

SMALL STEPS AND GIANT LEAPS: PATTERNS IN AUSTRALIAN CONSTITUTIONAL ADJUDICATION

JUSTICE STEPHEN GAGELER AC*

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I

The *Australian Constitution* ('*Constitution*') was drawn up and approved by the Australian people at the close of the nineteenth century. It entered into operation by force of Imperial statute on the first day of the twentieth century. The *Constitution* mandated the existence of a Federal Supreme Court to be known as the High Court of Australia, but left to the Commonwealth Parliament the task of creating the necessary machinery and to the Commonwealth Executive the task of making the necessary appointments. The Commonwealth Parliament created the machinery necessary for the working of the High Court by enacting the *Judiciary Act 1903* (Cth) ('*Judiciary Act*'). The Commonwealth Executive appointed the first Chief Justice and Justices of the High Court a short time later.

There was never any doubt amongst those responsible for framing the *Constitution* and amongst those responsible for framing the *Judiciary Act* that the High Court, once established, would assume the role of final arbiter of the meaning of the *Constitution*. The principle underlying the decision of the Supreme Court of the United States in *Marbury v Madison*,¹ establishing the role of that Court as the final arbiter of the meaning of the *United States Constitution*, was accepted in Australia as axiomatic.²

There was also never any doubt amongst those responsible for framing the *Constitution* and the *Judiciary Act* that, in performing the role of final arbiter of the meaning of the *Constitution*, the High Court would act as a living national institution, attuned to contemporary Australian circumstances. The understanding of the High Court as a living national institution attuned to contemporary national circumstances informed both sides of the conflict which occurred, in the closing stages of the framing of the *Constitution*, between Australian representatives and Imperial authorities concerning appeals to the Privy Council. The conflict resulted in the compromise that the Privy Council was to lack jurisdiction to hear appeals from the High Court in

* Justice of the High Court of Australia. This is a revised version of the Tony Blackshield Lecture delivered at Queen's Square, Sydney on Tuesday, 27 November 2018. My thanks to Glyn Ayres and Duncan Wallace for their assistance and comments. The final quotation I owe to Harry Hobbs and Andrew Trotter: Harry Hobbs and Andrew Trotter, 'Lessons from History in Dealing with Our Most Dangerous' (2018) 41 *University of New South Wales Law Journal* 319, 319.

¹ 5 US 137 (1803).

² Cf *Australian Communist Party v Commonwealth* (1951) 83 CLR 1, 262–3.

matters concerning the constitutional powers of the Commonwealth and the States as between each other without the prior certification of the High Court.³

The speech made by the Commonwealth Attorney-General, Alfred Deakin, in the House of Representatives in 1902, when moving that the Bill for the *Judiciary Act* be read for a second time, laid out an understanding of how the role of the High Court as the final arbiter of the meaning of the *Constitution* would likely play out through time. Deakin drew on the earlier experience of the Supreme Court of the United States in interpreting the *United States Constitution*, with which he and other key participants in the framing of the *Constitution* were broadly familiar.

Noting that the *United States Constitution* was notoriously difficult to amend, Deakin said that the Americans had found themselves with a Constitution which might have been a 'dead letter' and a 'burden' to them 'but for the fact that they had created a Supreme Court capable of interpreting it, a court which had the courage to take that instrument, drawn in the eighteenth century, and read it in the light of the nineteenth century, so as to relieve the intolerable pressure that was being put upon it by the changed circumstances of the time'.⁴ Deakin continued:

Precisely the same situation must arise in Australia, for although it be much easier to amend our *Constitution*, it is yet a comparatively costly and difficult task and one which will be attempted only in grave emergencies. In the meantime, the statute stands and will stand on the statute-book just as in the hour in which it was assented to. But the nation lives, grows, and expands. Its circumstances change, its needs alter, and its problems present themselves with new faces. The organ of the national life which preserving the union is yet able from time to time to transfuse into it the fresh blood of the living present, is the Judiciary — the High Court of Australia or the Supreme Court of the United States. It is as one of the organs of Government which enables the *Constitution* to grow and to be adapted to the changeful necessities and circumstances of generation after generation that the High Court operates. Amendments achieve direct and sweeping changes, but the court moves by gradual, often indirect, cautious, well considered steps, that enable the past to join the future, without undue collision and strife in the present.⁵

