution* has been matched, throughout much of the High Court’s history, by what can fairly be described as a legalistic approach to constitutional adjudication. As recently as 1996, four members of the High Court agreed with Justice Windeyer’s observation, made in 1971, that the Court does not make implications in the *Constitution*, since its ‘avowed task is simply the revealing or uncovering of implications that are already there’.¹⁸

This disclaimer suggests that the ‘uncovering’ of constitutional implications is a value-free semantic exercise, devoid of any element of judicial policy making. Such a proposition is difficult to reconcile, for example, with the range of judicial views expressed as to the implications to be drawn from the economical language of ss 7 and 24 of the *Constitution*, requiring that senators and members of the House of Representatives be ‘directly chosen by the people’.¹⁹

16 David McCullough, *John Adams* (2001) 646–7.

17 Most famously, his assertion that it ‘is emphatically the province and duty of the judicial department to say what the law is’: *Marbury v Madison*, 5 US (1 Cranch) 137, 177 (1803). See *Attorney-General (WA) v Marquet* (2003) 202 ALR 233, 248 (Gleeson CJ, Gummow, Hayne and Heydon JJ); *United States v Morrison*, 529 US 598, 616 n 7 (2000) (Rehnquist CJ); Sir Owen Dixon, ‘Marshall and the Australian Constitution’ (1955) 29 *Australian Law Journal* 420.

18 *Victoria v Commonwealth* (1971) 122 CLR 353, 402 (Windeyer J). The passage was cited with approval in *McGinty v Western Australia* (1996) 186 CLR 140, 169–170 (Brennan CJ), 184 (Dawson J), 202 (Toohey J). Justice Gaudron agreed generally with Toohey J.

19 I refer to the cases on the implied freedom of political communication, notably *Nationwide News Pty Ltd v Wills* (1992) 179 CLR 1; *Australian Capital Television Pty Ltd v The Commonwealth* (1992) 177 CLR 106; *Theophanous v Herald & Weekly Times Ltd* (1994) 182 CLR 104; *Lange v Australian Broadcasting Corporation* (1997) 189 CLR 520. As to post-*Lange* developments, see Adrienne Stone, ‘The Freedom of Political Communication since *Lange*’ in Adrienne Stone and George Williams (eds), *The High Court at the Crossroads* (2000) 1, 1–20; *Roberts v Bass* (2002) 212 CLR 1.

Echoes of this approach are found in *Re Wakim; Ex parte McNally*²⁰ a case of far-reaching importance for the Australian judicial system. In that case, the High Court, by a majority of six to one, struck down the cross-vesting scheme to the extent that it purported to invest Chapter III courts with State judicial power. Members of the Court asserted that the inconvenience of the result – destroying a scheme for an integrated Australian judicial system that had worked well for more than a decade²¹ – was not a factor to be taken into account in assessing whether the legislation infringed implications to be drawn from Chapter III of the *Constitution*.²² Nor was it relevant that the scheme had been enacted and supported by every democratically elected Parliament in the country.²³

One consequence of legalism is that even cases of fundamental constitutional importance are presented as raising issues that are best analysed in terms of technical doctrine, often accompanied by an elaborate analysis of precedent. Inevitably, the reasoning of the Court is likely to prove beyond the understanding of all but the most well-informed or determined lay observers or commentators. Indeed, on occasions, the legalistic language may be difficult enough even for the specialist to follow.

The point is well illustrated by the first major constitutional decision of 2003, *Plaintiff S157/2002 v Commonwealth*²⁴ (*'Plaintiff S157'*). *Plaintiff S157* is one of the most important cases decided by the High Court in recent decades.²⁵ At issue was the validity and effect of s 474(1) of the *Migration Act 1958* (Cth), a so-called privative clause. The High Court rejected the challenge to the validity of the provision, holding that s 474, as a matter of construction, does not purport to oust the entrenched jurisdiction of the Court conferred by s 75(v) of the *Constitution*.²⁶ In order to avoid a possible infringement of Chapter III of the *Constitution*, the joint judgment of Gaudron, McHugh, Gummow, Kirby and Hayne JJ gave the definition of 'privative clause decision' in s 474(2) a very narrow and somewhat strained interpretation. Their Honours held that the expression 'decision...made...under this Act' in s 474(2) does not include a purported decision by the Refugee Review Tribunal which involves a failure to

20 (1999) 198 CLR 511.

21 And which had been upheld by an evenly divided Court in *Gould v Brown* (1998) 193 CLR 346. The composition of the Court had changed between the two decisions. See Gian Boeddu and Richard Haigh, 'Terms of Convenience: Examining Constitutional Overrulings by the High Court' (2003) 31 *Federal Law Review* 167, 188–90.

22 (1999) 198 CLR 511, 540 (Gleeson CJ), 549 (McHugh J) and 581–2 (Gummow and Hayne JJ).

23 Ronald Sackville, 'Foreword' in Adrienne Stone and George Williams (eds), *The High Court at the Crossroads* (2000) v.

24 (2003) 211 CLR 476.

25 See Duncan Kerr and George Williams, 'Review of Executive Action and the Rule of Law under the Australian Constitution' (2003) 14 *Public Law Review* 219, 219.

26 Section 75(v) provides that the High Court shall have original jurisdiction in all matters in which a writ of mandamus or prohibition, or an injunction, is sought against an officer of the Commonwealth. There is no equivalent in the *United States Constitution*. Section 75(v) was inserted into the *Australian Constitution* in order to overcome the holding in *Marbury v Madison*, 5 US (1 Cranch) 137 (1803), that the Supreme Court could not be given jurisdiction to issue mandamus or prohibition to non-judicial officers of the United States. See *ibid* 226 and authorities cited there.

exercise its jurisdiction or is in excess of the jurisdiction conferred by the Act.²⁷ Consequently, s 474(1) does not protect a purported decision where the Tribunal fails to accord the plaintiff procedural fairness, since a contravention of the principles of procedural fairness constitutes a jurisdictional error.²⁸ The Court reached this conclusion notwithstanding a clear indication in the Minister's second reading speech that s 474 was intended to insulate Tribunal decisions from judicial review provided only that they complied with the so-called *Hickman* principles.²⁹

The significance of the decision lies not so much in the particular construction of the privative clause,³⁰ but in the reasons for the Court adopting that construction. The joint judgment emphasises two 'fundamental constitutional propositions'.³¹ First, the jurisdiction of the Court to grant relief under s 75(v) of the *Constitution* cannot be removed by or under a law of Parliament, in particular where the decision-maker has committed a jurisdictional error. Secondly, Parliament cannot confer on a non-judicial body the power to determine conclusively the limits of its own jurisdiction. Accordingly, s 75(v) introduces into the *Constitution* 'an entrenched minimum provision of judicial review'.³² The joint judgment clearly implies that if the privative clause had purported to immunise decisions of the Tribunal against judicial review for jurisdictional error, it would have fallen foul of s 75(v).³³ In this way, *Plaintiff S157* strongly affirms that it is the High Court and not Parliament that ultimately determines the limits of judicial review of administrative action in Australia.³⁴

There are important issues left unresolved by *Plaintiff S157*, notably the precise extent to which Parliament can define the limits of power of administrative decision-makers to exclude judicial review. Nonetheless, the case plainly represents a victory for the rule of law, in the sense of upholding judicial supervision of administrative decisions in order to ensure that the executive adheres to certain minimum standards of legality.³⁵ At the very least, the decision

27 *Plaintiff S157* (2003) 211 CLR 476, 506.

