THE LEGALITY OF WESTERN AUSTRALIA'S UNILATERAL SECESSION

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ABSTRACT

This thesis investigates the possibility of Western Australia's secession from the Commonwealth of Australia. Although there are many types of secession (including negotiated secession), the focus of this study is on the state's unilateral withdrawal from the federal union in a manner which does not seek permission from other states or from the federal government.

Although the Australian framers of the *Commonwealth of Australia Constitution Act 1900* (UK) did seek to discourage secession, there is no evidence that they sought to prohibit it. The political facts that have flowed from the abdication by the United Kingdom of its authority over Australia, as reflected in the *Australia Act 1986* (UK) and (Cth), now lend support to the High Court's doctrine of popular sovereignty which says that the electors are sovereign over Australia. However, this thesis argues that it is the people of an individual state who are sovereign, not the people of Australia as a whole. The basic norm of popular sovereignty organised by state, along with a state's constitutional text, structure and history, provides support for a shared sovereignty interpretation that now permits unilateral secession by Western Australia. A right to secede falls within the 'peace, order and good government' power in section 2 of the WA Constitution.

In addition to a state having an inherent right of secession flowing from its internal constitutional arrangements, there are reasonable arguments available that enable the consistency of secession with the Commonwealth Constitution. Through an examination of the Preamble, Covering Clauses, Commonwealth parliamentary powers in ss 51 and 52 of the Constitution, the judicial power in s 71 and the financial, trading and equal treatment provisions at ss 92, 105A and 117, this thesis provides an interpretation that allows for the lawfulness of secession. The Preamble is ambiguous and the Covering Clauses envision a consensual relationship. There is no express, prerogative or nationhood power to coerce a state that could give rise to an inconsistency with Commonwealth power. Furthermore, this thesis also argues that the judicial power of the Commonwealth may be consistent with secession. Finally, border closures by WA in response to the COVID-19 crisis is one element that suggests the financial and trading provisions are unlikely to pose an obstacle to the high degree of autonomy required for secession.

STATEMENT OF ORIGINALITY

This work has not previously been submitted for a degree or diploma in any university. To the best of my knowledge and belief, the thesis contains no material previously published or written by another person except where due reference is made in the thesis itself.

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CONCLUSION 257

INTRODUCTION

> Mr. King O'Malley - *Does the Prime Minister intend to take action to cope with the secession of New South Wales threatened by its Premier?*
>
> Mr. Deakin - *When the possibility of secession arises, it will receive consideration.*[1]

My purpose in this thesis is to discover the following. Would it be constitutional for the Western Australian state government to unilaterally depart from the Commonwealth of Australia and form an independent nation if it holds a referendum and most WA residents vote in favour of secession? Unilateral separation raises unique concerns because it entails a group of people exiting a political union on the basis of their own alleged sovereignty and without seeking permission from external authorities such as a central government or other provinces.

WHAT IS SECESSION?

Defining secession is deceptively easy. The *International Encyclopedia of the Social Sciences* defines the term as 'the act of withdrawing territory from a state and converting it into an independent state or joining it to another state'.[2] Philip Roeder similarly says that secession 'seeks to create a new sovereign state for a nation residing on its homeland that is currently located inside another sovereign state'.[3] Yet there are presuppositions embedded within these descriptions that are not necessarily accurate in a federal system. In the context of a secession led by an existing local government, such as that of WA, why is it correct to assume that the seceding state is taking territory 'from' another state or that the territory is located 'inside' another state? Some constitutions can be interpreted as delineating certain territories to a central government and the remainder to the states. In these non-unitary polities, describing secession is not as simple as these accounts suggest and a theory with broader applicability is required.

[1] Commonwealth, *Parliamentary Debates,* House of Representatives, 13 December 1905, 6818 (King O'Malley and Alfred Deakin).
[2] 'Secession', *International Encyclopedia of the Social Sciences* (18 May 2018) <https://www.encyclopedia.com>
[3] Philip Roeder, 'National Secession', *Oxford Research Encyclopedia* (24 May 2017) <https://doi.org/10.1093/acrefore/9780190228637.013.530>

There are a range of other complications associated with defining secession, some of which are noted by Radan.[4] He points out that some presume secession is associated with the use of force, while others emphasise the host state's attitude toward attempted secession. Other kinds of secession involve private individuals. If the Roman historian Livy is to be believed, there was a *secessio plebis* – withdrawal of the commoners – expressed in the form of a general strike that occurred in 494 BC over the issue of freedom and security of property.[5] One account by Cary and Scullard claims that there were five such incidents between 494 BC and 287 BC.[6] The second occurred in 449 BC, the third in 445 BC, the fourth in 342 BC and the last in 287 BC. Although these were not territorial secessions in which the local government of a region claims a stake in the land, these individual secessions were based on similar principles like the right to resist tyranny to extract concessions. Likewise, modern-day secessionists at the individual level include numerous Australians who have anointed themselves as kings or queens of 'micro-nations'.[7] Indigenous persons throughout Australia have also sought secession from the jurisdiction in which they reside, often as part of a First Nations quest for sovereignty.[8]

Not all these variations are relevant to this study. First, the kind of secession considered here is that of the original states – specifically WA – named in the *Commonwealth of Australia Constitution Act 1900* (UK) ('Constitution'). Second, I examine peaceful withdrawal in accordance with existing principles of law and not independence that relies upon force or the threat of force.[9] This is because the use of force is usually a revolutionary act that obviates the need for legal analysis whereas this thesis emphasises inquiry into avenues that are *de jure* as opposed to *de facto*.[10] Third, the secession that I investigate is a continuum rather than an all-or-nothing concept. This means that there can be varying degrees of departure.

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[4] Peter Radan, 'Secession: a word in search of a meaning' in Aleksandar Pavković and Peter Radan (eds), *On the Way to Statehood: Secession and Globalization* (Routledge, 2008) 17-32.

[5] Titus Livy, *The History of Rome: Book II* (EP Dutton & Co, 1926) vol 1.

[6] Max Cary and Howard Scullard, *A History of Rome: Down to the Age of Constantine* (Red Globe, 1980) 66.

[7] Harry Hobbs and George Williams, "The demise of the 'second largest country in Australia': micronations and Australian exceptionalism" (2021) 56 *Australian Journal of Political Science* 206, 207; Harry Hobbs, "Why is Australia 'micronation central'? And do you still have to pay tax if you secede?", *The Conversation* (7 July 2021) < https://theconversation.com/why-is-australia-micronation-central-and-do-you-still-have-to-pay-tax-if-you-secede-162518>

[8] See the examples in Keith Windschuttle, *The Breakup of Australia: The Real Agenda behind Aboriginal Recognition* (Quadrant Books, 2016); Dianne Otto, 'A Question of Law or Politics? Indigenous claims to sovereignty in Australia' (1995) 21 *Syracuse Journal of International Law and Commerce* 65, 70-71; Livia Albeck-Ripka, 'The indigenous man who declared his own country', *New York Times* (13 September 2019).

[9] Of course, I do not deny that revolutionary secession can succeed in creating a new state. This was confirmed in *Reference Re Secession of Quebec* [1998] 2 SCR 217.

[10] Peaceful secession can be distinguished from a civil war. A civil war is typically akin to a *coup d'etat*. Secession, as this thesis views it, is by contrast the desire to be left alone. See, eg, Thomas DiLorenzo, 'The Great Centralizer: Abraham Lincoln and the War between the States' (1998) 3 *The Independent Review* 243-269.

Why have I chosen to explore state secession rather than individual secession? It is not because I think individual secession is theoretically barren. Rather, it is because the practical reality of Australia's federal arrangements is that only state secession is relevant to prevailing norms. Individual secession has little chance of success within the legal system at the present time. The reasons for this are detailed further at Chapter 1 where I show that our legal positivism simply does not countenance individuals using secession to avoid their obligations to government.

Why has WA been chosen as the focal point of this thesis? First, the state tried to secede once before. On April 8, 1933, 66.23 percent of Western Australia's voters cast their ballot in a referendum favouring 'withdrawing from the Federal Commonwealth established under the *Commonwealth of Australia Constitution Act (Imperial)*'.[11] Rather than unilaterally seceding, Philip Collier, the WA Premier at the time, chose the unsuccessful path of submitting a petition to the parliament of the United Kingdom in 1935. Second, secessionist impulse is a feature of life and is reflected in an opinion poll taken in 1995 which found that 23 percent of WA residents support secession.[12] Local newspapers and politicians routinely support the idea.[13] A recent poll during 2020 found 28 percent of Western Australians want to see the state become an independent country.[14] Another poll carried out in 2021 found that 54 percent of Western Australians perceive themselves as being Western Australians first, rather than identifying as Australian.[15] A political party with the objective of securing secession by 2029, the WAxit Party, has been formed.[16] Third, since March 2020, Western Australia kept its borders substantially closed for a period of two years on the basis of the COVID-19 pandemic and threatened to do so irrespective of whether other states revert to normality as vaccination rates improve.[17] If economic discontent increases – as it may due to increasing federal government debt and higher taxes imposed upon WA residents to repay this debt – then divorce cannot be ruled out.

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[11] Thomas Musgrave, 'The Western Australian secessionist movement' (2003) 3 *Macquarie Law Journal* 95, 98.
[12] Ben Jensen, 'Secession in Australia' (1999) 2 *Australian Social Monitor* 24.
[13] "WA Liberal Party vote for 'fiscal secession' draws gasps", *WA Today* (4 September 2017); Nick Butterly, 'Liberal State president Norman Moore picks fight on WA secession', *The West Australian* (8 December 2017).
[14] Peter Law, "WAxit: poll shows one-in-four want WA secession in result labelled 'deeply concerning' by MP Patrick Gorman", *The West Australian* (5 October 2020).
[15] Robert Carling and Simon Cowan, *Attitudes to a post-Covid Australia* (Centre for Independent Studies, 2021).
[16] *WAxit Party* (Web Page, 13 September 2021) <http://waxit.org>. Josh Zimmerman, 'WAxit: Premier Mark McGowan rules out referendum on WA forming its own country', *The West Australian* (7 October 2020).
[17] Peter Law, 'Premier Mark McGowan reveals WA's hard border may stay closed until April 2022', *The West Australian* (8 September 2021).

Why has peaceful secession been chosen for study? Unlike other examples such as the Confederate States of America which departed from the United States or Bangladesh which left Pakistan, the WA secession movement has so far been a calm and courteous affair, with no shots being fired nor any military posturing. This removes many extraneous variables from academic discussion and emphasises the logic of arguments rather than the coercive means of settling debate that inflicts the United States Supreme Court's judgement in *Texas v White*.[18]

Finally, why do I contend that secession is a continuum rather than a binary concept? The reality is that secession does not always happen overnight. Australia itself began as a British penal colony in the 18th century but withdrew from the UK's grasp through a series of gradual steps that took decades.[19] Baby steps may pay off for other movements too and merit investigation. WA's borders border closure during the COVID-19 crisis or the nullification movement in the United States where states ignore select federal laws are examples of governmental entities repudiating some ties but otherwise remaining substantially within a union.[20] These are taken to be forms of partial secession or co-existing assertions of sovereignty. In the Australian context, which I argue in Chapter 3 is shaped by popular sovereignty, a feature of full secession on the other hand is a reversion to the pre-Constitution situation whereby the citizens of WA *only* appoint agents to the state parliament. Across other branches of state government, the right to rule would no longer shared with the Commonwealth parliament or the High Court of Australia.

PERSPECTIVES ON SECESSION

What does the academic literature and case law say about secession in Australia? In fact, the scholarly and judicial material has directly or indirectly tended to oppose the constitutionality of secession by a state and it is an uphill battle for those who seek to overturn this consensus. Arguably, most of the literature adopts a legalistic approach, that is, seeking to exclude

[18] *Texas v White* 74 U.S. (7 Wall.) 700 (1869). Brandon has labelled the judgement as a 'confused benediction', that was 'fundamentally incoherent and – putting aside questions of bindingness of judicial precedent – of little value': Mark Brandon, *Free in the World: American Slavery and Constitutional Failure* (Princeton University Press, 1998) 168, 179. Elsewhere Brandon describes *Texas v White* as being 'so riddled with contradiction… that it is an unreliable foundation for any coherent principle on whether secession is constitutionally justifiable': Mark Brandon, 'Secession and Nullification in the Twenty-First Century' (2014) 67(1) *Arkansas Law Review* 91, 99.

[19] Suri Ratnapala, *Jurisprudence* (Cambridge University Press, 2009) 88: 'The constitutional evolution of the Australian Commonwealth provides a good illustration of revolution by consensus'.

[20] Nullification is defined in Robert Levy, 'Yes, states can nullify some federal laws, not all' *Investor's Business Daily*, 18 March 2013; James Read and Neal Allen, 'Living, Dead and Undead: Nullification Past and Present' (2012) 1 *American Political Thought* 263-267; Thomas Woods, *Nullification: How to Resist Federal Tyranny in the 21st Century* (Regnery Publishing, 2010) 7-14.

discussion of values embedded in the constitutional structure and instead treating secession as a formal technical question answerable without reference to political and moral factors.

Secession by individuals

This thesis is about secession by the state of Western Australia. However, since there are no Australian court decisions directly addressing state secession, what the courts have said about secession by individual natural persons provides some insight about how courts might approach the issue. In *Fyffe v State of Victoria*,[21] a single justice of the High Court addressed individual secession from the state of Victoria. The appellant, Brian Charles Fyffe, sought special leave to appeal to the Court against an eviction by the Victorian government from a parcel of land. Fyffe had been unsuccessful in persuading the Supreme Court of Victoria (Court of Appeal) that he had seceded under international law and that his consequent diplomatic status conferred immunity from civil action. Hayne J denied Fyffe's claim with respect to secession:

> It is, in my view, neither necessary nor appropriate that I record in these reasons the steps which Mr Fyffe contends have been taken to secede from the Commonwealth, nor is it appropriate to record the steps which it is submitted have been taken in recognition of that secession. Mr Fyffe comes to this Court seeking an order in aid of his rights. He may have such an order if, but only if, the sovereign power which applies relevantly to the land in question and/or the parties concerned is that which is embodied in the Constitution. The submission of secession is fundamentally antithetical to such a contention. It is therefore a point which, if it were to be accepted, would fly in the face of granting the order which Mr Fyffe seeks. It should, in my opinion, be put wholly to one side.[22]

Similar rulings exist in relation to groups of Indigenous people seeking to assert sovereignty. In *Mabo (No 2)* seven justices of the High Court unanimously held that the acquisition of sovereignty over the Australian landmass could not be questioned in a domestic court.[23]

Likewise, in *R v Buzzacott*, Aboriginal Australian Kevin Buzzacott submitted that '[t]he Commonwealth of Australia has no lawful jurisdiction over the Original Peoples of geographic

[21] *Fyffe v State of Victoria* (2000) 74 ALJR 1005 ('*Fyffe*').
[22] *Fyffe v State of Victoria* (2000) 74 ALJR 1005, 1009.
[23] *Mabo v Queensland (No 2)* (1992) 175 CLR 1, 69.

Australia nor over Their Lands and Laws' as part of his defence to theft charges.[24] But Connoly J of the Supreme Court of the Australian Capital Territory dismissed his submission:

> Any legal system is based on a fundamental proposition that establishes the authority of the law. HLA Hart, in *The Concept of Law…*refers to a rule of recognition. Kelsen, a doyen of continental jurisprudence, refers in his *General Theory of Law and State…*to a 'grundnorm'. The underlying concept is the same – in any legal system there must be a starting point that cannot itself be challenged within the system. In our system the starting point is the sovereignty vested by the people in 'the Crown' and set out in the Constitution of the Commonwealth of Australia. It is clearly not possible, in a court established pursuant to the constitution, being a court created to exercise part of that sovereignty vested in the Crown (in this case, being the sovereignty inherent in an assertion of criminal jurisdiction relating to an alleged theft occurring within the geographical jurisdiction of this Court) to challenge the sovereignty of the court.[25]

Confirmation of this line of thought comes from the dispute between Leonard Casley, the self-declared sovereign of the Principality of Hutt River and the Australian Taxation Office over non-lodgment of tax returns. This matter came to the federal judicial system in 2007 in an application for removal of the WA Magistrate Court's jurisdiction to the High Court under s 40 of the *Judiciary Act 1903* (Cth). On this occasion the submissions pertaining to individual secession were described by Heydon J as 'fatuous, frivolous and vexatious' and the case was dismissed.[26] The Supreme Court of Western Australia in 2017 subsequently held that '[t]his court is bound by and to give effect to the *Constitution Act* and to any law made by the Parliament of the Commonwealth under the *Constitution*, including the *TAA* [*Taxation Administration Act 1953 (Cth)*]'.[27] An appeal was denied by the WA Court of Appeal because '[n]othing in the material relied on by the appellants, which we have read and considered, provides any arguable basis for concluding that Leonard Casley's purported declaration of secession from Australia in 1970 had any legal effect'.[28] The common theme among the judges in the Supreme Court and the Court of Appeal was that there is a sovereign who has passed tax laws that are binding upon Casley.

Although individual persons are referenced as 'the people' in the Constitution, the courts have not extended the doctrine of popular sovereignty to derive an individual right to secede.[29] Hayne

[24] *R v Buzzacott* (2004) 154 ACTR 37, 39.
[25] Ibid 41.
[26] Transcript of Proceedings, *Casley v Commissioner of Taxation* (High Court of Australia, 4 October 2007).
[27] *Deputy Commissioner of Taxation v Casley* [2017] WASC 161 (16 June 2017) [13].
[28] *Casley v Deputy Commissioner of Taxation* [2017] WASCA 196 (20 October 2017) [6].
[29] Benjamin Saunders and Simon Kennedy, "Popular sovereignty, 'the people', and the Australian Constitution: a historical reassessment" (2019) 30 *Public Law Review* 36-50.

J's suggestion that '[h]e may have such an order if, but only if, the sovereign power which applies relevantly to the land in question and/or the parties concerned is that which is embodied in the Constitution' indicates individual secession is incompatible with residing under a coercive government. One cannot seek a remedy that can only be sought outside the court's jurisdiction through extra-legal mechanisms because sovereignty is a non-justiciable concern.[30] This apparent statism is consistent with the reality that no government permits secession for natural persons, hence also precluding the feasibility of secession by Indigenous tribes.[31]

Secession by States

This section considers the literature related to secession by an Australian state, of which there is a relative paucity. The Constitution's framers dedicated Chapter V to 'The States', thereby evincing an intention to recognise the states as independent units of governance.[32] Although the nature of this recognition has changed via a series of High Court rulings from a decentralised to a more centralised union, the Court continues to speak of Australia as a federation where the states enjoy protected constitutional status.[33] Yet the document is silent about the administrative units known as 'States' seceding. Of course, implications can be made one way or the other. Yet the Australian courts have not directly addressed complete unilateral secession since such a controversy has never reached them. Even with those precedents involving partial secession – like *Palmer v WA*[34] discussed in Chapter 8 – the word 'secession' has never been used.

A right to secede outside the Constitution?

Craven, who has written the leading study on Australian secession and whose ideas are discussed throughout this thesis, has asked whether Australian states possess an 'inherent' right to secede.[35] This question is asked from the standpoint of the status quo outside the Constitution. In other

[30] See, eg, *Fyffe v State of Victoria* [1999] VSCA 196 (18 November 1999) [22]*: '*Mr Fyffe resides in Victoria and we can take judicial notice that the relevant land is situated within the State. Mr Fyffe is accordingly subject to the laws of Victoria'.

[31] For other instances precluding individual secession, see *Harris v Muirhead* [1993] 2 Qd.R. 527; *Alexander Brackstone v Police* (1999) SASC 35; *Williamson v Hodgson* [2010] WASC 95. One of the few states in the world that explicitly permits secession, Liechtenstein, refers in its constitution to a right of secession for 'individual communes' not for persons: *Constitution of the Principality of Liechtenstein* (Liechtenstein), art 4.

[32] Timothy Andrews, 'The High Court's attack on federalism' (2013) 3 *Journal of Peace, Prosperity and Freedom* 11, 43-8; Nicholas Aroney, 'Constitutional choices in the *Work Choices Case*, or what *exactly* is wrong with the reserved powers doctrine?' (2008) 32 *Melbourne University Law Review* 1, 19.

[33] See, eg, *Melbourne Corporation v Commonwealth* (1947) 74 CLR 31; *Re Australian Education Union & Australian Nursing Federation; ex parte Victoria* (1995) 184 CLR 188.

[34] *Palmer v Western Australia* (2021) 95 ALJR 229.

[35] Gregory Craven, *Secession: The Ultimate States Right* (Melbourne University Press, 1986) 62.

words, does WA have the right to leave Australia based on some source of power outside any authority that it may derive from the Constitution? An example of such outside authority is the WA Constitution, but it could also be the people of the state if one accepts popular sovereignty.

The existence of inherent state sovereignty was rejected in 1935, when WA's government made submissions to the UK Parliament's Joint Select Committee of the House of Commons and the House of Lords seeking negotiated secession from that legislature to 'effectuate the withdrawal of the people of Western Australia from the Federal Commonwealth'.[36] The Committee said:

> The [Constitution] Act gives no power to any State to secede. The Commonwealth itself has no power to amend the Constitution to the extent of enabling any State to secede. It is only by legislation in the Parliament of the United Kingdom, therefore, that the dissolution of the Commonwealth or the secession of any of its constituent parts can be effected.[37]

As the Joint Committee explained, at the time of entering federation WA irreversibly 'surrendered all those powers, previously enjoyed by it as a self-governing colony' which were transferred to the Commonwealth as the 'separate and integral national authority covering the whole area of Australia'.[38] The Committee characterised petitioning for secession as an issue outside the jurisdiction of WA and within the scope of the federal government.[39]

Writing before the passage of the *Australia Act 1986* (UK), Craven concurs that the states have no inherent right to secede. Craven finds that Australia's federation is an *imposed* rather than a voluntary union like that of the original American colonies. Talk of 'state rights' in the Australian context, while historically plausible, has no legal force because the merging together into a nation came about under British authority and the colonies lacked internal sovereignty.[40] Yet when it comes to the UK parliament's continuing authority over Australia, Craven concedes that it is doubtful s 4 of the *Statute of Westminster 1931* (UK) – which restrains Britain from interfering in a Dominion's affairs – could be repealed by that parliament given the political fact

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[36] Joint Committee of the House of Lords and the House of Commons, Parliament of the United Kingdom, *Petition of the state of Western Australia together with the proceedings of the committee and minutes of speeches delivered by counsel* (1935) iv. This petition was about negotiated secession. At that time WA was not seeking to prove its unilateral right since it agreed that it was bound by the UK parliament's decision. The petition was denied on the basis that a state did not have a right under the Constitution and that the UK parliament could not intervene in the absence of support from the Commonwealth government: Thomas Musgrave, 'The Western Australian secessionist movement' (2003) 3 *Macquarie Law Journal* 95, 110.

[37] Ibid viii.

[38] Ibid ix.

[39] Ibid.

[40] Craven, *Secession: The Ultimate States Right* (n 36) 76.

of Australia's status an independent nation. He admits that it is unlikely that the High Court would take a deferential approach toward English legislation given intervening events.[41]

The latter concession by Craven paves the way for arguments supporting state sovereignty and secession. After all, if the UK is no longer the sovereign, then perhaps the fact of voluntary agreement between the people of the states to participate in the federation is elevated to more than historical importance? Craven agrees that the legality of secession in the United States is plausible, since the original colonies possessed all the attributes of internal sovereignty.[42] However Craven shuts down Australian secession by noting that even if it is accepted that popular sovereignty is now the legal basis of the Constitution, such sovereignty is exercised by the people as a whole acting through the Commonwealth and not via individual states.[43]

In the decades since Craven's *Secession: The Ultimate States Right,* academic inquiry has tended to reinforce his conclusions. McGrath, writing in the year 2000, opines that:

> There is no doubt that the federating colonies entered into a federation, which could not be dissolved by unilateral secession. This is clear from the Preamble to the *Constitution Act*. The validity of this stipulation does not depend solely upon the Preamble. Indissolubility was only one of the core conditions upon which the federation was based. There were three elements to the nature of the entity into which the separate colonies agreed to unite. The first was that it was a federation, and not a complete Union. The second was that it was to be indissoluble in the sense that it could not be broken up by unilateral secession. The third was that the Crown was central to the nature of the polity created.[44]

In contrast to the relatively rigid approach to interpretation taken by Craven and McGrath, Besant adopts a flexible 'inclusive' positivist method that gives significant weight to the political and economic changes that have occurred since the passage of the *Australia Act*. From the fact of these changes, he concludes that secession by a state is now constitutionally possible.[45]

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[41] Ibid 141.
[42] Ibid 73.
[43] Ibid 140.
[44] Frank McGrath, *The intentions of the framers of the Commonwealth of Australia Constitution* (PhD Thesis, University of Sydney, 2000) 92-3.
[45] Christopher Besant, 'Two nations, two destinies: a reflection on the significance of the Western Australian secession movement to Australia, Canada and the British Empire' (1990) 20 *University of Western Australia Law Review* 209, 304-306.

There are two main reasons why the time is ripe for a fresh study of secession. Theoretically, there is room for a critical assessment of the premises of some earlier scholarship. For example, McGrath's claim that the federation cannot 'be dissolved' does not rule out secession since the departure of a single state would not dissolve the federation as a conceptual union. The critical institutional machinery of the federation remains intact in the form of the Commonwealth parliament and the High Court. Second, since Craven's study the independence of Australia from the UK is now established. We have also seen the High Court announce the doctrine of popular sovereignty. In addition, as this thesis is being written the state of WA has put in place border closures between itself and the rest of Australia due to the COVID-19 virus. These considerations and developments have the potential to radically alter the constitutional position.

Internal consistency with the Constitution

What about the consistency of secession with the Constitution that codifies federation? Indirect guidance can be gleaned from the Victorian Supreme Court of Appeal in *Fyffe v State of Victoria*, where Batt, Charles and Chernov JJ cite Craven's book on secession which they say held that 'arguably the Preamble, and certainly s 3 of the *Commonwealth Constitution* [Covering Clauses] impose a continuing unity upon the Australian States and that secession would contravene both ss 3 and 4 of the Constitution'.[46] In addition, the Supreme Court of Western Australia references s 5 of the Covering Clauses in its ruling against individual secession.[47]

Quick and Garran in *The Annotated Constitution of the Australian Commonwealth* claim that the Preamble bars secession because the phrase 'indissoluble Federal Commonwealth' implies a permanent union since the Preamble is a declaration of the 'promulgating principles, ideas, or sentiments operating, at the time of the formation of the instrument, in the minds of its framers, and by them imparted to and approved by the people to whom it was submitted'.[48] They concede, however, that there is no explicit prohibition within the body of the Constitution.[49]

[46] *Fyffe v Victoria* [1999] VSCA 196 (18 November 1999) [20].
[47] *Deputy Commissioner of Taxation v Casley* [2017] WASC 161 (16 June 2017) [13].
[48] John Quick and Robert Garran, *The Annotated Constitution of the Australian Commonwealth* (1901) 292-4.
[49] Ibid 280. See also John Quick, 'The West Australian Discontent, Is Secession Possible?' (15 October 1906) *Life* <http://purl.library.usyd.edu.au/setis/id/fed0031>.

Twomey and Williams have also cast doubt on the constitutionality of unilateral secession by an Australian state. Twomey rests her opposition upon the Preamble to the Constitution while Williams appears to imply from the Constitution's silence that secession is prohibited.[50]

However, the suggestion that the Preamble constrains the legality of secession has been criticised by Craven. First, ordinary principles of construction do not place much weight on the preamble to an Act, and for this reason Quick and Garran's reasoning is not especially persuasive even among those who agree that secession is unconstitutional.[51] Second, the preamble is generally consulted when there is vagueness in the body of a legislative instrument, but Craven denies that there is any such ambiguity. Instead, Craven points to the Covering Clauses – sections 1 to 9 of the Constitution – as unambiguous proof that the document was written for perpetuity.[52]

Having found textual inconsistency between secession and the Covering Clauses, Craven follows Moore's earlier view[53] that it is not possible to amend the Covering Clauses using the procedure in s 128 since the Constitution is an act of the UK parliament and only that body can amend its preliminary clauses.[54] Craven adds, however, that it is possible to amend the Covering Clauses using s 51(xxxviii) by 'the states directly concerned' plus the Commonwealth exercising 'any power which can at the establishment of this Constitution be exercised only by the Parliament of the United Kingdom'.[55] While Craven rules out the possibility of unilateral secession in which a state asserts independence by an act of its legislature, he leaves open the possibility of negotiated secession affected by amending the Covering Clauses using the Commonwealth parliament's power in s 51(xxxviii). Following Craven's theory, secession must satisfy a high standard because *all* the states and the Commonwealth must agree for withdrawal to be effective.

Although the Preamble and Covering Clauses 'which are not part of the Constitution itself'[56] are the primary focus of those who have analysed the constitutionality of secession, other provisions

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[50] Laura Beavis, 'It's not you, it's me… is it time for Tasmania to break up with the rest of Australia', *ABC News* (Web Page, 7 January 2019) <https://www.abc.net.au/news/2019-01-07/should-tasmania-cut-ties-with-the-mainland/10687936>; George Williams, 'Too rich, too weak to succeed seceding', *Sydney Morning Herald* (11 May 2010).

[51] 'Recourse may be had to the preamble in the interpretation of a Statute, but only if the words of the section under consideration are first found to be unclear or ambiguous': Craven, *Secession: The Ultimate States Right* (n 36) 86. Craven's assessment is not universally accepted, cf. Anne Winckel, 'The Contextual Role of a Preamble in Statutory Interpretation' (1999) 23 *Melbourne University Law Review* 184, 202-204.

[52] Craven, *Secession: The Ultimate States Right* (n 36) 97.

[53] William Moore, *The Constitution of the Commonwealth of Australia* (2nd ed, 1910) 602-03.

[54] Craven, *Secession: The Ultimate States Right* (n 36) 168.

[55] Ibid 190.

[56] Alex Castles, 'Limitations on the Autonomy of the Australian States' (1962) *Public Law* 175, 177.

have also been mentioned. Craven finds that s 51 bars secession of a state because if a state withdrew from the Commonwealth such a manoeuvre would have the result of preventing the federal government from exercising its heads of power over matters provided for in that section.[57] In addition, Mizen raises s 105A dealing with financial agreements for if a State left the Federal Commonwealth, undue financial liability might be placed on the remaining parties and this might be a barrier to withdrawal.[58] There does not seem to be any doubt that these provisions, being part of the Constitution proper, can be amended using the s 128 double majority process, but in their present form it is argued that they are an obstacle to secession.

Similar sentiments are found in Dillon's dissertation from 2005.[59] He argues, firstly, that the Constitution contains no equivalent provision to the *US Constitution's* 10th amendment which reserves powers not delegated to the federal government 'to the States…or to the people'.[60] Second, Dillon highlights the Preamble's reference to 'one indissoluble Federal Commonwealth' as evidence of a compromise between complete centralisation (a unitary state) and extreme decentralisation (a confederation): "it was clearly not the intention of the Australian founders…to 'place the dissolution of the [federal] government in the hands of a single State'".[61] Third, he says that the Constitution being an imperial act creates a higher sovereign power and precludes unilateral secession because a state's sovereignty is accordingly diluted.[62]

These arguments also merit re-examination. First, the notion that the Preamble and the Covering Clauses somehow unambiguously bar secession is open to dispute. Chapter 5 examines these parts of the *Constitution Act* and concludes that, to the contrary, they may evince an intent to tolerate a consensual union. Second, it must be emphasised that the law is not fixed in time. For example, the *Australia Act* has created a new source of state power which is discussed in detail at Chapter 4. And as Chapter 8 observes, events like the effective partial secession of WA from the Commonwealth due to the COVID-19 crisis need to be considered when analysing secession.

THESIS STRUCTURE

[57] Craven, *Secession: The Ultimate States Right* (n 36) 98.
[58] Alan Mizen, *The possible secession of, and creation of, states under the Commonwealth of Australia Constitution Act* (Honours Thesis, University of Western Australia, 1975) 29.
[59] Anthony Dillon, *A response to the jurisprudence of the High Court in the 'implied rights cases'* (PhD Thesis, James Cook University, 2005) 360-64.
[60] Ibid 363. Cf. *D'Emden v Pedder* (1904) 1 CLR 91, 112 where the Court held that ss 107 and 108 of the Australian Constitution are substantially the same as the 10th amendment to the *US Constitution*.
[61] Ibid 361. Quoting J. Gough, *The Social Contract* (Clarendon Press, 1936) 217.
[62] Ibid 362.

Evaluating the constitutionality of secession by Western Australia is an inquiry that can be broken into discrete sub-questions. Part I of this thesis explores theoretical and historical concerns of relevance to the meaning of legality in the circumstance of secession. Part II is dedicated to assessing secession from the standpoint of constitutional documents including the *Western Australia Constitution Act 1890* (UK) ('WA Constitution'),[63] the Commonwealth Constitution and statutes like the *Australia Act 1986* (UK) or *Australia Act 1986* (Cth).

Chapter 1 examines the legal theory and methodology of relevance to the question. The chapter affirms that there is no controlling precedent with respect to secession and that the Constitution is ambiguous. Compounding the uncertainty is that there are no reliable guidelines for interpretation since High Court judges disregard the doctrine of *stare decisis* and because methodologies evolve.[64] The chapter suggests that what decision-makers do is often more important than what they say they are doing. Interpreters approach data in a manner affected by their opinion about the true nature of political authority, even if they do not disclose their preconceptions.[65] The chapter's argument is that a holistic approach – inspired by what Hart labels 'inclusive positivism' – is preferable when dealing with a novel topic like secession.[66]

Chapter 2 applies a historical lens to the issue. The High Court in *Cole v Whitfield* allowed the use of extrinsic sources, particularly constitutional convention debates, where it can assist in appreciating the subject to which language is directed.[67] However, historical inquiry is an artform rather than an exact science and value-laden choices are frequently made. Moreover, history is not always treated as binding.[68] Nonetheless, from an investigation of the views of the drafters and ratifiers of the Constitution, I find that history does not preclude secession.

Chapter 3 then asks whether the United Kingdom is still the sovereign of Australia. The reason for this inquiry is that secession is often tied up with the concept of sovereignty; certainly, most American debate appears to be framed around this.[69] Matters are complex in Australia because of

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[63] A schedule to the *Constitution Act 1890* (UK) contains the *Constitution Act 1889* (WA). When speaking of the WA Constitution, I will hereafter refer to these two interchangeably.

[64] Gregory Craven, 'The High Court of Australia: a study in the abuse of power' (1999) 22 *University of New South Wales Law Journal* 216, 219-20. Further confirmation comes from Brian Galligan, *Politics of the High Court: a study of the judicial branch of government in Australia* (University of Queensland Press, 1987) 129-30.

[65] John Hasnas, 'The myth of the rule of law' (1995) *Wisconsin Law Review* 199, 217.

[66] Herbert Hart, *The Concept of Law* (1994) 250.

[67] *Cole v Whitfield* (1988) 165 CLR 360, 385.

[68] Michael Kirby, 'Constitutional interpretation and original intent: a form of ancestor worship?' (2000) 24(1) *Melbourne University Law Review* 1, 3-4, 14.

[69] Daniel Webster, *Select Speeches of Daniel Webster 1817-1845* (Aeterna, 2021) 18-19; John Calhoun, *A Disquisition on Government and A Discourse on the Constitution and Government of the United States* (Forgotten

the country's formalistic attachment to its colonial roots. After an examination of *Sue v Hill*[70] which declares the UK a foreign nation for the purposes of assessing whether a parliamentarian has breached the constitutional rule against holding dual citizenship, I agree with scholarship that sees the Commonwealth and state governments as independent from British control.[71] There is also case law which suggests that the people are the true source of power in Australia, supporting the view that eligible voters have replaced the UK as the source of ultimate sovereignty.[72]

Chapter 4 proceeds to assess the extent of WA autonomy. From a review of the constitutional framework, it is posited that from WA's founding as a British colony on 18 June 1829 several attributes associated with sovereignty were exercised prior to joining the Commonwealth and this influenced the WA Constitution's plenary language – 'peace, order and good government'[73] – indicating broad power. Furthermore, the Commonwealth Constitution implies that the federal arrangement is one where sovereignty is shared between the centre and the states. There is good reason to think that the dissolution of ties to the UK now allows for a pathway to secession.

Chapter 5 tackles the Preamble and the Covering Clauses and their relationship to secession. This chapter argues that the Preamble's proclamation of 'one indissoluble Federal Commonwealth under the Crown…and under the Constitution' is not a barrier to secession. And the Covering Clauses provide hints that a relationship of ongoing consent was established. Covering cl. 3 notes that WA will only become a member of the Commonwealth of Australia 'if Her Majesty is satisfied that the people of Western Australia have agreed thereto'. Covering cl 6 defines a 'State' as being part of the Commonwealth 'for the time being'. For these and other reasons, neither the Preamble nor the Covering Clauses are inconsistent with secession by WA.

Chapter 6 explores the scope of Commonwealth executive and legislative power to determine whether these powers conflict with a state intent on leaving. In the US, *Texas v White* is authority for the proposition that the federal government has the power to regulate secession.[74] That

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Books, 2018) 1-12; Abel Upshur, *A Brief Enquiry into the Nature and Character of our Federal Government: Being a Review of Judge Story's Commentaries on the Constitution of the United States* (Leopold Classic Library, 2016) 1-7.

[70] *Sue v Hill* (1999) 199 CLR 462.

[71] See, eg, Deborah Gare, 'Dating Australia's independence: national sovereignty and the 1986 Australia acts' (1999) 29 *Australian Historical Studies* 251, 252-63.

[72] *Nationwide News Pty Ltd v Wills* (1992) 177 CLR 1, 72. I concede that some interpret the popular sovereignty cases as only having established the source of political – as opposed to legal – sovereignty. I consider this to be unpersuasive semantics. As I show in Chapter 1, law and legal interpretation is merely politics by other means.

[73] *Constitution Act 1889* (WA) s 2.

[74] Peter Radan, "'An Indestructible Union…of indestructible states': The Supreme Court of the United States and Secession" (2006) 10 *Legal History* 199-200; James Ostrowski, 'Was the Union Army's Invasion of the Confederate

decision held that the Congress has an obligation to guarantee to each state a republican form of government and that this duty can be fulfilled using coercive actions against a secessionist state. This chapter contends that the position in Australia different. While the Commonwealth government can bind the states to some degree, this authority does not extend to regulating secession. Australian federation is based on friendly cooperation and comity, not coercion.

Chapter 7 delves into secession and its interaction with the 'judicial power' of the Commonwealth in s 71 of the Constitution. My analysis entails two elements. First, if a hypothetical secession dispute were to reach the High Court, would a dispute of this kind meet the tests for being a constitutional 'matter' and is it justiciable? Second, is secession inconsistent with the appointment of an arbiter of federal-state or state-state disputes, namely, the High Court? Is there anything innate to the exercise of judicial power that impedes secession?

Finally, Chapter 8 considers the financial and trading sections of the Constitution – in particular, ss 92, 105A and 117 – to assess whether these restrain a state from taking measures associated with secession such as border closures and discrimination against out-of-state residents. After analysis of the text and precedent, I propose that the relevant provisions do not hinder secession.

In contrast to almost all the Australian literature, the finding of this thesis is that secession by WA is constitutional. I take issue with an overly simplistic conception that sees the Commonwealth parliament as the sole sovereign and the state parliaments as its subsidiaries. I question the assumption that Australia is a unitary state of the kind envisioned by Hobbes and highlight that the arrangements established by the Constitution are suggestive of shared sovereignty of the kind advocated by Althusius.[75] Whether WA secedes or not, secession is at the theoretical heart of federal arrangements and is a neglected topic worth exploring.

States a lawful act? An Analysis of President Lincoln's Legal Arguments against Secession' in David Gordon (ed), *Secession, State and Liberty* (Transaction Publishers, 1998) 185.

[75] On the difference between Hobbes and Althusius see Andrei Kreptul, 'The constitutional right of secession in political theory and history' (2003) 17 *Journal of Libertarian Studies* 39, 42.

PART I

THEORY AND HISTORY

CHAPTER 1: POSITIVISM, SECESSION AND VALUES

> *The Constitution is a political instrument…It is not a question whether the considerations are political, for nearly every consideration arising from the Constitution can be so described, but whether they are compelling.*
>
> Dixon J[1]

I. INTRODUCTION

This chapter briefly examines the legal theory pertaining to the constitutionality of unilateral secession by Western Australia. It is brief because it is beyond the scope of this chapter to either critique or defend any school of thought. Rather, the purpose of this chapter is to introduce the concept of legal positivism and the debate between so-called 'exclusive' and 'inclusive' positivists, to lay the foundations for the functionalism and realism inspired analysis in what follows. Theorists disagree about whether the inclusive and exclusive branches of positivism merit separate categorisation or are semantic differences of emphasis.[2] There is also dispute about other facets of positivism, but it is beyond the scope of this chapter to resolve such uncertainties.

That said, a reference to theoretical underpinnings is beneficial because it can bolster transparency. Constitutional interpretation is a complex endeavor yet those who interpret the Commonwealth of Australia Constitution or the WA Constitution often proceed without explaining their premises. Partly because of this lack of clarity, critiques have arisen that claim to see behind the words of judges and look at their actions to discern hidden ideologies.[3] For example, irrespective of whether they consider judges to be politically motivated, some scholars like Craven have criticised the opaqueness in the reasoning of the High Court of Australia and allege that the Court abuses its power.[4] Some reference to theory is therefore worthwhile.

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[1] *Melbourne Corporation v Commonwealth* (1947) 74 CLR 31, 82 ('Melbourne Corporation').
[2] David Dyzenhaus, 'The Genealogy of Legal positivism' (2004) 24 *Oxford Journal of Legal Studies* 39, 54.
[3] Kathleen Mahoney, 'The myth of judicial neutrality: the role of judicial education in the fair administration of justice' (1996) 32 *Willamette Judicial Review* 785, 793-95; Kathleen Mahoney, 'Judicial bias: the ongoing challenge' (2015) 43 *Journal of Dispute Resolution* 43, 46-64.
[4] Greg Craven, 'The High Court of Australia: a study in the abuse of power' (1999) 22 *University of New South Wales Law Journal* 216, 222-24; Greg Craven, 'The High Court and the ethics of constitutional interpretation: honesty is the best policy' (2003) 52, 53.

Part II of this chapter begins with a stylised description of positivism. While labels are almost always an oversimplification, the purpose of this exposition is to show that there are two camps when it comes to incorporating moral and political concerns in determining law. Throughout this chapter, I ignore grey areas and take positivists at their word when they claim that their theory is 'value-free'.[5] Furthermore, I do not consider critiques of positivism which suggest that there are contradictions in what positivists like Hart have written about their own theory.[6]

Part III ties the simplified exposition to the unique ambiguity of secession. Secession by an Australian state is a hard case because it is not a technical question answerable with reference to decided precedents directly on point and because there is room for disagreement on how to proceed. Because of this, I deem it necessary to appeal to moral and political considerations that are embedded in the constitutional sources. Part IV justifies adoption of methodological approaches like functionalism and realism which acknowledge political and moral factors as legitimate criteria to establish constitutional validity. Rather than treating moral concerns as a roadblock, this thesis proceeds on the basis that law and politics are enmeshed, particularly where the documents under consideration have the factual underpinnings of a political compact.

II. LEGALITY IN GENERAL

Let us begin by juxtaposing legal positivism with other theories about law and examining its two broad branches of inclusive and exclusive positivism. Theories about the nature of law, like positivism, help determine what is legal – in the sense of being valid decree obligating obedience – and what is not.[7] Rothbard submits that there are three ways to reason about law:

> In fact, the legal principles of any society can be established in three alternate ways: (a) by following the traditional custom of the tribe or community; (b) by obeying the arbitrary, ad hoc will of those who rule the State apparatus; or (c) by the use of man's reason in discovering the natural law – in short, by slavish conformity to custom, by arbitrary whim, or by use of man's reason.[8]

[5] Andrei Marmor, 'Legal Positivism: Still Descriptive and Morally Neutral' (2006) 26 *Oxford Journal of Legal Studies* 683, 686-687; Giorgio Pino, 'The Place of Legal Positivism in Contemporary Constitutional States' (1999) 18 *Law and Philosophy* 513, 518.
[6] See, eg, the summary of Ronald Dworkin's 'semantic sting' in Kenneth Himma, *Legal Positivism* Internet Encyclopedia of Philosophy <https://www.iep.utm.edu/legalpos/>.
[7] See generally Suri Ratnapala, *Jurisprudence* (Cambridge University Press, 2013).
[8] Murray Rothbard, *The Ethics of Liberty* (New York University Press, 1998) 17.

Rothbard's option (a) above refers to customary practices like those often based on voluntary tradition that are still followed by Indigenous peoples across the world; (b) is akin to acts of parliament or rulings by the judiciary and (c) means each individual exercises their faculties and decides for themselves what is lawful (this natural law option assumes that living people are sovereign, not previous generations of parliaments or judges). Likewise, Murphy confirms that "[n]o three concepts are more central to legal theory than nature, custom, and stipulation; thus the familiar expressions 'natural law', 'customary law' and stipulated or 'positive law'".[9]

Suppose one accepts Rothbard's characterisation for the sake of argument. A case could be made that some variant of positive law, or Rothbard's option (b), is practiced by governments in the modern age. The *Stanford Encyclopedia of Philosophy* defines positivism as 'the thesis that the existence and content of law depends on social facts and not on its merits'.[10] Or in other words:

> What laws are in force in that system depends on what social standards its officials recognize as authoritative; for example, legislative enactments, judicial decisions, or social customs. The fact that a policy would be just, wise, efficient, or prudent is never sufficient reason for thinking that it is actually the law…[11]

Positivism offers no theory of interpretation.[12] It is not a theory of adjudication but a scientific description of the general nature of law and has three planks: (1) the pedigree thesis; (2) the separability thesis and (3) the discretion thesis.[13] First, positivists focus on the 'pedigree or the manner in which [rules] were adopted or developed' to ascertain valid law enforceable by force.[14] Secondly, positivists suggest that law is a set of rules that can be separated from moral content and there is no *necessary* connection between law and morality.[15] Third, they say that where the law does not provide guidance, a judge cannot enforce existing rights. Rather, in such cases, the judge exercises quasi-legislative power by reaching beyond the law to create a rule[16] (note that almost every element of these planks is disputed;[17] however, such controversies are outside this chapter's purview since it presents a simplified version of positivism).

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[9] James Murphy, 'Nature, custom and stipulation in law and jurisprudence' (1990) 43 *The Review of Metaphysics* 751, 751.
[10] Leslie Green and Thomas Adams, *Legal Positivism* Stanford Encyclopedia of Philosophy <https://plato.stanford.edu/entries/legal-positivism/>
[11] Ibid.
[12] Kelsen, *Pure Theory of Law* (Lawbook Exchange, 2005) 351-52.
[13] Kenneth Himma, *Legal Positivism* Internet Encyclopedia of Philosophy <https://www.iep.utm.edu/legalpos/>
[14] Ronald Dworkin, *Taking Rights Seriously* (Harvard University Press, 1978) 17.
[15] Cf. James Allan, *A Sceptical Theory of Morality and Law* (Peter Lang, 1998) 173.
[16] Dworkin, *Taking Rights Seriously* (n 19) 17.
[17] See, eg, those who deny the separation thesis: David Dyzenhaus, 'The Genealogy of Legal Positivism' (2004) 24 *Oxford Journal of Legal Studies* 39, 45.

Austin's positivism focuses on hard power and is consistent with the impression that the sovereign is a 'gunman writ large'[18] who people habitually obey because they fear the consequences of not obeying.[19] The sovereign then gives commands that are treated as law. These commands may be arbitrary in that they differ from custom and from natural law. Others, like Hart and Kelsen, adopt a soft positivism where government is not equivalent to a band of robbers, perhaps because officials internally believe in law's righteousness or because the government's orders are widely accepted by the public and are practically efficacious.[20]

Dworkin, whose views can be broadly categorised as anti-positivist, defines positivism in a similar fashion insofar as he argues that authoritative social practice is important. He says that positivism is 'the theory that individuals have legal rights only insofar as these have been created by explicit political decisions or explicit social practice' and which 'holds that the truth of legal propositions consists in facts about the rules that have been adopted by specific social institutions, and in nothing else'.[21]

As Raz admits however, the various theories of positivism are 'elusive' in meaning.[22] Raz further says that categorising theories of law into artificial categories neglects the intermingling among them.[23] Indeed, Green and Adams contend that that one can be *both* a positivist and a natural lawyer.[24] One can see how this is plausible from the 19th century when judges were more forthright in identifying the sense of justice that guided their decisions in hard cases. Examples include the *Case of Proclamations* and *Bonham's Case*, in which Coke CJ applied customary reasoning to constrain the British King and invalidate acts of the UK parliament, respectively.[25]

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[18] Mark Tebbit, *Philosophy of law: an introduction* (Routledge, 2017) 34.

[19] John Austin, *The Province of Jurisprudence Determined* (John Murray, 1832) 322-24. For instance, it is acknowledged that Australia was founded on coercion by taking land from Aboriginal peoples: John Harris, 'Hiding the bodies: the myth of the humane colonisation of Aboriginal Australia' (2003) 27 *Aboriginal History* 79, 79-82. See also Martin van Creveld, *The rise and decline of the State* (Cambridge University Press, 1999) 72-79; Emile Durkheim, *The division of labour in society* (MacMillan, 1933) 202. Cf. Peter Leeson, 'The calculus of piratical consent: the myth of the myth of social contract' (2009) 139 *Public Choice* 443, 443-49.

[20] Herbert Hart, *The Concept of Law* (Oxford University Press, 1994) 82-87; Hans Kelsen, *Pure Theory of Law* (Lawbook Exchange, 2002) 44-48.

[21] Dworkin, *Taking rights seriously* (1978) vii, xii.

[22] Joseph Raz, *The Authority of Law* (Oxford University Press, 2nd ed, 2009) 37.

[23] Ibid vii, 39.

[24] This is because '[positivism] is a thesis about the *relation* among laws, facts, and merits, and not otherwise a thesis about the individual relata': Leslie Green and Thomas Adams, *Legal Positivism* The Stanford Encylopedia of Philosophy <https://plato.stanford.edu/archives/win2019/entries/legal-positivism>.

[25] *Thomas Bonham v College of Physicians* (1610) 8 Co Rep 107. For discussion of how Coke CJ overruled parliament see Haig Patapan, 'Politics of interpretation' (2000) 22 *Sydney Law Review* 247, 266; Augusto Zimmermann, 'Sir Edward Coke and the Sovereignty of the Law' (2017) 17 *Macquarie Law Journal* 127, 142.

Nonetheless, positivism as per the three planks above is an influential way of conceiving of the nature of law. This is because the logic of positivism focuses on the exercise of government power, meaning that reference to empirical data is crucial to buttress one's claims. In Australia, where the organs of federal and state government hold a monopoly on the use of legitimised violence, legality is limited to the kinds of reasoning approved by these ruling institutions.[26]

Hence, there appears to be good reason for this thesis to rely on social pedigree constituting Australian law instead of philosophising about secession *a priori* from first principles. Secession's constitutionality is properly to be determined within existing social and political boundaries with an attitude that disclaims 'any supposed objective or mind-independent morality' and recognises constraints.[27] To this extent, positivists largely agree with each other.

Digging deeper reveals some disagreement among positivists with respect to what, exactly, embodies a social source. Can the content of a social source (like a constitution) incorporate external elements such that, for example, morality becomes part of the criterion for establishing legal validity? The divergence about what constitutes a social source is about the separability thesis and the connection (or lack thereof) between morality and law. For the purposes of this thesis, I adopt the approach taken in the *Engineers Case* in not distinguishing between statutory or constitutional interpretation when discussing legality.[28] However, constitutions are statutes of a special kind and so contain norms that are broad in application.[29]

On the one hand, exclusive positivists like Raz and Shapiro disapprove of a blurring between the legal and the political.[30] They argue that 'the existence and content of law can *always* be determined by reference to its sources without recourse to moral arguments'.[31] Raz contends that even if a law – like the *US Constitution*'s Bill of Rights – directs judges to consider moral

[26] Randy Barnett, 'A law professor's guide to natural law and natural rights' (1997) 20 *Harvard Journal of Law and Public Policy* 655: 'The legal rights that a particular legal system recognizes as valid may or may not conform to the background rights specified by the liberal conception of justice'.
[27] James Allan, *A Sceptical Theory of Morality and Law* (Peter Lang, 1998) 174.
[28] *Amalgamated Society of Engineers v Adelaide Steamship* (1920) 28 CLR 129.
[29] Robert French, 'Interpreting the Constitution – words, history and change' (2011) 40 *Monash University Law Review* 29, 29-30: 'The Constitution defines the essential architecture of our universe'.
[30] Joseph Raz, *The Authority of Law: Essays on Law and Morality* (Clarendon Press, 1979) 49-55; Scott Shapiro, "The 'Hart-Dworkin' debate: a short guide for the perplexed" in Arthur Ripstein (ed) *Ronald Dworkin* (Cambridge University Press, 2007) 22-49. For an example of applied exclusive positivism see Anthony Dillon, *A response to the jurisprudence of the High Court in the 'implied rights cases': an autochthonous Australian constitution, popular sovereignty and individual rights?* (PhD Thesis, James Cook University, 2005) 61, 232.
[31] Kenneth Himma, *Legal Positivism* Internet Encyclopedia of Philosophy <https://www.iep.utm.edu/legalpos/>. Emphasis added.

concepts, at best this incorporates a modified morality into law.[32] A judge acts in accordance with law when they base decisions upon a narrow technical standard, much like conflicts-of-law cases incorporate, albeit for limited surgical purposes, the foreign law of another nation. If a judge reads moral language as an invitation to comprehensive morality, then they are drawing on 'extra-legal considerations'.[33] For Raz, '[i]f a legal question is not answered by standards deriving from legal sources then it lacks a legal answer – the law on the question is unsettled'.[34]

On the other hand, inclusive positivists contend that *sometimes* a social fact can smuggle in a norm such that morality becomes a condition of legal validity.[35] This line of thinking has been spurred by Dworkin's anti-positivist critique where he contends that the content of legal systems is in part determined by moral principle.[36] Thus the process of determining law can incorporate extrinsic values and *realpolitik* if this is permitted by dictates like the text of a constitution.[37]

To be clear, inclusive positivists accept that criteria of legality are grounded in social sources and agree with the three planks of positivism above. Agreement on the fundamentals suggests that the difference between the two schools is semantic and of minor substantive significance.[38]

Nevertheless, what is claimed to distinguish the inclusive positivists from the exclusive positivists is that some of the former adopt the 'Midas Principle' wherein "[j]ust as everything King Midas touched turned into gold, everything to which law refers becomes law'.[39] So inclusive positivists conceive of law as an open system that enforces standards not necessarily drawn from social facts, implying that one can rely upon a range of norms.[40] For example, although classifying himself as a believer in the 'strong social thesis' of exclusive positivism, Raz says law is an open normative system that enforces standards from politics. As he explains, "[t]his sense of 'source' is wider than that of 'formal sources'… 'Source' as used here includes

[32] Joseph Raz, 'Incorporation by law' (2004) 10 *Legal Theory* 1, 4-6, 10-12.
[33] Joseph Raz, *The Authority of Law: Essays on Law and Morality* (Clarendon Press, 1979) 50; Leslie Green, 'Three themes from Raz' (2005) 25 *Oxford Journal of Legal Studies* 503, 504-505.
[34] Raz, *The Authority of Law* (1979) 50.
[35] Wilfrid Waluchow, *Inclusive legal positivism* (Oxford University Press, 1994) 82; Jules Coleman, *The practice of principle: In defense of a pragmatist approach to legal theory* (Oxford University Press, 2001) 107.
[36] Michael Bayles, 'Hart vs. Dworkin' (1991) 10 *Law and Philosophy* 349, 350-53.
[37] Mehmet Demiray, 'Natural law theory, legal positivism, and the normativity of law' (2015) 20 *The European Legacy* 807, 813-14.
[38] David Dyzenhaus, 'The Genealogy of Legal positivism' (2004) 24 *Oxford Journal of Legal Studies* 39, 54.
[39] Kelsen, *General Theory of Law and State* (Russell & Russell, 1961) 161.
[40] Joseph Raz, 'The institutional nature of law' (1975) 38 *The Modern Law Review* 489, 502; R Poscher, 'The hand of Midas: when concepts turn legal, or deflating the Hart-Dworkin debate' in Jape Hage and Dietmar von der Pfordten, *Concepts in law* (Springer, 2009) 103-04.

'interpretive sources', namely all the relevant interpretive materials".[41] According to Raz the sources of a law 'are never a single act (of legislation etc.) alone, but a whole range of facts of a variety of kinds' including judicial notice of political facts.[42] Take Hart in the *Concept of Law*:

> The law of every modern state shows at a thousand points the influence of both the accepted social morality and wider moral ideals…In some systems, as in the United States, the ultimate criteria of legal validity explicitly incorporate principles of justice or substantive moral values; in other systems, as in England, where there are no formal restrictions on the competence of the supreme legislature, its legislation may yet no less scrupulously conform to justice or morality.[43]

Hart explains that 'statutes may be a mere legal shell and demand by their express terms to be filled out with the aid of moral principles; the range of enforceable contracts may be limited by reference to conceptions of morality and fairness; liability for both civil and criminal wrongs may be adjusted to prevailing views of moral responsibility'.[44] In summary, inclusive positivism is a compromise that lies in between Dworkin's anti-positivism and the exclusive positivism of theorists like Raz and Shapiro.[45] An inclusive scholar like Coleman agrees that law can incorporate morality, but does not go as far as Dworkin in rejecting other positivist tenets.[46]

How does the preceding, admittedly superficial, overview of legal positivism relate to secession? Quite simply, because it builds an appreciation of how principles – moral, political, economic, sociological – could by inclusive accounts be part of the law. Not extra-legal, but part of the law. Such an appreciation is important because, as the next part argues, deriving answers about the constitutionality of secession is not straightforward and there is uncertainty about any findings.

III. SECESSION AS A HARD CASE

Inclusive positivism, or to be precise a methodology that supports its outlook, is useful when tackling a question like the constitutionality of secession by Western Australia because such a concern is fundamentally unsettled. Just because there is no rule that provides a simple yes or no answer, however, does not mean that one must reach entirely outside the law. As this thesis will show, there is constitutional text that indirectly bears upon secession but its application requires

[41] Joseph Raz, *Practical Reason and Norms* (Princeton University Press, 1990) 48, 152-54.
[42] Ibid.
[43] Hart, *The Concept of Law* (Oxford University Press, 1994) 203-04.
[44] Ibid 204.
[45] Robin Kar, 'Hart's response to exclusive legal positivism' (2007) 95 *The Georgetown Law Journal* 393, 400.
[46] Jules Coleman, *The practice of principle: In defense of a pragmatist approach to legal theory* (Oxford University Press, 2001) 107-109.

weighing principles and rationalising precedent. Yet one could say the same about many other legal problems that judges deal with when disposing of the cases that come before them.

First, constitutional norms are fluid and it is debatable whether Australia has a constitution that restrains government.[47] It is true that there is a document called the Constitution and that WA also has a constitution, but these do not always correlate with what happens in practice. The text often means *less* than what it says. Guarantees like the right to trial by jury or the freedom of interstate trade, commerce and intercourse have been read down to have minimal substantive content.[48] And the text sometimes means *more* than what it says. Judges speak of principles like freedom of political communication, popular sovereignty and responsible government that are not spelled out in the text.[49] During the 1975 crisis, the Governor-General dismissed the Prime Minister in a manner that suggests that text trumps convention, but this is not guaranteed.[50]

Second, just as political scientists speak of anarchy in foreign relations between countries there is a level of unpredictability in the relationship between states and between a state vis-à-vis the federal government.[51] Australia's system is monopolistic in the sense that state and federal governments claim exclusive power over binding court decisions and the lawful use of force. However, Australia is also polycentric with respect to law and its interpretation because there is competition between the states due to varying laws on subject-matter within the authority of state governments.[52] Each state also, in theory at least, has residual power that is untouchable by the Commonwealth.[53] This need for voluntary cooperation in dealings between governments is a

[47] It is a 'constitutionalism built on sand': Kenneth Mayer and Howard Schweber, 'Does Australia have a constitution? Part I: powers – a constitution without constitutionalism' (2008) 25 *Pacific Basin Law Journal* 228, 260-63.

[48] Augusto Zimmermann, "How the High Court redefined 'absolutely'", *Quadrant Online* (4 March 2021) <https://quadrant.org.au/opinion/qed/2021/03/how-the-high-court-redefined-absolutely>; Clifford Pannam, 'Trial by jury and section 80 of the Australian Constitution' (1968) 6 *Sydney Law Review* 1, 24.

[49] Dan Meagher, "What is 'political communication'? The rationale and scope of the implied freedom of political communication" (2004) 28 *Melbourne University Law Review* 438-70; Benjamin Saunders and Simon Kennedy, "Popular sovereignty, 'the people', and the Australian Constitution: a historical reassessment" (2019) 30 *Public Law Review* 36-50.

[50] Mayer and Schweber, 'Does Australia have a constitution?' (n 159) 259-60.

[51] Alfred Cuzan, 'Do we ever really get out of anarchy?' (1979) 3 *Journal of Libertarian Studies* 151, 153. See Joseph Blau, 'Government or anarchy? In the debates on the Constitution' (1987) 23 *Transactions of the Charles S. Peirce Society* 507, 507; Colin Ward, 'The anarchist sociology of federalism', *Freedom* (1992) <http://www.theanarchistlibrary.org>; Helen Milner, 'The assumption of anarchy in international relations theory: a critique' (1991) 17 *Review of International Studies* 67, 67.

[52] Tom Bell, 'What is polycentric law?', *Foundation for Economic Education* (26 February 2014) <https://fee.org/articles/what-is-polycentric-law>

[53] Michael Stokes, 'The role of negative implications in the interpretation of Commonwealth legislative powers' (2015) 39 *Melbourne University Law Review* 175, 220-21.

characteristic more common to federal than unitary arrangements. It also means that citizens can attempt to use their state as a shield against another state within the overall system.[54]

Both these factors give rise to ambiguity with respect to secession. Ambiguity has a relatively precise meaning. As explained by Spigelman CJ in *Repatriation Commission v Vietnam Veterans' Association of Australia* it includes uncertainty surrounding the 'lexical or verbal', 'syntactic or grammatical' or 'circumstances in which the intention of the legislature is for whatever reason, doubtful'.[55] The text could be ambiguous if there are several reasonable interpretations available. This thesis offers examples of alternative interpretations. Although Craven suggests that the Covering Clauses unambiguously quash the possibility of secession, in Chapter 5, I note an interpretation of cls 3 and 4 that allows for secession. In that chapter, I also submit that covering cl. 6 unambiguously permits secession by any original state of the union. And in Chapter 6, I raise interpretations of s 51 that do not permit coercion against a state.

In contrast to the ambiguity in Australia, frankness is exemplified by art. 23 of the *Hong Kong Constitution*, which permits the central government to pass laws prohibiting secession:

> The Hong Kong Special Administrative Region shall enact laws on its own to prohibit any act of treason, secession, sedition, subversion against the Central People's Government, or theft of state secrets, to prohibit foreign political organizations or bodies from conducting political activities in the Region, and to prohibit political organizations or bodies of the Region from establishing ties with foreign political organizations or bodies.[56]

And the *Constitution of Liechtenstein* allows for secession using absolute words:

> Individual communes have the right to secede from the State. A decision to initiate the secession procedure shall be taken by a majority of the citizens residing there who are entitled to vote. Secession shall be regulated by a law or, as the case may be, a treaty. In the latter event, a second ballot shall be held in the commune after the negotiations have been completed.[57]

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[54] The pedigree of this strategy can be confirmed from the Kentucky and Virginia Resolutions drafted by James Madison and Thomas Jefferson, respectively, that was passed by the Kentucky and Virginia legislatures in 1798. The resolutions adopt a contractual theory of interpretation arguing that the state governments have a duty to interpose to protect their citizens against federal depredations by nullifying laws they deem unconstitutional. See Thomas Woods, *Nullification: how to resist federal tyranny in the 21st century* (Regnery Publishing, 2010).
[55] *Repatriation Commission v Vietnam Veterans' Association of Australia* (2000) 48 NSWLR 548, 577-78.
[56] *Basic Law of the Hong Kong Special Administrative Region of the People's Republic of China* art 23.
[57] *Constitution of Liechtenstein 1921* art 4.

By comparison, there is no specific provision dealing with secession in the Constitution or WA Constitution. All we can do is draw inferences, thereby opening space for the constitutional framework to bear more than one interpretation. For these reasons, and due to the political implications, secession fits within the definition of what Dworkin describes as a 'hard'[58] case:

> When lawyers argue cases, or advise clients, or draft laws to meet specific social goals, they face problems that are technical, in the sense that there is general agreement within the profession as to what sort of argument or evidence is relevant. But sometimes lawyers must deal with problems that are not technical in this sense, and there is no general agreement on how to proceed.[59]

In assessing WA's purported right to secede, an interpreter must weigh the imperial connection, the federal parliament's powers, the state parliament's powers and the role of popular will. Yet there is no law that advises courts how to precisely undertake this balancing act: the Constitution, the WA Constitution, associated laws and precedent provide incomplete guidance.[60] The content of legal sources invites incorporation of external theories and facts. For example, the Preamble says that Australia is a 'Federal' Commonwealth but an attempt to define 'Federal' using legal sources alone would be necessarily incomplete. Likewise, courts routinely acknowledge non-legal facts by incorporating external conventions of language: this is why it is extremely unlikely that a court would, for instance, define the colour 'white' as meaning 'black'.

More generally, Justice Kirby notes that 'there is no inevitable and objectively right decision in much judicial work, particularly in the highest courts' and that 'the growing realization of the importance of judicial policy have tended to cast the judges adrift from their calm harbour of strict and complete legalism'.[61] Methodologies that contrast law with other political institutions ignore an older tradition led by John Locke, Jean-Jacques Rousseau and Immanuel Kant who instead incorporate legal institutions within one understanding of the general civil condition.[62]

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[58] Allan Hutchinson and John Wakefield, "A hard look at 'hard cases': the nightmare of a noble dreamer" (1982) 2 *Oxford Journal of Legal Studies* 86, 91.

[59] Dworkin, *Taking rights seriously* (n 19) 1.

[60] In response to indeterminacy, judges have invented utilitarian tests like 'structured proportionality' that do not appear anywhere in the Constitution's text: *Palmer v Western Australia* (2021) 95 ALJR 229, 243. See Chapter 8.

[61] Michael Kirby, *The Judges*, Boyer Lectures 1983 (Australian Broadcasting Corporation) 38-39. Kirby's statement can be contrasted to Margaret Davies, 'Exclusion and the identity of law' (2005) 5 *Macquarie Law Journal* 5, 6: "'law' is premised on the idea of difference from some excluded other, such as morality or politics".

[62] See Pavlos Eleftheriadis, 'Hart on Sovereignty' in Luis Duarte d'Almedia, James Edwards and Andrea Dolcetti (eds) *Reading HLA Hart's 'The Concept of Law'* (Bloomsbury Publishing, 2013).

Critical legal theorists, originalists, realists and sociologists adopt an external perspective that incorporates insights from economics, history, political and moral philosophy and empirical sociological research where incorporation of such content is common practice among officials.[63]

IV. METHOD AND VALUES

Recall that positivism, being a general theory about the nature of law, offers no guidance about interpretation in specific cases. Deciding the constitutionality of a hypothetical secession in the Australian constitutional framework considered here therefore requires more than what positivism can offer. This does not mean that inclusive positivist insights must be entirely discounted. Rather, a methodology of interpretation that broadly supports inclusivity can be chosen. Along these lines, this section explains the functionalist method chosen by this thesis.

The starting point of this thesis' approach to constitutional analysis is the traditional forms of text, history and structure. Beyond that, this thesis' method draws on functionalism, which is 'concerned with law's operative role in society' and its social and institutional ends, i.e. a purposive interpretation.[64] Functionalism lies somewhere between the extremes of pure formalism and pragmatism or policy-oriented legal reasoning.[65] Dixon submits that it is:

> a close relative of *realist* approaches to constitutional interpretation, which emphasise the role of individual judges' moral and political outlooks as an influence on constitutional interpretation, and often call for more open engagement by judges with questions of political morality. It is also related to various forms of pragmatic, policy-orientated approaches to constitutional interpretation, which invite judges to pay explicit attention to questions of policy and practical impact, or the practical consequences of judicial decisions, as part of the process of constitutional construction.[66]

The influence of realism is relevant insofar as it acknowledges 'the creative and policy role of judges' and that 'a constitutional account of the High Court's role that is credible cannot be

[63] David Fraser, 'What a long, strange trip it's been: deconstructing law from legal realism to critical legal studies' (1988) 5 *Australian Journal of Law and Society* 35, 37-38; Coleman, *The practice of principle: In defense of a pragmatist approach to legal theory* (n 41) 108.
[64] Samuel Mermin, 'Legal functionalism' (Conference Paper, World Congress on Philosophy of Law, 7 September 1973) 82.
[65] Jeffrey Goldsworthy, 'Functions, purposes and values in constitutional interpretation' in Rosalind Dixon (ed), *Australian Constitutional Values* (Bloomsbury Publishing, 2018) 43.
[66] Rosalind Dixon, 'Functionalism and Australian constitutional values' in Rosalind Dixon (ed), *Australian Constitutional Values* (Bloomsbury Publishing, 2018) 9.

strictly legal…but must also encompass the political'.[67] Courts routinely do this anyway: "[e]ven in the heyday of strict legalism judges clearly made choices which were policy driven and, sometimes quite dramatic ones, as a range of cases shows, from *R v Kirby*; *Ex parte Boilermakers' Society of Australia…*to *Parton v Milk Board (Vic)*".[68] As Garran has said, '[n]o rule of construction can ignore the truth that what is necessarily implied is as much part of the Constitution as that which is expressed; the only question is, whether the implication is necessary'.[69] To find out whether implications are necessary is about understanding political consequences. That thinking in terms of rules is counterproductive was pointed out by Dworkin, who recalls an insight from sociological jurisprudence that '[t]he very fact that men are unable to agree on what following a rule means… disqualifies that concept for science'.[70]

Functionalism helps interpreters look for text that supports constitutional values, rather than assuming that the provisions are technical 'black-letter' law bereft of political implications. The emphasis on values can be useful in directing attention to otherwise neglected provisions. For example, without an appreciation of the consensual foundations of the Australian Constitution, one can easily place undue emphasis on the large list of powers granted to the Commonwealth parliament and think of it as the political master of the states. Yet with the benefit of values one might ask questions like: why does the Commonwealth parliament exist in the first place? Did the states create the Commonwealth, or was it the other way around? Such questions are prompted by the Constitution, but without functionalism one may not look for them.

A. The role of values

Faced with the task of understanding secession's constitutionality, the choice to interpret words in a constitution or in precedent will invariably be influenced by principles and values. And these in turn rest upon philosophical or policy rationales about why these values are or are not a good thing. Different people choose one or the other interpretation based on implicit beliefs about substantive merits. As Green explains, 'all descriptions express choices about what is salient or significant, and these in turn cannot be understood without reference to values'.[71]

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[67] Galligan, "Realistic 'realism' and the High Court's political role" (1989) 18 *Federal Law Review* 42, 49.
[68] Cheryl Saunders, 'Interpreting the Constitution' (2004) 15 *Public Law Review* 289, 291.
[69] Robert Garran, 'The development of the Australian Constitution' (1924) 40 *Law Quarterly* Review 202, 216.
[70] Dworkin, *Taking Rights Seriously* (n 19) 5.
[71] Leslie Green, *Legal Positivism* (3 January 2003) The Stanford Encyclopedia of Philosophy <https://plato.stanford.edu/archives/spr2018/entries/legal-positivism>

One important value that has arisen in Australian constitutional discourse is that of subsidiarity.[72] Subsidiarity in a federal union means that the central government should be a federal and not a *national* government. It is federal because it should only perform those functions that cannot be performed at the local level and it should enable rather than suppress the state governments.[73] Another aspect of subsidiarity, at least as conceived of by the liberal philosopher Altusius, is non-interference in local governance. In this paradigm, '[n]o single state institution monopolizes political authority'.[74] As Kreptul explains, 'the government is pluralized, with sovereign power shared by multiple social units starting at the lowest level of authority, namely, the family'.[75] Moreover, '[f]amilies consent to become members of guilds and colleges. Guilds and colleges consent to forming cities and provinces, which consent to uniting in a universal commonwealth'.[76] For an Althusian committed to subsidiarity, secession is a lawful device to ensure that individuals exercise control over their destiny. Those holding such values are likely to say that the Constitution allocates powers to the Commonwealth that are of national importance, with the residuary – including the right to leave – left to the states.

The second constitutional value aligns better with the statism of Hobbes and Austin.[77] Its core values are opposed to secession. Under the Hobbesian paradigm, consent is only given at the initial acceptance of a social contract. After this preliminary agreeance, subjugation to the government is permanent and irrevocable.[78] Hobbesianism rules out the possibility of withdrawal from the ties created by the Constitution since consent need not be continuous. O'Connor J

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[72] Benjamen Gussen, 'Australian Constitutionalism between subsidiarity and federalism' (2016) 42 *Monash University Law Review* 383, 385. Gussen argues that 'in Australia we see both types of subsidiarity: methodological individualism through referenda and methodological collectivism through federalism'.

[73] The *Federal Constitution of the Swiss Confederation* art 5a says 'The principle of subsidiarity must be observed in the allocation and performance of state tasks'. Art 6 notes: '[a]ll individuals shall take responsibility for themselves and shall, according to their abilities, contribute to achieving the tasks of the state and society'. Art 3 states that '[t]he Cantons are sovereign except to the extent that their sovereignty is limited by the Federal Constitution. They exercise all rights that are not vested in the Confederation'. Likewise, the 10th amendment to the *US Constitution* says: 'powers not delegated to the [central government] by the Constitution, nor prohibited by it to the States, are reserved to the States respectively, or to the people'.

[74] Andrei Kreptul, 'The constitutional right of secession in political theory and history' (2003) 17 *Journal of Libertarian Studies* 39, 42.

[75] Ibid 43.

[76] Ibid.

[77] Statism is a normative preference in favour of the right to rule by coercive government. It can be traced to the theory of divine rule. Although divine rule has been discarded, it was replaced by parliamentary sovereignty after the Glorious Revolution of 1688. Statism ensures that the will of the Crown is not equated with the will of its constituents for the purpose of interpreting constitutions. As Brennan J writes '[t]he necessity to preserve the institutions of government and their ability to function is an unspoken premise of all constitutional interpretation…for it is the necessity to preserve the Constitution itself': *Street v Queensland Bar Association* (1989) 168 CLR 461, 513. See also Rothbard, *Anatomy of the State* (Ludwig von Mises Institute, 2009) 30.

[78] Ibid 44. See also Thomas Hobbes, *Leviathan* (Clarendon Press, 1965) 131-32.

appears to describe the Constitution in this manner when he says in *Tasmania v Commonwealth* that it was 'the compact by which the people of the several colonies of Australia agreed to enter into an indissoluble union'.[79] Similarly, the UK's Joint Committee tasked with receiving WA's petition to secede in 1935 prioritised the federal government over the states, thereby elevating the Commonwealth to the status of an unchallengeable sovereign.[80]

It is statism of the Hobbesian and Austinian kind that has been prominent in the Australian material. This normative belief is implicit in the argument by Craven, McGrath and Dillon that an inherent right of secession does not exist because the colonies never enjoyed absolute sovereignty due to subsisting under the British Crown.[81] Another variant of this argument concedes that the Australian states are now independent from the UK, but like Craven then places the Commonwealth alone, or the Commonwealth and all the states combined, as the authority from which permission must be sought.[82] The statist value of deference to parliamentary will has been deployed to favour the Commonwealth parliament at the expense of a state parliament even though both are named in the Constitution and appear to enjoy equal status and legitimacy. For example, without elaborating, Craven determines that secession by a state is inconsistent with the Commonwealth parliament's free exercise of its powers in s 51.

Whilst Kirby J in *Grainpool v Commonwealth* put forward the statist principle that 'ambiguities must be resolved in favour of a broad interpretation, given that the words appear in a Constitution'[83] when the dispute involved the Commonwealth versus a private party, he then mounted a defence of state rights in *NSW v Commonwealth* ('Work Choices') when the dispute was between governments.[84] Such inconsistency among judges indicates that statism does not say whether the Commonwealth should prevail simply because the former's powers are broad.

Althusian values of comity are held dear by the present author and are believed to be the best fit for Australia's constitutional arrangements. In my opinion, it is not inevitable that a

[79] *Tasmania v Commonwealth* (1904) 1 CLR 329, 360 (O'Connor J).
[80] Joint Committee of the House of Lords and the House of Commons, Parliament of the United Kingdom, *Petition of the state of Western Australia together with the proceedings of the committee and minutes of speeches delivered by counsel* (1935) 92.
[81] Craven, *Secession: The Ultimate States Right* (Melbourne University Press, 1986) 81.
[82] Ibid 190; Anne Twomey, 'The States, the Commonwealth and the Crown – The Battle for Sovereignty' (Research Paper No 48, Parliament of Australia, January 2008): 'The power to amend or repeal those fundamental statutes that form our Constitution, the *Commonwealth of Australia Constitution Act 1900,* the *Statute of Westminster 1931,* and the *Australia Acts 1986* was transferred by s 15 of the *Australia Act 1986* (UK) not to the Commonwealth but collectively to the Commonwealth and all the state parliaments'.
[83] *Grainpool of Western Australia v Commonwealth* (2000) 202 CLR 479, 526 (Kirby J).
[84] *NSW v Commonwealth* (2006) 229 CLR 1, 222 (Kirby J).

Commonwealth based upon state-level referenda binds in the present day, since the people were never asked to approve an indissoluble Commonwealth Constitution forever at the outset.[85] The mistake that the Hobbesians make is to limit the content of law to vertical structures where law is defined almost solely in terms of 'a neatly defined hierarchy of authority with supreme legislative power at the top that is itself free from legal restraints'.[86] Barnett shows that this model cannot be sound because it fails 'to see that the law-maker is constrained by his own rules imposed from below by the justified expectations of the citizenry'.[87] In liberal democracies 'even a State legal system is, to some extent, a two-way system'.[88] The assertion that secession is unconstitutional implies that even if WA decided to secede after a unanimous vote by its residents, the voices of its one million seven hundred thousand enrolled voters would count for nothing. Yet no formal source provides a definitive standard by which such hubris against the voices of nearly two million citizens can be assessed. While evaluating such a submission, this thesis mounts an argument for Althusian values being embedded in federal arrangements.

