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THE JUDICIAL INCOMPATIBILITY CLAUSE — OR, HOW A VERSION OF THE *KABLE* PRINCIPLE NEARLY MADE IT INTO THE FEDERAL CONSTITUTION

ABSTRACT

Until nearly the end of the Convention debates the draft *Australian Constitution* contained a provision that would have prevented judges from holding any federal executive office. The prohibition, removed only at the last minute, would have extended to all federal executive offices but was originally motivated by a desire to ensure that judges did not hold office as Vice-Regal stand-ins when a Governor-General was unavailable, as well as by the feud between Sir Samuel Way CJ and (Sir) Josiah Symon QC. The clause was eventually deleted, but not principally because of any reservations about the separation of judicial power; rather, it was thought difficult to be sure that other suitable stand-ins could always be found and problematic to limit the royal choice of representative. However, this interesting episode also shows that a majority of the Convention and of public commentators rejected the idea of judicially enforcing, as a constitutional imperative, the separation of judicial power from the executive. Presumably, while not rejecting the separation of powers itself, they would have rejected the judicial enforcement of that principle such as now has been established by case law and implication.

I INTRODUCTION

Chief Justice French¹ and Dr Matthew Stubbs² have already drawn attention to the fact that the draft *Australian Constitution* very nearly went to the people with the following clause at the end of Chapter III on the federal judiciary:

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¹ *South Australia v Totani* (2010) 242 CLR 1, 43; Robert French, 'John Forrest: Founding Father from the Far West' (2011) 35 *University of Western Australia Law Review* 205, 224.

² Matthew Stubbs, 'The Constitutional Validity of State Chief Justices Acting as Governor' (2014) 25 *Public Law Review* 197, 200–2. See also J M Finnis, 'Separation of Powers in the Australian Constitution — Some Preliminary Considerations' (1968)

No person holding any judicial office shall be appointed to or hold the office of Governor-General, Lieutenant-Governor, Chief Executive Officer, or Administrator of the Government, or any other executive office of the Commonwealth.³

The clause was inserted in Adelaide on Thursday 22 April 1897 by 19 votes to 11⁴ and not deleted until almost the last working day of the final Constitutional Convention. Its end came on Friday 11 March 1898, and after only two further days of business the Convention disbanded after votes of thanks and other formal business on Thursday 17 March 1898 — after which its work was to be submitted to the people and, once accepted by them, could be altered only by Imperial *force majeure*. Indeed, as late as Friday 4 March 1898 this clause was being amended (the only amendment it suffered) by the addition of the final clarificatory three words ‘of the Commonwealth’ on the motion of Edmund Barton QC.⁵

In what follows I shall refer to the proposed clause as ‘the judicial incompatibility clause’. Forgotten for many decades, and ignored by La Nauze’s standard history of the making of the *Australian Constitution*,⁶ this ghost of a clause has experienced a remarkable afterlife thanks to case law. The incompatibility exception to the *persona designata* exception to the rule that federal judges may exercise only judicial and not non-judicial power is clearly analogous to this clause: the incompatibility principle also operates to prevent judges from holding some executive offices. Given that the *Kable*⁷ principle at state level ‘share[s] a common foundation in constitutional principle’⁸ with the federal incompatibility rules and is sometimes — although not consistently, as Dr Rebecca Ananian-Welsh has noted — applied in a similar way,⁹ there is also an analogy with the *Kable* line of authority. Indeed, the clause goes further than both present-day streams of authority in one respect, for it would have prohibited the holding of any executive office at all by federal judges rather than merely those deemed incompatible with judicial office. Therefore, there would be no doubt under it about whether judges could be federal royal commissioners, for example; the clause peremptorily declares all executive offices to be incompatible with federal judicial office. On the other hand, the wording of the judicial incompatibility clause confined it to the holding of offices, and accordingly mere functions,

3 *Adelaide Law Review* 159, 171, as Dr Stubbs notes (at 200).

³ This is the form of the clause as it existed immediately before its deletion: John Williams, *The Australian Constitution: A Documentary History* (Melbourne University Press, 2005) 931.

⁴ *Official Report of the National Australasian Convention Debates*, Adelaide, 22 April 1897, 1176.

⁵ See below, n 74.

⁶ J A La Nauze, *The Making of the Australian Constitution* (Melbourne University Press, 1972).

⁷ Deriving from *Kable v Director of Public Prosecutions (NSW)* (1996) 189 CLR 51.

⁸ *Wainohu v New South Wales* (2011) 243 CLR 181, 228.