In choosing to describe in the present tense the conduct of a national institution which had not yet then begun to function, Deakin plainly thought it beyond question that the High Court would apply to constitutional interpretation the dominant methodology of common law courts which could be traced back at least to the period that saw the framing of the English constitutional settlement of the late seventeenth century. No differently from any other subject matter of adjudication, constitutional interpretation would proceed incrementally within an historical continuum in which problems thrown up by the present would be resolved in light of contemporary circumstances, with respect for the collective wisdom and experience of the past and with concern for the effect which the present resolution of those problems would have through the doctrine of precedent on the resolution of those and other problems in the future. There would be changes in constitutional interpretation from generation to

³ See Stephen Gageler, 'James Bryce and the *Australian Constitution*' (2015) 43 *Federal Law Review* 177, 194–9.

⁴ Commonwealth, *Parliamentary Debates*, House of Representatives, 18 March 1902, 5 (Alfred Deakin).

⁵ *Ibid.*

generation, but, in the later words of Sir Owen Dixon concerning judicial method more generally, those changes would be ‘gradual and evolutionary’.⁶

Evolutionary and incremental change, to the extent no more and no less than necessary to serve the needs of a changing society, is the ideal of the common law system. When changes are viewed doctrine by doctrine over a comparatively short period, the reality can be seen sometimes to have approximated the ideal. When changes are viewed in aggregate over the entire history of the common law system, a more complicated pattern emerges. The societies which the common law system has served have not changed merely incrementally over that period. Nor has the common law system itself been characterised by merely evolutionary and incremental change.

In his important treatise on the formation of the Western legal tradition, the first volume of which was published in 1983,⁷ and the second volume of which was published in 2003,⁸ Professor Harold Berman contrasted what he described as ‘incremental’ or ‘smooth’ historiography characteristic of the late nineteenth century – the age of Darwin, the age of Empire, and the age in which the *Constitution* was called into existence as the political destiny of the Australian people – with the ‘[c]atastrophic history, dominated by social conflict’, which became ‘characteristic of the historical writings of the early and middle parts of the twentieth century’, dominated as that time was from the perspective of the West by two World Wars.⁹ Viewed from the standpoint of the late twentieth century and looking back over a millennium, the dominant theme of Western history, including Western legal history, which Berman identified, was not merely evolution and not merely revolution but the blending of the two.

Berman wrote of the Western legal tradition, of which the common law tradition has formed a distinctive although not unique part, as having been transformed by a series of revolutions – epoch-making periods in each of which a pre-existing system of social relations, beliefs and values was overthrown and replaced with a new one. The first was the period of the Papal Revolution of 1075–1122, which brought about the separation of church and state, the rediscovery of the *Institutes of Justinian* and the beginning of the scholastic tradition. The last of present relevance was the period beginning with the American Revolution of 1776 and ending with the French Revolution of 1789. In between, and critical to the emergence of the common law system in its distinct modern form, was what Berman described as the ‘English Revolution’ which began with the so-called ‘Great Rebellion’ of 1640 and came to an end with the so-called ‘Glorious Revolution’ of 1688. From the English Revolution emerged the constitutional settlement which Baron de Montesquieu came to describe in the 1740s in terms of the separation of legislative, executive and judicial power.¹⁰ What also emerged was that mixture of positivism, reason and historicism epitomised by Sir Matthew Hale, who had occupied the position of Chief Justice of the Court of

⁶ Sir Owen Dixon, *Jesting Pilate and Other Papers and Addresses*, ed Judge Woinarski (William S Hein & Co, 2nd ed, 1997) 158.

⁷ Harold J Berman, *Law and Revolution: The Formation of the Western Legal Tradition* (Harvard University Press, 1983) (*Formation of the Western Legal Tradition*).

⁸ Harold J Berman, *Law and Revolution, II: The Impact of the Protestant Reformations on the Western Legal Tradition* (Belknap Press, 2003).