28 *Ibid* 508; see also 494 (Gleeson CJ).

29 *R v Hickman; Ex parte Fox and Clinton* (1945) 70 CLR 598, 616 (Dixon J). A portion of the second reading speech is reproduced in the joint judgment: *Plaintiff S157* (2003) 211 CLR 476, 499. A fuller extract appears in *NAAV v Minister for Immigration and Multicultural and Indigenous Affairs* (2002) 123 FCR 298, 467–9. The Minister's explicit position, which the High Court did not share, was that s 474 would be read as protecting a Tribunal decision unless it was not a bona fide attempt to exercise the power in question, did not relate to the subject matter of the legislation or was not reasonably capable of reference to the power.

30 See the Migration Amendment (Judicial Review) Bill 2004 (Cth) which, if passed, will define a 'privative clause decision' to include a *purported* decision that would be a privative clause decision within s 474(2) if there had been a failure to exercise jurisdiction or an excess of jurisdiction.

31 *Plaintiff S157* (2003) 211 CLR 476, 511–12.

32 *Ibid* 513.

33 *Ibid* 506, 508.

34 *Ibid* 514. Thereby constitutionalising refugee law in Australia. See Ronald Sackville, 'Refugee Law: The Shifting Balance' (2004) 26 *Sydney Law Review* 37.

35 As French J points out in *NAAV v Minister for Immigration and Multicultural and Indigenous Affairs* (2002) 123 FCR 298, 415, the concept of 'rule of law' presents definitional difficulties. See, generally Paul Craig, 'Formal and Substantive Conceptions of the Rule of Law: An Analytical Framework' [1997] *Public Law* 467; Cheryl Saunders and Katherine Le Roy, *The Rule of Law* (2003).

marks a significant shift in the balance of power between Parliament and the executive, on the one hand, and the High Court, on the other.³⁶

In these circumstances, one might have expected the decision to have generated a sustained and informed discussion, not merely within legal circles, but in the wider community. In fact, while the decision was widely reported at the time, there has been little subsequent discussion of its ramifications outside legal circles. Doubtless, there are many reasons for this state of affairs. However, one explanation for the paucity of debate on constitutional questions outside the legal community is the sheer difficulty facing non-specialists in attempting to follow issues presented by a case like *Plaintiff S157*.

In part, the difficulty for the non-specialist is a matter of judicial style. The joint judgment in *Plaintiff S157*, despite concluding with a ringing endorsement of judicial review of administrative action as a central plank in the rule of law,³⁷ would be largely impenetrable to those not steeped in the esoteric terminology and doctrines of Australian public law. In contrast to the concurring judgment of Gleeson CJ, the joint judgment does not provide a straightforward and concise statement of the issue for determination or the central role of s 75(v) of the *Constitution* in securing 'a basic element of the rule of law'.³⁸ Nor does it explain at the outset in simple language the nature and purpose of the constitutional writs (né the prerogative writs) and of injunctive relief.³⁹ The exposition in the joint judgment assumes a sophisticated understanding of the structure of Chapter III of the *Constitution* and of the jurisprudential and practical dilemmas created by privative clauses. Again in contrast to the judgment of Gleeson CJ, the joint judgment does not acknowledge the difficulty of grasping some core concepts in this field of discourse and therefore does not attempt to expound them from the standpoint of basic principle.⁴⁰ These matters of style are not unique to *Plaintiff S157*.

But it is not only questions of style that make constitutional adjudication so inaccessible to non-specialists. The issue in *Plaintiff S157* was the compatibility of a particular privative clause with s 75(v) of the *Constitution*. Section 75(v) is contained in a subparagraph of a section within Chapter III of the *Constitution* that defines the original jurisdiction of the High Court. The sub-paragraph is drafted in the language of the old prerogative writs, hardly the linguistic currency of the concerned citizen wishing to understand Australia's constitutional arrangements. It certainly does not convey to the uninitiated the sense of a fundamental guarantee of liberty. Perhaps the difficulty is that the technicalities of writs of mandamus and prohibition, the subtleties of jurisdictional error and the jurisprudential conundrums presented by privative clauses simply do not readily lend themselves to simple and lucid exposition for the benefit of a non-specialist audience, even an informed one.

36 But not necessarily federal courts created by statute: *Abebe v Commonwealth* (1999) 197 CLR 510.

37 *Plaintiff S157* (2003) 211 CLR 476, 513–14 (Gaudron, McHugh, Gummow, Kirby and Hayne JJ).

38 *Ibid* 482 (Gleeson CJ).

39 *Ibid* 483 (Gleeson CJ).

40 *Ibid* 485, acknowledging that the idea that there are degrees of administrative error is 'not always easy to grasp' (Gleeson CJ).

A second recent illustration of the complexity of constitutional adjudication in Australia is *Attorney-General (Western Australia) v Marquet*⁴¹ ('*Marquet*'), a case involving the application of the 'manner and form' requirements of s 6 of the *Australia Act 1986* (Cth)⁴² to the Western Australian Parliament. The legal issue in *Marquet* was whether it was lawful for the Clerk of the Parliaments of Western Australia to present for the royal assent Bills designed to alter the electoral system in Western Australia so as to largely eliminate the considerable disparities between the number of enrolled voters in city and country electorates. The issue arose because s 13 of the *Electoral Distribution Act 1947* (WA), which had been enacted by the Western Australian Parliament in the usual way, provided that it was not lawful to present for assent 'any Bill to amend this Act' unless the Bill had been passed by an absolute majority of the members of each House. The relevant Bills were passed by a majority of those present and voting in each House, but not by an absolute majority.

The non-specialist might wonder why the fate of Bills passed by each House of the Western Australian Parliament, which were designed to introduce the principle of one vote one value in State elections, should fall to be determined by reference to the terms of a law of the Commonwealth Parliament. By a five to one majority (Kirby J dissenting), the High Court upheld the majority decision of a five member Full Court of the Supreme Court of Western Australia that the Clerk could not lawfully present the Bills for assent.⁴³ In substance, the Court held that s 13 of the *Electoral Distribution Act* was a law respecting the powers, constitution or procedures of the Western Australian Parliament for the purposes of s 6 of the *Australia Act*; that the *Australia Act* was a valid enactment of the Commonwealth Parliament; that the Bills proposed to 'amend' the *Electoral Distribution Act* and so were caught by s 13 of that Act; and that since the Bills had not been passed in accordance with the manner and form requirements prescribed by s 13, it was unlawful to present them for the royal assent.