B. *Reference re Secession of Quebec*

The role of values in shaping interpretation can be seen from *Reference re Secession of Quebec* where the Government of Canada requested an advisory opinion from the Canadian Supreme Court about the possibility of unilateral secession by the province of Quebec.[89] In its unanimous reasons, the Court applied the principles of 'federalism, democracy, constitutionalism and the rule of law, and respect for minorities' to argue that secession is not lawful in Canada except through an amendment to the Canadian Constitution.[90] However, the Court did say that if Quebec held a referendum on secession with a clear question and won a clear majority, the rest of the country is constitutionally obliged to negotiate the terms of secession. But the outcome of such a negotiation is to be resolved politically rather than being judicially directed.

After reviewing the relevant history, the Court begins the core of its reasons under the heading 'Analysis of the Constitutional Principles'. The judges emphasise that the 'foundational' principles 'inform and sustain the constitutional text: they are the vital unstated assumptions

[85] See the Preamble to the Constitution which refers to 'one indissoluble Federal Commonwealth' rather than 'one dissoluble Federal Commonwealth for eternity'. Similarly, none of the resolutions of the 13 American states that ratified the US Constitution did so on a forever basis; indeed, Virginia, Rhode Island and New York reserved the right to leave the American union: *Documentary History of the Constitution* (1894) vol 2, 145, 146, 160, 377-385.
[86] Lon Fuller, *The Morality of Law* (Yale University Press, 1969) 124.
[87] Randy Barnett, 'Toward a theory of legal naturalism' (1978) 2 *Journal of Libertarian Studies* 100.
[88] Ibid.
[89] *Reference Re Secession of Quebec* [1998] 2 SCR 217 ('*Reference re Quebec*').
[90] *Reference re Quebec* [1998] 2 SCR 217 [32].

upon which the text is based'.[91] These underlying principles, they say, can give rise to substantive legal obligations with a powerful force that is binding upon courts and the legislature. The Court then balances these principles against each other to reach the opinion that although Quebec cannot secede unilaterally, the other provinces must negotiate in good faith.[92]

From a methodological perspective, it is noteworthy that *Reference Re Quebec* affirms that constitutional values assist in resolving issues where the answer is unsettled. The Court goes into a substantial amount of detail to explain how politically informed federalism, democracy, the rule of law and protection of minorities interrelate to the constitutionality of secession. The Court's reasons illustrate the functionalist and realist interpretive theories that shape this thesis.

V. CONCLUSION

To summarise, evaluating the constitutionality of unilateral secession by an Australian state is a hard case. Existing law leaves room for interpretation and no precedent directly addresses the issue considering recent legal and political changes. Even so, this does not mean that the law has run out. An analysis suitable to a law department is possible if it is acknowledged that law and politics influence each other.[93] Along these lines, to the extent it is an interpretive option available from the text, it is arguably better to think of the Constitution and WA Constitution as barebones structures entrenching political participation and an ongoing conversation rather than as rigid documents that can never be read differently based on events.[94]

An implication of this chapter is that when it comes to secession, the expressed will of the people in WA cannot be deemed irrelevant without explaining why secessionist values are wrong. Whether or not the UK is the current sovereign of Australia, it needs to be shown from where the Commonwealth and other states derive a purported right to rule over WA when none of the parties enjoyed absolute sovereignty in the first place due to originally being under the British Crown. It is a leap of logic from the existence of broad federal government powers to suggesting that secession is precluded because there are a series of choices that need to be explained before reaching such a finding. These choices will be influenced by one's assessment of whether majorities ought to dominate a nation or whether decentralisation should be preferred.

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[91] *Reference re Quebec* [1998] 2 SCR 217 [49].
[92] Peter Radan, 'Constitutional Law and Secession: The Case of Quebec' (1998) 2 *Macquarie Law Journal* 69, 70.
[93] Miro Cerar, 'The relationship between law and politics' (2009) 15 *Annual Survey of International & Comparative Law* 19, 22.
[94] Jeremy Waldron, 'Participation: the right of rights' (1998) 98 *Proceedings of the Aristotelian Society* 307, 337.

CHAPTER 2: HISTORICAL FOUNDATIONS

> *[T]he intention of an instrument is to be gathered from the obvious facts of history—if we at all go outside the four corners of the instrument itself and the policy logically to be deduced from its express words.*
>
> Barton J[1]

I. INTRODUCTION

This chapter aims to cast light on the history behind the creation of the *Commonwealth of Australia Constitution Act* and its relationship to secession. The Constitution left behind an array of primary sources: the constitutional convention debates where the document was drafted during the 1890s, public records of ratification and much more. Occasionally, exclusive positivists have contended that the ostensible literalism expounded in the *Engineers Case* prioritises the text above secondary interpretive aids like history and that the past should be used cautiously lest it usurp the Constitution.[2] That decision of the High Court held that the Constitution, being a British statute, should be interpreted according to the principles of statutory interpretation which prioritise the natural meaning of the words and give them their widest possible meaning.[3] Swayed by this sentiment, the next 68 years saw many justices retreat from historical inquiry. A striking feature of the post-*Engineers* period was the almost complete lack of interest in the convention debates; it was only in *Cole v Whitfield* that the Court relied for the first time on the debates as a significant step in its reasoning.[4]

Use of history in interpretation is generally tied to originalism. Originalism is a 'common belief…that the original intended meaning behind a constitutional document is an important

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[1] *Tasmania v Commonwealth* (1904) 1 CLR 329, 350.

[2] *Amalgamated Society of Engineers v Adelaide Steamship Co Ltd* (1920) 28 CLR 129 ('Engineers Case'). Giving priority to text is explained in *Singh v Commonwealth* (2004) 222 CLR 322, 347-348 (McHugh J) ('Singh). McHugh J writes that 'the basic premise of a textualist approach is that the text has ultimate primacy, although history and extrinsic materials may be relevant to explain the meaning of the text'. Elsewhere, in *Pape v Federal Commissioner of Taxation* 3 (2009) 238 CLR 1, 148 Heydon J tries to limit use of history by saying that '[r]eference to history is not permitted for the purpose of substituting for the meaning of the words in the Constitution the scope and effect which the framers subjectively intended the Constitution to have'. Cf. McHugh J in *Eastman v R* (2000) 203 CLR 1, 47 where it is said that *Engineers* does not rule out use of history.

[3] Dale Atkinson, 'Re-engineering the federal balance' (2018) 2 *Western Australian Student Law Review* 4, 5. Contrary to the way in which *Engineers* is commonly mischaracterised, Atkinson shows that 'a strict application of literalism would likely dictate a narrow reading of Commonwealth legislative competency'.

[4] *Cole v Whitfield* (1988) 165 CLR 360, 385 ('Cole'). See Stephen Gageler, 'The section 92 revolution' in James Stellios (ed), *Encounters with constitutional interpretation and legal education* (Federation Press, 2018) 30.

consideration…when interpreting the meaning of the document itself'.[5] It is basically the notion that a constitution has a fixed and knowable intended meaning. Lael Weis claims that it is a 'common misapprehension' that 'originalism is a distinctively American theory of constitutional interpretation' and in fact 'originalism has a more mainstream place in Australia than it does in the United States'.[6] Similarly, Dahdal observes that:

> Through American eyes, the *Engineers Case* and *Cole v Whitfield* were not sharp turning points in the interpretive approach of the High Court, but rather movements or expressions of varying forms of originalism. This conclusion supports the idea that history has always been a significant part of the interpretive approach adopted by the High Court, although at different times deference to history has manifest itself in different ways.[7]

The aims of this chapter are therefore twofold. First, to discover whether and how historical material can be used to shape outcomes in an Australian constitutional context. And second, to ascertain what history reveals about the constitutionality of unilateral secession by Western Australia. Part II shows how history has typically been utilised in constitutional interpretation and addresses the appropriateness of extrinsic sources being brought to bear on cases. Part III provides an overview of key history that informs analysis of secession, including sources that partially reveal the framers' intentions and sentiment among the ratifying public. Part IV proceeds to discuss how these social facts relate to the constitutionality of secession and evaluates their consistency with theoretical presumptions like subsidiarity and unitary statism.[8]

Once the Commonwealth Constitution was enacted by the UK parliament in 1900, the expectations of participants of the conventions became practically irrelevant, since interpretation was no longer in their control and passed to future generations. To the extent that past intentions are deemed influential however, this chapter's argument is that this history poses no obstacle to unilateral secession. Although the evidence undoubtedly indicates a desire to discourage secession, in my view it falls short of evincing an intent to institute a prohibition on the remedy.

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[5] Andrew Dahdal, 'The transparent use of history in Australian constitutional interpretation: the banking power as a case study' (PhD thesis, University of New South Wales, 2013) 26.

[6] Lael Weis, 'Originalism in Australia' (2016) 28 *Proceedings of the Samuel Griffith Society* 46, 47.

[7] Andrew Dahdal, 'The transparent use of history in Australian constitutional interpretation: the banking power as a case study' (n 5) 27.

[8] There is, admittedly, a problem of subjectivity when researching history and drawing conclusions from it. This is because there is often conflict between the principles that underlie historical statements (such as the tension between responsible government at the national level and responsible government at the state level). Furthermore, it is sometimes impossible to generalise about the beliefs of any group due to the diversity of opinion, particularly among the ratifiers to the Constitution. For a critique of originalism along these lines see Whitley Kaufman, 'The Truth about Originalism' (2014) *The Pluralist* 39-54.

II. HISTORY IN LEGAL REASONING

Previous scholarship about the constitutionality of secession alleges a distinction between history and law. In doing so, history is treated as being something outside the law.[9] Craven's work is an example. His study surveys the circumstances leading up to Federation and finds that 'the people of the Australian colonies were factually required to agree to the provisions of the Constitution Act before that Act would apply to them'.[10] But Craven then asserts 'this agreement did not form the legal basis of the application of the Act' and that '[o]n no analysis can it be said that the Constitution Act is legally, rather than as a matter of history, a federal compact'.[11] What is unusual about his delineation between history and law is that Craven also simultaneously concedes that the voluntary nature of the agreement is 'plainly apparent upon the face of the Constitution Act', implying that the constitutional text directs the nature of the agreement and so consent is incorporated as a part of the law rather than merely an historical curiosity.[12]

The discussion in Chapter 1 undermines a strict demarcation between history and law. In Chapter 1, I note that what matters is whether there are authoritative social sources permitting the insertion of a particular norm into law. In this regard, there is authority from some judges which hint that extrinsic perceptions are a component of law. For instance, Callinan J writes in *Singh v Commonwealth* that '[t]he court is not only… entitled, but *also obliged,* to have regard to the Convention Debates when, as is often the case, recourse to them is relevant and informative'.[13]

A. The authority for originalism

This section explores the authority for treating history as a tool of legal reasoning. An important decision about the application of the role of history in constitutional interpretation was handed down in 1907. In *Baxter v Commissioner of Taxation* ('Baxter'), a majority agreed that when reading a Constitution it is appropriate to 'discover the object of the legislature in making the enactment', since 'interpreting a Constitution merely by the aid of a dictionary, might arrive at a very different conclusion as to its meaning from that which a person familiar with history would reach'.[14] An example of the sort of history that is pertinent can be deduced from the Court's

[9] Gregory Craven, *Secession: The Ultimate States Right* (Melbourne University Press, 1986) 76.
[10] Ibid 75.
[11] Ibid 75, 77.
[12] Ibid 75.
[13] *Singh v Commonwealth* (2004) 222 CLR 322, 423-5 ('Singh') (emphasis added).
[14] *Baxter v Commissioner of Taxation (NSW)* (1907) 4 CLR 1087, 1106 (Griffith CJ, Barton and

comment that the founding fathers were aware of political science and 'might assuredly be expected to consider the constitution and history of other federations, old and new'.[15]

The *Engineers Case* typified textual originalism or the so-called 'common law' method whereby the text of the Constitution was seen as the most authentic expression of the framers' intent.[16] Criticism in the majority judgement of earlier decisions was directed at the political implications that were derived and not at history per se, however after the decision the Court 'did not recognise and rely upon history with the same liberality evident in the pre-*Engineers* period'.[17]

At the peak of the decisive turn toward legalism, the Court in the *Boilermakers Case* flipped on its head the idea in *Baxter* that relying solely upon a dictionary divorced from historical context is insufficient when interpreting a constitution. Instead, Dixon CJ, McTiernan, Fullagar and Kitto JJ propose that even if one knew nothing of the separation of powers or the impact of American constitutional history upon the Australian Constitution, one 'would still feel the strength of the logical inferences from Chaps I, II and III and the form and contents of ss 1, 61 and 71'.[18] Nevertheless, even during the heyday of professed legalism, extrinsic sources continued to make minor appearances throughout the High Court's curial interventions.[19]

The pendulum swung back to the strong use of history after 1988. In *Cole*, a unanimous High Court agreed that the true meaning of 'absolutely free' in s 92 of the Constitution is 'discriminatory barriers of a protectionist kind' – thereby leaving open the possibility of 'reasonable' restrictions on interstate trade, commerce and intercourse.[20] The bench relied on the convention debates, comment by leading figures and government reports to dismiss the literal meaning of 'absolutely free' which suggests an absence of *any* restriction or hindrance. Rather, the Court inferred from history that the framers left the precise effect of the guarantee in s 92 as an unresolved task for the future, due to 'political expediency'.[21] Hence, it was deemed open to reject a literal reading. Furthermore, the Court argued that a historically informed construction

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O'Connor JJ).

[15] *Baxter v Commissoners of Taxation* (1907) 4 CLR 1087, 1109.

[16] Dahdal (n 5) 61.

[17] Ibid 76.

[18] *R v Kirby; Ex parte Boilermakers' Society of Australia* (1956) 94 CLR 254, 275.

[19] See, eg, *Deputy Federal Commissioner of Taxation (NSW) v Moran Pty Ltd* (1939) 61 CLR 735, 793-794 (Evatt J); *Australian Communist Party v. The Commonwealth* (1951) 83 CLR 1, 147 (Dixon J) ('Communist Party case'); *Victoria v Commonwealth* (1971) 122 CLR 353, 396-7 (Windeyer J) *(*'Payroll Tax case'*)*.

[20] *Cole v Whitfield* (1988) 165 CLR 360, 390.

[21] Ibid 394.

reveals no desire by the framers to encourage 'anarchy'[22] and so the safeguard in s 92 should only render invalid protectionist burdens relating to freedom of trade. In this way, norms drawn from history lying outside of formal legal sources appear to motivate the decision.

In *Eastman v R*, McHugh J says that the *Engineers Case* did nothing to create a general exclusionary rule precluding consideration of history and circumstances.[23] Moreover, as Chapter 8 explores in detail, the s 92 cases that investigate how absolute the words 'absolutely free' really are also illustrate the point that literalism is never consistently applied by the judiciary anyway.[24] According to Dahdal, the Court's present willingness to entertain history appears to derive from (1) common law construction where 'all the words must be construed with reference to the whole enactment, and to the facts surrounding the framing of the Constitution'[25] to find the 'object' of the legislature and (2) less frequently, from an expansive practice where history transcends surgical limits and forms the core of a decision.[26]

The reality that history has regularly been cited by judges suggests that we should not entirely dismiss its legitimacy for interpretive purposes. This is particularly true when faced with a problem like secession that lies at the intersection of law and politics. In such a situation, history provides further grounds for the veracity of textual implications. Balkin's account of constitutions as being comprised of silences is apt since there is no language directly addressing secession and so a degree of uncertainty. Balkin explains that constitutional drafters:

> leave things silent for any number of reasons: because certain matters go without saying, because they are implicit in the structure of the constitutional system, because the adopters could not decide among themselves how to resolve a particular issue and therefore handed the problem off to the future, or because the adopters simply wanted to leave space for later generations to design and build institutions appropriate to the situations they would face.[27]

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[22] Ibid 393.
[23] *Eastman v R* (2000) 203 CLR 1, 47 (McHugh J); Andrew Dahdal, 'The transparent use of history in Australian constitutional interpretation: the banking power as a case study' (n 5) 74.
[24] Augusto Zimmermann, "How the High Court redefined 'absolutely'", *Quadrant Online* (4 March 2021) <https://quadrant.org.au/opinion/qed/2021/03/how-the-high-court-redefined-absolutely/>
[25] *Tasmania v Commonwealth* (1904) 1 CLR 329, 356.
[26] Dahdal (n 5) 65. See also *Singh v Commonwealth* (2004) 222 CLR 322, 328-42. (Gleeson CJ). In his judgement, Gleeson CJ accords significant importance to history in a manner that elevates it to the core of his reasoning. A wider approach that goes beyond legalism is also hinted at by Callinan J: at 424. Callinan J stresses that history is a source of continuing truth, because 'in practice linguistic changes occurs very slowly, particularly in legal phraseology' and the 'fundamental ideas, philosophies, principles and legal concepts' that underlie the Constitution can only be changed by a formal amendment approved by the people at a referendum pursuant to s 128.
[27] Jack Balkin, 'Framework originalism and the living constitution' (2009) 103 *Northwestern University Law Review* 549, 553-54.

Hence, this chapter will proceed on the assumption that history is a component of the law.

B. An artform, not a science

While Kenny confirms that 'interpretation in the historical mode has become a well-accepted style of constitutional interpretation',[28] the High Court has not unanimously committed to a step-by-step guide. Consequently, the mechanism by which history shapes legal claims remains an art rather than an exact science.[29] This is because there is no exposition explaining how to decide who or what is a reliable source and how to reconcile competing interpretations of the same facts. Thus, utilising history does not lead to identical outcomes because of the varieties of originalism and diversity of uses to which data can be put. Although judges say that they are objectively ascertaining original intent, none explain what they are doing with mathematical precision or elaborate upon untested premises.

It can be seen that there are a range of ways in which one can seek out intended meaning, including searching for: 1) the original intention of the framers of the document; 2) the original intention of the ratifiers of the document; or, 3) the original public meaning that the words or phrases had at the time the document was drafted or adopted. Weis notes that among mainstream originalists who hold that a written constitution must be interpreted considering the original understanding of the words, there are three opinions on method:

- *Textual originalists* are committed to the view that a written law is nothing more than its text, including presumptions and implications that follow from text and structure;
- *Anti-intentionalists* are concerned with the objective public meaning of the text at the time of its enactment, and do not inquire about subjective intentions/expectations;
- *Semantic originalists* commit to the belief that the language used in a written law means what it meant at enactment; as such, they reject the idea that constitutional provisions can evolve in meaning (for example, due to shifts in moral values).[30]

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[28] Susan Kenny, 'The High Court of Australia and modes of constitutional interpretation' (2007) 10 *Federal Judicial Scholarship* < http://www5.austlii.edu.au/au/journals/FedJSchol/2007/10.html>.

[29] In addition, the doctrine of *stare decisis* does not bind the High Court. Hence, there is uncertainty about which direction the court will take at any given moment, especially because historical interpretation rests upon political and economic assumptions. While it is true that the court has usually adopted assumptions in favour of centralisation, this could change: Matthew Harding, 'The High Court and the Doctrine of Precedent', *Opinions on High* (18 July 2013) <https://blogs.unimelb.edu.au/opinionsonhigh/2013/07/18/harding-precedent/>.

[30] Lael Weis, 'What comparativism tells us about originalism' (2013) 11 *International Journal of Constitutional Law* 842, 846.

Whatever type of originalism one practices – whether textual, anti-intentionalist or semantic – there are a variety of uses to which sources can be put. As Dahdal points out:

> History can either be used to: (1) cynically justify consequentialism; or (2) stylistically enhance judicial opinions and provide credibility to other approaches; or (3) substantively enhance the deployment of other methods of constitutional interpretation; or (4) establish the true meaning of a constitutional provision without regard for alternative approaches and legal frameworks.[31]

In an article that has been deeply influential, Goldsworthy argues that the Court prefers 'moderate originalism'.[32] By this, Goldsworthy refers to the anti-intentionalist view where public meaning, rather than subjective intent, is what counts for interpretation:

> Moderate originalism differs from…extreme versions of originalism... First, it holds that the meaning of the Constitution depends on evidence of the founders' intentions which in 1900 was readily available to their intended audience, but not on other evidence of their intentions…Second, moderate originalism holds that only the founders' 'enactment intentions' are relevant to the meaning of the Constitution, and not their 'application intentions'. The object is to clarify the meaning of the provisions which they enacted, and not to discover their beliefs about how those provisions ought to be applied. Those beliefs are not part of the Constitution and have no legal status.[33]

Here, Goldsworthy excludes so-called 'extreme'[34] versions of originalism. Yet there can nonetheless be divergence even when practicing his preferred moderate originalism because of the values inherent in interpretive choices. Or in other words, there are a range of philosophical lenses through which material 'readily available to their intended audience' can be construed, so adherence to moderate originalism may gloss over economic and political assumptions.[35] Given this uncertainty about application of history, it is perhaps understandable that Selway highlights that 'it is a conceit of the legal profession that its members are necessarily good historians'.[36]

An illustration of Selway's quip is that the same sources have resulted in contradictory outcomes. In *Singh*, all justices relied upon history when ascertaining the meaning of 'alien' in s

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[31] Andrew Dahdal, 'The transparent use of history in Australian constitutional interpretation: the banking power as a case study' (n 5) 269.
[32] Jeffrey Goldsworthy, 'Originalism in constitutional interpretation' (1997) 25 *Federal Law Review* 1, 20.
[33] Ibid.
[34] Ibid 1.
[35] John Hasnas, 'The Myth of the Rule of Law' (1995) *Wisconsin Law Review* 199, 201.
[36] Bradley Selway, 'The uses of history and other facts in the reasoning of the High Court of Australia' (2001) 20 *University of Tasmania Law Review* 129, 129.

51(xix).[37] Yet not all judges reached the finding that there is no constitutional citizenship conferred by birth. And in *Work Choices*, Gleeson CJ, Gummow, Hayne, Heydon and Crennan JJ assessed the corporations power in s 51(xx) and determined that 'the Convention Debates reveal very little about what those who framed the Constitution thought would fall within or outside the power' and hence 'it is impossible to distil any conclusion about what the framers intended should be the meaning or the ambit of operation of s 51(xx) from what was said in debate about the power'.[38] In his dissent however, Callinan J reached an opposing inference.[39] Part of the divergence arose because of each side's untested premises about federal balance.[40]

III. ORIGINAL INTENT AND SECESSION

When passing judgement, judges have drawn on two types of history: thematic or descriptive.[41] Thematic history sets the scene and is sourced from the general facts surrounding the framing of the Constitution. A thematic outlook considers any studies or prominent personalities to form an understanding of the broader context.[42] Being wide-ranging, thematic history is imprecise and so can be criticised. Descriptive history on the other hand is narrowly tailored, often tracing the background to specific provisions and attempting to find intent by examining what delegates to the constitutional conventions thought.

Since there are no specific provisions about secession to analyse, this chapter adopts a largely thematic perspective to ascertain the intention behind the Commonwealth Constitution. In doing

[37] The dependence on history in *Singh* was so strong that Michelle Foster observes that 'the formulation adopted by a majority of the Court is open to criticism on the basis that it is derived solely from historical sources without regard to its contemporary relevance, and that its practical application to various categories of persons remains uncertain and problematic'. Michelle Foster, 'Membership in the Australian community: *Singh v The Commonwealth* and its consequences for Australian citizenship law' (2006) 34 *Federal Law Review* 161, 182.
[38] *Work Choices Case* (2006) 229 CLR 1, 40.
[39] Ibid 352 (Callinan J).
[40] Ibid 59 (Gleeson CJ, Gummow, Hayne, Heydon and Crennan JJ). For example, the joint judgement at [195] cites with approval the statement by Dixon J that the federal government is 'necessarily stronger than that of the States'. This untested pro-centralisation assumption, which is made without citing any scientific evidence (for example, social science studies that assess the effectiveness of centralisation across a variety of policy areas), permeates the judgement. In the same paragraph, the joint judgement also implicitly assumes that Australia is a unitary state where powers are 'divided' between the federal government and the states. For a critique see Nicholas Aroney, 'Constititutional choices in the Work Choices Case, or what exactly is wrong with the reserved powers doctrine?' (2008) 32 *Melbourne University Law Review* 1-43; Nicholas Aroney, *The Constitution of a Federal Commonwealth* (Cambridge University Press, 2009) 17-20. Aroney explains that to refer to a 'division of power' is to presuppose 'an original unity of power' that downplays the communities that chose to integrate.
[41] Andrew Dahdal, 'The transparent use of history in Australian constitutional interpretation: the banking power as a case study' (n 5) 48-51.
[42] *Communist Party Case* (1951) 83 CLR 1 (Dixon J): 'courts may use the general facts of history as ascertained or ascertainable from the accepting writings of serious historians…and employ the common knowledge of educated men upon many matters and for verification refer to standard works of literature and the like'.

so I make no claims about the weight that should be given to history over other kinds of legal argument. Nor do I mount an argument for one kind of originalism over another. Although for the most part I strive toward anti-intentionalist moderate originalism to help ascertain the meaning of general words and phrases, it is beyond the scope of this chapter to defend any brand of originalism. The purpose of this chapter is instead to lay the groundwork for coming chapters.

A. Whose intent matters?

Strictly speaking, the relevant intention with respect to the Commonwealth Constitution is that of the British government which introduced the *Constitution Act*. Yet external factors like Australia's political independence from the UK have tended to focus judges' minds on the local framers rather than the intentions of the foreign body that solidified a covenant between states.[43] At the present time this is for the most part unobjectionable, but it is misleading to not pay at least some attention to the British government.[44] In line with a purposive approach, it is relevant to ask: what was the mischief that the UK parliament sought to remedy by creating the *Constitution Act* and what does this suggest for the permissibility of unilateral secession?[45] To assist in finding out, the opinions of the founding fathers who drafted the Constitution and secured the agreement of the colonies, the UK parliament's objectives and the opinions of the ratifying public at referenda can be consulted.

There is not always a single purpose to legislation. Kirby P argues that a literal approach is preferable where there are a 'multitude of obscure, uncertain and even apparently conflicting purposes'.[46] The overriding issue with respect to WA secession is whether it was intended that the Constitution entrench an inflexible union or whether the union was something less than complete centralisation into one state. There are written constitutions in the world that do create a unitary state: for example, the *Hong Kong Constitution* expressly grants power to prohibit secession and the *Constitution of India* permits the central government to take over a state's

[43] Even before the *Australia Act 1986* (UK), the High Court declared in *Peterswald v Bartley* (1904) 1 CLR 497, 509 that 'the Constitution was framed in Australia by Australians, and for the use of the Australian people'.
[44] This is because the UK still has, in theory at least, a power to intervene to ensure that appeals to its Privy Council are preserved in accordance with s 74 of the *Commonwealth of Australia Constitution Act 1900* (UK).
[45] The purposive approach advocates interpreting a statute in accordance with its purpose, if such a clear purpose can be discovered. In *Pambula District Hospital v Herriman* (1988) 14 NSWLR 387, 410 Samuels JA comments that 'it has always been open to the court to have regard to the historical setting of a statute and by that means to ascertain what the object of the legislature was'.
[46] *Avel Pty Ltd v Attorney-General for New South Wales* (1987) 11 NSWLR 126, 127 (Kirby P).

governance and effectively precludes secession.[47] At the other end of the spectrum lie the constitutions of Liechtenstein and Ethiopia which allow secession for any grievance.[48]

B. The path to Federation

It is worth starting when the colonisation of Australasia by the United Kingdom began. During April 1770, Captain James Cook of the Royal Navy claimed sovereignty over Australia on behalf of the British Crown. Subsequently, Admiral Arthur Philip, who became the first Governor of New South Wales, again asserted the reception of British law upon his arrival with the First Fleet in January 1788 since the land was deemed uninhabited or 'terra nullius'. This was based on a view that the Aboriginal population lacked the hallmarks of a 'civilised' legal system (like a recognised sovereign).[49]

While this fiction that Australia was uninhabited was partially overridden by the High Court in *Mabo v Queensland (No 2)*, the Court did not wholly recognise Indigenous customary laws, since that would entail invalidating the act of state that gives rise to the Court's authority.[50] Rather, most of the justices took the position that Australia had been acquired by settlement and that England's law had become the general law of Australia.[51] If Indigenous customary law continues, it does so within the prevailing confines of the common law of Australia not as an independent co-existing legal system.[52] And 'the question whether any native interests in the land have been extinguished by an assumption of sovereignty is a question of fact which can only be determined by reference to the surrounding circumstances'.[53]

There was initially complete centralisation of power in Sydney, New South Wales. New South Wales was the mother colony out of which the five other colonies mentioned in the Preamble to the Constitution geographically split. WA, meanwhile, originated through westward expansion by Governor Darling of NSW.[54] As Joseph Chamberlain, the British Secretary of State for the

[47] *Basic Law of the Hong Kong Special Administrative Region of the People's Republic of China* (1997) art 23; *The Constitution of India* (1950) ss 250, 353. With respect to India, see Patrick Hoenig, 'Totem and taboo: the case for a secession clause in the Indian Constitution?' (2010) 45 *Economic and Political Weekly* 43, 44.
[48] *Constitution of the Principality of Liechtenstein* (1921) art 4; *Constitution of the Federal Democratic Republic of Ethiopia* (1994) art 39. With respect to Ethiopia, see Alem Habtu, 'Multiethnic Federalism in Ethiopia: A Study of the Secession Clause in the Constitution' (2005) *Publius* 313, 327.
[49] *Mabo v Queensland (No 2)* (1992) 175 CLR 1, 36-38 (Brennan J).
[50] *Mabo v Queensland (No 2)* (1992) 175 CLR 1, 31, 138; *Coe v Commonwealth* (1979) 53 ALJR 403, 410.
[51] *Mabo v Queensland (No 2)* (1992) 175 CLR 1, 100. Affirmed by *R v Walker* (1994) 182 CLR 45, 49.
[52] *Mabo v Queensland (No 2)* (1992) 175 CLR 1,
[53] *Mabo v Queensland (No 2)* (1992) 175 CLR 1, 127 (Dawson J).
[54] G. Bolton, *History of Western Australia* <https://www.britannica.com/place/Western-Australia/History>

Colonies explains in his introduction to the Constitution bill during May of 1900, colonial autonomy began 'in 1825 [when] what was then known as Van Diemen's Land became a separate colony under the name of Tasmania, and the example of Tasmania was followed in succession by Western Australia, South Australia, Victoria, and lastly by Queensland in 1859'.[55] These examples are effectively instances of secession being legislatively approved to accommodate local conditions. Boundaries were relatively fluid, with some advocating additional smaller regions should form independent colonies.[56]

The UK parliament, in response to demands by the Australian colonists, passed legislation to establish representative government in the 1840s and 1850s.[57] Although the Governor appointed by Britain remained powerful in that he could refuse assent to the laws passed by the elected Legislative Council, it was a step toward self-governance and greater autonomy akin to that enjoyed currently by Scotland, Wales and Northern Ireland. Between 1855 and 1890, the UK parliament enacted state constitutions establishing a system whereby the Governor would take advice from a premier holding the majority in the lower house of the legislature and who no longer ran the entire government singlehandedly.[58]

Ultimately, however, as assumed in s 2 of the *Colonial Laws Validity Act 1865* (UK), all the Australasian colonies were a creation of, and therefore subordinate to, the mother country that had settled the lands. Section 2 made clear that any colonial law repugnant 'to the provisions of any Act of [the UK] parliament extending to the colony…shall, to the extent of such repugnancy' be void and inoperative. The dominant view at the time was that the laws of the UK applied with paramount force in cases of inconsistency with a colony's laws.[59]

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[55] United Kingdom, *Parliamentary Debates*, House of Commons, 14 May 1900, vol 83, col 47 (Chamberlain).
[56] Nicholas Aroney, *The Constitution of a Federal Commonwealth: The Making and Meaning of the Australian Constitution* (Cambridge University Press, 2010) 137.
[57] An initial step was the *Australian Constitutions Act (No 1) 1842* (UK), by which 12 members of the Legislative Council were appointed by the Queen and 24 elected by the residents of New South Wales. In 1854, there was some bloodshed during the Eureka rebellion, where at least 27 people died: Richard Butler, *Eureka Stockade* (Angus & Robertson, 1983). This miners' rebellion over mining licenses directly influenced the decision to expand the voter franchise in the Victorian parliament: Allison Oosterman, "'This inglorious struggle': a New Zealand view of the Eureka stockade' (2010) 32 *Australian Journalism Review* 51, 54.
[58] For example, the *Australian Constitutions Act (No 2) 1850* (UK); *New South Wales Constitution Statute 1855* (UK); *Australian Constitutions Act 1862* (UK) and *Western Australian Constitution Act 1890* (UK).
[59] See, eg, United Kingdom, *Parliamentary Debates*, House of Commons, 14 May 1900, vol 83, col 47 (Chamberlain): 'The fact that Imperial legislation is paramount has always been admitted by the colonies, although the use of the constitutional power has, of course, been extremely rare'. Along similar lines see Alex Castles, 'The reception and status of English law in Australia' (1963) 2 *Adelaide Law Review* 1, 13.

Within this framework, there was a desire for inter-colonial cooperation that manifested itself in creation of the Federal Council of Australasia. To put its legality beyond doubt, the colonies pushed for the *Federal Council of Australasia Act 1885* (UK) ('Federal Council of Australasia Act'), which was drafted by Samuel Griffith. The Council – a body preceding the Commonwealth whose laws are, by reason of covering cl. 7 of the *Constitution Act* still technically in force – was a voluntary union that initially included New Zealand and Fiji. South Australia requested that the UK not include it. In response, s 30 of the *Federal Council of Australasia Act* clarified that the law did not have an operation in any colony unless adopted by that colony's legislature. Section 31 recognised a right of secession by permitting unconditional withdrawals by colonies already members of the Council and was inserted due to pressure by New South Wales (which ended up not joining). The latter section says:

> This Act shall cease to be in operation in respect to any colony the legislature of which shall have passed an Act or Ordinance declaring that the same shall cease to be in force therein: Provided nevertheless that all Acts of the Council passed while this Act was in operation in such colony shall continue to be in force therein, unless altered or repealed by the Council.[60]

The British Secretary of State for the Colonies, Fred Stanley, wrote the following description about s 31 in a message to the Victorian Parliament:

> *[T]he Colonial Constitutions remain unaffected*, securing to each Colony that self-government which it now enjoys independently of the other Colonies, and as at any time it may become the wish of the majority of the Colonies who have joined the Council to apply to themselves through its agency some legislation which may not be applicable or acceptable to one or more of their number, *it appears reasonable that there should be left open a mode of retiring from the Council*. I am happy to say that this view ultimately commended itself to the Governments of the four Colonies which now desire the establishment of the Federal Council, and that in order to remove the objections of the Government of New South Wales they consented to the retention of the clause.[61]

[60] *Federal Council of Australasia Act 1885* (UK) s 31.

[61] Letter from Fred Stanley to the Governor of Victoria, 14 August 1885 <https://www.parliament.vic.gov.au/papers/govpub/VPARL1885No70.pdf> (emphasis added).

After initially joining the Council between 1888 and 1890, South Australia ended up seceding from the Council after attending only one session.[62] Given s 31 of the enabling legislation, there does not appear to have been any dispute about the propriety of the state's withdrawal.

By 1890, most Australasian colonies had acquired self-governance and enjoyed full autonomy, including over defence where they sometimes interfered with imperial foreign policy decisions but still remained as members of the empire.[63] Unsatisfied with the Council's workability, concerned with creating a defensive pact against foreign threats and encouraging inter-colonial free trade, representatives then met in conferences held during 1890, 1891, 1897 and 1898 with the dual purpose of 1) creating a more powerful central organ that enlarges self-governance by forging a direct relationship to Australians; and 2) closer cooperation between existing colonies in a polycentric union.[64] Delegates were representatives of their colony and were nominated by a legislature or popularly elected. New Zealand participated in 1890 and 1891 but lost interest and did not attend later conventions.[65]

At the conclusion of these conventions the resulting draft Constitution was put to a referendum of the people voting by colony. The electoral method required for ratification to succeed was squarely within the control of the respective polity.[66] Moreover, voting was voluntary; participation in the referendum ranged somewhere between 30 percent to 67 percent of a colony's total eligible franchise.[67] A simple majority vote in favour was sufficient according to the enabling acts, so once the Constitution was adopted by majorities in Tasmania, New South Wales, Victoria, South Australia and Queensland, the bill was enacted in imperial legislation. Western Australia joined after the bill's enactment, about three weeks after the first five

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[62] Stuart Kaye, 'Forgotten Source: The Legislative Legacy of the Federal Council of Australasia' (1996) 1 *Newcastle Law Review* 57, 59.

[63] Theodore Miller, 'Imperial contradiction: Australian foreign policy and the British response to the rise of Japan, 1894-1904', *Yale Review of International Studies* (June 2015) <http://yris.yira.org/essays/1528>; Rob Lundie and Joy McCann, 'Commonwealth parliament from 1901 to World War I' (Research Paper, Parliamentary Library, Parliament of Australia, 4 May 2015) 5.

[64] *Official Record of the Debates of the Australasian Federal Convention*, Melbourne, 10 February 1890 (Henry Parkes); Nicholas Aroney, *The Constitution of a Federal Commonwealth* (2010) 141. A key motivation for discarding the Federal Council was Henry Parkes' stated assumption that the decentralised *Articles of Confederation and Perpetual Union* (1781) had hindered the American revolutionaries in their war of independence. But modern research now supports an alternative assessment: see, eg, Russell Sobel, 'Defending the Articles of Confederation: A Reply to Dougherty' (2002) 113 *Public Choice* 287-299.

[65] Nicholas Aroney, 'New Zealand, Australasia and Federation' (2010) 16 *Canterbury Law Review* 31, 43.

[66] Aroney, *The Constitution of a Federal Commonwealth* (2010) 176-180.

[67] Ibid 181.

colonies.[68] The Constitution thereafter commenced upon proclamation by the Queen and the Commonwealth of Australia came into existence.

C. The UK parliament's purpose

Although nothing about the constitutionality of secession was mentioned when moving the Constitution bill in the UK parliament, some clues about the government's attitude can be gleaned from members' speeches. In introducing the bill, Chamberlain describes it as being 'for the federation of some of our greatest colonies' and 'a great and important step towards the organisation of the British Empire'.[69] The bill 'enables that great island continent to enter at once the widening circle of English-speaking nations. No longer will she be a congeries of States, each of them separate from and entirely independent of the others'.[70] Administration for important functions would pass to a single government thereby ameliorating 'friction and weakness' by, among other things, providing for 'a common control of national defences'.[71] It was good for British interests, Chamberlain said, because 'the relations between ourselves and these colonies will be simplified, will be more frequent and unrestricted, and…will be more cordial when we have to deal with a single central authority'.[72]

When the Constitution bill was introduced, an Irish member of the UK parliament, Tim Healy, wondered why Australians were permitted to take the lead in securing their future, even though the same parliament had been suppressing Irish independence. Healy pointed out that the Australian Constitution bill did not mention the supremacy of the imperial parliament, even though such an amendment had been insisted upon by Chamberlain with respect to the failed *Government of Ireland Bill 1893* (UK).[73] As Healy wryly noted, 'it appears that an Irishman cannot be trusted with Home Rule unless he has first been transported [to Australia]'.[74]

Did Britain seek to influence or was it content to permit Australians to forge their destiny? In this regard, although Chamberlain believed that '[t]his Constitution is to be an Imperial Act, and it is,

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[68] Augusto Zimmermann, 'The still reluctant state: Western Australia and the conceptual foundations of Australian federalism' in Gabrielle Appleby, Nicholas Aroney and Thomas John (eds), *The Future of Australian Federalism* (Cambridge University Press, 2002) 77; Thomas Musgrave, 'The Western Australian secessionist movement' (2003) 3 *Macquarie Law Journal* 95, 96.
[69] United Kingdom, *Parliamentary Debates*, House of Commons, 14 May 1900, vol 83, col 47 (Chamberlain).
[70] Ibid.
[71] Ibid.
[72] Ibid.
[73] United Kingdom, *Parliamentary Debates*, House of Commons, 21 May 1900, vol 83, col 802 (Healy).
[74] Ibid.

in substance, the delegation of powers to an authority which is created by the Imperial Parliament', he admitted that the UK parliament could not seek to impose its will:

> We have got to a point in our relations with our self-governing colonies in which I think we recognise, once for all, that *these relations depend entirely on their free will and absolute consent*. The *links between us and them at the present time are very slender*. Almost a touch might snap them.[75]

Any changes to protect British interests had to be done through a process of negotiation 'in a perfectly friendly spirit'.[76] On matters that impact purely Australian interests, Chamberlain would 'freely and gladly…[accept] without demur' all autonomy of decision-making.[77] As Chamberlain explained, this is why when Western Australia and New Zealand appealed to the British government to secure amendments in the Constitution bill, 'we felt we were not justified in pressing these claims, or in insisting upon securing their adoption as against the majority of the colonies in Australia'.[78] However, 'wherever the Bill touches the interests of the Empire as a whole, or the interests of Her Majesty's subjects, or of Her Majesty's possessions outside Australia', Chamberlain clarified that amendments would be sought (but the only amendment that was successful was to preserve appeals to the Privy Council on matters not internal to the federation. Another proposal to put it beyond doubt that the *Colonial Laws Validity Act* applied to repugnant Commonwealth laws was not pursued).[79]

Given that the colonies began in a consolidated unitary state as New South Wales, was the parliament attempting by its Constitution bill to revert to centralisation? Chamberlain did not appear to think that complete centralisation was the goal. Rather, the principle of subsidiarity – where a federal government only deals with those concerns that cannot be effectively handled at a local level – was alluded to.[80] Earl Grey, who had pushed for the 'local management of local interests' and the 'central management of all interests not local' was cited with approval.[81]

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[75] United Kingdom, *Parliamentary Debates*, House of Commons, 14 May 1900, vol 83, col 63 (Chamberlain) (emphasis added).
[76] United Kingdom, *Parliamentary Debates*, House of Commons, 14 May 1900, vol 83, col 62 (Chamberlain).
[77] United Kingdom, *Parliamentary Debates*, House of Commons, 14 May 1900, vol 83, col 56 (Chamberlain).
[78] United Kingdom, *Parliamentary Debates*, House of Commons, 14 May 1900, vol 83, col 57 (Chamberlain).
[79] United Kingdom, *Parliamentary Debates*, House of Commons, 14 May 1900, vol 83, col 56 (Chamberlain).
[80] Augusto Zimmermann, 'Subsidiarity and a free society: the subsidiary role of the State in Catholic social teaching' (2018) 8 *Solidarity: The Journal of Catholic Social Thought and Secular Ethics* 1, 1; Benjamen Gussen, 'Australian constitutionalism: between subsidiarity and federalism' (2016) 42 *Monash University law Review* 383, 384; Nicholas Aroney, 'Federalism and subsidiarity: principles and processes in the reform of the Australian federation' (2016) 44 *Federal Law Review* 1, 2.
[81] Quoted in United Kingdom, *Parliamentary Debates*, House of Commons, 14 May 1900, vol 83, col 48 (Chamberlain).

When speaking about the kind of federation created by the bill, Chamberlain distinguished it from the Canadian model, noting that it 'in the main, and more than any other, follows the Constitution of the United States of America'.[82] He observed that in Australia 'the separate colonies had enjoyed for so long such great powers that they were naturally unwilling to part with them to anything like the same extent'.[83] So 'while in Canada the result of the Constitution was substantially to amalgamate the provinces into *one Dominion*, the Constitution of Australia creates a federation for distinctly definite and limited objects of a number of *independent States*, and State rights have throughout been jealously preserved'.[84] In short, '[i]n Australia the Central Government has only powers over matters which are expressly stated and defined in the Constitution' whereas in Canada it is the inverse of this. Though the Commonwealth parliament was constrained to 'definite and limited objects', Chamberlain thought that it was otherwise on par with the states. In his second reading speech he 'fully acknowledged' that the federal parliament should not have less power within its sphere of influence than the constituent states.[85] This view was tempered by his description of the Commonwealth as a 'Federal'– rather than a 'national' – legislature that is subject to a state rights component embodied by checks and balances like a Senate.[86]

D. The convention debates and secession

By enacting the Australian framers' proposal in essentially the same form as it was delivered, the UK parliament demonstrated that when it came to local liberty it would defer to the judgement of its overseas subjects. In this regard, the Australian delegates made a range of comments of relevance to secession when they discussed their expectations of federalism and the contractual nature of the enterprise they were partaking in. It was common belief that there were three types of union: a confederation, a federation and a unitary state.[87] The difference between a

[82] United Kingdom, *Parliamentary Debates*, House of Commons, 14 May 1900, vol 83, col 52 (Chamberlain).
[83] Ibid.
[84] United Kingdom, *Parliamentary Debates*, House of Commons, 14 May 1900, vol 83, col 53 (emphasis added). According to Chamberlain, the variance between Australia and Canada arose because of the divergent context and method by which drafting occurred. First, the *Canadian Constitution* was created soon after the American War of Secession and so was influenced by those events toward guarding against possible secession. Second, the Canadians worked in close consultation with the UK, a unitary state whose representatives influenced the outcome. Australians, by contrast, 'worked alone, without either inviting or desiring any assistance from outside' and their constitution's formation happened about 30 years after the war.
[85] United Kingdom, *Parliamentary Debates*, House of Commons, 21 May 1900, vol 83, col 763 (Chamberlain).
[86] United Kingdom, *Parliamentary Debates*, House of Commons, 14 May 1900, vol 83, col 60 (Chamberlain).
[87] *Official Record of the Debates of the Australasian Federal Convention*, Sydney, 12 March 1891 (John Hackett): 'There may be a mere unity – a unity such as existed in the American states under the articles of confederation…a unity such as existed in Canada before the passing of the British North America Act. That system may be called the

confederation and a federation is that the former operates upon the states whereas the latter operates upon individuals.[88] Some delegates adopted this understanding and suggested that the federal government has no power over a state, and were opposed to interference with state constitutions due to such action being outside the mandate of the constitutional conventions.[89]

The principles expounded by the father of the US Constitution, James Madison, were influential insofar as delegates like John Cockburn wished for something more than a confederation but less than a unitary state.[90] State constitutions were assumed to be pre-existing and most sympathised with the idea of subsidiarity. For example, Frederick Holder exclaimed that 'I do not want that the States should be dependent for their existence on the Commonwealth. If there must be any dependency, there would be less danger in making the Commonwealth dependent on the States'.[91] Henry Parkes assured observers on March 4, 1891 that 'it is in the highest degree desirable that we should satisfy the mind of each of the colonies that we have no intention to cripple their powers, to invade their rights, to diminish their authority, except so far as is absolutely necessary in view of the great end to be accomplished'.[92] These sentiments were echoed by Thomas Playford and Alfred Deakin.[93] Likewise, in response to resolutions proposed to restrict the powers of the Senate, John Hackett warned that 'the most dangerous point about this proposal [is that it will] ingraft the…system of England upon our federal constitution'.[94]

It is in the preceding context that the subject of secession was directly raised at the 1891 Sydney and 1897 Adelaide conventions. The discussion was brief and only a minority spoke on it. Ironically, given the framers' support for subsidiarity, most who addressed the issue of secession saw it as a threat to be guarded against. For example, Holder said that '[w]e cannot provide an easy back door out, for in a lasting Federation there is no secession' and Lyne said that '[w]e must frame a Constitution from which there shall be no secession, and one that will prove a binding contract between all the colonies, or else the same troubles which arose in the United

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confederated one. Then there is a union – a union of a federal character, true union, true federation. And finally – and I believe it is upon this kind of a united Australia that the delegates from Victoria have chiefly fixed their eyes – there is a unification. That system may be called the imperial system'.

[88] Alexander Hamilton, 'Federalist 21', *The Federalist Papers* (Bantam Classic, 1982).

[89] *Official Record of the Debates of the Australasian Federal Convention*, Sydney, 1891, 328-9 (Playford).

[90] *Official Record of the Debates of the Australasian Federal Convention*, Melbourne, 1890 (Cockburn).

[91] *Official Record of the Debates of the Australasian Federal Convention*, Adelaide, 1897, 155 (Holder).

[92] *Official Report of the National Australasian Convention Debates*, Sydney, 4 March 1891, 23–5 (Sir Henry Parkes)

[93] *Official Report of the National Australasian Convention Debates*, Sydney, 18 March 1891, 328 (Thomas Playford); *Official Report of the National Australasian Convention Debates*, Sydney, 5 March 1891, 79–80 (Alfred Deakin); *Official Report of the National Australasian Convention Debates*, Sydney, 16 March 1891, 383 (Alfred Deakin).

[94] *Official Report of the National Australasian Convention Debates*, Sydney, 12 March 1891 (Hackett)

States, when States desired to withdraw from the Federation, will arise here'.[95] No delegate who spoke about secession seems to have challenged the distaste for it, and such implicit opposition appears to have been a sentiment held by all who considered the topic.

Their proposed responses to the dilemma can be categorised into four schools of thought.

First, Holder suggested making it easy to amend the document: '[t]here must be a ready and easy way to, make amendments in the Constitution… where there is a growth of public conviction'.[96] Lyne proposed a flexible constitution that is 'largely… built upon in the future by custom'. He continued:

> [t]he Constitution of Great Britain is not upon any hard and fast lines, but expanded by custom and usage. We must, therefore, have a Constitution sufficiently elastic to be built upon, and made stronger and more suitable in the future than we can possibly expect to make it at present.[97]

Carruthers supported this line of thinking, observing that '[i]f…you have the Constitution so rigid that you cannot either secede or amend it, it is just possible civil wars and disasters similar to those which took place in the United States would eventuate in the Australasian Colonies'.[98] George Turner of Victoria can also be placed in this camp, given his comment that '[i]f we make it too rigid we will have a Constitution that will not bend, but will probably break'.[99] Presumably, by making the law easy to change, a dissatisfied state can obtain the required amendments that enable it to have its grievances addressed. This would then allow it to stay inside the union.

Second, Barton believed that the probability of secession could be reduced through appointment of a constitutional court that decides between parties. As he said:

> [o]ne of the strongest guarantees for the continuance and indestructibility of the Federation is that there should be some body of this kind constituted which, instead of allowing the States to fly to secession because they cannot get justice in any other way, will enable them to settle their differences in a calm judicial atmosphere.[100]

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[95] *Official Report of the National Australasian Convention Debates*, Adelaide, 26 March 1897, 148 (Holder); *Official Report of the National Australasian Convention Debates*, Adelaide, 26 March 1897, 161 (Lyne).
[96] *Official Report of the National Australasian Convention Debates*, Adelaide, 26 March 1897, 149 (Holder).
[97] *Official Report of the National Australasian Convention Debates*, Adelaide, 26 March 1897, 162 (Lyne).
[98] *Official Report of the National Australasian Convention Debates*, Adelaide, 25 March 1897, 94 (Carruthers).
[99] *Official Report of the National Australasian Convention Debates*, Adelaide, 24 March 1897, 48 (Turner).
[100] *Official Report of the National Australasian Convention Debates*, Adelaide, 23 March 1897, 25 (Barton).

Barton urged that such an arbiter should be neutral – or as he put it, not a 'judge in its own cause' – in any disputes between a state and the federal government.[101]

Third, there was advocacy from Josiah Symon of South Australia to insert prohibitions against secession across the *Constitution Act*. Symon cited the American experience as justification because there 'it was not contained in express terms within the four corners of the Constitution, that no State should be able to secede'.[102] To avoid the same mistakes and for the avoidance of doubt, he submitted that an intention for the federal union to be indissoluble 'should be clearly and definitely expressed at every point wherever it is possible'. '[W]e should make…', he insisted, 'a considerable mistake if we do not make it absolutely clear… that this Union is to be permanent, and that there shall be no secession'.[103]

Fourth, Isaacs Isaacs claimed that doing nothing was the best response, since guarding against secession was per his understanding unnecessary because the Constitution is contained within imperial legislation. Isaacs relied on prevailing legal orthodoxy to argue that '[t]here is no possible dissolution or secession'[104] because '[t]here cannot [be a secession] if [the Constitution] is an Act of the Imperial Parliament'.[105] Isaacs believed that without the UK's permission a state could not secede anyway, hence the scenario was unlikely to occur.

The final product can best be described as a mixture of the adjudicative and doing nothing options. The Constitution creates a High Court to determine disputes (although contrary to Barton's hopes it is far from a neutral body since it is appointed and funded by the federal government). And consistent with Isaacs' relaxed *laissez faire* attitude, the words 'indissoluble Federal Commonwealth' are inserted in the Preamble rather than the body of the document. As elaborated in Chapter 5, there is doubt about how far a preamble affects interpretation and moreover these words are open to a contrary interpretation that is not necessarily unfavourable to secession.[106] The option of making the Constitution easy to change is overlooked: far from being flexible, s 128 entrenches rigidity since its mechanism does not empower state-led reform given that amendments must be initiated by the Commonwealth. Likewise, Symons' proposal to insert

[101] Ibid.
[102] *Official Report of the National Australasian Convention Debates*, Adelaide, 25 March 1897, 128 (Symon).
[103] Ibid.
[104] *Official Report of the National Australasian Convention Debates*, Adelaide, 25 March 1897, 93 (Isaacs).
[105] Ibid 128 (Isaacs Isaacs).
[106] Anne Winckel, 'The contextual role of a preamble in statutory interpretation' (1999) 23 *Melbourne University Law Review* 184, 209-10.

incontrovertible language forbidding secession is ignored despite his warning about the costs of the American Civil War.

It might be retorted that Symon's advice to insert express prohibitions against secession was, in fact, implemented. Following Craven it can be submitted that the covering cls 3 and 4 unambiguously deny the possibility of secession.[107] This argument seems unviable for the reasons outlined in Chapter 5. In brief, those clauses contain pro-federal (as opposed to pro-national) consensual language that controls their meaning and thereby permits secession.

E. The ratifiers of the Constitution

The ruling elites[108] who drafted the Constitution likely had a vested interest in seeing their project succeed and so tried – using indirect means like establishing a constitutional court and inserting an aspirational reference to indissolubility – to guard against secession. But what did the ratifying public think? There is, of course, no single source that can prove the public mindset. That said, confirming the same opinion in multiple sources can reveal trends.

An editorial in the *Daily Telegraph* on March 31, 1891 clarifies the choice between subsidiary and unitary statism that was at the forefront of public consciousness. It was asserted there that the choice facing the delegates at the 1891 convention held in Sydney was between 'absolute absorption of the present colonies in one consolidated Australian State' versus the 'independent political lives of the colonies which they represent'. The convention delegates were characterised by the editors of the *Daily Telegraph* as considering themselves 'bound by their commissions to taboo the former system altogether, as outside the authorised range of discussion'.

1. Subsidiarity

Many observers characterised Federation not as a shift to consolidation, but rather as a decentralised compact where provincialism is given free reign. Several letters were published in newspapers along these lines.[109] Eugene Rudder, in a letter published 20 April 1898, bemoaned

[107] Craven, *Secession: The Ultimate States Right* (n 9) 27.
[108] I call the founders 'ruling elites' because many of them were drawn from the upper echelons of society, i.e. they were not commoners/plebs. As Craven writes, 'if you do a political head count of the Founding Fathers, there are some impressive statistics. There is little point counting the ministers or members of parliament, which almost all of them were or had been , because there simply are too many of them': Greg Craven, 'The Founding Fathers: Constitutional Kings or Colonial Knaves?' (Research Paper No 21, Parliament of Australia, December 1993).
[109] See, eg, 'Some federations we don't hear much boasting about', *The Tocsin* (2 June 1898) 2.

that '[e]very delegate – perhaps excepting Mr Barton – seemed to be a provincialist first and a federationist afterwards. Therefore, the interests of Australia were always made subordinate to the interests of a colony'. Rudder wished that 'we should be one people' rather than having 'half a dozen Houses of Parliament and Legislative Chambers' tying the hands of a Commonwealth parliament.[110] His preferred solution in this regard was to abolish the states altogether and subsume their functions under a national government.

Another illustration comes from EN Rogers who wrote in 1898 that if Australians aspire to become 'one nation with one destiny' they must 'abandon the federal principle altogether'. Rogers, who published a book-length critique of the bill entitled *Is Federation Our True Policy?* defined a federation as 'a collection of interdependent sovereign powers without a single centre of unity, without a true sovereign at all'.[111] According to the author, 'to adopt federation is to confirm the existing habit of looking upon the state governments as supreme, and it was just this national habit which…brought upon America the disastrous war of secession'.[112] To create real unity, Rogers submits that 'the people of Australia ought to add to the Commonwealth bill…a national referendum and a national sovereign'.[113] Criticism was advanced of the undefined residual powers enjoyed by the states, with the author quoting John Quick who said that '[i]n the Senate they will be represented as *sovereign* states'.[114] Federation was treated by Rogers as a secessionist scheme to 'throw off the allegiance to the English Crown'[115] and create sovereign states, rather than an adoption of the national principle.

2. Unitary statism

Not everyone understood the Constitution bill as promoting subsidiarity. *The Daily Telegraph* adopted a stance effectively supporting a consolidated unitary government by arguing that the Constitution bill's silence precludes unilateral secession. As its editorial said:

> The authority over its affairs which [an Australian colony] now of its own freewill constitutionally concedes to the Federation it could have no power to constitutionally take back unless a special stipulation to that effect is provided. The absence of such a provision will amount

[110] Eugene Rudder, 'Federation on new lines', *The Daily Telegraph* (Sydney, 20 April 1898) 5.
[111] EN Rogers, *Is federation our true policy?* (George Robertson & Co, 1898) 10.
[112] Ibid.
[113] Ibid 10-11.
[114] Quoted ibid 25.
[115] Ibid 26.

> to positive legislation denying the right of secession, and the question is, are the States prepared to make a bargain on such terms?[116]

While the Constitution was being drafted, an amalgamation into a unitary state rather than a federation had been advocated for by the Labor Electoral League, but it gained no traction.[117]

Some opponents of Federation were convinced that the Preamble's reference to indissolubility hampers secession and called the bill a 'Federal Trap'.[118] *The Australian Star* on June 2, 1898 declared that '[e]lectors cannot be too often reminded that the proposed form of federation now before them is an indissoluble partnership' for the benefit of the smaller states who would be 'relieved at the expense of the larger States'. It urges readers to vote no to such a 'one-sided arrangement'.[119] The anti-Federalists thought that pro-Federation forces were being dishonest about the ease of secession. As *The Australian Star* on May 2, 1898 sarcastically commented, '[a]dvocates of the bill…have discovered that the Commonwealth is not indissoluble, and the federal delegates who favour the bill make a similar assertion. How an indissoluble union can be dissolved is a puzzle that has never yet been solved'.[120] The newspaper then queries whether any clause provides for secession and rejects the utility of s 128 by pointing out the obstacles associated with constitutional amendment.

The promoters of Federation apparently did not think that any colony would unite if it were announced that silence was equivalent to a ban on leaving. Insinuations were made implying that withdrawal was, practically at least, an easy step. "In urging its readers to vote for the Commonwealth bill," Craven finds, "the *Bulletin* suggested that the provision for the indissolubility of the proposed Commonwealth was not a problem, as s 128 could be used to strike the word 'indissoluble' from the preamble".[121] He adds, '[i]n 1898 the Governor of Victoria…adopted a similar line of reasoning in his speech from the throne'.[122] Moreover, Robert Garran in 1897 noted that '[a] federal government…in legal theory…is perpetual' but 'in

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[116] *Daily Telegraph* (31 March 1891).
[117] Aroney, *Constitution of a Federal Commonwealth* (n 53) 165.
[118] 'The Federal Trap', *The Worker* (26 March 1898) 5. See 'Federal Partnership: The Deed Indissoluble When Once Signed', *The Australian Star* (28 May 1898) 14. The *Evening News* (20 April 1898) 4 which notes that '[t]he opponents of the bill complain that when once the union is entered into it is indissoluble; yet they claim to be federationists. Can they point to any federation in the world which provides for its own dissolution?'.
[119] 'Indissoluble partnership', *The Australian Star* (2 June 1898) 2.
[120] 'The Federal Fight', *The Australian Star* (2 May 1898) 5.
[121] Craven, *Secession: The Ultimate States Right* (n 9) 27. For a critique of the argument that s 128 can be used to strike 'indissoluble' from the preamble see "The 'Bulletin' Flounders", *The Tocsin* (12 May 1898) 2.
[122] Craven, *Secession: The Ultimate States Right* (n 9) 27.

actual practice it is not necessarily so'.[123] In doing so, Garran gave hope to reluctant federalists, explaining that '[t]he federal tie, though legally it is perpetual, becomes useless or worse than useless when it ceases to be voluntary'.[124] And furthermore that '[i]n a case where secession was really necessary, this step, though technically a revolution, would probably meet with little resistance – with less, indeed, than under any other form of government'.[125]

F. An interpretation of the facts

This section puts forward a story that can be told about the sources and what it means for secession. In the first place, one interpretation of the general circumstances leading up to Federation is that the founding fathers of Australia felt compelled to seek each colony's consent to enter into the Constitution. Certainly, right up until the point of entry, there is no trouble in aligning the facts to the Althusian norms highlighted in Chapter 1 of this thesis.[126] In terms of this consensual background to Federation, Craven confirms that '[h]istorically, the Australian Federation bears close parallels with the American'.[127] As he explains:

> The constituent document of the federation, the *Commonwealth of Australia Constitution Act*, was drafted by representatives of the colonies which proposed to unite. Indeed, these representatives were intensely aware of the similarities between their own position and that of those who drafted the United States Constitution. The drafting of the *Constitution Act* likewise notoriously involved the making of bargains and concessions between the representatives of the various colonies. Before any colony was brought inside the federation and under the Constitution, the agreement of the people of that colony was factually required.[128]

Speaking of the US, Craven says that the legal permissibility of secession 'was a perfectly tenable view of the American Federation, at least as it applied to the original thirteen states'.[129] However, he then distinguishes the Australian situation because at the time the Australian people were not completely sovereign due to their status as British subjects.

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[123] Robert Garran, *The coming Commonwealth: an Australian handbook of federal government* (Angus & Robertson, 1897) 35.
[124] Ibid.
[125] Ibid.
[126] Andrei Kreptul, 'The constitutional right of secession in political theory and history' (2003) 17 *Journal of Libertarian Studies* 39, 42-43: 'the Althusian paradigm conceives of political order as federative in nature' where '[n]o single state institution monopolizes political authority'. Per Kreptul: 'government is pluralized, with sovereign power shared by multiple social units starting at the lowest level of authority, namely, the family'.
[127] Craven, *Secession: The Ultimate States Right* (n 9) 75.
[128] Ibid 75.
[129] Craven, *Secession: The Ultimate States Right* (n 9) 73.

There are two plausible responses. First, the distinction between the sovereignty of the US states and lack of sovereignty of the Australian colonies is arguably an irrelevant one since a people *can* secede from an organisation established under British legislation. This is illustrated by the secession of South Australia from the Federal Council of Australasia, which shows that departure from a quasi-federal union is possible under British sovereignty.[130] The experience with the Council suggests that secession is acceptable if the specific circumstances permit it. Second, as I note below, the UK government at the time freely acknowledged that it did not seek to legally intervene in the domestic affairs of the colonies. In consequence, there is unlikely to have been any practical barrier to a state of Australia seceding from the Commonwealth.

Nonetheless, a Hobbesian interpretation holds that consent was only required at the time of formation, because the compact then became irrevocable.[131] There is, however, a flaw underlying such a Hobbesian perspective. Logically, if the colonies wished to trap each other into the union, there was no need to secure the consent of the people at the outset or to enter any kind of compact at all. Coercion simply requires raw power, so why bother with an elaborate charade of attempting to seek out initial consent? An agreement implies a desire to cooperate on those specified ends mentioned therein, not to coerce.[132] Thus, Sawer observes that:

> [T]o an important degree an overwhelming majority of the delegates at all stages were State-righters. It was federation they aimed at, and furthermore a federation in which there was a strong emphasis on preserving the structure and powers of the States so far as consistent with union for specific and limited purposes.[133]

The people of WA who consented to federate in 1900 are not the same people voting on whether to continue participation in the federation today. In other words, consent at the aggregate level must necessarily be a continuous process because dead people do not bind living people.[134] Today's generation of Australians express their consent in each federal and state election state to

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[130] Stuart Kaye, 'Forgotten Source: The Legislative Legacy of the Federal Council of Australasia' (1996) 1 *Newcastle Law Review* 57, 60: 'The powers given to the Council strongly resemble some of those ultimately given to the Commonwealth Parliament in section 51 of the Commonwealth Constitution'.

[131] Kreptul (n 126) 43: 'consent to political authority in Hobbes's conception is unitary and irrevocable'.

[132] Economics teaches that when two or more parties enter into a voluntary agreement, it is implicit in such consent that the agreement is beneficial to all: Murray Rothbard, *Man, Economy and State with Power and Market* (Ludwig von Mises Institute, 2009) 85.

[133] Geoffrey Sawer, *The Australian Constitution* (Australian Government, 1975) 23.

[134] Lysander Spooner, 'No Treason No 6: The Constiution of No Authority*'* in Charles Shivley (ed), *The Collected Works of Lysander Spooner* (M&S Press, 1971); Merrill Peterson, "Mr Jefferson's 'Sovereignty of the Living Generation'" (1976) 52 *Virginia Quarterly Review* 437, 439-40.

the prevailing system.[135] If the people of WA withdraw that consent and choose a different system in a successful referendum for secession, then they can simply leave because the conditional requirement that the Federation subsists upon fails to be met. This condition is why the Queen had to proclaim that she was satisfied that the people of WA had consented to Federation.[136] Yet after a successful state-wide referendum in favour of withdrawal, the facts grounding that proclamation no longer exist and so the bond is thereby dissolved.

Second, the UK government had no appetite to force the colonies to unite either.[137] This is why any colony which chose not to participate, like New Zealand, was not compelled to federate. Chamberlain recognised that the links between the UK and Australia were tenuous and not founded on coercion. One member of the UK parliament, Edward Blake, depicted the connection as 'links of good will, founded on local freedoms'.[138] If Blake's principle is the one that the imperial government adopted with respect to its role in the establishment and enforcement of the Constitution, then imperial sovereignty is no barrier to secession. Certainly, the UK's acts after Federation confirm that the links to its dominion are not founded on coercion.[139] This peaceful transfer of power provides a template to govern the relationship between the Commonwealth government and the states in the present day. Seen in this context, the intentions underlying the Constitution favour a voluntarily abided by enduring compact that does not seek to crush goodwill.

Third, the framers chose light-touch approaches like the phrase 'one indissoluble Federal Commonwealth' in the Preamble where its effect is contestable or like authorising a High Court to arbitrate constitutional disputes. With respect to the Preamble, it is possible to submit that the term 'indissoluble' was intended to discourage – but not prohibit – secession by symbolising a lasting arrangement.[140] Although it is true that some, like William McMillan,[141] did treat the Constitution as if it creates an unbreakable union of states tethered to a federal government, all delegates stopped short of providing detail beyond a general preference against dissolution. They

[135] *Theophanous v Herald & Weekly Times* (1994) 182 CLR 104, 172 (Deane J): 'Every community of men is governed by present possessors of sovereignty and not by the commands of men who have ceased to exist'.
[136] 'Proclamation uniting the people of New South Wales, Victoria, South Australia, Queensland, Tasmania and Western Australia in a Federal Commonwealth' (Court at Balmoral, 17 September 1900).
[137] Despite not wanting to openly coerce, the British government did subtly pressure WA to join: Thomas Musgrave, 'The Western Australian Secessionist Movement' (2003) 3 *Macquarie Law Journal* 95, 97-98.
[138] United Kingdom, *Parliamentary Debates*, House of Commons, 21 May 1900, vol 83, col 783 (Blake).
[139] *Statute of Westminster 1931* (UK); *Australia Act 1986* (UK).
[140] The choice of language was perhaps influenced by the decision of the US Supreme Court in *Texas v White*, 74 US (7 Wall) 700 (1869) which describes the 'indissoluble relation' between the states of America.
[141] *Official Report of the National Australasian Convention Debates*, Adelaide, 14 April 1897, 571 (McMillan).

did not explain how their anti-secession views reconcile with their opinions in support of subsidiarity and federalism. Nor was it clarified how indissolubility could be compatible with the delegates' distaste for a unitary state, since only if the Constitution positioned the states underneath a superior master would it be feasible for secession to be declared unlawful.

In truth, there was ambiguity about the effect of a declaration of indissolubility. On the one hand, Patrick McMahon Glynn said that '[t]he indissolubility of the Commonwealth of Australia is proclaimed in the Preamble of the Constitution. The Union is, of course, none the less indissoluble on that account'.[142] Glynn's evaluation was that the Preamble 'may be regarded as one of those preliminary flourishes addressed to the conscience, which are to be found in the preamble of instruments which suggest more than they achieve'. On the other side, among opponents of Federation there was fear that the Preamble could hinder withdrawal and so some labour unionists sought inclusion of a right of secession.[143] The necessity of political compromise makes it likely, as Craven writes, that 'the preamble may have provided a middle ground, being all things to all men' because the framers were unable to insert a comprehensive prohibition without risking Federation.[144] It was easier for parties to accept pious sentiment in the Preamble than to risk conflict over a proscriptive clause within the body of the Constitution.[145]

Yet surely there must have been some mischief that the term 'indissoluble' tried to solve? Quick interprets the history as suggesting that 'Western Australia, like other States, has freely and voluntarily joined the Commonwealth in the full knowledge that it is not a mere compact or partnership, dissolvable at will, like the old Australian Federal Council, but that it is an indissoluble Federal Commonwealth'.[146] It is true that the Constitution does not obviously mention a right to secede, unlike the *Federal Council of Australasia Act*.[147] In addition, the debate between opposing sides verifies that the document was to be a centralising step. Hence, the idea that the framers sought to create 'one people'[148] has become a fashionable inference.

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[142] Patrick Glynn, 'Secession' (1906) 3 *Commonwealth Law Review* 193, 203.
[143] See, eg, Hank Morgan, 'A Labour Opinion on Federation' in Charles Clark (ed) *Select Documents in Australian History 1851-1900* (Angus & Robertson, 1971) 494-6.
[144] Craven, *Secession: The Ultimate States Right* (n 9) 29.
[145] In other words, part of the reason for the delegates' silence, as Craven points out (above n 9, 29-30) may have been tactical. The delegates chose omission because they were unable to reveal the strength of their feeling against secession with 'divisive specifics' as this is likely to have alienated potential supporters of Federation.
[146] John Quick, 'The West Australian Discontent: Is Secession Possible?', *Life* (Melbourne, 15 October 1906) <http://adc.library.usyd.edu.au/data-2/fed0031.pdf>
[147] *Federal Council of Australasia Act 1885* (UK) s 31.
[148] *Street v Queensland Bar Association* (1989) 168 CLR 461, 485 (Mason J).

However, the Preamble's reference to an agreement 'to unite in one indissoluble Federal Commonwealth' is liable to mislead. The Constitution's achievement was not to superimpose consolidation but rather to create separate federal institutions that operate *alongside* state institutions. The Council, by reason of s 29 of the *Federal Council of Australasia Act*, raised revenue from the colonial governments rather than from individual taxpayers, whereas the new Commonwealth parliament can operate directly upon a state's residents. The delegates' accomplishment was the creation of a federal government with the power to bind individuals directly, but without the power to extinguish the states by absorbing them into the federal government. Aroney's opinion is that co-equal status within respective spheres was desired and that this is a reason why the delegates sought to confine the Commonwealth parliament to a list of powers rather than giving it open-ended plenary power unambiguously binding a state's Crown.[149] And since no delegate – except Symon – supported inserting an express power on the part of the Commonwealth parliament to regulate secession by a state, it is reasonable to side with Besant who says that this authority was to remain with the states or with the UK.[150] At all points, a majority of delegates guarded the existence of the states and their powers over the individuals within jurisdiction. Even Quick and Garran, following Deakin,[151] describe the states as 'contracting parties'.[152] Of course, using such a phrase also invites inquiry into the scope for termination of the contract!

To what extent does the delegates' approval of a High Court act as a brake upon secession? A function of the court in disputes, according to Dobson, is to 'say whether a state on the one hand or the Commonwealth on the other infringes the principles of the Constitution'.[153] Dobson's interpretation was shared by most delegates because it was assumed that judicial review is a function of the Court.[154] A proposal from Glynn to bolster the neutrality of the Court by including in its composition the chief justices of the states was defeated 29 to 9, further reinforcing the nationalist aspect of the body.[155] There is consequently little doubt that a majority

[149] Moreover, Samuel Griffith recognised that the pre-existing power of the colonies granted by their constitutions – which was only partially impacted due to ss 106 and 107 of the Constitution – was so vast that it was akin to 'sovereign' states: Aroney, *Constitution of a Federal Commonwealth* (n 53) 67, 273-275.
[150] A similar line of reasoning is pursued in Christopher Besant, 'Two nations, two destinies: a reflection on the significance of the Western Australian secession movement to Australia, Canada and the British Empire' (1990) 20 *University of Western Australia Law Review* 209, 304: '[power to dissolve the federal tie] not being within the Commonwealth heads of power, the authority…must be within the legislative competence of each state'.
[151] *Official Report of the National Australasian Convention Debates*, Adelaide, 15 April 1897, 650 (Deakin).
[152] John Quick and Robert Garran, *The Annotated Constitution of the Australian Commonwealth* (1901) 294.
[153] *Official Record of the Debates of the Australasian Federal Convention, Melbourne, 24 February 1898,* 1497.
[154] Aroney, *Constitution of a Federal Commonwealth* (n 53) 292.
[155] Ibid 293.

intended that the Court can bind any state with a decision that is final should Western Australia or another state seek redress for grievances through it. Even so, there is no argument to the effect that the existence of the Court means that a state *must* seek a remedy through it. Although Barton saw the Court as a mechanism to avoid an 'arbitrament of blood'[156] – open warfare – he said nothing about what ought to happen if a state refused to make use of the judicial avenue. His silence on this point makes it possible for a state to ignore Chapter III relating to the judicature and retreat peacefully from Federation in reliance on other grounds like inherent autonomy.[157]

Fourth, while it can be conceded that the ratifiers were in two camps about the nature of the union, the reference by *The Australian Star* newspaper to promises of an easy opt-out show that it was political suicide for a coercive union to be openly advertised. Moreover, the publicly available evidence reveals that a prominent intellectual like Garran treated Federation as a voluntary arrangement prior to ratification. After the Constitution had been safely ratified, Quick and Garran say that the union was intended to be 'lasting one' consistent with the 'continuity of the Commonwealth as an integral part of the British Empire'.[158] This does not diminish Garran's earlier assessment of the bill because the Commonwealth is, by Besant's account, no longer part of the British Empire and therefore secession is not necessarily inconsistent with it.[159]

IV. THE TREND TO CENTRALISATION

It would be remiss to end this chapter without mentioning the Western Australian movement which culminated in a referendum for secession in 1933. After the referendum, the WA government sent a delegation to the UK Parliament to seek legislation releasing the state from the Federation. As these events occurred after the Constitution's ratification, they are irrelevant to a purposive interpretation that focuses on the intentions of the document's framers. Nonetheless, the arguments made by WA, as reflected in the submissions of its legal representatives before the Joint Committee set up to consider the petition, highlight how far the High Court has strayed from original intent. The Court's preference to centralise power in Canberra with the Commonwealth parliament was a major justification for secession by WA.

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[156] *Official Report of the National Australasian Convention Debates*, Adelaide, 23 March 1897, 25 (Barton).
[157] There is, admittedly, a genuine doubt about whether from an intrinsic perspective the existence of Chapter III judicial power contradicts unilateral secession. This issue is evaluated in Chapter 7 of this dissertation.
[158] Quick and Garran, *The Annotated Constitution of the Australian Commonwealth* (n 190) 294.
[159] Besant, 'Two nations, two destinies: a reflection on the significance of the Western Australian secession movement to Australia, Canada and the British Empire' (n 150) 304.

The minutes reveal a preoccupation on the part of Morgan, counsel for WA, with the 'whittling down of the powers of the States by reason of judicial interpretation of the Constitution'.[160] His chief complaint was that the High Court had unconstitutionally diminished the state sovereignty reflected in s 106 of the 'deed of political partnership' by expanding the scope of federal power at the expense of the states in the areas of conciliation and arbitration, taxation, inter-state commerce and customs and excise.[161] Morgan observed that WA had become subject to federal industrial courts which could control the hours of labour and wages of state government employees and had become subject to Commonwealth taxation of its employees.[162] The original agreement for a federation had thus been diverted along the path toward a unitary state – a shift that has been confirmed by scholars like Aroney who says that '[t]he High Court has adopted an approach to constitutional interpretation that is essentially unitarist'.[163] Whether these judicial amendments to the Constitution preclude secession will be evaluated throughout this thesis.

V. CONCLUSION

During the 1890s, the UK wished to devolve spending to its dominion and its Australian colonies wanted inter-state trade and defence cooperation. The Commonwealth Constitution was the result. Entrance was predicated on consent. Consent is important because an agreement that is voluntary implies mutual benefit, because otherwise the parties are unlikely to enter into it in the first place. It is also implicit in an agreement predicated on mutual benefit that it can be voided if that benefit is no longer served, in the absence of unambiguous provision to the contrary.

It is a federation that was intended, not a unitary state. In a federal union '[d]ecisions… are made at the base of the organisation and flow upwards so ensuring that power remains decentralized in the hands of all'.[164] This can be contrasted to a unitary state where 'power rests at the top and the role of those below is simply to obey'.[165] Importantly, the Canadian model was not chosen. The

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[160] Joint Committee of the House of Lords and the House of Commons, Parliament of the United Kingdom, *Petition of the state of Western Australia together with the proceedings of the committee and minutes of speeches delivered by counsel* (1935) 13.
[161] Ibid 22.
[162] Ibid 27.
[163] Nicholas Aroney, 'The High Court of Australia: Textual Unitarism vs Structural Federalism' in Nicholas Aroney and John Kincaid (eds), *Courts in Federal Countries: Federalists or Unitarists?* (University of Toronto Press, 2017) 29. Along similar lines see also Alan Fenna, 'The Centralization of Australian Federalism 1901-2010: Measurement and Interpretation' (2018) 49 *Publius: The Journal of Federalism* 30, 35; Angus O'Brien, 'Wither Federalism: The Consequences and Sustainability of the High Court's Interpretation of Commonwealth Powers' (2008) 23 *Australiasian Parliamentary Review* 166, 176; Dale Atkinson, 'Re-Engineering the Federal Balance' (2018) 2 *Western Australian Student Law Review* 47, 47.
[164] 'What could the social structure of anarchy look like?', *Infoshop.org* (Web Page) <https://web.archive.org/web/20110629060032/http://www.infoshop.org/page/AnarchistFAQSectionI5>
[165] Ibid.

Canadian Constitution lists local provincial powers and preserves the residual to the federal government, whereas in Australia the opposite was preferred. Australian delegates considered that they had no authority to usurp the existence of the colonies and were in no mood to interfere with self-governance beyond what was necessary. Although the framers adopted measures to discourage secession – namely, the Preamble and the High Court – their decision to choose these lukewarm barriers provides reason to infer a desire to tolerate secession. All parties were aware that the final product had to be palatable and that emphasising control by the federal government could inflame the objections of the anti-Federalists. Thus, by leaving the Constitution with a degree of ambiguity, they passed its relationship to secession to future generations to resolve. Since we do not know their subjective intentions, all we can say is that they did not insert stronger barriers and that wanting to discourage secession is not the same as banning it.