⁹ Berman, *Formation of the Western Legal Tradition* (n 7) vi.

¹⁰ Montesquieu, *The Spirit of the Laws*, tr Anne M Cohler, Basia Carolyn Miller and Harold Samuel Stone (Cambridge University Press, 1989).

the King's Bench at the height of the English Revolution, and this mixture came to characterise the idealised form of common law judicial methodology so ably described by Deakin in his second reading speech for the *Judiciary Act* in 1902.

Berman explained that each revolution was different but that all shared a small number of common features. Each marked a fundamental change from that which had existed before. Each sought legitimacy in a remote past and an apocalyptic vision. Each eventually produced a new body of law. Each was transformative of the legal tradition from which the common law tradition emerged while remaining within that tradition.

The patterns of a century are hardly the patterns of a millennium. The changes that have occurred within Australian society during the twentieth century do not begin to match the upheavals which Berman described as revolutions. Parallels should not too readily be drawn lest they be taken too far.

Looking back from the early twenty-first century to the changes that occurred in Australian constitutional interpretation during the first hundred years of the High Court's existence, however, it is difficult to portray the course of constitutional adjudication as conforming in all respects to Deakin's articulated common law ideal of evolutionary and incremental change. Any fair-minded and informed reader of the Court's work product is forced to acknowledge that there have been marked changes in constitutional interpretation brought about through a relatively small number of landmark decisions. The two most important of those decisions were each described as revolutionary not long after they were made,¹¹ and each can be seen to share in a minor way some of the features which Berman associated with transformative revolutions.

The common features that can be seen are: first, a fundamental departure from prior constitutional doctrine; second, a return to an original understanding of the *Constitution* different from that which previously prevailed, bringing with it a different understanding of the function of the *Constitution* and of the role of the Court within the Australian polity; third, the laying of the foundation for the development in time of a new body of constitutional principle; fourth, the assimilation of the changed perspective within the same overall constitutional tradition characterised by the same common law judicial methodology, the ideal form of which was described by Deakin.

How you can tell that a decision of the High Court is a landmark decision in Australian constitutional law is that Professor Tony Blackshield has written a song about it. In the balance of this lecture in Professor Blackshield's honour, I want to illustrate the observations I have just made by reference to the two decisions to which I refer. The first is *Amalgamated Society of Engineers v Adelaide Steamship Co Ltd* ('Engineers'

¹¹ R T E Latham, 'The Law and the Commonwealth' in W K Hancock, *Survey of British Commonwealth Affairs: Problems of Nationality 1918-1936* (Oxford University Press, 1937) vol 1, 510, 563; Michael Coper, 'Section 92 of the *Australian Constitution* since *Cole v Whitfield*' in H P Lee and George Winterton (eds), *Australian Constitutional Perspectives* (Law Book Co, 1992) 129, 131.

Case').¹² The second is *Cole v Whitfield*.¹³ To add a note of Blackshieldian humour, I will borrow some libretti from the Tony Blackshield Songbook. The musical score you will need to imagine.

II THE ENGINEERS' CASE

The *Engineers' Case* is unquestionably the single most important case in Australian constitutional history. Much will be written of it as we approach its hundredth anniversary in 2020. For present purposes, I want to use it to illustrate the four common features to which I have referred.

First, we see in the *Engineers' Case* a fundamental departure from prior constitutional doctrine. The initial 17 years of the High Court's existence, from 1903 until 1920, had been dominated by what Professor Leslie Zines would refer to as a struggle for constitutional standards.¹⁴ The struggle manifested in a strongly held difference of opinion within the Court as to the appropriateness of importing into Australian constitutional analysis two constitutional doctrines which then held sway in the United States. The first doctrine was that of 'immunity of instrumentalities', by which the Commonwealth and the States were each treated as lacking in power to make laws binding on the agencies or instrumentalities of the other. The second doctrine was that of 'reserve powers', by which subject matters of legislative power not expressly conferred on the Commonwealth were treated as reserved to the States. Both of those doctrines were supported by a body of American case law which developed after the Civil War of the 1860s and which would be swept away in their country of origin in the 1930s following changes in the composition and jurisprudence of the Supreme Court wrought by the New Deal. Viewed from Australia in the decades following federation, the body of case law appeared formidable and relatively coherent. Grouped together under the banner of 'implied prohibitions', importation of the two doctrines was justified by their Australian proponents as founded on a principle of 'necessity' inherent in the nature of federalism.