Justice Kirby saw *Marquet* as raising important questions as to the capacity of an unrepresentative Parliament to prevent its successors adapting to a more representative and democratic electoral system. He considered that an expansive interpretation of the word 'amend' in s 13 of the *Electoral Distribution Act* would impede attempts in Western Australia to achieve 'representative democracy' in the form accepted elsewhere in Australia.⁴⁴ Justice Kirby preferred a narrower construction that 'advances fundamental rights in preference to one that attempts to "entrench" ... the last malapportionment of state electorates in the Commonwealth'.⁴⁵

41 (2003) 202 ALR 233.

42 Section 6 replaces the 'manner and form' proviso to s 5 of the *Colonial Laws Validity Act 1865* (UK). Section 6 provides that a law made by the Parliament of a State 'respecting the constitution, powers or procedure of the Parliament' is to be of no force or effect unless made 'in such manner and form as may from time to time be required by a law made by that Parliament'.

43 *Marquet v Attorney-General (WA)* (2002) 26 WAR 201 (Wheeler J dissenting).

44 *Marquet* (2003) 202 ALR 233, 271.

45 *Ibid* 273.

For much the same reasons, Kirby J took a narrow view of the expression ‘constitution, powers or procedure’ in s 6 of the *Australia Act*. To do otherwise would be ‘inimical to the basic postulates of representative democracy’.⁴⁶ This led him to conclude that the Bills were not concerned with the Constitution, powers or procedure of the Western Australian Parliament, since they did not affect the ‘framework and basic structure of the legislature, as such’.⁴⁷ Whatever the merits of Kirby J’s construction of the statutory provisions, his analysis, from a standpoint of political theory, illuminates what otherwise appear to be dry and technical legal questions and facilitates understanding of both the issues and his Honour’s reasoning process.

The joint judgment,⁴⁸ by contrast, puts policy considerations to one side. According to their Honours, it is a ‘fundamental legal error’ to assign a particular meaning to s 13 of the *Electoral Distribution Act* (or, presumably, to s 6 of the *Australia Act*) ‘according to the qualitative assessment that is made of the desirability of the proposed laws’.⁴⁹ The questions in the case are to be resolved by a process of construction and analysis that eschews reference to the values of representative democracy and disregards the impact of the proposed legislation on different classes of electors.

A concerned Western Australian elector wishing to be fully informed as to how it is that Australia’s constitutional arrangements preclude a current elected State Parliament asserting its will over that of an earlier Parliament, must follow a tortuous path through the joint judgment. He or she must proceed through the intricacies of Western Australian constitutional history; the indigenous source of authority for the *Australia Act*;⁵⁰ the ‘rule of recognition’ in the light of manner and form provisions imposed on a subordinate legislature in a federal system; and the construction of the specific language of s 6 of the *Australia Act* and s 13 of the *Electoral Distribution Act*. Moreover, the journey is to be undertaken, so it seems, without any consideration of the values that might inform a decision on these matters. My point is not that the reasoning of the majority in *Marquet* is necessarily flawed, but that the hypothetical elector, unless possessed of legal training, is unlikely to be able to make an informed assessment of that reasoning.

Plaintiff S157 and *Marquet* show that a combination of the form of the *Australian Constitution* and what can fairly be described as a legalistic style of judgment writing, limits the accessibility of genuinely important constitutional cases to a non-specialist audience. It is true that the High Court has recently adopted the practice, through its public information officer, of issuing summaries

46 Ibid 281.

47 Ibid.

48 Ibid 235 (Gleeson CJ, Gummow, Hayne and Heydon JJ). Justice Callinan delivered a judgment to similar effect: *ibid* 287.

49 Ibid 245.

50 Said to be s 51(xxxviii) of the *Constitution*, which empowers the Commonwealth Parliament, at the request or with the concurrence of all State Parliaments directly concerned, to make laws with respect to ‘the exercise within the Commonwealth ... of any power which can at the establishment of this *Constitution* be exercised only by the Parliament of the United Kingdom’. See *ibid* 248–9.

of important decisions.⁵¹ Although useful, these tend to concentrate on the outcome of the case rather than the reasoning of the Court or the issues of principle at stake. Unless the Court alters its approach to judgment writing, there is little incentive or opportunity for the concerned citizen to follow, let alone participate, in an informed discussion of the merits of constitutional decisions.

III THE SILENT CONSTITUTION

A second and related contrast between Australia and the United States is that significant features of Australia's constitutional structure are either simply not recorded in the *Constitution* or are referred to in terms that do not match current realities. The absence of any reference to the office of Prime Minister or to the Cabinet in the *Constitution* are familiar examples. But the obstacles facing the reader of the document in seeking an understanding of the principles of constitutional government go considerably further than the omission of the fundamentals of responsible government. Take, for example, the preamble to the *Commonwealth of Australia Constitution Act 1900* (UK). This recites the agreement of the people of five Colonies⁵² to

unite in one indissoluble Federal Commonwealth under the Crown of the United Kingdom of Great Britain and Ireland.

The Federal Commonwealth may be indissoluble, but the Crown of the United Kingdom of Great Britain and Ireland no longer exists.⁵³ The High Court has reassuringly held that this does not mean that the *Australian Constitution* 'miscarries'.⁵⁴ Nonetheless, the anomaly illustrates the difficulties facing non-specialists in ascertaining Australia's constitutional arrangements. A reader of the *Constitution* might well wonder, for example, whether the reference to a 'subject of the Queen' in s 117 includes a subject of the Queen of the United Kingdom referred to in the preamble to the *Commonwealth of Australia Constitution Act*.⁵⁵

In a sense this was the issue in *Shaw v Minister for Immigration and Multicultural Affairs*⁵⁶ ('Shaw'). Mr Shaw had migrated to Australia with his parents in 1974, when he was two years old. He was then and remained a citizen of the United Kingdom. Despite being absorbed into the Australian community,⁵⁷ Mr Shaw never took out Australian citizenship. Unwisely he chose to follow a 'life of crime',⁵⁸ prompting the Minister to cancel his permanent residence visa

51 The media statements are found at High Court of Australia, *Media Releases* <http://www.highcourt.gov.au/publications_04.html> accessed 12 July 2004.

52 Western Australia had not yet agreed to join the Federation. See s 3.

53 *Sue v Hill* (1999) 199 CLR 462, 489 (Gleeson CJ, Gummow and Hayne JJ).

54 *Ibid.*

55 Section 117 provides that a subject of the Queen, resident in a State, shall not be subject to any disability or discrimination in another State that would not be equally applicable if he or she were resident in the other State.

56 (2003) 203 ALR 143.

57 Thereby escaping the reach of the immigration power: *ibid* 153–4 (McHugh J), 172–4 (Kirby J); 180 (Callinan J).

58 *Ibid* 153 (McHugh J).

pursuant to s 501(2) of the *Migration Act 1958* (Cth). The question for the High Court was whether s 501(2), in its application to Mr Shaw, could be supported by Parliament's power in s 51(xix) of the *Constitution* to make laws with respect to aliens.