PART II

CONSTITUTIONAL CONSISTENCY

CHAPTER 3: LEGAL SOVEREIGNTY IN AUSTRALIA

> *The relation of the Commonwealth to the Empire, and the relation of the Federal and State Governments of the Commonwealth to one another, can hardly be appreciated apart from a sound study of the principle of sovereignty.*
>
> John Quick and Robert Garran[1]

I. INTRODUCTION

This chapter will ascertain the locus of sovereignty in Australia to understand how power is exercised in the Australian federation. Sovereignty is a concern that has frequently arisen during analysis of unilateral secession because a declaration of independence necessarily entails an assertion of social power. The Introduction chapter has explained how courts have generally refused to adjudicate individual sovereignty. State sovereignty on the other hand can be traced to the modern system of states based on the principle of territorial sovereignty inaugurated by the Peace of Wesphalia.[2] The American Revolution of 1776 and the French Revolution of 1789 then promoted the concept of self-determination as an ideal of representative government.[3] These latter historical events greatly weakened the basis of an all-encompassing Austinian political authority and some of the principles espoused are now reflected in parts of international law.[4]

Despite the trend away from a monolithic sovereign due to the American and French revolutions, it is generally accepted by observers that for a period after 1788 until either 1901,[5] 1935[6] or 1986[7] – depending on one's evaluation of the moment of legal independence – there was one organisation that ruled over Australia.[8] That body was the Parliament of the United Kingdom.

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[1] John Quick and Robert Garran, *Annotated Constitution of the Commonwealth* (1901) 324.

[2] Martin Griffiths, 'Self-determination, international society and world order' (2003) 3 *Macquarie Law Journal* 29, 29-30.

[3] Ibid.

[4] Joshua Castellino and Jeremie Gilbert, 'Self-determination, indigenous peoples and minorities' (2003) 3 *Macquarie Law Journal* 155, 158-59.

[5] *Bistricic v Rokov* (1976) 135 CLR 552, 567 (Murphy J); *Kirmani v Captain Cook Cruises Pty Ltd* (No 1) (1985) 159 CLR 351, 384 (Murphy J).

[6] Christopher Besant, 'Two nations, two destinies: a reflection on the significance of the Western Australian secession movement to Australia, Canada and the British Empire' (1990) 20 *University of Western Australia Law Review* 209, 304: 'the 1935 Joint Select Committee Report was a declaration that the United Kingdom Parliament had abdicated its sovereign power to dissolve the federal tie in a situation of State/Commonwealth conflict'.

[7] *Sue v Hill* (1999) 199 CLR 462, 528 (Gaudron J).

[8] If authority is required for the proposition that the UK was sovereign of Australia, see *China Ocean Shipping Ltd and Others v South Australia* (1978) 145 CLR 172; John Tate, 'Giving substance to Murphy's Law: the question of Australian sovereignty' (2001) 27 *Monash University Law Review* 21, 22-23; David Clark, 'Cautious constitutionalism: Commonwealth legislative independence and the *Statute of Westminster 1931-1942*' (2016) 16

In 1934, the Parliament of Western Australia admitted this when presenting its petition to the UK seeking to leave the Commonwealth of Australia. Although a booklet prepared by WA's government entitled *The Case of the People of Western Australia* references the 'people',[9] the government did not claim that its legal authority was derived from voters. Nor did the government say that it could act upon whatever voters desired. To the contrary, WA conceded that prevailing arrangements required that the state seek permission from the UK to revert to the self-government that the state enjoyed prior to ratifying the Commonwealth Constitution.[10] Lead counsel for the federal government, Wilfred Greene, concurred in holding that WA was never a wholly free and independent state but was rather a dominion under the British Crown.[11]

Conversely, Besant quotes evidence which he claims shows that the UK parliament has since at least 1935 abdicated its sovereignty by transferring its power to disband Federation. And since the power at issue is not expressly within Commonwealth heads of power, Besant submits that 'the authority to dissolve the federal tie must be within the legislative competence of each state'.[12] However, Craven disagrees with such an interpretation and thinks that authority over secession resides in the people of Australia *as a whole*, rather than in individual states.[13]

Either way, a preliminary inquiry to be resolved is whether the Parliament at Westminster is still the sovereign over Australia. Part II of this chapter begins by considering whether sovereignty is an appropriate inquiry and conceptual tool. In Part III, I interrogate sovereignty as it subsists in the Australian legal framework and describe the feasible options that arise from the legal material. Certainly, a reader looking to find clarity in the *Commonwealth of Australia Constitution Act 1900* (UK) can find indicators of an imperial sovereign. Yet there is also another plausible option – that of popular sovereignty. Part IV makes the case for popular sovereignty as an accurate description of Australia's constitutionalism given developments since Federation in 1901. Finally, Part V examines the implications of the foregoing for secession.

Macquarie Law Journal 41, 44: 'British legislative limitations on the Commonwealth parliament…continued to apply to the Commonwealth until…1942'.

[9] Parliament of Western Australia, *The Case of the People of Western Australia in support of their desire to withdraw from the Commonwealth of Australia* (Report, 1934) 1.

[10] Joint Committee of the House of Lords and the House of Commons, Parliament of the United Kingdom, *Petition of the state of Western Australia together with the proceedings of the committee and minutes of speeches delivered by counsel* (1935) 92.

[11] Ibid.

[12] Besant, 'Two nations, two destinies: a reflection on the significance of the Western Australian secession movement' (1990) 20 *University of Western Australia Law Review* 209, 304.

[13] Gregory Craven, *Secession: The Ultimate States Right* (Melbourne University Press, 1986) 81.

II. THE RIGHT QUESTION?

Although many, and probably most, judges and academics conceive of Australian federalism through the prism of sovereignty, a minority of scholarship objects to sovereignty altogether. Zines has queried the need to locate a sovereign and claims that '[t]he idea of a sovereign of any sort is not essential'.[14] Aroney provides another critique worth exploring. He contends that 'the idea of sovereignty provides an inadequate conceptual framework for understanding the federation of the Australian colonies'.[15] Aroney maintains that 'the Australian federation involves a plurality of communities and authorities in which no particular community or authority is sovereign'.[16] Instead of a sovereign, Aroney advocates what is essentially a middle ground position between extreme decentralisation (confederalism) and nationalism (a unitary state):

> Both the compactual and nationalist theories are counterfactual. The operative assumption of both approaches is that there must be a unitary locus of sovereignty in some definite institution or political community: either the constituent states or the federation as a whole. Neither approach can adequately account for all the specific institutional features of extant federations, in their formative basis, representative structures, configuration of power and amendment procedures.[17]

His preferred mode of analysis is 'better explained by reference to a mediating, covenantal interpretation' that 'has a superior capacity to explain both the formative (compactual) and representational (national) features of the Constitution in a coherent fashion'.[18]

Because of this divergence in views, it is necessary to justify the choice of question. Why choose to evaluate the Australian system through the lens of sovereignty?

It is unclear how Aroney's inclination to avoid the notion of sovereignty can be workable when faced with the dilemma of unilateral secession. If a state seeks to take with it a certain territorial area which is also simultaneously under threat from the Commonwealth, how is it possible to decide which party should prevail without an understanding of their sovereign rights? According

[14] Leslie Zines, 'Constitutionally protected individual rights' in Paul Finn (ed), *Essays on Law and Government* (Law Book, 1996) vol 2, 151.
[15] Nicholas Aroney, *The Constitution of a Federal Commonwealth: The making and meaning of the Australian Constitution* (Cambridge University Press, 2010) 366.
[16] Ibid 353.
[17] Ibid 343.
[18] Ibid.

to Aroney, his approach 'seeks to account for all the inter-individual and inter-communal features of the Australian Constitution without making one aspect determinative'.[19] Yet when analysing the constitutionality of secession from a theoretical standpoint, it is arguably unsatisfactory to say that a conflict between a state and federal government is by design a stalemate where both litigants are right. Either a state has the right to secede in a theoretical sense, or it does not. If it does, then that right must derive from some power or control – that is, from sovereignty. If it does not, then that must be because another power source takes superiority over the state. There cannot be a half-way house with respect to secession. I acknowledge in Chapter 7 however, that in a practical sense were such a dispute to reach the High Court, the Court could simply refuse to hear the case and thereby leave the answer indeterminate.

Despite his attempt to forge a compromise reading of the Constitution that accommodates both federal and national features, Aroney ultimately ends up siding with a unitary approach toward secession by positing that the High Court – a branch of the Commonwealth government whose appointees are political choices by politicians – is by design the sovereign:

> The intention was to create an 'indissoluble' federal commonwealth, foreclosing the possibility of unilateral secession, and the intention was to make the High Court the ultimate arbiter of disputes concerning the constitutional validity of government action and legislation, foreclosing the possibility of state-determined nullification of federal laws.[20]

This appears contradictory. From where does any party – or the Court – derive a right to say a state cannot leave, if not at root from some kind of sovereignty? Aroney seems to make the High Court and its judicial power determinative rather than following the approach he sets out.

For the purposes of this chapter, it is sufficient to observe that this thesis' method of functionalism and realism where there is no necessary disconnect between law and politics means it is necessary to interrogate secession by engaging with sovereignty. Even Dicey – who at times supports a distinction between law and politics – defines constitutional law as 'all rules which directly or indirectly affect the distribution or the exercise of the *sovereign power* in the state'.[21] At a time when many Australian judges think that the UK occupies the position of a

[19] Ibid 343.
[20] Ibid 350.
[21] Emphasis added. Albert Dicey, *Introduction to the Study of the Law of the Constitution* (Liberty Fund, 1982) xix.

foreign country, this change is directly related to the location where sovereignty resides.[22] Hence, this thesis proceeds on the footing that sovereignty is an essential inquiry.

III. UNDERSTANDING SOVEREIGNTY

To begin with, it is worth noting that the concept of 'sovereignty' is contested. It is usually taken to mean control or dominion over a territory[23] Beyond that, the experts disagree.[24]

One definition posits that for an entity or person to be sovereign implies possession of supreme power free from interference by third parties seeking to exercise dominion over the same subject matter. For example, the Roman jurist Ulpian suggests that a characteristic of sovereignty is that it is absolute: the 'people transferred all their imperium and power to the emperor' and 'the emperor is not bound by the laws'.[25] The other attribute of this kind of sovereignty is that it is indivisible; it cannot be shared with other parties since that might leave disputes between co-equal authorities unresolved.[26] This edifice is like that of Austin's positivism mentioned in Chapter 1. It is easiest to apply in a unitary state without a written constitution where a single layer of governance obviously exercises power unchecked by other coordinate institutions.

A second outlook is nuanced and empirically suited to polycentric societies. The location of sovereignty in a liberal democracy depends upon what Hart has labelled a 'rule of recognition' and what Kelsen calls a *Grundnorm*.[27] These terms refer to the notion that there is a set of norms in every legal system that cannot be directly supported with reference to precedent, yet which is agreed upon by most officials. Neither Hart or Kelsen assume that there is only one person or group who holds sovereign power, since this depends on what the rules commonly adhered to by government officials say (for instance, it might be that there are multiple sovereigns dominant in their areas of authority). Note however that Dworkin in *Taking Rights Seriously* shows that there

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[22] *Sue v Hill* (1999) 199 CLR 462, 490.
[23] Daniel Philpott, 'Sovereignty' in Edward Zalta (ed), *The Stanford Encyclopedia of Philosophy* (2020) <https://plato.stanford.edu/entries/sovereignty/>.
[24] Sean Brennan, Brenda Gunn and George Williams, "'Sovereignty' and its Relevance to Treaty-Making Between Indigenous Peoples and Australian Governments" (2004) 26(3) *Sydney Law Review* 307, 308; James Knight, 'Splitting sovereignty: the legislative power and the Constitution's federation of independent states' (2019) 17 *Georgetown Journal of Law & Public Policy* 683, 683-84.
[25] Quoted in F.H. Hinsley, *Sovereignty* (Cambridge University Press, 1986) 42.
[26] Jens Bartelson, 'On the indivisibility of sovereignty' (2011) 2 *Republics of Letters: A Journal for the Study of Knowledge, Politics and the Arts* 85, 85-86. Along these lines Morgenthau posits, 'sovereignty over the same territory cannot reside simultaneously in two different authorities, that is, sovereignty is indivisible': Hans Morgenthau, 'The Problem of Sovereignty Reconsidered' (1948) 48(3) *Columbia Law Review* 341, 350.
[27] Herbart Hart, *The Concept of Law* (Oxford University Press, 1994) 250; Hans Kelsen, *General Theory of Law and State* (1945) 111.

is disagreement on the finer details of political and legal interactions, to the extent that it can be doubted whether there is such a thing as an unambiguous rule of recognition.[28] Clearly, such a nuanced understanding of sovereignty fits a federation where regional governments operate alongside a central government and where pressure groups exert influence through voting.

The historical background to sovereignty in the Australian context can be traced to the Glorious Revolution when the English Parliament established a check on the monarch and entrenched its dominance over law-creation. When the British parliamentarians of 1688 decided to adopt the fiction of abdication by their King, this populist revolutionary norm set the stage for parliamentary sovereignty.[29] Kirby argues that 'it is [the Glorious Revolution of 1688] which finally established the system of limited or constitutional monarchy as a conditional and generally symbolic form of government, always ultimately answerable to the will of the people'.[30] Prior to this the King's common law co-existed with Church courts applying canon law, local regions applying customary law and maritime courts applying Roman law.[31]

In Chapter 2, I explored the UK Parliament's establishment of New South Wales as a penal colony in 1788 by Governor Phillip and noted that body's subsequent legislation to carve out from NSW what are now the states of Tasmania, Victoria, Queensland and South Australia. Western Australia originated separately through westward expansion on behalf of NSW in 1826.[32] Since that time, a variety of developments have occurred which suggest feasible options (i.e. within the confines of positivist law) with respect to the locus of ultimate sovereignty:

1) Unitary sovereign:
    a. that Australia is still a colony and so the UK is the statist sovereign[33];
    b. that the Commonwealth is the statist sovereign because its High Court decides what the Constitution means and its parliament operates nationally. A variation of

[28] Ronald Dworkin, *Taking rights seriously* (Harvard University Press, 1978) 54-55.
[29] John Graham, *A Constitutional History of Secession* (Pelican Publishing, 2002) 58-59.
[30] Michael Kirby, 'The Trial of King Charles I – A Defining Moment for Our Constitutional Liberties' (Speech, Anglo-Australasian Lawyers Association, 22 January 1999).
[31] 'The common law and civil law traditions', *Berkeley Law* (Web Page, 2017) <https://www.law.berkeley.edu/wp-content/uploads/2017/11/CommonLawCivilLawTraditions.pdf >: 'In the Middle Ages, common law in England coexisted, as civil law did in other countries, with other systems of law. Church courts applied canon law, urban and rural courts applied local customary law, Chancery and maritime courts applied Roman law. Only in the seventeenth century did common law triumph over the other laws, when Parliament established a permanent check on the power of the English king and claimed the right to define the common law and declare other laws subsidiary to it'.
[32] Dorothy Reid, 'French exploration and intentions with regard to the West Coast of Australia 1772-1829' (Masters Thesis, Curtin University of Technology, 2008) 5.
[33] See, eg, Owen Dixon, 'The Law and the Constitution' (1935) 51 *Law Quarterly Review* 590, 597.

this argument relies on the sovereignty of the people as an amalgamated whole to posit that the Commonwealth has overarching power.[34]

2) Shared or divided sovereignty:
    a. that Australia is a compact between six state parliaments and/or the people of the six states[35]
    b. that Australia is a compact between six state parliaments plus the federal parliament and/or the people of each of these seven polities.[36]

Zimmermann and Finlay define a unitary state versus a federation as follows:

> The type of political decentralisation provided by federalism is in contrast to a unitary system of government, which consists of one sovereign or central government. Although there may be regional units in unitary systems, any authority vested in them is merely delegated by the central government and can be resumed by it. In contrast, the central feature of federalism is the separation of powers between central and regional governments in such a way that each of them cannot encroach upon the power of another.[37]

Unitary or shared/divided sovereignty can be justified on two ideological grounds: either popular consent or a statist power-based rationale for each practice. On the one hand, popular consent is 'the sovereignty of the people represented by the electors'.[38] As Weill points out, even Dicey 'believed the constitution was in practice, though not in theory, based on popular and not parliamentary sovereignty'.[39] On the other hand, statism is sovereignty that 'resides in the State, but…is principally manifested through the Government'.[40] These contrasting justifications for unitary and shared sovereignty reflect varying philosophical beliefs about the sources of law.

A. A unitary state

[34] See mention of a Commonwealth-led unitary state in William Coleman, 'State supremacy will falter at first hint of conflict', *The Australian* (22 July 2021); Michelle Evans, 'Rethinking the Federal Balance: How Federal Theory Supports States' Rights' (2010) 1 *The Western Australian Jurist* 14, 52; Geoffrey de Q Walker, 'The Seven Pillars of Centralism: Engineers Case and Federalism' (2002) 76 *Australian Law Journal* 678, 701.
[35] See, eg, Anthony Dillon, 'A turtle by any other name: the legal basis of the Australian Constitution' (2001) 29 *Federal Law Review* 241, 247-249.
[36] See, eg, Michael Kirby, 'Deakin: Popular Sovereignty and the true foundation of the Australian Constitution' (1996) 3 *Deakin Law Review* 129, 135-139.
[37] Augusto Zimmermann and Lorraine Finlay, 'Reforming federalism: a proposal for strengthening the Australian federation' (2011) 37(2) *Monash University Law Review* 190, 191.
[38] Quick and Garran, *Annotated Constitution of the Commonwealth* (1901) 325.
[39] Rivka Weill, 'Dicey was not Diceyan' (2003) 62 *Cambridge Law Journal* 474, 474.
[40] Ibid.

1. An imperial sovereign

An older school of thought with respect to the locus of sovereignty holds that Australia is still a colony subservient to the chain of command with the Queen in council with the UK parliament at its apex. A line of reasoning prior to passage of the *Statute of Westminster* 1931 (UK) and its subsequent adoption in 1942 asserts that the UK can at any time repeal Australia's founding documents.[41] However, the modern version of this view holds that the UK is the legal root of the Constitution yet concedes that Australians are no longer subordinate to its power to bind with paramount force.[42] The principle behind either view is coercive: the monarch is a sovereign as ordained by divine right, not because the people delegated their will to her.[43]

The *Constitution Act* includes a Preamble, the Covering Clauses and the Constitution proper. Both the *Constitution Act* and the *Australia Act 1986* (UK) are replete with references to an imperial sovereign. Later, I advocate that this text has lost relevance due to the abdication of control by the UK, but my intention here is to provide an overview of the background.

In the *Constitution Act*, the Preamble recites that Australia is a 'Federal Commonwealth under the Crown of the United Kingdom of Great Britain and Ireland' and speaks of the Queen's 'possessions' including 'other Australasian Colonies'.[44] Quick and Garran point out that 'under the Crown' designates a relationship to the imperial Crown that is constitutionally subordinate; the Commonwealth is 'not an independent Sovereign community, or state'.[45]

Covering cl. 2 extends the *Constitution Act* in perpetuity: '[t]he provisions of this Act referring to the Queen shall extend to Her Majesty's heirs and successors in the sovereignty of the United Kingdom'. Covering cl. 5 alludes to the UK's priority over foreign policy, explaining that 'the

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[41] For a summary of the position prior to 1986 see HP Lee, 'The Australia Act 1986 – Some Legal Conundrums' (1988) 14 *Monash University Law Review* 298, 299-300; Alex Castles, 'The reception and status of English law in Australia' (1963) 2 *Adelaide Law Review* 1, 29-30. In brief, s 2 of the *Colonial Laws Validity Act 1865* (UK) applied to the *Commonwealth Constitution* and to the state constitutions so that any law passed by the Commonwealth or a state that was repugnant to a UK law 'extending to' it would be void. The *Statute of Westminster Adoption Act 1942* (Cth) retrospectively removed this fetter by adopting the *Statute of Westminster 1931* (UK), with the effect that the Commonwealth could thereafter legislate inconsistently as against UK law.

[42] Dillon, 'A turtle by any other name: the legal basis of the Australian Constitution' (n 29) 245.

[43] *ACTV v Commonwealth* (1992) 177 CLR 106, 181-182 (Dawson J).

[44] The word 'possessions' is significant. Dicey in 1914 said that colonies like Australia are subordinate legislatures irrespective of the *Constitution Act* which permits a power of amendment: Dicey, *Introduction to the Law of the Constitution* (Liberty Fund, 1982) xxxvii. As he writes, 'the Imperial Parliament still claims in 1914, as it claimed in 1884, the possession of absolute sovereignty throughout every part of the British Empire…[t]he constitution…of a Dominion…originates in and depends upon an Act, or Acts, of the Imperial Parliament; and these constitutional statutes are assuredly liable to be changed by the Imperial Parliament' (at xliii).

[45] Quick and Garran, *Annotated Constitution of the Commonwealth* (1901) 367.

laws of the Commonwealth shall be in force on all British ships, *the Queen's ships of war excepted*, whose first port of clearance and whose port of destination are in the Commonwealth'.[46] Covering cl. 8 affirms that the *Colonial Boundaries Act 1895* (Imp), which provides for alteration of the boundaries of a colony, continues to apply.[47]

A literal reading of the Constitution reveals that there is a Queen who has appointed a Governor-General as her representative (s 2), that both possess awesome powers to suspend or dissolve the houses of parliament (s 5) and that their veto power over bills (s 58) is – unlike in the *US Constitution*[48] – incapable of being overridden by a super-majority of the legislature (s 59). Their veto power over bills extends to proposals for amending the Constitution using ss 128, 51(xxxiv) or s 15 of the *Australia Act* since any bill passed can be disallowed by the Governor-General or Queen prior to being submitted to the states or to the people for assent.[49] Roman lawyers associated the power to control the armed forces with attributes of sovereignty,[50] and this too is allocated to the Governor-General (s 68).

At the state level, s 2(3) of the *Constitution Act 1889* (WA) ('WA Constitution') reserves to the Governor and Queen the responsibility to assent to bills: no bill shall be of any effect unless it has been duly assented to 'by or in the name of the Queen'. Section 3 allows the Governor as 'the Queen's representative in Western Australia' (s 50) to control sessions of the legislature and dissolve parliament 'whenever he shall think fit'. Section 60 prohibits the 'Legislature of the Colony' from enforcing 'any duty or charges upon shipping contrary to or at variance with any treaty concluded by Her Majesty with any foreign Power'. Section 61 allows the Queen to divide 'the Colony of Western Australia…by separating therefrom any portion thereof…under such form of Government as she may think fit'. Section 68 makes clear that no public revenue is to be issued except with the permission of the Governor. Although s 73 permits the state parliament to amend the WA Constitution (except for those provisions entrenched by 'manner and form'[51]

[46] See the discussion in A. Lefroy, 'Commonwealth of Australia Bill (Second Article)' (1899) 15 *Law Quarterly Review* 281, 281; W. Brown, 'Australian Commonwealth Bill' (1900) 16 *Law Quarterly Review* 24, 25-26; Quick and Garran, *Annotated Constitution of the Commonwealth* (1901) 345.
[47] Quick and Garran, *Annotated Constitution of the Commonwealth* (n 42) 378-79.
[48] *United States Constitution* art I. There is an inherent tension between popular sovereignty (majority rule) and republican protection of human rights. Supermajority clauses aim to protect rights: Brett King, 'The use of supermajority provisions in the Constitution: the framers, *The Federalist Papers* and the reinforcement of a fundamental principle' (1998) 8 *Seton Hall Constitutional Law Journal* 363, 364.
[49] Christopher Gilbert, 'Section 15 of the Australia Acts: Constitutional Change by the Back Door' (1989) 5 *Queensland University of Technology Law Journal* 55, 57-58.
[50] Ryan Greenwood, 'War and sovereignty in Medieval Roman law' (2014) 32 *Law and History Review* 31, 32.
[51] Highlighted in C McLure, 'Key judicial decisions on the *Constitution Act 1889* (WA) and the *Constitution Acts Amendment Act 1899* (WA)' (2013) 36 *University of Western Australia Law Review* 234, 236: "Section 73(2) of the 1889 *Constitution Act*… restricts the capacity of the legislature to enact a bill which expressly or impliedly: provides

requirements), the document is authorised by imperial enabling legislation – the *Western Australian Constitution Act 1890* (UK).[52]

Section 42 of the Commonwealth Constitution requires federal legislators to swear an oath or affirmation of loyalty to 'Her Majesty Queen Victoria, Her heirs and successors according to law'. This cannot be changed except through a constitutional amendment via referendum using s 128.[53] In WA, however, it is not mandatory to swear loyalty to the Queen. Section 22 of the WA Constitution allows a member of parliament to only swear loyalty to the people.

In addition to the preceding context, certain curial pronouncements buttress the constitutionality of imperial sovereignty. Famously, the *Engineers Case* shifted emphasis from American authorities to imperial precedent from the UK, with the judges explaining that there are 'cardinal features' that make this necessary: '[o]ne is the common sovereignty of all parts of the British Empire; the other is the principle of responsible government'.[54]

In *Union Steamship Co. Of New Zealand Ltd v the Commonwealth*, decided in 1925, the High Court was unanimous insofar as they agreed that Australia is still a 'colony' within the meaning of the *Colonial Laws Validity Act 1865* (UK) ('CLVA').[55] The CLVA made Commonwealth and state laws invalid, to the extent of any inconsistency, when repugnant to an act of the UK parliament extending to the colonies. Higgins J, though dissenting on the final order to be delivered by the Court, determined that "there is no doubt that an Act passed by the Australian Parliament is a 'colonial law' within the meaning of the *British Act of 1865* [*Colonial Laws Validity Act*]; for it cannot be reasonably contended that Australia is not one of the 'King's possessions abroad'".[56] All judges upheld the principle that provisions of federal government legislation pertaining to shipping that contradict UK legislation are invalid to the extent of the inconsistency. As such, the UK parliament's sovereignty over Australia was confirmed.

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for the abolition of or alteration in the office of Governor; provides for the abolition of either the Council or the Assembly; provides that either House 'shall be composed of members other than members chosen directly by the people'; provides for a reduction in the number of the members of the Council or of the Assembly; or in any way affects any of ss 2, 3, 4, 50, 51 and 73 of the 1889 *Constitution Act*".

[52] The WA Constitution is a schedule to the *Western Australian Constitution Act 1890* (UK).

[53] Deirdre McKeown, 'Oaths and affirmations made by the executive and members of the federal parliament since 1901' (Research paper, Parliamentary Library, Parliament of Australia, 24 October 2013).

[54] *Amalgamated Society of Engineers* v *Adelaide Steamship Company* (1920) 28 CLR 129, 146 ('Engineers Case').

[55] *Union Steamship Co. Of New Zealand Ltd v the Commonwealth* (1925) 36 CLR 130, 140 (Knox CJ).

[56] Ibid 154 (Higgins J).

Admittedly, steps toward Australian autonomy came about with the Balfour Declaration of 1926 which was a resolution by imperial premiers at a conference in London.[57] The Balfour Declaration affirmed that there will be no intervention by the British in the municipal affairs of a Dominion without permission from that Dominion. These sentiments were approved in the *Statute of Westminster 1931* (UK) that was then adopted in the *Statute of Westminster Adoption Act 1942* (Cth) and thereafter applied to Commonwealth institutions. In between these two pieces of legislation however, Western Australia's acceptance of British sovereignty is demonstrated by the fact that the state approached the UK in 1934 seeking secession.[58] Furthermore, in 1975 the monarch's representative exercised his awesome powers highlighted above to dismiss the federal government of Prime Minister Whitlam. As Mayer and Schweber note, this dismissal by the Queen's representative was not cast into doubt:

> Despite some heated rhetoric to the contrary, there was no widespread immediate response to suggest that Governor-General Kerr's actions represented an illegitimate coup. In other words, actions by political actors that contradict the normal system of government are not constitutionally *ultra vires,* they are merely unusual. The conventions of responsible government, it turns out, are political rather than constitutional conventions.[59]

It may be submitted that this incident highlights that monarchical text prevails over practice. The Governor-General exercised his power to dissolve parliament using s 5, even though by convention Governor-Generals usually follow the advice of the Australian Prime Minister.

In 1976, Mason J in *Bistrcic v Rokov* affirmed that the *Merchant Shipping Act 1894* (UK) applied by paramount force to the Australian states. By this time, the *Statute of Westminster Adoption Act* had made imperial legislation – besides the *Constitution Act*, which is excluded from its ambit – inapplicable to the Commonwealth government except by its request and consent. But state-level institutions were still bound by s 2 of the *Colonial Laws Validity Act* due to the *Statute of Westminster* not on its face including states within its scope.[60] Unsurprisingly,

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[57] Another important step toward independence was the *Royal and Parliamentary Titles Act 1927* (UK) which paved the way for personalised local Crowns for New Zealand, Canada, Ireland, South Africa and other former dominions. This legislation had the consequence that there was a shared King of Australia, a King of New Zealand etc. with the monarch also having another capacity as a British sovereign.

[58] *Secession Act 1934* (WA); Thomas Musgrave, 'The Western Australian secessionist movement' (2003) 3 *Macquarie Law Journal* 95, 109.

[59] Kenneth Mayer and Howard Schweber, 'Does Australia have a constitution? Part I: Powers – a constitution without constitutionalism' (2008) 25 *UCLA Pacific Basin Law Journal* 228, 260.

[60] *Statute of Westminster 1931* (UK) s 9. Cf. an argument that suggests that the federal government is still subordinate since British sovereignty allows it to repeal the *Constitution*: John Tate, 'Giving substance to Murphy's law: the question of Australia sovereignty' (2001) 27 *Monash University Law Review* 21, 24.

Mason J held that the *Merchant Shipping Act* continued to apply to NSW: '[i]t is not in question that the 1894 Act is in force in New South Wales. It came into force in the Colony because it applied generally to British possessions…[i]t continued in force in the State after Federation…and after the *Statute of Westminster Adoption Act 1942* (Cth)'.[61]

Soon after, in 1979, Gibbs J in *China Ocean Shipping Co v South Australia* upheld this orthodox position with respect to the relationship between the UK and state institutions:

> The change in the relationship that gradually occurred between Australia and the United Kingdom did not have the effect of repealing any of the Imperial statutes in force in the States. Statutes do not cease to be part of the law because the conditions in which they were enacted have changed. If a change in the political relationship between the United Kingdom and Australia had resulted in the silent abrogation of some or all of the Imperial legislation in force in Australia, the law would have been rendered defective and gravely uncertain; indeed, on some subjects there would have been no law at all. But that is not the case. The *Merchant Shipping Acts*, not having been repealed, remain in force in Australia.[62]

Then came an undeniable shift toward autonomy for the Commonwealth and the states due to the *Australia Act 1986* (UK). This reform to the constitutional relationship with the UK parliament was requested by WA in its *Australia (Request and Consent) Act 1985* (WA), as well as separately by other states and the Commonwealth parliament.[63] Section 1 of the *Australia Act* specifies the termination of the power of the UK parliament to legislate for any part of Australia. Section 2 of the Act confirms that the state governments have plenary power, including to legislate extra-territorially. Section 3 terminates the application of the *Colonial Laws Validity Act 1865* to the states, thereby removing the repugnancy fetter of imperial sovereignty. Section 8 eliminates the possibility for the Queen to disallow state legislation after it has been assented by the Governor of a state. Section 5 preserves the pre-existing position of the *Constitution Act.* And s 10 declares '[a]fter the commencement of this Act Her Majesty's Government in the United Kingdom shall have no responsibility for the government of any State'.

There are some, like Dillon and Moshinsky, who highlight Australia's lack of home-grown autochthony and observe that the country's increased autonomy does not equate to a local legal

[61] *Bistricic v Rokov* (1976) 135 CLR 552, 555 (Mason J).
[62] *China Ocean Shipping Co v South Australia* (1979) 145 CLR 172, 195 (Gibbs J).
[63] Anne Twomey, *The Australia Acts 1986: Australia's Statutes of Independence* (Federation Press, 2010) 361.

root since legal validity is still established by tracing back to British sources.[64] Autochthony is concerned with how 'at some stage, a state must cease to be the offspring and derivative of an Imperial predecessor and exist as a complete and self-contained entity, as a law-constitutive fact itself'.[65] Dillon argues that '[a]utonomy is not autochthony'.[66] Hong Kong, for instance, is autonomous but answers to a Chinese sovereign.[67] Conversely, India is an example of autochthony. Although the *Indian Independence Act 1947* (UK) set out the regime that was to operate after independence, the difference from Australia is that art. 395 of the Constitution of India thereafter repealed the *Indian Independence Act*. This is despite the Indian people having no authority, from the point of view of the UK, to repeal a British act. The reason that this was done is to clarify India's status as a republic with a local legal foundation.[68]

Dillon submits that even after the *Australia Acts*, 'existing Imperial Acts applicable to Australia in 1986, continue in force after 1986 until amended or repealed by valid Australian legislation'.[69] An example is the *Constitution Act*. Dillon agrees, however, that 'any attempt by the Westminster Parliament to repeal or amend any of Australia's basic constitutive documents would be met with Australian rejection and disdain'.[70] Or as Marshall puts it, 'preservation of the British historical and legal root is compatible with its being the case that the Westminster Parliament is no longer able to legislate for [Australia]'.[71] And the High Court in *Mabo (No 2)* refers to the formative norm that "the whole of the territory designated in Phillip's Commissions was, by 7 February 1788, validly established as a 'settled British Colony'"[72] and in *Walker v State of South Australia* the Federal Court affirms that 'sovereignty and the radical title to all the land vested in the [British] Crown'.[73] If the imperial sovereignty view of the constitutional framework is correct, then the implication for secession is that WA lacks the inherent autonomy it needs to secede because it is a not a sovereign entity and is bound by a foreign legal root.

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[64] Anthony Dillon, 'The legal basis of the Australian Constitution' (2001) 29 *Federal Law Review* 241, 247; Mark Moshinsky, 'Re-enacting the Constitution in an Australian Act' (1989) 18 *Federal Law Review* 134, 144.
[65] Phillip Joseph, *Constitutional and Administrative Law in New Zealand* (1993) 398.
[66] Anthony Dillon, 'The legal basis of the Australian Constitution' (2001) 29 *Federal Law Review* 241, 243.
[67] Tai-Lok Lui, 'The unfinished chapter of Hong Kong's long political transition' (2020) 40 *Critique of Anthropology* 270, 271.
[68] Shivprasad Swaminathan, 'India's benign constitutional revolution', *The Hindu* (26 January 2013). The Indian people took it upon themselves to bring about a break in legal continuity by subsequently passing a 'home grown' constitution that did not receive royal assent from Britain, thereby on one interpretation breaking the legal chain: Moshinsky, 'Re-enacting the Constitution in an Australia Act' (n 59) 147. More confirmation of a break is that the Constitution of India is designed for a republic and does not mention a monarch.
[69] Dillon, 'The legal basis of the Australian Constitution' (n 65) 245.
[70] Ibid.
[71] Geoffrey Marshall, *Constitutional Conventions* (Oxford University Press, 1984) 207.
[72] *Mabo v Queensland (No 2)* (1992) 175 CLR 1, 79 (Deane and Gaudron JJ).
[73] *Walker v South Australia and others (No 2)* (2013) 215 FCR 254, 258 (Mansfield J).

2. A national sovereign

The Commonwealth government as overarching sovereign is an option that may become prominent given the void in British influence and attempts to fill that void. Such an opinion contends that the *Constitution Act* irreversibly subordinates the states inside a greater whole known as the Commonwealth of Australia. A similar proposition was argued in the US during debate about nullification between Calhoun and Webster. Calhoun's evaluation of the *US Constitution* is that the people primarily exercise their will through the states, while Webster retorts that the people do so on a national basis through the federal government.[74]

The alternative of an 'essentially unitary state in which the ordinary powers of sovereignty are elaborately divided between federal and state governments' has been noted by O'Brien.[75] In this regard, Dixon J proposes in *Melbourne Corporation* that '[t]he position of the federal government is necessarily stronger than that of the States' because '[t]he Commonwealth is a government to which enumerated powers have been affirmatively granted'.[76] The *Work Choices Case* likewise suggests that provisions should be interpreted in a manner that gives preference to the federal parliament by ignoring any impact on state powers.[77] Similarly, the cases pertaining to the defence power imply complete federal control over the states in situations of wartime emergency due to the elastic nature of the clause which permits peacetime protections to be suspended.[78] It is also possible to read the external affairs power in a way that expands Commonwealth power under the guise of implementing international treaties.[79]

National sovereignty was put forward by Barwick CJ in 1979 when he stated an interpretation of the *Constitution Act* that effectively binds Australians into a unitary state wherein the states derive their power from s 106 of the Commonwealth Constitution and not from a local source:

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[74] John Calhoun, *A Disquisition on Government and a Discourse on the Constitution and Government of the United States* (A.S. Johnston, 1851) 858-860; Caleb Loring, *Nullification, Secession, Webster's Argument and the Kentucky and Virginia Resolutions* (GP Putnam's Sons, 1893) 15-16.

[75] Angus O'Brien, 'Wither federalism: the consequences and sustainability of the High Court's interpretation of Commonwealth powers' (2008) 23 *Australasian Parliamentary Review* 166, 176.

[76] *Melbourne Corporation v The Commonwealth* (1947) 74 CLR 31, 82.

[77] *NSW v Commonwealth* (2006) 229 CLR 1, 85 ('Work Choices'); O'Brien, 'Wither federalism: the consequences and sustainability of the High Court's interpretation of Commonwealth powers' (n 71) 171-75.

[78] *Farey v Burvett* (1916) 21 CLR 433, 451; *Stenhouse v Coleman* (1944) 69 CLR 457, 471.

[79] *Commonwealth v Tasmania* (1983) 158 CLR 1, 127-28 (Mason J); David Mercer, "Australia's constitution, federalism and the 'Tasmanian dam case' (1985) 4 *Political Geography Quarterly* 91, 107.

> The Commonwealth, by the grant of the Constitution, in my opinion quite clearly became a colony. Indeed, it might well have been concluded that it became *the* colony. The former colonies, whose people were united in the indissoluble Commonwealth, could have been considered no longer to be colonies having become constituent States of the new Commonwealth albeit with constitutional powers identical in content with those formerly existing but now *deriving*, but *subject to its terms*, from s 106 of the Constitution.[80]

Relevantly, s 106 of the Commonwealth Constitution is expressed as follows:

> The Constitution of each State of the Commonwealth shall, subject to this Constitution, continue as at the establishment of the Commonwealth, or as at the admission or establishment of the State, as the case may be, until altered in accordance with the Constitution of the State.

There is debate about what 'subject to' means and in this context how federal versus state conflict should resolve.[81] It could be asserted that the individual or group whom society permits to have the final say on what it means for a state constitution to be 'subject to' the federal Constitution is for practical purposes the sovereign. As Hoadly comments in 1717, '[w]hoever hath an ultimate authority to interpret any written or spoken laws, it is he who is truly the Law-giver to all intents and purposes, and not the person who first wrote or spoke them'.[82] Hoadly's statement is an extreme version of the principle that was later elaborated by the Supreme Court of the United States in *Marbury v Madison*[83] which upheld strong-form judicial review.

The Preamble and covering cl. 5 state that the Commonwealth operates 'under the Constitution'. This could also be taken to imply that the sovereign is whoever the authorised interpreter of the Constitution says it is, since the document requires human beings to interpret what is 'under the Constitution'. In Australia it is the Commonwealth's High Court that can decide with finality because s 75 of the Constitution grants it jurisdiction in matters where the federal government is a party and appeals to the Privy Council were for the most part abolished by the s 8 of the

[80] *China Ocean Shipping Co v South Australia* (1979) 145 CLR 172, 182 (emphasis added). Another similar statement is in *Victoria v Commonwealth* (1971) 122 CLR 353, 371 (Barwick CJ).
[81] Adam Sharpe, 'State immunity from Commonwealth legislation: assessing its development and the roles of sections 106 and 107 of the Commonwealth Constitution' (2013) 36 *University of Western Australia Law Review* 252, 259.
[82] Quoted in John Gray, 'A Realist Conception of Law' in Feinberg and Gross (eds), *Philosophy of Law* (Wadsworth, 1986) 12.
[83] *William Marbury v James Madison, Secretary of State of the United States* 5 U.S. 137 (1803).

Australia Act 1986 (UK).[84] Any law that parliament passes to override the Court would also be given meaning by the judiciary, which could theoretically interpret statutes to make them mean anything it wants.[85] Similarly, any state government is subject to interpretations propounded by the Court about the extent of that state's power.[86]

Of course, political constraints do not presently allow the Court to be the primary focal point of Commonwealth sovereignty and interpret laws in completely absurd ways. In the Australian system, the centre of attention is parliament. There is strong evidence that the courts routinely defer to other branches of government and that they are the weakest branch given that they lack police powers.[87] When it comes to parliament, Dixon J's statement that '[w]e treat our organs of government simply as institutions established by law' rather than as trustees of popular will is an example of opinion that considers government authority to be supplemented with prerogative powers carried forward from the divine right of kings.[88] In particular, Commonwealth heads of power that exist are said to be plenary because the *Constitution Act* is an imperial act and not a delegation by the people that justifies narrowly construing it.[89] The discretionary Commonwealth executive authority which has been asserted by the Federal Court in *Ruddock v Vadarlis* further buttresses such an outlook.[90] If the national sovereign option is correct, then WA is unlikely to be able to secede since it will remain as a sub-national entity subject to Commonwealth power.

B. Shared or divided sovereignty

[84] A future bench could allow appeals to the Privy Council under Constitution s 74 in *inter se* matters: Murray Gleeson, 'The Privy Council – an Australian perspective' (Speech, Anglo-Australasian Lawyers Society, 18 June 2008). The state Supreme Courts have for the time being abolished appeals to the Council (with its cooperation).
[85] In *D'Emden v Pedder* (1904) 1 CLR 91 the High Court established itself as an arbiter of constitutional disputes. Griffith CJ (at 117) explains that it is 'the duty of the Court, and not of the Executive Government, to determine the validity of an attempted exercise of legislative power. The assent of the Crown cannot, nor can the non-exercise of the power of veto, give effect to an invalid law'. Gavan Duffy and Rich JJ in *Farey v Burvett* (1916) 433, 462 comment that 'Parliament cannot itself determine the limits of its jurisdiction; that is the province of this Court exercising its function as expounder of the Constitution'.
[86] *Kable v Director of Public Prosecutions* (1996) 189 CLR 51, 102-103 (Gaudron J).
[87] Alexander Hamilton, 'Federalist No. 78' in *The Federalist Papers* (Bantam Classic, 1982) 472; Gabrielle Appleby and Adam Webster, 'Parliament's role in constitutional interpretation' (2013) 37 *Melbourne University Law Review* 255, 265-68.
[88] Owen Dixon, 'The Law and the Constitution' (1935) 51 *The Law Quarterly Review* 590, 597.
[89] Consistent with the ideology of statism/governmentality that permeates constitutional law, clauses are given a sweeping scope: *Cadia Holdings Pty Ltd v NSW* (2010) 242 CLR 195, 218 (Gummow, Hayne, Heydon and Crennan JJ): 'A written constitution or organic document attracts a rule of broad construction of the powers which it confers'.
[90] Although the courts claim that s 61, and not the UK's sovereignty, is now the source of the prerogative powers, they at the same time refer to an undefined historical residue that arises from the reception of English law and its doctrine of Crown immunities and privileges: *Ruddock v Vadarlis* (2001) 110 FCR 491, 538.

1. A compact between six distinct states

American founding father Thomas Jefferson's compact theory is another plausible option with which to describe Australia's constitutional arrangements.[91] His theory characterises the Constitution as a contract between states – the state's *people*, not the state's governments – who together delegate responsibilities to a new institution known as the federal government that is not a party to the compact but is akin to a trustee. The Jeffersonian theory has historical roots in the United States, but the historical circumstances of Australia's federation are similar.[92] In Australia, the Commonwealth government was a creature created by the colonies deciding to come together and did not exist prior to Federation. Craven has said that '[a] compact theory of federation, is, if anything, rather more plausible in Australia after the collapse of Imperial supremacy than it was before that event'.[93] Applied to secession, Jefferson's theory can be used to contend that the Commonwealth is an agent of the states entrusted to carry out enumerated functions and that if it breaches its agreement the states have a right to terminate.

Similarly, Aroney portrays the Constitution as a treaty or covenant between states that decided to transfer power to a federal government to assist them in performing functions that cannot be easily carried out locally.[94] Although Aroney denies that his interpretation relies on a compact theory, his theory is nevertheless similar to Dillon's belief that the Constitution is a compact between parliaments.[95] A difference between Dillon and Aroney is that the former largely sides with a statist compact between states and disputes the correctness of popular constitutionalism.[96] Another distinction is that Aroney seems sympathetic to the second compact option considered below wherein the state and federal governments are independent contracting parties rather than the latter being a trustee for the former.[97] Both Aroney and Dillon acknowledge that the Constitution entrenches cooperation in what is a system of coordinate or shared authority.

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[91] Michael Lind, 'Do the people rule?' (2002) 26 *The Wilson Quarterly* 40, 43.
[92] Greg Craven, *Secession: The Ultimate States Right* (Melbourne University Press, 1986) 75.
[93] Greg Craven, 'A few fragments of state constitutional law' (1990) 20 *Western Australian Law Review* 353, 362.
[94] Nicholas Aroney, *The Constitution of a Federal Commonwealth* (2010) 340.
[95] Elsewhere, Aroney concludes that the Constitution is a compact between states: Nicholas Aroney, 'A public choice? Federalism and the prospects of a republican preamble' (1999) 20 *University of Queensland Law Journal* 262, 292; Dillon, 'A turtle by any other name: the legal basis of the Australian Constitution' (n 35) 248.
[96] Dillon (n 35) 249-252.
[97] Aroney, *The Constitution of a Federal Commonwealth* (2010) 249.

The shared compact sovereignty option finds support in references by the High Court and Privy Council to a voluntary 'compact'.[98] Griffith CJ in the *Railway Servants Case* opines that '[t]he Constitution Act is not only an Act of the Imperial legislature, but it embodies a compact entered into between the six Australian Colonies which formed the Commonwealth'.[99]

One could argue that the Preamble and covering cl. 3's reference to a 'Federal Commonwealth' implies that no single party to the compact takes priority.[100] Black defines federalism as 'a system in which the powers of government are distributed between a central government and parliament and governments and parliaments in the regions or provinces'.[101] And Dixon J advises that '[t]he foundation of the Constitution is the conception of a central government and a number of State governments separately organized. The Constitution predicates their continued existence as independent entities'.[102] The aforementioned understanding of federalism suggests coordinate authority such that no entity is inherently more powerful and where the Commonwealth and states possess equal status within their constitutional spheres. This is a system of shared sovereignty between state governments and their agent the Commonwealth.[103]

Of the interpretations canvassed, an inter-state compact of the kind just discussed is most conducive to the possibility of unilateral secession by WA. Such a compact may allow for unilateral separation or a process of negotiation until a resolution is reached, because without the Commonwealth being a party to the agreement – since it is a creation of the pre-existing colonies – and with no dominant sovereign across all spheres, there would be no body authorised to forbid secession. The force of this logic is exemplified by the reality that an attempt to coercively restrain secession inevitably results in interference with a state's residual sphere of authority.

2. A compact between seven polities combined

[98] *Federated Service Association v NSW Railway Traffic Employees Association* (1906) 4 CLR 488, 534 ('Railways Servants Case'); *Attorney-General for the Commonwealth v Colonial Sugar Refinery Co. Ltd* (1913) 17 CLR 644, 655; *James v Commonwealth* (1936) 55 CLR 1, 43.

[99] *The Federated Amalgamated Government Railway and Tramway Service Association v The New South Wales Railway Traffic Employees Association* (1906) 4 CLR 488, 534.

[100] Quick and Garran, *Annotated Constitution of the Commonwealth* (1901) 332-42.

[101] David Black, *Federation Issues* (Constitutional Centre of Western Australia, 1998).

[102] *Melbourne Corporation v Commonwealth* (1947) 74 CLR 31, 82.

[103] Anthony Dillon, *A response to the jurisprudence of the High Court in the 'implied rights cases': an autochthonous Australian constitution, popular sovereignty and individual rights?* (PhD Thesis, James Cook University, 2005) 54-55: 'Australian parliaments are not sovereign in the sense outlined by Dicey…they are supreme under the Constitution'.

Another option which came to prominence after a series of High Court decisions in the 1980s and 1990s is that of a broad-based sovereignty of the people as a union of seven parties (as opposed to six).[104] This interpretation of constitutional arrangements proposes that the people of WA and other states vest their sovereign power in agents who represent them in federal and state parliament. It is still a contractual theory in that the people of one state agree to share power on certain terms with the others named in the Constitution, with the key difference being that the federal parliament is considered a distinct party to the compact, unlike the option above. In effect, this option constitutes an agreement between the people of Australia as a whole.

'[T]he people' is a phrase repeated 19 times throughout the *Constitution Act*. When 'the people' is used in the Constitution, however, it more often refers to the 'people of the states' than to 'the people of the Commonwealth'. Covering Cl. 3 speaks of 'the people of New South Wales, Victoria, South Australia, Queensland, and Tasmania' and 'the people of Western Australia'.

By contrast, most judicial references are to the people as a whole – 'the Australian people' – rather than to the distinct people of each state. In *Bistricic v Rokov* for instance, Murphy J states that '[t]he original authority for our Constitution was the United Kingdom Parliament, but the existing authority is its continuing acceptance by the Australian people'.[105] He continues:

> The United Kingdom Parliament ceased to be an Imperial Parliament in relation to Australia at the inauguration of the Commonwealth. Provisions of statutes directed towards regulating the Imperial-colonial relations (e.g. those in the *Colonial Laws Validity Act 1865*) then ceased to be applicable. There are strong grounds for considering that cases which held Commonwealth legislation ultra vires because of inconsistency with any law other than the Constitution (e.g. *Union Steamship Co of New Zealand Ltd v The Commonwealth*) were wrongly decided.[106]

Deane J in *University of Wollongong v Metwally* likewise opines that:

> [T]he Australian federation was and is a union of people and that, whatever may be their immediate operation, the provisions of the Constitution should properly be viewed as ultimately concerned with the governance and protection of the people from whom the artificial entities called Commonwealth and States derive their authority.[107]

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[104] Harley Wright, 'Sovereignty of the people – the new constitutional grundnorm?' (1998) 26 *Federal Law Review* 165, 166.
[105] *Bistricic v Rokov* (1976) 135 CLR 552, 566 (Murphy J).
[106] *Bistricic v Rokov* (1976) 135 CLR 552, 567 (Murphy J).
[107] *University of Wollongong v Metwally* (1984) 158 CLR 447, 477 (Deane J).

In *Kirmani v Captain Cook Cruises*, Deane J similarly observes that 'whatever be the theoretical explanation, ultimate authority in this country lies with the Australian people'.[108] This sentiment is echoed by Murphy J when he holds in the same case that '[t]he authority for the Australian Constitution [in 1901] and now is its acceptance by the Australian people'.[109]

Mason CJ in *ACTV* reiterates that 'the *Australia Act 1986* (UK) marked the end of the legal sovereignty of the Imperial Parliament and recognized that ultimate sovereignty resided in the Australian people'.[110] Deane J concurs that '[t]he present legitimacy of the Constitution as the compact and highest law of our nation lies exclusively in the original adoption (by referenda) and subsequent maintenance (by acquiescence) of its provisions by the people'.[111] McHugh J in *McGinty* remarks that 'ultimate sovereignty resides in the body which made and can amend the Constitution' and 'the sovereignty of the Australian nation has ceased to reside in the Imperial Parliament and has become embedded in the Australian people'.[112] Accordingly, per McHugh J, '[o]nly the people can now change the Constitution. They are the sovereign'.[113]

Note, however, that while the doctrine of popular sovereignty can sustain a shared sovereignty interpretation involving seven parties, it can also assist the opposing view which advocates for a unitary sovereign. An argument for the Commonwealth being the sovereign flows from the assertion in *Engineers* that the Constitution is a 'political compact of the *whole* of the people of Australia'.[114] Deane and Toohey JJ remark in *Leeth v Commonwealth* that the Constitution was formed out of a voluntary union of '*all* the people'.[115] In *Nationwide News Pty Ltd v Wills*[116] they note that '[i]n implementing the doctrine of representative government, the Constitution reserves to *the people of the Commonwealth* the ultimate power of governmental control'. Chapter 4 suggests that shared sovereignty aligns better with the constitutional framework.

IV. IS POPULAR SOVEREIGNTY COMPELLING?

[108] *Kirmani v Captain Cook Cruises* [No 1] (1985) 159 CLR 351, 442 (Deane J).
[109] Ibid 383 (Murphy J).
[110] *Australian Capital Television v Commonwealth* (1992) 177 CLR 106, 138 ('ACTV').
[111] *Theophanous v Herald & Weekly Times* (1994) 182 CLR 104, 171 (Deane J).
[112] *McGinty and Western Australia* (1996) 186 CLR 140, 237 (McHugh J).
[113] Ibid (McHugh J).
[114] *Engineers Case* (1920) 28 CLR 129, 142 (emphasis added).
[115] *Leeth v Commonwealth* (1992) 174 CLR 455, 486 (Deane and Toohey JJ).
[116] *Nationwide News Pty Ltd v Wills* (1992) 177 CLR 1, 71 (Deane and Toohey JJ).

The options with respect to sovereignty that have been reviewed here are critical to the initial decisions by a secessionist state. If a unitary imperial sovereign is chosen by WA, then it is necessary for it to once again approach the UK seeking legislation enabling secession (assuming it is agreed that the *Constitution Act* does not permit secession already). On the other hand, if shared sovereignty backed by popular consent from the electorate of each state is chosen, then that lends weight to a state-wide referendum process leading up to secession[117] and also means that WA has greater impetus to act alone (assuming it is agreed that the *Constitution Act* does not make the Commonwealth government the sovereign). It is this preliminary interpretive choice between imperial statism and popular consent that will be resolved in this section, with Chapter 4 examining the shared sovereignty model of federalism in light of this chapter.

Waluchow comments that '[c]onstitutionalism is the idea, often associated with the political theories of John Locke and the founders of the American republic, that government can and should be legally limited in its powers, and that its authority or legitimacy depends on its observing these limitations'.[118] For much of Australian history, constitutionalism has not been the conventional approach. Instead, interpretation has emphasised a governmentalism said to require deference to an imperial chain of command.[119] Popular sovereignty challenges statist premises by integrating the consent of the governed into constitutional reasoning and acknowledging that it is 'the people' who grant parliamentarians authority. In what follows, this section contends that popular sovereignty is the best interpretation of sovereignty now. This section also addresses objections to the doctrine that have been put forward by some positivists.

A. Evaluating imperial sovereignty

The choice with regards to imperial sovereignty versus popular consent is essentially between theoretical consistency/textualism and practical reality/realism. To the best of my knowledge, there is no one who claims that an Australian court would today recognise the Queen in council with the UK Parliament as the sovereign. While still a common view when the *Engineers*

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[117] A referendum was seen as the trigger for negotiations in *Reference Re Secession of Quebec* [1998] 2 SCR 217 at [87]: 'Although the Constitution does not itself address the use of a referendum procedure, and the results of a referendum have no direct role or legal effect in our constitutional scheme, a referendum undoubtedly may provide a democratic method of ascertaining the views of the electorate on important political questions on a particular occasion. The democratic principle identified above would demand that considerable weight be given to a clear expression by the people of Quebec of their will to secede from Canada, even though a referendum, in itself and without more, has no direct legal effect, and could not in itself bring about unilateral secession'.

[118] Wil Waluchow, 'Constitutionalism', *The Stanford Encyclopedia of Philosophy* (Web Page, 2018) <https://plato.stanford.edu/archives/spr2018/entries/constitutionalism/>

[119] Theories of governmentalism advocate for an extension in the sphere and degree of government activity. See Alan Hunt and Gary Wickham, *Foucault and Law* (Pluto Press, 1994) 76.

Case[120] was decided, *Sue v Hill*[121] has put to rest that line of reasoning. Nevertheless, there are oddities with judicially treating the UK as a 'foreign nation'[122] given that most Australian and Western Australian constitutional documents are replete with references to the British monarchy. It is also a fact that a national referendum in 1999 seeking to convert Australia to a republic failed 54 to 45 percent (though various rationales can be provided about why it failed).[123]

First, consider textualism. The notion of an imperial sovereign can be commended for its consistency with the text of Australian constitutional documents. In this vein, Ratnapala confirms that 'the UK parliament is not bound by its own previous laws, and may, in bland theory, repeal the *Statute of Westminster* and the *Australia Act* or may legislate against them'.[124] A similar insight applies to WA, with Gummow J in 1996 referring to 'Imperial, colonial and State legislation' as 'together comprising the written provisions of the Western Australian Constitution', thus appearing to confirm that autochthony has not been achieved.[125]

Rather than the middle-ground *Australia Act* which has the trappings of an imperial legislative act directing Australian subordinates, the British parliament could have entered a treaty with the six or seven parliaments. Treaty-making is a recognition of sovereignty and would remove any vestiges of imperial sovereignty in an unambiguous manner.[126] Indeed, the treaty approach was utilised by Britain with respect to the American colonies at the conclusion of their War for Independence and left little doubt that the process was irreversible.[127] The *Treaty of Paris* negotiated by the Americans with King George III was signed in 1783 and ended the war. Article 1 separately names each of the 13 original states and acknowledges 'free, sovereign, and independent states', noting that 'the British Crown and all heirs and successors relinquish claims to the Government, property, and territorial rights of the same, and every part thereof'.

[120] *Engineers Case* (1920) 28 CLR 129, 146.
[121] *Sue v Hill* (1999) 199 CLR 462.
[122] *Sue v Hill* (1999) 199 CLR 462, 489 (Gleeson CJ, Gummow and Hayne JJ).
[123] Glenn Patmore, *Choosing the Republic* (University of New South Wales Press, 2009); Martyn Webb, 'When no means no: the failure of the Australian November 1999 Republican Referendum and its roots in the Constitutional Convention of 1998' (Working Paper, Institute of Governmental Studies, July 2000) 2-3.
[124] Suri Ratnapala, *Jurisprudence* (Cambridge University Press, 2009) 85. See also *British Coal Corp v R* [1935] AC 500, 520.
[125] *McGinty v Western Australia* (1996) 186 CLR 140, 259 (Gummow J).
[126] Sean Brennan, Brenda Gunn and George Williams, "'Sovereignty' and its relevance to treaty-making between indigenous peoples and Australian governments" (2004) 26 *Sydney Law Review* 307, 308.
[127] Hoover Randolph, 'Political divorce of peoples: a search for a right to secession in international law and normative international relations theory' (Masters Thesis, University of Kansas, 2013) 4.

There is something unsettling about the *Australia Act*, which purportedly severs the remaining ties between the UK, the Commonwealth and the states, yet still takes care in s 7 to preserve the power of the Queen to exercise her vast powers in the Constitution (except for those excluded by ss 8 and 9 of the Act) when 'personally present in a State' without specifying any end-date. It is also a strange kind of abdication since ss 5 and 15 proscribe the way future Australian parliaments can amend the *Constitution Act* and *Australia Act*. It is basically saying, 'You are allowed to amend your constitutional documents, but only in the manner we say you can in ss 5 and s 15. You are not allowed to have your own thoughts about the appropriate process as an independent and free country'. Admittedly, Australian parliaments decided the process and the content of the legislation, so this concern is probably overstated, particularly since *Sue v Hill*. Ideally, however, renunciation of power should tidy up contradictory elements and be framed in a way that avoids a continuation of instructions binding the very colony that is supposedly being made independent. The confusion caused by remnants of monarchy, particular to non-lawyers, is likely part of the reason why many are pushing for converting into a full-fledged republic.[128]

If the people of Australia had wanted autochthony of the same strength as the United States or India, then their representatives should not have supplicated for the *Australia Acts*. Instead, Australians could have taken radical steps like that proposed by Moshinsky, who suggests re-enacting the Constitution in a local act of parliament.[129] By ignoring amendment procedures such as that in s 51(xxxviii) or s 128 and re-enacting the Constitution unilaterally, a peaceful break in the chain of continuity to the UK would occur. Moshinsky claims that this is needed because the Constitution becomes home-grown when there is acceptance that the new legal order is based on violating the old, such that it is no longer necessary to look beyond the shores of the nation 'to explain the binding force of the new constitution'.[130] Doing so would make Australians the incontrovertible owner of their foundational document. That said, these concerns are perhaps liable to be overstated since Australians did help to devise the content of the *Australia Acts*.

Second, consider realism. Irrespective of what the formal sources say, most officials have discarded the idea of a British sovereign. Political conditions guarantee that all branches and levels of Australian governance will decline to honour imperial legislation: constitutionalism as it stands does not support an imperial sovereign over Australia.[131] This can be attributed

[128] Legal and Constitutional References Committee, Parliament of Australia, *The road to a republic* (Final Report, August 2004) 4-6.
[129] M. Moshinsky, 'Re-enacting the Constitution in an Australian Act' (1989) 18 *Federal Law Review* 134, 150.
[130] Ibid 150.
[131] Suri Ratnapala, *Jurisprudence* (Cambridge University Press, 2013) 84-5.

primarily to the World Wars which gave birth to a strong Australian nationalism and ended the military supremacy of the British Empire. Due to such external events, Australia began to ally with the Americans instead and this was reflected in its push for constitutional independence.[132]

The High Court in *Sue v Hill* declares that the UK is a foreign country for the purposes of s 44 of the Constitution.[133] It does this by citing changes that, according to Gleeson CJ and Gummow and Hayne JJ, mean that the Australian courts are no longer bound to 'recognise and give effect to the exercise of legislative, executive and judicial power by the institutions of the government of the United Kingdom' after 1986.[134] The Court grounded an autochthonous revolution in the legal basis of the Constitution by surmising that the states and federal government had passed the *Australia Act 1986* (Cth) – which substantially duplicates the *Australia Act 1986* (UK) – and that this legislation is why Australia is now independent.[135] Australia's version of the *Australia Act* is identical except for its preamble which proclaims the Commonwealth of Australia as a 'sovereign, independent and federal nation'. The Court countered the monarchical text in the Constitution by noting that '[w]hilst the text of the Constitution has not changed, its operation has'.[136] In addition, 'the circumstance that the same monarch exercises regal functions under the constitutional arrangements in the United Kingdom and Australia does not deny the proposition that the United Kingdom is a foreign power within the meaning of s 44(i) of the Constitution'.[137] The Court did not see itself as leading autochthony unilaterally, 'rather they were giving effect to a process of evolution initiated for the most part elsewhere'.[138]

Campbell suggests that autochthony requires a strict legal break.[139] This misses the point that the courts have recognised such a break in continuity irrespective of contradictory text in the Constitution or *Australia Acts*. Goldsworthy finds that 'what has been terminated is authority to change the law of Australia' and that '[t]he effect of the termination is to put Australia, Canada and New Zealand in the same position as Mexico and France, and all other countries in the world

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[132] Christopher Waters, 'Australia, the British Empire and the Second World War' (2001) 19 *War & Society* 93, 95.
[133] *Sue v Hill* (1999) 199 CLR 462, 489.
[134] Ibid 490 (Gleeson CJ, Gummow and Hayne JJ).
[135] It was suggested by the Court that the local legislation is valid because of s 51 (xxxviii) which allows the state and federal governments to come together and exercise 'any power which can at the establishment of this Constitution be exercised only by the Parliament of the United Kingdom': *Sue v Hill* (1999) 199 CLR 462.
[136] *Sue v Hill* (1999) 199 CLR 462, 496 (Gleeson CJ, Gummow and Hayne JJ).
[137] Ibid.
[138] Simon Evans, 'Why is the Constitution binding? Authority, obligation and the role of the people' (2004) 25 *Adelaide Law Review* 103, 122.
[139] E. Campbell, 'An Australian-made Constitution for the Commonwealth of Australia' in *Report of Standing Committee D to the Executive Committee of the Australian Constitutional Convention* (1974) 95, 100.

whose legal systems are independent of Britain's'[140] One might quote Dicey who writes that 'a monarch who slumbers for years is like a monarch who does not exist'.[141] As early as 1969, in *Bonser v La Macchia*, Windeyer J refers to Australia as having become 'by international recognition... competent to exercise rights that by the law of nations are appurtenant to, or attributes of, sovereignty'.[142] For him, '[t]he words of the Constitution must be read with that in mind' because '[t]he law has followed the facts' which are part of the 'march of history'.[143]

B. The case for popular sovereignty

While it is generally clear that imperial sovereignty has been discarded, there is significant uncertainty as to what has replaced it. Is popular sovereignty an accepted replacement?

1. In support of popular sovereignty

In this regard, the democratic provisions of the Constitution like ss 7 and 24 are a source of inspiration for the doctrine of popular sovereignty. Mason CJ observes that the Constitution 'brought into existence a system of representative government for Australia in which the elected representatives exercise sovereign power on behalf of the Australian people'.[144] And 'in the exercise of those powers the representatives of necessity are accountable to the people for what they do and have a responsibility to take account of the views of the people on whose behalf they act'.[145]

Sovereignty of the people is also said to find a basis in the amendment procedure contained in s 128, which leaves the final decision on whether to approve a change to the Constitution in the hands of the voting public rather than with their parliamentary agents.[146] Perhaps it could be said that such provisions substantiate that popular consent underlies the Constitution.

Another factor to note is that popular sovereignty is an historically consistent interpretation. As Chapter 2 of this thesis finds, in 1901 securing the consent of eligible voters casting ballots by their respective state of residence was critical in forming the federal union. The parliament at

[140] Jeffrey Goldsworthy, 'Abdicating and limiting parliament's sovereignty' (2006) 17 *King's Law Journal* 255, 257-258.
[141] Dicey, *Law of the Constitution* (Liberty Fund, 1982) 58.
[142] *Bonser v La Macchia* (1969) 122 CLR 177, 224.
[143] Ibid 223.
[144] *ACTV* (1992) 177 CLR 106, 138 (Mason CJ).
[145] *ACTV* (1992) 177 CLR 106, 138 (Mason CJ).
[146] *Nationwide News Pty Ltd v Wills* (1992) 177 CLR 1, 71 (Deane and Toohey JJ) ('Nationwide News').

Westminster was in no position to coerce the colonies into submitting to its vision of union, and Chamberlain, the minister introducing the Constitution bill, admitted as much.[147] Moreover, the Constitution is Australian in origin except for s 74 involving appeals to the Privy Council. Saunders and Kennedy confirm the historical veracity of popular sovereignty, with the authors writing that '[t]he framers believed that the authority of the people lay behind the legitimacy of the founding of the *Constitution* and the functioning of government'.[148] Consequently, '[t]he recourse to popular sovereignty in the free speech cases was not a paradigm shift in constitutional interpretation, but rather the recovery of an original constitutional value'.[149]

Finally, while there is controversy about the extent to which the judiciary can have regard to international law in interpreting the Australian Constitution, the High Court may be influenced by the majorities on the Canadian Supreme Court which have held that international trends are useful in discerning values even where an international instrument has not been incorporated by way of implementing legislation.[150] Of importance is the principle of self-determination which refers to 'a people's right to choose its political, economic and social status'.[151] Self-determination prioritises legitimacy over stability. Article 1 of the *International Covenant on Civil and Political Rights* provides that "[a]ll peoples have the right of self-determination. By virtue of that right they freely determine their political status and freely pursue their economic, social and cultural development'. Although this principle has typically been utilised against conquest, colonisation and oppression, WA could allege that internal means of resolution have failed and so secession is the right remedy. Canada's Supreme Court holds that international law recognises that 'when a people is blocked from the meaningful exercise of its right to self-determination internally, it is entitled, as a last resort, to exercise it by secession'.[152]

2. Objections to popular sovereignty

Objections to popular sovereignty are often founded upon a somewhat formalist separation between politics and law. According to Evans' interpretation of the meaning of a Kelsenian *Grundnorm*, it is a 'category error' to associate popular sovereignty with the *Grundnorm* in

[147] United Kingdom, *Parliamentary Debates*, House of Commons, 14 May 1900, vol 83, col 47 (Chamberlain).
[148] Benjamin Saunders and Simon Kennedy, "Popular sovereignty, 'the people' and the Australian Constitution: a historical reassessment' (2019) 30 *Public Law Review* 36, 56.
[149] Ibid 57.
[150] *Baker v Canada* [1999] *2 S.C.R.* 817, 861; *United States v Burns* [2001] 1 S.C.R. 283, 330-35. See discussion of these cases in Michael Kirby, 'Constitutional law and international law: national exceptionalism and the democratic deficit?' (2010) 12 *UNDALR* 95, 102-03.
[151] Milena Sterio, 'Self-Determination: Historical Underpinnings' in *Secession in International Law* (Elgar, 2018) 10.
[152] *Reference re Secession of Quebec* [1998] 2 S.C.R. 217 at [134].

Kelsen's terms. He argues that although the 'fundamental political or moral justification of a legal order may be that it reflects and pursues the people's sovereignty or capacity for self-rule… it is best not obscure the moral analysis with the metaphysics of Kelsenian analysis'.[153]

Furthermore, some propose that the legacy of the UK continues to have normative relevance since the *Constitution Act* is still an imperial statute. Thus, Dawson J in *ACTV* writes:

> No doubt it may be said as an abstract proposition of political theory that the Constitution ultimately depends for its continuing validity upon the acceptance of the people, but the same may be said of any form of government which is not arbitrary. The legal foundation of the Australian Constitution is an exercise of sovereign power by the Imperial Parliament. The significance of this in the interpretation of the Constitution is that the Constitution is to be construed as a law passed pursuant to the legislative power to do so. If implications are to be drawn, they must appear from the terms of the instrument itself and not from extrinsic circumstances.[154]

Many objections to the doctrine of popular sovereignty express concern about its vagueness and the unpredictable consequences for constitutional interpretation if an 'extra-legal' concept were allowed to infiltrate the sanctity of law. Duke's reading of the doctrine proposes that it is 'consistent with the assumption that the status of the constitution as higher law requires recourse to an *extra-legal non-positive source of authority*'.[155] Based on the same characterisation, Winterton disapproves because of the potential implications for interpretation:

> It might be argued that there is little point in distinguishing between the legal and political sources of constitutional authority, so that the consent of the Australian people now provides the *legal*, as well as political, foundation for the authority of the Australian Constitution. But one ought to be wary of breaking the chain of legal authority or legitimacy, however obsolete it might seem to be, for the extra-legal realm is a world of legal fiction in which there are no boundaries except, practically, political power and, theoretically, the limits of imagination. This is an irresistible lure to some philosophically inclined scholars and judges, as is illustrated by speculation… as to possible consequences of popular sovereignty for constitutional interpretation…The extra-legal realm can offer no security against revolutions and constitutional

[153] Simon Evans, 'Why is the Constitution binding? Authority, obligation and the role of the people' (2004) 25 *Adelaide Law Review* 103, 110.
[154] *ACTV* (1992) 177 CLR 106, *181* (Dawson J).
[155] George Duke, 'Popular sovereignty and the nationhood power' (2017) 45 *Federal Law Review* 415, 415-16.

> convulsions – which need not necessarily be violent – as fanciful as they may seem in present-day Australia.[156]

Along similar lines, *Sue v Hill* has been criticised by those who perceive it as judicial activism that shifts the basis of the Constitution beyond what the people themselves want.[157]

Evans provides an example of how popular sovereignty is descriptively inaccurate. He maintains that the amendment process in s 128 does not imply that the people are sovereign since that section of the Constitution is not an 'apex' norm from which others in the system derive.[158] To be precise, constitutional referenda have only been successful on eight occasions and so only explain those instances of law-making by the people. According to Evans, popular sovereignty need not play a part in determining why the Constitution is generally authoritative:

> In 1900 most likely [the *Grundnorm*] included, 'What the Crown-in-Parliament at Westminster enacts is law'. The relevant part may now be, 'The terms of the *Constitution of the Commonwealth of Australia Act 1900* (Imp) are law', so that the current Grundnorm makes no reference to the role of the Imperial Parliament in producing the constitutional text and denies that any new Acts of the Imperial Parliament are law for Australia…But…this does not make popular sovereignty the Grundnorm.[159]

Evans submits that the continuing authority of the Constitution cannot be explained through popular sovereignty since 'the acquiescence of some of the people some of the time' is not a 'presupposition of the legal system'.[160] If one tries to claim that the rule of recognition has changed via court decisions to recognising popular sovereignty, then this is a 'very weak sense' of the will and authority of the people because so far this rule has only been consented to by senior officials in the judiciary and this hardly indicates broad based societal support where the courts follow external events.[161] For acquiescence of the people to be useful in legal reasoning, there would need to be a clear definition of 'the people' and of 'acquiescence', yet this has not

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[156] George Winterton, 'Popular sovereignty and constitutional continuity' (1998) 26 *Federal Law Review* 1, 7.
[157] Dillon, *A Response to the Jurisprudence of the High Court in the 'implied rights' cases* (n 35), 122-23. Others criticise the inconsistency between constitutional text and practice and so advocate a program of reform that would 'tidy up' contradictory elements: Peter Johnston, 'Tidying up the Loose Ends: Consequential Changes to Fit a Republican Constitution' (2002) 4 *University of Notre Dame Australia Law Review* 189, 195-96.
[158] Evans, 'Why is the Constitution binding?' (n 156) 111.
[159] Ibid.
[160] Ibid.
[161] Ibid 123.

been clarified by the courts.[162] After all, there are a variety of ways in which elections are conducted and consent via democracy means different things to different people.

These objections are worth considering because they raise theoretical and practical concerns that have not been authoritatively resolved. However, I do not think that they succeed.

First, Winterton's belief that popular sovereignty is an extra-legal norm is undermined by the inclusive positivist literature outlined in Chapter 1. Such inclusive positivism recognises that sometimes social sources can make moral criteria a condition of legal validity. While popular sovereignty leaves scope for judicial creativity this does not mean that it is wholly non-positive since its pedigree can be traced to curial decisions. Open normative systems like law leave space for judicial philosophising because they draw on essential truths or political facts (e.g. about democracy embedded in the Constitution) to prevent absurd conclusions that are divorced from the valuable insights provided by other disciplines of inquiry or from politics. Talking about external facts and analysing their relationship to legal questions can improve transparency.

That said, it is true that popular sovereignty is not elucidated in the *Constitution Act*, *Australia Acts* or in unwritten constitutional conventions exactly in the way that judges have articulated it in their curial interpretations. To that extent, therefore, popular sovereignty is undoubtedly partly non-positive as Duke suggests. However, having a partly non-positive rule is compatible with Kelsen's positivism. Raz explains that in Kelsen's theory there is 'one *nonpositive* law – a law which authorizes all the fundamental constitutional laws and the existence of which does not depend on the chance action of any law-creating organ, but is a logical necessity'.[163] It is not necessarily judicial activism to recognise that such a basic norm underlies the system.[164]

The second objection relates to s 128 and its relationship to popular sovereignty. Evans' observations are accurate in this respect. Winterton has correctly said that s 128 does not support popular sovereignty because any constitutional amendment is initiated by the Commonwealth parliament and not by the voters at large.[165] To these contradictions, one could add that s 128 is not the only method of amending the Constitution. Lindell notes that s 15(1) of the *Australia Acts* allows the states and the Commonwealth government to amend the Constitution without any

[162] Ibid 111.
[163] Joseph Raz, 'Kelsen's theory of the basic norm' (1974) 19 *American Journal of Jurisprudence* 94, 95.
[164] Pablo Castillo-Ortiz, 'The dilemmas of constitutional courts and the case for a new design of Kelsenian institutions' (2020) 39 *Law and Philosophy* 617, 629: 'a modicum of activism is an intrinsic part of Kelsenian courts'.
[165] George Winteron, 'Popular sovereignty and constitutional continuity' (1998) 26 *Federal Law Review* 1, 8.

input from voters.[166] This leaves a backdoor to amendment with unanimous consent by state governments and the Commonwealth, since s 15(1) can be used to remove legislative fetters in the *Statute of Westminster* and *Australia Acts*. It is no response to say that all these governments are elected by the people, since governments are not bound to do what voters want in the absence of another norm requiring them to keep their promises. As Rothbard points out, 'we' are *not* the government.[167] Rather the provisions encourage statism by permitting government to upend fundamental laws, including the democratic clauses which entrench popular sovereignty.

As an aside, in terms of constitutional amendment, popular sovereignty is in fact a better description of the WA Constitution because its s 74 entrenches democratic provisions using a manner and form requirement that mandates submitting certain bills to the voters for approval.[168]

Nonetheless, the reason why popular sovereignty is persuasive even in the context of the Commonwealth Constitution is that there is no practical possibility that the option for amendment of the Constitution found in s 15 of the *Australia Acts* will be exercised without permission from the people. This has been confirmed by Twomey. Her assessment is that political realism is likely to prevail so that governments will not dare change documents that comprise part of Australia's rigid constitution without a referendum using s 128.[169]

Finally, what about the suggestion that popular sovereignty is not widely followed or that imperial sovereignty still has relevance? These claims turn on an evaluation of social practice because what supports the validity of a *Grundnorm* is whether it is followed by a given population.[170] If a population thinks that popular sovereignty is why the Constitution is binding, then that is the presupposition which they assume to be true regardless of it being a nebulous concept or there being textual inconsistencies. Evans' concerns centre upon the absence of logical reasons for popular sovereignty, not its efficacy as a social practice. Indeed, Kelsen does not say anything that supports Evan's suggestion that popular sovereignty cannot be a *Grundnorm.* For example, a successful secession can change the basic norm simply because the

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[166] Geoffrey Lindell, 'Why is Australia's constitution binding? The reasons in 1900 and now, and the effect of independence' (1986) 16 *Federal Law Review* 29, 40-41.
[167] Murray Rothbard, *Anatomy of the State* (Ludwig von Mises Institute, 2009) 10.
[168] *Constitution Act 1889* (WA) s 73. Certain provisions in the WA Constitution cannot be changed through ordinary legislation because of the manner and form requirements entrenched by *Australia Act 1986* (UK) s 6. See also Neil Douglas, 'The Western Australian constitution: its source of authority and relationship with section 106 of the Australian Constitution' (1990) 20 *University of Western Australia Law Review* 340, 341.
[169] Anne Twomey, *The Australia Acts 1986: Australia's Statutes of Independence* (Federation Press, 2010) 340.
[170] Andrei Marmor, 'The pure theory of law', *The Stanford Encyclopedia of Philosophy* (2021) <https://plato.stanford.edu/archives/fall2021/entries/lawphil-theory>.

old norm is no longer followed.[171] Likewise, whether popular sovereignty makes logical sense is irrelevant because Kelsen's theory is ethically relative: he says nothing about content but focuses on efficacy.[172] Hart similarly holds that the rule of recognition is a convention among the officials in a society, thus making it a relative concept that varies in line with social facts.[173]

Of course, it could be retorted that popular sovereignty is not actually efficacious or, as Evans says, that it is a very weak social practice. Perhaps practice has changed since the implied rights cases were decided by the High Court and another basic norm has replaced popular sovereignty?