The champions in the struggle during those initial years had been Sir Samuel Griffith, who had been appointed the first Chief Justice of the High Court in 1903, and Sir Isaac Isaacs, who had joined the Court with Henry Bournes Higgins when its numbers were increased in 1905. Griffith, who favoured the application of the American-inspired doctrines, had commanded the majority, although the majority had become increasingly fragile as difficulties in the application of the doctrines had become apparent. Isaacs, who with Higgins had rejected the doctrines from the beginning, had been continuously in dissent.

The problems with the imported doctrines having become increasingly apparent, the national mood having distinctly changed during and immediately after the First World War, and the composition of the Court also having changed (most significantly with the retirement of Griffith in 1919), the scene was set in 1920 for what had previously

¹² *Amalgamated Society of Engineers v Adelaide Steamship Co Ltd* (1920) 28 CLR 129 ('*Engineers' Case*').

¹³ (1988) 165 CLR 360 ('*Cole v Whitfield*').

¹⁴ James Stellios, *Zines's The High Court and the Constitution* (Federation Press, 6th ed, 2015) ch 1.

been the minority view to become that of the majority. In written reasons for judgment published in the rarely used form of ‘The judgment of Justices A, B, C and D (delivered by Justice B)’, Isaacs, writing for the plurality in the *Engineers’ Case*, engaged in a wholesale repudiation of what had gone before. Of the prior case law in which the two doctrines in question had been adopted and applied, Isaacs said this:

The more the decisions are examined, and compared with each other and with the *Constitution* itself, the more evident it becomes that no clear principle can account for them. They are sometimes at variance with the natural meaning of the text of the *Constitution*; some are irreconcilable with others, and some are individually rested on reasons not founded on the words of the *Constitution* or on any recognized principle of the common law underlying the expressed terms of the *Constitution*, but on implication drawn from what is called the principle of ‘necessity’, that being itself referable to no more definite standard than the personal opinion of the Judge who declares it. The attempt to deduce any consistent rule from them has not only failed, but has disclosed an increasing entanglement and uncertainty, and a conflict both with the text of the *Constitution* and with distinct and clear declarations of law by the Privy Council.¹⁵

In the balance of the judgment of the plurality, the old doctrines were repudiated, by reference in part to early decisions of the Privy Council interpreting the scope of powers conferred by Imperial statutes on colonial legislatures, including one purportedly decided by reference to the *Constitution* in 1906¹⁶ which Griffiths, a year later, had openly disparaged to the point of declaring the Privy Council to have exceeded its jurisdiction.¹⁷ In the place of the old doctrines, Isaacs laid down the principle that the words of the *Constitution* were to be accorded their broad and ordinary meaning, and that it would henceforth rest ‘upon those who rely on some limitation or restriction ... to indicate it in the *Constitution*’.¹⁸ The supremacy of Commonwealth law over State law, Isaacs pointed out, was expressly established by s 109 of the *Constitution* itself.¹⁹

*This new interpretation
Should fill us all with hope:
The powers of the nation
Are limitless in scope.
Good legalistic arguments
Should keep the States in line –
And if that’s not enough
We can always get tough
With section 109!*

The cases which had applied the old doctrines were then re-examined. Some were declared to be wrongly decided and were overruled. Others were declared to have been correctly decided, albeit for the wrong reasons, and were explained on other grounds.²⁰

¹⁵ *Engineers’ Case* (n 12) 141–2.

¹⁶ *Webb v Outtrim* (1906) 4 CLR 356.

¹⁷ *Commissioners of Taxation (NSW) v Baxter* (1907) 4 CLR 1087, 1117–18.

¹⁸ *Engineers’ Case* (n 12) 154.

¹⁹ *Ibid* 154–5.

²⁰ *Ibid* 156–60.