Mr Shaw perhaps had some reason for optimism in view of the decision of the High Court only two years earlier, in *Re Patterson; Ex parte Taylor*⁵⁹ (*'Re Patterson'*). The facts in that case were virtually identical to those in *Shaw*, except that Mr Taylor had arrived in Australia in 1966, rather than 1974. A majority of the Court in *Re Patterson*⁶⁰ held that Mr Taylor had not been an alien when he arrived in Australia and had never become one. Accordingly, he was beyond the reach of the aliens power and thus outside s 501 of the *Migration Act*.

There were two themes in the reasoning in *Re Patterson*.⁶¹ One, propounded by Gaudron and Kirby JJ, was that Mr Taylor had become a member of the Australian body politic constituting the Australian community or had been absorbed into the people of the Commonwealth. As such, he was beyond the reach of the aliens power. A second approach, taken by McHugh J, was that since Mr Taylor had been a subject of the Queen permanently resident in Australia before the enactment of the *Royal Style and Titles Act 1973* (Cth), which 'assert[ed] the sovereignty of the Queen of Australia', he could not be an 'alien'. All members of the majority appeared to accept that by an 'evolutionary process', subjects of the Queen living in Australia had at some stage become subjects of the Queen of Australia rather than of the Queen of the United Kingdom.⁶² A possible difficulty for Mr Shaw was that, if the evolutionary process had been completed by 1973, McHugh J appeared likely to hold that a United Kingdom citizen arriving in Australia after that date (as Mr Shaw had done) would be an alien and would retain that status.

The majority in *Re Patterson*, whatever the differences in their reasoning, were united in the view that the decision of the High Court in *Nolan v Minister for Immigration and Ethnic Affairs*⁶³ (*'Nolan'*) should be overruled. In that case, by a majority of six to one, the Court had held that Parliament could treat as an alien any person born outside Australia whose parents were not Australian and who had not been naturalised.⁶⁴ This included Mr Nolan, a United Kingdom citizen who had arrived in Australia in 1967 aged ten and had never been naturalised. The majority in *Re Patterson* considered that the Court in *Nolan* had failed to address the critical questions, namely whether Mr Nolan had always been an alien and, if not, when and how his status had changed.

Not for the first time in the history of the Court, a change in its membership led to a reconsideration of earlier decisions. Between the date of the decision in *Re Patterson* and the decision in *Shaw*, Gaudron J had retired and had been

59 (2001) 207 CLR 391.

60 Gaudron, McHugh, Kirby and Callinan JJ; Gleeson CJ, Gummow and Hayne JJ dissenting.

61 See the analysis of McHugh J in *Shaw* (2003) 203 ALR 143, 154.

62 *Re Patterson* (2001) 207 CLR 391, 408 (Gaudron J), 432 (McHugh J), 491 (Kirby J), 517 (Callinan J).

63 (1988) 165 CLR 178.

64 *Ibid* 185. The sole dissenter was Gaudron J, who was the only member of the 1988 Court still on the Bench in 2001.

replaced by Heydon J. In *Shaw*, the dissenters in *Re Patterson*, with Justice Heydon's concurrence, restored the *status quo ante*. Thus *Nolan* was resuscitated and *Re Patterson* itself overruled. The majority in *Shaw* were emboldened to take this course, in part, by their view that *Re Patterson* contained no binding statement of constitutional principle and thus had no precedent value beyond its own facts.⁶⁵

The majority in *Shaw* take as their starting point the definition of 'alien' accepted in *Nolan*. This contrasts with Justice Gaudron's notion of an alien as someone who is not a member of the Australian body politic and with Justice Kirby's idea that absorption into the community takes a person outside the aliens power. The majority also accepts that by 1948, when the *British Nationality Act 1948* (UK) came into force, 'the Imperial Crown, indivisible in nature, with an undivided allegiance, was no longer apparent, whether in this country or the UK'.⁶⁶ Mr Shaw had entered Australia as a person owing allegiance to the Queen of the United Kingdom, not to the Queen of Australia, and thus was an alien in this country. Nothing had changed his status after that time.

While *Shaw* may have clarified the scope of the aliens power, it leaves some fundamental questions unanswered. We know that the Queen of the United Kingdom of the original *Constitution* has been transformed into the Queen of Australia. But how and precisely when did this occur? The majority in *Shaw* do not answer these questions beyond indicating that the *Constitution* itself contemplates the possibility of change in the relationship between the United Kingdom and Australia and that the process of sundering the previously indivisible Crown was complete by 1948.⁶⁷ A lay person, even after a diligent reading of the *Constitution* and cases such as *Shaw*, is likely to be left wondering as to the 'mystical'⁶⁸ constitutional process by which Australia acquired its very own discrete sovereign.

What then of the authority of the United Kingdom Parliament to legislate for Australia? Australia can hardly be regarded as independent if the Parliament of another country retains authority, even as a matter of theory only, to legislate for this country. It is now orthodox doctrine that Australia has severed all constitutional links with the United Kingdom and that the Parliament of the United Kingdom no longer has authority to legislate for Australia. This is said to have come about no later than the enactment of the *Australia Act*, s 1 of which denies, at least prospectively, the efficacy of statutes enacted by the United Kingdom Parliament insofar as they purport to affect Australia.⁶⁹ In consequence,

65 *Shaw* (2003) 203 ALR 143, 152 (Gleeson CJ, Gummow and Hayne JJ). It must be said that this analysis is not entirely convincing. In *Re Minister for Immigration and Multicultural Affairs; Ex parte Te* (2002) 212 CLR 162, 187, McHugh J acknowledged that *Re Patterson* had no *ratio decidendi* with respect to the aliens power. But he did not say that no principle at all could be derived from the reasoning. His Honour pointed out that all four members of the majority in *Re Patterson* had held that the constitutional expression 'alien' could not be regarded as co-extensive with the concept of non-citizen. The effect of *Shaw* is to make the two expressions co-extensive.

66 *Shaw* (2003) 203 ALR 143, 150.

67 *Ibid*, referring to ss 34 and 51 (xxxviii) of the *Constitution*.