This does not seem likely. Within the judicial branch, the implied rights cases from the 1990s show that the High Court is cognisant of a higher norm that identifies the sovereign with the electors.[174] Several precedents in the 2000s and 2010s also support popular sovereignty.[175] Consistent with this, the Court has said that the parliaments of Australia are not sovereign bodies but operate subject to the Constitution which is a document that derives its legitimacy from implicit or explicit consent on an ongoing basis.[176] And outside the judiciary, plebiscites at both state and federal level appear to be taken more seriously than during the reign of the UK parliament. In 1933, the plebiscite about WA secession was downplayed and finally ignored by the Commonwealth despite nearly 70 percent voting in favour of secession. Yet it is unlikely that any plebiscite would be treated so casually now. A plebiscite in 2017 about marriage laws that was supported by 61 percent of electors led to the Commonwealth legalising same-sex marriage.[177] Australia also contains numerous secessionist micro-nations, the existence of which

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[171] J Harris, 'When and why does the Grundnorm change?' (1971) 29 *Cambridge Law Journal* 103, 103; Andrei Marmor, 'The pure theory of law', *The Stanford Encyclopedia of Philosophy* (2021) <https://plato.stanford.edu/archives/fall2021/entries/lawphil-theory>. As Marmor notes, '[i]nstead of providing an explanation of what makes the presupposition of the legal point of view rational, or what makes it rational to regard the requirements of law as binding requirements, Kelsen invites us to stop asking'.

[172] Andrei Marmor, 'The pure theory of law', *The Stanford Encyclopedia of Philosophy* (2021) <https://plato.stanford.edu/archives/fall2021/entries/lawphil-theory>.

[173] Adam Tucker, 'Uncertainty in the rule of recognition and in the doctrine of parliamentary sovereignty' (2011) 31 *Oxford Journal of Legal Studies* 61, 63.

[174] *Theophanous v Herald & Weekly Times Ltd* (1994) 182 CLR 104, 173 (Deane J); *Nationwide News Pty Ltd v Wills* (1992) 177 CLR 1, 70 (Deane and Toohey JJ).

[175] *Yougarla v Western Australia* (2001) 207 CLR 344, 375 (Kirby J); *McCloy v New South Wales* [2015] HCA 34; *Re Lambie* [2018] HCA 6; *Love v Commonwealth of Australia; Thoms v Commonwealth of Australia* [2020] HCA 3.

[176] *Engineers Case* (1920) 28 CLR 129, 143-44: "the legislative powers given to the Commonwealth Parliament are all prefaced with one general express limitation, namely, 'subject to this Constitution'".

[177] Ian McAllister and Feodor Snagovsky, 'Explaining voting in the 2017 Australian same-sex marriage plebiscite' (2018) 53 *Australian Journal of Political Science* 409, 415.

indicates public belief in the sovereignty of the governed – although admittedly to a minor extent given that these micro-nations are a tiny percentage of the Australian population.[178]

Admittedly, a degree of uncertainty prevails since shifts in political conditions could result in another change to the basic norm. It is also plausible that popular sovereignty operates alongside constitutional monarchy in what Krieken labels a 'second head'.[179] Rather than cutting the monarch's head off and quashing statism completely, perhaps the concept of 'the people' will in future be used as a cloak to enable statism whenever convenient, because "the High Court has renamed the King 'the people' and given [the monarch] a second head".[180] It would be folly to rule out such an alternative interpretation since it is to be expected from a realist understanding of law that popular sovereignty may be wielded as a cloak to disguise power exercised by elites, rather than as a protective principle ensuring that the wishes of the masses are respected.[181]

V. IMPLICATIONS FOR SECESSION

Let us assume, however, for the sake of analysis that imperial sovereignty is dead, and that popular sovereignty has replaced it (perhaps in collaboration with the second head of statism). What does this imply for the unilateral secession of Western Australia from the Commonwealth?

Now that the *Australia Acts (Request) Act 1985* (WA), *Australia Act 1986* (UK) and the *Australia Act 1986* (Cth) have codified the termination of the ability of the UK parliament to legislate for Western Australia and the rest of Australia, a consequence is that WA or any state cannot approach the UK for permission to leave the Commonwealth. It is now more than 70 years 'since the United Kingdom Parliament renounced any lingering claims to legislative powers over Australia [in the *Statute of Westminster 1931* (UK)]' and '[t]he United Kingdom is, in relation to Australia, a foreign state'.[182] Even if WA petitioned Westminster for relief, that parliament would almost certainly decline to intervene. Hence, any action toward secession can only proceed unilaterally or through negotiation with other members of the federal union.

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[178] Australia has one of the highest rates of secessionist micro-nations in the world. These are inspired by the sovereign citizen movement which sees individuals as being able to withdraw consent. See Harry Hobbs, "Why is Australia 'micronation central'? And do you still have to pay tax if you secede?", *The Conversation* (7 July 2021) <http://www.theconversation.com>; Judy Lattas, 'DIY sovereignty and the popular right in Australia' (Conference Paper, Centre for Research on Social Inclusion, 28 September 2004).

[179] Robert Krieken, 'The sovereignty of the governed' (Working Paper, University of Sydney, May 2006) 11.

[180] Ibid.

[181] Heinz Klug, 'The judicialization of politics?' in Shauhin Talesh, Elizabeth Mertz and Heinz Klug (eds), *Research Handbook on Modern Legal Realism* (Edward Elgar Publishing, 2021) 303.

[182] *The Grain Pool of Western Australia v Commonwealth* (2000) 202 CLR 479, 523 (Kirby J).

Popular sovereignty, which this chapter argues is the basic norm, can ground either a unitary state or decentralised federalism. It can support a unitary state if the people are perceived to give their consent as an amalgamated whole with the Commonwealth as the sovereign. On the other hand, it can underlie shared sovereignty if the people of the states are seen to be distinct polities who give consent to representatives in federal and state parliament as part of a compact with people from other states. It is only the latter opinion which allows for secession since, as Wilson writes, '[f]ederalism implies states' rights, and states' rights imply a right of secession'.[183] A unitary state where the federal government is the only agent of the people and exercises absolute control over persons within each state simply does not leave room for a lawful unilateral secession (but it might leave space for a negotiated secession, if the sovereign is kind enough).[184]

Some authors have pondered the impacts upon constitutional interpretation because of adopting the doctrine of popular sovereignty.[185] This remains an open question that 'awaits cases in which questions of interpretation which might be affected by the source of authority of the Constitution arise for consideration'.[186] The short answer is that no one really knows for certain.

Popular sovereignty can conceivably be influential because there are implications for textualism if the concept is unpacked for its moral content. A variety of consequences once thought unthinkable during imperial sovereignty might follow if popular sovereignty is taken seriously. Dixon J had claimed that in Australia laws operate as of right due to the statist principle and that parliamentarians are not trustees for authority delegated by the people.[187] Today, one could counter that plebiscites and referendums should be given judicial notice. There is nothing unusual about this; actually, Dicey thought that the referendum ought to play a legal role in the British unwritten constitution.[188] In *Reference Re Quebec*, the Canadian Supreme Court accepts

[183] Clyde Wilson, 'Secession: The Last, Best Bulwark of Our Liberties' in David Gordon (ed), *Secession, State and Liberty* (Transaction Publishers, 1998) 89.
[184] President Lincoln argued that the US is a unitary state during the American Civil War: James Ostrowski, 'Was the Union Army's invasion of the Confederate States a lawful act? An analysis of President Lincoln's legal arguments against secession' in David Gordon (ed), *Secession, State and Liberty* (Transaction Publishers, 1998) 175.
[185] Andrew Fraser, 'False hopes: implied rights and popular sovereignty in the Australian Constitution' (1994) 16 *Sydney Law Review* 213, 222; Harley Wright, 'Sovereignty of the people – the new constitutional *Grundnorm*?' (1998) 26 *Federal Law Review* 165, 166.
[186] Robert French, 'If they could see us now – what would the founders say?' (JCPML Anniversary Lecture, Curtin University, 7 July 2013) 15 <https://jcpml.curtin.edu.au/wp-content/uploads/sites/11/2020/05/20130718-If-they-could-see-us-now-what-would-the-founders-say.pdf>.
[187] Owen Dixon, 'The Law and the Constitution' (1935) 51 *Law Quarterly Review* 590, 597.
[188] Mads Qvortrup, 'AV Dicey: The Referendum as the People's Veto' (1999) 20 *History of Political Thought* 531, 531-534; Rivka Weill, 'Dicey was not Diceyan' (2003) 62 *Cambridge Law Journal* 474, 474.

popular sovereignty and indicated that a referendum result by the secessionist province of Quebec should not be ignored and ought to trigger negotiation with the government.[189] The rationale behind such recognition is to ensure that casting a ballot is not a performative act devoid of meaning but that it really does secure the people's consent to the system of laws. To be sure, Australia's path from British colony to constitutional monarchy to a potential republic lends credence to the utility of incorporating autochthonous consent into the judicial calculus. Unilateral secession in the wake of a referendum could be constitutionally compelling if shown to be consistent with such a norm. The international law principle recognising a community's right to self-determination is an additional factor supporting the existence of an implied right to secede where residents of a state indicate an unmistakable desire to govern themselves.

VI. CONCLUSION

In 1688, after the Glorious English Revolution when the Parliament usurped the King's authority, parliamentary sovereignty became the highest norm in England. From the 1990s, thanks to judicial recognition of political realities, this chapter has resolved that it likely the will of the people operates as the highest norm binding the Commonwealth and state parliaments.

Few deny that there are ambiguities associated with the doctrine of popular sovereignty. There are always ambiguities associated with any kind of *Grundnorm* or rule of recognition – and I include in this blanket statement all possible substitutes like imperial sovereignty or parliamentary sovereignty. Indeed, this is one of the main concerns that anti-positivists like Dworkin have with the idea of positivism in general.[190] Yet this does not render fatal a reliance on a generally efficacious legal norm that is followed by the bulk of officials in a society. After all, it is an actual verifiable social fact that numerous judicial decisions have affirmed that the doctrine exists, even though its application to concrete cases remains relatively opaque.

A takeaway for a study of secession is that there is an Australian constitutional norm that values the consent of the governed. This is ground-breaking. Although this chapter does not address whether popular sovereignty operates in a unitary or shared fashion or how constitutional interpretation might be affected, in the next chapter I pay attention to these issues. There, I contend that Federation resulted from a voluntary union of people from six states and that it was their delegations which created a federal government to work on their behalf. Popular

[189] Peter Radan, 'Constitutional law and secession: the case of Quebec' (1998) 2 *Macquarie Law Review* 69, 71.
[190] Adam Tucker, 'Uncertainty in the rule of recognition and in the doctrine of parliamentary sovereignty' (n 166) 70.

sovereignty bolsters secession because the people of each state retain absolute power to leave the federal union in the same manner in which they entered, that is, using a referendum.

CHAPTER 4: STATE AUTONOMY IN A POPULIST FRAMEWORK

[A] right of sovereignty subject to extrinsic control is a contradiction in terms.

Griffith CJ[1]

I. INTRODUCTION

If it is true, as Chapter 3 submits, that popular consent is the basic norm of the constitutional framework, then it follows that the justification for constitutional arrangements resides either in the people as one amalgamated whole (a unitary sovereign) or in the people as six or seven separate communities (shared sovereignty).[2] As Chapter 3 argues, the question of ultimate sovereignty cannot be avoided because this would leave the question of secession's constitutionality logically unresolved. Vitally, the abdication of the Parliament of the United Kingdom allows for Federation to be understood from an autochthonous legal root.

Which of the unitary or shared popular sovereign paradigms typifies the Australian enterprise? This chapter approaches this question from the outlook of an original state[3] seeking to secede. The answer can be tied to whether WA exists as an independent entity with law-making capacity outside the Commonwealth of Australia Constitution or whether it is wholly dependent for power upon s 106 of the Commonwealth Constitution which announces that the state constitutions continue 'as at the establishment of the Commonwealth' but remain 'subject to' the Constitution. While Aroney believes that s 106 merely recognises the continuation of the pre-existing state constitutions, Barwick CJ thinks that states establish their powers from that clause.[4]

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[1] *D'Emden v Pedder* (1904) 1 CLR 91, 110.

[2] See, eg, *Rowe v Electoral Commissioner* (2010) 243 CLR 1, 112 (Crennan J). In support of the people's sovereignty, one could liken the State to a fiduciary of the people exercising powers as trustee on behalf of beneficiaries: Benjamin Gussen, 'The State is the fiduciary of the people' (2015) 3 *Public Law* 440, 443-444. Cf. to Manetta who thinks that the 'Queen-in-Parliament – that is, the Queen acting with the advice and consent of all her Australian Parliaments – is the true omnicompetent Sovereign of Australia': Michael Manetta, 'Sovereignty in the Australian Federation' (2007) 19 *Samuel Griffith Society Proceedings* 89.

[3] New states have fewer rights than the six original states of the Commonwealth of Australia because their representation can be limited: *Commonwealth of Australia Constitution Act 1900* (UK) s 121.

[4] Nicholas Aroney, *The Constitution of a Federal Commonwealth: The Making and Meaning of the Australian Constitution* (Cambridge University Press, 2010) 263-266. Cf. Barwick CJ in *Victoria v the Commonwealth* (1971) 122 CLR 353, 371 and *New South Wales v Commonwealth* (1975) 135 CLR 337, 372 who adopts a reading of the Australian Constitution that is as unitary as the Canadian Supreme Court's interpretation of the Canadian Constitution. For instance, in *Reference Re Secession of Quebec* [1998] 2 SCR 217, the Canadian Supreme Court said (at [72]): 'The Constitution binds all governments, both federal and provincial, including the executive branch... They may not transgress its provisions: indeed, their sole claim to exercise lawful authority rests in the powers allocated to them under the Constitution, and can come from no other source'.

Also relevant is s 5 of the *Australia Act 1986* (Cth) and (UK). Section 5 notes that the powers of the states do not extend to legislation affecting the *Constitution Act, Statute of Westminster* or the *Australia Act.* Since popular sovereignty is now the basic norm, *Sue v Hill* claimed that the Commonwealth version of that Act passed in pursuance of the Constitution s 51(xxxviii) is what matters for Australian constitutional law.[5] By implication, perhaps s 5 binds the states and grants the Commonwealth authority over their affairs? Although Twomey finds that the *Australia Acts* enhance state autonomy, Craven – commenting on a draft of the bill – appears to disagree.[6]

What is at issue for the purposes of this thesis is the ability of the seven Australian parliaments to bind each other and for one or more of them to interfere with a hypothetical secession. If the WA parliament draws power from sources other than the Constitution, then depending on subject matter it may be able to rely on its outside authority to unilaterally secede. However, if the state's entire source of law-making authority derives from the Constitution, then there is less scope for asserting rights since it is then theoretically a subordinate legislature.[7] In the latter scenario, s 128 which permits amendment of the Constitution when supported by a majority of states and a majority of the people nationwide, can be used to amend the WA Constitution.[8]

The Constitution does not say which of the unitary or shared sovereignty options considered here is correct.[9] Even if it did, what is correct at one period can be incorrect at another time, because as Holmes remarks, '[t]he life of the law has not been logic: it has been experience'.[10]

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

[6] Anne Twomey, 'The States, the Commonwealth and the Crown – the Battle for Sovereignty' (Research Paper No 48, Parliament of Australia, January 2008); Gregory Craven, *Secession: The Ultimate States Right* (Melbourne University Press, 1986) 199.

[7] This subordination is assisted by the reality that the Constitution is often interpreted in ways favourable to the Commonwealth parliament by the judicial branch of the Commonwealth. See Craven, 'The High Court of Australia: A study in the abuse of power' (1999) 22 *University of New South Wales Law Journal* 216, 222-223.

[8] Gregory Craven, 'Would the abolition of the states be an alteration of the Constitution under s 128?' (1989) 18 *Federal Law Review* 85, 85: 'there has been an almost unanimous consensus that s 128 would permit abolition of the States'. This article is relevant because abolishing the states would entail amending the state constitutions.

[9] The Australian Constitution nowhere in its body states that the people of the states are or shall be united forever. Although the Australian framers were aware that 700,000 men, women and children had perished in the American Civil War, they contented themselves with inserting indirect references in the Preamble like 'indissoluble', 'Federal Commonwealth' and 'under the Crown'. This is revealing given the insistence by some at the Australasian Federation Conference on clarifying the matter by inserting an explicit provision: *Official Report of the National Australasian Convention Debates*, Adelaide, 25 March 1897, 93 (Joseph Carruthers).

[10] Oliver Wendell Holmes Jr., *The Common Law* (1881) 5: 'The felt necessities of the time, the prevalent moral and political theories, intuitions of public policy… even the prejudices which judges share with their fellow-men, have had a good deal more to do than the syllogism in determining the rules by which men should be governed. The law embodies the story of a nation's development through many centuries, and it cannot be dealt with as if it contained only the axioms and corollaries of a book of mathematics'. Cf James Allan, "The three 'R's' of recent Australian judicial activism: *Roach, Rowe* and (no)riginalism" (2012) 36(2) *Melbourne University Law Review* 743, 746-50.

Part II of this chapter presents the material that reflects the unitary and shared sovereignty alternatives. Part III of this chapter mounts an argument for shared sovereignty. Significance is placed in this regard on the fact that WA's powers existed before Federation in its state constitution passed in 1890,[11] whereas the Commonwealth Constitution commenced in 1901. Finally, Part IV considers the implications of shared sovereignty for an inquiry into secession.

II. THEORIES ABOUT THE AUSTRALIAN UNION

Constitutional theories about the Australian union contain confederal, federal and national aspects depending on which components of constitutional documents are emphasised.[12] As detailed in Chapter 5, it is said that in a confederation, the central government is weak and not much more than a forum for forging interstate agreements that operate directly upon the regional governments rather than on persons.[13] Conversely, in a federation the central government is more powerful because it has a taxing authority and has the capability to create laws that bind individuals living in the states.[14] And in a national state the central government is all-powerful.[15]

The Commonwealth parliament has the power to operate upon both states and individuals so it has confederal and federal elements. It can bind the state governments directly with acts targeted to that state.[16] And the Commonwealth can also bind private individuals living within a state's boundaries.[17] This blending suggests there is little value in sticking to a strict delineation. Aroney acknowledges that '[t]here are important continuities between confederations and federations, in particular as regards their formation, representative structure and amending procedures'.[18] Follesdal explains that '[a] *federation* is one species of…a federal order; other

[11] *Western Australia Constitution Act 1890* (UK).
[12] Nicholas Aroney, *The Constitution of a Federal Commonwealth: The Making and Meaning of the Australian Constitution* (Cambridge University Press, 2009) 26; Benjamen Gussen, 'Australian Constitutionalism: Between Subsidiarity and Federalism' (2016) 42 *Monash University Law Review* 392-408.
[13] Andreas Follesdal, 'Federalism', *Stanford Encyclopedia of Philosophy* (2018) <https://plato.stanford.edu/archives/sum2018/entries/federalism>
[14] Alexander Hamilton, James Madison and John Jay, *The Federalist Papers* (Bantam Classic, 2003) 83.
[15] Andreas Follesdal, 'Federalism', *Stanford Encyclopedia of Philosophy* (2018) <https://plato.stanford.edu/archives/sum2018/entries/federalism>
[16] *Commonwealth v Tasmania* (1983) 158 CLR 1 ('Tasmanian Dam Case'). This ruling was directed at the Tasmanian state government and upheld Commonwealth legislation that prevented Tasmania from constructing a dam on the Franklin river. This was done using s 51(xxix). Gibbs CJ said (at 100) that 'the external affairs power differs from the other powers conferred by s 51 in its capacity for almost unlimited expansion'.
[17] See, eg, *New South Wales v Commonwealth* (2006) 229 CLR 1 ('*Workchoices Case*').
[18] Aroney, *The Constitution of a Federal Commonwealth* (n 12) 31.

species are unions, confederations, leagues and decentralised unions—and hybrids such as the present European Union'.[19] Thus, this chapter focuses on 1) a unitary state and 2) a federal state.

A. A unitary federal state with a single sovereign

Post-Federation, the notion of a substantively unitary state with decentralised forms was put by Quick and Garran in their *Annotated Constitution of the Australian Commonwealth*:

> By force of the legislative mandate that 'the Constitution of each State of the Commonwealth shall, subject to this Constitution, continue as at the establishment of the Commonwealth' it may be argued that *the Constitution of the States are incorporated into the new Constitution, and should be read as if they formed parts or chapters of the new Constitution*. The whole of the details of State Government and Federal Government may be considered as constituting one grand scheme provided by and elaborated in the Federal Constitution; a scheme in which the new national elements are blended harmoniously with the old provincial elements, thus producing a national plan of government having a Federal structure.[20]

Quick and Garran's reference above to a 'national plan' that substitutes the 'old' provincial elements characterises Australia as a unitary state because they note that 'the Constitution of the States are incorporated into the new Constitution, and should be read as if they formed parts or chapters of the new Constitution'. Indeed according to the authors, a state's constitution is 'subject to' the federal Constitution.[21] As they assert, s 128 provides the power to amend 'this Constitution' which means that s 128 'extends to the structure and functions of the Governments of the States' in addition 'to the structure and functions of the Federal Government'.[22]

This idea of a unitary state that happens to have decentralised features is affirmed in *Farey v Burvett*.[23] Regulating the minutia of a state's market economy – in this case, the price of bread – was determined to fall within the scope of s 51(vi) pertaining to defence of the Commonwealth. Griffith CJ claims that '[t]he power to make laws with respect to defence is, of course, a paramount power, and if it comes into conflict with any reserved State rights the latter must give way'.[24] Isaacs J concurs, noting that the limits of the Commonwealth parliament's defence 'are

[19] Andreas Follesdal, 'Federalism', *Stanford Encyclopedia of Philosophy* (2018) <https://plato.stanford.edu/archives/sum2018/entries/federalism>
[20] John Quick and Robert Garran, *Annotated Constitution of the Commonwealth* (1901) 930. Emphasis added.
[21] Ibid 990.
[22] Ibid.
[23] *Farey v Burvett* (1916) 21 CLR 433.
[24] *Farey v Burvett* (1916) 21 CLR 433, 441 (Griffith CJ).

bounded only by the requirements of self-preservation. It is complete in itself, and there can be no implied reservation of any State power to abridge the express grant of a power to the Commonwealth'.[25] Although the reasoning of the High Court is contingent upon an emergency situation, this ruling leaves open the possibility that other exclusive state powers (that is, those not expressly granted to the Commonwealth) can be overturned to the point of taking over an entire state during wartime.[26] In other words, when the state itself is under threat the Commonwealth resumes its position as ultimate sovereign.

A unitary sovereign, albeit of the imperial kind identified in Chapter 3, was given impetus by the UK Committee of the House of Lords and the House of Commons in 1935 when it refused WA's petition seeking an alteration of the *Constitution Act* to enable secession.[27] The Committee's reasoning assumes that the *Constitution Act* as it stands precludes secession. As such, the Committee does not inquire into whether there are sections that permit secession. Since the Committee's decision is the only precedent in Australian history directly addressing secession by a state, it is worth summarising the reasons:

- First, the Committee agreed that the UK parliament has legal competence to enact the legislation being requested by WA and that the UK is the *only* authority which can enable secession of an Australian state. A state has no power granting a right of secession and the 'Commonwealth itself has no power to amend the Constitution to the extent of enabling any State to secede' (by implication, it appears that the Committee thought that the Commonwealth has no power over secession either).[28]
- Second, the Committee noted that the UK parliament has an 'ancient right' to receive petitions.[29]
- Third, the Committee said that its right to receive petitions, along with the UK parliament's right to legislate for its Dominions, has to be tempered by the principles granting Dominions autonomy in the *Statute of Westminster 1931* (UK) (although the Act did not come into effect in Australia until 1942, it reinforces a convention).[30]
- Fourth, the principles of autonomy dictate that in matters concerning the Commonwealth Constitution the Committee should only accept a petition if it is offered by the parliament

[25] *Farey v Burvett* (1916) 21 CLR 433, 453-4 (Isaacs J).
[26] Kate Chetty, 'A History of the Defence Power: Its Uniqueness, Elasticity and Use in Limiting Rights' (2016) 16 *Macquarie Law Journal* 17-40.
[27] Joint Committee of the House of Lords and the House of Commons, Parliament of the United Kingdom, *Petition of the state of Western Australia together with the proceedings of the committee and minutes of speeches delivered by counsel* (1935).
[28] Ibid viii.
[29] Ibid vi.
[30] Ibid.

representing the voice of the entire people of Australia, namely, the Commonwealth parliament. The WA parliament can only petition the UK on state matters and it 'has no *locus standi* in asking for legislation from the Parliament of the United Kingdom in regard to the constitution of the Commonwealth'.[31] The WA government is not concerned with 'Commonwealth affairs' and 'is not concerned with the subject matter'.[32] The Committee argues that this distinction between federal and states issues is reinforced by the *Statute of Westminster* s 9(2) which the Committee summarises as meaning that 'the Parliament of the United Kingdom may deal with respect to any matters within the authority of the States of Australia, without any concurrence of the Commonwealth'.[33]

- Fifth, the above conclusion is buttressed by the Committee's evaluation that once the Constitution came into effect, the WA parliament lost those colonial powers which were vested in the Commonwealth parliament. The WA parliament now exists as a political entity 'in respect only of the powers which remain vested in the States'.[34]
- Finally, though the UK parliament has the strict legal power to enable secession by an Australian state, it must abide by constitutional convention and refuse to act until presented with a petition conveying the wishes of the entire Australian people.

Given that the Committee's reasons were delivered when imperial sovereignty still had lingering force, the importance of the reasons at the present time is doubtful.[35] The Committee may also have been motivated by the pursuit of British foreign policy interests to defer to the Commonwealth government.[36] To the extent that the Committee clarifies issues about the nature of the Australian union, however, there is a connection that can be made. The Committee's opinion that matters concerning the Constitution are outside the purview of a single state supports a Commonwealth sovereign because it could now be argued that the Commonwealth parliament is the authority representing the people on national issues like secession.

Backing for a Commonwealth sovereign is also implicit in the suggestion by Barwick CJ that original states are *of* the Commonwealth rather than entities deriving power from another source. His comments are made in *Victoria v Commonwealth* while analysing s 106:

[31] Ibid ix.
[32] Ibid.
[33] Ibid.
[34] Ibid.
[35] See also a critique of the Committee as 'exalting expediency at the expense of legality': United Kingdom, *Parliament Debates*, House of Commons, 20 June 1935, vol 303, col 697 (Moreing).
[36] Christopher Besant, 'Two nations, two destinies' (1990) 20 *University of Western Australia Law Review* 209, 260.

> The constitutional arrangements of the colonies were retained by, and subject to, the Constitution as the constitutional arrangements for the government of those portions of the Commonwealth to be known as States. These, though coterminous in geographical area with the former colonies, *derived their existence as States from the Constitution itself*: and being parts of the Commonwealth became constituent States.[37]

During 1975, in *New South Wales v Commonwealth*, Barwick CJ contends as follows:

> On the passage of the Imperial Act [the Commonwealth of Australia Constitution Act], those colonies ceased to be such and became States forming part of the new Commonwealth. As States, they owe their existence to the Constitution which, by ss. 106 and 107, provides their constitutions and powers referentially to the constitutions and powers which the former colonies enjoyed, including the power of alteration of those constitutions.[38]

Also in 1975, Murphy J held in *Commonwealth v Queensland* that unilateral legislation by the Queensland parliament permitting appeals from the Queensland Supreme Court to the Privy Council for advisory opinions on federal constitutional matters is invalid. Murphy J argues that:

> [T]he Queensland Act is incompatible with the unity of the 'one indissoluble Federal Commonwealth' which was established by the *Commonwealth of Australia Constitution Act. The Constitution Act is the authority for the Constitution of Queensland and the powers of its Parliament* (Constitution ss 106, 107).
>
> The establishment by an Australian State of a relationship with another country under which a governmental organ (judicial or otherwise) of that country is to advise the State on the questions and matters referred to in the Act, is quite inconsistent with the integrity of Australia as an independent sovereign nation in the world community. It is not within the legislative competence of the Parliament of any State to compromise or attempts [sic] to compromise Australian sovereignty and independence.[39]

In 1976, Murphy J in *Bistricic v Rokov* expressly endorses the views of Barwick CJ:

> *The Constitutions of the States now have their source in s 106 and the following sections of the Commonwealth of Australia Constitution Act* (see Barwick CJ in *New South Wales v*

[37] *Victoria v Commonwealth* (1971) 122 CLR 353, 371 (Barwick CJ). Emphasis added. See also Menzies J in *Victoria* (at 386) who says: 'The States are not outside the Constitution. They are States of the Commonwealth'.
[38] *New South Wales v Commonwealth* (1975) 135 CLR 337, 372 (Barwick CJ).
[39] *Commonwealth v Queensland* (1975) 134 CLR 298, 337 (Murphy J). Emphasis added.

> *Commonwealth*; my judgement in *The Commonwealth v Queensland*). There is no proper constitutional relationship between the governments of the States of Australia and the government of any other country… and therefore any State government which deals with the Queen through the United Kingdom government is acting unconstitutionally.[40]

Post-*Australia Acts*, a unitary interpretation has been put forward in a variety of settings. In the judicial context, the High Court has discovered that Australia has a single common law as opposed to separate state systems and that the Constitution 'provides for an integrated Australian judicial system for the exercise of the judicial power of the Commonwealth'.[41] In a legislative context, the Commonwealth parliament has been characterised as being 'necessarily stronger' such that its scope should be read without reference to state powers that might exist.[42] In an executive setting, a nationhood power has been invented for national objects.[43] All of these combine to give the impression that there is one Australian people rather than people of separate polities, and that the former should prevail over the objections of individual states.[44]

In *Durham Holdings,* all judges except for Callinan J (who declined to express an opinion on this issue) agree with the pre-*Australia Act* view that s 106 erects, maintains and permits exercise of state power. Gaudron, McHugh, Gummow and Hayne JJ limit the plenary state power acknowledged in s 2(2) of the *Australia Act* by noting that 'the universality of the power thus conferred is subject to the *Commonwealth of Australia Constitution Act 1900* (UK) and to the Constitution of the Commonwealth. *It is to that Constitution that the States owe their existence*'.[45] Moreover, in a footnote they approve earlier statements by Barwick CJ.

Kirby J in a separate judgement likewise proposes that a state's existence derives from the Constitution rather than from an external source. As he puts it: 'In Australia, a state is not free-standing…It is a state of the Commonwealth. It derives its constitutional status, as such, from the

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[40] *Bistricic v Rokov* (1976) 135 CLR 552, 566 (Murphy J). Emphasis added.
[41] *Kable v Director of Public Prosecutions* (1996) 189 CLR 51, 102 (Gaudron J).
[42] See the precedent cited in Liam Boyle, 'An Australian August Corpus: Why there is only one common law in Australia' (2015) 27(1) *Bond Law Review* 27, 27-30. And also *Melbourne Corporation v The Commonwealth* (1947) 74 CLR 31, 82 (Dixon J); *Work Choices* (2006) 229 CLR 1, 85 (Gleeson CJ, Gummow, Hayne, Heydon and Crennan JJ); Angus O'Brien, 'Wither federalism: the consequences and sustainability of the High Court's interpretation of Commonwealth powers' (2008) 23 *Australasian Parliamentary Review* 166, 171-75.
[43] Cheryl Saunders, 'Nationhood Power' in Michael Coper, Tony Blackshield and George Williams (eds), *The Oxford Companion to the High Court of Australia* (Oxford University Press, 2001).
[44] Note, however, that the COVID-19 crisis has emboldened state autonomy such that this proposition seems dubious. See Alan Fenna, 'Australian federalism and the COVID-19 crisis' in Rupak Chattopadhyay, Felix Knupling and Diana Chebenova, *Federalism and the response to COVID-19* (Routledge, 2022).
[45] *Durham Holdings v New South Wales* (2001) 205 CLR 399, 409 (Gaudron, McHugh, Gummow and Hayne JJ). Emphasis added.

federal Constitution'.[46] He also submits that s 107[47] plays a role in controlling the content of state legislation because '[i]t may be inferred, from [the] Constitution, that a State is a polity of a particular character'.[48] For Kirby J, s 107 is associated with a necessary implication that each state should have a parliament and that "[s]uch parliaments must be of a kind appropriate to a state of the Commonwealth and to a legislature that can fulfil functions envisaged for it by the Constitution'.[49] He adds, "[u]ltimately, a 'law of a State', made by such a parliament, could only be a 'law' of a kind envisaged by the Constitution. Certain 'extreme' laws might fall outside that constitutional presupposition".[50] Furthermore, Kirby J contends that the authority to strike down state laws is linked to a national popular sovereignty:

> The significance of the contemporary realisation that the foundation of Australia's Constitution lies in the will of the Australian people has not yet been fully explored. It is not impossible that this conception would, in an extreme case, also reinforce the foregoing and affect judicial recognition of a purported 'State law' that was not, in truth, a 'law' at all.[51]

A final example is *Kable v NSW*, which was decided by the High Court in 1996.[52] Section 77(iii) of the Constitution allows for the Commonwealth parliament to vest a state court with federal jurisdiction. It was determined by most judges that if there is a power to vest state courts with federal jurisdiction, there must be an accompanying ability to control how that authority is exercised by intervening in a state's judicial system. Specifically, a principle of judicial independence inferred from Chapter III of the Constitution was said to require that state Supreme Court judges not exercise 'non-judicial' power.[53] The subservience of NSW's judiciary can be seen from Toohey J's reasons. He concedes that the NSW Constitution permits the practices under scrutiny but maintains that the state is subordinate to the Commonwealth Constitution.[54] The outcome overturned the NSW legislation due to it being inconsistent with the federal Constitution.

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[46] *Durham Holdings v New South Wales* (2001) 205 CLR 399, 409 (Kirby J).

[47] Relevantly, s 107 of the Constitution provides that:

> Every power of the Parliament of a Colony which has become or becomes a State, shall, unless it is by this Constitution exclusively vested in the Parliament of the Commonwealth or withdrawn from the Parliament of the State, continue as at the establishment of the Commonwealth, or as at the admission or establishment of the State, as the case may be.

[48] *Durham Holdings v New South Wales* (2001) 205 CLR 399, 409 (Kirby J).

[49] Ibid (Kirby J).

[50] Ibid (Kirby J).

[51] Ibid 431 (Kirby J).

[52] *Kable v Director of Public Prosecutions (NSW)* 189 CLR 51.

[53] Ibid 102 (Gaudron J).

[54] Ibid 92-95, 98 (Toohey J).

B. A composite state with multiple sovereigns

At the Constitutional Convention held in 1891, Hackett describes federalism as a mode of shared sovereignty whereby '[a state] will have all her present rights, privileges, and prerogatives, minus the limited, definite, and specified quantity which is surrendered to the central government for the purpose of allowing it to carry on its own business'.[55] In 1908, Griffith CJ notes that prior to Federation, Tasmania was 'a self-governing Colony having no political association with any other part of Australia'.[56] This latter point by Griffith CJ is equally applicable to Western Australia. As Murray and Thomson confirm, it is in the context of confederalism under the British Crown that Western Australia evolved 'via documents and personalities from autocracy (1829-1870) to limited representative government (1870-1890) and subsequently, since 1890, to responsible government'.[57] Acquisition of self-governance came about due to imperial action with the *Western Australia Constitution Act 1890* (UK).

Similarly, after Federation it was said in *D'Emden v Pedder* that the Commonwealth and states are 'sovereign' albeit 'subject…to the restrictions imposed by the Imperial connection and to the provisions of the Constitution, either expressed or necessarily implied'.[58] Though an imperial connection no longer applies due to the reasoning put forward in Chapter 3, the perception of a state or its people as sovereign informs an alternative interpretation whereby:

- the Commonwealth government possesses a monopoly on certain powers
- there are concurrent powers shared between Commonwealth and state governments (with the Commonwealth prevailing in areas of inconsistency due to s 109); and
- a category of unwritten residual authority rests exclusively with the states.[59]

The foregoing assessment of the constitutional position conceives of either six original states *or* seven bodies (if one adds the institutions of the Commonwealth) in a power-sharing relationship within a composite state that is neither entirely national nor entirely federal. This undermines the concept of a unitary state where regional powers are revokable at will, insofar as the High Court as appointed arbitrator is willing to protect state exclusive powers from encroachment.

[55] *Official Record of the Debates of the Australasian Federal Convention*, Sydney, 12 March 1891, 280.
[56] *Eastern Extension Australasia & China Telegraph Company Ltd v Commonwealth* (1908) 6 CLR 647, 658.
[57] Sarah Murray and James Thomson, 'A Western Australian Constitution? Documents, Difficulties and Dramatis Personae' (2012) 36 *University of Western Australia Law Review* 1, 3.
[58] *D'Emden v Pedder* (1904) 1 CLR 91, 109.
[59] *D'Emden v Pedder* (1904) 1 CLR 91, 110.

Two mechanisms by which the High Court in the early 20th century tried to ensure the efficacy of shared sovereignty were the twin doctrines of reserved state powers and implied immunity of instrumentalities. Reserved state powers takes seriously the idea that the Constitution should be read as whole to ascertain whether a power to deal with a subject under consideration was intended to be withdrawn from the states and conferred upon the Commonwealth.[60] And implied immunity is explained in *D'Emden* in the following fashion: 'when a State attempts to give to its legislative or executive authority an operation which, if valid, would fetter, control, or interfere with, the free exercise of the legislative or executive power of the Commonwealth, the attempt, unless expressly authorized by the Constitution, is to that extent invalid and inoperative'.[61] And vice versa, the inverse of this sovereign immunity was later relied upon by the Court to protect state institutions from Commonwealth government interference.[62]

From Federation till 1920, the majorities on the Court appear to have accepted, indirectly through the reserved powers doctrine, that state constitutions extrinsic to the Constitution are a legitimate source of autonomy.[63] Endorsement of the doctrine suggests that s 106 is a savings provision for the state constitutions rather than the only basis determining a state's existence.[64] This is because s 106 does not explain what authority a 'State' has; the silence in this respect suggests that the clause must have been preserving powers existing elsewhere.

When Griffith CJ, Barton and O'Connor JJ scrutinised ss 107 of the Constitution they did not find 'any material difference' between it and the Tenth Amendment of the *United States Constitution*.[65] *D'Emden* advocates that due to historical similarities, US precedent should be

[60] Keven Booker, 'Reserved state powers' in Michael Coper, Tony Blackshield and George Williams, *The Oxford Companion to the High Court of Australia* (Oxford University Press, 2001); *Peterswald v Bartley* (1904) 1 CLR 497; *R v Barger* (1908) 6 CLR 41; *Attorney-General (NSW) v Brewery Employees Union of NSW* (1908) 6 CLR 469 ('Union Label Case'); *Huddart Parker v Moorehead* (1909) 8 CLR 330.
[61] *D'Emden v Pedder* (1904) 1 CLR 91, 111. Affirmed in *Heiner v Scott* (1914) 19 CLR 381, 398 (Barton J).
[62] Michael Coper, 'Intergovernmental immunities' in Michael Coper, Tony Blackshield and George Williams, *The Oxford Companion to the High Court of Australia* (Oxford University Press, 2001); *Federated Amalgamated Government Railway & Tramway Service Association v NSW Rail Traffic Employees Association* (1906) 4 CLR 488 ('Railway Servants Case').
[63] *New South Wales v Commonwealth* (1915) 20 CLR 54, 77-78 (Barton J). For similar reasoning, see the following dissenting judgements which advocate for shared sovereignty: *Engineers Case* (1920) 28 CLR 129, 175-177 (Gavan Duffy J); *Farey v Burvett* (1916) 21 CLR 433, 462-464 (Gavan Duffy and Rich JJ).
[64] D Graham, Solicitor-General of Victoria, intervening to support the defendants in *McGinty v Western Australia* (1996) 186 CLR 140, 160: 's 106 is expressed not as establishing or re-enacting those constitutions but as continuing their operation in the new context. It follows that the legal foundation of constitutions of the colonies and of those of the States is found in various Imperial Acts as well as s 106'.
[65] *D'Emden v Pedder* (1904) 1 CLR 91, 112.

used to interpret Australian provisions.[66] This is significant because the Tenth Amendment is claimed by American Founding Fathers Jefferson and Madison to be the crux of the case in favour of secession.[67] It says: '[t]he powers not delegated to the United States by the Constitution, nor prohibited by it to the States, are reserved to the States respectively, or to the people'. It was only after the secession question was settled by force due to the outcome of the American Civil War that this earlier interpretation by the Founding Fathers was cast aside.[68]

The import of reserved powers and federal immunities is summed up by the Supreme Court of the United States in *McCulloch v Maryland* (a case cited with approval in *D'Emden*):

> We have a principle which is safe for the States, and safe for the Union. We are relieved, as we ought to be, from clashing sovereignty; from interfering powers; from a repugnancy between a right in one government to pull down what there is an acknowledged right in another to build up; from the incompatibility of a right in one government to destroy what there is a right in another to preserve.[69]

Granted, in 1920 until about 1946 there were setbacks for shared sovereignty. According to Chordia and Lynch, the *Engineers Case* led to a radical shift in thinking such that the Constitution became simply a 'utilitarian reorganisation of the common sovereignty of the Crown' with the states being administrative units under a 'unified people'.[70] Federalism is by this understanding just a convenient method of unitary governance rather than a system of checks and balances with real teeth as envisioned by Madison in *Federalist Paper No. 51*.[71]

However, attempts to restrain the abuse of *Engineers* began in earnest in 1937 with *West v Commissioner of Taxation*. There, Dixon J stated the true principle of *Engineers*:

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[66] Ibid 113. The Court continues: 'When, therefore… we find embodied in the Constitution provisions undistinguishable in substance, though varied in form, from provisions of the Constitution of the United States which had long since been judicially interpreted by the Supreme Court of that Republic, it is not an unreasonable inference that its framers intended that like provisions should receive like interpretation'.

[67] Michael Maharrey, *Smashing Myths: Understanding Madison's Notes on Nullification* (Tenth Amendment Center, 2013) 25-31. In accordance with the Introduction chapter, I include nullification as part of secession.

[68] W.B. Yearna, 'The Constitutional Significance of the American Civil War' (1981) 42 *Proceedings of the Indian History Congress* 576, 576-78.

[69] *McCulloch v Maryland* 17 US 316 (1819).

[70] Shipra Chordia and Andrew Lynch, 'Federalism in Australian constitutional interpretation: signs of reinvigoration?' (2014) 33 *University of Queensland Law Journal* 83, 87; Aroney, *The Constitution of a Federal Commonwealth* (n 12) 98.

[71] Aroney, *The Constitution of a Federal Commonwealth* (n 12) 40.

> The principle is that whenever the Constitution confers a power to make laws in respect of a specific subject matter, prima facie it is to be understood as enabling the Parliament to make laws affecting the operations of the States and their agencies. The prima facie meaning may be displaced by considerations based on the nature or the subject matter of the power or the language in which it is conferred or on some other provision in the Constitution.[72]

Based on this statement of ratio, shared sovereignty has not been completely extinguished because *Engineers* does not impede displacement of its rule using federal implications from constitutional text and structure. So, according to Dixon J, 'the decision does not appear to deal with or affect the question whether the Parliament is authorized to enact legislation discriminating against the States or their agencies'.[73] Or as Evatt J put it in the same case:

> A different angle of approach to the question of discriminatory legislation is this, that it must at least be implied in the Constitution, as an instrument of Federal Government, that neither the Commonwealth nor a State legislature is at liberty to direct its legislation toward the destruction of the normal activities of the Commonwealth or States. Such a principle is not inconsistent with the rejection by the *Engineers Case* of the earlier doctrine of 'immunity of instrumentalities', though it *is* inconsistent with the unqualified dogma that the Constitution leaves no room whatever for implications arising from the co-existence side by side of seven legislatures each of which is…sovereign within the limits fixed by the distribution of constitutional functions.[74]

Furthermore, Evatt J maintains that there is no need to rely on the unpopular reserved powers doctrine to profess that there are limits to the intrusions that the Commonwealth and states can levy. Each Commonwealth power in s 51 should be treated separately and it cannot be presumed that a fair construction entails imposition upon State activities.[75] Nor can s 109, which establishes Commonwealth supremacy in situations of inconsistency, be used to 'manufacture inconsistency' and invalidate state legislation if the head of power does not support such a reading.[76]

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[72] *West v Commissioner of Taxation (NSW)* (1937) 56 CLR 657, 682 (Dixon J).
[73] Ibid 682 (Dixon J).
[74] Ibid 687-88 (Evatt J).
[75] *West v Commissioner of Taxation (NSW)* (1937) 56 CLR 657, 705-706 (Evatt J). Elsewhere (at 708), Evatt J lucidly characterises the nature of the union: 'Perhaps it might be said that the *broad* scheme of the Australian Constitution is that of mutual subjection to law of *both* Commonwealth and the States so that, generally speaking, all the laws of the Commonwealth may bind all the people of the Commonwealth (including, of course, State servants), and that all the laws of a State shall bind all the people of the State (including, of course, Commonwealth servants in that State)'.
[76] Ibid 707-708 (Evatt J).

These attempts to push back against centralisation reached their pinnacle in the *Melbourne Corporation Case* when the majority struck down a Commonwealth law that tried to force the Melbourne City Council to use the federal government's preferred bank. While s 51(xiii) of the Constitution gives the Commonwealth power over banking, a federal law will be invalid if: 1) it denies the existence or ability of a state to govern itself; 2) denies the federal structure of the Commonwealth; or 3) singles out any one state.[77] Dixon J adopts a strong vision of state autonomy and notes that 'the States' title to protection from Commonwealth control… arise not from the character of the powers retained by the States but from their position as separate governments in the system exercising independent functions' and moreover that 'unless a given legislative power appears from its content, context or subject matter so to intend, it should not be understood as authorizing the Commonwealth to make a law aimed at the restriction or control of a State in the exercise of its executive authority'.[78]

Also, Dixon J's judgement in the *Second Uniform Tax Case* raises the specter of there being a principle limiting coercion by the Commonwealth against the states. Although Dixon J allowed indirect compulsion or inducement using s 96 tied grants, he agrees that there could be a degree of oppression by the Commonwealth that may unacceptably hinder a state.[79]

Post-*Australia Acts*, the principle of *Melbourne Corporation* has now become entrenched.[80] In *Australian Education Union*, Victoria successfully challenged the applicability of orders of the Australian Industrial Relations Commission to the state's decision to offer redundancies among public school teachers. Six justices affirmed that 'a Commonwealth law cannot curtail or interfere in a substantial manner with the exercise of constitutional power by the States'.[81] In *Austin v Commonwealth*, a limited 'State immunity' was again confirmed.[82] But note that Gaudron, Gummow and Hayne JJ doubt that discriminatory treatment can on its own give rise to relief.[83] Instead, they suggest that the question is a matter of degree revolving around whether a 'special burden' and curtailment of a state's capacity to exercise granted powers exists.[84]

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[77] *Melbourne Corporation v The Commonwealth* (1947) 74 CLR 31, 79 (Dixon J).
[78] Ibid 83 (Dixon J).
[79] *Victoria v Commonwealth* (1957) 99 CLR 575, 605-10 (Dixon CJ) ('Second Uniform Tax Case').
[80] Neil Douglas, "'Federal' implications in the construction of Commonwealth legislative power: a legal analysis of their use' (1985) 16 *University of Western Australia Law Review* 105, 110.
[81] *Re Australian Education Union & Australian Nursing Federation; ex parte Victoria* (1995) 184 CLR 188, 228 (Mason CJ, Brennan, Deane, Toohey, Gaudron and McHugh JJ) ('Australian Education Union').
[82] *Austin v The Commonwealth of Australia* (2003) 215 CLR 185, 259 (Gaudron, Gummow and Hayne JJ) ('Austin').
[83] Ibid 249.
[84] Ibid 256.

III. ASSESSMENT OF THE COMPETING THEORIES

The two theories of Australian union are superficially similar. The theory of a unitary state with federal features includes among its proponents some who ostensibly defend state rights.[85] Conversely, advocates of shared sovereignty sometimes lapse into unitary speech.[86] It is arguable that the unique character of these schools of thought has been lost due to practitioners on each side who blur the boundaries (or perhaps they would argue that the boundaries *are* blurred).

Yet in my view there is a critical difference between the two. A unitary state is theoretically best suited to an unwritten constitution where the central government's parliament is dominant and has no textual restraints to contend with (as in the United Kingdom). Shared sovereignty, on the other hand, commonly refers to a division of powers under a written constitution and is associated with federalism (as in the United States).[87] The purpose of the text under shared sovereignty is to regulate power so that no single body wields absolute control. A constitution details a substantial demarcation of authority between the central government and the state governments and to some extent between the state governments versus other state governments.

It is typically unnecessary for a foreign government to work out the intricacies of internal municipal arrangements when dealing with the country known as 'Australia'. Yet for a domestic observer, whether Australia is a unitary federal state or a composite federal state is a critical distinction because there are major disparities in outcome depending on which interpretation is adopted. If Australia is a unitary state with the Commonwealth government at its apex, a necessary implication is that WA cannot secede without permission from the Commonwealth. By contrast, in a composite state, WA secession may be possible if the state retains legal authority independent of the Commonwealth Constitution and of the federal government.

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[85] For example, Kirby J has endorsed the reasoning of *Kable* (1996) 189 CLR 51 which allowed the Commonwealth to interfere in a state's judiciary. Elsewhere however, in the *Work Choices Case* (2006) 229 CLR 1, 224 Kirby J lodges a dissent arguing that the Commonwealth overstepped its mark by regulating the industrial relations of states.

[86] For example, in *Railway Servants Case* (1906) 4 CLR 488, 534 Griffith CJ calls the Constitution a 'compact entered into between the six Australian colonies which formed the Commonwealth' but in *Curley v Commonwealth* (1909) 8 CLR 178, 182 he uses language that suggests Australia only has one Crown ('There were then six different Departments in Australia which were about to be united in a few days').

[87] For descriptions of shared sovereignty see *Kruger v Commonwealth* (1997) 190 CLR 1, 42, 117; *Burns v Corbett* (2018) 265 CLR 304, 398 (Edelman J); Jaime Lluch, *Visions of sovereignty: nationalism and accommodation in multinational democracies* (University of Pennsylvania Press, 2015) 199-200.

A. The case for shared sovereignty

There is good reason to think that a shared sovereignty interpretation is the best fit considering Australia's populist *Grundnorm* where consent of the governed is fundamental.

First, each state enjoys external sources of power outside of the Commonwealth Constitution, with the result that its existence cannot be extinguished through unilateral action from any branch of the Commonwealth government or from any other state of the federation. These sources are: the WA Constitution, the *Australia Acts* and, ultimately, the electors of the state. Extending the principles in Chapter 3, sovereignty of the people implies that the WA Constitution and *Australia Acts* are manifestations of the people's will and that the documents are not in themselves binding. Rather, it is the consent of electors which supplies the reason for these documents being followed. If this is accepted, then it follows that it is not just the High Court's interpretations that grant state governments their status. To the contrary, WA exists as a social fact on the terms outlined in its autochthonous constitution which is binding in the 21st century because the officials of *that state* and the public of *that state* treat it as law.[88]

Sections 106 and 107 merely confirm the objective reality of pre-existing polities called 'States' – as that term is defined at Covering Cl. 6 – but nothing in those provisions purports to be the origin for the powers of WA. Aroney observes that the Commonwealth Constitution does not 'establish institutions for the states or confer powers upon them' and so undoubtedly presupposes their legal existence.[89] Logically, it is odd to derive the WA Constitution passed in 1890[90] from the *Constitution Act* passed in 1900 because the former preceded the latter enactment. The powers of the WA government were initially authorised by the 1890 legislation, meaning that at Federation the state primarily obtained its powers and privileges from that external source.[91] And there is little indication that the Constitution's s 106 extinguishes the 1890 legislation such that if s 106 were, hypothetically, repealed then the state would automatically cease to exist.

The Supreme Court of Western Australia has rejected the notion that s 106 is the source for state legislative authority. Burt CJ in *Western Australia v Wilsmore*, with whom Lavan SPJ and Jones J agreed, argues that High Court authorities as of 1981 deny the veracity of such an opinion. Instead, the Court held that the source of authority for WA's constitution is the imperial act

[88] Gerard Carney, *The Constitutional Systems of the Australian States and Territories* (Cambridge University Press, 2006) 105-106.
[89] Aroney, *The Constitution of a Federal Commonwealth* (Cambridge University Press, 2010) 2.
[90] *Constitution Act 1889* (WA) ('WA Constitution') contained in a schedule to *Constitution Act 1890* (UK).
[91] Cheryl Saunders, 'Australian State Constitutions' (2000) 31 *Rutgers Law Journal* 999, 1002.

which created it, not s 106 of the Commonwealth Constitution.[92] Thus, a question arising under a state constitution is not ipso facto a matter arising under the Commonwealth Constitution.[93] As part of its reasoning, the Court rebuffed opposing views put by Quick and Garran and Barwick CJ.[94] Although *Wilsmore* references WA's imperial constitution because the case was handed down prior to legal autochthony, it affirms the general principle that the Australian states exist as entities outside the Commonwealth Constitution and not because of the Constitution.

Besides, according to Douglas, the *Australia Acts* now also manifest a source of state power that cannot be unilaterally changed by the Commonwealth and exists outside of the Constitution ss 106 and 107.[95] *Sue v Hill* said that it is the Commonwealth version of the *Australia Act* that is binding in Australia – thus creating a local legal root and rejecting imperial forms – and that version was passed in pursuance of a shared sovereignty arrangement.[96] Section 51(xxxviii) of the Constitution gives the Commonwealth parliament permission to make laws with respect to:

> the exercise within the Commonwealth, at the request or with the concurrence of the Parliaments of all the States directly concerned, of any power which can at the establishment of this Constitution be exercised only by the Parliament of the United Kingdom or by the Federal Council of Australasia…

Via s 51(xxxviii), the *Australia Act* was enacted. It declares that each state has plenary legislative power (s 2), removes restrictions on state legislative power (ss 3, 8 and 9) and entrenches manner and form requirements (s 6). Furthermore, s 7 declares that '[t]he advice to Her Majesty in relation to the exercise of the powers and functions of Her Majesty in respect of a State shall be tendered by the Premier of the State'. Twomey opines that s 7 'now gives the States the power to advise the Queen directly on State matters – the same power that was regarded by [Prime Minister] Whitlam as dangerously increasing the status of the States and was regarded by the British Government as establishing independent Realms and Crowns'.[97] Section 15 of the

[92] *Western Australia v Wilmore* (1981) 51 FLR 348, 352 (Burt CJ).
[93] Ibid 353 (Burt CJ).
[94] Ibid 351-52 (Burt CJ).
[95] Neil Douglas, 'The Western Australian Constitution: Its Source of Authority and Relationship with Section 106 of the Australian Constitution' (1990) 20 *University of Western Australia Law Review* 340, 350.
[96] *Sue v Hill* (1999) 199 CLR 462, 491-92 (Gleeson CJ, Gummow and Hayne JJ).
[97] Anne Twomey, 'The States, the Commonwealth and the Crown – the Battle for Sovereignty' (Research Paper No 48, Parliament of Australia, January 2008).

legislation enables amendment of the *Statute of Westminster*, *Australia Act* and the *Constitution Act* through cooperative action by state and federal parliaments.[98] As Manetta explains:

> The *Statute of Westminster* and the *Australia Acts* repealed the *Colonial Laws Validity Act* in its application to the Commonwealth and the States, with two effective exceptions. They preserved the manner and form requirement for the States (*Australia Act*: s. 6) and, more importantly, they provided that (apart from whatever amendments may be made to the federal Constitution from time to time under s. 128) no Parliament in Australia could repeal or amend the Constitution, or the *Constitution Act*, or the continuing provisions of the *Statute of Westminster*, or the *Australia Acts*, except by Commonwealth legislation passed with the consent of the Parliaments of all the States (*Statute of Westminster*: s. 8; *Australia Act*: ss. 2 & 15).
>
> This consequence is of vital importance to the proper understanding of Australian constitutional theory because, in my view, it forms the true fundamental law of this country. The mirror image of the old Imperial Parliament is nowadays to be found in the Parliamentary Concert of the Commonwealth and the States. It is in this combination of legislative will that the authority can be found literally to do anything. By this procedure, the Parliaments in concert could remove the fetters that prevent amendment of any part of the Constitution or the Constitution Act, and do so, what is more, without referendum. Indeed, in theory, they could repeal and replace s. 128 itself without reference to the people.
>
> Politically, such an eventuality might be fancifully remote but, legally, it is possible. To that extent, s. 128 can be viewed in its proper place as an inferior source of constitutional authority to s. 15 of the *Australia Acts*.[99]

Manetta's interpretation confirms that via s 15 of the *Australia Act*, shared sovereignty is an integral and entrenched component of Australia's prevailing constitutional framework. A unitary sovereign is presently out of place since the Commonwealth cannot unilaterally extinguish the powers of any state without cooperation from other states. Manetta's observation that s 15 of the *Australia Acts* is politically unpalatable aligns with this thesis' belief that popular sovereignty is the *Grundnorm* underlying shared sovereignty. Since the people would not tolerate parliaments coming together to subvert popular will, the only realistic method of amending foundational legislation – or at least, amending the Constitution – is with a referendum using s 128.

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[98] Christopher Gilbert, 'Section 15 of the Australia Acts: Constitutional Change by the Back Door' (1989) 5 *Queensland University of Technology Law Journal* 55, 55-58.

[99] M. Manetta, 'Sovereignty in the Australian Federation' (2007) 19 *Samuel Griffith Society Proceedings* 89.

Likewise, Twomey concurs that s 15 transfers the power to 'amend or repeal…fundamental statutes that form our Constitution…collectively to the Commonwealth and all the State Parliaments' and that 'sovereignty in Australia remains vested collectively in the Commonwealth and the States'.[100] For most of history each Australian state 'had an independent relationship with the [British] Crown through the British Secretary of State for the Colonies' and after 1986, 's 15 of the *Australia Acts*… secured their place in Australian sovereignty'.[101] Elsewhere, Twomey expresses sympathy for popular sovereignty as the *Grundnorm.*[102]

In addition, the process by which the *Australia Acts* were requested by each state parliament and the recognition of states in the legislation confirms that they are entities equal in stature to the Commonwealth, removing the possibility that the states are subordinate legislatures.[103] Neither constitutional entity is dominant except to the extent that the Commonwealth Constitution ratified in 1900, as effectively amended through the *Statute of Westminster* and the *Australia Acts* and consented to by the electors at each election, permits them to be. Similar sentiments arise from Aroney who shows through historical inference that '[t]he federation of the Australian colonies was understood to be part of a movement from the autocratic, unitary and subordinate patterns of government characteristic of the convict era, towards a scheme of representative government, local government and constitutional self-determination'.[104]

Second, as Detmold finds, there is no institution that represents the will of the people as a consolidated polity because the Commonwealth parliament only represents the people through a federal arrangement.[105] The Constitution reveals that electors do not cast ballots as a homogenous bloc but actually do so by state. In elections to the Commonwealth parliament, the number of parliamentarians is proportionately linked to the population of each state and each state is guaranteed a minimum of five representatives to the House of Representatives to help preserve a degree of equality in status.[106] It is also notable that electors do not delegate authority to a single legislature as in a unitary state. Rather – per ss 7, 8, 9, 24, 30 and other sections

[100] Anne Twomey, 'The States, the Commonwealth and the Crown – the Battle for Sovereignty' (Research Paper No 48, Parliament of Australia, January 2008).
[101] Ibid.
[102] Anne Twomey, *Australia Acts: Statutes of Independence* (Federation Press, 2010) 431-32. Nonetheless, Twomey qualifies her sympathy for popular sovereignty with her realisation that the 'federal parliamentary democratic system of government' – a compact between seven parliaments, not peoples – is likely the legal sovereign.
[103] Anne Twomey, *Australia Acts 1986: Australia's Statutes of Independence* (Federation Press, 2008) 464-65.
[104] Aroney, *The Constitution of a Federal Commonwealth* (n 12) 338.
[105] M Detmold, *The Australian Commonwealth – A Fundamental Analysis of its Constitution* (Law Book Co, 1985) 210-211.
[106] Australian Constitution s 24. Aroney notes that '[t]he ultimate ground of federation was unanimous agreement among the original states, considered as equals': *The Constitution of a Federal Commonwealth* (n 12) 340.

relating to the qualification of voters and the method of election – many of the same voters separately appoint local parliamentarians who exercise power through state parliaments in the state in which they reside. The two delegations of power flow directly from voters who have a link to the state in which they live and it does not occur on a purely national basis.[107]

To summarise, therefore, there are two key reasons why shared sovereignty makes sense: 1) the states exist as polities with sources of power outside the Commonwealth Constitution such that the Commonwealth government is unable to unilaterally abolish the states and 2) the Commonwealth parliament is itself not a unitary organisation since it is partly federal.

B. Objections to shared sovereignty

There are two lines of attack seeking to undermine shared sovereignty. The first favours a unified single Crown throughout the Commonwealth of Australia. Zines, for instance, contends that the Preamble which refers to one 'indissoluble Federal Commonwealth under the Crown of the United Kingdom of Great Britain and Ireland' and covering cl. 2 which carries forward the Queen's heirs and successors 'in the sovereignty of the United Kingdom' combine to make the Australian federation bound together under a single Crown.[108] Along similar lines, Winterton asserts that sovereignty is an attribute of nationhood, but since the states are not nations they do not have such sovereign rights. Winterton instead theorises that a Queen of Australia is the sole Crown 'because Australia is one nation and, therefore, has one Head of State'.[109]

Is there really only one Crown throughout Australia? It would appear not since the assessment of Zines contradicts what is now known about imperial sovereignty and its applicability.[110] Because of the intervening events outlined in Chapter 3 of this thesis, the Preamble's monarchical text and covering cl. 2 do not have much relevance. Similarly, Twomey says in response to Zines that 'those provisions were enacted at a time when the British Crown was considered indivisible and must now be interpreted to accommodate later developments'.[111] Zines' explanation is not a persuasive explanation for prevailing arrangements. Even the *Australia Acts*, which form part of Australia's rigid constitution, were initiated by the distinct people of the states acting through

[107] Anne Twomey, *The Australia Acts 1986: Australia's Statutes of Independence* (Federation Press, 2010) 427.
[108] Leslie Zines, *The High Court and the Constitution* (Federation Press, 2008) 436-37.
[109] George Winterton, 'The evolution of a separate Australian Crown' (1993) 19 *Monash Law Review* 1, 3.
[110] Anne Twomey, *The Chameleon Crown: The Queen and Her Australian Governors* (Federation Press, 2006) 263–71; Cheryl Saunders, 'The Concept of the Crown' (2015) 38(3) *Melbourne University Law Review* 873, 883.
[111] Twomey, *Australia Acts 1986: Australia's Statutes of Independence* (Federation Press, 2008) 465.

their state parliaments to pass request and consent acts and were not progressed solely by an amalgamated people acting through the Commonwealth parliament.[112]

Winterton's perspective is historically questionable. Twomey has shown that from 1930 to 1986, 'Australia had effectively two Queens while it was one nation'.[113] After the Imperial Conferences in 1926 and 1930, independence was achieved for the Commonwealth at the national level while the states were left untouched. Hence, the Crown became divided, meaning that the monarch acted in separate capacities pursuant to the advice of different polities. Twomey points out that '[t]here was a separate Crown in relation to the Commonwealth of Australia, but the States remained under the Crown of the United Kingdom'.[114] The states continued to advise the British on state affairs, while the Commonwealth was only permitted to advise the Queen on federal affairs. This arrangement is alluded to in the UK Joint Committee's report in 1935.[115]

A second objection to shared sovereignty asserts that s 128 of the Commonwealth Constitution can be used to amend state constitutions. According to this interpretation, s 128 proscribes a procedure whereby four out of six states plus a majority of people nationwide is required to amend WA's constitution without that state's consent because each state is incorporated in the meaning of 'this Constitution'. As Craven notes, ''there has been an almost unanimous consensus that s 128 would permit the abolition of the states'.[116] While Saunders observes that '[t]here is conflicting authority on whether section 106 provides the basis for state constitutions or merely preserves and reinforces them', she is of the opinion that 'national majorities can effectively amend state constitutions under s 128 of the Australian Constitution…subject to the limitations in s 128 itself and, perhaps, to federal immunities principles'.[117] If true, this certainly lends credence to the notion of a unitary state with the states being subordinate.

Yet there are theoretical problems with the opinion that the WA Constitution can be amended without the consent of WA. In the first place, since this chapter has argued that the state constitutions are not incorporated into the Commonwealth by s 106, there is a barrier to including a state constitution within the meaning of 'this Constitution' in s 128. Although

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[112] *Australia Acts (Request) Act 1985* (WA).
[113] Ibid 464.
[114] Ibid 462.
[115] Joint Committee of the House of Lords and the House of Commons, Parliament of the United Kingdom, *Petition of the state of Western Australia together with the proceedings of the committee and minutes of speeches delivered by counsel* (1935) ix.
[116] Greg Craven, 'Would the abolition of the states be an alteration of the Constitution under section 128?' (1989) 18 *Federal Law Review* 85, 85.
[117] Cheryl Saunders, 'Australian State Constitutions' (2000) 31 *Rutgers Law Journal* 999, 1012.

acknowledging that there is uncertainty surrounding this question, Thompson notes that '[i]n all probability the Founding Fathers did not envisage the possibility that State Constitutions would or could be subject to amendment by s 128 through the amendment of s 106'.[118] Moreover, he observes that "after Federation 'the States continued their *separate* constitutional relations with the Imperial Crown and Parliament, and this separate relationship has been emphasised by the *Statute of Westminster 1931*'".[119] Aroney has confirmed that '[s]ection 128…is not a power to amend, or to confer the power to amend, the constitutions of the several states' because this is inconsistent with the shared sovereignty arrangements reflected in s 15 of the *Australia Acts.*[120]

Another reason why s 128 probably does not allow for 'alteration' of state constitutions is because that section is itself subject to the Constitution because it is a principle of construction that a document should be read in its entirety.[121] This creates a circular argument because the federalism and state immunities outlined by *Melbourne Corporation* and *Austin* form part of the Constitution and restrain what is possible in terms of alteration. Craven thinks that using s 128 to abolish the states by removing all references to 'States' is unlikely to be valid because:

> the essence of the Constitution is not merely that it created a nation, but that it created a federal nation. Accordingly, were either of these features to be removed, the character of the Australian Constitution would be fundamentally changed, and the operation involved would not be a constitutional 'alteration'.[122]

Due to the combination of these reasons, it can be said that 'a power to alter a Constitution is not a power to change the fundamental nature or character of that Constitution, and…the abolition of the States would involve…just such an impermissible change in the Australian Constitution'.[123]

Realistically, nor is there much political appetite to interfere dramatically in state constitutions, particularly if the people of the affected state oppose such intervention. After all, the Commonwealth parliament cannot afford to alienate an entire state's voters. Hence, interpreting s 128 as allowing for interference in state constitutions will probably not be supported by courts that are cognisant of the sensitive political circumstances within which they operate. It is even

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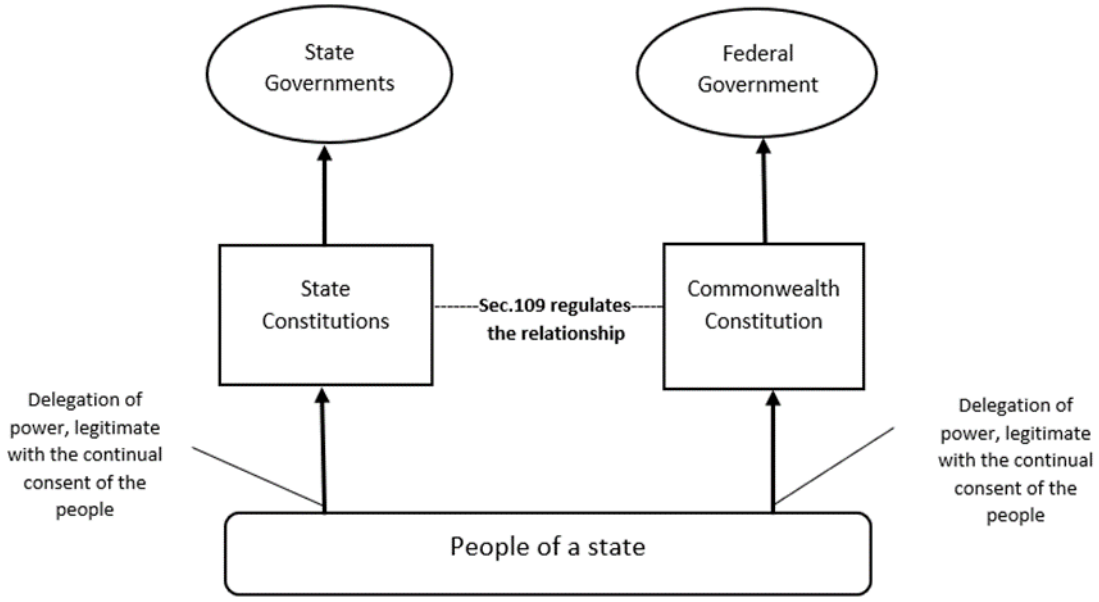
[118] James Thompson, 'Altering the Constitution: Some Aspects of section 128' (1983) 13 *Federal Law Review* 323, 337.
[119] Ibid 338.
[120] Nicholas Aroney, *Constitution of Federal Commonwealth* (Cambridge, 2010) 357.
[121] Michael Kirby, 'Statutory interpretation: the meaning of meaning' (2011) 35(1) *Melbourne University Law Review* 113, 113-115.
[122] Craven' Would the abolition of the states be an alteration of the Constitution under section 128?' (n 116) 120.
[123] Ibid 121.

less likely to be deemed permissible now due to the passage of the *Australia Act* which manifests an external source of power that confirms the states as equal partners in the federation.

Having addressed the main objections to shared sovereignty, I therefore conclude that it is the preferable theory of Australian union. I now turn to examine the impact of shared sovereignty on the autonomy of WA, particularly as it relates to unilateral secession from the Commonwealth.

IV. SECESSION AND ITS CONSTITUTIONALITY

This chapter has so far determined that the Australian federation creates a composite state composed of co-equal governments that operate alongside one another. The electors who delegate these governments their sovereignty are not a single polity but are instead linked to their state of residence. That states are a critical organising principle is confirmed by numerous provisions in the Constitution including s 121 which provides a mechanism whereby new 'States' can join the federation and additionally by the *Australia Acts* which elevate the stature of the states.[124] Sovereignty, or the right to rule, is thus like a football that is kicked around and shared between state and federal institutions which operate in parallel but derive authority from mostly the same underlying electors. Figure 1 is a visual representation of this model. This section examines the ramifications of this model of shared sovereignty for unilateral succession.



[124] Australian Constitution s 121. For an overview of how the new state clause is based on the *US Constitution* and how it applies to Federation, see Alan Mizen, 'The possible secession of, and creation of, states under the Commonwealth of Australia Constitution Act' (Honours Thesis, University of Western Australia, 1975) 36-52.

Figure 1: Australian federation*:* parallel and co-equal agents of the electors in each state.

A. The possibility of exit

The major implication of the arguments in this chapter is that unilateral secession is constitutional. Genuine consent foresees the ongoing maintenance of the constitutional framework by the six sovereigns, namely, the people of each state.[125] It does not necessarily make a material difference whether one's interpretation of shared sovereignty highlights a division of authority between six parliaments or seven parliaments, since secession boils down to the same thing: a withdrawal of consent by the underlying sovereign which is the people. A referendum in this context assists a secession claim by providing evidence of the people's intent.[126] A commitment to popular sovereignty implies that state governments will enjoy whatever power the electors want them to have even if these delegated abilities do not adhere to the interpretations given by national majorities from the Commonwealth or from other states.

Because consent from the people of a state is ongoing, the sovereign people can vary their wishes at any time even if that violates the letter of the constitutional framework. This is illustrated in Chapter 8. There, I analyse s 92 of the Constitution and ascertain that the High Court in *Palmer v WA*[127] effectively sanctions partial secession from the federation while significantly downplaying the meaning of the words 'absolutely free' in that section.[128] Although the judges seemingly deferred to parliamentary will by accepting the WA parliament's evaluation of public health risk, parliament is often an indirect proxy for popular will.[129]

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[125] *Theophanous v Herald & Weekly Times Ltd* (1994) 182 CLR 104, 171 (Deane J). Popular sovereignty supports secession: Scott Boykin, 'The Ethics of Secession' in David Gordon (ed), *Secession, State and Liberty* (Transaction Publishers, 1998); Charles Adams, *When in the course of human events: arguing the case for southern secession* (Rowman & Littlefield, 2004); John Graham, *A Constitutional History of Secession* (Pelican Publishing, 2002).

[126] Between 1776 and 2012, there were over 600 secession referendums: Juve Rivera, 'Creating new states: the strategic use of referendums in secession movements' (2020) *Territory, Politics and Governance* 1, 1. On the advantages and disadvantages, see Matt Qvortrup, 'Referendums on independence and secession' in Gezim Visoka, Edward Newman and John Doyle (eds), *Routledge Handbook of State Recognition* (Routledge, 2019).

[127] *Palmer v Western Australia* (2021) 95 ALJR 229 ('Palmer'). Section 92 says that 'trade, commerce, and intercourse among the States, whether by means of internal carriage or ocean navigation, shall be absolutely free'.

[128] As defined in the Introduction chapter, by 'secession' I include partial forms of withdrawal such as nullification. See Britannica, The Editors of Encyclopaedia, 'Nullification crisis', *Encyclopedia Britannica* (29 July 2021) <https://www.britannica.com/topic/nullification-crisis>: "The doctrine of nullification had been advocated by Thomas Jefferson and James Madison in the Virginia and Kentucky Resolutions of 1798–99. The union was a compact of sovereign states, Jefferson asserted, and the federal government was their agent with certain specified, delegated powers. The states retained the authority to determine when the federal government exceeded its powers, and they could declare acts to be 'void and of no force' in their jurisdictions".

[129] See examples of uncritical deference with respect to the nature of the pandemic: *Palmer v Western Australia* (2021) 95 ALJR 229, 272; *Palmer v Western Australia* (No 4) [2020] FCA 1221 at [84], [88]-[89].

Viewed from the perspective of the model of Australian federalism at Figure 1, unless a power was given by the people of WA exclusively to the Commonwealth or was specifically taken away from the state, there is a high probability that WA and the people of each state retain it even after joining the Commonwealth. There is no body of people who are exclusively national – as mentioned, even the Commonwealth parliament has federal features – and so the balance of residual power must go to the other agent of the people (the state) or remain with the people themselves. Finding this residual power entails a process of elimination vis-à-vis other bodies to ascertain the unallocated portion not delegated by the people to a particular government.[130]

While it is difficult to prove who has the residual power to secede since there is no comprehensive list of powers held by WA prior to joining federation or now, it is not out of the realm of possibility to think that state powers are wide enough to include secession and that the state upon departing retains enough authority to function as an independent government. State legislative power is expressed in broad terms akin to a sovereign.[131] Section 2 of the WA Constitution authorises a power 'to make laws for the peace, order and good government of the colony of Western Australia and its dependencies'. The phrase 'peace, order and good government' was said by the Privy Council in *Ibralebbe v The Queen* to 'connote, in British constitutional language, the widest law-making powers appropriate to a sovereign'.[132] The High Court confirms in *Union Steamship v King* that the words confer plenary power within a territory.[133] And the WA judiciary and its judicial power is preserved by the WA Constitution s 58, which provides that '[a]ll courts…within the Colony at the commencement of this Act shall…continue to subsist in the same form and with the same effect as if this Act had not been passed'. To sum up, all branches of government are impressed with most of the authority required for the initial stages of being an independent country outside the Commonwealth.[134]

Ironically, state parliaments enjoy greater latitude than the Commonwealth. Blackshield and Williams explain that "[b]y contrast with the federal Parliament, with its circumscribed list of

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[130] Christopher Besant, 'Two nations, two destinies: a reflection on the significance of the Western Australian secession movement to Australia, Canada and the British Empire' (1990) 20 *Western Australian Law Review* 209, 304. An example of an exclusive power that has been attributed to state governments is the expropriation of property 'according to the sole judgement of the Parliament of the State' (*New South Wales v Commonwealth* (1915) 20 CLR 54 (Barton J)). One can contrast this unrestricted right to the Commonwealth Constitution's requirement in s 51(xxxi) that the federal government offer 'just terms' compensation for eminent domain.

[131] Gerard Carney, *The Constitutional Systems of the Australian States and Territories* (Cambridge University Press, 2006) 106-107.

[132] *Ibralebbe v The Queen* [1964] AC 900.

[133] *Union Steamship v King* (1988) 166 CLR 1, 9.

[134] That said, some additional authority – perhaps over foreign affairs and defence – may have to be delegated by the people of the state after secession is complete (via an amendment to the WA Constitution).

enumerated powers, the State Parliaments are invested with Australia's closest approximation to the British concept of 'parliamentary sovereignty'".[135] For instance, state parliaments can enact manner and form requirements to bind themselves in a way that the Commonwealth Parliament cannot. Kirby J notes that '[i]n this respect, the grant, or confirmation, of legislative power inherited by the state parliaments… is larger than that enjoyed by the Federal Parliament'.[136]

The *Australia Acts* declare another source of constitutional power for WA and for the other states of the federal union. Section 2(1) says that the states have 'full power to make laws for the peace, order and good government of the State that have extra-territorial operation' and that the powers of the Parliament of each state include 'all legislative powers that the Parliament of the United Kingdom might have exercised before the commencement of this Act'.[137] Twomey has described the effect of the *Australia Acts* on the state Crowns as a net positive in terms of their status:[138] '[i]f the states have the same legislative power as the Westminster Parliament, they cannot be limited by matters that do not limit the United Kingdom legislative power, except to the extent that such limitations are found in the Commonwealth Constitution'.[139]

Whether the Constitution does contain limitations against secession is the focus of the rest of this thesis. For the moment, it is worth highlighting a clause that apparently allows for secession. The *Constitution Act* defines 'The States' in Covering Cl. 6 to mean 'the colonies of New South Wales, New Zealand, Queensland, Tasmania, Victoria, Western Australia, and South Australia, including the northern territory of South Australia, *as for the time being* are parts of the Commonwealth'. The words 'for the time being', as Chapter 5 argues, suggest that it was envisioned original states can depart the union. It is also important to note that 'States' is in plural and the states are named as separate communities, signifying the free and independent polities involved and not dependent branches of the Commonwealth government at Canberra.