Second, we see in the *Engineers' Case* a return to an original understanding of the *Constitution* different from that which previously prevailed, bringing with it a different understanding of the function of the *Constitution* and of the role of the Court. I use the expression 'an original understanding of the *Constitution*' in deliberate contradistinction to 'the original understanding of the *Constitution*'. Griffith and Isaacs had both been intimately involved in the framing of the *Constitution*, Griffith most prominently in the framing of the original draft which emerged from the Convention of 1891 and Isaacs in its revision into the final draft which emerged from the Convention of 1897 and 1898. Just as Sir Kenneth Bailey made the point in 1933 that it would be futile to describe either view as 'wrong',²¹ it would be futile to describe the view of one but not the other as reflecting the original understanding of the *Constitution*. The *Constitution* was the product of many minds and several distinct influences. Neither Griffith nor Isaacs held *the* original understanding of the *Constitution*. Each held *an* original understanding of the *Constitution*. Each held a different original understanding of the *Constitution* and the different understanding of each was well capable of being defended by reference to orthodox legal methodology.

To attribute the difference between Griffith and Isaacs to a difference in the relative weight each attached to rival precedents of the Supreme Court of the United States and of the Privy Council, or even to the relative weight each attached to the Westminster and United States models of government, both of which had been drawn on in the framing of the *Constitution*, would not be inaccurate. But it would be incomplete. There was a deeper division between them. At the risk of oversimplification, that division can be explained as follows.

Griffith's understanding of the federal compact embodied in the *Constitution* was essentially that of a compact between polities — the federating colonies which had become the States and the newly created Commonwealth — in which the role of the High Court was akin to that of a contractual arbitrator maintaining the polities as potential antagonists within their designated spheres. It was an understanding which closely aligned with the first of the principles of federation proposed by Sir Henry Parkes and adopted by the Convention of 1891 to the effect that 'in order to establish and secure an enduring foundation for the structure of a federal government ... the powers and privileges and territorial rights of the several existing colonies shall remain intact, except in respect to such surrenders as may be agreed upon as necessary and incidental to the power and authority of the National Federal Government'.²²

Isaacs' rival and ultimately triumphant understanding of the federal compact embodied in the *Constitution* was essentially that of a compact between people — the people or electors of the colonies who voted for those colonies to become States and who also became, on federation, the people or electors of the newly created Commonwealth. The Commonwealth and the States were representatives of the same unified people owing allegiance to the same unified Crown. The High Court had no role in policing the exercise of power by the people's representatives beyond that which the people themselves, in the nationwide referenda which adopted the *Constitution*,

²¹ K H Bailey, 'The Working of the Constitution since Federation' in G V Portus (ed), *Studies in the Australian Constitution* (Angus & Robertson, 1933) 23, 44.

²² *Official Report of the National Australasian Convention Debates*, Sydney, 4 March 1891, 23 (Sir Henry Parkes).

had quite clearly committed to the Court by the terms of the *Constitution*. For the Court to attempt to do so was both unnecessary, because the people acting electorally could be expected to look after themselves, and improper, because it involved an overreaching by the judicial arm of government into the political arena where it had neither the skill-set nor the mandate to interfere. Following on from the popular movement towards federalism of the mid-1890s,²³ this was an understanding which more closely aligned with the revised principles of federation proposed to and adopted by the Convention of 1897 to the effect that ‘in order to enlarge the powers of self-government of the people of Australia ... the powers, privileges, and territories of the several existing colonies shall remain intact, except in respect of such surrenders as may be agreed upon to secure uniformity of law and administration in matters of common concern’.²⁴

So it was said in the *Engineers’ Case*:

When the people of Australia, to use the words of the *Constitution* itself, ‘united in a Federal Commonwealth’, they took power to control by ordinary constitutional means any attempt on the part of the national Parliament to misuse its powers. If it be conceivable that the representatives of the people of Australia as a whole would ever proceed to use their national powers to injure the people of Australia considered sectionally, it is certainly within the power of the people themselves to resent and reverse what may be done. No protection of this Court in such a case is necessary or proper.²⁵

Third, we see in the *Engineers’ Case* the laying of the foundation for the development in time of a new body of constitutional principle. And fourth, we see the assimilation of new doctrine within the same overall constitutional tradition stretching back to the time of Deakin. To introduce an element of hyperbole, although the result of the *Engineers’ Case* was arrived at through application of essentially the same orthodox legal methodology which had supported the earlier doctrines it repudiated, the *Engineers’ Case* was Australia’s constitutional ground zero. It recalibrated the baseline for all that has followed.