68 Justice McHugh uses the word 'mystical' in *Re Patterson* (2001) 207 CLR 391, 432.

69 *Sue v Hill* (1999) 199 CLR 462, 491 (Gleeson CJ, Gummow and Hayne JJ).

so it is said, the legal sovereignty of the Imperial Parliament has ceased and ultimate sovereignty now ‘reside[s] in the Australian people’.⁷⁰ As McHugh J put it in *McGinty v Western Australia*:

the sovereignty of Australia originally resided in the United Kingdom Parliament. Since the *Australia Act 1986* (UK), however, the sovereignty of the Australian nation has ceased to reside in the Imperial Parliament and has become embedded in the Australian people. Only the people can now change the *Constitution*. They are the sovereign.⁷¹

The *Australia Act* itself is said to be a law validly enacted by the Commonwealth Parliament pursuant to s 51(xxxviii) of the *Constitution* by reason of a request made by the States.⁷² On this basis, it seems appropriate to treat the *Australia Act* as part of Australia’s constitutional arrangements. Doubtless for this reason the current reprint of the *Constitution*, published under the auspices of the Commonwealth Attorney-General’s Department, includes the *Australia Act*.⁷³ Yet the status of the *Australia Act* did not deter Kirby J in *Marquet* from expressing the by no means implausible view that s 6 of the *Australia Act*⁷⁴ is invalid as an impermissible attempt to amend the *Constitution* otherwise than in accordance with s 128.⁷⁵

If this is not confusing enough to the diligent lay observer, he or she will receive little comfort on the question of the precise date Australia attained its national independence. A citizen might reasonably wish to be informed as to when Australia became an independent nation. Even without a formal declaration of independence or a definitive statement in the *Constitution* itself, it might be thought that this would be an easy question to answer. Such is not the case.⁷⁶

It is generally accepted that Australia did not become truly independent upon Federation, since the United Kingdom Parliament at that time retained power to legislate for this country.⁷⁷ But when did Australia attain full independence? The Court had the opportunity to address the issue in *Shaw*. The majority, however, thought that it was inappropriate to do so:

70 *Australian Capital Television Pty Ltd v Commonwealth* (1992) 177 CLR 106, 138 (Mason CJ); *McGinty v Western Australia* (1996) 186 CLR 140, 230 (McHugh J).

71 (1996) 186 CLR 140, 237 (footnote omitted). Cf George Winterton, ‘Popular Sovereignty and Constitutional Continuity’ (1998) 26 *Federal Law Review* 1, arguing that ‘Australian popular sovereignty’, as distinct from legal sovereignty, has existed since 1901.

72 Above n 50.

73 Office of Legislative Drafting, Attorney-General’s Department, *The Constitution as in Force on 1 June 2003* (2003).

74 Above n 42.

75 *Marquet* (2003) 202 ALR 233, 282–4.

76 See, generally George Winterton, ‘The Acquisition of Independence’ in Robert French, Geoffrey Lindell and Cheryl Saunders (eds), above n 5, 31, 31–50.

77 *China Ocean Shipping Co v South Australia* (1979) 145 CLR 172, 181–3 (Barwick CJ), 194–5 (Gibbs J), 209–214 (Stephen J), 240 (Aickin J), *contra* 236–9 (Murphy J, dissenting).

To ask when Australia actually achieved complete constitutional independence or other questions phrased in similar terms is to assume a simple answer to a complex issue, rather than attend to the particular matter ... which has arisen for decision.⁷⁸

Justice Callinan, in his dissenting judgment, accepted that it may not be feasible to determine 'in strict legal, or ... historical theory' the date Australia achieved independence.⁷⁹ Nonetheless, he concluded that the 'magic date' was 3 March 1986, when the *Australia Act* came into force.⁸⁰ Any earlier date erroneously conflated political realities with legal theory. Until the *Australia Act* came into force, the United Kingdom Parliament retained the legal authority to legislate for Australia, notwithstanding the *Statute of Westminster*. But the *Australia Act* 'gave voice to the completion of Australia's evolutionary independence'.⁸¹

The significance of these uncertainties should not be underestimated. The reasoning of the majority of the High Court implies that the date Australia achieved complete constitutional independence is too complex an issue for the Court to address directly. Yet the inability of the High Court, let alone political leaders, to nominate a date for Australian independence clothes our constitutional arrangements in complexity and obscurity. This may not matter much to the expert who well understands the nuances of constitutional law. But the confusion about such fundamental matters is unlikely to advance the ordinary citizen's grasp of constitutional arrangements. The uncertain date of Australian independence both illustrates and symbolises the inaccessibility of the *Constitution*.

IV THE ABSENCE OF A BILL OF RIGHTS

A third point of contrast between the two constitutional systems is that the *United States Constitution* incorporates a Bill of Rights, whereas the *Australian Constitution* does not. Americans have been accustomed for two centuries to the sweeping language of, say, the First Amendment's prohibition on laws 'abridging the freedom of speech' or of the Due Process Clause of the Fifth Amendment.⁸² They may or may not agree with the interpretation accorded to these provisions from time to time by the Supreme Court, but the core ideas embodied in the constitutional guarantees are readily enough understood and their general significance appreciated in the wider community.

Because of the broad reach of the Bill of Rights, constitutional norms in the United States pervade many areas of State and federal law, including the

78 *Shaw* (2003) 203 ALR 143, 149 (Gleeson CJ, Gummow and Hayne JJ). Justice Heydon agreed with their Honours' reasons, although expressing the view that it was 'not in fact self-evident that as from 1 January 1901 all British subjects were not aliens': at 187.

79 *Ibid* 183.

80 *Ibid* 185.

81 *Ibid*. Justice McHugh, also in dissent, expressed himself persuaded by Justice Callinan's analysis. He therefore considered that the date of independence was not 1973 (as he had suggested in *Re Patterson*) but 1986.

82 Providing that no person shall be deprived of life, liberty or property without due process of law.

everyday application of the criminal law. In consequence, constitutional law is a very substantial component of the work of the Supreme Court,⁸³ taking it into many areas central to American life. In doing so, it ordinarily engages in what Justice Ruth Bader Ginsburg has described as ‘a dialogue with other organs of government, and with the people as well’.⁸⁴ As Robert C Post has argued, the Court sometimes seeks to change the ‘constitutional culture’, as it did in *Brown v Board of Education* (the ‘*School Desegregation Case*’),⁸⁵ while on other occasions its decisions are influenced by the ‘constitutional culture’ of other arms of government or of the American people themselves.⁸⁶

The central place of constitutional law in the work of the Supreme Court of the United States is shown by the statistics. According to the *Harvard Law Review*'s most recent annual statistical surveys, between one third and one half of all cases in the Supreme Court resulting in ‘full opinions’ have a constitutional question as their ‘principal issue’.⁸⁷ The figures for the 1998 to 2002 Terms are as follows:

Term	Full Opinions	Constitutional Cases
1998	81	26
1999	77	38
2000	86	31
2001	81	39
2002	78	34

The range of issues typically canvassed by the Court is illustrated by its caseload in the 2001 Term (although any year would do).⁸⁸ In that Term, the constitutional decisions addressed the methodology used in conducting the decennial census; the immunity of States from regulation by federal administrative agencies; the execution of mentally retarded defendants (held to be a violation of the Eighth Amendment’s prohibition on cruel and unusual punishment⁸⁹); the scope of the Sixth Amendment’s guarantees of a jury trial and of legal assistance for defendants in criminal cases; the application of the First Amendment’s guarantee of freedom of speech to the federal *Child Pornography*

83 Of course, there are other contributing factors, such as the fact that the Supreme Court, unlike the High Court, is not the final court of appeal in matters of purely State law: *Erie Railroad Co v Tompkins*, 304 US 64 (1938).

84 Justice Ruth Bader Ginsburg, ‘Speaking in a Judicial Voice’ (1992) 67 *New York University Law Review* 1185, 1198. She gives the ‘brehtaking ... decision’ in *Roe v Wade*, 410 US 113 (1973) as an example of the Court not engaging in dialogue with legislators but ‘entirely [removing] the ball from the legislators’ court’: at 1198, 1205.