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[135] Tony Blackshield and George Williams, *Australian Constitutional Law and Theory* (Federation Press, 2006) 477.
[136] *WA v Marquet* (2003) 217 CLR 545, 596 (Kirby J). See also Jeffrey Goldsworthy, 'Manner and form in the Australian States' (1987) 16 *Melbourne University Law Review* 403, 410-411; Gerard Carney, 'An Overview of Manner and Form in Australia' (1989) 5 *Queensland University of Technology Law Journal* 69, 70-72; Anne Twomey, *The Australia Acts 1986 – Australia's statutes of independence* (The Federation Press, 2010) 236.
[137] Although important qualifications are located at *Australia Act 1986* (UK) s 2(2), which notes that the states are not granted any additional power in foreign relations that they did not already possess and by s 5 which says that the *Constitution Act* and the *Statute of Westminster* continue to restrain the states. Section 6 of the *Australia Act* also preserves the manner and form requirements to amend state constitutions. However, none of these sections usurp popular sovereignty, which in a secession backed by referendum could authorise ignoring these kinds of restrictions.
[138] Anne Twomey, 'The States, the Commonwealth and the Crown – the Battle for Sovereignty' (Research Paper No 48, Parliament of Australia, January 2008). See also Anne Twomey, *The Australia Acts 1986 – Australia's statutes of independence* (The Federation Press, 2010) 214-216, 475-476.
[139] Twomey, *The Australia Acts 1986 – Australia's Statutes of Independence* (n 138) 217.

For these reasons, secession appears to be *prima facie* possible given constitutional law as it stands. Granted, there are pragmatic questions to be worked out, such as territorial boundaries and the repayment of debts to the Commonwealth. These do not undermine the core conclusion of this chapter because, as subsequent chapters observe, such practical concerns can be the subject of negotiation and compromise.[140] For example, with respect to debts, Chapter 8 evaluates whether financial arrangements with the Commonwealth are a barrier to secession and advocates that they are not since a state can repay debts even while outside the union.

B. Barriers to secession

From a nationalist standpoint there are potential weaknesses in the analysis presented here. An advocate of a unitary federal state could oppose unilateral secession on at least two grounds.

1. The unitary polity argument

First, it can be posited that unilateral secession violates the rights of the national polity of Australians.[141] For instance, the UK Joint Committee characterises the Commonwealth government as 'covering the whole area of Australia'.[142] One can draw from these comments a critique of the sovereignty of the people by state. Isaacs, Rich and Starke JJ have suggested that:

> The people of New South Wales are not, as are, for instance, the people of France, a distinct and separate people from the people of Australia. The Commonwealth includes the people of New South Wales as they are united with their fellow-Australians as one people for the higher purposes of common citizenship, as created by the Constitution.[143]

[140] There is little reason to suspect that the territorial boundaries of WA should be different from what exists, however this can be the subject of negotiation and compromise. WA territorial boundary lines are sourced in commands from the Queen: Quick and Garran, *Annotated Constitution of the Commonwealth* (1901) 373-376.
[141] This is an ethical value raised in Allen Buchanan and Elizabeth Levinson, 'Secession', *The Stanford Encyclopedia of Philosophy* (2011) <https://plato.stanford.edu/archives/win2021/entries/secession/>. See, eg, for similar reasoning *D'Emden v Pedder* (1904) 1 CLR 91, 120 where a state's ownership over its territory is downplayed in favour of national functions. As the judges put it, '[i]n our judgment the operations of the Commonwealth, and the acts of its agents as such, ought, so far as regards State control, to be considered on the same footing *as if they did not occur within the territorial limits of any State*' (emphasis added).
[142] Joint Committee of the House of Lords and the House of Commons, Parliament of the United Kingdom, *Petition of the state of Western Australia together with the proceedings of the committee and minutes of speeches delivered by counsel* (1935) ix.
[143] *Commonwealth v New South Wales* (1923) 32 CLR 200, 209 (Isaacs, Rich and Starke JJ).

In *Kruger v Commonwealth*, despite shared sovereignty having been by 1997 recognised in s 15 of the *Australia Acts* and popular sovereignty having been affirmed by the High Court, the following from Barwick CJ was cited with approval by Brennan CJ:

> It may… be granted that the powers which were given to the Commonwealth were of different orders, some federal, limited by subject matter, some complete and given expressly, and some no doubt derived by implication from the very creation or existence of the body politic… *The difference in the quality and extent of the powers given to it introduced no duality in the Commonwealth itself*. The undoubted fact that the Commonwealth emerged from a federal compact or that that compact is reflected in the limitations placed upon some of the powers of the Commonwealth or that the new political entity derived from a union of the peoples of the former colonies *does not deny the essential unity and singleness of the Commonwealth.*[144]

There are plausible inferences that flow from an acceptance of one Australian polity:

1. Commonwealth power automatically binds State Crowns, such that the states are in effect subjects of the Commonwealth government liable to coercion being used against them as any ordinary subject would be[145]
2. The Commonwealth has power over secession that overrides a state's secession resolution because enumerated powers take priority over unwritten residual powers[146]
3. The restrictions in the Commonwealth Constitution which are imposed on states, like s 114 which prevents states from raising their own armies, preclude secession.

This section examines whether the above statements accurately describe the constitutional position. If they do, this implies that Australia is a unitary state contrary to this chapter's preference for shared sovereignty and suggests that Barwick CJ's endorsement of 'the essential unity and singleness of the Commonwealth' reflects a trend rather than an isolated data point.

A generally apparent flaw is that the above inferences overlook Covering Cl. 6 which, as mentioned, impliedly permits secession by acknowledging the chance of an original state leaving

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[144] Quoted in *Kruger v Commonwealth* (1997) 190 CLR 1, 43 (Brennan CJ).

[145] A similar interpretation was relied upon by Lincoln during the American Civil War: James Ostrowski, 'Was the Union Army's invasion of the Confederate States a lawful act? An analysis of President Lincoln's legal arguments against secession' in David Gordon (ed), *Secession, State and Liberty* (Transaction Publishers, 1998) 159-178.

[146] For instance, in *D'Emden v Pedder* (1904) 1 CLR 91, 109-10 it is said that Commonwealth powers should be read in an 'absolute and uncontrolled' fashion because 'where any power or control is expressly granted, there is included in the grant, to the full extent of the capacity of the grantor, and without special mention, every power and every control the denial of which would render the grant itself ineffective'. Similarly, Windeyer J in *Victoria v Commonwealth* (1971) 122 CLR 353, 395-6 ('Payroll Tax Case') claims that it is natural for the federal government to intrude into the domain of the states given the evolving nationhood of the 20th century.

the union at some future time. Covering cl. 6 shows that the existence of federal union is not necessarily inconsistent with secession because after the exit of one member the other parties can simply carry on as before – except without the former member. Craven concedes this theoretical possibility when discussing the words 'Federal Commonwealth' in the Preamble. He raises the prospect of the community of the Commonwealth retaining its character as a 'Federal' union even if one state's people leaves.[147] Mizen likewise endorses such an interpretation.[148]

The first proposition about the Commonwealth being able to bind state Crowns and keep them inside the federation through force is contestable. Covering Cl. 5 to the Constitution mandates that all laws made by the Commonwealth parliament 'shall be binding on the courts, judges and people of every state', however this direction only extends to valid federal laws made 'under the Constitution'. Section 109 also begs the question because federal laws must first be valid. Using either section to bind a secessionist state assumes that regulating secession is an enumerated power of the Commonwealth, but Chapter 6 submits that the opposite is true. While it is true, as Taylor explains, that 'in the Australian federation, the States enjoy no constitutional protection against Commonwealth laws which apply generally to all and which are not destructive of the States' capacity to function',[149] the breadth of intervention into a state's governance that would be required to stop secession is likely to be out of bounds. By way of illustration, during the American Civil War, the Confederate states were placed under a military protectorate run by the US government.[150] In contrast, Aroney and others continue to portray Australian federation as one based on principles of friendly cooperation.[151] The Australian states, Twomey surmises, have shown themselves capable of opposing the Commonwealth and asserting sovereignty on behalf of their people.[152] These states carried on with appeals to the UK Privy Council despite opposition from the Commonwealth until that avenue was closed with the *Australia Act*.[153]

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[147] Craven, *Secession: The Ultimate States Right* (Melbourne University Press, 1986) 94. Equally, when the UK seceded from the EU using Article 50 of the *Treaty on European Union*, that action did not destroy the EU.
[148] Alan Mizen, 'The possible secession of, and creation of, states under the Commonwealth of Australia Constitution Act' (Honours Thesis, University of Western Australia, 1975) 28.
[149] Greg Taylor, 'Commonwealth v Western Australia and the Operation in Federal Systems of the Presumption that Statutes do not apply to the Crown' (2000) 24 *Melbourne University Law Review* 77, 83.
[150] James Ostrowski, 'Was the Union Army's Invasion of the Confederate States a lawful act? An analysis of President Lincoln's legal arguments against secession' (n 145) 178-180; Laura Edwards, *A Legal History of the Civil War and Reconstruction* (Cambridge University Press, 2015) 90-100.
[151] Aroney, *The Constitution of a Federal Commonwealth* (n 12) 340. It can be suggested that the immunity recognised in *Austin v Commonwealth* (2003) 215 CLR 185 indirectly supports mutual respect between members of Federation, on the basis that interference by the Commonwealth into state governance is precluded.
[152] Anne Twomey, *Chameleon Crown: The Queen and her Australian Governors* (Federation Press, 2006).
[153] Liam Boyle, 'The significant role of the *Australia Acts* in Australian Public Law' (2019) 47(3) *Federal Law Review* 358, 362-363.

Granted, in *Work Choices* the majority of justices disparage the presumption of comity.[154] There, it was said that 'relying on notions of comity is apt to invoke presuppositions about allocation of legislative power between the integers of the federation that are not easily distinguished from a reserved powers doctrine'.[155] With respect however, it is a mistake to discard comity. As Callinan J contends, the efficacy of Australia's federation depends upon the mutual recognition afforded by each state to the other members of the union.[156] In addition, comity is doubly persuasive because it forms part of other branches of law: Schultz and Mitchenson find that comity has been endorsed in private international law, while Allsop notes that commercial usage stresses the reasonableness, voluntariness and respectful civility of relationships.[157]

The second inference about the Commonwealth as a unitary sovereign having power to regulate secession is examined at Chapter 6. That chapter considers the scope of federal power over secession and determines that there is no such power. Alternatively, if there is such a power, Chapter 7 concludes that the power is unenforceable since the coercion required to restrain secession is not contemplated by the constitutional remedies that we are accustomed to.

With respect to the third claim that the Constitution imposes restrictions on the states, the reality is that not all restrictions are interpreted literally by the High Court and so not all are strictly efficacious.[158] Textual consistency is not an inflexible requirement of Australian constitutionalism, as Mayer and Schweber deduce.[159] Hence, the view that the states are restricted from seceding overstates the importance of text and neglects popular sovereignty. French opines that '[t]he idea of popular authority or sovereignty cannot be dismissed as a trivial statement of historical reality which has nothing to say about the construction of the Constitution'.[160] That popular consent underlies federation means that it should be permissible for states to secede and raise their own armies because the practice of the Australian Constitution is closer to a set of guidelines than a firm rulebook. Small 'c' constitutionalism evolves through popular will reflected in parliament and through common law evolution. Authority for such

[154] *Work Choices Case* (2006) 229 CLR 1, 89 (Gleeson CJ, Gummow, Hayne, Heydon and Crennan JJ).
[155] Ibid (Gleeson CJ, Gummow, Hayne, Heydon and Crennan JJ).
[156] Ibid 322 (Callinan J).
[157] *XYZ v The Commonwealth* (2006) 227 CLR 532, 607-612 (Callinan and Heydon JJ); *Thomas v Mowbray* (2007) 233 CLR 307, 364 (Gummow and Crennan JJ); Thomas Schultz and Jason Mitchensen, 'Navigating sovereignty and transnational commercial law: the use of comity by Australian courts' (2016) 12 *Journal of Private International Law* 344, 353; James Allsop, 'Comity and commerce' (2015) *Federal Judicial Scholarship* 27.
[158] See, eg, Augusto Zimmermann, "How the High Court redefined 'absolutely'" (4 March 2021) <https://quadrant.org.au/opinion/qed/2021/03/how-the-high-court-redefined-absolutely/>
[159] Keith Mayer and Howard Schweber, 'Does Australia have a constitution? Part I: Powers – a Constitution without constitutionalism' (2008) 25 *UCLA Pacific Basin Law Journal* 228, 237-245.
[160] Robert French, 'The Constitution and the People' (2001) 7 *Federal Judicial Scholarship*.

flexibility can be sourced in *Dietrich v R* where Brennan J spoke of 'the ability of courts to mould the law to correspond with the contemporary values of society'.[161] French adds:

> It is not suggested that the references to community values in judgments of the High Court in the last decade were inspired by theories of popular sovereignty. They are, however, consonant with that concept and, to the extent the Constitution permits reference to community values, may in accordance with authority in relation to the development of the common law, inform its construction. This would sit comfortably with the statement by Inglis Clark in 1901 of the proposition that 'as the people change, so does their written constitution change also'.[162]

While such malleability is criticised by some due to its undermining the rule of law,[163] Hasnas shows that legal indeterminacy is unavoidable so long as human beings interpret law, whatever the alleged *Grundnorm*.[164] We are yet to devise a means of eliminating discretion especially where constitutional text is ambiguous or silent on an issue like secession. And nor should we necessarily want to get rid of ambiguity since '[i]ts indeterminacy gives the law its flexibility'.[165] Because government law is 'a monopoly product, the law must apply to all members of society in a one-size-fits-all manner' and so 'flexibility is its most essential feature' because this allows judges to account for the unique circumstances of a particular case.[166]

To summarise, through an examination of the three implications from a unitary polity which are stated above, this section has shown the basis for such a unitary polity in the Australian context is weaker than it might first appear. Such a theory of federal union is deficient primarily because it fails to acknowledge the comity that underlies the constitutional framework.

2. Does WA have a power to secede?

A second objection from the nationalists is to suggest that WA has no power to secede. Logically, the demonstration in Chapter 6 that the Commonwealth does not have a power to block secession implies that the residual power to secede remains with the states, particularly

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[161] *Dietrich v The Queen* (1992) 177 CLR 292, 319 (Brennan J).
[162] Robert French, 'The Constitution and the People' (2001) 7 *Federal Judicial Scholarship*.
[163] James Allan, 'The activist judge – vanity of vanities' in Luis Coutinho, Massimo la Torre and Steven Smith (eds), *Judicial Activism: An Interdisciplinary Approach to the American and European Experiences* (Springer, 2015) 72; James Allan and Michael Kirby, 'A public conversation on constitutionalism and the judiciary between Professor James Allan and the Hon Michael Kirby AC CMG' (2009) 33 *Melbourne University Law Review* 1032, 1041.
[164] John Hasnas, 'The Myth of the Rule of Law' (1995) *Wisconsin Law Review* 199, 213.
[165] Ibid.
[166] Ibid.

since there is no longer an imperial sovereign to worry about. Nevertheless, Craven contends that there is no power by a state to secede because "it is…unlikely that a law of a State Parliament providing for the unilateral secession of that State could be characterized as a law for the 'peace, order and good government' of the relevant State, rather than for the Commonwealth".[167] Essentially, Craven doubts whether secession falls within s 2(1) of the WA Constitution which provides authority to make laws for the 'peace, order and good Government of the Colony of Western Australia' or s 2(2) of the *Australia Act* which declares that states can make laws for 'peace, order and good government'.[168] In effect, like the UK Joint Committee in 1935, Craven depicts secession as a national matter falling outside the domain of state legislative power.

Secession is undoubtedly placed on firmer ground if it can be shown that there is an independent source that provides such a power. The powers encompassed within the phrase 'peace, order and good government' are broad ranging. They necessarily must be since the words signify parliamentary sovereignty without going into specifics on what is included. There are three schools of thought on its meaning. First, and most authoritative, Kirby P and Mahoney JA take a deferential attitude to state parliaments and retort that the formula is not a constraint on the capacities of a parliament.[169] A unanimous High Court in *Union Steamship v King* confirms that the words 'do not confer on the courts of a State, jurisdiction to strike down legislation on the ground that, in the opinion of a court, the legislation does not promote or secure…peace, order and good government'.[170] Second, Street CJ in *Builder's Labourers Federation v Minister for Industrial Relations* proposes that the formula imposes a limit on legislative ability to interfere with fundamental democratic rights.[171] Third, and mostly overlooked, the words have 'a unique operation in that they neither grant nor inhibit power, but operate as no more than a suggestion provided by the grantor of power as to the ends to which exercises of power should aim'.[172]

Might a unilateral secession resolution by WA fall within its plenary power? Such a secession resolution is likely to be similar to others that have existed.[173] A legislative declaration of secession will be driven by popular referendum. The declaration would provide an overview of the case for secession and then announce that WA is a free, independent and sovereign nation.

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[167] Craven, *Secession: The Ultimate States Right* (Melbourne University Press, 1986) 193.
[168] *Constitution Act 1889* (WA) s 2(1).
[169] *Builder's Labourers Federation v Minister for Industrial Relations* (1986) 7 NSWLR 372, 405 (Kirby P) ('BLF Case').
[170] *Union Steamship Company of Australia v King* (1988) 166 CLR 1, 10.
[171] *BLF Case* (1986) 7 NSWLR 372, 383-84 (Street CJ).
[172] Ian Killey, "'Peace, order and good government': A Limitation on Legislative Competence" (1989) 17 *Melbourne University Law Review* 24, 45.
[173] See, eg, *South Carolina Declaration of Secession* (24 December 1860).

Secession appears to fit within the latitude afforded by the description of plenary power in *Union Steamship.* That secession is a state issue can be defended on the basis that it mostly impacts the land already controlled by a state. To deny that secession is a WA matter would be to assert that the state's territory and property is a legitimate object of control by the Commonwealth parliament or by the other states, but such a sweeping interpretation undermines the constitutional protections in ss 111 (consensual surrender of state territory) and 114 (prohibition on taxing state property). Twomey confirms that the Constitution only gives the federal government control over 'Commonwealth places' located on state territory.[174] These Commonwealth places are obviously very small in area when measured against the vast area of WA. Aside from these places, the Commonwealth only has a right to control its territories.

The discussion in Chapter 2 about South Australia's secession from the Federal Council of Australasia shows that the colonies did have a power, derived from s 31 of the *Federal Council of Australasia Act 1885* (UK), to secede from that body. Though there is no equivalent of s 31 in the *Constitution Act*, shared sovereignty probably supports a necessary implication to that effect.

A secession measure also does not significantly curtail fundamental rights and liberties and so is not impermissible on that ground either. To the contrary, it enhances democratic participation by giving voice to a minority neglected by the rest of the country. Admittedly, secession creates financial disruption for taxpayers and investors, but these impacts are unlikely to be severe and could be mitigated using appropriate private contracts and treaties between countries.

Finally, a state could submit that secession, as a matter of public policy, promotes peace, order and good government. There are a myriad of meritorious interests such as public health, law and order and education which could theoretically benefit from secession and promote the spirit of s 2 of the WA Constitution and s 2(1) of the *Australia Act*. For instance, it might be claimed that WA needs to impose controls on entry into the state to improve public health, even if that means the state operates as an independent country for travel and commerce purposes for a period of two years. A similar circumstance was confirmed to be constitutionally valid in *Palmer.*[175]

[174] Anne Twomey, *The Constitution of New South Wales* (Federation Press, 2004) 177. Twomey confirms that '[t]he High Court in *Worthing v Rowell and Muston Pty Ltd* held that no State law could operate at all within a Commonwealth place, even though it be a State law of general application'.
[175] *Palmer v WA* (2021) 95 ALJR 229.

It is suggested, therefore, that the history outlined in Chapter 2, the WA Constitution and the *Australia Act* together give the WA parliament plenary power including the right to withdraw from the federation. The legislation referred to here is, at root, binding because of the consent granted by the electors of WA who tacitly assent to them when casting ballots at state elections.

V. CONCLUSION

This chapter forms the core of this thesis' contribution to understanding the constitutionality of unilateral secession by Western Australia. The theoretical puzzle has been approached within the framework of an inquiry into unitary sovereignty and shared sovereignty. The reasons for shared sovereignty being the best fit are twofold. First, the state of WA has an existence outside the Commonwealth Constitution such that if ss 106 and 107 were repealed tomorrow, the state could draw on external power from the WA Constitution, the *Australia Act* and the people of the state. It is the Commonwealth government that subsists mostly on the Constitution, whereas the states survive on a mixture of sources that cement their place in a system of power sharing. Second, there is no consolidated unitary institution in Australia. The Commonwealth parliament is a mixture of national and federal features with the Constitution recognising that electors are sourced from their state of residence. The Constitution contains protections that preserve state rights, including the Senate and a minimum of five parliamentarians for each state in the House of Representatives along with proportionate representation linked to state population.

Shared sovereignty supports the finding that secession by a state is constitutionally possible. The understanding behind shared sovereignty federalism is that the former colonies contracted to give up certain powers to help achieve national objectives and retained the rest.[176] Since regulating secession is not one of the powers of the Commonwealth in ss 51 or 52 (see Chapter 6), it stands to reason that a state's free will to leave was not transferred.[177] Covering cl. 6 also envisions that a state can depart. And the WA Constitution and *Australia Act* suggest that WA's plenary authority includes secession. This assessment has the benefit of aligning with the historical background whereby the Constitution was produced by unanimous agreement between

[176] Nicholas Aroney, *Constitution of a Federal Commonwealth* (Cambridge, 2010) 340.

[177] In the realm of abstract philosophy, it is doubtful whether a person can transfer their will. However, for the purposes of the present chapter, which operates within the confines of legal positivism, it is assumed that this is possible. For a critique of the transferability of will see Murray Rothbard, *The Ethics of Liberty* (New York University Press, 1998) 134-35.: 'All physical property owned by a person is alienable, i.e., in natural fact it can be given or transferred to the ownership and control of another party…But there are certain vital things which, in natural fact and in the nature of man, are inalienable, i.e., they cannot in fact be alienated, even voluntarily. Specifically, a person cannot alienate his will, more particularly his control over his own mind and body'.

the colonies and the UK, and where the Commonwealth government did not exist until after proclamation and so never held any prior authority over the entities that created it. As Shaffer asks, '[w]hat is the reasoning that allows a *tool* to acquire a superiority of *purpose* and *control* over its creators?'[178]

[178] Butler Shaffer, 'Secession and the Law' (31 March 2014) <https://mises.org/wire/secession-and-law>.

CHAPTER 5: THE PREAMBLE AND THE COVERING CLAUSES

> *The Indissolubility of the Commonwealth of Australia is proclaimed in the Preamble of the Constitution. The Union is, of course none the less indissoluble on that account. The declaration, therefore, that the Australian Commonwealth is indissoluble, may be regarded as one of those preliminary flourishes addressed to the conscience, which are to be found in the preamble of instruments which suggest more than they achieve.*
>
> Patrick Glynn[1]

> *The Constitution is on its face federal and is so described in the Covering Clauses.*
>
> Geoffrey Sawer[2]

I. INTRODUCTION

In Chapter 4 of this thesis, a theory of shared sovereignty is put forward. That theory asserts that Australian federation is a cooperative, voluntary endeavour by the people of each state who are entitled to revoke their consent at any time. Moreover, the government of the Commonwealth of Australia, being a creature arising out of an agreement by the people of the states to enter a constitution, never had the authority to restrain secession at Federation and does not have it now.[3] Consequently, the remit of Western Australia's power extends to leaving Federation unilaterally if authorised by the people of the state who are one of six co-equal sovereign peoples (or seven co-equal sovereigns, if one adds the people of the Commonwealth's territories who also elect representatives to the federal parliament). WA retains the power to secede because its people did not refer the power to secede to the Commonwealth at Federation in 1900 and nor was it subsequently transferred using the referral clause in s 51(xxxvii) of the *Constitution Act*.

This part of the thesis begins an investigation into the constitutional text that might overturn the findings of Chapter 4. In this chapter, I address the prospect that the Preamble and the Covering Clauses to the *Constitution Act* could be a barrier to unilateral secession. These parts of the *Constitution Act* routinely arise in the conversation for scholars seeking to come to grips with the consistency of secession of a state.[4] There are two concerns sought to be resolved here. First, should the Preamble be considered legally binding? Second, if the Preamble is binding, then does it favour any specific interpretation with respect to secession? The Covering Clauses 1 to 8 in the *Constitution Act* pose a different conundrum. Unlike the Preamble, there is little doubt

[1] Patrick Glynn, 'Secession' (1906) 3 *Commonwealth Law Review* 193, 203-204.
[2] Geoffrey Sawer, *Australian Federalism in the Courts* (Melbourne University Press, 1967) 121.
[3] The latter point is elaborated at Chapter 6 of this thesis.
[4] Gregory Craven, *Secession: The Ultimate States Right* (Melbourne University Press, 1986) 83-97; Anne Twomey, *The Constitution of New South Wales* (Federation Press, 2004) 850-51.

among commentators that the Covering Clauses are legally binding.[5] Rather, the issue is how these preliminary clauses impact upon secession and is solely one of statutory interpretation because the *Constitution Act*, being a statute of the UK parliament, is according to the *Engineers Case* susceptible to the principles of statutory interpretation.[6]

When it comes to the interpreting the Preamble, Quick and Garran have rested their case in part on the word 'indissoluble', which they suggest indicates an intention to create a 'lasting' union where secession is not possible.[7] As for the Covering Clauses, Craven has claimed that cls 3 and 4 unambiguously rule out unilateral secession.[8] He submits that these are 'fundamentally inconsistent' with secession because they impose a 'continuing union'.[9] This chapter prefers an alternative interpretation. First, the Preamble does not mention WA and so is not binding upon it. Even if it were, the Preamble is ambiguous and of limited utility to the question at hand. Second, the Covering Clauses tend to support secession by affirming a consensual union where a state is free to leave at any time. Cl 3 puts WA in a different category by specifying that the state's consent is required, and the nature of that agreement appears to be for the future and conditional.

The present chapter examines these contentions in relation to withdrawal by Western Australia from the Commonwealth of Australia. My reasoning relies less on the intangible concept of autonomy existing in the state constitutions and focuses more on the intrinsic aspects of the constitutional framework pertaining to secession. By intrinsic, I mean that I do not rely upon the outside fact of the WA Constitution and instead primarily direct attention to the text and structure of the *Constitution Act*. Part II begins by confirming that the Preamble and Covering Clauses are part of 'this Constitution'. Part III considers the bindingness of the Preamble and its relationship to secession. Finally, part IV of this chapter evaluates the Covering Clauses.

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[5] Although Aroney believes that '[t]he operative effect of most of the covering clauses is now spent', there are others like Arcioni who think that the clauses are 'not merely of historical interest, nor…a relatively inconsequential matter'. The better view is that the Covering Clauses are binding to the extent that they are still relevant. See Nicholas Aroney, 'The High Court of Australia: textual unitarism vs structural federalism' in *Courts in Federal Countries: Federalists or Unitarists?* (University of Toronto Press, 2017) 42; Elisa Arcioni, 'Historical facts and constitutional adjudication: the case of the Australian constitutional preamble' (2015) 30 *Giornale di storia costituzionale* 107, 121; Craven, *Secession: The Ultimate States Right* (Melbourne University Press, 1986) 91-97.

[6] *The Amalgamated Society of Engineers v The Adelaide Steamship Company Limited and Ors* (1920) 28 CLR 129, 149-50 ('Engineers Case').

[7] John Quick and Robert Garran, *The Annotated Constitution of the Commonwealth* (The Australian Book Company, 1901) 294.

[8] Gregory Craven, 'The Constitutionality of the Unilateral Secession of an Australian State' (1985) 15 *Federal Law Review* 123, 137.

[9] Ibid.

II. WHAT IS 'THIS CONSTITUTION'?

All chapters so far have presumed that the Preamble and Covering Clauses are part of the Commonwealth Constitution and have without elaboration proceeded on this basis. Delving deeper however, Aroney notes that there is a distinction between the *Commonwealth of Australia Constitution Act 1900* (UK) and the Constitution of the Commonwealth which is contained in cl 9 of the *Constitution Act*.[10] The Preamble and covering cls 1 to 8 stand outside cl 9. Cl 9 is titled 'Constitution' and it declares 'The Constitution of the Commonwealth shall be as follows'.

Are the Preamble and Covering Clauses included when various sections of the Constitution speak of 'this Constitution'? For example, Section 128 says alterations can be made to '[t]his Constitution'. The varying analyses with respect to this question are shaped by:

- whether one thinks that the legal basis for the Constitution Act lies in an imperial sovereign or whether its legal foundation is popular sovereignty; and
- whether one subscribes to the view that the *Constitution Act* should be read as a whole to determine its purpose or whether one does not.

Past orthodoxy used to be that the Preamble and Covering Clauses are the domain of the UK parliament and beyond the reach of Australians.[11] Wynes treats the *Constitution Act* as foreign rather than home-grown and contends that '[i]n virtue of their character [as] Imperial enactments, the covering sections of the Constitution are alterable only by the Imperial Parliament itself'.[12] For Wynes and others of similar belief, the Preamble and Covering Clauses stand outside the Constitution and are unamendable except by the UK parliament. If this is accepted, then the Australian people can only amend cl. 9 of the *Constitution Act* using s 128.

With the political independence of Australia and the political movement to convert Australia into a republic, opinion has changed.[13] The debate has moved on from the confines of imperial sovereignty and is about whether s 128, s 51(xxxviii) or s 15 of the *Australia Act 1986* (UK) is an appropriate means of amending the Preamble and Covering Clauses.[14] Lumb, for instance,

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[10] Nicholas Aroney, 'A public choice? Federalism and the prospects of a republican preamble' (1999) 20(2) *University of Queensland Law Journal* 262, 262-263.

[11] See, eg, Geoffrey Marshall, *Parliamentary Sovereignty and the Commonwealth* (Clarendon Press, 1962) 115; Geoffrey Sawer, 'The British Connection' (1973) 47 *The Australian Law Journal* 113, 114. In addition, the sources in Aroney, 'A public choice? Federalism and the prospects for a republican preamble' (n 10) 264-265.

[12] William Wynes, *Legislative, Executive and Judicial Powers in Australia* (Law Book Co, 1976) 541.

[13] See, eg, Geoffrey Lindell and Dennis Rose, "A response to Gageler and Leeming: 'An Australian republic: is a referendum enough?'" (1996) 7 *Public Law Review* 155, 159-160.

[14] Aroney, ''A public choice? Federalism and the prospects for a republican preamble' (n 10) 264.

thinks that the preliminary sections to the Constitution have been part of 'this Constitution' since at least 1942 when the *Statute of Westminster Adoption Act 1942* (Cth) came into being:

> Insofar as the Constitution was contained in an Imperial Act, and insofar as the *Colonial Laws Validity Act* prevented the enactment of legislation by the parliament of a self-governing colony which was repugnant to the provisions of an Imperial Act, [the Covering Clauses] remained sacrosanct until the enactment of the *Statute of Westminster*. However the effect of s. 8 of the *Statute of Westminster* was to recognise that the *Constitution Act*…could be amended in accordance with the law existing before the commencement of the Statute. One apparent effect of the section was to prevent the Commonwealth Parliament from approaching the Westminster Parliament seeking an alteration to the Constitution by direct legislation of the United Kingdom Parliament without going through the processes embodied in s. 128. The other effect was…to make the covering clauses, contained as they were in an Imperial Act, subject to the amendment processes of the Constitution, i.e. to s. 128.[15]

Given that Chapters 3 and 4 together determine that the people of Australia organised by state are sovereign, the interpretation of Lumb is preferred here since the UK parliament is no longer able to amend the *Constitution Act* and it would be odd to say that no-one can. Although the Preamble and Covering Clauses stand apart from the Constitution proper, it is difficult to separate the two because contextual interpretation relies on knowledge provided by preliminary components. The necessity of reading the *Constitution Act* as a whole is illustrated by covering cls 5 and 6 which many have relied on to cast light upon the main body.[16] Much more could be said about the intricacies of this interpretive preference, but in the end as Aroney notes 'the final resolution of such matters will turn on one's allegiance to the ultimate principles involved'.[17]

III. ASSESSING THE PREAMBLE

The first paragraph of the Preamble to the Commonwealth Constitution says as follows:

> Whereas the people of New South Wales, Victoria, South Australia, Queensland, and Tasmania, humbly relying on the blessing of Almighty God, have agreed to unite in one indissoluble Federal Commonwealth under the Crown of the United Kingdom of Great Britain and Ireland, and under the Constitution hereby established…

[15] Richard Lumb, 'The bicentenary of Australian constitutionalism: the evolution of rules of constitutional change' (1988) 15(1) *University of Queensland Law Journal* 3, 29.
[16] See, eg, *Fyffe v Victoria* [1999] VSCA 196 at [20]; Lee Harvey and James Thomson, 'Some aspects of state and federal jurisdiction under the Australian Constitution' (1979) 5 *Monash University Law Review* 228, 228.
[17] Aroney, ''A public choice? Federalism and the prospects for a republican preamble' (n 10) 293.

Quick and Garran helpfully describe the 'eight separate and distinct affirmations or declarations' contained in the three paragraphs of the Preamble as follows:

> (i) The Agreement of the people of Australia
> (ii) Their reliance on the blessing of Almighty God
> (iii) The purpose to unite
> (iv) The character of the Union – indissoluble
> (v) The form of the Union – a Federal Commonwealth
> (vi) The dependence of the Union – under the Crown
> (vii) The government of the Union – under the Constitution
> (viii) The expediency of the provision for admission of other Colonies as States[18]

Of significant relevance to WA secession are propositions (i), (iii) and (iv). Proposition (i) derives from the Preamble's reference to 'the people of [the named states]' not including Western Australia which joined late (but whose consent is alluded to at covering cl. 3). Voluntary consent can also be inferred from the words 'have agreed'. A purpose to unite is evident from 'to unite', although it is not clear how firm that unity is. Finally, proposition (iv) is drawn from 'one indissoluble Federal Commonwealth'. By some accounts this last component partially negatives proposition (i) since it is relied upon to claim that secession is unconstitutional because consent is only relevant at the time of formation but not thereafter.[19]

A. Legal status of the Preamble

A preamble is a 'descriptive component' of a statute that provides a 'useful guide to the intention of the Parliament in that it may detail the mischief to which the Act is directed; explain the reason, purpose, object or scope of the Act; and detail facts or values which are relevant to the Act'.[20] There is controversy about the extent to which a preamble is binding when interpreting a constitution. In analysing the role of preambles, Winckel observes:

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[18] John Quick and Robert Garran, *The Annotated Constitution of the Commonwealth* (The Australian Book Company, 1901) 286.
[19] Greg Craven, *Secession: The Ultimate States Right* (n 4) 83-84; Greg Craven, 'An indissoluble federal Commonwealth? The founding fathers and the secession of an Australian state' (1983) 14 *Melbourne University Law Review* 281, 295.
[20] Anne Winckel, 'The Contextual Role of a Preamble in Statutory Interpretation' (1999) 23 *Melbourne University Law Review* 184, 185.

> Preambles can be seen to have both a contextual and a constructive role in statutory interpretation. The contextual role is where the preamble assists with confirming the ordinary meaning of the enactments and assists with determining if there is any ambiguity in the Act. The constructive role is where the preamble is effectual in clarifying or modifying the meaning of ambiguous enactments. While there is substantial consensus on the function of a preamble in relation to the latter role, the contextual role of a preamble has had the more contested history.[21]

Another way to categorise preambles is to say that they are either 1) symbolic 2) interpretive or 3) substantive.[22] A symbolic preamble, as the label suggests, is essentially one that has no legal force.[23] An interpretive preamble has legal force but is limited to serving as an aid for contextual or constructive interpretation to aid in understanding the intention of parliament.[24] Finally, the option of a substantive preamble has strong legal force and operates as a source of enforceable rights for anyone – including federal or state governments – who relies on it.[25]

Of these three options, it is the interpretive use of a preamble that has been given importance by the High Court when it comes to constitutional interpretation. The principle that a written document should be construed as a whole[26] has led many judges to view the Preamble as more than just symbolism and thus able to be employed in either a contextual or constructive manner.[27] As such, the Preamble is usually only influential for the purposes of confirming or denying the meaning of an Act or if an ambiguity is found elsewhere in an Act. It is not common practice for Australian judges to elevate the Preamble to a substantive controlling source of rights or obligations for either the Commonwealth government or for the states.[28]

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[21] Ibid 185.

[22] Liav Orgad, 'The preamble in constitutional interpretation' (2010) 8 *International Journal of Constitutional Law* 714, 722.

[23] Mark McKenna, Amelia Simpson and George Williams, 'First Words: The Preamble to the *Australian Constitution*' (2001) 24 *University of New South Wales Law Journal* 382, 382.

[24] Orgad, 'The preamble in constitutional interpretation' (n 22) 723-725.

[25] Ibid 726-727; Carl Schmitt, Constitutional Theory (Jeffrey Seitzer trans. and ed., 2008) 77–79. Schmitt argues that 'it is a typical error of prewar-era state theory to misconstrue' preambles as 'mere statements'.

[26] On the principle that an Act must be read as a whole, see *Metropolitan Gas Co v Federated Gas Employees' Industrial Union* (1924) 35 CLR 449, 455; *Scott v FCT* (1966) 117 CLR 514, 524.

[27] See Anne Twomey, 'The application of constitutional preambles and the constitutional recognition of indigenous Australians' (2013) 62 *International & Comparative Law Quarterly* 317, 328-330. Some have advocated symbolic use of preambles: *Federated Saw Mills Employees v James Moore & Sons Pty Ltd* (1909) 8 CLR 465, 535 ('Woodworkers Case') where Isaacs J describes the Preamble as 'pious aspirations for unity'.

[28] Cf. *Leeth v Commonwealth* (1992) 174 CLR 455, 488-89 (Deane and Toohey JJ) and *Kruger v Commonwealth* (1997) 190 CLR 1, 96-97 (Toohey J) *('*Stolen Generations case') where the Preamble was used in a substantive manner by a minority of judges to imply equality rights for people across the federation.

The orthodox rule in relation to the use that can be made of preambles was noted by Griffith CJ in *Bowtell's Case*: 'where the words of a Statute are plain and clear, their meaning cannot be cut down by reference to the preamble. But if the words are uncertain as applied to the subject matter, and may bear more than one meaning, then you may, in a proper case, refer to the preamble to ascertain what was the occasion for the alteration of the law'.[29] However, in 1997, it was decided in *CIC Insurance Ltd v Bankstown Football Club* that:

> [T]he modern approach to statutory interpretation (a) insists that the context be considered in the first instance, not merely at some later stage when ambiguity might be thought to arise, and (b) uses 'context' in its widest sense to include such things as the existing state of the law and the mischief which ... one may discern the statute was intended to remedy.[30]

The critical debate centres upon whether the Preamble should be resorted to for context (to help confirm the substantive meaning of legislation) or only for construing ambiguous text (to ascertain meaning when there is an ambiguity identified somewhere in the legislation)?

On the one hand, Craven has asserted that the Preamble cannot be referenced as of right. He cites Gibbs CJ who wrote that a preamble cannot be used to cut down a 'plain and unambiguous'[31] provision. As Craven submits, ambiguity is a preliminary requirement:

> It would first be necessary to identify a provision of the Constitution Act which could be regarded as being inconsistent with the unilateral secession of a State. In the event that this provision was ambiguous in its inconsistency, the preamble could then be used to resolve that ambiguity. But the preamble could not itself be utilized to give rise to any such inconsistency in the absence of an ambiguous provision in the substantive enactment. All this follows from the application to the preamble of the ordinary principles of statutory interpretation expressed in such cases as the *Sussex Peerage Claim* and *Bowtell v Goldsbrough Mort & Co Ltd*. It would thus seem that statements such as those of Enright, which appear to regard the preamble as a direct bar to unilateral secession, are quite incorrect.[32]

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[29] *Bowtell v Goldsbrough, Mort & Co Ltd* (1906) 3 CLR 444, 451 (Griffith CJ).
[30] *CIC Insurance Ltd v Bankstown Football Club Ltd* (1997) 187 CLR 384, 408 (Brennan CJ, Dawson, Toohey and Gummow JJ) ('CIC Insurance').
[31] *Wacando v Commonwealth* (1981) 148 CLR 1, 16 (Gibbs CJ).
[32] Gregory Craven, 'The Constitutionality of the Unilateral Secession of an Australian State' (1985) 15 *Federal Law Review* 123, 131.

Craven in the above passage makes two vital claims. First, he contends that no recourse can be had to a preamble 'in the absence of an ambiguous provision in the substantive enactment'.[33] Second, he criticises Enright who has tried to rely upon the Preamble to the Constitution as a 'direct bar to unilateral secession'.[34] Since Craven's second proposition is consistent with the trend in the literature to disregard a statutory preamble as a *substantive* source of rights or obligations, it is his first argument that is of greater relevance because it also precludes consideration of the Preamble for its *contextual* utility in assessing unilateral secession by a state.

On the other hand, Pearce and Geddes criticise constructive approaches like Craven's which suggest that no recourse can be had to a preamble without establishing ambiguity, noting that these ignore 'the fact that a preamble is as much a part of an Act as is a section and that it therefore should be given the same weight for interpretation purposes as other parts of the Act'.[35] Their position is reinforced by Mason J's comment in *Wacando v Commonwealth* where he explains that '[t]he particular section must be seen in its context; the statute must be read as a whole and recourse to the preamble may throw light on the statutory purpose and object'.[36]

Can a preamble be checked as part of the context to find the mischief which a statute is intended to remedy, consistent with the spirit of *CIC Insurance,* even if there is no pre-existing ambiguity in the substantive enactment? Winckel has traced the history and shown that there is little judicial support for Craven's view that no recourse may be had to a preamble except to clarify an ambiguity.[37] Much confusion stems from conflating the idea that one may use the preamble where there is ambiguity with the idea that one *must* have an ambiguity before consulting the preamble. Craven's description of *Bowtell's Case* is an example of this misunderstanding: Winckel's reading is that Griffith CJ uses the permissive 'but if' rather than the prohibitive '*only* if' that Craven implies to hinder reliance on a preamble.[38] According to Winckel, the 'principle that an ambiguity is not needed for consideration to be given to the purpose of an Act' has always been the dominant stance of the law.[39] This is because of 'a common law argument that a preamble may be considered as part of the context in the initial reading of an Act as a whole,

[33] Ibid.
[34] Christopher Enright, *Constitutional Law* (Law Book, 1972) 52.
[35] Dennis Pearce and Robert Geddes, *Statutory Interpretation in Australia* (LexisNexis Butterworths, 2011) 156.
[36] *Wacando* v Commonwealth (1981) 148 CLR 1, 23 (Mason J).
[37] In *Powell v Kempton Park Racecourse Co Ltd* [1899] AC 143, 157 ('Powell's Case II'), it was held by Lord Davey that a preamble cannot control a statute expressed in clear terms. But the often-cited Lord Davey was an 'isolated dissenting judgement': Winckel, 'The contextual role of a preamble in statutory interpretation' (n 20) 204.
[38] Winckel, 'The contextual role of a preamble in statutory interpretation' (n 20) 202.
[39] Ibid 192.

whether or not an ambiguity exists'.[40] A consequence of this is that a preamble can 'prompt alternative meanings which [make] evident any ambiguities in the text'.[41]

Sometimes indefinite words can be interpreted as bearing a limited meaning because of context provided by a preamble. In *Emanuel v Constable,* the ordinary meaning of the text was modified using the preamble to the *Wills Act 1752* (Imp).[42] When evaluating 'any will or codicil', the issue was whether these included wills pertaining to real property only or whether wills pertaining to personal property were within scope of the section. Sir John Leach MR wrote that 'the plain intent of the legislature is expressed in the preamble, and the nature of the mischief, which is sought to be remedied, may serve to give a definite and qualified meaning to indefinite and general terms'.[43] Because the preamble of the Act evinced an intention to regulate wills pertaining to real property, a narrow interpretation of 'any will or codicil' which excluded personal property was appropriate. Likewise, Viscount Simonds explains in *A-G v Hanover:*

> I conceive it to be my right and duty to examine every word of a statute in its context, and I use context in its widest sense which I have already indicated as including not only other enacting provisions of the same statute, but its preamble, the existing state of the law, other statutes in *pari materia,* and the mischief which I can, by those and other legitimate means, discern that the statute was intended to remedy.[44]

An act of a legislature is obeyed because of deference to the relevant parliament which is a rough proxy for popular will. It is the intent of the lawmakers that is relevant for interpretation and not the preferences of the judge.[45] Giving lesser priority to a preamble is arbitrary when seen in light of this justification, since it privileges some parts of a statute or constitution over other parts. The same logic that leads us to acknowledge the body of a constitution also commands giving adequate weight to a decision by the framers to insert a preamble in the first place (albeit with the qualification that preambles are often better suited to discerning history or general themes).

Is there any difference between a constitution and a statute that could undermine reliance on the Preamble to the *Constitution Act*? The rule in *Engineers* that the Constitution should be

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[40] Ibid.
[41] Ibid 193.
[42] *Emanuel v Constable* (1827) 3 Russ 435, 436.
[43] *Emanuel v Constable* (1827) 3 Russ 435, 438.
[44] *Attorney-General v Prince Ernest Augustus of Hanover* [1957] AC 436, 461. See also *Salkeld v Johnson (or Johnston)* (1848) 154 ER 487; *Johns v Australian Securities Commission* (1993) 178 CLR 408, 452.
[45] *Brett v Brett* (1826) 162 ER 456, 458.

interpreted like a statute, albeit a special kind of statute,[46] suggests that there is not.[47] Winterton observes that the Preamble 'will inevitably be employed in constitutional interpretation'.[48] Two clarifications mitigate counter-arguments that have opposed use of a Preamble in constitutional interpretation.[49] First, it is agreed that the natural meaning of a substantive provision must prevail irrespective of any supplemental information provided by a preamble. The task of discovering whether the meaning of a provision should be limited or expanded can only be a matter of judgement based on consideration of the full statute.[50] Second, it may be that a preamble is of limited value in deciding between two reasonable interpretations because the preamble is itself ambiguous. In short, there is no barrier to usage in constitutional interpretation so long as the document is read as a whole and the preamble is scrutinised for its utility.

It can in the alternative be mentioned that there is in any event ambiguity surrounding secession due to its intersection with politics which go to the heart of federal arrangements. As a result, assuming the existence of such ambiguity is accepted, then the Preamble could in a hypothetical secession undoubtedly be cited to ascertain the purpose and nature of the Constitution.

B. Understanding indissolubility

Chapter 2 outlined the views of the framers with respect to secession and the role of history in constitutional interpretation. The aspects of the Preamble that attracted the most attention among the framers at the Constitutional Conventions in Adelaide in 1897 and Melbourne during 1898 were 'Commonwealth', the recitation of 'one indissoluble Federal Commonwealth' and the phrase 'humbly relying on the blessing of Almighty God'.[51] Each of these provides hints as to the principles that the framers wished for future generations of Australians to have in mind, but it is the phrase 'one indissoluble Federal Commonwealth' that is most pertinent to secession.

Merriam-Webster dictionary defines indissoluble as meaning 'not dissoluble, especially incapable of being annulled, undone, or broken'; for example, an 'indissoluble contract'.[52] A

[46] Michael McHugh, 'The constitutional jurisprudence of the High Court' (2008) 30(1) *Sydney Law Review* 5, 21.
[47] Dale Atkinson, 'Re-Engineering the federal balance' (2018) 2 *Western Australian Student Law Review* 47; Haig Patapan, 'Politics of interpretation' (2000) 22 *Sydney Law Review* 247, 249.
[48] George Winterton, 'A New Constitutional Preamble' (1997) 8 *Public Law Review* 186, 189.
[49] For a counterargument see *Mills against Wilkins* (1662) 87 ER 822 which held that the 'preamble of a statute is no part thereof'. Winckley, 'The contextual role of a preamble in statutory interpretation' (n 20) 205 counters that *Mills* is 'discredited' because it 'is actually dealing with titles to Acts, and the reference to preambles is obiter dicta'. Certainly, it is out of step with recent precedent such as *CIC Insurance* (1997) 187 CLR 384.
[50] *Doe v Brandling* (1828) 108 ER 863, 870.
[51] McKenna, Simpson and Williams, 'First words: the preamble to the Australian Constitution' (n 13) 384-85.
[52] Merriam-Webster.com Dictionary, *Indissoluble* <https://www.merriam-webster.com/dictionary/indissoluble>.

contractual analogy certainly fits with the history outlined in Chapter 2 which supports a political compact between the people of the states. Some authors have taken 'indissoluble' to support an inference against secession. Moore writes that '[t]he Commonwealth is established in virtue of [covering cl. 9 of the *Constitution Act*], and it would appear to be dissoluble only by Imperial Act, and so far as the preamble may throw light on the Act it supports this view'.[53] However, in contrast to Moore, Craven opines that it is unclear what exactly 'indissoluble' restrains:

> "[i]t might be argued…that the word 'indissoluble is intended to qualify the word 'federal' rather than the word 'Commonwealth'. If this were the case, the preamble would look not to a Commonwealth that was indissoluble in itself, but to a Commonwealth which was indissolubly 'federal' in character".[54]

After examining the legislative history of the *Constitution Act*, Craven further determines that "the purpose behind the inclusion of the word 'indissoluble' in the preamble was not the prohibition of the secession of a State, and that the Convention Debates thus hold no joy for anyone seeking to assert the preamble as a substantive legal barrier to such action".[55]

The competing interpretations of the Preamble by Moore and Craven raise the prospect that the Preamble is ambiguous and of limited utility when assessing secession by a state. In particular, does 'indissoluble Federal Commonwealth' refer to the Commonwealth as a community or to the indissoluble status of a Commonwealth government which happens to be composed of 'Federal' features (such as the Senate)? If it is the former, then this favours an interpretation that says the community of Australian people is indissoluble and that secession is unlawful. On the other hand, if it is the latter then one section of the community could secede while not violating the indissolubility or intactness of the national government.[56] Even if 'indissoluble' is interpreted as describing the whole Australian community this may still signify cooperative bonds rather than coercive chains.[57] Thus, the Quick, Garran and Moore argument that sees the Preamble as barring secession by the people of an Australian state is not the only possible interpretation.

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[53] William Moore, *The Constitution of the Commonwealth of Australia* (G Partridge & Co, 1910) 603.
[54] Gregory Craven, *Secession: The Ultimate States Right* (Melbourne University Press, 1986) 94.
[55] Craven, 'The Constitutionality of the Unilateral Secession of an Australian State' (1985) 15 *Federal Law Review* 123, 131.
[56] A similar differentiation appears in Kenneth Wheare, *Federal Government* (Oxford University Press, 1963) 86-7. The two interpretations of the Preamble raised in this chapter are incorrectly conflated. Breaking up a nation (a push for secession/independence) is not the same as seeking to control the national government (a civil war).
[57] *NSW v Commonwealth* (2006) 229 CLR 1, 322 (Callinan J) ('Work Choices Case').

The legitimacy of the preceding interpretive conundrum is confirmed by the next paragraph in the Preamble which says '[a]nd whereas it is expedient to provide for the admission into the Commonwealth of other Australasian Colonies and possessions of the Queen'. From this sentence, it is still not feasible to identify whether 'the Commonwealth' mentioned is the Australian community or just Commonwealth governmental organs. Either interpretation is prima facie reasonable: it is possible for new colonies to become members of the community of Australian people or to narrowly become members of the Commonwealth parliament.

It is true that instances in which the indissolubility of the Commonwealth has been considered by the High Court do suppose that 'indissoluble' means unbreakable.[58] In *Victoria v Commonwealth*, Menzies J observes that '[a] constitution providing for an indissoluble Federal Commonwealth must protect both Commonwealth and States' and used this as a step toward arguing that the nature of the Constitution carries a corollary limiting the law-making powers of the Commonwealth Parliament with regard to the states.[59] Likewise, Kirby J in *R v Hughes* uses indissolubility to justify a safeguard for intergovernmental cooperation.[60] He reaches this view because "[n]o other approach is appropriate to the interpretation of the basic law of the 'indissoluble Federal Commonwealth' upon which the people of Australia agreed when the Constitution was adopted and which they are taken to accept for their governance today".[61] In *Queensland v Commonwealth*, Barwick CJ says: "The Constitution, unless altered in a constitutional manner, was intended to be permanent, just as the union of the people of the colonies 'in one indissoluble Federal Commonwealth' upon the terms of the Constitution was intended to be permanent".[62] His honour submits that the indissoluble nature of 'the Commonwealth' buttresses a finding that residents of a territory cannot elect representatives to the Senate.[63] Such an understanding follows from an argument that the bargain between the six colonies cannot be disrupted by the introduction of external influence from a territory.[64]

These opinions about indissolubility do not address secession. In fact, no precedent elaborates how such opinions could apply to secession by a state and so the preceding cases are not directly binding on the question at hand. McKenna, Simpson and Williams further add that:

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[58] See cases cited in Mark McKenna, Amelia Simpson and George Williams, 'First Words: The Preamble to the Australian Constitution (2001) 24 *UNSW Law Journal* 382, 388.
[59] *Victoria v Commonwealth* (1971) 122 CLR 353, 386 (Menzies J) ('Payroll Tax Case').
[60] *R v Hughes* (2000) 171 ALR 155, 170 (Kirby J).
[61] Ibid.
[62] *Queensland v Commonwealth* (1977) 139 CLR 585, 592 (Barwick CJ).
[63] Ibid 592.
[64] Ibid 592; Michael Sloane, 'Representation of Commonwealth territories in the Senate' (Research Paper No 64, Parliament of Australia).

> [i]n High Court judgements, references to the phrase 'indissoluble Federal Commonwealth' have generally had little legal significance. Judges have typically used this evocative phrase to describe the historical event of Federation or to convey a sense of the sentiment of the time, rather than as support for a particular legal conclusion.[65]

Moreover, '[i]n none of these cases…did reference to the phrase…constitute the central, or even a particularly significant, plank in the reasoning or conclusions of the judge'.[66]

C. Evaluation of prospects for secession

To decipher the meaning of 'indissoluble Federal Commonwealth', two ambiguities raised earlier cry out for resolution. Firstly, does the word 'indissoluble' qualify the word 'Federal' or 'Commonwealth'? And secondly, does the word 'Commonwealth' refer to the nation-wide community of Australians or just to the Commonwealth government? A textual factor of relevance is also worth noting: specifically, the Preamble is not particularly useful in relation to WA since that state is not named therein. Because of WA's absence from the Preamble, it could be argued that the state never agreed to unite in one indissoluble Federal Commonwealth.

Does the indissolubility of the union qualify 'Federal' or 'Commonwealth'? In relation to this first question, a unitary interpretation is put in *Queensland v Commonwealth*. In his reasons, Barwick CJ implies that it is the Commonwealth of Australia as a nation which is indissoluble and not just the federal character of that Commonwealth. His reasons describe the Constitution as a 'compact for a federation' which was intended to be a permanent amalgamation into a consolidated whole.[67] This appears to substantiate that it is the Commonwealth as one people that is supposed to be everlasting and not just the federal nature of that polity.

Does the word 'Commonwealth' refer to the community of Australians or just to the Commonwealth government? With respect to this second question, Barwick CJ sees 'Commonwealth' as referring to *both* the Australian people and the institutions of Commonwealth government. Unless 'altered in a constitutional manner' it is the union of the people that was intended to be permanent.[68] And it is also the Commonwealth parliament that is

[65] Ibid 388.
[66] Ibid 389.
[67] *Queensland v Commonwealth* (1977) 139 CLR 585, 592 (Barwick CJ).
[68] Ibid.

indissoluble.[69] Likewise, a close reading indicates that Kirby J believes in a unitary polity with federal characteristics.[70] For him, the 'Commonwealth' means a conglomeration of Australians as suggested by his reference to the whole 'people of Australia'.[71] In sum, Barwick CJ and Kirby J think that the Constitution establishes a perpetual framework. Such a verdict certainly aligns with Charles and Chernov JJ in *Fyffe v Victoria* where the judges said that 'arguably the Preamble, and certainly s 3 of the *Commonwealth Constitution* impose a continuing unity upon the Australian States and that secession would contravene both ss 3 and 4 of the Constitution'.[72]

Nonetheless, the binding force of the comment in *Fyffe* is debatable because that case dealt with individual rather than state secession and, moreover, the judges' reasoning is qualified by the word 'arguably' and so is not necessarily conclusive. In addition, Barwick CJ and Menzies and Kirby JJ in the statements discussed are not concerned with applying their reasoning to secession, so any attempt at teasing out implications is conjecture. There is therefore leeway to make arguments on either side since there is no binding authority with respect to state secession.

All things considered the Preamble is a weak barrier to secession because it is imprecise and somewhat ambiguous.[73] This is because contradictory submissions can be made because the expression 'indissoluble' is not something that provides a connotation susceptible to easy application. Hence, it is advisable to avoid the Preamble altogether when evaluating the constitutionality of secession and aim for certainty elsewhere for the reasons detailed below.

First, WA is not named in the Preamble, meaning that so as far as the Preamble is concerned the word 'indissoluble' does not bind it. Although cl. 3 describes WA as having 'agreed…[to] be united in a Federal Commonwealth under the name of the Commonwealth of Australia', that clause is missing the word 'indissoluble'. What WA consented to is qualitatively different than what the other five original states consented to. Normal agreeance is not the same as subscribing to an indissoluble bond since deciding to participate in an organisation without that extra condition of indissolubility is not a pact solidifying permanency. An analogy drawn by Lindsay and Wellman is that if a constitution is a contract entered into voluntarily, the parties can

[69] Ibid. This conclusion is implicit in the suggestion by Barwick CJ that the composition of the Commonwealth parliament cannot be amended to include the territories.
[70] *Durham Holdings Pty Ltd v New South Wales* (2001) 205 CLR 399, 431 (Kirby J).
[71] *R v Hughes* (2000) 171 ALR 155, 170 (Kirby J).
[72] *Fyffe v Victoria* [1999] VSCA 196 at [20].
[73] Courts have said that bare 'doubt' about meaning is enough to be ambiguous: *The Sussex Peerage Case* (1844) 8 ER 1034, 1057. Per Winckel: 'ambiguity has been said to exist where there are: equivocal words; doubts as to the proper construction; two possible constructions; two rival constructions; or, such general words that they could apply universally or be limited': Winckel, 'The contextual role of a preamble in statutory interpretation' (n 20) 206.

terminate such a contract at any time so long as they secede fairly.[74] Specific performance – being forced to stay within the union – is frequently only awarded when damages are an inadequate substitute.[75] The union that covering cl. 3 says WA consented to is not expressed to be permanent and so the state could terminate and then pay compensation to the Commonwealth and to the other states. Chapter 8 discusses this compensation aspect in greater detail.

The absence of WA from the Preamble due to the historical reluctance of that state to join Federation shows that there were separate peoples that chose to come together to create a Commonwealth government.[76] Clearly, the colonies did not amalgamate into one people, but rather sought a parallel layer of federal governance that did not interfere with their local governance except as allowed for by the Constitution. Each state continued to have an independent relationship to the British Crown until links were severed with the *Australia Act 1986* (UK) and this indicates a high degree of autonomy. As Zimmermann observes:

> As the referendum did not take place until after the Australian Constitution had been finally enacted, however, the agreement of Western Australia to federate was not mentioned in the preamble. This omission continues to undermine the unity expressed in those words. Arguably, if the presence of Western Australia 'had not been necessary in the creation of the Federation, neither would its withdrawal affect its ongoing existence'.[77]

Second, even if WA had been named, the Preamble does not explain whether 'indissoluble' or 'unite' is a limitation affecting the state governments, the central governments or both. If the intention was to deny the state governments a right to secede, then why does the Preamble at the same time affirm the states as distinct societies with '[w]hereas the people of NSW, Victoria…'? Naming the 'people of the states' negates the concept of an amalgamated whole that is critical to a unitary state; one would expect, to the contrary, something similar to 'the Australian people'.

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[74] Peter Lindsay and Christopher Wellman, 'Lincoln on secession' (2003) 29(1) *Social Theory and Practice* 113, 118, 126-127. See also Michael Conlin, *The Constitutional Origins of the American Civil War* (Cambridge University Press, 2019) 183-223.

[75] Luca Siliquini-Cinelli and Andrew Hutchinson, 'Constitutionalism, good faith and the doctrine of specific performance: rights, duties and equitable discretion' (2016) 133 *The South African Law Journal* 72, 76.

[76] The reasons for this reluctance are explained in Augusto Zimmermann, 'The still reluctant state: Western Australia and the conceptual foundations of Australian federalism' in Gabrielle Appleby, Nicholas Aroney and Thomas John (eds), *The Future of Australian Federalism* (Cambridge University Press, 2012) 76-77. This reluctance was eventually overcome with the promise of a train line connecting the state to the east.

[77] Ibid 77.

Third, the Preamble does not clarify how its aspirations fit with an emphasis in the rest of the Constitution on forming the organs of the federal government. Perhaps it is all those central organs of government – like the Commonwealth parliament – that are indissoluble rather than the union of people itself? If so, then WA could leave anytime and recall its parliamentarians from the Commonwealth parliament. In this scenario the Commonwealth parliament remains structurally intact, it is just that it would be missing its West Australian representatives.

Fourth, there are components in the Preamble that contradict its assertion of indissolubility. Specifically, its reference to 'agreed to unite' undermines a coercive union. Indeed, the word 'agreed' implies voluntarism because it indicates free choice is the reason why the union came into existence. In the absence of any other contrary section in the substantive part of the *Constitution Act*, the expression leaves scope for the argument that the terms of the agreement can be changed by the people of the states named in the Preamble (including WA, if one sets aside the fact that it is not named in the first place). The very fact that a request for permission to join was made suggests that the polities respected each other – what Callinan J calls 'comity' – and sought to abide by a norm of reciprocity.[78] Furthermore, the Preamble does not name the Commonwealth government as a party to the compact. In this regard, 'a stream cannot rise higher than its source';[79] that is, the Commonwealth government cannot rise above the people of the states who united and created a federal government to fulfil national objectives.

For these reasons, the preferable course of action is to acknowledge that WA is not bound by the Preamble since it is not named therein. More generally, the Preamble contains several ambiguities that diminish its utility for the purposes of ascertaining secession's constitutionality.

IV. ON THE COVERING CLAUSES

The Covering Clauses to the Constitution are a preface that contain ideas fundamental to the Australian legal system. Clause 2 extends the 'sovereignty of the United Kingdom' to her Majesty's heirs and successors. Covering cls 3, 4 and 5 deal with the proclamation of the Commonwealth of Australia by the Queen, the commencement date of the *Constitution Act* and

[78] For sources supporting comity between the states, see *Work Choices Case* (2006) 229 CLR 1, 322 (Callinan J); Nicholas Aroney, 'Constitutional choices in the *Work Choices Case*, or what *exactly* is wrong with the reserved powers doctrine?' (2008) 32 *Melbourne University Law Review* 1, 28-29; Paul Jersey, 'A sketch of the modern Australian federation' in *The Future of Australian Federalism* (Cambridge University Press, 2012) 69.
[79] *Australian Communist Party v Commonwealth* (1951) 83 CLR 1, 258 (Fullagar J); Michael Olds, 'The stream cannot rise above its source: the principle of responsible government informing a limit on the ambit of the executive power of the Commonwealth' (Honours Thesis, Murdoch University, 2016) 72.

the supremacy of the Constitution and its laws which are said to be 'binding on the courts, judges, and people of every State and of every part of the Commonwealth, notwithstanding anything in the laws of any State'. Clause 6 defines 'the States' as meaning 'the colonies of New South Wales, New Zealand, Queensland, Tasmania, Victoria, Western Australia, and South Australia…as for the time being are parts of the Commonwealth'. Clause 7 repeals *The Federal Council of Australasia Act 1885* (UK) but leaves in place laws of the Council 'in force at the establishment of the Commonwealth', subject to override by the Commonwealth parliament.

Given the high priority afforded to clauses 3 and 4 in Craven's *Secession: The Ultimate States Right*, these two components merit special scrutiny.[80] Clause 3 says as follows:

> It shall be lawful for the Queen, with the advice of the Privy Council, to declare by proclamation that, on and after a day therein appointed, not being later than one year after the passing of this Act, the people of New South Wales, Victoria, South Australia, Queensland, and Tasmania, and also, if Her Majesty is satisfied that the people of Western Australia have agreed thereto, of Western Australia, shall be united in a Federal Commonwealth under the name of the Commonwealth of Australia. But the Queen may, at any time after the proclamation, appoint a Governor-General for the Commonwealth.

Clause 4 is also central to Craven's study. The text of that stipulation notes that:

> The Commonwealth shall be established, and the Constitution of the Commonwealth shall take effect, on and after the day so appointed. But the Parliaments of the several colonies may at any time after the passing of this Act make any such laws, to come into operation on the day so appointed, as they might have made if the Constitution had taken effect at the passing of this Act.

The interpretation relied on by Craven proceeds in the following manner. First, it is denied that the clauses are spent and are legally barren.[81] Second, s 3 is characterised as providing for the 'union' of colonies and s 4 is described as establishing 'the Commonwealth'. As he explains it, '[t]he two concepts of union and establishment are treated as being distinct'.[82] At the same time however, Craven equates a unitary state with a federal system and says that s 3 'imposed

[80] Gregory Craven, *Secession: The Ultimate States Right* (Melbourne University Press, 1986) 91.
[81] Gregory Craven, 'The Constitutionality of the Unilateral Secession of an Australian State' (1985) 15 *Federal Law Review* 123, 140.
[82] Ibid 136.

federation' upon the states.[83] His final analysis relies on a construction of these two clauses based on 'unlimited futurity' where 'no term is set for [the] union'. [84] As he puts it:

> [o]nce the Australian colonies were bound in a Federal Commonwealth, and became States of that Commonwealth, none could seek to escape the burden thus imposed without running foul of s 3. That section imposes a continuing union upon the Australian States, and any attempt at unilateral secession would by definition conflict with its terms, in that it would clearly involve the dissolution of the union referred to.[85]

Craven contends that '[t]he words of [covering cl. 3], viewed alone, can ultimately bear only one meaning: that the Australian colonies, now States, were united by the proclamation under s 3 in 1901, and most importantly, by the force of that section they continue to be united'.[86] He adds that '[t]he unqualified words of the section impose an unqualified union and '[n]othing in s 3 gives any impression that the union it imposes is intended to be anything other than permanent and lasting'.[87] Thus, in summary, he argues that '[s]ection 3 is not in any way ambiguous, and the unilateral secession of a State would conflict with it upon its very face'.[88]

A. Are Covering Clauses 3 and 4 spent?

For a provision to be labelled expended supposes that it is no longer applicable due to being overtaken by events. As early as 1978, Lumb wrote that '[t]he force of section 3 (Proclamation of Commonwealth) and section 4 (commencement of Act) were expended at the time the Constitution came into effect'.[89] Enright likewise believes that:

> [O]nce the proclamation is made the force of s 3 is spent; that is, s 3, while speaking about union in a federation, was really just authorising the formal act of federation (i.e. the proclamation), the date of which according to s 4 would be the date the Constitution takes effect, but the juristic basis of the Federation is the Constitution itself, especially those sections establishing the Commonwealth Government (e.g. ss 1, 61 and 71) and preserving (subject to the Constitution itself) the laws, powers and Constitutions of the States (ss 106, 107 and 108).[90]

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[83] Ibid 137.
[84] Ibid.
[85] Ibid.
[86] Craven, *Secession: The Ultimate States Right* (n 86) 93.
[87] Ibid.
[88] Ibid 94.
[89] Richard Lumb, 'Fundamental law and the Processes of Constitutional Change in Australia' (1978) 9 *Federal Law Review* 148, 159.
[90] Christopher Enright, *Constitutional Law* (Law Book Company, 1977) 287.

With the passage of the *Australia Act 1986* (UK) diminishing Britain's influence over Australia, it is also open to conclude that other monarchical terms in the *Constitution Act* could fall into the spent category since these sections bear little relationship to modern judicial practice.[91]

In response to Lumb and Enright's opinion that covering cls 3 and 4 are spent, Craven has cast attention upon the words 'on and after a certain day' which evinces 'an immediate act of union, which necessarily occurred and expired at the same moment, and also for a continuing state of union between the Australian States which extends indefinitely beyond that moment and applies at this present time'.[92] Craven's observations are an obstacle to the success of Lumb and Enright's contention that the clauses are spent. The portion of cl. 3 that is directly relevant to an analysis of secession is indeed written for the future. Similarly, cl. 4 does not specify an end-date and has the future in mind. This means that the bulk of cls 3 and 4 are legally effective in the present day. It is arguably because of this fact that from the time that the *Constitution Act* was proclaimed on 1 January 1901, WA has remained part of a Federal Commonwealth.

Further support for the argument that the clauses are not expended comes from the UK Joint Select Committee's decision in 1935. The Committee approached the petition for secession by WA on the footing that the union was perpetual and only action by the UK parliament could dissolve it.[93] In 1999, the Victorian Supreme Court treated cl. 3 as precluding an individual's secession from the Commonwealth because of 'a continuing unity' imposed upon the states.[94] The Victorian court's estimation coincides with the view of Marshall who maintains that cl. 3 was not spent upon proclamation of Federation in 1901.[95] Equally, this logic applies to cl. 4 since it too speaks of establishment 'on and after' a certain day appointed by the Queen. In summary, an interpretation whereby the clauses remain effective is probably the correct one.

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[91] Two main categories of clauses are now spent: provisions that are inoperative due to being linked to a colonial past and provisions that 'are a dead letter for other reasons': Cheryl Saunders, 'Common sense in relation to the Constitution' (2005) 17 *Sydney Papers* 97, 100-101. See also Anne Twomey, *The Australia Acts: Australia's Statutes of Independence* (Federation Press, 2010) 416-420.

[92] Gregory Craven, 'The Constitutionality of the Unilateral Secession of an Australian State' (n 87) 140.

[93] Joint Committee of the House of Lords and the House of Commons, Parliament of the United Kingdom, *Petition of the State of Western Australia together with the Proceedings of the Committee and Minutes of Speeches delivered by Counsel* (Report, May 1935) viii.

[94] *Fyffe v Victoria* [1999] VSCA 196 at [20]: 'The question whether it is possible for a State to secede from the Australian Federation has been considered at length by Professor Craven in his book *Secession, The Ultimate States' Right* (1986) Melbourne University Press. Professor Craven has taken the view…that arguably the Preamble, and certainly s.3 of the Commonwealth Constitution impose a continuing unity upon the Australian States and that secession would contravene both ss.3 and 4 of the Constitution'.

[95] Geoffrey Marshall, *Parliamentary Sovereignty and the Commonwealth* (1962) 114-115.

B. Potential meaning for secession

Having found that covering cls 3 and 4 remain effective, the question that arises is whether these clauses prevent unilateral secession by WA. For Craven, the significant expressions in this regard are 'united in a Federal Commonwealth' and 'shall be established' – it is because of these that he advises that states face barriers to secession. Twomey similarly argues that the Covering Clauses, along with other sections considered later in this thesis, preclude secession:

> Unilateral secession would not be legally valid. While the effectiveness of the preamble to the *Commonwealth of Australia Constitution Act* in prohibiting secession is doubtful, legislation enacted by a State Parliament providing for its secession would be likely to be inconsistent with numerous provisions of the Commonwealth Constitution, and may also conflict with covering clauses 3, 4 and 5 of the *Commonwealth of Australia Constitution Act*.[96]

With respect, a reasonable retort to Craven and Twomey is that there are vital qualifications controlling cl. 3 that should be accounted for. Specifically, the controlling words are 'Federal' and 'the people [of the states]'. The former can be submitted as a descriptor of the nature of the association and the latter refers to the polity who are the legal foundations of the federal enterprise. Thus, even if it were conceded that there was an intention to form a permanent union, the object of the union would still be grounded in federalism[97] and the agreement of the people organized by state and so the repercussions of these constraints cannot be overlooked.

Unlike the Preamble, it is also important to stress that none of the Covering Clauses expressly refer to an aspiration for indissolubility since they are technical operative provisions. The difference in tone between the Preamble and the Covering Clauses is an indication that the former's reference to 'indissolubility' was probably not intended to be taken literally. Conversely, the definition of 'The States' at covering cl. 6 probably was intended to be taken literally since it is a definition section. Cl. 6 unambiguously leaves open the possibility of secession by saying 'as for the time being are parts of the Commonwealth' but does not proscribe a procedure. Unfortunately, Cl. 6 has never been judicially tested and was inserted without debate of relevance to secession at the constitutional conventions of the 1890s. However, a literal reading of cl. 6 suggests that its effect is to substitute for any appearance of the term 'State' a political entity that is potentially transient in its membership of the union.

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[96] Anne Twomey, *The Constitution of New South Wales* (Federation Press, 2004) 855.

[97] *The Lord Mayor, Councillors and Citizens of the City of Melbourne v The Commonwealth and Another* (1947) 74 CLR 31, 74 (Starke J) ('Melbourne Corporation Case').

In what follows, I consider the words 'Federal', 'people of the states' in cl. 3 and 'for the time being' in cl. 6 and discuss how they impact upon the permissibility of secession.

1. The meaning of 'Federal'

Chapter 4 has discussed confederalism, federalism and a unitary state but this section elaborates on these concepts in greater detail. As Chapter 4 observes, confederalism and federalism are similar. The key divergence is between those who suppose that a compound community built on federal principles is nonetheless a unitary state, versus others who see confederalism/federalism as 'a voluntary agreement, often written, between co-equals who agree to come together and form a lasting union for certain purposes such as the common defense and general welfare'.[98]

The Center for the Study of Federalism notes that federalism is both a principle of interpretation and a system of political organisation.[99] Of relevance to interpretation and organisation, Aroney explains that 'Federal' is derived from the Latin word *foedus*, meaning covenant, pact or treaty.[100] Quick and Garran note that 'the term Federal is used first in the preamble, and next in clause three, as qualitative of the Commonwealth, considered as political community or state' but elsewhere 'in various sections of the Constitution it is employed as descriptive of the organs of the central government'.[101] They raise three main classifications of 'Federal':

1. A confederal state where a collection of independent states are 'linked together in one political system'.[102] Examples include the union of American states under the *Articles of Confederation and Perpetual Union*. In such a confederation, the central organs are minimally coercive because they are primarily a voluntary forum for discussing concerns.

[98] Center for the Study of Federalism, *What is Federalism and its Governmental Forms?* <https://web.archive.org/web/20200919185018/https://federalism.org/about/what-is-federalism/>. Australia is similar to the American model, which James Bryce called 'a Commonwealth of Commonwealths': James Bryce, *The American Commonwealth* (Macmillan, 1889) vol 1, 332.
[99] Center for the Study of Federalism, *What is Federalism and its Governmental Forms?* <https://web.archive.org/web/20200919185018/https://federalism.org/about/what-is-federalism/>
[100] Aroney, *The Constitution of a Federal Commonwealth* (Cambridge University Press, 2010) 4.
[101] John Quick and Robert Garran, *The Annotated Constitution of the Commonwealth* (The Australian Book Company, 1901) 333.
[102] Ibid.

2. The composite federal state 'formed by such a union'.[103] This is the option that Quick and Garran believe describes the Australian system.[104] This option is like a confederal state to the extent that it suggests there are multiple sovereigns, since the relationship between the states and central government is constitutionally delineated and each operates within an entrenched sphere. Such remains the case even if outwardly – during relations with other countries – the entity presents as if sovereignty is undivided.

3. A unitary state with federal features: that is, a 'dual system of government, central and provincial' part 'of one whole government under one Constitution'.[105] Federal on this interpretation refers to a unitary state that happens to enjoy decentralised features.

From its inception until 1920, the High Court generally construed federalism consistently with options 1 or 2. The Court interpreted the Constitution as requiring shared autonomy and cited American jurisprudence to preserve the 'compact' between the states and the federal government.[106] There were hints of a confederal attitude because of the reserve powers doctrine which encouraged a restrictive approach toward Commonwealth government power due to a desire to preserve the remaining residual powers left to the states by the compact.[107]

After 1920, as Bradley Selway and John Williams point out, 'federal powers were read broadly and without any overt consideration of federalism issues',[108] thus pushing interpretation toward option 3 of a unitary state. In the *Engineers Case* this was reflected in the assertion by Knox CJ, Isaacs, Rich and Starke JJ of what one scholarly evaluation has described as a 'common and indivisible sovereignty across the tiers of Australian government'.[109] The justification for this stemmed from a belief at the time that an expansion of one level could not be seen as a diminishment of the other, because within the terms of an imperial grant, it is proper for state and

[103] Ibid.
[104] Ibid. But see Chapter 4 for a discussion of Quick and Garran's support for a unitary interpretation of s 128 of the Constitution. They imply that it authorises the amendment of state constitutions without a state's consent.
[105] Ibid.
[106] See *Commonwealth v New South Wales* (1918) 25 CLR 325 (Gavan Duffy J). *D'Emden v. Pedder* (1904) 1 CLR 91, 93 declared that when a state gives its authority an operation that would 'fetter, control, or interfere with, the free exercise of the…power of the Commonwealth' the attempt is invalid unless 'expressly authorized by the Constitution'. The inverse of this rule was delivered in the *Railway Servants Case* (1906) 4 CLR 488 when the *Conciliation and Arbitration Act 1904* (Cth) was deemed inoperative insofar as it covered state employees.
[107] *Peterswald v Bartley* (1904) 1 CLR 497; Leslie Zines, *The High Court and the Constitution* (Butterworths, 1997) 5.
[108] Bradley Selway and John Williams, 'The High Court and Australian Federalism' (2005) 35 *Publius* 467, 467.
[109] Shipra Chordia and Andrew Lynch, 'Federalism in Australian constitutional interpretation: signs of reinvigoration?' (2014) 33 *University of Queensland Law Journal* 83, 84.

federal legislative power to be as broad as that of the UK parliament itself.[110] Such a reading comes closest to a unitary state with federal features and adopting this theory is why Craven determines that even if popular sovereignty were accepted it would 'presumably vest in the people of Australia as a whole' rather than the people's will being expressed via each state.[111]

Yet even using the *Engineers* approach (which some have called literalism[112]), the 'Federal' aspect of the Commonwealth can gain prominence now that imperial sovereignty is unlikely to be persuasive due to political conditions shifting. Selway and Williams posit that:

> Once it is accepted that the 'imperial' analysis within the *Engineers* case is no longer compelling, and that the Constitution itself is the fundamental constitutional document of the Australian legal system, then the need to interpret that document with regard to its context, including the federal structure created by it, becomes obvious.[113]

During the heyday of the *Engineers Case,* Zines has shown that there was still a safeguard for the residual authority of the states, at least when applying the Commonwealth government's trade and commerce power at s 51(i).[114] Trade and commerce has always been restrictively construed in comparison to the comparable American constitutional provision.[115]

Since 1947, a third phase accepts that 'federalism issues can be considered in a narrow range of cases for the purpose of limiting what would otherwise be broad federal powers',[116] hence pushing interpretation back to option 2. In the *Melbourne Corporation Case*, a majority decided that the Commonwealth parliament's banking power in s 51(xiii) does not authorise legislation directed to control or hinder the states in the execution of their governmental functions. Although the notion of a unitary state was not openly rebuffed, the legitimacy of making implications from the 'federal character' of the Constitution was nonetheless affirmed.[117] In the words of Starke J, 'it is beyond the power of either [the states or the Commonwealth government] to abolish or destroy the other' when each is acting under an authorised constitutional power.[118] Although

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[110] *Engineers Case* (1920) 28 CLR 129, 148–149 (Knox CJ, Isaacs, Rich and Starke JJ).
[111] Gregory Craven, *Secession: The Ultimate States Right* (Melbourne University Press, 1986) 81.
[112] Greg Craven, 'Cracks in the façade of literalism: is there an Engineer in the house?' (1992) 18 *Melbourne University Law Review* 540, 540.
[113] Selway and Williams, 'The High Court and Australian federalism' (n 116) 482.
[114] Leslie Zines, *The High Court and the Constitution* (1997) 75–79.
[115] *R v Burgess Ex parte Henry* (1936) 55 CLR 608, 628–629; *Australian National Airways Pty Ltd v Commonwealth* (1945) 71 CLR 29, 61. For the American position see *Gonzales v. Raich* 545 U.S. 1 (2005).
[116] Selway and Williams, 'The High Court and Australian Federalism' (n 116) 467.
[117] *Melbourne Corporation Case* (1947) 74 CLR 31, 70.
[118] Ibid 74 (Starke J).