The steady expansion in the practical reach of Commonwealth legislative power which has occurred since 1920, made possible by an expansive interpretation of the express provisions of the *Constitution* which confer Commonwealth legislative power, exemplified by the holdings in the *Payroll Tax Case* in 1971,²⁶ *Tasmanian Dam Case* in 1983²⁷ and the *Work Choices Case* in 2006,²⁸ has been built directly on the foundation of the *Engineers’ Case*. And although post-*Engineers’* implications have replaced pre-*Engineers’* implications in limiting Commonwealth and State legislative and executive power, the legacy of the *Engineers’ Case* has been to require those more modern implications to be linked closely to the constitutional text and structure.²⁹

²³ See Stephen Gageler, ‘Sir Robert Garran: Medio Tutissimus Ibis’ (2018) 46 *Federal Law Review* 1, 5–8.

²⁴ *Official Report of the National Australasian Convention Debates*, Adelaide, 23 March 1897, 17 (Edmund Barton).

²⁵ *Engineers’ Case* (n 12) 151–2.

²⁶ *Victoria v Commonwealth* (1971) 122 CLR 353.

²⁷ *Commonwealth v Tasmania* (1983) 158 CLR 1.

²⁸ *New South Wales v Commonwealth* (2006) 229 CLR 1.

²⁹ See, for example, *McGinty v Western Australia* (1996) 186 CLR 140, 168, citing *Engineers’ Case* (n 12) 145, 155.

III COLE V WHITFIELD

Cole v Whitfield, when it was decided in 1988, was unquestionably the most important case in Australian constitutional history second only after the *Engineers' Case*. The great accomplishment of *Cole v Whitfield* was to overcome what had until then seemed an intractable problem. Ironically, that accomplishment is now under-recognised precisely because of the lasting success that it achieved.

The unqualified prescription of s 92 of the *Constitution* that 'trade, commerce, and intercourse among the States ... shall be absolutely free' was for the first 85 years of the High Court's existence the bane of its Justices and the scourge of every constitutional adviser to Commonwealth and State governments.

Before 1988, at least one third of all constitutional cases decided by the High Court were cases decided on s 92.³⁰ Despite several valiant attempts to do so, most notably in *McArthur's Case* in 1920³¹ and the *Bank Nationalisation Case* in 1948³², neither the High Court nor the Privy Council had been successful in articulating a coherent explanation of the section's meaning, let alone a workable criterion for its legal operation.

On his retirement as Chief Justice in 1952, Sir John Latham said that, when he died, the words of s 92 would be found written on his heart. Writing in retirement in 1957, he described the section as 'the curse of the *Constitution*' and as a 'boon to lawyers and to road-hauliers and to people who want to sell skins of protected animals or to trade in possibly diseased potatoes'.³³ Writing in 1977, Professor Geoffrey Sawer described the whole subject of s 92 as one of 'gothic horrors and theological complexities'.³⁴

In *Cole v Whitfield* in 1988, a unanimous High Court, under the leadership of Sir Anthony Mason as Chief Justice, discarded the existing case law, reinterpreted the section and formulated a new standard to guide its application. The parallels to the *Engineers' Case* are significant.

The first is the deliberate and extensive departure from prior constitutional doctrine. Members of the High Court, differently constituted, would later say that 'it would be an error to read what was decided in *Cole v Whitfield* as a complete break with all that had been said in [the] Court respecting the place of s 92 in the scheme of the *Constitution*'.³⁵ That is so to the extent that, like the reasoning in the *Engineers' Case*, some of the reasoning in *Cole v Whitfield* was foreshadowed in some of the earlier case law. The greater error would be to treat what was decided in *Cole v Whitfield* as mere continuation of what had gone before.