85 347 US 483 (1954).

86 Robert C Post, ‘Foreword: Fashioning the Legal Construction: Culture, Courts and Law’, (2003) 117 *Harvard Law Review* 4, 36–8.

87 These figures have been derived from ‘The Statistics’ section of the *Harvard Law Review* published annually in its first issue. In addition to the full opinions, there is a very large number of appeals, petitions for review and other applications disposed of summarily by the Supreme Court (averaging 7000 to 8000 in recent years).

88 See, ‘The Supreme Court – Leading Cases’ (2002) 116 *Harvard Law Review* 200, 200–331.

89 *Atkins v Virginia*, 536 US 304 (2002).

*Prevention Act*⁹⁰ (held to be unconstitutional insofar as it purported to prohibit virtual child pornography⁹¹) and to laws forbidding candidates for State judicial office from expressing views on controversial topics (also struck down⁹²); the mandatory drug testing of school students engaged in extracurricular activities (upheld as not in contravention of the Fourth Amendment's prohibition on unreasonable searches and seizures⁹³); the application of the Fifth Amendment privilege against self-incrimination to prisoners; and the scope of the Fifth Amendment's takings clause.

Moreover, in the United States, constitutional law is not exclusively or even primarily the province of the Supreme Court, although its decisions are binding on matters of federal law. All courts, especially federal courts, encounter constitutional questions, or at least are required to apply constitutional norms, as part of their quotidian diet. This is reflected in the fact that nearly all the constitutional cases decided by the Supreme Court are heard in its appellate jurisdiction.⁹⁴ In the ordinary course, constitutional issues ultimately determined by the Supreme Court are first addressed by federal or State courts. The Supreme Court's opinions on constitutional law often build on jurisprudence developed in the lower courts or resolve conflicts among intermediate appellate courts.

The nature of constitutional adjudication in the United States enhances the accessibility of Supreme Court decisions to the wider community. In the 2003 *Foreword*, for example, Post analyses three important and controversial decisions of the Rehnquist Court from the 2002 Term.⁹⁵ In *Lawrence v Texas*,⁹⁶ the Court held that a Texas statute which imposed criminal penalties for acts of sodomy violated the liberty protected by the Due Process Clause of the Fourteenth Amendment.⁹⁷ In *Grutter v Bollinger*,⁹⁸ the Court upheld the University of Michigan Law School's admission policy, which allowed race to be taken into account as one factor in selecting students, against a challenge based on the Fourteenth Amendment's Equal Protection Clause.⁹⁹ In *Nevada Department of Human Resources v Hibbs*,¹⁰⁰ the Court upheld the validity of the family care provisions of the federal *Family and Medical Leave Act*¹⁰¹ as within the Congressional power to enforce, by appropriate means, the provisions of the Fourteenth Amendment.¹⁰²

90 *Child Pornography Prevention Act of 1996*, 18 USC §§ 2252A, 2256 (Supp V 1999).

91 *Ashcroft v Free Speech Coalition*, 535 US 234 (2002).

92 *Republican Party of Minnesota v White*, 536 US 765 (2002).

93 *Board of Education v Earls*, 536 US 822 (2002).

94 In the 1999, 2000 and 2001 Terms no constitutional case decided by the Supreme Court was commenced in the original jurisdiction of the Court: see 'The Statistics', above n 87, Table III.

95 Post, above n 86.

96 539 US 558 (2003).

97 United States Constitution, amend XIV § 1 applies due process requirements to the States.

98 539 US 306 (2003).

99 The Equal Protection Clause provides that no State shall deny to any person the equal protection of the laws: *United States Constitution*, amend XIV § 1.

100 538 US 721 (2003).

101 *Family and Medical Leave Act of 1993*, 29 USC §§ 2601 et seq.

102 *United States Constitution*, amend XIV § 5.

Each of these cases addressed controversial, indeed highly charged issues. Each required an analysis of constitutional doctrine, including a survey of earlier Supreme Court authorities. Yet, largely because the decisions interpret fundamental guarantees framed in broad language, the issues are not unduly difficult for interested lay observers and commentators to follow. The treatment of these issues, both by majority judges and dissenters, range over matters of history, sociology, educational and employment policy, political philosophy and international norms. The debate within the Court is robust, sometimes fierce and caustic. For the most part, the competing arguments can be understood readily enough by educated readers, with or without legal training.

It is not difficult, for example, to catch the drift of the opening paragraph of Justice Kennedy's opinion, writing for the majority, in *Lawrence v Texas*:

Liberty protects the person from unwarranted government intrusions into a dwelling or other private places. In our tradition the State is not omnipresent in the home. And there are other spheres of our lives and existence, outside the home, where the State should not be a dominant presence. Freedom extends beyond spatial bounds. Liberty presumes an autonomy of self that includes freedom of thought, belief, expression, and certain intimate conduct. The instant case involves liberty of the person both in its spatial and more transcendent dimensions.¹⁰³

Nor is it difficult to follow Justice Scalia's scathing attack, in the same case, on the willingness of the majority to overrule an earlier decision, when (as he pointed out) members of the majority had co-authored a 'paean to *stare decisis* ... in *Planned Parenthood v Casey*'.¹⁰⁴ Similarly, Justice Scalia's repudiation of the University of Michigan Law School's admission policy as 'a sham to cover a scheme of racially proportionate admissions'¹⁰⁵ admits of little doubt as to his assessment of the worth of that policy.

The *Australian Constitution*, although lacking a Bill of Rights, has some specific guarantees of civil rights and freedoms. But these are limited in scope and qualified in their terms.¹⁰⁶ Thus the range of constitutional issues that can be presented to the Court is limited. For this reason and others,¹⁰⁷ the High Court is not predominantly a constitutional court. This is borne out by a statistical analysis of the work of the Gleeson Court during the period May 1998 to December 2002. The study reported that in that four and a half year period, out of

103 539 US 558, 562 (2003).

104 539 US 558, 587 (2003). In *Lawrence v Texas*, the five member majority overruled *Bowers v Hardwick*, 478 US 186 (1986). In *Planned Parenthood of Southeastern Pennsylvania v Casey*, 505 US 833 (1992) the opinion of O'Connor, Kennedy and Souter JJ reaffirmed the 'essential holding' of *Roe v Wade*, 410 US 113 (1973) on *stare decisis* grounds. See Michael Stokes Paulsen, 'Abrogating *Stare Decisis* by Statute: May Congress Remove the Precedential Effect of *Roe* and *Casey*?' (2000) 109 *Yale Law Journal* 1535.

105 539 US 306, 347 (2003).

106 For example, the guarantee in s 80 of a jury for the trial on indictment of an offence against the Commonwealth is easily evaded (*Cheng v The Queen* (2000) 203 CLR 248) and in any event does not apply to the States. Similarly, s 116, which prevents the Commonwealth from making any law prohibiting the free exercise of religion, does not apply to the States. This might be significant if, for example, a State wished to emulate France and prohibit the display of religious symbols in public schools.