Williams J said that 'I must give effect to the principles for construction of the Constitution laid down in the *Engineers Case*', he in the end relied on the exception for discrimination in that case to find that the federal legislation under consideration was unconstitutional.[119]

From the standpoint of a secessionist WA, the case law between 1903 and 1920 is beneficial since these allow one to refer to the Tenth Amendment of the *US Constitution* which the High Court bench designated as analogous to ss 107 of the Constitution.[120] Earlier judgements also occasionally affirm Quick and Garran's characterisation of the Constitution as a contract,[121] a view which is an historically accurate depiction and aids secession. The practice since 1947 is also valuable since it acknowledges that the continuity of a state's essential functions is guaranteed. These cases cast doubt on whether an act passed by the Commonwealth parliament that attempts to block secession is within scope of its authority because such is 'not a law for the peace, order and good government of the Commonwealth, but an unlawful intervention in the constitutional affairs of the states'.[122] In contrast, one can envision ways in which WA can unilaterally depart from the union without substantially interfering in the federal government.

Consistent with the reasoning at Chapter 4, present consensual norms render it likely that 'Federal' will be read in line with Quick and Garran's option 2 and that this necessitates an interpretation of the Covering Clauses which qualifies the nature of the union agreed to by WA. Shared sovereignty implies that a state is an equal partner rather than, as in a unitary state, a subordinate to a central government. The deference accorded to state interests was palpable when the High Court in *Palmer v WA* upheld WA's effectively indefinite border closure to other residents of Australia despite the guarantee in s 92 of free trade and travel between states.[123]

In future, there is scope for a fourth stage of development that strengthens federalism. Prior to the *Australia Act 1986* (UK), Craven was able to dismiss the notion that the states had any inherent sovereignty because the federal project was initially formed under the auspices of UK sovereignty.[124] Since that time, the theory that the Constitution's binding force derives from the

[119] Ibid 98 (Williams J).
[120] *D'Emden v Pedder* (1904) 1 CLR 91, 112.
[121] John Quick and Robert Garran, *The Annotated Constitution of the Commonwealth* (The Australian Book Company, 1901) 294; Shireen Morris, *A First Nations Voice in the Australian Constitution* (Hart, 2020) 69.
[122] *Melbourne Corporation Case* (1947) CLR 31, 100.
[123] *Palmer v WA* (2021) 95 ALJR 229; Anne Twomey, *Clive Palmer just lost his WA border challenge — but the legality of state closures is still uncertain* < https://theconversation.com/clive-palmer-just-lost-his-wa-border-challenge-but-the-legality-of-state-closures-is-still-uncertain-149627>
[124] Craven, *Secession: The Ultimate States Right* (n 119) 81.

people has been accepted at the highest levels.[125] So for a political community to be 'Federal' takes on a significance beyond mere administrative convenience imposed by an imperial sovereign, because authority arguably now flows directly from the people organised by state-based electorates.[126] Whereas discarding popular will was easy to justify under an imperial sovereign, at the very least popular sovereignty now makes it difficult for judges to ignore a referendum such as the one in 1933 where 66.23 percent of Western Australians voted to secede.

All of this suggests that there is more to covering cl. 3 than first meets the eye. It is not that the framers aspired to unite indefinitely (although, see analysis of cl. 6 below which contradicts this claim) into the future but rather that the union is federal which is pertinent to secession.[127] A 'Federal' union is one where each party has to stay within its constitutionally allocated domain. Such a system of shared sovereignty implies that WA retains its powers on topics that affect it alone whereas 'those matters which concern the whole body of members collectively'[128] are within the federal parliament's ambit. And for the reasons expressed in Chapter 4, departure is part of the pre-existing suite of power in WA. Acknowledging the nature of the Australian Commonwealth in this manner opens a path to secession consistent with a layered system.

2. Consent from the 'people of [the states]'

A second element of cl 3 is its emphasis on deferring to the people organized by state as the unit of analysis. The mention of the people of the states at cl 3 is significant because the recognition of the people by state suggests representative and responsible government at the local level is afforded formidable respect. Judges may choose to prioritise the reference to the people of the states when it comes to considering the consequences of a state legislature carrying out the wishes of its electors to secede since consent by each state was critical in the process of federation. For example, New Zealand did not join despite allowance being made for its admission at cl 6 and despite being part of the British Empire.[129] Importantly, there was no possibility of a consolidated Australian people until after the Commonwealth was formally

[125] *Love v Commonwealth of Australia; Thoms v Commonwealth of Australia* [2020] HCA 3 at [352]; *University of Wollongong v Metwally* (1984) 158 CLR 447, 476-477 (Deane J); *Nationwide News Pty Ltd v Wills* (1992) 177 CLR 1, 72 (Deane and Toohey JJ); *ACTV v The Commonwealth* (1992) 177 CLR 106, 137 (Mason CJ).
[126] Popular sovereignty may result in incorporation of other canons from the United States that Dixon J has previously rejected, like the doctrine of nondelegability where an agent of the people cannot entirely delegate legislative power: Owen Dixon, 'The Law and the Constitution' (1935) 51 *The Law Quarterly Review* 590, 597.
[127] Michelle Evans, 'Re-thinking the federal balance: how federal theory supports states' rights' (2010) 1 *The Western Australian Jurist* 14, 55-56.
[128] Edward Freeman, *Federal Government in Greece and Italy* (Macmillan, 2nd ed, 1898) 1-3. Likewise, see *Official Report of the National Australasian Convention Debates*, Sydney, 1891, 31-2 (Samuel Griffith).
[129] Nicholas Aroney, 'New Zealand, Australasia and Federation' (2010) 16 *Canterbury Law Review* 31, 43.

proclaimed. And even thereafter, cls 3 and 4 give priority to the 'people of [the states]' or the 'parliaments of the several colonies' with no mention of a single unitary polity.

The main opposing argument is the Hobbesian interpretation that agreement was only required at the time of formation and was not intended to be continuing. In other words, once WA joined, its people irreversibly relinquished their autonomy. From the perspective of textual consistency however, it can be noted that cl 3 is expressed for the future not just in its uniting aspect but also in its mention of agreement as a precondition to unity: 'Her Majesty' must be 'satisfied that the people of Western Australia have agreed' to unite 'on and *after* a day' so appointed, meaning that WA's assent must carry forward even *after* the day of proclamation.[130] Similar language is used at cl 4. The wording of these clauses suggests that consent is required to be ongoing.

Another counterargument is that a unitary state is endorsed by covering cl 5. It is true that some textual backing for a national, rather than a federal, electorate lies at cl 5, which speaks of the 'people of… every part of the Commonwealth'. Such an allusion to the body of people may be evidence of a system of law that suppresses subsidiarity.[131] Bolstering such reasoning is the claim in cl 5 of supremacy by the Commonwealth over state courts and the people of every state.

One problem with this contention, however, is that cl 5 only covers those situations where the parliament of the Commonwealth is acting 'under the Constitution'. Given that a secessionist state can argue that the federal parliament does not have power to regulate secession and would therefore not be acting 'under the Constitution', cl 5 redirects consideration to other sections and provides little guidance about secession.[132] In addition, the effect of cl. 6 is to substitute for the word 'State' at cl 5 a political entity that can by definition leave the union, with the result that cl. 5 is inapplicable to a former state once it has left. Second, Twomey concedes that practical considerations will play a part in determining legal outcomes with respect to secession.[133] There is no guarantee that the resolution of secession will be forced to the battlefield, since there is a reasonable chance that opposing parties will decide that it is better to permit secession to proceed in an orderly manner. Hence it is not certain that the allowance for supremacy in cl 5 rules out withdrawal by WA. In fact, there is evidence to suggest that supremacy clauses are ineffective in

[130] Australian Constitution covering cl. 3. Emphasis added.
[131] Nicholas Aroney, 'Federalism and subsidiarity: principles and processes in the reform of the Australian Federation' (2016) 44(1) *Federal Law Review* 1, 1-10; Michelle Evans, 'The use of the principle of subsidiarity in the reformation of Australia's federal system of government' (Phd Thesis, Curtin University, 2012).
[132] The same point has been made in the context of the American supremacy clause, which closely mirrors the Australian one, by Alexander Hamilton, 'The Federalist No. 33' in *The Federalist Papers* (Bantam Classic, 2003).
[133] Anne Twomey, *The Constitution of New South Wales* (Federation Press, 2004) 855.

preventing secession. Cl 5 can be traced to the supremacy clause in the *Articles of Confederation*.[134] Yet those *Articles* failed to prevent their own dissolution and the creation of the *US Constitution*.[135] For similar reasons, it is unlikely that covering cl 5 impedes secession.

3. '[A]s for the time being are parts of the Commonwealth'

The belief that the Covering Clauses prohibit secession faces another stumbling block in the form of cl 6 of the *Constitution Act*. Craven admits that '[w]hile the unilateral secession of a State does not appear to be immediately inconsistent with s 6 itself, which apparently contemplates that one of the original States could, at some future time, cease to be part of the Commonwealth' he goes on to maintain that 'an indirect inconsistency might well occur with one of the provisions of the Constitution proper which impose liabilities, duties or restrictions upon 'the States'".[136] Examples include ss 73, 75, 92 and 114, which attempt to limit a state's judicial process, its ability to hinder free movement of commerce or to raise armies.

Clause 6 is a definition section. Subject to the proviso that some text is not susceptible to a full and accurate meaning, every expression in a statue or constitution has effect and none can be considered superfluous or insignificant.[137] Even so, with respect to the use that can be made of definition sections, McHugh J in *Kelly v R* has cautioned that:

> [T]he function of a definition is not to enact substantive law. It is to provide aid in construing the statute. Nothing is more likely to defeat the intention of the legislature than to give a definition a narrow, literal meaning and then use that meaning to negate the evident policy or purpose of a substantive enactment…But once it is clear that the definition applies, the better…course is to read the words of the definition into the substantive enactment and then construe the substantive enactment…in its context and bearing in mind its purpose and the mischief that it was designed to overcome.[138]

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[134] John Quick and Robert Garran, *The Annotated Constitution of the Commonwealth* (The Australian Book Company, 1901) 353; *United States Constitution* art VI; *Articles of Confederation and Perpetual Union* art XIII.
[135] The adoption of the *US Constitution* was, strictly speaking, illegal from the standpoint of the *Articles*: Peter Radan, "An Indestructible Union…of Indestructible States': The Supreme Court of the United States and Secession" (2006) 10 *Legal History* 187, 200. Likewise, upon leaving the US, the Confederate States adopted a supremacy clause, yet its members still had the right to secede. See Alison LaCroix, 'Continuity in Secession: The Case of the Confederate Constitution' (Working Paper No 512, The University of Chicago, February 2015) 16. Cf. Christopher Drahozal, *The Supremacy Clause: A Reference Guide to the United States Constitution* (Praeger, 2004) 52.
[136] Craven, *Secession: The Ultimate States Right* (n 119) 98.
[137] *Commonwealth v Baume* (1905) 2 CLR 405, 414 (Griffith CJ); *Beckwith v R* (1976) 135 CLR 569, 574 (Gibbs J); *Brisbane City Council v Attorney-General (Qld)* (1908) 5 CLR 695, 720 (O'Connor J).
[138] *Kelly v R* (2004) 218 CLR 216, 253 (McHugh J).

The circumstances in which a court will be prepared to treat a definition section as having a substantive effect are narrow. Generally, a definition is only to be used as an aid for construction of a statute, so that where a term appears in the body of an enactment it is understood in the defined sense or is taken to include certain things which, but for the definition, they would not include.[139] An exception is where a definition clearly gives effect to the policy of a statute, such as in *San v Rumble* where a definition was used in a substantive manner.[140]

In the Australian Constitution, 'the States' or its simpler derivative 'States' is mentioned at numerous places across the document. So, while cl 6 cannot be relied upon as a concrete source of obligations, it does assume importance in ascertaining the meaning of a 'State'. Yet unlike in most statutes which have dedicated sections explaining the substantive law, there is no part of the Constitution which illuminates secession. Logically, this increases the substantive significance of cl 6 due to the paucity of constitutional guidance on the topic elsewhere.

Clause 6 distinguishes between two kinds of potential 'States'. First, there is New South Wales, New Zealand, Queensland, Tasmania, Victoria, Western Australia and South Australia. Then there are new states, being 'such colonies or territories as may be admitted into or established by the Commonwealth as States'. It is toward the first class that the qualification 'as for the time being are parts of the Commonwealth' is directed; this can be seen by use of the comma and conjunction which separates the two categories. Inserting the preceding into the sections referring to 'States' leads to the conclusion that the entities of the federation are allowed to be in flux rather than being settled. In the case of *NZA v Minister for Immigration and Citizenship* ('NZA'), Kenny J acknowledges that the composition of the Commonwealth is not static:

> When covering cl 6 defines 'The States' as 'such of' those colonies 'as for the time being are parts of the Commonwealth', it attempts to capture in the definition *any of those colonies that happen to be States at any given time*. This is because the drafters realised that perhaps *not all of the named colonies would in fact become States or, indeed, remain States forever*.[141]

Kenny J's statement that not all colonies may 'remain States forever' can be taken in two ways. First, as an assessment of a state's ability to secede from the federation. And second, as a technical reference to the legal process whereby a state can change its status and become a

[139] *Gibbs v FCT* (1966) 118 CLR 628, 635 (Barwick CJ, McTiernan and Taylor JJ). The various interpretation Acts also evince an intention that the definition section can be consulted. See *Acts Interpretation Act 1901* (Cth) s 12.
[140] *San v Rumble (No 2)* [2007] NSWCA 259 at [55].
[141] *NZA v Minister for Immigration and Citizenship* (2013) 140 ALD 555, 569 (emphasis added) (Kenny J).

territory, for example, by surrendering its entire land area to the Commonwealth parliament using the procedure in ss 111 and 122 of the Constitution. Although it seems far-fetched that the latter option could occur, if it did then the whole polity effectively no longer remains a 'State'. Both plausible options highlight that the nature of the federal bargain was not intended to be static and that the political facts which shape the legal meaning of terms are allowed to change.

Clause 6 reveals a degree of hesitation over, firstly, whether an original colony will choose to become a state and, secondly, whether an original colony will stop being a state at some time in the future. At minimum, cl 6 assumes that a state exerts control over its geographic area and controls machinery of government sufficient to coordinate an autonomous community at the point of entry. It is an open question whether that self-governance necessary to enter is surrendered elsewhere in the Constitution. Often an express reference to one matter in a statute indicates that other matters are excluded.[142] The plain meaning of 'as for the time being' admits the possibility of a state leaving, and since no other section expressly prohibits a state from bidding farewell, the clause can be read as assuming that any original state can depart.[143]

The different status accorded to the original states versus any new states is also significant. Clause 6 indicates that the words 'as for the time being are parts of the Commonwealth' do not apply to 'such colonies or territories as may be admitted into or established by the Commonwealth as States'. Such delineation between original and new states aligns with the approach of s 121. Section 121 makes clear that new states are inferior to original states because their representation and other rights are at the mercy of the Commonwealth parliament. Comparing and contrasting the two allows one to argue that original colonies have greater immutable powers of self-governance than any ensuing territories or acquisitions,[144] and that the former's status is acknowledged by cl 6 which preserves autonomy encompassing secession.

Finally, cl 6 gives effect to the policy of the *Constitution Act* by encouraging the principle of comity which can be interpreted as permitting secession. The accepted goal underlying the Constitution is to create a federal government so that defence, trade and other issues can be

[142] *Tasmania v Commonwealth and Victoria* (1904) 1 CLR 329.
[143] With the disclaimer that *NZA v Minister for Immigration and Citizenship* (2013) 140 ALD 555 was not directly about secession, Kenny J's passage in *NZA* hints that a 'named' colony can exercise free will at the time of entry and departure. The facts concerned whether New Zealand is a State or otherwise part of the Commonwealth as part of a challenge to the cancellation of a visa under the *Migration Act 1958* (Cth). It was decided that New Zealand is not part of the Commonwealth. In doing so, the precedent confirms that entry into Federation was voluntary.
[144] Chris Tappere, 'New states in Australia: the nature and extent of Commonwealth power under section 121 of the Constitution' (1987) 17 *Federal Law Review* 223, 230-234.

addressed through inter-governmental cooperation and are dealt with in a fashion that presents a cohesive front against enemies.[145] Textual acceptance of the possibility of withdrawal preserves the comity that is necessary for such an enterprise to succeed.[146] States that hate each other do not function well in achieving common goals, so it is more likely that comity is a principle of a federation than its inverse. By allowing the prospect of secession, the union is made stronger because each polity must learn to cooperate rather than taking any member for granted.[147]

Clause 7 makes sense in these circumstances because it enforces the continuity between the Council and the Commonwealth by carrying forward the laws of the Council until these are repealed. A historically informed reading of cl 6 therefore preserves the spirit of s 31 of the *Federal Council of Australasia Act 1885* (UK) which permitted secession. Like the Council, the Commonwealth government still protects some state rights due to its federal features, so cl 7 is not inconsistent with secession if one accepts the analysis offered in Chapter 6 about the limited scope of federal power with respect to separation. Certainly, South Australia seceded from the Federal Council and there was little doubt at the time that doing so was lawful.[148] And if WA decides to exercise a lawful discretion to stop being a 'State' as that term is used throughout the Constitution, any inconsistency with sections like 114 automatically ceases to matter.

V. CONCLUSION

The Australian founders had ample opportunity to make obvious a distaste for secession in the same level of detail as they addressed the route for admission of new states at s 121 of the Constitution. It is noteworthy that due to the political constraints explored in Chapter 2, they instead chose what this chapter has found is an inconclusive reference to indissolubility in the Preamble. While the Covering Clauses are by no means unambiguous, cls 3 and 4 evince a sympathy toward consent-based federalism that favours the people organised by state polities.

Cl 6 is particularly compelling because, by Craven's own account, it recognises the prospect that a state may not remain in the Commonwealth. Consent was critical to WA's agreement to unite, so one could argue that cl 6 recognises that there needs to be a reason why that consent should not be required to be continuous. As Rousseau observes, '[e]ven if each person can alienate

[145] Lyall Hunt (ed), *Towards Federation: Why Western Australia joined the Australian Federation in 1901* (Royal Western Australian Historical Society, 2000).
[146] See *Work Choices* (2006) 229 CLR 1, 322 (Callinan J); Gil Seinfeld, 'Reflections on comity in the law of American federalism' (2015) 90 *Notre Dame Law Review* 1309, 1312-1314.
[147] A point made in John Remington Graham, *A Constitutional History of Secession* (Pelican Publishing, 2002).
[148] See Chapter 2 of this thesis for elaboration on this point.

himself, he cannot alienate his children'.[149] In other words, the philosophical burden is on those who think secession is unconstitutional to show why the living people of WA should inherit political obligations from a political compact entered generations earlier. Similarly, married couples are permitted to divorce so long as they do so on fair terms. Few think that couples should be forced to stay together, since the harms thereby caused to both parties are perhaps a greater evil than separation. At best, Lindsay and Wellman suggest, there should be a 'modest responsibility to secede in a fair fashion' rather than a complete ban on secession.[150]

[149] Jeans Jacques Rousseau, *The Social Contract* (Hackett Publishing, 1987) 144.

[150] Peter Lindsay and Christopher Wellman, 'Lincoln on secession' (2003) 29 *Social Theory and Practice* 113, 127.

CHAPTER 6: CONSISTENCY WITH COMMONWEALTH POWERS

> *A federal system is necessarily a dual system. In a dual political system you do not expect to find either government legislating for the other.*
>
> Dixon J[1]

I. INTRODUCTION

Chapter 5 of this thesis posits that the Covering Clauses to the *Commonwealth of Australia Constitution Act* reflect a consensual relationship between polities of the Australian federation. Specifically, covering cls 3 and 4 recognise the federal aspects of the union and the initial consent provided by the people of Western Australia can be interpreted as a continuing requirement. The description of a 'State' in cl. 6 reveals that each state is implicitly acknowledged to have the ability to leave the union. Wherever the term 'State' appears, including in s 109 and other avenues of potential conflict with federal law, it includes the prospect that WA can depart and no longer function as a part of 'the Commonwealth'.

This chapter proceeds to explore whether Commonwealth powers are binding on the state of Western Australia in a manner that is inconsistent with unilateral secession by that state. The analysis in this chapter adds an evidentiary base to buttress the claim of Chapter 4 where it was asserted that the Commonwealth government lacks the power to regulate secession.

In *Secession: The Ultimate States Right*, Craven argues that 'any law enacted by the Parliament of a State which sought to deny or restrict the power of the Commonwealth Parliament to pass legislation applying in that State pursuant to s 51 would be inconsistent with that section'.[2] Craven believes that secession is unconstitutional because if a state leaves then 'the power of the Commonwealth Parliament to legislate for the State concerned would cease altogether'.[3] He characterises s 51 as preventing secession because it contains an 'affirmative grant of power to the Commonwealth Parliament to legislate, within its limits, for the States whose names appear [at cl 3 of the Covering Clauses]'.[4] Apart from these cursory remarks, no further detail is provided by Craven. One can speculate, however, that the Commonwealth's prerogative and 'nationhood' authority are also pertinent. Per Mason J in *Victoria v Commonwealth*, the

[1] *Uther v Federal Commissioner of Taxation* (1947) 74 CLR 508, 529 (Dixon J).
[2] Gregory Craven, *Secession: The Ultimate States Right* (Melbourne University Press, 1986) 98.
[3] Ibid.
[4] Ibid.

nationhood powers permit engagement in 'enterprises and activities peculiarly adapted to the government of a nation and which cannot otherwise be carried on for the benefit of the nation'.[5]

This chapter proceeds on the basis that, firstly, the degree to which Commonwealth powers listed in ss 51 and 52 bind the states is a relevant concern when discussing whether there is inconsistency with withdrawal from the federation. It must first be established that a state instrumentality is, in principle at least, bound by a federal law for there to be an inconsistency with it (granted, Chapter 4 claims that WA possesses autonomy drawn from sources outside the Constitution, but there is still value in elucidating the nature of the state's relationship to the Commonwealth). After having established that states are bound by laws or actions of the Commonwealth, the second step is to look at prominent heads of federal power and determine whether their free exercise will be hindered by a change in the composition of the Australian union. The final facet of my inquiry relates to prohibitions that control the placita/heads of power. Even if characterisation produces an inconsistency with secession, there are limits inbuilt into the Constitution that may prevent such an interpretation from being from being valid. This is because precedent like the *Melbourne Corporation Case* has resulted in attention being paid to the limited immunity of state instrumentalities from interference by a national polity.[6]

II. SECTIONS 51, 52 AND NATIONHOOD

Section 51 begins with the statement that '[t]he Parliament shall, *subject to this Constitution*, have power to make laws for the *peace, order, and good government of the Commonwealth* with respect to'[7] and proceeds to enumerate 39 heads of power over which the Commonwealth parliament holds authority. Out of these, 13 mention the 'State/s'. For instance, the parliament's authority in s 51(i) is said to cover trade and commerce 'among the States' and s 51(xxiv) permits service and execution of 'judgements of the courts of the States'. A further subset of these 13 mentions the states but does so in a way that narrows federal power by the terms of the grant – like s 51(xxxiv) which authorises railway construction and extension in a state but only with 'the consent of that State'. The other 26 provisions are expressed in general terms without

[5] *Victoria v Commonwealth* (1975) 134 CLR 338, 397 ('AAP Case'). Stephenson suggests that the formulation of the nationhood power by Mason J is the 'most precise formulation of it': Peta Stephenson, 'Nationhood and section 61 of the Constitution' (2018) 43(2) *University of Western Australia Law Review* 149, 151.

[6] *Melbourne Corporation v Commonwealth* (1947) 74 CLR 31, 82 ('Melbourne Corporation Case'). On the continuing relevance of the *Melbourne Corporation Case* to the view that 'law and politics overlap and are often difficult to distinguish' see J Shaw, 'The 50th anniversary of *Melbourne Corporation v The Commonwealth*' (1999) 7 *Bar News: The Journal of the New South Wales Bar Association* 31, 32.

[7] *Commonwealth of Australia Constitution Act 1900* (UK) s 51 (emphasis added).

any explanation of how they interact with the states. An example of this category is s 51(xxxii) pertaining to control of railways for the naval and military purposes of the Commonwealth.

Some of the Commonwealth heads of power are concurrent, meaning that WA and other original states can legislate on the same objects. An example is taxation in s 51(ii). Other Commonwealth powers are exclusive, meaning that only the Commonwealth parliament can exercise power over the enumerated subject matter. Section 52 declares that the 'the seat of government of the Commonwealth, and all places acquired by the Commonwealth for public purposes' is an exclusive power of the federal parliament, but other examples include any power which is specifically taken away from the states elsewhere in the Constitution (like raising armies).

Section 109 provides that where there is an inconsistency between federal and state law in areas of shared power, the federal law prevails.[8] Notably, that section is expressed in relation to a 'State'. As Chapter 5 points out, the definition of a 'State' at covering cl. 6 contemplates the possibility of secession and so there is no necessary inconsistency with secession in this regard. The same logic applies to any other part of the Constitution that mentions the term 'State' or 'States' – for instance, s 114 which declares that a 'State' cannot raise 'any naval or military force' and the 13 enumerated heads of federal power that mention 'State' or 'States'.

In addition to Commonwealth powers that are written in the Constitution, the federal executive also enjoys prerogative and nationhood powers alluded to in s 61 which are unwritten because they are not listed in advance. These unwritten powers depend on the national character of the act in question. With respect to the breadth and depth of such executive power, Stephenson opines that 'Australian constitutional jurisprudence is best understood as confining the nationhood power to the established common law powers of the Crown'.[9] As Australia became politically independent, 'the prerogative powers relating to Imperial matters that had traditionally only been exercised by the British Government gradually came to be exercisable by the Commonwealth Government'.[10] Commonwealth legislation that supports executive power is likely to fall within s 51(xxxix) which permits making laws with respect to 'matters incidental to the execution of any power vested by this Constitution in the Parliament or in either House thereof, or in the Government of the Commonwealth, or in the Federal Judicature'.[11]

[8] Vince Morabito and Henriette Strain, "The section 109 'cover the field' test of inconsistency: an undesirable legal fiction' (1993) 12 *University of Tasmania Law Review* 182, 183-185.
[9] Peta Stephenson, 'Nationhood and section 61 of the Constitution' (2018) 43(2) *University of Western Australia Law Review* 149, 153.
[10] Ibid 155.
[11] *Davis v The Commonwealth* (1988) 166 CLR 79 (Wilson and Dawson JJ).

For the Commonwealth powers that have just been mentioned, it is worth reiterating that their compatibility with secession by a state remains unexplored by the Australian courts.

III. CAN THE COMMONWEALTH BIND WA?

This section begins the substantive inquiry by asking whether federal acts bind a state Crown. The reason this is relevant is because the Preamble refers to the 'Crown of the United Kingdom of Great Britain and Ireland' and precedent pertaining to Commonwealth power speaks of the 'Crown'.[12] It was proposed by counsel for the Commonwealth in the *Engineers Case* that '[t]he rule that the Crown is not bound by a statute unless expressly named or included by necessary implication does not apply to the Constitution'.[13] Hence, an initial concern is whether a state Crown is bound by ss 51 and 52 absent a definite indication to the contrary. If a state is so bound, then this leaves open a mechanism for the Commonwealth to quash secession.

A. What is the Crown?

The Crown 'is an is an elusive, shapeshifting and hydra-headed entity that assumes a number of different forms'.[14] It can be "the government, the state, a 'corporation sole' or 'aggregate', the Queen or her representatives, the governors-general, a metaphor for legal authority, a relic from medieval political theology, or a mask that cloaks the accumulation and exercise of executive power".[15]

The concept is derived from British constitutional theory. Gleeson CJ, Gummow and Hayne JJ in *Sue v Hill* note that "[i]n its oldest and most specific meaning, 'the Crown' is part of the regalia which is 'necessary to support the splendour and dignity of the Sovereign for the time being', is not devisable and descends from one sovereign to the next".[16] The Crown is associated with the divine right of kings, a largely discredited absolutism which asserts that the sovereign is not answerable to any earthly authority – not to parliament or to the people.[17] Elements of divine right continue to survive in American jurisdictions through ideas such as sovereign immunity

[12] See, eg, *Engineers Case* (1920) 28 CLR 129.
[13] *Engineers Case* (1920) 28 CLR 129, 139.
[14] Cris Shore, 'The Crown as a proxy for the state? Opening up the black box of constitutional monarchy' (2018) 107 *The Round Table* 401, 402.
[15] Ibid 402.
[16] *Sue v Hill* (1999) 199 CLR 462, 497 (Gleeson CJ, Gummow and Hayne JJ).
[17] Toby Reiner, 'Divine right of king' in Mark Bevir (ed), *Encyclopedia of Political Theory* (SAGE, 2010).

whereby the Crown cannot be sued for certain acts of state, although the justification is now put on the grounds of statism (the right of government to rule) rather than religion.[18]

In Australia, the Crown has been aligned to corporate agency theory to create a legal personality that can sue, hold land, funds, liabilities and capacities of various kinds while being distinct from the real people – usually, ministers of the executive – involved.[19] Twomey notes that '[w]hether there is one Crown in relation to Australia or seven remains the subject of debate'.[20] Along similar lines, Gaudron J in *Sue v Hill* affirms that the Constitution divides the Crown:

> [A]lthough the notion of 'the divisibility of the Crown' may not have been fully developed at federation, that notion is implicit in the Constitution. It is implicit in the existence of the States as separate bodies politic with separate legal personality, distinct from the body politic of the Commonwealth with its own legal personality. The separate existence and the separate legal identity of the several States and of the Commonwealth is recognised throughout the Constitution, particularly in Ch III (see esp ss 75(iii), (iv), 78).[21]

Even so, the 'Crown' is increasingly irrelevant to constitutional law. Interpretation is now influenced by the belief that polities draw their existence from text considered in light of history, common law and context.[22] In *Sue v Hill*, five options for the Crown were outlined by Gleeson CJ, Gummow and Hayne JJ,[23] but as Saunders observes 'there was a conspicuous lack of enthusiasm in relation to their relevance in Australia'.[24] It was said that the complexities of federalism make the model unsuited.[25] Gummow J in the *Mining Act Case* highlights that the Constitution does not rely on the Crown, but rather speaks of the polities directly – that is, 'the Commonwealth', 'the States' – without adding a layer of mysticism.[26] Diminishment in the role of the concept of the Crown can also be seen from judicial acceptance that members of the Commonwealth executive are not immune from suit, due to s 75(iii) of the Constitution.[27]

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[18] Sovereign immunity inspired by statism still exists in American law. See George Pugh, 'Historical approach to the doctrine of sovereign immunity' (1953) 13 *Louisiana Law Review* 476, 478; Erwin Chemerinsky, 'Against sovereign immunity' (2001) 53 *Stanford Law Review* 1201, 1201-1203.
[19] *Western Australia v Watson* [1990] WAR 248, 270 (Malcolm CJ, Brinsden and Seaman JJ).
[20] Anne Twomey, *The Chameleon Crown: The Queen and her Australian Governors* (Federation Press, 2006) 272.
[21] *Sue v Hill* (1999) 199 CLR 462, 525-526 (Gaudron J).
[22] Cheryl Saunders, 'The concept of the Crown' (2015) 38 *Melbourne University Law Review* 873, 887-888.
[23] *Sue v Hill* (1999) 199 CLR 462, 497-503 (Gleeson CJ, Gummow and Hayne JJ).
[24] Cheryl Saunders, 'The concept of the Crown' (n 22) 887.
[25] *Sue v Hill* (1999) 199 CLR 462, 501-502 (Gleeson CJ, Gummow and Hayne JJ).
[26] *Commonwealth v Western Australia* (1999) 196 CLR 392, 431 (Gummow J) ('Mining Act Case').
[27] *Commonwealth v Mewett* (1997) 191 CLR 471, 546-547 (Gummow and Kirby JJ); Sebastian Davis, 'The legal personality of the Commonwealth of Australia' (2019) 47(1) *Federal Law Review* 3, 11.

Saunders writes that 'Australia has by no means replaced the concept of the Crown in its application to executive government with a developed theory of the state, although it has begun to move down that path'.[28] Popular sovereignty may be a step in this direction. The Supreme Court of Ireland in *Byrne v Ireland* provides a lesson on how one might incorporate popular sovereignty rather than relying on a statist basis for the Crown. In that case, Walsh J held that the sovereign people created a state-like entity called the Irish Free State and that the contention 'the Crown personified the State' was inconsistent with the *Constitution of Ireland 1937* which declared that the powers of government and all authority derive from the people of Ireland.[29]

If the Crown is to be used, then, it effectively refers most of the time to agents in the executive branch who act on behalf of an abstract government personality . At the federal level, this is generally in the context of prerogative powers implicit in s 61, which are exercisable without initial parliamentary authority but are subject to override.[30] With respect to the state executive, the scope of the Crown remains unclear and awaits further elaboration by the courts.[31]

B. The current position

The Privy Council case of *Province of Bombay v Bombay Municipal Corp* is precedent for the view that there has been a rebuttable presumption that the Crown is not bound unless specifically named in an Act or where it is 'manifest from the very terms of the statute, that it was the intention of the legislature that the Crown should be bound'.[32] This presumption of interpretation was weakened in the *Engineers Case* and has been comparatively weaker ever since.[33]

The *Engineers Case* rests on two main planks. First, Knox CJ, Isaacs, Rich and Starke JJ said that the Crown is one and indivisible because the Commonwealth is an entity pursuant to a 'common' imperial sovereignty.[34] Second, s 51 of the *Constitution Act* read alongside s 109 and covering cl 5 was alleged to buttress the superior status of the federal government to bind the states.[35] The judges place the burden on those seeking to restrain federal power, noting that 'it

[28] Saunders, 'The concept of the Crown' (n 22) 895.
[29] *Byrne v Ireland* [1972] 1 IR 241, 262-281 (Walsh J).
[30] *Victoria v Commonwealth* (1975) 134 CLR 338, 404-405 (Jacobs J); *Davis v Commonwealth* (1988) 166 CLR 79, 109-111 (Brennan J).
[31] Saunders, 'The concept of the Crown' (n 22) 896.
[32] *Province of Bombay v Bombay Municipal Corp* [1947] AC 58, 61.
[33] *Engineers Case* (1920) 28 CLR 129, 153; William Partlett, 'Engineers' problematic comparative legacy' (2020) 31 *Public Law Review* 22, 24-26.
[34] *Engineers Case* (1920) 28 CLR 129, 146 (Knox CJ, Isaacs, Rich and Starke JJ).
[35] Ibid 151, 154-55.

rests upon those who rely on some limitation or restriction upon the power, to indicate it in the Constitution' and that 'sec. 107 contains nothing which…exempts the Crown in right of a State'. Higgins J contends that 'it is evident…from the form of the placita in sec. 51 of the Federal Constitution, that the Federal Parliament was to have power to bind the State Crown except so far as the power to bind it is expressly negatived, as in pl. xiii and pl. xiv'.[36]

The first *Engineers* plank of a unified imperial Crown is no longer accepted. Stokes confirms that 'the *Engineers' Case* notwithstanding, the High Court has still based reasoning on the assumption that there are separate Commonwealth and State Crowns.'.[37] Since the *Statute of Westminster 1931* (UK) – which Shore describes as codifying divisibility because previously semi-independent dominions became independent – 'the number of Crowns in Australia is…a matter of some dispute'.[38] Twomey's analysis of federalism since the *Australia Act 1986* (UK) concludes that there are 'at least nine Crowns in Australia in the sense of bodies politic'.[39] Despite what Stokes labels the 'dogmatic statement' in the *Engineers Case*, there has been a string of cases endorsing shared sovereignty and a Crown in right of each state.[40]

The second plank of the *Engineers Case* is in a 'state of flux'[41] and appears to vary as the dominant ideology of the time changes. As Twomey has written when considering the issue:

> To what extent can the laws of one polity bind the executive of another, or abrogate or abolish its prerogatives? The High Court, over the last century, has had a very difficult time in answering these questions. Fundamental though they be to our governmental system, there has never been a clear and consistent principle established to provide ready answers to them. After the centenary of federation, one would think we would understand how the polities within that federation are intended to interact, but we do not.[42]

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[36] *Engineers Case* (1920) 28 CLR 129, 166 (Higgins J).
[37] Michael Stokes, 'Are there separate state Crowns?' (1998) 20 *Sydney Law Review* 127, 130.
[38] Cris Shore, 'Introduction' in *The Shapeshifting Crown: Locating the State in Postcolonial New Zealand, Australia, Canada and the UK* (Cambridge University Press, 2019) 8.
[39] Anne Twomey, 'Responsible Government and the Divisibility of the Crown' (Research Paper No 8/137, Faculty of Law, University of Sydney, November 2008) 7.
[40] Michael Stokes, 'Are there separate state Crowns?' (1998) 20 *Sydney Law Review* 127; *New South Wales v Commonwealth* (1931) 46 CLR 155, 220-1 (Evatt J); *Broken Hill South Ltd v Commissioner of Taxation* (NSW) (1937) 56 CLR 337, 378 (Evatt J); *Commonwealth v Bogle* (1952–3) 89 CLR 229, 259–60; *Re Residential Tenancies Tribunal (NSW)*; *Ex parte Defence Housing Authority* (1997) 190 CLR 410, 451 (McHugh J); *John Pfeiffer Pty Ltd v Rogerson* (2000) 203 CLR 503 (Gleeson CJ, Gaudron, McHugh, Gummow and Hayne JJ); *Austin v Commonwealth* (2003) 215 CLR 185 (McHugh J).
[41] Greg Taylor, 'Commonwealth v Western Australia and the Operation in Federal Systems of the Presumption that Statutes do not Apply to the Crown' (2000) 24 *Melbourne University Law Review* 77, 122.
[42] Anne Twomey, 'Federal limitations on the legislative power of the States and the Commonwealth to bind one another' (2003) 31 *Federal Law Review* 507, 507.

In *Bropho v WA* ('Bropho'), six judges of the High Court affirm the rebuttable presumption that statutes do not bind the Crown, but then broaden the test to allow for flexibility.[43] On their assessment, if the provisions of a statute – including its subject matter, disclosed purpose and policy when construed in a context that includes permissible extrinsic aids – reveal an intent to bind the Crown, then it is so bound.[44] French J in *State Government Insurance v Government Insurance Office* sums up the approach: '[t]he common law presumption that statutes are intended not to bind the Crown remains in force, but as a more flexible guide to construction which may be displaced without the stringent requirements that previously existed'.[45]

Because of the expansive nationalism propounded in the *Work Choices Case*, rebutting the presumption is likely to be very easy. Five judges in *Work Choices* declare a 'federation of *national character* exercising *the most ample power*'[46] while interpreting the corporations power in s 51(xx) of the Constitution. Although this decision did not comment on the issue of binding a state Crown, the interpretive takeaway is that the plenary reach of nationalism in s 51 will be given significant leeway, with any inkling of reserved powers looked upon with disapproval.[47]

A saving grace for WA is that federal decrees do not bind a state Crown where the constitutional text clearly excludes such a relationship. For example, s 51(xiii) of the Constitution quarantines 'State banking' from the reach of the Commonwealth parliament.[48] In addition, Twomey confirms that federal implications derived from the *Melbourne Corporation Case* and others like it, continue to provide a limited degree of protection to states from federal encroachment.[49]

In summary, it is unlikely that representatives of the WA Crown can deny it is bound by valid Commonwealth legislation. Where there is a law characterised as being within Commonwealth power, it is usually accepted that it binds the Crown in right of a state except where a placitum

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[43] *Bropho v WA* (1990) 171 CLR 1, 14-15 (Mason CJ, Deane, Dawson, Toohey, Gaudron and McHugh JJ).
[44] Ibid 21-22.
[45] *State Government Insurance Corp v Government Insurance Office of NSW* (1991) 28 FCR 511, 557.
[46] *Work Choices Case* (2006) 229 CLR 1, 19. Emphasis added.
[47] *Work Choices Case* (2006) 229 CLR 1, 117-118; Nicholas Aroney, 'Constitutional choices in the *Work Choices Case*, or what *exactly* is wrong with the reserved powers doctrine?' (2008) 32 *Melbourne University Law Review* 1, 5. Cf. the dissent of Callinan J at *Work Choices Case* (2006) 229 CLR 1, 214 and the dissent in *Engineers Case* (1920) 28 CLR 129, 174 where Gavan Duffy J argues that s 51 'does not determine the persons who may be bound by the legislation which it authorizes'.
[48] *Pape v Commissioner of Taxation* (2009) 238 CLR 1, 117-19 (Hayne and Kiefel JJ).
[49] Twomey, 'Federal limitations on the legislative power of the States and the Commonwealth to bind one another' (n 42) 508-509.

expressly or by necessarily implication excludes it.[50] The proper method of interpreting ss 51 and 52 is that decentralisation is given less weight and the Commonwealth government is assumed to be 'necessarily stronger than that of the states', subject to any textual limitations or federal implications that judges happen to emphasise.[51] To this extent, secession is difficult. The Commonwealth parliament has been given so much deference by the High Court that it seems almost natural to say that the legislature has a power to regulate the states and prevent them from seceding. And unlike in Canada where provincial powers are enumerated, WA's powers are not listed in the Constitution but are put in unspecific terms like 'peace, order and good government' at s 2 of the WA Constitution, with the consequence that state rights are easier to overlook.

IV. A POWER TO REGULATE SECESSION?

Having established that WA is bound by acts of the Commonwealth, it is worth examining whether regulating secession does in fact fall under the umbrella of federal power. Nothing directly pertinent to secession by an Australian state appears in the Constitution.[52] Therefore, the answer to the question whether there is a federal power to regulate secession must *prima facie* be in the negative. This is consistent with the UK Joint Committee's reasons set out at Chapter 4.

Because of an absence of obviously conclusive provisions, this section focuses on implications plus indirect inconsistencies that may be argued to impede free exercise of federal power. Implications can derive from the 'text and structure' of the Constitution and must be 'necessary'.[53] A 'necessary implication means, not natural necessity, but so strong a probability of intention, that an intention contrary to that, which is imputed…cannot be supposed'.[54] A head of Commonwealth power could give rise to an inconsistency with unilateral secession if the indissolubility of the union is a necessary accompaniment to its exercise. This is a matter of construction: can the power be exercised despite a shifting composition of the states?

A. What is 'this Constitution'?

[50] *Austin v Cth* (2003) 215 CLR 185, 278 (McHugh J): 'the *Engineers Case* did not preclude the drawing of constitutional implications concerning the power of the States and the Commonwealth to bind each other'.
[51] *Melbourne Corporation v Commonwealth* (1947) 74 CLR 31, 82-83 (Dixon J).
[52] See Chapter 1 where it was established that secession is an ambiguous question.
[53] *Lange v Australian Broadcasting Corporation* (1997) 189 CLR 520, 567 (Brennan CJ, Dawson, Toohey, Gaudron, McHugh, Gummow and Kirby JJ); Jeremy Kirk, 'Constitutional Implications (I): nature, legitimacy, classification, examples' (2000) 24 *Melbourne University Law Review* 645, 647.
[54] *Wilkinson v Adam* (1813) 35 ER 163, 180; approved in *James v South Australia* (1927) 40 CLR 1, 24.

Section 51 says that the powers of the Commonwealth parliament are subject to 'this Constitution'. Understanding what 'this Constitution' encompasses is thus vital for a secession dispute because debate has arisen as to whether the Preamble and the Covering Clauses 1 to 8 are part of 'this Constitution'. Either the Preamble and Covering Clauses 'do not form part of the Constitution' because 'they merely introduce it'[55] or alternatively are an integral part of the document that have become absorbed within the framework of the Constitution.[56]

Chapter 5 considered this question and ascertained that the Preamble and Covering Clauses are part of the Constitution and can be relied upon for establishing constitutionality. As Winterton says, it is too pedantic to interpret the Preamble and Covering Clauses as being immune from the Australian people.[57] This is especially true if popular sovereignty has replaced imperial sovereignty as the basic norm, with the result that the earlier restrictiveness seems inapplicable.

So, what does this mean for unilateral secession by WA? It confirms that the definition of 'State' at Covering Cl 6 leaves open the possibility of secession because that clause presupposes the feasibility of departure from the Commonwealth at a future time. Such an understanding can be incorporated into the meaning of a 'State' throughout s 51 to dispose of constraints on secession in the placita which mention the entities known as 'States'. In other words, there is no inconsistency with secession for the 13 heads of power that reference the 'State/s'.

B. Commonwealth power over secession

To the extent that 26 heads of power located in s 51 are written in general language that does not mention the 'State/s', counterarguments can be made positing that the free exercise of these Commonwealth powers necessitates that WA is precluded from seceding. Furthermore, s 52 does not mention the 'State/s' either. Similarly, the executive power in s 61 must be considered.

The proposition that Commonwealth powers in ss 51, 52 and 61 extend to secession or are inconsistent with secession can be framed on the basis that a separation by a state contradicts a

[55] Anthony Mason, 'Constitutional issues relating to the republic as they affect the states' (1998) 21 *UNSW Law Journal* 750, 753.
[56] As argued by Richard Lumb, 'Fundamental law and the processes of constitutional change in Australia' (1978) 9 *Federal Law Review* 148, 160; Richard Lumb, 'The bicentenary of Australian constitutionalism: the evolution of rules of constitutional change' (1988) 15 *The University of Queensland Law Journal* 3, 29.
[57] George Winterton, *Monarchy to Republic: Australian Republican Government* (Oxford University Press, 1986) 124-27.

right arising out of the character of the Commonwealth government to have an ongoing political relationship with the states (as reflected in the characterisation of the placita).

1. Power expressly conferred

The Commonwealth parliament generally only has legislative power in relation to the subject matter expressly specified in the Constitution. It is not feasible for this chapter to examine all the 26 heads of power and additionally s 52. Hence, four examples that may potentially grant a power to the Commonwealth to regulate or otherwise interfere with secession are evaluated in this part, with the arguments made being transferable to other sections. First, section 51(vi) pertaining to defence. Second, section 51(vii) which allows the Commonwealth parliament to make laws with respect to 'lighthouses, lightships, beacons and buoys'. Third, the power over corporations in s 51(xx). And finally, 51(xxvii) which says simply 'immigration and emigration'.

The connection to secession cannot be 'so insubstantial, tenuous or distant' that it cannot be described as a law 'with respect to' the power.[58] A head of power does extend to matters ancillary or incidental to it.[59] The practical operation of the laws must also be examined.[60]

Section 51(vi) covering 'the naval and military defence of the Commonwealth and of the several States, and the control of the forces to execute and maintain the laws of the Commonwealth' is the most likely candidate for a parliament seeking to claim that it has a right to permit or stop secession. Although s 51(vi) does mention 'State/s' and thus comes under the previously stated exclusion inspired by covering cl 6, the grant is uniquely suited to suppressing secession because it is a flexible one that expands and contracts depending on whether there is a state of emergency.[61] By analogy to the reasoning of President Lincoln during the American Civil War, a secession by WA – even if supported by the WA parliament and its electorate – can be treated as a rebellion threatening the existence of Commonwealth institutions and that of the other states.[62] A situation along these lines aligns well with Lincoln's view that action against a state is

[58] *Re Dingjan; Ex parte Wagner* (1995) 183 CLR 323, 368-369 (McHugh J).
[59] *Wragg v New South Wales* (1953) 88 CLR 353, 386 (Dixon CJ).
[60] Stephanie Brenker, 'An Executive Grab for Power During COVID-19?', *AUSPUBLAW* (13 May 2020) <https://auspublaw.org/2020/05/an-executive-grab-for-power-during-covid-19>
[61] Kate Chetty, 'A history of the defence power: its uniqueness, elasticity and use in limiting rights' (2016) 16 *Macquarie Law Journal* 17, 17-18.
[62] James Ostrowski, 'Was the Union army's invasion of the Confederate States a lawful act? An analysis of President Lincoln's legal arguments against secession' in David Gordon (ed), *Secession, State and Liberty* (Transaction Publishers, 1998) 189.

required to prevent the commission of treason. It can be claimed that secession interferes with the federal government's capacity to execute and maintain the laws of the Commonwealth.

The argument is not compelling. First, the defence power would not apply to a secession that is entirely peaceful. After the passage of a secession resolution by the WA parliament, it is not a given that the state will turn to violence. Consequently, the Commonwealth parliament will find it impossible to establish the factual precondition for an expansion of the defence power into the domain traditionally presided over by the states, unless there is an offensive violent threat to counter. Second, the text of the Constitution indicates that the states operate in a relationship of reciprocity and consent rather than coercion with the federal government when it comes to rebellions. Section 119 titled '[p]rotection of States from invasion and violence' clearly says that the Commonwealth shall protect every state against domestic violence 'only on the application of the Executive Government of the State'. Due to the comity recognised in s 119 of the Constitution, it is unlikely that s 51(vi) supports a federal power to regulate secession by a state.

It is convenient to deal with the remaining case studies at once. All three contradict secession to varying degrees when read with the High Court's jurisprudence in mind.[63] Section 51(vii) allows the Commonwealth parliament to make laws with respect to 'lighthouses, lightships, beacons and buoys'. A wide interpretation leaves open the possibility that there is an interference with the ability of WA to exercise its autonomy to regulate lighthouses, lightships, beacons and buoys. Similarly, s 51(xx) has been interpreted so broadly in the *Work Choices Case* that it severely curtails a state's autonomy over industrial relations and to this extent creates an ongoing relationship to the Commonwealth. Following the principles of construction in the *Engineers Case*, 51(xxvii) almost certainly stops a state from controlling immigration and emigration policies in a manner that contradicts federal law. Without an autonomous power over international borders, WA lacks one of the crucial ingredients of an independent country.

Even then, an inconsistency of the kind mentioned is subject to the mechanism in s 109. Section 109 says that '[w]hen a law of a *State* is inconsistent with a law of the Commonwealth, the latter shall prevail, and the former shall, to the extent of the inconsistency, be invalid'. The key to s 109 is the word 'State'. There is no inconsistency for those states that choose to leave as allowed for by covering cl 6 which defines the states as only members of the federal union 'for the time

[63] Using sufficiently generous assumptions, any express power in ss 51 or 52 can, with the assistance of the *Engineers Case* and the *Work Choice Case*, be found to include a power to regulate secession. For example, the power over corporations in s 51(xx) can be taken to permit interference in the personal affairs of every director of a corporation right down to regulating the colour of the underwear that they must wear to work each day.

being'. Consequently, by drawing on other parts of the *Constitution Act* for a complete picture, the inconsistency with Commonwealth power can be resolved in the manner detailed at Chapter 5. The same reasoning applies for other express powers that evince an apparent inconsistency.

The constitutional context provides other inferential evidence in favour of secession. First, s 51(xxxvii) allows any state to refer matters to the parliament in Canberra. No power to secede has ever being referred by WA to the Commonwealth. What the existence of a referral power does imply is that the states were intended to be distinct entities holding certain authorities that are untouchable by the federal parliament. This ironically strengthens a shared sovereignty interpretation based upon consensual relations, since a matter transferred under s 51(xxxvii) only applies to that particular state. Second, the expropriation power in s 51(xxxi) reveals that the Commonwealth parliament cannot expropriate property except on 'just terms', importing a requirement of quid pro quo appropriate to federation.[64] At the Constitutional Convention in 1898, Isaacs was careful to draw a line between eminent domain and a state's jurisdiction.[65]

In summary, there is no obvious Commonwealth power dealing with secession. The closest is perhaps s 51(vi) pertaining to defence, but that is inapplicable due to s 119 which requires consent by a state. Even if a head of Commonwealth power is inconsistent with a state secession resolution, a Commonwealth law can only override state law in the manner explained at s 109. Yet s 109 itself provides a loophole for a secessionist WA since it refers to a 'State'. There is consequently no reasonable expectation of a continuing relationship with an original state.

2. Prerogative power

Another category of Commonwealth power is its prerogative executive power sourced from historical exercise by the Crown or acknowledgement at common law. These executive prerogatives cannot be expanded and so relying on them to ground a power over secession depends on locating an existing category that is suited to Commonwealth affairs.[66]

It is not obvious that regulating secession by WA – or what is in effect, a common law power to dictate to the government of a state – was a pre-Federation custom of the Commonwealth executive. The Commonwealth did not even exist prior to federation. And after its formation in 1901, the Queen's prerogatives did not automatically transfer exclusively to the Commonwealth

[64] See *Commonwealth v New South Wales* (1906) 3 CLR 807; *Spencer v Commonwealth* (1907) 5 CLR 418.
[65] *Official Record of the Debates of the Australasian Federal Convention*, Melbourne, 25 January 1898, 153.
[66] *British Broadcasting Corporation v Johns* [1965] Ch 32 at 79.

government since, in line with Chapters 3 and 4, a better interpretation is that these prerogatives were divided between the federal and state governments who share sovereignty. What happened between 1901 to 1986 while political independence was progressed is that Commonwealth ministers advised the British Crown on federal affairs, while state ministers advised on state affairs. There was therefore no sense in which prerogatives derived from the United Kingdom transferred exclusively to federal institutions as if it were a new unitary sovereign.

The only realistic possibility is perhaps the prerogative of self-protection whereby the Commonwealth government is authorised to act in times of national emergency to protect itself and protect the Australian people.[67] This option is suggested by Twomey, who comments that there is no need for a separate nationhood power (see discussion below) when the common law prerogative already provides an avenue for self-preservation.[68] As she describes it:

> [T]he prerogative extends to the protection by the Commonwealth of itself and its functions. In relation to external threats, such powers find their source in the defence and external affairs powers and the prerogative powers relating to them. In relation to domestic threats, such an executive power also finds support in the reference in s 61 to the maintenance of the *Constitution* and the laws of the Commonwealth. The prerogative power would appear to include the power to maintain the Queen's peace and ensure public safety when war is imminent or when other emergencies occur that may put public safety at risk, such as '[r]iot, pestilence and conflagration'.[69]

However, there is doubt as to how far self-protection authorises non-consensual intervention into an Australian state's affairs (as would be required during a secession). Moore retorts that:

> Twomey…argues that there is a prerogative power of self-protection relying upon *Burmah Oil Co Ltd v Lord Advocate* [1965] AC 75…and so there is no need for a nationhood power source of authority. She does not cite a pinpoint reference in the case, however, and it is difficult to see how it could be authority for a federal government to intervene in a State to protect its own functions. If there can have been no new prerogatives since 1689, when there was no contemplation of a federal Commonwealth of Australia, it is difficult to see how prerogative power could authorise Commonwealth intervention in a State to protect Commonwealth or State functions. For this

[67] *Burmah Oil Co Ltd v Lord Advocate* [1965] AC 75 at 136.
[68] Anne Twomey, 'Pushing the boundaries of executive power – *Pape*, the prerogative and nationhood powers' (2010) 34 *Melbourne University Law Review* 313, 325-326.
[69] Ibid 336.

> reason it is, arguably, preferable to refer to the text of s 61 itself, a nationhood power approach, for the source of authority.[70]

We know that prerogatives are liable to be extinguished by legislation that is inconsistent with the power. Section 119 of the Constitution says that the Commonwealth cannot intervene in cases of domestic violence without permission from the state. That means that if an elected government of WA were to secede peacefully albeit with the promise of *defensive* violence to protect its rights, then it is implausible that the prerogative can trump s 119. This inference is even more compelling if the state has, prior to seceding, carried out a free and fair referendum that demonstrates public support for departure. The position would be different if WA engaged in *offensive* violence, since that would no doubt directly harm Commonwealth institutions.

Defensive secession does not interfere with Commonwealth power because it leaves the federal government and other states intact apart from financial impacts like losing property and revenue streams within the seceding state. It is unlikely that self-preservation is enlivened purely based on indirect financial impacts when there is no fundamental attack on a government's institutions (although see the discussion of this point in greater detail at Chapter 8 where the *Garnishee Cases* are examined). According to the High Court in *Baxter*, the Constitution is an agreement 'made between the people of the several self-governing Australian Colonies, and also between the people of those Colonies collectively and the United Kingdom'.[71] Per Griffith CJ, the rule that 'in construing a contract regard must be had to the facts and circumstances existing at the date of the contract, are applicable in especial degree to the construction of… a Constitution'.[72] What is important is that 'the Constitution as framed was to be, and was, submitted to the votes of the electors of the States'. These statements recognise the people's place within state polities and make it improbable that the Commonwealth has prerogative over what is a local concern.[73]

3. Nationhood power

The nationhood power is another authority held by the Commonwealth – primarily by its executive.[74] One stream of nationhood grants power to suppress internal rebellions while a

[70] Cameron Moore, *Crown and Sword: Executive Power and the Use of Force by the Australian Defence Force* (Australian National University Press, 2017) 76.
[71] *Baxter v Commissioners of Taxation* (NSW) (1907) 4 CLR 1087, 1104-1105.
[72] *The Federated Amalgamated Government Railway and Tramway Service Association v The New South Wales Railway Traffic Employees Association* (1906) 4 CLR 488, 534.
[73] Ibid 534.
[74] *Work Choices* (2006) 229 CLR 1, 33; *Pape v Commissioner of Taxation* (2009) 238 CLR 1, 84 (Gummow, Crennan and Bell JJ).

second is a facultative measure to progress the arts and sciences. The former can be traced to *R v Sharkey*, where Dixon J says that the Commonwealth parliament has the power to protect the country against internal insurrections in addition to defence against external threats: this was said to arise 'out of the very nature and existence of the Commonwealth as a political institution'.[75] The second stream arose in the *AAP Case*, where Barwick CJ proposes that ss 51 and 52 are not exhaustive because authority is also derived 'from the very foundation of the Commonwealth as a polity and its emergence as an international state'.[76] Likewise, in *Davis v Commonwealth*, Mason CJ, Deane and Gaudron JJ defend the proposition that the legislature has capacities that extend beyond those enumerated and 'include such powers as may be deduced from the establishment and nature of the Commonwealth as a polity'.[77]

Another way to conceive of the nationhood power is by linking it to s 51(xxxix) which grants the right to make laws covering any 'matters incidental to the execution of any power vested by this Constitution'. This was the preferred aproach of Wilson and Dawson JJ (endorsed by Toohey J[78]) in *Davis*.[79] Although nationhood is usually incidental to ss 51(vi) or 61, in theory there is nothing stopping it from being an incident to other provisions listing Commonwealth power.

It is the coercive aspect to do with suppressing internal rebellions that is troublesome from the perspective of WA secession. Suppose that WA unilaterally secedes and its action is then challenged in the High Court by the other states or by the Commonwealth. If the Court rules against the constitutionality of secession, is such a ruling enforceable by the Commonwealth against WA using the nationhood power? Or would secession become permissible by default due to a lack of Commonwealth authority to coerce a state back into the union?

Stephenson breaks down the test for nationhood into two limbs: 1) 'peculiarly adapted to the government of a nation'; and 2) that 'which cannot be otherwise carried on for the benefit of the nation'.[80] With respect to the first, she writes that the courts have considered three factors: whether an activity is substantively connected with Australia's national identity, the complexity of the activity and the extent to which it requires national coordination and whether there is a

[75] *R v Sharkey* (1949) 79 CLR 121, 148 (Dixon J). See also *Burns v Ransley* (1949) 79 CLR 101, 110 (Latham CJ) and *Australian Communist Party v Commonwealth* (1951) 83 CLR 1, 187-188 ('Communist Party Case').
[76] *Victoria v Commonwealth* (1975) 134 CLR 338, 362 ('AAP Case).
[77] *Davis v The Commonwealth* (1988) 166 CLR 79, 93 (Mason CJ, Deane and Gaudron JJ).
[78] Ibid 117 (Toohey J).
[79] Ibid 104 (Wilson and Dawson JJ).
[80] Peta Stephenson, 'Nationhood and section 61 of the Constitution' (2018) 43 *University of Western Australia Law Review* 149, 175-180.

national emergency. When it comes to the second, courts have looked at whether the exercise of power by the Commonwealth would entail competition with the executive competence of the states, the availability of other constitutional mechanisms and state consent.

In terms of the first limb, in my view regulating secession is not connected to national identity and does not require national coordination since it involves a single state. WA secession is connected primarily to the business of that state because it dissolves the benefits that WA's residents obtain from remaining in a federal union. Indeed, secession is uniquely within the capacity of a state given that it entails activities which involve a change in the relationship of state institutions toward outsiders. And it has few major adverse impacts on the integrity of any other state or the Commonwealth. It is true that the Commonwealth loses the benefit of tax revenue obtained from residents of the departing state. Nevertheless, a peaceful secession is not a national emergency despite secondary economic impacts. Any secondary economic impacts can be partly alleviated with compensation payments that leave the federal government and other states whole.[81] In this regard, Chapter 8 notes that the financial provisions of the Constitution require a state to make payments to fulfil obligations under financial agreements.

In the alternative, even if one accepts for the sake of argument that secession is a national crisis, it is not clear that the federal executive's leadership role is a necessary one as opposed to being merely convenient. Secession can plausibly be resolved without national coordination.

As for the second limb, there is a basic contradiction in saying that the nationhood power supports coercively stopping WA's secession. The problem is that upholding such a power contradicts the autonomy of that state and ignores the emphasis in the case law on obtaining consent.[82] More fundamentally, how can an enterprise be for the benefit of a nation if it wages war against – and destroys – a part of the same? There are also alternative mechanisms, like tied grants under s 96, that could be used to incentivise a state to remain in the union. As such, regulating secession is not something that must necessarily be carried out via coercive means even if one were to accept that it can be characterised as being for the benefit of the nation.

[81] France, for example, extorted Haiti to pay for its freedom. See Marlene Daut, 'When France extorted Haiti – the greatest heist in history', *The Conversation* (30 June 2020) <https://theconversation.com/when-france-extorted-haiti-the-greatest-heist-in-history-137949>

[82] *AAP Case* (1975) 134 CLR 338, 358 (Barwick CJ); *R v Duncan; Ex Parte Australian Iron and Steel Pty Ltd* (1983) 158 CLR 535, 560 (Mason J).

Smith observes that '[t]he question of whether, and to what extent, a nationhood power could support coercive measures — such as measures that compel individuals or entities to do, or refrain from doing, particular things or the creation of criminal offences —with or without statutory authority remains contested'.[83] The preferable reading is that nationhood does not extend to coercing a state due to federal implications discussed later in this chapter.

Stephenson explains that '[i]t is a longstanding principle that a prerogative of the Crown may be abrogated, curtailed or displaced by a statute that directly regulates the same subject matter'.[84] But there is 'a strong presumption against displacement of prerogative powers that are important to national sovereignty and the functioning of the executive government'.[85] Since I have found that there is no prerogative or nationhood power to regulate secession, it is unnecessary to consider if it has been displaced. If I am wrong and such a power exists, then it seems unlikely that it has been displaced since the Constitution does not create a regime regulating secession.

C. Constraints on Commonwealth power

So far it has been found that there is no Commonwealth power to regulate secession, either arising from its express authority, the prerogative or from nationhood. This part suggests that, in the alternative, all the powers in ss 51 and 52 are additionally constrained in at least three possible ways. First, power must be used 'for…the Commonwealth'. Second, power is 'subject to this Constitution'. Third, the powers in ss 51 and 52 must be exercised for 'peace, order and good government'. This section investigates these issues to ascertain the impact on a state seeking to secede. To the extent that the text-based implications below are accepted – and there is no guarantee that they will be, given the shifts in curial thinking about federalism that occur from time to time – the following implications supplement the arguments raised so far.

1. '[O]f the Commonwealth'

Sections 51 and 52 note that the 'Parliament shall…have' power to make laws for the government 'of the Commonwealth'. Can the phrase 'of the Commonwealth' be interpreted as a

[83] Shreeya Smith, 'The Scope of a Nationhood Power to Respond to COVID-19: Unanswered Questions' *AUSPUBLAW* (13 May 2020) <https://auspublaw.org/2020/05/the-scope-of-a-nationhood-power-to-respond-to-covid-19>

[84] Peta Stephenson, 'The relationship between the royal prerogative and statute in Australia' (2021) 44 *Melbourne University Law Review* 1, 1.

[85] Ibid.

constraint limiting the degree to which federal action under an express head of power or using the prerogative/nationhood power can interfere with a unilateral secession attempt?

In its narrowest sense, 'the Commonwealth' may address the Commonwealth as a *government*, while in its broadest sense the phrase might be directed to the Commonwealth as a *polity*. Either way, there is nothing to suggest that the connotation of 'the Commonwealth' remains fixed for eternity. Or to put it differently, there is no indication that the Commonwealth parliament can only make laws for 'the Commonwealth' as constituted in the year 1901 when federation commenced. To the contrary, the passage of time is undefined, thus leaving open the possibility that there is room for fluctuations in the political composition of 'the Commonwealth'.

The legislature's laws must be 'for the peace, order and good government *of* the Commonwealth'. Prime facie this suggests, first, a territorial restriction and, second, a substantive check whereby laws must be characterised as having a nexus to the nation rather than discriminating for or against certain parts. For something to be '*of* the Commonwealth' imports a requirement of generality whereby federal laws treat all states equally. This interpretation can be asserted on the basis that the word 'Commonwealth' is used as a metaphor for a community of people. Along these lines, a federal law regulating secession may be invalid because it is aimed at controlling a specific state and is therefore discriminatory rather than for the nation as a whole.[86] Indeed, an anti-discrimination paradigm has been raised in the case law based on implications from federalism without reliance on the words 'of the Commonwealth' (see below). These considerations impose a constraint on the way in which ss 51 and 52 are interpreted.

2. '[S]ubject to this Constitution'

The Commonwealth parliament's laws are 'subject to this Constitution' which as a necessarily implication means that they must be consistent with what properly constituted Chapter III courts have said that the Constitution means. And what these courts have said is, in fact, a constraint limiting the ability of the Commonwealth parliament to interfere with unilateral secession.

[86] Interestingly, the Northern Territory intervention by the Australian federal government in 2007, which many complained was discriminatory in the way that it targeted Indigenous people, was enacted using the territories power in s 122 of the Commonwealth Constitution. Arguments were made that the government's policies could not have been rolled out in a state because of limits to Commonwealth power. See Matthew Stubbs, 'The acquisition of indigenous property on just terms: Wurridjal v Commonwealth' (2011) 33 *Sydney Law Review* 119, 130-131.

Quite apart from the textual emphasis given above to 'of the Commonwealth', the High Court has put in place an anti-discrimination paradigm that protects states from federal laws that are calculated to destroy or harm the state's capacity to function. These precedents have been referred to in previous chapters as being associated with the *Melbourne Corporation Case*.[87]

Save for a contrary provision or from the nature, subject matter or terms in which it is conferred, 'every grant of legislative power to the Commonwealth should be interpreted as authorising the Parliament to make laws affecting the operation of the States and their agencies'.[88] But if a state is acting in the exercise of its Crown prerogative, or if the Commonwealth Parliament enacts laws which 'discriminate against the States or their agencies' or if the Commonwealth power exercised relates to taxation, then the Commonwealth parliament has exceeded its authority to bind the states in these situations.[89] Discrimination singles out and treating one state differently than others.[90] Dixon J adds that it requires 'a particular disability or burden upon an operation or activity of a State, and more especially upon the execution of its constitutional powers'.[91] Commonwealth laws may be set aside by the courts if they exert control over a state in a manner different from the laws that affects governments and individuals alike.[92]

The rule against laws imposing a discriminatory burden has been criticised as being a misapprehension of the *Engineers Case*. Nonetheless, it has been repeated in several cases and is described by Zines as being "the least controversial of 'exceptions'".[93] A rationalisation for such an exception to the plenary power of the Commonwealth is that a state government is not to be treated as a mere subject because the Constitution is predicated on the existence of the states 'as independent units'.[94] It thus remains one of the few reliable protections for state rights.

Can there exist such a thing as constitutionally permissible discrimination? The answer is yes. First, 'where the differential treatment and unequal outcome is…the product of a distinction

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[87] See, eg, *Commonwealth v Cigmatic* (1962) 108 CLR 372, 377 ('Cigmatic'). Dixon J's reasoning that a state cannot alter or impair the prerogative rights of the federal executive is a partial revival of the intergovernmental immunities doctrine.

[88] *Australian Railways Union v Railways Commissioners (Vic)* (1930) 44 CLR 319, 390 (Dixon J).

[89] *Australian Railways Union v Railways Commissioners (Vic)* (1930) 44 CLR 319, 390; *Essendon Corporation v Criterion Theatres Limited* (1947) 74 CLR 1.

[90] *Austin v Commonwealth* (2003) 215 CLR 185, 247-48 (Gaudron, Gummow and Hayne JJ).

[91] *Melbourne Corporation Case* (1947) 74 CLR 31, 79 (Dixon J).

[92] *Melbourne Corporation Case* (1947) 74 CLR 31, 82 (Dixon J); *Kruger v Commonwealth* (1997) 190 CLR 1, 64 (Dawson J); *Bank of New South Wales v Commonwealth* (1948) 76 CLR 1, 337 (Dixon J).

[93] *West v Commissioner of Taxation (NSW)* (1936-1937) 56 CLR 657, 682-683; *Re Australian Education Union* (1995) 184 CLR 188; *Austin v Commonwealth* (2003) 215 CLR 185, 281-282; Leslie Zines, 'Sir Owen Dixon's Theory of Federalism' (1965) 1 *Federal Law Review* 221, 231.

[94] *Queensland Electricity Commission v The Commonwealth* (1985) 159 CLR 192, 260 (Dawson J).

which is appropriate and adapted to the attainment of a proper objective',[95] discriminatory burdens might be allowed. Another avenue was raised by Williams J, who writes that '[d]iscrimination against a State, where it can be seen to be justified, is not a ground for invalidating a Commonwealth law'.[96] Even in these situations it needs to be shown that there is a good reason for targeting a state; for instance, because it is the main player in a market.[97]

Another factor that indicates Commonwealth legislation has an inappropriate aim is if it impacts upon a state's ability to exercise its functions. Such a burden can even come about from a law of general application.[98] The consequences of a federal act can be investigated, although these consequences should not be the only consideration.[99] Ultimately, it needs to be ascertained whether the impairment created is only 'speculative and uncertain' or whether the 'particular disability' is sufficient to affect a state's freedom to discharge its constitutional functions.[100]

Having provided an overview of the relevant tests, how do these federalism concerns interact with WA secession? It seems evident that any action by the Commonwealth parliament that attempts to stop unilateral secession often entails the 'unequal treatment of equals'[101] in that it singles out WA and specifically legislates about it. Even with a general law applicable to all, its reach can without much imagination impose a special burden on that state's functions.

American constitutional history is instructive for what it reveals about how a government is likely to go about suppressing state secession and how this could violate Australian constitutional norms. Most of the militarism during the American Civil War was undertaken by the executive branch of the federal government as part of the President's war-making authority using Article II of the *US Constitution*. Congressional action was also endorsed by the United States Supreme Court in *Texas v White* due to the clause guaranteeing 'to every State in this Union a Republican Form of Government'.[102] Alhough the seceding American states were duly

[95] *Austin v Commonwealth* (2003) 215 CLR 185, 247 (Gaudron, Gummow and Hayne JJ).
[96] *Victoria v Commonwealth* (1957) 99 CLR 575, 638 ('Second Uniform Tax Case').
[97] Leslie Zines, 'Sir Owen Dixon's Theory of Federalism' (1965) 1 *Federal Law Review* 221, 232.
[98] See, eg, *Payroll Tax Case* (1971) 122 CLR 353, 375 (Barwick CJ): 'the discriminating nature of a legislative provision will not itself be definitive of invalidity'. In the *Melbourne Corporation Case* (1947) 74 CLR 31, 66, the law in question was directed at private banks, however the Court unanimously held that it burdened the state government. Rich J says that a 'provision of general application' can nonetheless impermissibly impede a state.
[99] See, eg, *Bayside City Council v Telstra Corporation* (2004) 216 CLR 595, 626 (Gleeson CJ, Gummow, Kirby, Hayne and Heydon JJ) which asserts that the test is 'whether the federal law in question, looking to its substance and operation, in a significant manner curtails or interferes with the capacity of the States to function as governments'; *Bank of NSW v the Commonwealth* (1948) 76 CLR 1, 336 ('Bank Nationalisation Case').
[100] *Austin v Commonwealth* (2003) 215 CLR 185, 262; *Bank Nationalisation Case* (1948) 76 CLR 1, 337.
[101] *Austin v Commonwealth* (2003) 215 CLR 185, 247 (Gaudron, Gummow and Hayne JJ).
[102] *Texas v White* 74 US 700, 727 (1869).

elected, they were treated for the purposes of law as common subjects rather than as sovereigns. In this manner, the Supreme Court justified the US government's intervention to protect rebellious voters from themselves by restoring their membership to the union. For 12 years after the conflict, the former secessionist states were run as protectorates of the federal government.[103]

Whatever the position in the US, it is likely that that in Australia express words are needed to authorise war-making against Western Australia. Sections 51 and 52 do not reveal such a power. The executive prerogative to make war derived from s 61 is not an alternative because this runs against s 119 which makes consent of a state a requirement for suppressing domestic violence (granted, there is room for debate since one can claim that s 119 does not apply to secession and so does not extinguish the prerogative). And finally, nationhood is not a basis for such action.

To the contrary, indirect support for consensual relations is found in Commonwealth powers which use the word 'consent' and make agreement of a state a requirement: see for example ss 51(xxxiii), (xxxiv) and (xxxviii) of the Commonwealth Constitution. In total, 'consent' is used 10 times in the Constitution. Of note are ss 123 and 124 relating to alteration and creation of new states, wherein a state's territorial integrity is shown respect. Other constitutional provisions reference consent indirectly. Section 26 refers to the voluntary nature of the Constitution when it says '[p]rovided that *if* Western Australia is an Original State' and s 95 uses similar wording. The 'if' implies that situations where WA is not part of the union were contemplated.

Wherever coercion has been accepted, the High Court usually directs the use of force against individuals and not against states.[104] Dixon J in *R v Sharkey* notes that the Commonwealth can use 'all the force at its disposal… to protect itself' in circumstances where disorder inside a state interferes with the 'carriage of federal mails, or with interstate commerce, or with the right of an elector to record his vote at federal elections'.[105] Nonetheless, he cautions that '[t]he power to legislate with respect to incidental matters…cannot authorize legislation upon matters which are prime facie within the province of the States upon grounds of a connection with Federal affairs that is only tenuous, vague, fanciful or remote'.[106] In *Ruddock v Vadarlis* ('Tampa'), a coercive power against non-Australian citizens was held to be part of s 61 but the domain of the states

[103] James Ostrowski, 'Was the Union Army's invasion of the Confederate States a lawful act? An analysis of President Lincoln's legal arguments against secession' in David Gordon (ed), *Secession, State and Liberty* (Transaction Publishers, 1998) 155; *Virginia v West Virginia*, 78 US 39.
[104] See, eg, *Ruddock v Vadarlis* (2001) 110 FCR 491, 543 ('Tampa Case').
[105] *R v Sharkey* (1949) 79 CLR 121, 151 (Dixon J).
[106] Ibid 151 (Dixon J).

was protected.[107] Section 61 includes the 'execution and maintenance of the Constitution and the laws of the Commonwealth' but '[i]t is…limited by those terms insofar as it will not authorise the Commonwealth to act inconsistently with the distribution of powers and the limits on power for which the Constitution provides'.[108] The joint judgement in *Davis* says that s 61 'confers on the Commonwealth all the prerogative powers of the Crown except those that are necessarily exercisable by the States under the allocation of responsibilities made by the Constitution'.[109]

Sharkey, Tampa and *Davis* expose the inadequacy of the argument of the US Supreme Court in *Texas v White* that a duly elected state government pursuing secession should be treated as a common subject engaged in rebellion. The WA government is not a common subject due to its privileged constitutional status and secession cannot be treated in the same fashion as civil disobedience by individuals. It might be true that when the residents of WA authorise their state to secede, they do so as a component of the same political community that comprises the Commonwealth parliament which does not want them to secede. Yet the legislature of WA is not a common subject since it has a distinct legal personality guaranteed by ss 106 and 107.

The above federalism considerations limit the Commonwealth's legislative power. There is grounds to think that Stephenson is correct when she contends that 'the weight of authority suggests that the nationhood power has not supported the Commonwealth Government engaging in coercive activities that would have been denied to it at common law' and further that 'the nationhood power has not undermined the federal distribution of powers' because the 'peculiarly adapted' test incorporates federalism concerns.[110] With respect to the common law prerogative, even if it is found to include war-making against a state, the manner of its exercise should arguably be required to be consistent with the anti-discrimination paradigm outlined here.

3. '[P]eace, order and good government'

The final constraint on the Commonwealth considered in this chapter are the words 'peace, order and good government' which are found in ss 51 and 52. Judges have countenanced the notion that 'peace, order and good government' can give rise to territorial restrictions.[111] And Killey speculates whether other limits can be discovered. 'There would seem to be no reason why,'

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[107] *Tampa Case* (2001) 110 FCR 491, 543 (French J).
[108] Ibid 538 (French J).
[109] *Davis v The Commonwealth* (1988) 166 CLR 79, 93 (Mason CJ, Deane and Gaudron JJ).
[110] Peta Stephenson, 'Nationhood and section 61 of the Constitution' (2018) 43 *University of Western Australia Law Review* 149, 153.
[111] *NSW v Commonwealth* (1975) 135 CLR 337, 498 ('Seas and Submerged Lands Case').

observes Killey, 'if the courts have been prepared to give the words an operation in relation to extra-territorial competence…[a] general limiting operation… should not be accepted'.[112] Killey's opinion, however, is not the mainstream view and so should be treated with caution.