³⁰ See Stephen Gageler, 'The Section 92 Revolution' in James Stellios (ed), *Encounters with Constitutional Interpretation and Legal Education: Essays in Honour of Michael Coper* (Federation Press, 2018) 26, 27.

³¹ *W & A McArthur Ltd v Queensland* (1920) 28 CLR 530.

³² *Bank of New South Wales v Commonwealth* (1948) 76 CLR 1.

³³ J G Latham, 'Book Reviews' (1957) 1(2) *Melbourne University Law Review* 266, 271–2.

³⁴ Geoffrey Sawer, 'Book Reviews' (1977) 8(3) *Federal Law Review* 376, 377.

³⁵ *Betfair Pty Ltd v Western Australia* (2008) 234 CLR 418, 451 [11].

Of the earlier case law, the joint judgment of the High Court in *Cole v Whitfield* said this:

No provision of the *Constitution* has been the source of greater judicial concern or the subject of greater judicial effort than s 92. That notwithstanding, judicial exegesis of the section has yielded neither clarity of meaning nor certainty of operation. Over the years the Court has moved uneasily between one interpretation and another in its endeavours to solve the problems thrown up by the necessity to apply the very general language of the section to a wide variety of legislative and factual situations. Indeed, these shifts have been such as to make it difficult to speak of the section as having achieved a settled or accepted interpretation at any time since federation.³⁶

‘Departing now from the doctrine which has failed to retain general acceptance’, announced the High Court, ‘we adopt the interpretation which ... is favoured by history and context’.³⁷ Starting again with the constitutional text and reading it against the background of nineteenth-century colonial history, the High Court reinterpreted the critical reference in s 92 to free trade as referring to an absence of protectionism. The section, the Court held, would be infringed only by a law which imposed a discriminatory burden on interstate trade which was protectionist in nature.

*Discrimination is now the sole test –
Local protection, implied or expressed.
Outside those limits, the State knows what’s best.*
...
*Once the new doctrine was fully unveiled,
Dozens of precedents suddenly failed.*

Next, we see in *Cole v Whitfield*, as we saw in the *Engineers’ Case*, the High Court self-consciously returning to an original understanding of the *Constitution*. Of the competing late nineteenth-century conceptions of freedom of trade available to be drawn on, the conception of equality of trade was given precedence over that of unrestrained trade.

Unlike the *Engineers’ Case*, which was decided at a time when some of the principal participants in important events of the 1890s were still alive, however, the return to an original understanding in *Cole v Whitfield* involved an extensive analysis of historical material. Resort to pre-federation history, including the debates of the Conventions of 1891 and of 1897 and 1898, it was said, was permissible ‘not for the purpose of substituting for the meaning of the words used the scope and effect – if such could be established – which the founding fathers subjectively intended the section to have, but for the purpose of identifying the contemporary meaning of language used, the subject to which that language was directed and the nature and objectives of the movement towards federation from which the compact of the *Constitution* finally emerged’.³⁸

³⁶ *Cole v Whitfield* (n 13) 383–4.

³⁷ *Ibid* 407.

³⁸ *Ibid* 385.

And we see in *Cole v Whitfield*, as we saw in the *Engineers' Case*, a revised understanding of the *Constitution* bringing with it a revised understanding of the role of the High Court itself. The application of s 92 as reinterpreted was unavoidably evaluative, and the evaluative nature of requisite constitutional adjudication was to be openly acknowledged and embraced. Pondering the future application of the interpretation which it was then announcing, the High Court adopted a tone of cautious realism. It said this:

The adoption of an interpretation prohibiting the discriminatory burdening of interstate trade will not of course resolve all problems. It does, however, permit the identification of the relevant questions and a belated acknowledgment of the implications of the long-accepted perception that 'although the decision [whether an impugned law infringes s 92] was one for a court of law the problems were likely to be largely political, social or economic' ...³⁹