107 See above n 83.

a total of 256 reported cases, the Court decided sixty constitutional cases.¹⁰⁸ This suggests that constitutional cases comprise between 20 per cent and 25 per cent of all reported cases decided by the High Court, although the author of the study appears to have employed less stringent criteria than the *Harvard Law Review* to characterise a case as ‘constitutional’.¹⁰⁹

Even by these standards, 2003 was a relatively light year for constitutional law in the High Court. The Full High Court decided nine cases that can fairly be described as involving substantial constitutional issues. Five of these raised constitutional issues of general importance, including *Plaintiff S157*,¹¹⁰ *Marquet* and *Shaw*. The other two cases of more general importance considered whether the so-called Commonwealth superannuation contributions surcharge could validly apply to State judicial officers¹¹¹ and whether a claim against a State to recover licence fees which had been held to be invalidly imposed as duties of excise¹¹² could be defeated by a failure to give notice of the claim as required by State law.¹¹³

The four cases of more limited significance addressed:

- whether State or Territory laws providing for reserve or additional jurors in complex criminal trials violates the guarantee in s 80 of the *Constitution* of a jury for the trial or indictment of an offence against the Commonwealth;¹¹⁴
- whether the *Workplace Relations Act 1996* (Cth) could validly apply to maritime employers or vessels engaged in interstate trade, notwithstanding

108 Andrew Lynch, ‘The Gleeson Court on Constitutional Law: An Empirical Analysis’ (2003) 26 *University of New South Wales Law Journal* 32, Tables A(I), A(II).

109 The study relied on catchwords appearing in the *Australian Law Reports* headnotes. This resulted in some cases being classified as constitutional when the constitutional point was ‘relatively minor or incidental’. Three of the 60 cases involved questions of State constitutional law: *ibid* 7.

110 A case heard and decided at the same time as *Plaintiff S157* considered the principle for which *Plaintiff S157* stands and did not raise any fresh constitutional question: *Re Minister for Immigration and Multicultural and Indigenous Affairs; Ex parte Applicants S134/2002* (2003) 211 CLR 441.

111 *Austin v Commonwealth* (2003) 195 ALR 321. The superannuation surcharge was struck down in its application to State judges on the ground that it significantly impaired the State’s freedom to select the manner and method for the discharge of its constitutional functions respecting the remuneration of the judges of State courts.

112 In contravention of s 90 of the *Constitution*.

113 *British American Tobacco Australia Ltd v Western Australia* (2003) 200 ALR 403. A unanimous Court held that the State law did not apply to the proceedings. The Court held that the claim to recover the moneys paid was a matter arising under the *Constitution* and thus the Supreme Court was exercising federal jurisdiction. The State law requiring notice could not apply to such a claim, since the right to proceed against the State was conferred by federal law which did not operate to ‘pick-up’ the relevant provisions of the State law.

114 *Fittock v The Queen* (2003) 197 ALR 1; *Ng v The Queen* (2003) 197 ALR 10. Each of these cases was an application to the High Court for special leave to appeal from a judgment or intermediate appeal court (the Northern Territory Court of Criminal Appeal in *Fittock v The Queen* (2001) 11 NTLR 52 and the Victorian Court of Appeal in *R v Ng* (2002) 5 VR 257). Each application was dismissed unanimously, the Court finding that s 80 had not been violated.

that the employer had no presence in Australia and that the employees did not reside in Australia;¹¹⁵ and

- whether State land tax could validly apply to land that had ceased to be a Commonwealth place.¹¹⁶

While 2003 was not an especially busy constitutional law year for the High Court, the fact is that, of necessity, the scope of the High Court's constitutional work is, in general, much more limited than that of the United States Supreme Court. As in most years, during 2003 the High Court devoted by far the bulk of its attention to non-constitutional questions, reflecting its role as the nation's ultimate court of appeal in matters of both federal and State law.¹¹⁷ As it happens, the High Court spent considerably more time on the law of torts than it did on constitutional law,¹¹⁸ while trade practices law,¹¹⁹ migration law and criminal law also formed a significant portion of its caseload.¹²⁰

The roll call of 2003 constitutional cases shows that in the absence of a Bill of Rights the High Court's constitutional pronouncements, no matter how important individual cases may be, can never have the pervasive influence on Australian life that decisions of the United States Supreme Court have. The High Court and the Australian people are less likely to engage in a dialogue on constitutional issues, simply because there is less to talk about. The High Court, not having the luxury of selecting its constitutional caseload from among thousands of candidates, is much less able to shape the course of constitutional development and thereby to set an agenda for public discourse. The sporadic involvement of the Court in matters of great public controversy, such as judicial review of migration decisions, is insufficient to spark substantive community interest in the work of the Court or in the significance of constitutional principles for Australian democracy.

115 *Re Maritime Union of Australia; Ex parte CSL Pacific Inc* (2003) 200 ALR 39. A unanimous Court upheld the impugned provision (s 5(3)(b)) as a valid law with respect to interstate trade pursuant to s 51(i) of the *Constitution*: at 49.

116 *Paliflex Pty Ltd v Chief Commissioner of State Revenue* (2003) 202 ALR 376. A unanimous Court held that the New South Wales Parliament had not purported to legislate with respect to a Commonwealth place and therefore had not infringed the exclusive power of the Commonwealth Parliament conferred by *Constitution*, s 52(i). Other cases decided in 2003 raised less substantial constitutional issues. See, eg, *Glennan v Federal Commissioner of Taxation* (2003) 198 ALR 250, where a three member Full Court rejected as untenable a contention that a taxpayer had a 'constitutional right' to challenge an assessment under s 75(v) of the *Constitution* independently of the review process under the *Taxation Administration Act 1953* (Cth) which he had already invoked.

117 At least since the abolition of appeals to the Privy Council.

118 Thirteen decisions involved tort law. Ten of these cases concerned various aspects of the law of negligence. The most prominent was *Cattanach v Melchior* (2003) 199 ALR 131, holding that a doctor who had failed to warn a patient that a sterilisation procedure might not be effective, could be held liable for the costs of raising and maintaining a child subsequently born to the patient. Two concerned the law of defamation and one dealt with contributions between joint tortfeasors.

119 Four cases raised questions of competition law and one concerned s 51AA of the *Trade Practices Act 1974* (Cth) (the unconscionability provision).

120 In 2003, the Full High Court decided five non-constitutional migration cases and eleven criminal cases.

Of course, the fact that the High Court is not predominantly a constitutional court does not detract from its role as the ultimate constitutional arbiter in Australia. Although lower courts, particularly the Federal Court, deal with a surprising number of constitutional cases,¹²¹ the High Court is the *only* court in Australia that has a substantial and continuous constitutional workload. The opportunity for lower courts to contribute to the development of constitutional doctrine is further limited by the conferral of original jurisdiction on the High Court in all matters arising under the *Constitution* or involving its interpretation.¹²² Since important constitutional cases are often commenced in the original jurisdiction of the Court, or removed from lower courts under the provisions of the *Judiciary Act 1903* (Cth),¹²³ constitutional issues frequently bypass the lower courts.