Chapter 4 of this thesis explained that there are three schools with respect to 'peace, order and good government' (POGG). The dominant line of thinking at present is found in the High Court decision of *Union Steamship v King* where it is affirmed that the POGG formula is a broad and plenary grant of authority not to be construed as a limitation.[113] Kirby P in the *BLF Case* writes that '[t]he appeal to… a principle higher than parliamentary sovereignty is certainly out of line with the mainstream of current constitutional theory as applied in our courts' and goes on to say that the words peace, welfare and good government have "hitherto been seen as an ample grant of power 'in all cases whatsoever'".[114] For a law to be for the 'peace, order and good government' of the Commonwealth is consequently an easy test to satisfy, since it is the legislature that should take responsibility for determining the facts and policy that inform what is for peace, order and good governance. As Kirby P points out while criticising natural law, it is dangerous to intervene in a field where 'there is no logical limit to their ambit'.[115]

By inference from the *BLF Case*, the main protection against a law that expressly and unambiguously puts in place a policy of coercing Western Australians or the people of other secessionist states may be 'a political and democratic one'.[116] If the Commonwealth parliament chooses to resort to such a course of action, the Constitution offers only limited relief. Mahoney JA agrees that 'it is the prerogative of the Parliament' to determine the propriety of legislative interference with human liberty, with electoral consequences being the rightful means of accountability. Hence it seems that many, if not most, Australian judges prefer that 'peace, order and good government' is not given an operative meaning but is instead treated as a formality, surplusage or verbiage.[117] A barrier preventing the adoption of contrary analysis is the lack of an

[112] Ian Killey, "Peace, Order and Good Government': A Limitation on Legislative Competence" (1989) 17 *Melbourne University Law Review* 24, 25.
[113] *Union Steamship v King* (1988) 166 CLR 1, 10 (Mason CJ, Wilson, Brennan, Deane, Dawson, Toohey, Gaudron JJ).
[114] *BLF v Minister for Industrial Relations* (1986) 7 NSWLR 372, 405 (Kirby P).
[115] Ibid 405 (Kirby P).
[116] *BLF v Minister for Industrial Relations* (1986) 7 NSWLR 372, 406 (Kirby P).
[117] See, eg, *Sillery v R* (1981) 180 CLR 353 where Murphy J says '[g]enerally these words are ignored as formal'. See also Ian Killey, "Peace, Order and Good Government': A Limitation on Legislative Competence" (1989) 17 *Melbourne University Law Review* 24, 25 who warns against treating POGG as 'surplusage'.

objective test or standard pertaining to the formula: judges are reluctant to give content to the phrase due to the complexity involved and to avoid openly intruding into politics.[118]

Still, there is one possibility for WA to pursue. In the *War Crimes Act Case*, Dawson J approved of *Union Steamship* but left open the possibility that 'quite extraordinary circumstances' might lead a court to revisit the rule.[119] The circumstances that might cause such a revision of thinking were left unstated. Toohey J struck a similar tone, raising the issue of '[w]hether a court may declare a statute to be invalid because it is unjust' but not answering this on the basis that it was unnecessary.[120] Quite apart from the foregoing, the 'federal character'[121] of the Constitution qualifies Commonwealth law-making. In *Newcrest Mining v Commonwealth*, Brennan CJ describes the formula as comprising 'the powers of the Commonwealth to make laws for the peace, order and good government of the Commonwealth *pursuant to the federal compact*'.[122]

Extraordinary circumstances could be satisfied if the people of WA prove that a Commonwealth law is unjust.[123] For example, in *Sillery*, Murphy J opines that 'peace, order and good government' rules out cruel and unusual punishment.[124] There are many forms which a Commonwealth law can take to overwhelm WA and these may evince a 'manifestly arbitrary and unjust'[125] course of action. Indeed, a desire to secede often arises because a state believes the federal government has not been making laws promoting peace, order and good government.[126]

What might an unjust or discriminatory law look like? Once again, to illustrate it is useful to examine laws of the US Congress between 1861 and 1868 aimed at restraining the southern confederacy comprised of 11 former American states. The following are two laws of Congress that directly targeted the secessionist Confederate States of America, in whole or in part:

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[118] See, eg, *BLF v Minister for Industrial Relations* (1986) 7 NSWLR 372, 405 (Kirby P).
[119] *Polyukhovich v The Commonwealth* (1991) 172 CLR 501, 636 ('War Crimes Act Case').
[120] *War Crimes Act Case* (1991) 172 CLR 501, 687 (Toohey J).
[121] Michael Crommelin, 'The Federal Principle' in Cheryl Saunders and Adrienne Stone (ed), *The Oxford Handbook of the Constitution* (Oxford University Press, 2018). It was said in *Capital Duplicators Pty Ltd v Australian Capital Territory* (1992) 177 CLR 248, 274 that the Constitution is 'designed to fulfil the objectives of the federal compact'.
[122] *Newcrest Mining v Commonwealth* (1997) 190 CLR 513, 544 (emphasis added).
[123] *Engineers Case* (1920) 28 CLR 129, 174 (Gavan Duffy J); *Trustees Executors and Agency Co v Federal Commissioner of Taxation* (1933) 49 CLR 220, 234 (Evatt J).
[124] *Sillery v R* (1981) 180 CLR 353, 362 (Murphy J).
[125] *BLF v Minister for Industrial Relations* (1986) 7 NSWLR 372, 406 (Kirby P). In *R v Secretary of State for Foreign and Commonwealth Affairs, ex parte Bancoult (No 1)* [2000] EWHC Admin 413, the Court ruled that a power for the peace, order and good governance of a territory does not authorise an ordinance to remove a territory's inhabitants from their homeland (note that this decision was overturned on appeal and is no longer good law).
[126] See generally Parliament of Western Australia, *The Case of the People of Western Australia in support of their desire to withdraw from the Commonwealth of Australia* (Report, 1934).

- *Confiscation Act of 1861*: this legislation authorised the seizure of slaves – then recognised as property by the fugitive slave clause in Article IV of the *US Constitution* – that were employed 'against the Government and lawful authority of the United States…any law of the State… to the contrary notwithstanding'
- *Military Reconstruction Acts of 1867 and 1868*: this legislation addressed requirements for readmission[127] of a state to the Union. A state had to draft a new constitution and ratify the Fourteenth Amendment to the US Constitution. It created military districts commanded by a general to serve as acting government of the erstwhile states.

Would the *Confiscation Act*'s seizure of state government property – ignoring for analytical purposes that slaves are no longer considered property – be a valid exercise of Commonwealth power in Australia? Using one of the avenues of Commonwealth power discussed above is likely to violate the anti-discrimination paradigm and lead to unjust consequences. Incidentally, it may also violate s 114 of the Constitution which prohibits the Commonwealth from taxing state property.[128] Expropriation of state property can be argued to be a tax of 100 percent since it devours the property. However, a better view is that such legislation is invalid because it has a constitutionally improper purpose and burdens the exercise of local constitutional functions.

Large sections of the *Military Reconstruction Acts* would probably also be unconstitutional in Australia. At various times, the High Court has declared unlawful Commonwealth action that forces a state government to deposit with a particular bank, regulates the working conditions of senior state government employees or places a surcharge on state judicial pensions.[129] If such comparatively minor burdens upon a state's constitutional functions are unacceptable, then placing an entire polity under military administration run by the Commonwealth government – thereby pausing representative and responsible government in that state for a period of time – is likely to be impermissible. Although it might be proposed that such a drastic course of action is authorised by some express power elsewhere in the Constitution, such a law is better characterised as a law aimed at controlling and targeting a state rather being pursuant to any head of power. As such, it falls foul of the judicial tendency to repudiate discriminatory legislation.

[127] Readmission assumes that a state had seceded in the first place. Ironically, this was a scenario objected to by President Lincoln, who preferred to deny that the Confederacy had seceded because this allowed it to be characterised as a rebellious insurrection attempting to take over the US government, bringing into play Article I, section 8 of the US Constitution which authorises Congress to 'suppress Insurrections and repel Invasions'.
[128] As McHugh notes in *Austin v Commonwealth* (2003) 215 CLR 185, 276: '[a] federal system of government involves a distribution of legislative power between a central and regional governments with the result that no government has the same legislative authority as a government in a unitary system of government'.
[129] *Melbourne Corporation Case* (1947) 74 CLR 31; *Re Australian Education Union* (1995) 184 CLR 188; *Austin v Commonwealth* (2003) 215 CLR 185.

In summary, peace, order and good government are not words of limitation and so Commonwealth action can pass legal muster even if it does not promote peace, order or good government. Yet there is space to contend that in extreme circumstances a law that is manifestly unjust and targets a state violates 'body politic'[130] interests. Certainly, by one account, decentralised federalism 'inheres in the very substance of our parliamentary democracy'.[131] A secessionist Western Australia could make policy submissions claiming that any action by the federal parliament or executive (in reliance on federal law) to block secession interferes with the 'peace' of the polity, given that it sets up an existential contest between the centre and a region.[132] Due to the ensuing conflict, a law suppressing secession can be said to encourage chaos as opposed to 'order'.[133] Additionally, WA could cite a body of economic literature which finds that permitting secession is more compatible with 'good government' than prohibiting it.[134]

V. CONCLUSION

Does the Commonwealth government have a power to restrain unilateral secession? Is the free exercise of federal power hindered if WA secedes from the federation? This chapter explored these questions and determined that although a state's Crown is generally bound by valid applications of Commonwealth power, no express Commonwealth authority gives rise to an inconsistency with WA secession. Section 109, which provides that federal law prevails over an inconsistency with state law in areas of concurrent power, is irrelevant since the Commonwealth does not have power with respect to secession in the first place. This is not to deny that there are no interpretations that convey such authority, however, these would not be founded on declaration from the text. In the alternative, if a power is found, then s 109 provides an escape valve because a 'State' is 'for the time being' according to cl 6 of the *Constitution Act*.

Despite the American precedent of *Texas v White* which has endorsed federal coercion of a state including imposition of military rule, in Australia judges hesitate to apply remedies that ignore

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[130] *BLF v Minister for Industrial Relations* (1986) 7 NSWLR 372, 382 (Street CJ).
[131] Ibid 382 (Street CJ).
[132] Ludwig von Mises, *Liberalism: In the Classical Tradition* (Cobden Press, 2002) 108.
[133] Robert Young, 'How do peaceful secessions happen?' (1994) 27 *Canadian Journal of Political Science* 773, 776 finds that 'contested secessions are far more numerous than peaceful ones'.
[134] James Buchanan and Roger Faith, 'Secession and the Limits of Taxation: Toward a Theory of Internal Exit' (1987) 77 *American Economic Review* 1023; Christopher Wellman, 'A Defense of Secession and Political Self-Determination' (1995) 24 *Philosophy & Public Affairs* 142, 171; Hans-Hermann Hoppe, 'The economic and political rationale for European secessionism' in David Gordon (ed), *Secession, State and Liberty* (Transaction Publishers, 1998); Kevin Vallier, 'Exit, Voice and Public Reason' (2018) 112 *American Political Science Review* 1120, 1122.

federal implications. The placita cannot be read as extending to burdening or controlling an Australian state due to factors identified in cases like *Austin v Commonwealth*. The idea of quashing a rebellion by a state is contradictory since it presupposes that state legislatures are equivalent to terrorists, when in fact their members are representatives of the seceding territorial area. Deane and Toohey JJ characterise the Constitution as a "free agreement of 'the people'…of the federating Colonies in the Commonwealth".[135] Consistent with earlier chapters, a better interpretation is that each constitutionally recognised government is entitled to adopt its vision of what is right, with a quid pro quo – of the kind alluded to by the Canadian Supreme Court in *Reference Re Quebec*[136] – being the proper way to resolve irreconcilable conflicts of laws.

[135] *Leeth v Commonwealth* (1992) 174 CLR 486 (Deane and Toohey JJ) ('Leeth').
[136] *Reference Re Secession of Quebec* [1998] 2 SCR 217.

CHAPTER 7: CONSISTENCY WITH JUDICIAL POWER

> *[A] Court of justice has no jurisdiction against a sovereign power which does not subject itself, or is not subjected by Statute, to its jurisdiction.*
>
> Griffith CJ[1]

I. INTRODUCTION

Previous chapters have evaluated inherent state autonomy and the Commonwealth government's powers for consistency with unilateral secession. This chapter examines the relationship between secession and the judicial power in Chapter III of the Commonwealth Constitution.

Unilateral secession entails a state government acting without permission to depart from a federal union based on its own interpretation of the law. As such, if the thrust of earlier chapters is accepted, then it requires no curial intervention at all since it is a solo remedy. Nonetheless, for the sake of added legitimacy beyond a favourable referendum of the people of Western Australia, it may be desirable for WA to put forward a defence in the High Court of Australia to show how its actions are consistent with the prevailing legal system. The Supreme Court of Canada writes that '[i]n our constitutional tradition, legality and legitimacy are linked'.[2]

Alternatively, even if WA chooses to go it alone, other parties to federation may not let it. Due to the dramatic change instigated by a secession resolution, the state will probably be criticised by private parties seeking to clarify commercial arrangements that depended on the status quo.[3] The resolution will likely also be attacked by the Commonwealth government or by other Australian states who will seek a judicial order to restrain or reverse the purported secession.

Hence, because of the latter scenario where secession is challenged via the court system, there is a need to consider the compatibility of secession with the High Court's judicial power. The South Carolina *Declaration of Secession* proclaimed on December 24, 1860 (absent South Carolina's defence of slavery) is a model for what a secession resolution looks like. Such legislation could announce in no uncertain terms that that the union subsisting between WA and the other states, under the name of the Commonwealth of Australia, is hereby dissolved. The

[1] *Commonwealth v Baume* (1905) 2 CLR 405, 413 (Griffith CJ).
[2] *Reference Re Secession of Quebec* [1998] 2 SCR 217.
[3] See, eg, *Texas v White*, 74 US 700 (1869) where bonds were at issue.

precise circumstances cannot be known in advance, but for the purposes of this chapter it is assumed that it is the Commonwealth that will file suit seeking to restrain secession.

There are limits to what the High Court can do – and is willing to do – if a dispute over the constitutionality of a secession resolution is brought before it. Institutional constraints mean that it must consider standing and justiciability.[4] While the Court can adopt any substantive position it wants, it may be influenced by the Canadian Supreme Court in *Reference Re Secession of Quebec* which acknowledged that in a constitutional context some things are best left to political rather than judicial sanction.[5] Much depends on 'the difficult interrelationship between substantive obligations flowing from the Constitution and questions of judicial competence and restraint in supervising or enforcing those obligations'.[6] When looked at by the apex courts of the United States and Canada, jurisdiction to decide on secession by a state or province has been found to exist.[7] But the question has not been explored directly in the Australian courts. Judges in *Mabo (No 2)* and *Coe* said that the Court cannot adjudicate the sovereignty that gives rise to its own power, so if the source of sovereignty is now the people of a state, then the Court could decline to interfere in popular will and leave secession to the political realm.[8]

With these considerations in mind, this chapter centres upon ss 71 to 80 of the Constitution and their relationship to secession. Underlying this chapter is an awareness that the Court was established to settle disputes between states and between states and the federal government.[9] After setting out the constitutional provisions and issues, the core of this chapter begins with Part III which evaluates whether the Court can consider secession a constitutional 'matter' falling with its jurisdiction. Part IV examines the compatibility of secession in relation to the exercise of

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[4] Jeremy Kirk, 'Justiciability' in Cheryl Saunders and Adrienne Stone (eds), *The Oxford Handbook of the Australian Constitution* (Oxford University Press, 2018); Peter Hanks and Olaf Ciolek, 'Techniques of Adjudication' in Cheryl Saunders and Adrienne Stone (eds), *The Oxford Handbook of the Australian Constitution* (Oxford University Press, 2018).

[5] *Reference Re Secession of Quebec* [1998] 2 SCR 217.

[6] Ibid. McHugh has explained that 'non-justiciability does not mean an absence of public law consequence. Rather, it means the courts will not be the sole or primary agent of that consequence in the claims-settlement arena': P McHugh, 'Treaty principles: constitutional relations inside a conservative jurisprudence' (2008) 39(1) *Victoria University of Wellington Law Review* 39, 67.

[7] *Texas v White*, 74 US 700 (1869); *Virginia v. West Virginia*, 78 U.S. (11 Wall.) 39 (1871); *Reference Re Secession of Quebec* [1998] 2 SCR 217.

[8] *Coe v Commonwealth* (1979) 24 ALR 118; *Mabo v Queensland (No 2)* (1992) 175 CLR 1; *Coe v Commonwealth (No 2)* (1993) 214 CLR 422; Shireen Morris, *A First Nations Voice in the Australian Constitution* (Hart Publishing, 2020) 17.

[9] The role of a constitutionally appointed court in a federal democracy is given treatment in Brian Galligan, 'Judicial review in the Australian federal system: its origin and function' (1979) 10 *Federal Law Review* 367, 367-397 and Matthew Brogdon, 'Political jurisprudence and the role of the Supreme Court: framing the judicial power in the federal convention of 1787' (2017) 6 *American Political Thought* 171, 171-200.

'judicial power'. What is the role of the Court? Does secession contradict the idea of having an arbiter of constitutional disputes entrenched by s 71 of the Constitution? Can a secessionist WA accept the authority of mechanisms provided for in Chapter III but argue that there is no inconsistency between secession and the existence of a body authorised to decide on matters within the Commonwealth? In the event that the Commonwealth is successful in being granted a judicial order quashing secession, part IV discusses remedies and whether the Court will grant an injunction restraining secession. This latter part complements the analysis in Chapter 6.

II. THE MEANING OF JUDICIAL POWER

The High Court is an organ of federal governance: according to s 71 of the Constitution, it exercises the judicial power 'of the Commonwealth'. That section also says:

> The judicial power of the Commonwealth shall be vested in a Federal Supreme Court, to be called the High Court of Australia, and in such other federal courts as the Parliament creates, and in such other courts as it invests with federal jurisdiction. The High Court shall consist of a Chief Justice, and so many other Justices, not less than two, as the Parliament prescribes.[10]

Confirmation of the High Court's federal status comes from s 72, which provides the mechanism for appointment of judges to the bench by the federal executive and for the salaries of these judges to be drawn by appropriations of the Commonwealth parliament.

Section 75 sets out the High Court's original jurisdiction. It is a provision provides authority over 'all matters… arising under any treaty', 'affecting consuls or other representatives of other countries', 'in which the Commonwealth, or a person suing or being sued on behalf of the Commonwealth, is a party', 'between States, or between residents of different States, or between a State and a resident of another State' or matters 'in which a writ of Mandamus or prohibition or an injunction is sought against an officer of the Commonwealth'.[11] Section 76 permits the Commonwealth parliament to confer additional original jurisdiction upon the High Court. Relying on this power, s 30 of the *Judiciary Act 1903* (Cth) authorises jurisdiction over any matter 'arising under this Constitution or involving its interpretation'.

[10] *Commonwealth of Australia Constitution Act 1900* (UK) ('Constitution') s 71.
[11] *Constitution* s 75.

According to s 73, the Court's appellate jurisdiction is subject to the whim of the Commonwealth parliament. Therefore, the appellate powers the Court exercises are in part a delegation from its employer which is the parliament of the Commonwealth of Australia.

The cumulative effect is to make the High Court the judicial arm of the federal government. Even so, the Court occupies a unique position in that its original jurisdiction, the tenure and salaries of its judges are guaranteed and cannot be taken away except through a referendum of the people using s 128. So, it has some independence that keeps its employer at arm's length.

What about the Court's judicial power? In *Brandy v HR Commission* ('Brandy'), it is conceded by Deane, Dawson, Gaudron and McHugh JJ that the 'judicial power' in s 71 is not precise:

> Difficulty arises in attempting to formulate a comprehensive definition of judicial power not so much because it consists of a number of factors as because the combination is not always the same. It is hard to point to any essential or constant characteristic. Moreover, there are functions which, when performed by a court, constitute the exercise of judicial power but, when performed by some other body, do not…One is tempted to say that, in the end, judicial power is the power exercised by courts and can only be defined by reference to what courts do and the way in which they do it, rather than by recourse to any other classifications of functions.[12]

Nevertheless, certain features have been influential. First, the concept of judicial power involves 'binding and authoritative decision' settling for the future controversies between subjects or involving 'the Crown'.[13] Second, judicial power determines existing rights and obligations and 'it does so by the application of a pre-existing standard rather than by formulation of policy or the exercise of an administrative discretion'.[14] Third, judicial decisions are enforceable.[15] When a court exercises judicial power, its act includes the authority to order a decision to be carried into effect with the assistance of the executive. Due to this enforcement aspect, the remedies that are awarded play a part in distinguishing between judicial versus non-judicial power.

In constitutional cases, the High Court has indicated that it is the final court of appeal for Australia and that it is unlikely to approve appeals to the UK Privy Council using s 74 of the

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[12] *Brandy v Human Rights and Equal Opportunity Commission* (1995) 183 CLR 245, 267 (Deane, Dawson, Gaudron and McHugh JJ).

[13] Ibid 268 (Deane, Dawson, Gaudron and McHugh JJ). Whether there are multiple Crowns is not explored in *Brandy*. As pointed out in Chapter 4, the concept of multiple Crowns is far more supportive of secession than a single Crown because the latter implies a unitary state, whereas the former suggests a federal/confederal union.

[14] Ibid 268.

[15] Ibid 268.

Constitution.[16] From this, another characteristic accompanying judicial power could be inferred: a monopoly on constitutional interpretation and the circumstances in which the document can be interpreted. For example, *Kable v DPP* ('Kable') illustrates that when a state court is invested with Chapter III jurisdiction, it must act in accordance with federal expectations with respect to the independence of state judges from other branches and the exercise of non-judicial power.[17]

III. THE EXTENT OF FEDERAL JURISDICTION

Jurisdiction refers to the official power to make legal decisions or judgements.[18] A court's authority over the participants in litigation depends upon factors like the kind of case and the geographic location of the plaintiff and defendant. The substance of jurisdiction is drawn from the general framework of law within a legal system, including constitutional law.

In Australia, the High Court's jurisdiction has not been considered in the context of secession. From other situations where jurisdiction has been raised however, addressing the issue can be seen to encompass the constitutional concept of a 'matter' (linked to standing) and justiciability. In *Re McBain; Ex Parte Australian Catholic Bishops Conference*, Hayne J observes that '[q]uestions of standing, for example, are not arid technical questions but are to be understood as rooted in fundamental conceptions about judicial power just as much as are questions of what is meant by a matter'.[19] All these are intertwined with each other in shaping judicial power.

A. The constitutional concept of a 'matter'

For secession by a state to be a proper issue for adjudication, it must fall within the scope of a matter as conceived of by legal sources, that is, it should entail 'some immediate right, duty or liability to be established by the determination of the Court'.[20] Anton writes that "a 'matter', as used in Chapter III of the Constitution, consists of the subject of the controversy that is amenable

[16] *Constitution* s 74 permits appeals from the High Court to the Privy Council on 'inter se' matters (that is, disputes pertaining to the powers of the Commonwealth and those of any state). This continues to operate in spite of the legislative termination of appeals in other kinds of matters. The High Court has only granted such leave once, in *Colonial Sugar Refining Co v A-G (Cth)* (1912) 15 CLR 182. Since that time, it is accepted that the High Court is unlikely to ever allow an appeal. See Tony Blackshield, Michael Coper and John Goldring, 'Privy Council' in *The Oxford Companion to the High Court of Australia* (Oxford University Press, 2001).
[17] *Kable v Direction of Public Prosecutions (NSW)* (1996) 189 CLR 51, 98 (Toohey J).
[18] Jurisdiction is an 'authority to decide' per *R v Bolton* (1841) 1 QB 66 (Lord Denman CJ).
[19] *Re McBain; Ex Parte Australian Catholic Bishops Conference* (2002) 209 CLR 372 ('Re McBain').
[20] *In re Judiciary and Navigation Acts* (1921) 29 CLR 257, 265 (Knox CJ, Gavan Duffy, Powers, Rich and Starke JJ).

to judicial determination".[21] Even if secession falls under original jurisdiction, there must also be a proper party/plaintiff before the High Court can exercise jurisdiction. Such an investigation is tied to the remedy – whether a constitutional writ in s 75(v) or an equitable declaration or injunction is sought – because desired orders can influence the tests used. In what follows, I explore these topics to ascertain whether a challenge to secession can be heard by the Court.

1. Original jurisdiction

A preliminary doubt is whether secession falls within the High Court's original jurisdiction. Secession is at first glance a matter within the scope of s 75 because if the Commonwealth government were to file suit against Western Australia, it would probably try to join other states of the federation that are opposed to secession in the proceedings. To use the wording of s 75(iv), this would then be a dispute 'between States' and per s 75(iii) a dispute where 'the Commonwealth…is a party'. An interpretation along these lines finds support from DF Jackson's observation that 'a significant part of the High Court's work in its original jurisdiction is in hearing and determining constitutional questions, often in proceedings for a declaration of invalidity' and because the court is often willing to take up novel or significant inquiries.[22] Prima facie, therefore, it appears that there is no barrier to the Court hearing a secession dispute.

Another way to bring secession within the Court's original jurisdiction is to use s 30 of the *Judiciary Act* relating to 'matters arising under the Constitution or involving its interpretation'. Whether WA can secede depends in part on interpreting the rights and obligations contained in the Constitution and this is certainly within the scope of s 30. It is preferable to rely primarily upon the constitutional conferral of jurisdiction at s 75 however, since the *Judiciary Act* is a Commonwealth statute and the authority granted therein can be amended by the federal parliament to remove the capacity of the Court to hear a challenge to secession. Whereas even if the parliament were to amend the *Judiciary Act* to try to force secession to be resolved politically, it cannot strip the Court of its jurisdiction at s 75 of the Constitution.[23]

[21] Donald Anton, "Truth, justice and the Australian way about 'open standing': *Truth about Motorways Pty Ltd v Macquarie Infrastructure Investment Management Ltd*" (2008) *SSRN Electronic Journal*.
[22] DF Jackson, 'The Australian judicial system: judicial power of the Commonwealth' (2001) 24 *UNSW Law Journal* 737, 740. Novel and significant examples are in Daniel Reynolds and Lyndon Goddard, *Leading Cases in Australian Law: A Guide to the 200 Most Frequently Cited Judgements* (Federation Press, 2016).
[23] Robert Size, 'Can Parliament deprive the High Court of jurisdiction with respect to matters arising under the Constitution or involving its interpretation?' (2020) 41(1) *Adelaide Law Review* 87, 90.

While the High Court has ostensible authority to consider a secession dispute, things are not so simple because there is room to posit ambiguity surrounding WA's status after it legislates a break from the Commonwealth. There is a question of jurisdictional fact, that is, 'a condition of jurisdiction'[24], a 'preliminary question on the answer to which...jurisdiction depends'[25] or the 'criterion, satisfaction of which enlivens the power of the decision-maker'.[26] On behalf of the WA people, it could be submitted that the polity must cross the threshold of being a 'State' or being 'part of the Commonwealth' for the federal supremacy mentioned at covering cl. 5 to apply to it. If this initial threshold of jurisdictional fact were not required, then logically the Court could bind foreign countries too.[27] Moreover, s 71 only grants judicial power 'of the Commonwealth', which implies that if WA ceases its membership of said Commonwealth, then the Court may not be able to preside over proceedings involving a former state.

There are lawful ways in which WA might leave the Commonwealth and place itself outside the Court's jurisdiction. In Chapter 4, I proposed that the Western Australian legislature has exclusive power over secession. In Chapter 5, analysis of a 'State' at covering cl. 6 of the Constitution relied on the wording of that clause to argue that membership of the union is only 'for the time being', with the implication that WA can cease its participation in the future. So, if findings earlier in this dissertation are accepted, then WA can remove itself from jurisdiction.

In *Texas v White,* it was submitted by the defendants that Texas – which had seceded during the American Civil War but was in the process of being brought back by military force – at the relevant time was not a 'State' and so the Supreme Court of the United States did not have jurisdiction over it. It was common ground that if the defendant's argument was established then the Supreme Court would have to dismiss the suit.[28] A majority ruled however, that Texas remained for constitutional purposes a state within the union throughout the war and at the time of decision, the prior withdrawal and ongoing military occupation notwithstanding.[29] The submission about lack of jurisdiction was rejected by Chase CJ and Nelson, Clifford, Davis and Field JJ who held that Texas joined an indissoluble relation that it was unable to revoke except by successful revolution or consent of the other states. It followed from this that the state's actions purporting to ratify secession, such as the *Ordinance of Secession* that was approved via

[24] *R v Connell* (1944) 69 CLR 407, 429-30 (Latham CJ).
[25] *R v Federal Court of Australia; Ex parte Pilkington ACI (Operations) Pty Ltd* (1978) 142 CLR 113, 125.
[26] *Corporation of the City of Enfield v Development Assessment Commission* (2000) 199 CLR 135, 148.
[27] *Inkerman Station Pty Ltd as Trustee for the Inkerman Station Trust v Allan (No 2)* [2017] QSC 243. For other case law about jurisdictional fact see Roger Douglas, *Administrative Law* (Federation Press, 2009) 446-449.
[28] *Texas v White,* 74 US 700, 719 (1869).
[29] Ibid 730-32.

referendum on February 23, 1861, were null and void. Any acts of the legislature intended to aid rebellion were ineffectual despite the reality of the state having departed with popular consent. In law, the state had never left and so the Supreme Court had power over it.

How did the majority in *Texas v White* reconcile their opinion with the reality that for several years during the war Texas was disloyal to the federal government? They did so by distinguishing between permanent obligations under the US Constitution and temporary relations. Irrespective of the fact that Texas for a time violated constitutional law by seceding, its obligation of allegiance to the union remained unhampered throughout the conflict.[30]

To support their view that a state cannot rethink its membership, the majority in *Texas v White* point to 'the responsibilities and duties of the original States under the Constitution'.[31] Legalising secession would abrogate these responsibilities and duties by permitting a state to throw off its obligations 'at pleasure'.[32] Factors deemed unfavourable to secession included the prior history of the *Articles of Confederation and Perpetual Union* which were discarded 'to form a more perfect Union' under the *US Constitution*; the fact of a 'common constitution' which 'forms the distinct and greater political unit' known as the 'United States'; the fact of prohibitions upon the states, such as with respect to making treaties; the fact of provisions regulating a state's representation in the US Congress; and the majority's belief that the *US Constitution* entrenches shared sovereignty – 'an indestructible Union, composed of indestructible States' – albeit of a kind that is 'more than a [voluntary] compact; it was the incorporation of a new member into the political body [of the United States]'.[33]

The dissent of Grier J in *Texas v White* – with which Swayne and Miller JJ concurred – adopts a legal realist approach that removes the Supreme Court from a position where it has to overrule the secessionist impulse of millions of voters in Texas. When evaluating whether Texas is a 'State' for the purposes of enlivening the Supreme Court's jurisdiction, Grier J declares that:

> This is to be decided as a political fact, not as a legal fiction. This court is bound to know and notice the public history of the nation. If I regard the truth of history for the last eight years, I cannot discover the State of Texas as one of these United States…It is a question of fact, I repeat, and of fact only. Politically, Texas is not a State in this Union. Whether rightfully out of it or not

[30] Ibid 729.
[31] Ibid 722.
[32] Ibid 722.
[33] Ibid 726.

> is a question not before the court…[t]he United States are no party to this suit…The contest now is between the State of Texas and her own citizens.[34]

Grier J goes on to cite the definition of a 'State' provided by Marshall CJ in *Hepburn & Dundass v Ellxey* ('Hepburn').[35] In *Hepburn,* Marshall CJ places emphasis on states being only those distinct political societies that are 'members of the American Confederacy'.[36] Applying this membership-based characterisation of a 'State', Grier notes that the status of Texas at the relevant time is akin to an Indian tribe rather than a state as contemplated by the *US Constitution* because Texas was not represented in the Congress and was under martial law. Furthermore, the US Congress in its reconstruction legislation declared Texas a 'rebel state' thus indirectly affirming that Texas is not currently 'a legal and republican State government'.[37] For the court to hold otherwise would place it in opposition to Congress, but such hubris was rejected by Swayne J who explained that 'this court is bound by the action of the legislative department'.[38]

The Australian position is uncertain but, in my opinion, allows secession. First, unlike the *US Constitution* which contains no definition of a 'State', covering cl. 6 of the *Constitution Act* defines a 'State' and implies an inability to exercise federal jurisdiction over an erstwhile state (although the legality of a WA secession declaration could still be litigated by the Commonwealth in the WA court system, given that Chapter 4 concluded that secession remains an exclusive state power). That the High Court does not have jurisdiction over former associates of the union is a conclusion buttressed by the fact that it does not claim control over New Zealand even though that polity is mentioned in the definition of a 'State' at covering cl. 6 and was for a time interested in joining the Federation.[39] Similarly, there is ample authority to support the position that the Court's primary role is to adjudicate local law, not foreign law.[40] If a state leaves, that political fact makes it a foreign nation in the same way that the UK is now said

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[34] Ibid 737.
[35] Ibid.
[36] *Hepburn & Dundass v Ellxey*, 6 US 445 (1805).
[37] Ibid 738.
[38] *Texas v White,* 74 US 700, 741 (1869). It is not clear whether Swayne J was referring to the state legislature or the federal legislature. Either way, there is evidence of a deference to political realities initiated by governments.
[39] Nicholas Aroney, 'New Zealand, Australasia and Federation' (2010) 16 *Canterbury Law Review* 31, 32.
[40] The first element of this circumscribed role is that there must be a link, however tenuous, between Commonwealth laws and Australia. This does not bar extra-territorial legislation that is expressed to be extraterritorial: *XYZ v Commonwealth* (2006) 227 CLR 532. The second element is that the High Court exercises the judicial power 'of the Commonwealth' (*Constitution* s 71). While the Commonwealth parliament can pass a law asking the court to apply foreign law when deciding cases, judges generally look as a starting point to Australian sources for enabling authority. Foreign law may be considered when applying Australian law, as a fact relevant to the proceedings or as influential reference where the law is unclear: see James McComish, 'Pleading and proving foreign law in Australia' (2007) 31 *Melbourne University Law Review* 400, 406.

to be a foreign nation. There is consequently no need for the intellectual gymnastics engaged in by Grier J owing to the firm textual basis for what a state is. Nor is there a need to engage in historical research or refutation of other inferences made by the majority in *Texas v White*.

Second, there is no expressly stated obligation on the part of Commonwealth institutions to shape the form of a state's governance.[41] The *US Constitution* at article IV advises that '[t]he United States shall guarantee to every State in this Union a Republican Form of Government', which was taken by the majority in *Texas v White* to imply a duty to restrain secession. Article IV provides jurisdiction where an American state seeking to secede has been oppressing a minority and denies access to the benefits of republicanism.[42] Yet there is no pathway to such a conversation in Australia. WA has been held to have plenary power arising from its state constitution and there are limited human rights protections restraining its autonomy.[43]

Of course, one cannot neglect to mention that there is an opposing interpretation. It can be asserted that secession impacts upon the federal bargain and representative democracy on a national scale. For instance, after a state's departure, the Commonwealth parliament can no longer invest jurisdiction in state courts as envisioned in s 77(iii). That section says: '[w]ith respect to any of the matters mentioned [in ss 75 or 76] the Parliament may make laws: (iii) investing any court of a State with federal jurisdiction'. *Kable* permits the Court to shape a limited separation of powers in the states.[44] Likewise, *Kotsis v Kotsis* held that the federal jurisdiction conferred on a Supreme Court does not allow delegation to a deputy registrar.[45]

There are three ways to circumvent the objection raised. First, the definition of a 'State' in s 77(iii) per covering cl. 6 may place a former state outside the Commonwealth. Second, while it is true that the Commonwealth parliament is empowered to vest jurisdiction upon state courts,

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[41] Note that *Union Steamship Co of Australia v King* (1988) 166 CLR 1, 10 (Mason CJ, Wilson, Brennan, Deane, Dawson, Toohey and Gaudron JJ) left open the possibility that 'the exercise of [state] legislative power is subject to some restraints by reference to rights deeply rooted in our democratic system of government and the common law'. The majority in *Durham Holdings v NSW* (2001) 205 CLR 399, 410 agreed that 'there are limits to the exercise of the legislative powers conferred upon the Parliament which are not spelled out in the constitutional text' that arise 'as a matter of logic or practical necessity' from the 'federal structure within which State Parliaments legislate'. Cf Geoffrey Walker, 'The Unwritten Constitution' (2002) 27 *Australian Journal of Legal Philosophy* 144.

[42] *Texas v White*, 74 US 700, 727 (1869).

[43] *Western Australia Constitution Act 1890* (UK) sch 1 cl 2. Moreover, the COVID-19 crisis has shown that even detention of the entire resident population – without proving individual criminal liability – is within state power. On this point see *Loielo v Giles* [2020] VSC 722 where a home detention curfew for all Victorians was upheld and *Gerner v The State of Victoria* [2020] HCA 48 where it was decided that there is no right of freedom of movement. Thus, human rights cannot be used to bring a former state within federal jurisdiction either.

[44] *Kable v Director of Public Prosecutions (NSW)* (1996) 189 CLR 51.

[45] *Kotsis v Kotsis* (1970) 122 CLR 69.

nothing says that the states must accept such a conferral of power. While the Commonwealth parliament can using s 77(ii) deprive state courts of their corresponding non-federal jurisdiction, this does not mean much if state courts refuse to accept federal jurisdiction in the first place. If, hypothetically, a state court purposefully denies its judges independence or contradicts other requirements laid down in *Kable*, it might be claimed that the High Court is only authorised to retract federal jurisdiction from that state but not force it to refashion its entire employment arrangements. Although the *Melbourne Corporation* principle restrains legislative power, for the sake of logical consistency perhaps senior state government employees should also be protected from unwarranted judicial interference.[46] Third, per Chapter 4, it is possible to say that the Court's jurisdiction does not extend to secession because that is a matter within exclusive state power. A court should perhaps hesitate to question the sovereignty of a state's people.

For the foregoing reasons, it is open for WA to suggest that after its passage of a secession resolution the state would not satisfy s 75(iv) which refers to the High Court's jurisdiction on all matters 'between States, or between residents of different States, or between a State and a resident of another State' because it is no longer a state for the purposes of that section. That being so, it is also reasonable to postulate that the Court does not have power to entertain such a suit using s 75(iii) either, since doing so is just another means to circumvent covering cl. 6. If this analysis is accepted, it can be countered that WA is no longer a dependent polity of the union and so the appropriate forum for the Commonwealth to litigate is the WA Supreme Court.

2. Constitutional standing

It is worth discussing, in the alternative, the standing of the Commonwealth government to sue WA if the High Court decides that it *does* have original jurisdiction over secession (maybe because it determines that the state's secession was not effective). Constitutional standing is an aspect subsumed within a 'matter' for equitable remedies.[47] It is a requirement largely governed by the common law, in particular the High Court's decision in *Australian Conservation Foundation v Commonwealth* ('Australian Conservation Foundation').[48] In *Bateman's Bay*, Gaudron, Gummow and Kirby JJ confirm the relevance of standing to s 71 of the Constitution

[46] *Melbourne Corporation Case* (1947) 74 CLR 31. There have been suggestions that the principle also limits federal executive power: Anne Twomey, 'Federal limitations on the legislative power of the states and the Commonwealth to bind one another' (2003) 31 *Federal Law Review* 507, 508-509.
[47] *Pape v Commissioner of Taxation* (2009) 238 CLR 1, 68 (Gummow, Crennan and Bell JJ): "It is now well established that in federal jurisdiction, questions of 'standing' to seek equitable remedies such as those of declaration and injunction are subsumed within the constitutional requirement of a 'matter'".
[48] *Australian Conservation Foundation* (1980) 146 CLR 493. Standing is also discussed in *Bateman's Bay Local Aboriginal Land Council v the Aboriginal Community Benefit Fund* (1998) 194 CLR 247 ('Bateman's Bay').

when they say that "the principles by which standing is assessed are concerned to 'mark out the boundaries of judicial power' whether in federal jurisdiction or otherwise".[49]

The common law requires 'injury to some individual interest, a special interest in the subject matter of the action that is distinct from the interest of the public generally' as 'a prerequisite to bringing a claim for an injunction or a declaration'.[50] In *Australian Conservation Foundation*, Gibbs J explains that there needs to be an assertion of a private right with respect to a wrong that 'threatens to cause [damage]…or that affects, or threatens to affect' the interests of the aggrieved person in a material way.[51] Genuinely held convictions about political interests of general concern may not on their own be sufficient to establish standing if these are too remote from a specific concrete interest that is adversely impacted.[52]

Yet the rigidity of this rule is open to challenge in constitutional matters. In *Truth about Motorways v Macquarie* ('Truth about Motorways'), a unanimous High Court determined that an environmental group that had no special interest in the subject matter and which had suffered no loss, nonetheless possessed standing to seek a writ of prohibition to stop publishing a prospectus containing allegedly misleading information.[53] In doing so, the constitutionality of the legislation granting standing was upheld. As Anton comments, "*Truth About Motorways* makes clear that the High Court will not allow parties unsympathetic to unlimited open standing to import traditional common law requirements of standing into the Constitutional meaning of a Chapter III 'matter'".[54] Similarly, Evans notes that 'the specific content of the law of standing is not constitutionalised, which leaves it open to judges to define and develop the prudential requirements of the law of standing free of constitutionally-imposed rigidity'.[55] Evans also confirms that the existence of standing is 'only notionally required when the constitutional litigation is initiated by government; and…it is often conceded or assumed'.[56]

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[49] *Bateman's Bay* (1998) 194 CLR 247, 262 (Gaudron, Gummow and Kirby JJ).
[50] Simon Evans, 'Standing to raise constitutional issues' (2010) 22 *Bond Law Review* 38, 40.
[51] *Australian Conservation Foundation* (1980) 146 CLR 493, 526 (Gibbs J).
[52] Ibid (Stephen J).
[53] *Truth about Motorways v Macquarie Infrastructure Investment Management* (2000) 200 CLR 591, 670 (Callinan J): 'an absence of a special interest, or of a particular grievance does preclude a grant of prohibition or certiorari respectively'.
[54] Donald Anton, "Truth, justice and the Australian way about 'open standing': *Truth about Motorways Pty Ltd v Macquarie Infrastructure Investment Management Ltd*" (2008) *SSRN Electronic Journal*.
[55] Simon Evans, 'Standing to raise constitutional issues' (n 51) 58.
[56] Ibid 40. See also *Truth about Motorways* (2000) 200 CLR 591, 648 (Kirby J): "There is nothing in the word 'matter', appearing in Ch III of the Constitution, which demands a particular requirement as to standing".

Because of these relatively loose standing requirements, there should not be obstacles encountered by the Commonwealth government in proving that it has an interest in WA secession sufficient to seek a declaration or injunction. The Commonwealth's interest can reasonably extend to its property located within WA's state borders since a causal link exists to the disruption caused by secession. The tests of standing for the constitutional writs of prohibition and certiorari are in any case somewhat more relaxed and this is another reason why standing is unlikely to pose a barrier to exercise of the High Court's jurisdiction over secession.[57]

B. Justiciability: the political questions doctrine

A related aspect of establishing the High Court's jurisdiction is the justiciability of the matter. By justiciability what is commonly referred to is the political questions doctrine. For example, it was contended by amicus curiae in the Supreme Court of Canada's inquiry in *Reference Re Secession of Quebec* that secession is a non-justiciable political question that is too 'theoretical'.[58] But a unanimous Canadian Supreme Court held that Quebec secession is a justiciable concern since it involves analysis of the legal framework as opposed to an usurpation of democratic institutions.[59] However, to the extent that unilateral secession is shown to be a concern that cannot be decided with reference to legal standards – or 'satisfactory criteria for judicial determination'[60] – this can be an impediment to a court's authority to decide.

Mason suggests that the political questions doctrine has rarely been applied to Australian affairs.[61] Nonetheless, it remains undeniable that courts of law are concerned with legal controversies.[62] In *South Australia v Victoria*, Griffith CJ explains that 'a matter…in order to be justiciable…must be such that it can be determined upon principles of law'.[63]

The Constitution, as Dixon CJ explains, is itself a political document and so strictly speaking all constitutional issues have political significance.[64] Yet the scope of the doctrine of justiciability is

[57] *Re Refugee Tribunal; Ex Parte Aala* (2000) 204 CLR 82, 141; *Kirk v Industrial Court* (2010) 239 CLR 531, 571.
[58] *Reference Re Secession of Quebec* [1998] 2 SCR 217 [27].
[59] Ibid.
[60] *Coleman v Miller* 307 US 433, 454 (1939).
[61] Anthony Mason, 'The High Court as Gatekeeper' (2000) 24 *Melbourne University Law Review* 784, 795. As an aside, any objection to jurisdiction due to the political questions doctrine relies in part on the presumption that there is an uncontroversial delineation between political and legal standards. This presumption is suspect due to the reasons at Chapter 1 of this thesis. From a practical perspective however, it remains true that judges continue to make such an artificial distinction between law and politics and so the distinction still exists.
[62] *South Australia v Commonwealth* (1941) 65 CLR 373, 409 (Latham CJ).
[63] *South Australia v Victoria* (1911) 12 CLR 667, 675 (Griffith CJ).
[64] *Melbourne Corporation v Commonwealth* (1947) 74 CLR 31, 82 (Dixon J).

narrower: it excludes from judicial consideration political 'questions', not political 'cases'. For example, the US Supreme Court has held that "[t]he courts cannot reject…a bona fide controversy as to whether some action denominated 'political' exceeds constitutional authority".[65] Nygh observes, "[t]he characterisation of a question as 'political' therefore does not lie in any possible effect which the decision may have on the political framework of the nation…[n]or is the effect of the court's decision on the political peace of the nation or on the policies of the government a relevant consideration".[66] Nygh continues:

> A political question therefore can only arise when the exercise of governmental power cannot be controlled by the assertion of a legal interest or right, but only by political action. This absence of a legal interest can arise only in cases where the executive and legislative branches of the government have been invested with wide discretionary powers or where the interests purported to have been created are not enforceable at law.[67]

The Canadian Supreme Court in *Reference Re Quebec* says that a question is not justiciable if (1) it draws the court into a political controversy and involves it in the legislative process, having regard to the judiciary's proper role in the constitutional framework; or (2) the court cannot give an answer that lies within its area of expertise: the interpretation of law.[68]

Whether a discretion to secede is reviewable depends primarily on the nature of a decision, not its source (whether statutory or prerogative), keeping in mind that courts are not 'substitute decision-makers'.[69] In the UK, in the *Council of Civil Service Unions v Minister for the Civil Service* ('CCSU'), their lordships give examples of subjects that may be non-justiciable: these include national security, the making of treaties, the defence of the country, the prerogative of mercy, the grant of honours, the dissolution of parliament and the appointment of Ministers.[70]

A unanimous Federal Court of Australia in *Minister for Arts, Heritage and Environment v Peko-Wallsend Ltd* ('Peko-Wallsend') denied that a cabinet decision to nominate Kakadu National Park for inclusion on the World Heritage List is justiciable. First, there was no legal standard because it was not a decision 'taken in accordance with an internationally binding obligation flowing from the Convention' and second 'the whole subject-matter of the decision involved

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[65] *Baker v. Carr*, 369 U.S. 186 (1962).
[66] P.E. Nygh, 'The doctrine of political questions within a federal system' (1963) 5 *Malaya Law Review* 132, 133.
[67] Ibid 134.
[68] *Reference Re Secession of Quebec* [1998] 2 SCR 217.
[69] *Minister for Arts, Heritage and Environment v Peko-Wallsend Ltd* (1987) 15 FCR 274, 278.
[70] *Council of Civil Service Unions v Minister for the Civil Service* [1985] 1 AC 374.

complex policy questions relating to the environment, the right of Aborigines, mining and the impact on Australia's economic position of allowing or not allowing mining as well as matters affecting private interests'.[71] In short, as Bowen CJ puts it, '[t]he matter appears to…lie in the political arena'.[72] Wilcox J's separate concurring reasons additionally rely on the effect of the decision in question, observing that 'the decision did not deprive [the applicant] of any present benefit or advantage' and so did not meet the test of justiciability in *CCSU*.[73]

Where liberty is at stake, an exception can be made to the strictness of the justiciability requirement. The proceedings in *Hicks v Ruddock* centered upon the justiciability of 'Acts of State' imposed on an Australian citizen, David Hicks, who was being detained by the US government and who sought orders that the Australian executive exercise its initiative to seek an order of habeas corpus. Tamberlin J agreed with the statements in *CCSU* that justiciability is not a general principle, but is instead based 'on subject matter and suitability in particular circumstances'.[74] In light of the available facts of the case, his Honour cited with approval English and American precedents that leave open the possibility of a human rights exception to justiciability to avoid creation of a 'legal black hole'.[75] In granting approval to proceed to trial, his Honour also explained that the law is far from settled in relation to justiciability.[76]

The position is broadly the same in Australia as it is in Canada.[77] The inquiry is: are there any legal standards that could guide the High Court in assessing WA's secession resolution, or is such an act an exercise of unchecked discretion? A ruling will no doubt have life-altering impacts for millions of Western Australians and for the rest of the nation, but this alone does not equate to a political question. Rather, it must be proved that secession is a discretion of WA's legislature – akin to the prerogative to make war – such that the Commonwealth cannot shape the manner of its exercise. The wisdom of secession from a policy angle is irrelevant.

On the one hand, it can be argued that secession is a non-justiciable question wholly within the discretion of the WA legislature. To recap what was said in Chapter 4, the WA legislature finds

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[71] *Peko-Wallsend* (1987) 15 FCR 274, 279 (Bowen CJ).
[72] Ibid 279 (Bowen CJ).
[73] Ibid 306.
[74] *Hicks v Ruddock* (2007) 156 FCR 574, 598 (Tamberlin J).
[75] Ibid 598.
[76] Ibid 600.
[77] Jeremy Kirk, 'Justiciability' in Cheryl Saunders and Adrienne Stone (eds), *The Oxford Handbook of the Australian Constitution* (Oxford University Press, 2018); Cheryl Saunders, 'The Concept of Non-Justiciability in Australian Constitutional Law', in D J Galligan (ed), *Essays in Legal Theory* (Melbourne University Press, 1984) 40–46.

its powers in a state constitution that provides it plenary authority to legislate for the 'peace, order and good government' of that polity.[78] Given the generous interpretation that has been accorded to the peace, order and good government formula when considering these identical words in the Commonwealth Constitution, the same latitude should be granted when looking at a state constitution.[79] And since there are no enumerated Commonwealth powers that can be used to restrain the WA parliament's political discretion, and furthermore no express provision barring secession in the Constitution, an argument can be raised that the dissents in *Texas v White* – which defer to parliamentary will where the nature of the discretion is purely political – ought to be adopted. Indeed, because secession by an Australian state has never been judicially resolved, it is almost 100 percent political rather than, say, only 50 percent political.

Conversely, it can be contended that there is a justiciable legal standard arising from the Constitution which confines WA's discretion. Since the existence of state constitutions is acknowledged by ss 106 and 107, these provisions open the possibility that the WA Constitution cannot operate in a vacuum and is constrained by the Commonwealth Constitution. It has been said by Perram J that the political questions doctrine has limited application because 'whenever a question as to the limits of Commonwealth power arises it is justiciable'.[80] Because the constitutionality of secession is partly about the limits of Commonwealth power, there is perhaps a pathway to asserting justiciability. In fact, secession is deemed justiciable in *Reference Re Quebec*. The Canadian Supreme Court indicates that there is no reason why one cannot maximise justiciability by concentrating on the legal elements of a dispute. The justices emphasise factors like the public importance of the questions and that the issues are not too imprecise or ambiguous to permit a legal answer.[81] As they say, '[t]he questions posed…are strictly limited to aspects of the legal framework in which that democratic decision is to be taken'.[82] And '[t]he legal framework having been clarified, it will be for the population of Quebec, acting through the political process, to decide whether or not to pursue secession'.[83]

As with many of the matters canvassed in this chapter, what the High Court will decide when the time comes is unknown. At present, the tendency among judges is shifting from the majority in

[78] *Western Australia Constitution Act 1890* (UK) sch 1 cl 2.
[79] See, eg, *Union Steamship v King* (1988) 166 CLR 1.
[80] *Habib v Commonwealth* (2010) 183 FCR 62, 73 [28] (Perram J).
[81] *Reference Re Secession of Quebec* [1998] 2 SCR 217.
[82] Ibid.
[83] Ibid.

Texas v White towards the realist understanding reflected in the dissenting reasons.[84] Due to the shared sovereignty model adopted by this thesis, it is also obvious that Australia is far less centralised than places like India where the central government is constitutionally permitted to dismiss a state government.[85] Consequently, it is plausible that the Court will decline to intervene out of respect for the discretion of a state legislature on the subject of secession.

IV. COMPATIBILITY WITH SECESSION

To be sure, the extent of the High Court's jurisdiction over a secessionist WA is controversial and there is no easy answer. Yet there is deeper theoretical concern that presents itself: is there something inherently inconsistent between unilateral secession and the nature of federal judicial power? Section 71 does not define judicial power. And nowhere does it say that the High Court has the power to nullify laws passed by a state parliament. Yet judicial review exists and is practiced vigorously: the High Court is not in the business of giving advisory opinions.[86]

How does our understanding of judicial power square with a hypothetical secession resolution by WA? After all, there are ways in which the qualities of s 71 could contradict a secession resolution. First, a trait of judicial power is that the rights and duties it imposes are final: it is for the court to decide whether WA's resolution is valid. Second, and derived from the first characteristic, is that the court's power to direct enforcement of its orders seems to contradict secession because this leaves open the possibility of an injunction restraining WA.

A. The finality of judicial decisions

Zines observes that while other branches of government routinely make determinations about existing law, such decisions differ "'from that which belongs exclusively to judicial power if it lacks the quality of 'conclusiveness'".[87] This quality of finality suggests that if WA comes before a Chapter III court seeking to defend the constitutionality of its secession but loses, then it cannot later secede because this would usurp the authority of s 71 judicial power. Or to put it differently, when a state comes before the High Court seeking to defend itself against a charge of unlawful secession, it accepts that the Court's jurisdiction is legitimate. By analogy, it was observed in

[84] Brian Galligan, "Realistic 'realism' and the High Court's political role" (1989) 18 *Federal Law Review* 40, 47. Galligan shows that while Australian judges claim to be legalists, what they actually do is more complex.
[85] *Constitution of India* (1950) s 353.
[86] Kathleen Foley, 'Australian Judicial Review' (2007) 6 *Washington University Global Studies Law Review* 281.
[87] Leslie Zines, *The High Court and the Constitution* (Federation Press, 2008) 220.

Fyffe that an individual who comes before the court to obtain an order permitting secession can only have such an order if the court's authority over that person is conceded.[88]

Once again, the Canadian experience is a fertile ground that illustrates how an Australian court may choose to approach the issue. If judicial decisions are final, then the Canadian government's submission in *Reference Re Secession of Quebec* that unilateral secession operates as an extra-legal amendment to the Canadian Constitution's supremacy makes perfect sense.[89] This is because once a court's judicial power is exercised, the finality of that decision cannot be disturbed through secession as this would disavow the judicial power. The Supreme Court of Canada also adopts a unitary perspective on the Canadian Constitution, noting that it binds all governments, 'both federal and provincial', and that their 'sole claim to exercise lawful authority rests in the powers allocated to them under the Constitution, *and can come from no other source*'.[90] As such, the Court effectively denies external sources of authority such as the kind described at Chapter 4 of this thesis. The Court's opinion was that '[t]he secession of a province from Canada must be considered, in legal terms, to require an amendment to the Constitution' because 'an act of secession would purport to alter the governance of Canadian territory in a manner which undoubtedly is inconsistent with our current constitutional arrangements'.[91]

Yet there are aspects to the Supreme Court's judgement that hint at a reconciliation between national power and secession. First, the Court recognised that text must be interpreted considering moral values, writing that 'a system of government cannot survive through adherence to the law alone… Our law's claim to legitimacy also rests on an appeal to moral values, many of which are imbedded in our constitutional structure'.[92] The Court's reasons imply that, where consistent with express words, an ostensible inconsistency between the judicial power and secession can be weighed against other principles like democracy, protection of minorities and federalism that guide 'delineation of spheres of jurisdiction, the scope of rights and obligations, and the role of…political institutions'.[93] When looked at from this holistic perspective, legitimacy is a factor when deciding whether to intervene into a secession dispute.

[88] *Fyffe v State of Victoria* (2000) 74 ALJR 1005, 1009 (Hayne J).
[89] Alec Morrison, 'The Quebec Secession Reference: The Constitutionalizing of Quebec Secession' (MA Thesis, University of Ottawa, 2004) 141.
[90] *Reference Re Secession of Quebec* [1998] 2 SCR 217 [72]. Emphasis added.
[91] *Reference Re Secession of Quebec* [1998] 2 SCR 217 [84].
[92] *Reference Re Secession of Quebec* [1998] 2 SCR 217 [67].
[93] *Reference Re Secession of Quebec* [1998] 2 SCR 217 [52].

Second, although the Canadian Court accepted that constitutional obligations which are breached should incur 'serious legal repercussions', it recognised that 'the appropriate recourse in some circumstances lies through the workings of the political process rather than the courts'.[94] This judicial restraint aligns with its finding that a successful referendum seeking secession imposes an obligation upon actors to negotiate in good faith and that if constitutionally mandated discussions reach an impasse then '[t]he role of the Court… is limited to the identification of the relevant aspects of the Constitution in their broadest sense' because '[t]he Court has no supervisory role over the political aspects of constitutional negotiations'.[95] Admittedly, the Court did say that there is no right of secession in the Canadian Constitution even if negotiations fail. Nonetheless, there is deference to the secessionist province of Quebec when it observes:

> The continued existence and operation of the Canadian constitutional order could not be indifferent to a clear expression of a clear majority of Quebecers that they no longer wish to remain in Canada. The other provinces and the federal government would have no basis to deny the right of the government of Quebec to pursue secession, should a clear majority of the people of Quebec choose that goal, so long as in doing so, Quebec respects the rights of others.[96]

Read with the Canadian Supreme Court's statements on legitimacy and judicial restraint in mind, it easy to see why *Reference Re Secession of Quebec* was hailed as a partial victory by Quebec and the Canadian national government.[97] Both sides found something promising for their opposed positions in the diplomatically worded judgment. For residents of Quebec, it represented a recognition that their voice counted for something in the legal calculus. Or as the justices put it, '[t]he Constitution is not a straitjacket' but rather a process of dialogue.[98]

Faced with the task of applying judicial power to a controversial situation, the High Court may be influenced by the Canadian impetus to preserve legitimacy and decide to practice curial restraint. It can choose to lend weight to shared sovereignty and undermine the norm that federal judicial power decides with finality. It can also choose to adopt judicial minimalism that pays due regard to the diverse interests represented by the WA parliament to ensure that any ruling on secession pays respect to what is a co-sovereign entity.[99] If the concept of shared sovereignty is

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[94] *Reference Re Secession of Quebec* [1998] 2 SCR 217 [102].
[95] *Reference Re Secession of Quebec* [1998] 2 SCR 217 [100].
[96] *Reference Re Secession of Quebec* [1998] 2 SCR 217 [151].
[97] *Henderson v Attorney-General of Quebec* [2018] QCCS 1586 [70].
[98] *Reference Re Secession of Quebec* [1998] 2 SCR 217 [150].
[99] This co-sovereign approach, drawn from James Madison, 'Federalist No. 45' in *The Federalist Papers* Bantam Classic, 1982), sees the centre and states as equal and subject to the Constitution. It was first supported by *D'Emden v Pedder* (1904) 1 CLR 91 but then undermined by *Amalgamated Society of Engineers v Adelaide Steamship Co Ltd*

to mean anything beyond empty words, then in this manner there would be nothing inconsistent between secession and the existence of a pre-appointed arbiter of constitutional issues. So, while it is true that a quality of judicial power is finality – meaning parties cannot take the law into their own hands – the Court's authority is not necessarily disturbed if a state interprets the Constitution as authorising secession and then declares that it has left federation.[100] First, for the reasons provided in Chapter 4, the Commonwealth's claim to being a monopolistic unitary body presiding over the whole of Australia is undermined by the reality of shared state sovereignty. And second, it is within the High Court's capacity to strike a balance between competing democratic interests to encourage federalism and protect minorities (like the residents of WA).

B. Remedies and enforcement

Another characteristic of Commonwealth judicial power is the ability to command enforcement. Execution of an order occurs through the executive branch which assists in upholding the rule of law by taking steps to enforce judicial review on behalf of the court. The High Court of Australia, being part of the 'least dangerous'[101] branch of the federal government only charged with passing judgement, cannot carry out its decisions since it has no policing capacity.

In a secession dispute, the remedies sought by the Commonwealth government will likely be:

- first, a declaration that WA's unilateral secession resolution is invalid; and
- second, an injunction to prevent the state from leaving the federal union.

Because a declaration stating pre-existing rights is non-coercive and depends on voluntary compliance by WA, it is easier to obtain. On the other hand, courts are reluctant to grant injunctive relief since it is a coercive remedy. Whether an injunction is approved depends in part on an assessment of the concept of state sovereign immunity; if the Court chooses to follow

(1920) 28 CLR 129. Nonetheless, practically speaking when one looks at the actual interaction of the states with the federal government, it remains a credible theory. See Nicholas Aroney, *The Constitution of a Federal Commonwealth* (Cambridge University Press, 2009) 344.

[100] There is another way to challenge a purported inconsistency between s 71 judicial power and unilateral secession. Nowhere in the Constitution does it say that *only* the High Court can adjudicate inter se matters involving competition between the Commonwealth and the states. Until the abolition of appeals to the Privy Council by the *Australia Act 1986* (UK), it was possible for a state to choose whether to approach the High Court or the Council. It is an open question as to whether the authority to decide secession is now shared between the federal judiciary and a state's judiciary. Given the decision of the High Court in *Pirrie v McFarlane* (1925) 36 CLR 170 the prospects for such an argument are not good. Whether rightly or wrongly, the High Court tries to monopolise constitutional jurisdiction. But this may not have been the intention of the framers: Size, 'Can Parliament deprive the High Court of jurisdiction with respect to matters arising under the Constitution or involving its interpretation?' (n 23) 94-96.

[101] This apt description of the US Supreme Court is found in Alexander Hamilton, 'Federalist No. 78' in *The Federalist Papers* (Bantam Classics, 1982) but largely applies to Australian conditions.

Texas v White, then the secession resolution will be ruled a revolutionary act and the WA government will be treated as a subject of the Commonwealth Crown liable to enforcement action. There would then be an inconsistency between judicial power and secession.

'The question of the constitutionality of State or Federal legislation within the Federal framework,' writes Sykes, 'has been raised mainly by suit for a declaratory judgment'.[102] A declaration creates no positive obligation on the part of WA because it is only worth the paper it is written on and is not carried into effect by the executive. It is true that the declaration is binding in some abstract sense where it is 'not a mere opinion devoid of legal effect'[103] and so should be given deference if one is serious about adhering to the philosophical ideal of the rule of law. Lord Denning explains that '[i]t is always presumed that once a declaration of entitlement is made the Crown will honour it'.[104] Nonetheless, there is good reason to think that if the Commonwealth were to obtain a declaratory order saying that WA's secession is invalid, there is no practical inconsistency between that declaration's existence and unilateral secession. A seceding state can safely disregard the decree since 'there is no sanction built into declaratory relief'[105] and a further order is required to give rise to a legal inconsistency with its contents.

Such a supplementary order is usually an injunction, which is a discretionary coercive remedy and therefore has stringent procedural requirements before it is available in a cause of action. The injunction began in private law to aid in the enforcement of property rights; as such, its translation to the field of public law has 'been attended with difficulties inherent in the nature of its origin',[106] most notably that using the injunction for community purposes has been fettered by traditional notions of preserving individual property rights. The use of injunctions has over time been broadened so that benefits which are not proprietary – including matters affecting the public interest – can be protected.[107] That an injunction can aid in enforcing the Constitution is acknowledged in *Bateman's Bay* when Gaudron, Gummow and Kirby JJ note that 'the use of equitable remedies to ensure compliance by the executive and legislative branches of government with the requirements of the Constitution should not be overlooked', with the proviso that '[n]o doubt special considerations may apply in that context'.[108] In *Ex Parte Aala,*

[102] Edward Sykes, 'The Injunction in Public Law' (1953) *The University of Queensland Law Journal* 114, 120.
[103] Itzhak Zamir and Jeremy Woolf, *The Declaratory Judgment* (Sweet & Maxwell, 2000) 1.07.
[104] *Franklin v The Queen* (No 2) [1974] 1 QB 205, 218.
[105] PW Young, *Declaratory Orders* (Butterworths, 1984) 214.
[106] Edward Sykes, 'The Injunction in Public Law' (1953) *The University of Queensland Law Journal* 114.
[107] *Cooney v Ku-ring-gai Corporation* (1963) 114 CLR 582, 604 (Menzies J).
[108] *Bateman's Bay* (1998) 194 CLR 247, 250 (Gaudron, Gummow and Kirby JJ).

Gaudron and Gummow JJ affirm that equitable remedies like injunctions are generally governed by the same discretionary factors applying to other remedies.[109]

During the American Civil War, an injunction was not formally sought by President Lincoln who prosecuted the war against the southern confederacy and nor was the legality of this remedy against a state elaborated upon by the US Supreme Court in *Texas v White*. The Supreme Court did, however, authorise coercive action due to other republican provisions in the *US Constitution* which, as discussed above, do not exist in Australia. There is consequently no precedent from a comparable liberal democracy on this precise issue that could influence the High Court.

Colonial Sugar Refining Co v Attorney-General stands for the proposition that an injunction can be obtained against the carrying into effect of legislation beyond the authority of a parliament of limited powers.[110] This theoretically allows for an injunction against the WA Attorney-General or the WA Crown once its secession resolution is proven to be beyond power.[111] Even so, there is a high bar to be met given that breach of an injunction constitutes contempt of court. First, there must be some legal right to be protected from WA's acts and the offense should be continuing. In January 1990, the Constitutional Court of Yugoslavia gave examples of the kinds of local and international interests that are affected when discussing a possible withdrawal of Slovenia and Croatia from the Yugoslav nation.[112] Radan summarises the Court's reasons:

> The reason that the unanimous consent of the Republics and Autonomous Provinces was required before secession of a Republic could be seen as constitutionally valid was because an act of secession by one people and its Republic was relevant, not only to that people and Republic, but to all the peoples and Republics that were parts of the common state of Yugoslavia. It was relevant to all six of Yugoslavia's peoples and Republics, because *secession of one people and Republic affected the composition of the federation, its international borders, internal relations*

[109] *Re Refugee Review Tribunal; Ex parte Aala* (2000) 204 CLR 82, 107-108 (Gaudron and Gummow JJ). See also *Enfield City Corporation v Development Assessment Commission* (2000) 199 CLR 135, 158 (Gaudron J): "[i]n the field of public law, equitable remedies are subject to the same considerations, including discretionary considerations, as apply in any other field".

[110] *Colonial Sugar Refining Co v Attorney-General* (1912) 15 CLR 182.

[111] Depending on who is initiating the litigation, it may be that the suit would have to be brought against the Attorney-General of WA to overcome any concerns about the immunity of the Crown. See Edward Sykes, 'The Injunction in Public Law' (1953) *The University of Queensland Law Journal* 114, 131.

[112] Robert Hayden, *Constitutional Events in Yugoslavia 1988-90: From Federation to Confederation and Paralysis?* (Final Report, National Council for Soviet and East European Research, July 1990) 33.

> *within Yugoslavia, and Yugoslavia's position as a member of the international community and signatory to many international agreements*.[113]

Similarly, the Commonwealth could suggest that unilateral secession impacts upon: 1) its property within WA borders; 2) upon the federal government's right to tax WA residents; and 3) upon external affairs by changing Australia's boundaries with respect to international treaties. In response, WA can retort that the Constitution restricts the interests that can be asserted over it because title rests in the state. In the Australian federation – or so the argument might go – the federal government exercises authority over individuals and federal territories, whereas a state parliament exercises authority over individuals and the land comprising the state. Yet it is difficult to avoid the conclusion that the Commonwealth government has, at minimum, a property interest in its buildings and military installations within a state's borders.

Another prerequisite to the grant of an injunction is that the offensive conduct be continuing.[114] Where the government of WA has actioned an intent to secede, there is no doubt that the subject of the injunction will be upon a continuing act, since a secession resolution creates impacts into the future unless repealed. Thus, it is likely that this ground for an injunction will be satisfied.

Second, it is helpful to show that a party would suffer 'irreparable injury for which damages will not be an adequate compensation'.[115] Such an injury need not have actually occurred, but at least a threat of such injury should be shown. Showing that damages are not adequate will be an uphill task given that history reveals examples of compensation being provided for interstate disputes or to facilitate territorial expansion, so the payment of damages appears to be an adequate remedy to compensate the Commonwealth for any harm caused by secession.[116] Of course, when delving into compensation, there are complex questions to be resolved that are beyond the scope of this chapter.[117] Nevertheless, there is no reason why such an inquiry could not be pursued.

Third, the Court's discretion to deny an injunction needs to be overcome. Deciding where the balance of convenience lies entails consideration of factors such as whether damages are

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[113] Peter Radan, 'Secession and Constitutional Law in the Former Yugoslavia' (2001) 20 *University of Tasmania Law Review* 181, 197.
[114] *Smethurst v Commissioner of Police* [2020] HCA 14.
[115] *Castlemaine Tooheys Ltd v South Australia* (1986) 161 CLR 148, 153 (Mason ACJ).
[116] This is seen most clearly in war reparations. Kim Oosterlinck, 'Reparations' in Steven Durlauf and Lawrence Blume (eds), *The New Palgrave Dictionary of Economics* (Palgrave Macmillan, 2009) 1.
[117] For example, should the Commonwealth government be compensated for the loss of expected tax revenue from the residents of Western Australia? For principles of compensation, see generally Michael Tilbury, Michael Noone and Bruce Kercher, *Remedies: Commentary and Materials* (Lawbook Co, 2004) 253-384.

recoverable, public welfare, unfairness or hardship to the defendant and the need for curial supervision. At this step, the main obstacle lies in the obligation that a plaintiff seeking an equitable injunction prove that there is no remedy at law equally practical and efficient.[118] Damages are particularly reasonable if the right being protected is a property interest rather than a general community interest. Because it is not outside the realm of possibility that the Commonwealth's injury can be repaired with damages, an injunction may falter at this step.

In addition, there are public interest concerns that can be raised. The Commonwealth can point to the policy rationale underlying the Constitution – that it is a statute uniting colonies in a trading and defence pact – to assert that an injunction is appropriate to aid its rights. However, the policy of unity conflicts with another policy of the Constitution which is to embed decentralised local polities that are legally protected. Although such tensions have been left unaddressed by the High Court in the context of injunctions, in the US these have been made explicit. In *Rizzo v Goode* ('Rizzo'), Rehnquist J writes that 'appropriate consideration must be given to principles of federalism in determining the availability and scope of equitable relief'.[119] Furthermore, "[w]here…the exercise of authority by state officials is attacked, federal courts must be constantly mindful of the 'special delicacy of the adjustment to be preserved between federal equitable power and State administration of its own law'". Such notions of 'equity, comity and federalism'[120] are elaborated in Chapter 4 and recommend against granting an injunction.

Ironically, the public interest may impose obligations on the Commonwealth that precludes an injunction. Although for the most part the requirements of an injunction sought by a government are the same as for private individuals, in *Commonwealth of Australia v John Fairfax & Sons* ('John Fairfax') a different standard was applied to a request by the Commonwealth for an injunction to suppress publication of a book, because there was a need to balance its claim with the desirability of free public discourse.[121] Also, in *Australian Broadcasting Corporation v O'Neill*, an interlocutory injunction to restrain broadcast of a film was refused because the justices favoured freedom of speech.[122] As Mason J observes in *John Fairfax*:

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[118] *Boyce's Executors v Gundy* 28 US 210, 215 (1830): 'It is not enough that there is a remedy at law; it must be plain and adequate, or, in other words, as practical and as efficient to the ends of justice and its prompted administration, as the remedy in equity'.
[119] *Rizzo v. Goode*, 423 US 362, 380 (1976). The Commonwealth can perhaps try to distinguish *Rizzo* by arguing that American states have more autonomy over their jurisdiction than Australian states.
[120] *Mitchum v. Foster*, 407 US 225, 243 (1972).
[121] *Commonwealth of Australia v John Fairfax & Sons* (1980) 147 CLR 39.
[122] *Australian Broadcasting Corporation v O'Neill* (2006) 227 CLR 57.

> The equitable principle has been fashioned to protect the personal, private and proprietary interests of the citizen, not to protect the very different interests of the executive government. It acts, or is supposed to act, not according to standards of private interest, but in the public interest.[123]

Relying on the foregoing, WA could counter that an injunction conflicts with the Commonwealth's duty to advance the public interest in peaceful relations with a state.

Finally, there is an assessment of fairness between the parties and toward innocent third parties.[124] Where there is an unconscionable hardship on a party not outweighed by the competing hardship faced by the other party or other discretionary considerations, a court will not award an injunction. Depending on how the legal claims are framed, the hardship faced by the Commonwealth could include the loss of its physical property within WA's borders and the loss of future tax revenue from the state's residents. Conversely, WA will be burdened by an injunction's indefinite limitation of its parliamentary autonomy, especially if the Court takes the subsequent step of approving of the constitutionality of executive enforcement measures. One can also consider the continuing burden upon WA residents of having to pay federal taxes, the costs of regulatory measures imposed by the Commonwealth parliament and other policy-based hardships imposed by a centralised federation. This latter burden upon WA is probably more substantial, since otherwise a state is unlikely to take the radical step of seceding in the first place. But the precise weightage is speculative and unnecessary to examine in detail here.

In the American case of *Rizzo,* where an injunction was sought against officials of the state of Pennsylvania, it was said that 'principles of equity ... militate heavily against the grant of an injunction except in the most extraordinary circumstances'.[125] Gummow J has resisted such a depiction of the law in Australia by noting the comments of Professor Chayes in 1976 that "the old sense of equitable remedies as 'extraordinary' has faded" due to the increasing importance of equitable relief.[126] Even so, if the reluctance to award injunctive relief except in extraordinary circumstances *were* to be used as a principle, then surely the situation of unilateral secession is an appropriate category for judicial caution because of the numerous political consequences.

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[123] *Commonwealth of Australia v John Fairfax & Sons* (1980) 147 CLR 39, 51 (Mason J).
[124] *Silktone Pty Ltd. v. Devreal Capital Pty Ltd*, (1990) 21 NSWLR 317, 324 (Kirby P).
[125] *Rizzo v. Goode*, 423 US 362, 380 (1976). Cf. Louise Weinberg, 'The New Judicial Federalism' (1977) 29 *Stanford Law Review* 1191.
[126] William Gummow, 'The injunction in aid of legal rights – an Australian perspective' (1993) 56 *Law and Contemporary Problems* 83, 104.

Suppose, however, that an injunction is approved by the High Court. Such an order probably still cannot be implemented because of this thesis' reasoning in Chapter 6 that there is no Commonwealth power to wholly regulate a state's government and use force against it. Indeed, the courts have repeatedly made decisions which implicitly suggest that WA is not a mere subject of the Commonwealth.[127] The lack of executive authority to implement an injunction confirms that there is no necessary contradiction between judicial power and secession.

V. CONCLUSION

Many of the issues canvassed in this chapter are speculative, given that they proceed on the basis of a hypothetical scenario. Even so, what has been discovered has relevance to an analysis of unilateral secession's relationship to the federal judicial power at Chapter III of the Constitution.

In Australia, a constitutional 'matter' can bear a wider meaning than its American counterpart which requires there to be 'Cases' or 'Controversies'.[128] Because of this comparatively relaxed judicial attitude, secession by WA *prima facie* falls within a cause of action envisioned by the original jurisdiction of the High Court. Moreover, the Commonwealth government is like to have standing because it can demonstrate some loss threatened by the withdrawal of WA.

Despite this, there are two impediments to enlivening the High Court's original jurisdiction. First, it remains to be shown that WA after passage of a secession resolution falls within the meaning of a 'State' as a jurisdictional fact enlivening the Court's power. I maintain that the jurisdiction of the Court does not reach to former states. To argue otherwise leads to inconsistencies with the role of the Court as an arbitrator for the states still within the union. In particular, expanding the Court's reach logically implies that it can decide on disputes pertaining to New Zealand, which is named in the definition of 'State' at covering cl. 6. In practice of course, this is absurd: the court does not purport to bind New Zealand because it recognises external realities which prevent it from doing so. Second, justiciability is doubtful because of the wide political discretion to legislate afforded to the WA parliament by the WA Constitution. The plenary discretion embedded within the WA Constitution creates the possibility that the Court will be unable to find an objective standard to determine the validity of secession.

[127] Twomey, 'Federal limitations on the legislative power of the states and the Commonwealth to bind one another' (n 47) 508-514.
[128] *Truth about Motorways* (2000) 200 CLR 591, 610 (Gaudron J).

As for the consistency between the High Court's capacities and secession, this chapter has investigated this aspect using two dimensions associated with judicial power: that of finality and that of enforcement. It is argued that neither one inevitably rules out secession. The finality of judicial decisions assumes a unitary view of judicial review in a federation that is not necessarily accurate. Even if a unitary interpretation is adopted, this does not prevent the Court from supporting secession within its reasons. In terms of enforcement, an injunction, assuming the requirements for its award are met – which is by no means certain – is still unenforceable by the Commonwealth executive due to the notions of federal comity discussed in Chapter 6.

Of course, none of the situations described in this chapter may arise. To avoid threatening its legitimacy, the Court may refuse to grant leave for an application and rid itself of thorny concerns altogether. This would then leave secession to be resolved in the political sphere.

CHAPTER 8: FINANCE, TRADE AND EQUAL TREATMENT

> *[T]he doctrine of stare decisis, never conclusive in determining the true construction of the Constitution, is least cogent in its application in its application to those few provisions which are calculated to protect human rights and fundamental freedoms (to use contemporary nomenclature), notably ss 92 (freedom of intercourse), 116 and 117.*
>
> Brennan J[1]

> *If the enforcement as against the States of their contractual obligations is the idea behind sec. 105A the language is singularly ill-adapted to hint at, much less express, such a thought. The word 'enforcement' would have been the obvious word to use.*
>
> Evatt J[2]

I. INTRODUCTION

Previous chapters have hinted at the prospect of economic consequences arising out of unilateral secession. This chapter examines some of these economic issues in the context of an inquiry into Chapter IV of the Commonwealth Constitution entitled 'Finance and Trade'. These financial and trading provisions are a potential source of conflict with secession because the departure of a state necessitates stepping outside the free trade and movement zone indicated at Chapter IV.[3] Certainly, s 92 hints at a zone that is vast when it says that 'trade, commerce, and intercourse among the States, whether by means of internal carriage or ocean navigation, shall be absolutely free'. And s 105A permits creation of political agreements between the Commonwealth and a state about managing debts or borrowing money, although it clarifies that '[a]ny such agreement may be varied or rescinded by the parties thereto' (meaning *all* the parties thereto).