We see in *Cole v Whitfield*, as we saw in the *Engineers' Case*, the laying of the foundation for the development of a new body of constitutional principle. *Cole v Whitfield* set out the parameters of a more coherent approach to the application of s 92 of the *Constitution*, which has come to be worked out in more detail in subsequent cases on that section.⁴⁰ *Cole v Whitfield* also set the groundwork for a complementary approach which came soon afterwards to be taken in relation to the interpretation and application of the related and similarly opaque prescription in s 90 of the *Constitution* which makes 'the power ... to impose duties of customs and of excise' exclusive to the Commonwealth Parliament.⁴¹

Finally, we see in the wake of *Cole v Whitfield*, as we saw in the wake of the *Engineers' Case*, the assimilation of new doctrine within a continuing and enriched constitutional tradition. Two aspects of approach taken in *Cole v Whitfield* to the interpretation and application of s 92 of the *Constitution* have had a profound influence on the development of constitutional law in general since 1988. One is resort to pre-federation historical sources, including but not limited to the transcripts of the debates which occurred during the Conventions of 1891 and of 1897 and 1898, to identify the purpose of constitutional provisions and to elucidate their text. The other is insistence on a consideration of the substantive or practical operation of an impugned law in order to determine its compliance with a constitutional limitation or restriction on power. In that latter respect, *Cole v Whitfield* presaged the structured form of analysis which would come soon afterwards to be embraced in relation to the doctrine of the implied freedom of political communication, as recognised in *Australian Capital Television Pty Ltd v Commonwealth*⁴² and as consolidated in *Lange v Australian Broadcasting Corporation*,⁴³ in which the validity of an impugned law was to be determined by enquiring as to whether the burden which it placed on conduct within an area of constitutionally protected freedom was able to be justified by reference to

³⁹ Ibid 408, quoting *Freightlines & Construction Holding Ltd v New South Wales* (1967) 116 CLR 1, 5.

⁴⁰ See *Castlemaine Tooheys Ltd v South Australia* (1990) 169 CLR 436; *Barley Marketing Board (NSW) v Norman* (1990) 171 CLR 182; *Betfair Pty Ltd v Western Australia* (2008) 234 CLR 418; *Betfair Pty Ltd v Racing NSW* (2012) 249 CLR 217.

⁴¹ See *Ha v New South Wales* (1997) 189 CLR 465.

⁴² (1992) 177 CLR 106.

⁴³ (1997) 189 CLR 520.

the law's pursuit of constitutionally permissible ends by constitutionally appropriate and adapted means.

IV CONCLUSION

To avoid misunderstanding, my point has not been to suggest that all, or even many, landmark cases in Australian constitutional law during the twentieth century exhibited the qualities that I have attributed to the two on which I have focused. The important cases on Ch III of the *Constitution*, for example, within which can be included the *Wheat Case* in 1915,⁴⁴ *Boilermakers' Case* in 1956⁴⁵ and *Kable* in 1996,⁴⁶ were controversial at the time of decision, but they involved no large scale departure from prior case law and took considerably longer to be assimilated. Overcoming extreme temptation, I refrain from incorporating words from the Tony Blackshield 'Separation of Powers' song set to the tune of 'Three Coins in the Fountain'.

My point has been to acknowledge that, while small steps are the ideal, the history of constitutional interpretation cannot honestly be told without reference to the giant leaps. The two cases on which I have focused to demonstrate that proposition, although separated by more than half a century, have much in common. In the words of Mark Twain, which could easily have been the words of Tony Blackshield, 'history never repeats itself; but it rhymes'.⁴⁷

⁴⁴ *New South Wales v Commonwealth* (1915) 20 CLR 54.

⁴⁵ *R v Kirby; Ex parte Boilermakers' Society of Australia* (1956) 94 CLR 254; *Attorney-General of the Commonwealth of Australia v The Queen* (1957) 95 CLR 529; [1957] AC 288.

⁴⁶ *Kable v Director of Public Prosecutions (NSW)* (1996) 189 CLR 51.

⁴⁷ Mark Twain quoted in 'A Said Poem' in John Robert Colombo, *Neo Poems* (Sono Nis Press, 1970) 46, quoted in Harry Hobbs and Andrew Trotter, 'Lessons from History in Dealing with our Most Dangerous' (2018) 41(2) *University of New South Wales Law Journal* 319, 319.