For example, of the nine constitutional cases decided by the High Court in 2003, four were commenced in the original jurisdiction of the Court,¹²⁴ and thus did not involve intermediate appellate courts (although a five member Full Federal Court in *NAAV v Minister for Immigration and Multicultural Affairs*¹²⁵ ('*NAAV*') had previously addressed the issues ultimately resolved by the High Court in *Plaintiff S157*). In one of the remaining five cases, the constitutional issue had been overlooked in the Full Court of the Supreme Court of Western Australia.¹²⁶ Consequently in only five of the nine constitutional cases (including *Plaintiff S157*), had intermediate appellate courts offered opinions on the constitutional questions.¹²⁷

121 A brief survey of the catchwords of cases decided by the Federal Court during the four year period from 1999 to 2003 inclusive indicates that the Court decided about 60 cases involving constitutional issues. (This figure includes cases determined at first instance and on appeal, but counting a case decided on appeal only once.) Some of these decisions involved important questions. See, eg, *Ruddock v Vardalis* (2001) 110 FCR 491 (special leave to appeal refused 27 November 2001), where the Full Court considered the executive power of the Commonwealth to prevent the entry of non-citizens to Australia; *NAAV v Minister for Immigration and Multicultural and Indigenous Affairs* (2002) 123 FCR 298, where a five member Full Court considered essentially the same issues as *Plaintiff S157*; *Femcare Ltd v Bright* (2000) 100 FCR 331, upholding impugned provisions of Part IVA of the *Federal Court of Australia Act 1976* (Cth) relating to representative proceedings. During the same four year period, by way of comparison, the Supreme Court of New South Wales decided thirteen reported cases involving constitutional questions, the Supreme Court of Victoria six and the Supreme Court of Queensland nine. (These figures should be taken as approximate, but include unreported cases decided in 2003.)

122 *Judiciary Act 1903* (Cth) s 30(a), enacted pursuant to s 76(i) of the *Constitution*.

123 Section 40(1) of the *Judiciary Act 1903* (Cth) allows the High Court to order the removal from a lower court of a cause arising under the Constitution or involving its interpretation. Such an order must be made as of course on the application of the Attorney-General of the Commonwealth, a State or a Territory.

124 *Plaintiff S157* (2003) 211 CLR 441; *Austin v Commonwealth* (2003) 195 ALR 321; *Re Maritime Union of Australia; Ex parte CSL Pacific Inc* (2003) 200 ALR 39; *Shaw v Minister for Immigration and Multicultural Affairs* (2003) 203 ALR 143.

125 (2002) 123 FCR 298. The Full Federal Court actually decided five appeals at the same time.

126 *British American Tobacco Australia Ltd v Western Australia* (2003) 200 ALR 403.

127 Two of these were the s 80 cases: *Fittock v The Queen* (2003) 197 ALR 1; *Ng v The Queen* (2003) 197 ALR 10. The other two were *Paliflex v Chief Commission of State Revenue* (2003) 202 ALR 376, where the High Court took a different approach to that of the New South Wales Court of Appeal, and *Marquet* (2003) 202 ALR 233, where the High Court affirmed the judgment of the Full Court of the Supreme Court of Western Australia.

Perhaps for these reasons, the High Court appears to pay less regard to the opinions of intermediate appellate courts on questions of constitutional law than on non-constitutional issues. The decision of the five member Full Federal Court in *NAAV*, which was referred to in argument before the High Court in *Plaintiff S157*,¹²⁸ analysed in considerable depth the construction and validity of s 474 of the *Migration Act*. The illuminating dissenting judgment of French J, in particular, although not reaching precisely the same conclusions as the majority in *Plaintiff S157*, takes a similar approach to that of the majority. The effect of *Plaintiff S157* was to overrule the majority decision in *NAAV*, which had been followed as a matter of course in many decisions in the Federal Court over a six month period. It might have been expected that the High Court in *Plaintiff S157* would refer to the judgments in *NAAV*, if only to explain why the case had been overruled and to identify the conclusions that should have been reached on the facts in that case. Yet the majority judgment in *Plaintiff S157* makes no reference whatsoever to the decision or reasoning in *NAAV*.¹²⁹

The relatively limited part played by Australian courts, other than the High Court, in the development and elucidation of constitutional doctrine contributes to the inaccessibility of the *Australian Constitution*. It encourages a perception, within the legal community and elsewhere, that constitutional law is peculiarly the province of the High Court and of specialist practitioners and theorists. To the extent that a genuine dialogue takes place on doctrinal or policy questions, it is usually between the High Court and academic commentators or among academic commentators themselves. While debate of this kind is undoubtedly important, it tends to reinforce the ‘specialist’ character of what should be a much more widely understood and discussed body of principles fundamental to Australia’s system of government.

V CONCLUSION

The High Court’s constitutional decisions in the 2003 calendar year provide further evidence of the inaccessibility of Australia’s *Constitution*. The document itself is both prosaic and, from the non-specialist’s perspective, obscure. Australia’s broader constitutional arrangements are difficult for the citizen to follow, with fundamental questions, such as the timing of Australia’s attainment of independence, being matters of unresolved controversy. These characteristics limit the extent to which the *Constitution* is capable of reflecting and influencing the aspirations of the Australian people. They also impede the prospects of significant constitutional reform, since uncertainty and obscurity breed fear of change.

128 The judgments in *NAAV* were handed down on 15 August 2002. *Plaintiff S157* was argued on 3 and 4 September 2002 and decided on 4 February 2003.

129 The concurring judgment of Gleeson CJ makes a brief reference to *NAAV: Plaintiff S157* (2003) 211 CLR 476, 493–4.

Perhaps these defects in Australia's constitutional arrangements are not wholly irremediable. The formidable difficulties in amending the *Australian Constitution* notwithstanding, the replacement of the monarchy with a republic (of whatever kind) seems inevitable. When this finally occurs, the principles governing the emergence of the Queen of Australia will presumably be relegated to historical curiosities. Similarly, the introduction of a republic is likely to be accompanied by textual changes to the *Constitution* which will specifically confirm Australia's independence and reaffirm the sovereignty of the Australian people. Such reforms, although they cannot retrospectively clarify historical uncertainty, will go some way towards ensuring that the formal *Constitution* matches political realities.

But much more is needed if there is to be a genuine dialogue between the High Court and the Australian people. From the High Court's perspective, this would require, at the very least, a different style of judgment writing, a conscious effort to encourage community understanding of the issues at stake in constitutional adjudication, more open analysis of policy questions and increased opportunities for other courts to contribute to the development of constitutional doctrine. For the institutional reasons I have given, even assuming a willingness by the High Court to alter course, a dialogue of the kind I envisage will be very difficult to achieve. Yet it is a necessary endeavour if the *Australian Constitution* is to become accessible to the Australian people.