The notion of a unitary Australian free trade and movement zone can also be deduced from Chapter V entitled 'The States'. Specifically, s 117 appears to preclude discrimination against out-of-state residents. That section says '[a] subject of the Queen, resident in any State, shall not be subject in any other State to any disability or discrimination which would not be equally applicable to him if he were a subject of the Queen resident in such other State'.

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[1] *Street v Queensland Bar Association* (1989) 168 CLR 461, 519 ('Street').

[2] *NSW v Commonwealth* (1932) 46 CLR 155, 204 (Evatt J) ('First Garnishee Case')

[3] Henry Parkes declared at the 1891 constitution convention held in Sydney that 'an absolutely necessary condition of anything like perfect federation…is, that Australia…shall be free – free on the borders, free everywhere – in its trade and intercourse between its own people; that there shall be no impediment of any kind': *Official Report of the National Australasian Convention Debates* (Sydney, 2 March 1891) 24-25.

Do ss 92, 105A and 117 together prove that Australia is necessarily a single financial and trading union or is state independence nevertheless possible? As with other questions considered by this thesis, there is no precedent that addresses the interaction of these sections with secession.

The relevance of the present chapter is highlighted by recent events. During March of 2020, Western Australia's government established a blockade between it and the other states and territories of Australia based on its determination of the threat posed by the novel coronavirus (COVID-19).[4] That border, with limited exceptions, set up a barrier with the rest of the country that hindered personal and commercial travel and operated intermittently for about two years till April 2022. Craven describes these closures as a 'partial secession'.[5] A unanimous High Court of Australia in *Palmer v WA* ('Palmer'*)* decided that the closures do not breach s 92.[6]

This chapter proceeds as follows. Part III explains the financial and trading union affirmed by s 92 as seen from the vantage point of High Court rulings to date. The proportionality method of the Court in *Palmer* is then applied to a hypothetical secession by WA. Part IV turns attention to s 105A and the compulsory nature of financial agreements made under it and examines how these relate to secession. Finally, part V evaluates the compatibility of secession with s 117.

II. INTERFACE WITH COVERING CLAUSE 6

As a preliminary matter, it is worth noting that ss 92, 117 and 105A of the Constitution are aimed at the 'States' as defined by covering cl. 6. The definition of a 'State' is analysed at Chapter 5 and if those earlier findings are accepted, cl. 6 provides an escape valve from the union because it implicitly approves of the possibility of secession. Mitzen confirms:

> Covering clause six provides a phrase that is consistent with the whole idea of legislation allowing for a State to secede…[t]hose words [i.e. 'as for the time being are parts of the Commonwealth'] emphasised, clearly indicate the possibility of a State, forming part of the

[4] The WA border closure was made under the *Quarantine (Closing the Border) Directions* (WA) which was issued as effective from 15 March 2020 pursuant to a delegated power under the *Emergency Management Act 2005* (WA). For analysis see Julian Murphy and Erika Arban, 'Assessing the performance of Australian federalism in responding to the pandemic' (2021) 51 *Publius: The Journal of Federalism* 627, 640-41; Marco Rizzi and Tamara Tulich, 'All bets on the executive(s)! The Australian response to COVID-19' in Joelle Grogan and Alice Donald (eds), *Routledge Handbook of Law and the COVID-19 Pandemic* (Routledge, 2022).
[5] Greg Craven, 'Hints of Trumpism in Daniel Andrews, Mark McGowan', *The Australian* (19 January 2021).
[6] *Palmer v WA* (2021) 95 ALJR 229.

> Commonwealth of Australia as was established under the *Commonwealth of Australia Constitution Act*, leaving the Commonwealth.[7]

Once it is conceded that covering cl. 6 supports a less permanent perspective on membership of the federal union, then it follows that a former 'State' ceases to be bound to the Commonwealth.

On the other hand, supposing that covering cl. 6 is not accepted as a sufficient basis for unilateral secession by WA, then the constitutionality of secession must turn on a substantive analysis of other provisions. For example, Mitzen suggests that the effect of s 105A has to be considered because 'if a State left the Federal Commonwealth, undue financial liability would be placed on the remaining parties'.[8] It is this latter kind of inquiry that is the focus of this chapter.

III. A FINANCIAL AND TRADING UNION?

This part examines the case law surrounding s 92 and applies it to a hypothetical secession by Western Australia. It has been suggested that s 92 creates a 'national economic unit'[9] because of its 'little bit of layman's language'[10] that trade, commerce and intercourse shall be 'absolutely free'. Trade and commerce is defined in case law as 'the mutual communings, the negotiations, verbal and by correspondence, the bargain, the transport and the delivery', while intercourse as the ability 'to pass to and fro among the States without burden, hindrance or restriction'.[11]

The High Court in *Cole v Whitfield* treated 'trade and commerce' and 'intercourse' as two limbs with separate tests. Recently however, in *Palmer*, when the plaintiffs challenged the *Quarantine (Closing the Border) Directions* (WA) passed in reliance on the *Emergency Management Act 2005* (WA), the majority rationalised the separate limbs and combined them into one test.[12]

In general, the case law relating to s 92 can be categorised into literal or non-literal strands. Literalism means that 'if the text is explicit, the text is conclusive'[13] while non-literalist

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[7] Alan Mitzen, 'The possible secession of, and creation of, states under the Commonwealth of Australia Constitution Act' (Honours Thesis, University of Western Australia, 1975) 28.
[8] Ibid 29.
[9] *Betfair Pty Ltd v Western Australia* (2008) 234 CLR 418, 461 [39] (Gleeson CJ, Gummow, Kirby, Hayne, Crennan and Kiefel JJ) quoting *Castlemaine Tooheys Ltd v South Australia* (1990) 169 CLR 436, 470.
[10] JA La Nauze, 'A Little Bit of Lawyer's Language: The History of "Absolutely Free" 1890-1900' in AW Martin (ed), *Essays in Australian Federation* (Melbourne University Press, 1969) 57.
[11] *W & A McArthur Ltd v Queensland* (1920) 28 CLR 530; *Gratwick v Johnson* (1945) 70 CLR 1.
[12] *Palmer v WA* (2021) 95 ALJR 229, 241 (Kiefel CJ and Keane J), 277-84 (Edelman J).
[13] *Attorney-General for Ontario v Attorney General for Canada* [1912] AC 571, 583.

reasoning prioritises judicially created tests, policy or historical insights because judges impose constraints on what they see as imprecise text.[14] The literal approach is necessarily pro-unitary state because 'absolutely free' in s 92 is read as compacting the Australian states into a single free trade and movement zone, while non-literal approaches can be either federalist or unitary depending on how the artificial tests are applied. A literal approach is discernible from the reasons of Isaacs J in *R v Smithers; Ex Parte Benson* ('Smithers')[15] and from Latham CJ and Starke J in *Gratwick v Johnson*,[16] while a non-literal style – more popular at the present time – can be seen from Griffith CJ and Higgins J in *Smithers*. The recent *Palmer* case appears to continue the tradition of non-literal or utilitarian reasoning demonstrated in *Smithers*.

A. *Smithers* and *Gratwick*

At stake in *Smithers* was the validity of New South Wales legislation that made it a crime to enter the state if, within the past three years, a person had been convicted of a crime which carried a maximum possible punishment of 12 months or more. All members of the Court – albeit for different reasons – held that the legislation offends s 92 and declared it invalid.

Isaacs J argues that s 92 is a 'definite and absolute guarantee' of freedom of transit and access for persons and property',[17] finding that 'it is an absolute prohibition on the Commonwealth and States alike to regard State borders as in themselves possible barriers to intercourse between Australians'.[18] His judgement can be described as literalist because it does not try to create an artificial test essentially *ab initio*. Given that he was unable to locate any other provision – not even ss 106 and 107 – to cut down s 92, he accepts 'absolutely free' at face-value so that it means what it implies when it comes to trade, commerce and intercourse: absolute freedom from government interference with goods, services or people at the point where they cross state boundaries, regardless of the policy justification behind the interference. The result is that Isaac J supports a unitary view of the Australian free trade zone that tends to make secession difficult.

On the other hand, Griffith CJ says that 'the Court is entitled to go beyond the formal words of a statute' and holds that laws for public order, safety or morals may give rise to a 'ground of

[14] Francois Recanati, 'Literalism and contextualism: some varieties' in Gerhard Preyer and Georg Peter (eds), *Contextualism in Philosophy: Knowledge, Meaning and Truth* (Clarendon Press, 2005); David Cole, 'Against Literalism' (1988) 40 *Stanford Law Review* 545, 545-46. For a critique of literalism see generally David Kairys (ed), *The Politics of Law: A Progressive Critique* (Basic Books, 1998).
[15] *R v Smithers; Ex Parte Benson* (1912) 16 CLR 99.
[16] *Gratwick v Johnson* (1945) 70 CLR 1 ('Gratwick').
[17] *R v Smithers; Ex Parte Benson* (1912) 16 CLR 99, 117 (Isaacs J).
[18] Ibid 117 (Isaacs J).

necessity' that soften s 92.[19] His inquiry into 'the real reason [for] the interference with the applicant's freedom of migration'[20] leads him to say that the criminal offence at issue in *Smithers* – that of being a person with 'insufficient lawful means of support'[21] – does not disclose reasonable grounds to prevent interstate movement. Unfortunately, Griffith CJ does not attempt to specify the line of demarcation between what is a justifiable restriction and what is not. From the perspective of secession, his reasoning has the effect of deferring to state rights by giving weight to the policy reasons behind a restriction on interstate trade, commerce or movement.

Meanwhile, Higgins J in *Smithers* puts forward a modified literalism that later morphed into the 'criterion of operation' test by which s 92 was applied only to laws directed to an essential attribute of interstate trade, commerce or intercourse.[22] Higgins J did not adopt the uncompromising position of Isaacs J but rested analysis upon a narrow inquiry as to whether the legislation was 'pointed directly at'[23] the movement of persons from one state to another. With respect to the policy issues alluded to by Griffiths CJ, Higgins J abstains from expressing an opinion, noting that the facts of the case did not require an answer to 'how far this result has to be qualified by the reserved powers of the States as to matters within their own borders'.[24]

Variations of the opinions of Griffith CJ and Higgins J can be found in many subsequent High Court cases.[25] For example, it has been claimed in *Cole* that accounting for policy is necessary to avoid chaos or anarchy.[26] To a greater or lesser degree depending on a judge's philosophy, 'absolutely free' really means *somewhat* free because reasonable restrictions are allowed.

The decision in *Gratwick* also illustrates how interpretation has divided into two camps. During World War II, in reliance on the defence power, the *National Security Act 1939-1943* (Cth) enabled the *National Security (Land Transport) Regulations* in pursuance of which the *Restriction of Interstate Passenger Transport Order* was issued. Of concern was whether Dulcie Johnson could be prosecuted for having travelled between South Australia and Western Australia without a permit. The *Restriction of Interstate Passenger Transport Order* provided that 'no person shall without a permit travel by rail or by commercial passenger vehicle…from any State

[19] *R v Smithers; Ex Parte Benson* (1912) 16 CLR 99, 109 (Griffith CJ).
[20] Ibid.
[21] Ibid.
[22] On the criterion of operation test: *Palmer v Western Australia* (2021) 95 ALJR 229, 238 (Kiefel CJ and Keane J).
[23] *Rex v Smithers; Ex Parte Benson* (1912) 16 CLR 99, 118 (Higgins J).
[24] Ibid 119 (Higgins J).
[25] *James v Cowan* (1932) 47 CLR 386; *James v Commonwealth* (1936) 55 CLR 1; *Australian National Airways Pty Ltd v Commonwealth* (1945) 71 CLR 29; *Commonwealth v Bank of New South Wales* (1949) 79 CLR 497.
[26] *Cole v Whitfield* (1988) 165 CLR 360, 393 (Mason CJ, Wilson, Brennan, Deane, Dawson, Toohey, Gaudron JJ).

in the Commonwealth to any other State therein'. Once again, the High Court was unanimous in deciding that the order requiring a permit was unconstitutional, but for varying reasons.

Starke J was of the belief that the orders could not survive scrutiny because of s 92. He observed that '[t]he people of Australia are [by reason of s 92]… free to pass to and fro among the States without burden, hindrance or restriction'.[27] The defence power granted to the federal parliament by s 51(vi) is subordinate to the 'declaration of right' in s 92 since the parliament's powers are granted 'subject to this Constitution'. Significantly, Starke J dismissed the pertinence of public safety or defence policy rationales regardless of whether the legislation in dispute is 'pointed directly at' the act of entry or not.[28] His focus was instead on the freedom of passage at the boundary between states. Dixon J likewise endorses this 'frontier' approach and minimises the possibility of a war being sufficient grounds to permit government orders overriding the freedom in s 92.[29] Their literalist reasons take seriously the unitary admonition in the Constitution.

Latham CJ is less firm on the literalist approach. Like Starke J, he acknowledges that s 92 operates as a limitation on s 51(vi) because '[s]ection 92 says that any person can travel between the States if he pleases'.[30] In addition, he rejects the doctrine of necessity and notes that 'the Commonwealth Constitution contains no special provision dealing with national emergency which enables the Commonwealth Parliament…in effect to repeal the Constitution *pro tempore*, even to meet such an emergency'.[31] Instead, Latham CJ states a test whereby if a law's real object is to prohibit interstate movement then it is impermissible but if it merely regulates then it may be acceptable. This test is not a purely literal interpretation because it leaves scope for the argument that a well-defined system of regulation hindering interstate trade can pass constitutional muster.[32] Nonetheless, Latham CJ broadly supports the unitary effect of s 92.

The remaining opinions in *Gratwick* accept a non-literal interpretation of s 92 dependent on the policy behind a burden on interstate trade, commerce and intercourse. Rich J leaves open the

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[27] *Gratwick v Johnson* (1945) 70 CLR 1, 17 (Starke J).
[28] Ibid 17 (Starke J). Starke J adopts a contrary view in an earlier case about states quarantining animals. Cf. *Ex Parte Nelson (No 1)* (1928) 42 CLR 209, 218 where he along with Knox CJ and Gavan Duffy J wrote: 'In truth, the object and scope of the provisions are to protect the large flocks and herds of New South Wales against contagious and infectious diseases, such as tick and Texas fever: looked at in their true light, they are aids to and not restrictions upon the freedom of inter-State commerce. They are a lawful exercise of the constitutional power of the State'.
[29] *Gratwick v Johnson* (1945) 70 CLR 1, 20 (Dixon J).
[30] Ibid 12 (Latham CJ).
[31] Ibid (Latham CJ).
[32] *Gratwick v Johnson* (1945) 70 CLR 1, 13 (Latham CJ).

possibility that an emergency can justify burdens on free movement.[33] McTiernan J advocates the criterion of operation test by focusing attention upon whether an impugned law is directed at interstate trade or movement.[34] Neither Rich nor McTiernan JJ was willing to affirm a general right to travel in all circumstances. As I show below when commenting on s 92 and its link to secession, non-literalist reasoning can support secession by WA on the ground of necessity.

B. The revolution in *Cole*

Prior to the unanimous decision of the High Court in *Cole* there were contradictory opinions about how to interpret s 92.[35] In *Cole,* a utilitarian method – similar to that of John Stuart Mill – became the dominant philosophy.[36] The facts of the case are that there was a prohibition in the Tasmanian regulations on bringing into Tasmania crayfish below a particular size. The undersized crayfish in question were legal under South Australian law but illegal under Tasmanian law. All judges found that the Tasmanian restriction on interstate trade was valid.

There are two features of the judgement worth mentioning. First, the judges advocate a technical distinction between 'trade and commerce' versus 'intercourse'. And second, they endorse a complex test for the former whereby 'discriminatory burdens of a protectionist kind' are impermissible.[37] Neither their distinction between trade and commerce versus intercourse or their preferred test is obvious from the actual words of s 92. A similar observation is made by Kiefel CJ and Keane J in *Palmer,* who summarise the influence of *Cole* as follows:

> It is well understood that *Cole v Whitfield* marked a turning point in s 92 jurisprudence. Prior to that decision, s 92 had been regarded by many as guaranteeing the right of individuals to engage in trade, commerce and intercourse. The broad effects of such an approach were mitigated by the 'criterion of operation' doctrine, by which s 92 was applied only to laws directed to an essential attribute of interstate trade, commerce or intercourse. These interpretations were rejected in *Cole v Whitfield*, where the Court instead adopted an approach which had regard to the character of the law and its effects upon freedom of interstate trade and commerce.
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> In *Cole v Whitfield* the Court said that the guarantee in s 92, that interstate trade, commerce and intercourse be 'absolutely free', was *not to be taken literally*. The section should not be construed

[33] Ibid 16.
[34] Ibid 21.
[35] *Cole v Whitfield* (1988) 165 CLR 360; Robert Randolph Garran, *Prosper the Commonwealth* (Angus and Robertson, 1958) 413.
[36] John Stuart Mill, *Utilitarianism* (1863).
[37] *Cole v Whitfield* (1988) 165 CLR 360, 394.

> as precluding an exercise of legislative power which would impose *any* barrier or restriction on interstate trade or commerce or interstate intercourse.[38]

It was agreed in *Cole* that a law which discriminates is one that subjects interstate trade or commerce 'to a disability or disadvantage or if the factual operation of the law produces such a result'.[39] Where a law has a purpose that is not of a protectionist kind, then it may be valid despite being discriminatory. What saved the regulation in *Cole* from invalidity was that the Court found that its purpose was to conserve the stock of a 'valuable natural resource', that is, Tasmanian crayfish. It was hence deemed not a form of protection which 'gives a market advantage'. And even if it were to give a market advantage, it was a 'necessary means of enforcing the prohibition against the catching of undersized crayfish in Tasmanian waters'.[40]

By giving weight to a state's right to make laws that aim to conserve natural resources, the Court effectively endorsed necessity-based reasoning like that of Griffith CJ in *Smithers.* The subsequent case of *Palmer* has modified the test of 'discriminatory burdens of a protectionist kind'; however, the latest precedent nevertheless carries on with the general approach of *Cole* which is to grant leeway to a legitimate policy reason for restrictions burdening s 92.

C. The test in *Palmer*

In *Palmer*, there were four separate judgements: a joint effort by Kiefel CJ and Keane J, plus independent decisions by Gageler, Gordon and Edelman JJ. The common threads in these four judgements will now dominate s 92 interpretation. Unlike in *Cole* where the prospect of separate tests for the 'trade and commerce' or 'intercourse' limb was raised, all justices broadly approved of the same test being applied to both limbs and sought to rationalise earlier approaches. Kiefel CJ and Keane J state the constitutional test that, on my interpretation, is now shared by all:

> It should therefore be accepted that a law which is directed to discriminating against, or in fact discriminates against, interstate movement is invalid as contrary to s 92 unless it is justified by

[38] *Palmer v Western Australia* (2021) 95 ALJR 229, 238-39 (emphasis added).
[39] *Cole v Whitfield* (1988) 165 CLR 360, 399. Although *Cole* supposedly swept away the criterion of operation doctrine, Anthony Gray in Zimmermann and Forrester (eds), *Fundamental Rights in the Age of COVID-19* (Connor Court Publishing, 2020) explains that 'essentially the same concept' continues. The rationale of Mason CJ and Deane J in *Cunliffe v Commonwealth* (1994) 182 CLR 272 who distinguished between 'direct' and 'indirect' (or 'incidental') burdens and restrictions on interstate trade and commerce remains.
[40] *Cole v Whitfield* (1988) 165 CLR 360, 409 (Mason CJ, Wilson, Brennan, Deane, Dawson, Toohey, Gaudron JJ).

> reference to a non-discriminatory purpose. It may be justified if it goes no further than is reasonably necessary to achieve a legitimate object, as this Court held in *Betfair No 1*.[41]

Gordon J offers clarity on the steps involved.[42] Her description is implicitly actioned by the other justices in their judgements.[43] First, does the impugned law impose a differential burden on interstate trade, commerce or intercourse in favour of intrastate trade, commerce or intercourse? (if there is no discriminatory burden, then the inquiry stops here). Second, where the law imposes a differential burden on interstate trade, commerce or intercourse, it is necessary to identify the law's object. This is an objective search for 'what the law is designed to achieve in fact' and resembles an inquiry into the mischief sought to be addressed by parliament. Third, where the law has a legitimate object, the question is whether the differential burden imposed by that law is justified. Justification is decided by investigating whether the burden, considering its legal and practical operation, is 'reasonably necessary' to achieve a legitimate object.

For the last step of Gordon J's formulation, Kiefel CJ, Keane and Edelman JJ use structured proportionality to ascertain whether a law is necessary to achieve a non-discriminatory purpose. Proportionality is a way of evaluating whether a law is suitable, necessary and adequate in its balance. For something to be suitable means that 'it has a rational connection with a legitimate purpose'.[44] Necessity is 'assessed according to the availability and obviousness of means that could achieve the same legitimate purpose to the same extent but without burdening, or with a lesser burden on, the freedom guaranteed by s 92'.[45] Adequacy on balance weighs the impact of restrictions on the freedom against the importance of the law's purpose. To put it differently, '[a] law will be inadequate in the balance if, notwithstanding that the law is the only reasonable means of achieving the purpose, the extent of the discrimination and thus the incursion into the freedom of trade, commerce, or intercourse cannot be justified given the purpose of the law'.[46]

The outcome in *Palmer* means that the actions of the WA legislature in imposing indefinite border restrictions in response to an epidemic remained in place till recently. *Palmer* relied on Federal Court findings by Rangiah J who assessed the scientific evidence on remittal under s 44

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[41] *Palmer v Western Australia* (2021) 95 ALJR 229, 238-39 (Kiefel CJ and Keane J).
[42] Ibid 267-68.
[43] The differences between justices 'are probably more significant in theory than in practical outcome': David Townsend, 'Constitutional algebra: *Palmer v Western Australia* reunites the broken parts of s 92' (2021) 76 *Law Society of NSW Journal* 84, 85.
[44] Ibid 285.
[45] *Palmer v Western Australia* (2021) 95 ALJR 229, 286 (Edelman J).
[46] Ibid 287.

of the *Judiciary Act 1903* (Cth).[47] Rangiah J considered the need for the border restrictions versus alternatives. His Honour found that the restrictions had been effective to 'a very substantial extent' in reducing the spread of COVID-19 into WA and that the measures were reasonable. Alternatives such as requiring entrants to quarantine for 14 days in a hotel near the border were deemed less effective. A precautionary approach was endorsed because uncontrolled transmission was said to risk 'catastrophic' impacts on the health system.[48]

None of the judges in *Palmer* explicitly impose time limits once they determine that border closures are a reasonable response to a viral concern. Kiefel CJ and Keane J do avert to the absence of vaccines and treatments 'to mitigate the risks of severe medical outcomes or mortality for a person who contracts COVID-19' as being a relevant factor.[49] Although the border is sometimes open, the strategy that was preferred dictates that each time COVID-19 case numbers increase the impediments are reimposed.[50] Even if the government's strategy is changed to focus on mitigation rather than on elimination, this does not from a constitutional standpoint prevent the borders being shut again if another strain or virus appears. That said, it has been contended that the utilitarian test of *Palmer* allows for re-interpretation of scientific evidence to adapt and render restrictions invalid.[51] This could be, for example, due to higher vaccination uptake.[52] From 29 April 2022, with over 90 percent of the eligible population fully vaccinated, the requirement for travellers to apply for an entry permit and to be vaccinated was removed.

Some members of the High Court said that the restrictions are not aimed *at* the WA border.[53] But the practical significance of WA restrictions is discernible from the fact that Commonwealth ministers have been denied entry into the state and that this has disrupted their election

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[47] *Palmer v Western Australia (No 4)* [2020] FCA 1221.
[48] *Palmer v Western Australia* (2021) 95 ALJR 229, 238 (Kiefel CJ and Keane J), 247 (Gageler J).
[49] Ibid 237.
[50] Michael Baker, Nick Wilson and Tony Blakely, 'Elimination could be the optimal response strategy for covid-19 and other emerging pandemic diseases' (2020) 371 *British Medical Journal* 1. Cf. a critique of elimination in Sanjeev Sabhlok, *The Great Hysteria and the Broken State* (Connor Court Publishing, 2020).
[51] Chris Meritt, 'Vaccine progress means closed borders may face High Court challenge', *The Australian* (27 August 2021); Leon Zwier, 'The time is right for a fresh challenge on state borders', *The Australian* (1 October 2021).
[52] The WA Premier has indicated a higher vaccine uptake is required: see Andrew Clennell, 'Mark McGowan keen to pursue a 'zero COVID' policy in WA even after 80pc vaccine threshold is achieved', 15 August 2021 <https://www.skynews.com.au/australia-news/coronavirus/mark-mcgowan-keen-to-pursue-a-zero-covid-policy-in-wa-even-after-80pc-vaccine-threshold-is-achieved/news-story/74b441d105fb4f65715ad931a59fc0d1>; Keane Bourke, 'WA Premier Mark McGowan says state reserves the right to lockdown, announces new measures to turn away COVID-19 ships' (30 July 2021) <https://www.abc.net.au/news/2021-07-30/mark-mcgowan-says-wa-reserves-the-right-to-lockdown/100336734>.
[53] *Palmer v Western Australia* (2021) 95 ALJR 229, 246 (Kiefel CJ and Keane J). Kiefel CJ and Keane J claim that the restrictions are aimed at public health, not the border per se. See Julian Murphy, 'Assessing the performance of Australian federalism in responding to the pandemic' (2021) 51 *Publius: The Journal of Federalism* 627, 641.

campaigning.[54] Arguably, the Court's decision to allow a public health exception for a 'powerful public, protective purpose'[55] has allowed for the effective partial secession of WA.[56]

D. Application to unilateral secession

There is now sufficient evidence available to say that 'absolutely free' is no longer taken literally in the post-*Cole* world and that as a result the unitary notion of a single free trade and movement zone has been diminished. Instead, it is probable that the High Court will adopt a proportionality test like in *Palmer* when examining WA secession and its compatibility with s 92. During a secession, this would mean the state's actions are judged against a rather weak standard that permits deference to parliamentary will (Edelman J writes that a degree of deference should be given to a parliamentary body when evaluating structured proportionality).[57] Although Edelman J characterises s 92 as creating a unitary trading union, the malleable test he adopts allows for undermining that unity when in the hands of an interpreter with a decentralised mindset.

To show how secession is plausible using *Palmer,* I will apply its method to a hypothetical secession. The first stage requires asking whether there is a law that imposes a differential/discriminatory burden on interstate as compared to intrastate trade, commerce and intercourse. The *South Carolina Declaration of Secession* issued in 1860 provides a model for the potential content of such a WA law. The South Carolina resolution declares that:

> [T]he Union heretofore existing between this State and the other States of North America, is dissolved, and that the State of South Carolina has resumed her position among the nations of the world, as a separate and independent State; with full power to levy war, conclude peace, contract alliances, establish commerce, and to do all other acts and things which independent States may of right do.

On its own, such a law need not burden the freedom of s 92 in a differential fashion. As Edelman J notes, it is not always appropriate for a Court to assess the validity of statutory provisions in relation to *all* of their applications.[58] While one consequence of the resolution could be that

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[54] Samantha Maiden, 'Scott Morrison could be banned from Western Australia until next year' (19 November 2021) <https://www.news.com.au/national/western-australia/scott-morrsion-could-be-banned-from-western-australia-until-next-year/news-story/2c25b3cbafc51057e4c99cf9701b1dbb>.
[55] *Palmer v Western Australia* (2021) 95 ALJR 229, 244 (Kiefel CJ and Keane J).
[56] Greg Craven, 'For the first time since WWI the states are the boss', *The Australian* (12 April 2021); Craven, 'Hints of Trumpism in Daniel Andrews, Mark McGowan', *The Australian* (19 January 2021).
[57] *Palmer v Western Australia* (2021) 95 ALJR 229, 285-87 (Edelman J).
[58] Ibid 275 (Edelman J).

intrastate trade, commerce and intercourse is hampered because of a hard border, it is also plausible that the new country of WA adopts a policy of free trade and migration with its neighbours, like the relationship that Australia enjoys with New Zealand whereby citizens of Australia can live in and work in New Zealand as of right. Secession is at root a rejection of central government interference in a state polity. So, it is entirely possible for WA to carry on with free trade, commerce and intercourse with *other states* even as an independent country and act in line with the guarantee of s 92. Such a secession would not differentiate and is consistent with s 92. If a resolution by WA is read down to only permit such a secession, it becomes lawful to that extent. Certainly, given existing political realities, it is unlikely that a peaceful secession by WA would result in a trade war with the other states. The likely outcome is that WA allows citizens of Australia privileges that result in the same trade and travel rights as before.

Suppose on the other hand, that WA chooses to implement a harsh and retributive policy against its former Australian compatriots. Or suppose that the resolution is given a construction that is claimed to inherently burden interstate trade, commerce and intercourse. A finding of differentiation then leads to the second stage where an inquiry into the law's purpose occurs.

The second stage inquires into whether there is a legitimate non-discriminatory purpose. If the purpose of secession is to advance protectionistism, then such an object is illegitimate because of the principle established in *Cole*. If, on the other hand, the intent of secession is to in fact enhance the welfare of the people of WA, then this could be a legitimate purpose. In this regard, WA could call upon academic experts to show the benefits of secession.[59] Some of the benefits of secession include greater competition for residents between countries, leading to higher living standards and less violent conflict because ethnic and cultural tensions can be dissipated through political decentralisation.[60] Any of these types of objectives might be constitutionally viable because they are not protectionist in the sense of trade, commerce and intercourse.

An objection to the foregoing is that secession is not a legitimate purpose because it decimates the freedom in s 92 by completely removing a state from the free trade and movement zone. But in *Palmer*, such an absolutist assumption was discarded in favour of utilitarianism. One can envision a range of purposes that may justify long-lasting border restrictions. These range from the mundane to the exciting. For example, shutting the WA border to Australians would, in the

[59] David Gordon (ed), *Secession, State and Liberty* (Routledge, 2002); Charles Adams, *When in the course of human events: arguing the case for southern secession* (Rowman & Littlefield, 2000); Viva Bartkus, *The Dynamic of Secession: An Analytical Framework* (Cambridge University Press, 1999) 96-114.
[60] Hans-Hermann Hoppe, *Democracy: the God that failed* (Routledge, 2001) 113-14.

short-term, cause the salaries of WA workers to rise due to reduced competition from interstate. A secession of two to three years – with resumption back into the federation once the purpose is achieved – seems reasonable if the principle of necessity from *Palmer* is taken seriously.

The final stage of the *Palmer* test relies on structured proportionality to pinpoint whether the secessionist measures taken are reasonably necessary for the purpose of enhancing a state interest. I draw here on Edelman J, who in *Palmer* sets out the steps for proportionality analysis. Although the test is couched in objective terms, there is always scope to argue both sides.[61]

First, is secession suitably connected to enhancing the welfare of the people of WA?[62] Presumably, if the people voted in a referendum to leave, then that fact is strong evidence that departure from the union will enhance their welfare. Much also depends on the kind of welfare sought to be achieved by secession, that is, whether economic, social, health-related or a combination of these. For instance, if the non-discriminatory purpose sought to be achieved is to reduce the cost of living for residents of WA, then secession is a rational response to that problem because by residents can thereby avoid the burden of federal taxation. Second, are there alternative, effective measures available to achieve the same object but which have less restrictive effects on the freedom in s 92?[63] It could be argued that WA should work within the Commonwealth parliament to bring about its desired change. Yet staying within the union is an impractical alternative given that the people of WA are a minority and persuading other Australians is far from guaranteed. Third, is secession adequate in the balance? Or in other words, is any burden 'incidental and not disproportionate'[64] to achieving the purpose? It is only in extreme situations that adequacy in the balance can be found to preclude an otherwise legitimate measure.[65] In this regard, secession is arguably a rational solution to the myriad of social problems caused by overcentralisation; it cannot be dismissed out of hand as being

[61] *Palmer*, for instance, can be criticised on the grounds that the judges failed to engage with the myriad of alternative measures that may have achieved the same goal as border restrictions, such as: 1) mandatory hotel quarantine; 2) mandatory home quarantine; 3) less restrictive border closures that distinguish between risk levels in terms of COVID-19 cases across the various states; 4) permitting exemptions for trade, commerce and familial ties that help increase economic output and therefore funds for health programs; 5) vaccination programs for other flu-like viruses which indirectly promote immunity to COVID-19; or 6) simply doing nothing at all to develop natural herd immunity. The lack of attention paid to these alternatives was a subjective choice on the part of the justices. The judges also failed to grapple with the relatively mild lethality of COVID-19 in probability terms, as compared to other health threats such as cancer and suicides, many of which outnumber COVID-19 deaths.

[62] *Castlemaine Tooheys v South Australia* (1990) 169 CLR 436 (Mason CJ, Brennan, Deane, Dawson and Toohey JJ) asks us to consider whether a measure is 'rational and legitimate' or 'appropriate and adapted'.

[63] *Palmer v Western Australia* (2021) 95 ALJR 229, 244 [61] (Kiefel CJ and Keane J).

[64] *Castlemaine Tooheys v South Australia* (1990) 169 CLR 436, 473 (Mason CJ, Brennan, Deane, Dawson and Toohey JJ).

[65] *Palmer v Western Australia* (2021) 95 ALJR 229, 289 (Edelman J).

disproportionate to the legitimate non-discriminatory objectives of the WA polity. To use the example of reducing the cost of living for WA residents, econometric models can demonstrate to a court how much better off each citizen of WA could be in the sense of greater leisure time due to less economic pressure and any follow-on benefits on mental health, life expectancy etc.

It can be inferred that there is no necessary inconsistency between s 92 and secession. The reasonable necessity approach contradicts the notion of a federal state where individuals have the right to access government offices throughout the nation and to visit relatives or conduct business wherever they may reside within Australia. It instead inadvertently approves of the concept of states existing in a confederal union that preserves pre-Federation borders. In another sense, *Palmer* is logical. While the Constitution facilitates the framework for inter-state cooperation, this does not equate to an intention to make the union coercive, so to that extent the judges correctly defer to state interests. Either way, WA has a range of policy at its disposal. Although there are critiques that have been made of *Palmer*, it remains the law for the moment.[66]

IV. RECONCILING FINANCIAL AGREEMENTS

This part evaluates another potential obstacle to secession by Western Australia: s 105A of the Constitution. Barwick's submissions as counsel for the plaintiff in the *Melbourne Corporation Case* characterise s 105A as establishing the proposition that the 'Commonwealth and States may now be regarded as *one government* for monetary and public credit purposes'.[67] Likewise, Dixon J held that '[s]ection 105A cuts across the Constitution and, as it has been construed in this Court, *imposes upon the States absolute liabilities* to the Commonwealth *enforceable against the revenues of the States'*.[68] What these contentions confirm is that there is a unitary element to the borrowing arrangements of federal and state governments due to s 105A.

Finances are the lifeblood of a nation. Hence, if WA tries to leave there is some doubt about what happens to its obligations owing to third parties. This part of the chapter examines the relevant authority to ascertain whether such obligations can reasonably hinder dissolution.

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[66] See Augusto Zimmermann, "How the High Court redefined 'absolutely'" (2021) *Quadrant Online* <https://quadrant.org.au/opinion/qed/2021/03/how-the-high-court-redefined-absolutely>. Where the reasoning in *Palmer* misfired is by approving partial secession without balancing this against WA's obligations as a beneficiary of the Federation. Although it is likely that the WA people, as the ultimate sovereigns (see Chapter 4), supported the border closures, there was no referendum result to prove this. So logic may have demanded that a state be required to either remain fully within the union or to leave completely. By endorsing the halfway house of partial secession, the High Court ignored the literal words of s 92 without a state-wide referendum to back its stance.

[67] *Melbourne Corporation* (1947) 74 CLR 31, 40. Emphasis added.

[68] Ibid 85 (Dixon J). Emphasis added.

A. Text of section 105A

Section 105A has several components. Important for the purposes of analysis are ss 105A(1), 105(3) and 105(5). Section 105(1) says that '[t]he Commonwealth may make agreements with the States with respect to the public debts of the States' – this includes Financial Agreements for the taking over of such debts, the management of such debts and other similar tasks. Section 105(3) has been a source of controversy in the *Garnishee Cases* examined below. It says '[t]he Parliament may make laws for the carrying out by the parties thereto of any such agreement'. Questions have arisen as to whether this provision permits coercion against a state for failing to adhere to the terms of a Financial Agreement made under s 105(1). Finally, s 105(5) notes that:

> Every such agreement and any such variation thereof shall be binding upon the Commonwealth and the States parties thereto notwithstanding anything contained in this Constitution or the Constitution of the several States or in any law of the Parliament of the Commonwealth or of any State.

To understand how s 105A of the Constitution could be an obstacle to secession, it is necessary to examine how the section came about and the Loan Council that it authorises.

B. Formation of the Loan Council

The Loan Council which is now authorised because of s 105A initially began in 1923 as a voluntary body to coordinate public sector borrowing. Its voluntariness was on full display from July 1925 to December 1927, when New South Wales withdrew from the Council. Political conditions changed and in 1928 all seven parliaments agreed to a Financial Agreement that was to come into being on a long-lasting basis on the basis of an amendment to the Constitution. After a successful referendum that same year, which inserted the current s 105A, the Commonwealth parliament gave the amended Financial Agreement legal effect.[69]

Section 105 already empowered the Commonwealth to take over state debts existing at Federation. By Section 105A, the Commonwealth's authority to assist with state debts incurred *after* Federation and facilitate a Loan Council that 'controls the borrowing of the entire public sector in Australia, other than borrowing for temporary purposes and for defense' was put

[69] C Headford, 'The Australian Loan Council – its origin, operation and significance in the federal structure' (1954) 13 *Australian Journal of Public Administration* 44, 49.

beyond doubt.[70] Although not directly named in the Constitution, the Loan Council exists under ss 105A(1) and 105A(3) which permit the making of agreements and for the Commonwealth parliament to make laws for the carrying out of the agreements. The Council is a powerful body because it, and not the respective parliament, controls the amount that may be borrowed each year for public investment by federal and state governments, semi-government public corporations and local authorities. It is comprised of the Prime Minister of the Commonwealth and the Premiers and Chief Ministers of the states and territories. At present, the Commonwealth has a dominant position on the Council because it enjoys two votes plus a casting vote.

The story of how the Council came to have coercive implications for secession begins with the Great Depression of 1929. Two schools of thought existed during the economic depression in terms of how governments should respond to the crisis.[71] The Melbourne plan supported by Prime Minister Scullin recommended a small government deflationary response to strive for a balanced budget by paying down debt and paying back interest on loans. In contrast, the Lang plan advocated by New South Wales Premier Lang sought to adopt pro-spending inflationary measures involving increased government intervention and repudiating debt obligations.[72]

At the time, the Financial Agreement passed in reliance on s 105A required New South Wales to pay to the Commonwealth monies that would allow the federal government to recoup payments made to overseas bondholders. After Prime Minister Joseph Lyons came to power in 1932, the Commonwealth parliament enacted the *Financial Agreements Enforcement Act 1932* (Cth) ('Financial Enforcement Act') purporting to compel NSW to adhere to the Agreement. The *Financial Enforcement Act* envisioned a process whereby the executive obtains a certificate from the Auditor-General stating that certain sums are due to the Commonwealth by a state and then invites the federal parliament to pass resolutions for debt recovery. Upon the parliament's passage of resolutions, legal action is taken by the Commonwealth to seize state assets. Section 5 of the *Financial Enforcement Act* declared that the Attorney-General may apply to the Court for a declaration that an amount of money is due by a state government and that the judgement is to be enforceable 'as a charge upon all the revenues of the State'. Section 6 provided for the sequestration of a state's revenue where a parliamentary resolution finds a threat of default.

[70] W Jay, 'The Australian Loan Council' (1977) 7 *Publius* 101, 101.
[71] Bede Nairn, *The 'Big Fella': Jack Lang and the Australian Labor Party 1891-1949* (Melbourne University Press, 1986) 369.
[72] Frank Cain, *Jack Lang and the Great Depression* (Australian Scholarly Publishing, 2005); Ross Cranston, 'From cooperative federalism to coercive federalism and back' (1979) 10 *Federal Law Review* 121, 125-126.

In line with its philosophy of repudiating debt obligations, the NSW government led by Lang refused to pay the Commonwealth and withdrew its funds from bank accounts to prevent the Commonwealth from recovering funds.[73] Unfortunately for the NSW government, ss 5 and 6 of the federal legislation was upheld by a majority of four to two in *New South Wales v Commonwealth (No 1)* ('First Garnishee Case') and set a precedent for coercion against an Australian state.[74] In *New South Wales v Commonwealth (No 3)* ('Third Garnishee Case) the High Court again upheld the law, but this time in relation to s 15 which enabled the federal government to coerce banks into transferring state deposits to the Commonwealth.[75] There is therefore clear precedent by the Court accepting coercion against a state which tries to evade its financial obligations. From the perspective of a secessionist WA, this is a problem.

C. Intervention in the *Garnishee Cases*

To help understand the issues involved, this part examines the majority and dissenting reasons in the *Garnishee Cases.* By way of background, the Financial Agreement entered by NSW and the other states contained a mechanism for the Commonwealth to take over state debts and to pay a portion of the interest toward those debts. In return, the states agreed to pay into a sinking fund any interest charges in excess of the amount that the Commonwealth had consented to pay. The Agreement provided that the states indemnify the Commonwealth against liabilities in respect of the public debt taken over by the federal government on behalf of a state. Lang was opposed to the settled plan. But a majority comprised of Rich, Dixon, Starke and McTiernan JJ took what Appleby describes as the politically safe option of deciding in favour of the status quo contained in the Agreement.[76] Gavan Duffy CJ and Evatt J dissented in separate judgements.

*1. **Reasons of the majority***

In their joint judgement in the *First Garnishee Case*, Rich and Dixon JJ characterise Part II of the *Enforcement Act* as creating 'an involuntary assignment of the specified revenues of the State to the Commonwealth'.[77] Section 5 of the *Enforcement Act* was deemed lawful primarily because of s 105A(3) of the Constitution. Dixon and Rich JJ think that s 105A(3) 'authorizes the enactment of laws calculated to bring about performance of their obligations by the parties; laws

[73] Gerald Stone, *1932: The Year That Changed a Nation* (Macmillan Australia, 2005).
[74] *New South Wales v Commonwealth (No 1)* (1932) 46 CLR 155 ('First Garnishee Case').
[75] *New South Wales v Commonwealth (No 3)* (1932) 46 CLR 246 ('Third Garnishee Case').
[76] Gabrielle Appleby, 'The Gavan Duffy Court' in Rosalind Dixon and George Williams (eds), *The High Court, the Constitution and Australian politics* (Cambridge University Press, 2015) 148.
[77] *First Garnishee Case* (1932) 46 CLR 155, 174 (Dixon and Rich JJ).

to procure the fulfilment of the agreement'.[78] Section 6 was upheld largely based on s 105A(5). Their opinion is that s 105A(5) operates 'to make any agreement of the required description obligatory upon the Commonwealth and the States, to place its operation and efficacy beyond the control of any law of any of the seven Parliaments, and to prevent any constitutional principle or provision operating to defeat or diminish or condition the obligatory force of' an Agreement made under it.[79] Secondary reliance was placed on s 51(xxxix), which confers power upon the Commonwealth 'to make laws with respect to matters incidental to the execution of any power vested by the Constitution in the Federal Judicature' and 'clearly authorizes laws for carrying into execution all the judgments which the judicial power has power to pronounce'.[80] To support their assertions, Dixon and Rich JJ rely on textual analysis, and moreover notice is taken of practical considerations such as the magnitude of the state debts taken over and the federal government's financial dependence upon a state to honour its repayment obligations. Such factors were alleged to make it 'reasonably necessary' to enforce an Agreement.[81]

Starke J adopts a multi-pronged approach. First, his Honour places emphasis on the purpose of the constitutional amendment inserting s 105A, which was to 'establish beyond question the validity of the Financial Agreement and all future agreements of the same kind, to render the rights and duties created or imposed thereby unalterable without the mutual agreement of all the parties thereto'.[82] Second, he attacks the philosophical foundations of the states with his argument that national power is 'paramount'[83] because states are not sovereign entities:

> It has been strenuously asserted that these Acts are an interference with the sovereign rights of the States and with the judicial power of the Commonwealth vested in its Courts. But, as has been pointed out more than once in this Court, the States are not sovereign powers.[84]

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[78] Ibid 178 (Dixon and Rich JJ).

[79] Ibid 176 (Dixon and Rich JJ).

[80] Ibid (Dixon and Rich JJ). Primary reliance was placed upon s 105A read in its entirety. Secondary reliance was placed upon the incidental power in s 51(xxxix) because enforcement of a judgement was seen as being incidental to the exercise of authority derived from ss 105A(3), 105A(5) and other relevant provisions like s 78. The passing of judgement by the Court on such a proceeding was said to be legitimate because the Commonwealth has a right to bring the matter to the judicial bench using s 75(iii) – which gives the Court jurisdiction over matters in which the Commonwealth is a party – and hence resolution falls within the judicial power of the Court.

[81] Ibid 182 (Dixon and Rich JJ).

[82] Ibid 184 (Dixon and Rich JJ).

[83] Per Starke J in *Third Garnishee Case* (1932) 46 CLR 246, 264: 'The States are subjected by the Constitution to the legislative power of the Commonwealth to enforce and execute the Agreement. The national power is paramount and may be exerted against the property, moneys, and revenues of the States in whatever form they exist, and wherever found… And it should be remembered that this authority can be exerted by the whole power of the Commonwealth, legislative, executive, and judicial'.

[84] *First Garnishee Case* (1932) 46 CLR 155, 184 (Starke J).

In effect, Starke J prefers to think of federation as a unitary state. Despite s 105A not indicating who is to enforce the provision in the event of default, he assumes that 'if default took place the Commonwealth seems the natural custodian of the power to enforce the Agreement and to provide remedies for non-performance, whether on its own part or on the part of the States'.[85]

Third, Starke J explains that the nature of judicial power includes the right to enforce the results of its exertion.[86] Accordingly, the legislation in question did not interfere with judicial power. In particular, s 6 of the *Financial Enforcement Act* which permitted the Commonwealth to garnishee a state's revenue prior to a court hearing due to urgency associated with the threat of default by the state was deemed not to be an interference with judicial power because it is merely a form of self-help that will subsequently be affirmed or denied in a court of law.

McTiernan J stressed that the states are not sovereign but went further in his unitary assumptions. Conceding that a state must follow a process of parliamentary appropriation before it can hand over revenue to the Commonwealth, he nonetheless said that this precondition is irrelevant because s 105A overrides that requirement.[87] The Commonwealth need not wait for a state to follow due process, it can enforce a payment obligation against a state because '[t]he Commonwealth is a Government, not a mere confederation of States, and no State within the Commonwealth is entitled to decline to fulfil according to its legal intent any obligation imposed upon it by the Constitution'.[88] Another reason that the Act was valid is because the Commonwealth is entitled to sue a state without its consent due to the original jurisdiction of the Court. Section 75(iii) permits the hearing of disputes where the Commonwealth is a party, so federal legislation allowing for claims against a state does not interfere with judicial power.[89]

2. The dissenting reasons

In dissent, Gavan Duffy CJ argues that Part II of the *Enforcement Act* is not supported by any constitutional power granted to the Commonwealth parliament.[90] He also raised two interpretative observations specific to s 105A. First, the *Enforcement Act* purports to compel taxpayers who are not parties to a Financial Agreement to set aside funds to pay the

[85] Ibid 187 (Starke J).
[86] Ibid 185 (Starke J).
[87] Ibid 228 (McTiernan J).
[88] Ibid (McTiernan J).
[89] Ibid 233-34 (McTiernan J).
[90] Ibid 173 (Gavan Duffy CJ).

Commonwealth because a state government has defaulted on its obligations.[91] His Honour's argument implicitly considers distributive justice by submitting that such action against innocent third-parties is not contemplated by s 105A(3). Second, although s 105A(1) enables the making of contracts by the Commonwealth with a state, s 105A(3) does not authorise coercion by any particular party. Gavan Duffy J retorts that '[t]he language of [s 105A(3)] is not apt to include a statute enforcing obligations against any of the parties to an agreement'.[92] The provision certainly should not be read as sanctioning enforcement solely in the Commonwealth's favour.

Evatt J places emphasis on the proper characterisation of s 5 of the *Enforcement Act* and its discriminatory impact on a state's officers who are liable to arrest by the federal government due to ss 7 to 13 of the *Act*, but without a corresponding power given to the state's Crown to arrest Commonwealth officers if the federal government defaults. He disputes the proposition that coercion against a state is authorised by the Constitution, noting that 'the application of such remedies to States possessing the powers of responsible government is entirely without precedent in the constitutional history of Britain and the British Dominions', citing statements by Viscount Haldane, Isaacs CJ and Starke J to the effect that the principle of responsible government prevents any appropriation of money from consolidated state revenue except by state parliamentary consent.[93] For Evatt J, it does not follow from a binding judgement that the principle of responsible government at the state level can be undermined by the Commonwealth by simply seizing funds in contradiction to the representative process of a state legislature:

> It seems likely, therefore, that although laws of the Parliament of the Commonwealth are 'binding' upon a State, judicial decisions declaring the liability of a State to pay moneys in accordance with such 'binding' laws may not be capable of execution by seizure of the King's State revenues. Implicit in the judgments delivered in the *Australian Railways Union Case* is the principle that political and not legal sanction may have to be relied on in order to induce State Legislatures to appropriate moneys for the purposes of meeting all judgments against the Crown in right of the State.[94]

In addition, it was suggested by Evatt J that s 105A(3) only encompasses Commonwealth laws validating an agreement and carrying it out.[95] The wording does not cover all manner of action

[91] Notably, the *Financial Agreement Enforcement Act 1932* (Cth) ss 7 to 13 required individual taxpayers to pay to the Commonwealth government any monies they owe to a state government in default of obligations.
[92] *First Garnishee Case* (1932) 46 CLR 155, 173 (Gavan Duffy CJ).
[93] Ibid 196 (Evatt J).
[94] Ibid 198 (Evatt J).
[95] Ibid 221 (Evatt J).

calculated to result in the performance of a financial agreement, especially when applied in a discriminatory fashion only to *some* states (rather than to *all* 'the parties thereto'). If it had been intended to confer such power, the obvious word to use would have been 'enforcement', but this was not used. Beyond a coordinating purpose, the provision does not to confer any coercive power. The fact that s 105A(5) of the Constitution says that s 105A is binding notwithstanding anything contained in the constitution of a state does not assist the Commonwealth's position. This is because whether an agreement is binding in principle is a separate question from coercion against a state. For Evatt J, the law has different things to say about each: laws imposing coercive remedies are not laws for the 'carrying out' of an agreement but are directed toward the consequences of non-performance, usually after a breach by one party.[96]

In the alternative, Evat J explains that the *Enforcement Act* can be characterised as a federal law imposing taxation upon a state government.[97] Since the Act operates upon those states in default of financial obligations and not upon all states equally, it violates the requirement in s 51(ii) that laws imposing taxation must be applied without discrimination between states.

With respect to s 6 of the Act, Evatt J declares it void because it usurps the Court's judicial power by giving to the Commonwealth's legislature and executive the role of 'plaintiff, judge and executioner' and purporting to prevent the Court from staying an extra-judicial garnishee.[98]

Finally, Evatt J dismisses the Commonwealth parliament's incidental power in s 51(xxxviii) as a ground for upholding the validity of Part II of the *Act*. The legislation is not an incidental exercise of s 61 since that clause relates to executing laws otherwise valid under another power. Nor is enforcing a curial judgement a necessary incident of the Court's jurisdiction in s 75, because the reality of a binding judgement is separate from the issue of the legality of enforcing that theoretically binding judgement. Furthermore, the legislation burdens only the states so is inconsistent with notions of impartial justice. Section 78 of the Constitution was also ruled out because of the interpretation of that section adopted in an earlier decision.[99] In sum, it was shown that there is no express power granting the Commonwealth a right to coerce NSW and so seizing that state's property and arresting its officers cannot be incidental to any power.

[96] Ibid 224 (Evatt J).
[97] Ibid 200-201 (Evatt J).
[98] Ibid 195 (Evatt J).
[99] Ibid 214 (Evatt J).

D. A restraint on unilateral secession?

Applying the majority perspective in the *Garnishee Cases* is a potential obstacle to secession because s 105A as interpreted theoretically permits the revenues of the WA government to be sequestered by the Australian Federal Police until state debts are repaid. This sets up a potential conflict with secession since WA may be unable to sever ties to the Commonwealth. Confirmation of this apparent conflict comes from Cranston who in his study identifies 'Australian government control over the Loan Council' as an element of 'coercive federalism'.[100]

The states are currently operating under the original Financial Agreement formulated in 1927 which was then amended several times and most recently in 1994.[101] Clause 5 of the Agreement specifies that the states have various obligations to pay the Commonwealth. The only way to revoke any Financial Agreement, according to s 105(4) of the Constitution, is for all parties to agree and this does not seem to be on the national agenda at the present time. Moreover, if there was an attempt to secede, there is likely to be opposition from the Commonwealth and other states to releasing WA from its obligations. This opposition could be based upon economic considerations, such as their financial dependence on WA's direct or indirect monetary contribution to servicing Australian public debt (which is presently over $1 trillion).[102]

Even so, it seems unlikely that the obstacle posed is insurmountable. First, the High Court has not been consistent in its application of coercion. Although it authorised enforcement against NSW in the *Garnishee Cases* of 1932, when South Australia asked the Court to enforce an agreement against the Commonwealth related to the standardisation of railway lines it declined. Cranston notes that in *South Australia v Commonwealth*, '[m]ost judges held that the Agreement gave rise to political obligations only and not to legal obligations enforceable by a court'.[103] The judges did say that intergovernmental agreements could be enforceable but did not explain how these could be identified or how their opinion relates to the shared sovereignty cases in Chapters 4. Give these circumstances, the dissent of Evatt J seems to align better with the *Melbourne Corporation Case.* What is notable about his dissent is that Evatt J does not rely on the concept of state sovereignty as a step in his reasoning and so sidesteps accusations of reserved powers

[100] Ross Cranston, 'From co-operative to coercive federalism and back' (1979) 10 *Federal Law Review* 121, 128.
[101] See, eg, *Financial Agreement Act 1994* (Vic); *Financial Agreement Act 1994* (NSW).
[102] Official measures of government debt generally understate the debt by excluding relevant components and contingent liabilities. For a comprehensive measure see <https://australiandebtclock.com.au>.
[103] Cranston, 'From co-operative to coercive federalism and back' (n 102) 128 commenting on the High Court decision of *South Australia v Commonwealth* (1962) 108 CLR 130.

doctrine heresy.[104] Instead, his analysis proceeds by looking at the substantive impact of enforcement against a state and then assesses whether this aligns with the Constitution.

Second, the development of financial relations outside the Agreement has rendered them less important to federation. As Saunders observes, 'The agreement was designed to meet objectives that have long since passed and was based on an economic theory that has long since been overtaken by events'.[105] And 'the form of the Financial Agreement now bears no relation to reality either in procedure or in substance'.[106] Nowadays, the primary mechanism for the Commonwealth to influence the states is via revenue redistribution payments rather than the Agreement. This suggests that WA could secede and not upset arrangements in a practical sense.

Third, before, after or during secession, WA can repay its financial obligations to the rest of Australia and in doing so prevent a cause of action arising under s 105A. It is true that the Financial Agreement will remain binding because of s 105A(4), however the state will not trigger enforcement if it takes care to honour its obligations at the time it secedes. Of course, in the long-term, issues might arise since the underlying Agreement will subsist and could create obligations. Nonetheless, it seems to be open to a state to pay its debts and thereby avoid the conditions arising that were held in the *Garnishee Cases* to justify coercion. Such ongoing payments by WA are akin to foreign aid or protection money paid to the Commonwealth of Australia to keep the peace and make secession legally possible. Within the domain of budgetary allocations, the amounts payable by WA are likely to be relatively manageable because in recent years the state has enjoyed the benefits of a mining boom and has low debt. In the meantime, the state could keep trying to persuade Australians to release it from its financial commitments.

V. SECTION 117 AND EQUAL TREATMENT

This part of the chapter explores a final potential barrier to secession: s 117 of the Constitution. Section 117 could be seen as solidifying a unitary state by mandating that the government of Western Australia cannot discriminate or burden the residents of other states who are within its jurisdiction. Section 117 is unique in that its text suggests that it was intended to protect individuals and so it may defy the tendency of the High Court to read down rights provisions and

[104] *Amalgamated Society of Engineers v Adelaide Steamship Co Pty Ltd* (1920) 28 CLR 129 ('Engineers Case'). Note that there is reason to think *Engineers* did not eliminate deference to state parliaments by the High Court, it merely concealed it: Nicholas Aroney, 'Constitutional choices in the *Work Choices Case*, or what exactly is wrong with the reserved powers doctrine?' (2008) 32 *Melbourne University Law Review* 1, 4.
[105] Cheryl Saunders, 'Government borrowing in Australia' (1990) 20 *Publius: The Journal of Federalism* 35, 49.
[106] Ibid.

strip them of substantive force.[107] The section refers to '[a] subject of the Queen' and then posits a prohibition on '*any* disability or discrimination' that is applied to that resident.

Nonetheless, Gray explains that 'the High Court has not interpreted [s 117] in the absolutist, literal terms in which it appears'.[108] This non-literal approach has resulted in s 117 being read in a manner that dilutes its effectiveness in securing individual rights.[109] For example, in *Davies v Western Australia*, rather than giving force to the substantive content of s 117, the Court upheld an estate tax that applied at a higher rate to beneficiaries not residents of Western Australia because of a formalistic criterion of operation test.[110] And although the leading judgement of *Street v Queensland Bar Association* ('Street') construed s 117 in a more substantive way, it contains seven separate judgements so there is ambiguity about the circumstances caught within the ambit of the section.[111] Furthermore, the decision permits exceptions to the prohibition in s 117, but at the same time provides varying descriptions of when exactly an exception arises.[112]

The following provides an overview of the relevant precedent and highlights aspects that pertain to secession by a state. An ambiguity to be resolved is whether the judicially recognised object of s 117 'to foster the concept of Australian nationhood'[113] implies a unitary state or whether the Court's thinking in this regard permits the high degree of autonomy that secession implies.

A. Initial attitude of the High Court

Early rulings by the High Court paid greater regard to the sovereignty of the states and limited the substantive force of s 117 primarily via narrow technical doctrine. As Ebbeck submits:

> Particularly in the cases prior to *Henry v Boehm*…the attention of the High Court was primarily focussed upon ensuring that the States could legislate in particular areas such as taxation without infringing s 117. An examination of these cases leads one to the conclusion that 'reserved power' reasoning was adopted in the interpretation of s 117 even after the doctrine of reserved power had

[107] On the tendency to read down rights guarantees, see Nicholas Aroney and Benjamin Saunders, 'On Judicial Rascals and Self-Appointed Monarchs: The Rise of Judicial Power in Australia' (2017) 36 *University of Queensland Law Journal* 221, 229; Shireen Morris, *A First Nations Voice in the Australian Constitution* (Hart Publishing, 2020) 49-50: 'history confirms the embedded respect for parliamentary supremacy in Australian constitutional culture'.
[108] Anthony Gray, 'Covid-19 border restrictions and section 92 of the Australian Constitution' in Augusto Zimmermann and Joshua Forrester (eds), *Fundamental rights in the Age of COVID-19* (Connor Court, 2020) 125.
[109] Cf. Genevieve Ebbeck, 'Section 117: the obscure provision' (1991) 13 *Adelaide Law Review* 23, 23.
[110] *Davies v Western Australia* (1904) 2 CLR 29.
[111] *Street v Queensland Bar Association* (1989) 168 CLR 461 ('Street').
[112] Gray, 'Covid-19 border restrictions and section 92 of the Australian Constitution' (n 110) 125.
[113] *Goryl v Greyhound Australia* (1994) 179 CLR 463, 486 (Dawson and Toohey JJ) ('Goryl').

> been categorically rejected by the High Court in *Amalgamated Society of Engineers v Adelaide Steamship Co Ltd*…Reliance upon this reasoning was a major factor in the 'process' of emasculating s117. Coupled with this was the adoption by many judges of a pedantic, technical approach to interpretation which proved to be a second major factor in this 'emasculation' of the section.[114]

In *Henry v Boehm*, handed down in 1973, a majority of the High Court decided that s 117 did not prevent the South Australian *Rules of Court Regulating the Admission of Practitioners* from requiring an applicant to reside in South Australia for three months prior to applying for admission, and then after conditional admission for at least a further twelve months. The plaintiff – who was ordinarily resident in Victoria – contended that the rules imposed a discriminatory burden on him to switch his state of residence. However, the majority said that the rules did not violate s 117[115] because the rule requiring residence in South Australia for a period of time applied equally to all applicants. Thus, there was no disability or discrimination applicable to the plaintiff which would not have been applicable to South Australians seeking admission.[116]

B. *Street v Queensland Bar Association*

Street is the most recent and prominent High Court decision where s 117 is comprehensively evaluated.[117] The plaintiff, Alexander Whistler Street, was a barrister practicing in several states who resided in New South Wales. He was refused admission as a barrister of the Supreme Court of Queensland on the basis that he was not a resident of Queensland and had no intention to relocate to that state. All justices of the High Court found in favour of Street and accepted that the rules amounted to discrimination on the ground of his out-of-state residence. In doing so, they overruled *Henry v Boehm* and gave s 117 a substantive rights-protecting force.

From *Street* one can infer that s 117 is triggered if there is a condition that imposes discrimination which burdens or negates a benefit. For McHugh J, discrimination means the act of distinguishing or treating differently irrespective of whether the distinction or different treatment can be justified.[118] But for Brennan J, if there is a rational and proportionate connexion

[114] Genevieve Ebbeck, 'Section 117: the obscure provision' (1991) 13 *Adelaide Law Review* 23, 23.
[115] *Henry v Boehm* (1973) 128 CLR 482, 489 (Barwick CJ).
[116] Ibid 491-92 (Menzies J).
[117] Later rulings after *Street* deal with s 117 as only a minor component of the decision so are not persuasive. See, eg, *Goryl* (1994) 179 CLR 463 and *Sweedman v Transport Accident Commission* (2006) 226 CLR 362.
[118] *Street* (1989) 168 CLR 461, 582 (McHugh J).

between a discriminatory condition and some objective other than the subjecting of protected persons to different treatment, then there is no discrimination for the purposes of s 117.[119]

Two assertions find agreement in the reasons of most of the justices. First, the substantive impact of a state government act on an affected person should not be ignored.[120] Second, if the legal or factual impact on an affected person has the consequence of subjecting that person to a disability or discrimination that is not imposed upon him as a hypothetical 'other' person not targeted by the law, then the legislation is to that extent unlawful unless an exception applies.[121]

It is the exceptions to s 117 that are a source of divergence in opinion. Of relevance to unilateral secession is the exception for state rights. In this context, although Mason CJ submits that 'nationhood and national unity' ought to be seen as a purpose of s 117, he also concedes that:

> To allow the section an unlimited scope would give it a reach extending beyond the object which it was designed to serve by trenching upon the autonomy of the States to a far-reaching degree. Accordingly, there may be cases where the need to preserve that autonomy leads to a recognition that a particular disability or discrimination is not prohibited. The object of s 117 is very broad-ranging and it is difficult to conceive of a disability or discrimination which does not offend that object unless to prohibit the imposition of the disability or discrimination would threaten the autonomy of the relevant State.[122]

The meaning of the above state autonomy exception is alluded to by Toohey J, who explains that 'the federal system contemplated by the Constitution assumes that, subject to the Constitution, the States will legislate for their peace, order and good government'.[123] And McHugh J in the *Street* case confirms that 'the existence of a federal system of government, composed of *a union of independent States* each continuing to govern its own people, necessarily requires the conclusion that *some subject-matters are the concern only of the people of each State*'.[124]

Mason CJ thinks that states are permitted to exclude out-of-state residents from the enjoyment of rights 'naturally and exclusively associated with residence in a state'.[125] Brennan J holds that the

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[119] *Street* (1989) 168 CLR 461, 510 (Brennan J).
[120] Ibid 581 (McHugh J): 'A person resident in another State may be subject to disability or discrimination on the ground of his residence not only from the direct operation of a law but also from its factual impact'.
[121] Ibid 546 (Dawson J).
[122] Ibid 491-92 (Mason CJ).
[123] Ibid 559 (Toohey J).
[124] Ibid 583 (McHugh J). Emphasis added.
[125] Ibid 492 (Mason CJ).

guarantee of equality of treatment is qualified by necessary implication from the Constitution to 'preserve the institutions of government and their ability to function'.[126] Deane J qualifies the scope of s 117 with reference to the natural structure of the State, the limited scope of its legislative powers or the nature of the particular right, privilege, immunity or other advantage or power to which it relates.[127] Toohey J says that the limits of s 117 are to be found in implications drawn from the Constitution, in particular the capacity of the states to regulate their own affairs within a federal system.[128] McHugh J writes that 'matters which are the concern only of a state and its people, e.g. the franchise, the qualifications and conditions for holding public office, and conduct which threatens the safety of a State or its people, are not within the scope of s 117'.[129] Dawson J adds that measures relating to the 'ordinary and proper administration of the affairs of that State'[130] – such as obtaining welfare benefits – are also exempt where 'reasonable'.[131]

Most approved of the view that a state should demonstrate a need for an exception from s 117. Mason CJ says that exceptions must be 'justified as a proper and necessary discharge of the State's responsibility to the people of that State, which includes its responsibility to protect the interests of the public'.[132] Or as Brennan J put it, '[n]othing less than the need to preserve the institutions of government and their ability to function can justify the erection by government of a barrier to the legal and social unity of the Australian people'.[133] That said, the categories of exceptions are not closed.[134] In practice there is a policy element that paves the path for a wide exception.[135] The prospect of such policy submissions broadens the scope of the exception.[136]

C. Implications for unilateral secession

[126] Ibid 513 (Brennan J).
[127] Ibid 462 (Deane J).
[128] Ibid 560 (Toohey J).
[129] Ibid 584 (McHugh J).
[130] Ibid 548 (Dawson J).
[131] Ibid 546 (Dawson J).
[132] Ibid 492 (Mason CJ).
[133] Ibid 513 (Brennan J).
[134] Ibid 513 (Brennan J).
[135] Ibid 550 (Dawson J). An example of how the exception can be broadened is provided by Dawson J, who apparently concedes that the disability or discrimination to which the plaintiff was subject could have been allowed were it 'genuinely directed towards the maintenance of proper professional and ethical standards'.
[136] In the context of the facts in *Street*, one can envision reasonable scientific and policy arguments whereby a residence requirement can be defended by a state on the grounds that it (1) encourages a practitioner's familiarity with a state's culture and rules; and (2) fosters loyalty to a state's government and in particular to its Supreme Court; (3) allows for assurance that a practitioner can physically attend proceedings; and (4) makes it more likely that a practitioner will undertake voluntary work in the jurisdiction. See, eg, Thomas Lytton, 'Crossing state lines to practice law: the poverty lawyer and interstate practice' (1970) 20 *American University Law Review* 7, 11.

As can be seen from the exposition so far, some of the reasoning in *Street* suggests that there remains a degree of deference to state interests despite s 117 of the Constitution and its ostensible support of a unitary state where Australians are free from discrimination based on their residence. Yet how far does this deference go and can it permit secession? Part of the answer lies in Simpson's assessment that the rationales behind s 117 are rooted in either an individual rights view or on a structural imperative sustaining union.[137] The former interpretation merely provides a remedy for individuals seeking to enjoy privileges and immunities across Australia, while the latter tries to intertwine a state Crown into a larger unitary system.

Reynolds has investigated the history behind s 117 at the Constitutional Convention debates at which the framers gathered in Melbourne during 1898. He concludes that the 'debate sheds little light on what the *limits* to section 117 might be' and that there was 'significant confusion and disagreement as to the import and effect of the clause'.[138] While s 117 was originally modelled on a clause in the *US Constitution*, it is not the same as the American text because that protects 'privileges and immunities'. The main difference is that the American clause is positively phrased to *secure* privileges and immunities, whereas the Australian formulation is phrased negatively to *prevent* the imposition of a disability or discrimination. In the US, interpretation has raised the 'fundamentality doctrine' which posits that only 'fundamental' privileges and immunities are beyond the reach of state laws.[139] These have included examples like the right to travel from state to state, the right to vote for federal officeholders and the right to enter public lands. Even in America, the clause has received a limited and narrow operation restricted to individual rights and does not sanction the federal government undermining the states.[140]

An individual rights reading allows for secession by WA because it does not subjugate a state Crown. Three judges in *Street* lend some credence to such an interpretation. First, Mason CJ notes that s 117 does not primarily operate as a limit on state legislative power and that the section does not impinge upon the validity of laws but rather affects their application to protected persons.[141] Second, Gaudron J frames her reasons around an anti-discrimination paradigm and says that "[t]he limits to the protection afforded by s 117 are, in my view, to be ascertained by

[137] Amelia Simpson, 'The (limited) significance of the individual in section 117 state residence discrimination' (2008) 32 *Melbourne University Law Review* 639, 640.
[138] Daniel Reynolds, 'Defining the limits of section 117 of the Constitution: the need for a theory of the role of states' (2004) 27 *University of New South Wales Law Journal* 786, 798-99.
[139] Ibid 800.
[140] *Baldwin v. Fish and Game Commission of Montana* 436 U.S. 371 (1978); William Rich, "Why 'privileges and immunities'? An explanation of the framers' intent" (2009) 42 *Akron Law Review* 1111, 1111.
[141] *Street* (1989) 168 CLR 461, 486, 520 (Mason CJ).

reference to the expression 'disability or discrimination' rather than by identification of interests pertaining to national unity or by reference to the federal object attending s 117".[142] Third, Toohey J writes that the language of s 117 is too narrow to found a unity of citizenship across the Commonwealth and so appears to support a limited scope for its application.[143]

Conversely, one judge prefers a structural imperative sustaining union, with the implication that secession is unconstitutional. Dawson J describes the provision's intent as being a 'federal one…being designed to ensure that persons from one State are treated in another as citizens of the one nation, not as foreigners'.[144] His Honour also thinks that the purpose of s 117 is to ensure that individuals are treated as citizens of Australia; in his opinion, discrimination is informed by purpose and does not offend if an act treats a person as a citizen of the same nation.[145]

Does secession impose a disability or discrimination of the kind covered by s 117? It is clear that WA secession can be discriminatory in the sense alluded to by McHugh J, both as a matter of form and in its factual impact. This is because withdrawal of a state entails treating residents of other states differently based on their residence or because it creates varying rules across a range of industries that is discriminatory. On the other hand, secession may not trigger s 117 if Brennan J's definition is used, because it can be posited that secession is for a range of noble purposes *other than* treating out-of-state residents differently – such as the health or economic welfare of WA residents. Indeed, if WA were to treat Australians the same as it treats its own residents for most purposes, then such a gentle secession may only rarely trigger s 117.

Could secession fall within the exception for state autonomy? Arguably, secession qualifies for an exception to s 117 because it is a matter uniquely within the scope of state legislative power under the peace, order and good government formulation. Chapter 4 suggests that secession is properly within the formula as an implication from the federal structure and purpose underlying the Constitution, being a matter mostly of interest to a state's residents and primarily impacting a state's residents with minimal adverse impacts on third parties. Copious evidence of financial or other oppression can be presented to demonstrate that the welfare of WA residents is better served by secession. The federal government can be portrayed as a threat.[146] Toohey J's belief that the text of s 117 does not found a unity of citizenship, combined with Gaudron J's focus on

[142] Ibid 570 (Gaudron J).
[143] Ibid 551 (Toohey J). Here, Toohey J cites with approval Barwick CJ in *Henry v Boehm*.
[144] Ibid 541 (Dawson J).
[145] Ibid 547 (Dawson J).
[146] Inspiration can be drawn in this regard from the nullification movement in the United States: Frank Anderson, 'Contemporary opinion of the Virginia and Kentucky resolutions' (1899) *American Historical Review* 45-63.

the individual rather than on a unitary state, provides indirect support for such a line of argument. As McHugh J comments, 's 117 was not intended as a human rights charter for interstate residents' and 'there are some subject-matters in respect of which an interstate resident is not entitled to equality of treatment'.[147] It is impossible to be certain about whether secession will be perceived as one such matter because the law pertaining to s 117 remains unsettled and its application to secession is unknown. As with everything, the Court will decide in a manner that preserves its legitimacy and pays due regard to social conditions at the time of decision.

VI. CONCLUSION

This chapter has explored the theoretical and practical relationship between ss 92, 105A and 117 of the Commonwealth Constitution and a hypothetical secession by WA. Gray notes that '[a]t the macro level, the nature of the *Constitution* must be acknowledged' in that '[i]t reflected an attempt to bring together the people of the six disparate colonies'.[148] While this is a nice ideal, I have shown that in reality the High Court's reasoning with respect to ss 92, 105A and 117 does not eliminate all the autonomy of a state to the extent of rendering secession impossible.

Particularly with respect to ss 92 and 117, policy arguments render it possible to establish a reasonable necessity for WA to secede. And structured proportionality when applied using the range of social science evidence can demonstrate that secession is a proportionate response to some kinds of oppression and harm. As for s 105A, there is scope for secession if at the time of withdrawing WA is not in default of its obligations under a Financial Agreement and if it continues making payments to enable peaceful secession. Lovekin of the West Australian Dominion League made a similar point in 1930: 'To alter a deed of partnership is one thing and needs consent of the partners. But any partner is entitled to terminate his partnership on fulfilment of his obligations to his co-partners'.[149] It is preferable, however, that s 105A be read as not sanctioning Commonwealth coercion to put it in line with the findings of Chapter 6.

[147] *Street* (1989) 168 CLR 461, 583 (McHugh J).
[148] Gray, 'COVID-19 border restrictions and section 92 of the Australian Constitution' (n 110) 102.
[149] Arthur Lovekin, 'Can We Secede from the Commonwealth?' (Speech delivered at the Dominion League of Western Australia, 23 May 1930), Battye Library, Perth, Western Australia PR 10563/36, 10-11.

CONCLUSION

The Constitution Act itself was carefully worded so as not to be coercive.

Windeyer J[1]

Analysis of constitutional law in Australia has focused heavily on federalism and state rights in general but has not explored the associated subject of secession by a state in depth. This is unfortunate because federal-state and state-state relations remain somewhat uncertain. To rectify the gap, this thesis set out to ascertain the constitutionality of Western Australia's unilateral departure from the Commonwealth of Australia. It found that the Commonwealth Constitution and associated documents like the *Statute of Westminster* and the *Australia Acts* do not bar secession. Text, structure and history suggests that WA has a right under the WA Constitution to leave the federal union if its people can provide evidence of their sovereign will, ideally through a referendum in the state that demonstrates significant support among the electorate.

The method of this thesis has shaped its interpretations. Chapter 1 examined theories of constitutional interpretation and sketched the literature pertaining to secession in Australia. My acceptance of the reality of inclusive positivism – which notes that moral reasoning can be a condition of validity if it is made such a condition by the sources – has filtered through into a realist willingness to accept the inherent flexibility and value-driven nature of law. While some positivists have tried in vain to impose logic upon illogical precedent, in truth scholars and practitioners have wide leeway in the way they interpret sources. This has led me to make arguments that have a moral flavour to them, as for instance when I make the case for comity and mutual respect as being values underlying the union.[2] The morality has been constrained, however, by the necessity of relying on the structure provided by legislation and precedent.

Since Chapter 2 argued that the history underlying the Constitution is consensual and in line with Althusian values, it is fitting that constitutional provisions have been discovered to reflect this. Chapters 3 to 8 engage with the constitutional framework in all its intricacy. An important conclusion from this analysis is that there does not appear to be any coercive foothold – whether based on express powers, prerogative, or nationhood – to justify Commonwealth action against a state to restrain secession. In practice, this means that WA can secede by default. Perhaps this is why Craven, who advocates that secession is unlawful, concedes that WA has partially seceded

[1] *Victoria v Commonwealth* (1971) 122 CLR 353, 395 (Windeyer J).

[2] Although this thesis has focused on Australia, there are other examples of legal systems that do not depend on coercion to survive. See David Friedman, *Legal Systems Very Different from Ours* (Independently published, 2019).

during the COVID-19 crisis. As he describes it: '[t]he west has effected a partial secession. WA is more independent now in practical terms than at any time since federation'.[3]

Within the scheme of existing research on federalism, the account put forward of multiple state polities operating within the context of shared sovereignty remains true to the character of the Commonwealth as 'Federal' which is affirmed in the Preamble and Covering Clauses. The findings of this thesis can therefore suitably be relied on as a complement to existing scholarship.

One aspect which may be of value to future research is the way this thesis has distinguished between seceding from a federal union and dissolving the union altogether. The two are vastly different and it greatly improves our understanding of what federalism is if we can acknowledge this distinction. *The Daily Telegraph* in an editorial opined that 'the preservation of State individuality…is one thing, while the investment of the State with special powers as against the people [of the entire nation as represented in the federal government] is another'.[4] Secession aims to preserve the individuality of the people of a state. It does almost nothing to interfere with the institutions of federal governance or with the other states. It therefore does not generally violate the Preamble's admonition of 'one indissoluble Federal Commonwealth' even if we assume for the sake of analysis that the Preamble binds WA (which is not named therein).

Secession forces us to think about the true purpose of our federalism. For example, does allowing secession actually make it *less* likely that a state will want to leave because the threat of secession imposes a check on what the Commonwealth or other states can do to oppress a minority? Does granting a right of secession create stronger and more effective federal unions by ensuring bonds are based on friendship? Does secession end up creating a *more* indissoluble union built on unbreakable bonds of trust and uphold the Preamble's 'one indissoluble Federal Commonwealth' more effectively than banning departure? When the Constitution Bill was being debated, Sir Campbell-Bannerman made a similar point, noting that Australia entered more cordial relations with the British government once England stopped interfering in its affairs:

> The freer they have been from interference or patronage on our part, the warmer has been their sentiment towards this country, and I need hardly point out, for it has been prominently before us of late, that they have again and again offered their most precious possession—the lives of their sons—whenever they thought the mother country needed them.[5]

[3] Greg Craven, 'Hints of Trumpism in Daniel Andrews, Mark McGowan', *The Australian* (19 January 2021).
[4] *The Daily Telegraph* (31 March 1891).
[5] United Kingdom, *Parliamentary Debates*, House of Commons, 14 May 1900, vol 83, col 77.

Secessionist impulse may subside. Yet these are intriguing questions that merit investigation.

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