⁹ Rebecca Ananian-Welsh, ‘Preventative Detention Orders and the Separation of Judicial Power’ (2015) 38 *University of New South Wales Law Journal* 756, 762.

such as authorising telephone warrants,¹⁰ would not have fallen within its purview. Probably, if the judicial incompatibility clause had remained in the *Australian Constitution*, that distinction between offices and mere functions would have assumed considerable importance in its interpretation, and certainly the federal legislative drafters would have been careful not to create executive offices rather than simply conferring functions on judges.

Despite its high purpose, the judicial incompatibility clause's origins are at first sight little short of ludicrous, for it appears to be a further shot in the long-running and largely one-sided personal campaign conducted by (Sir) Josiah Symon QC against Sir Samuel Way CJ, the Lieutenant-Governor of South Australia. The arguments for and against the clause concentrated on the occupation by Chief Justices of the post of Lieutenant-Governor and other forms of Vice-Regal deputising, as those were the most important additional posts they held and the only roles in the executive to which judges were appointed with some frequency. However, a little more thought shows that the clause would hardly have received the endorsement of the Conventions had it been merely the continuation of a personal feud by other means. At the very end, when it was deleted from the draft by a decisive vote of 11 to 26, some of the greatest names in Australian federalism and both future founding puisne Justices of the High Court of Australia¹¹ defended and sought to save it. This article, as well as outlining the background to the feud just mentioned, will also ask: what (besides the feud just mentioned) motivated the proponents and defenders of this clause? How did its opponents, colonial legislatures and the public at large view this proposal? Why was it finally deleted? And what, if anything, does this episode reveal about the Founders' attitude towards the separation of judicial power and constitutional protections of it?

While this article is agnostic about originalism, even those who reject that approach will surely agree that a greater understanding of the thoughts of the Founders is a matter of inherent interest; and in this case, we can conclude something from what they considered, added and then left out as well as from what they left in the final document.

II THE FEUD

A Background: Chief Justices as Lieutenant-Governors in the 1890s

In the 1890s it had not yet become a matter of course for the Chief Justices of the states (as they were about to become) to be appointed to the office of Lieutenant-Governor, but those that did not hold that office nevertheless sometimes acted as Governors if

¹⁰ The example is, of course, taken from *Grollo v Palmer* (1995) 184 CLR 348.

¹¹ *Minutes of Proceedings of Australasian Federal Convention*, Melbourne, 11 March 1898, 5. As we shall see, Sir Samuel Griffith CJ was against the clause, but was not of course available to vote in Convention.

the need arose.¹² By the mid-1890s, as our judicial incompatibility clause was about to commence its rise and fall, Darley and Way CJJ held the permanent posts of Lieutenant-Governor of New South Wales and South Australia respectively. Victoria had seen Madden CJ act as Governor when the need arose, but he was not to be formally appointed to the permanent post of Lieutenant-Governor until 1899, after the judicial incompatibility clause had lived and died. In Queensland, exceptionally, the former Premier and then President of the unelected Legislative Council, the ailing Sir Arthur Palmer, was permanent Lieutenant-Governor. In Western Australia Onslow CJ had been the subject of some controversy and was only ever made Acting Governor as the need arose. In Tasmania also, Dobson CJ had merely acted as Governor when necessary and Dodds CJ, who succeeded him on his death in 1898, was not appointed Lieutenant-Governor until 1903.¹³ Sir Arthur Palmer died on 20 March 1898, only three days after the federal Conventions closed (unlike Dobson CJ, who died on the very day of their closure); in the following year Griffith CJ was appointed Lieutenant-Governor of Queensland.¹⁴ Thus, while only two Chief Justices held the office of Lieutenant-Governor during the Conventions, at Federation four Chief Justices — Darley, Madden, Griffith and Way CJJ — were Lieutenant-Governors.¹⁵

Unsurprisingly, the Colonial Office continued to reserve for itself the decision about who might step in, should the need arise, for the Governors it appointed — with the coming of responsible government the Chief Justices were all appointed locally rather than by it.¹⁶ Furthermore, at this time the modern party system was only just visible on the horizon, thus increasing the likelihood that difficult decisions would have to be made by the Vice-Regal stand-in, whether a mere acting Governor or a formally appointed Lieutenant-Governor, and thus making the office potentially more sensitive than it is today. Accordingly, it was by no means to be taken for granted in the 1890s that any Chief Justice would be formally constituted Lieutenant-Governor,

¹² Some of the history is briefly but usefully and correctly outlined in David Clark, ‘The Struggle for Judicial Independence: The Motion and Suspension of Supreme Court Judges in Nineteenth Century Australia’ (2013) 12 *Macquarie Law Journal* 21, 57.

¹³ Sir John Quick and Sir Robert Garran, *Annotated Constitution of the Australian Commonwealth* (Angus & Robertson, Sydney 1901) 373–5; Victoria, *Victorian Government Gazette*, No 125, 30 December 1896, 5325; Victoria, *Victorian Government Gazette*, No 45, 16 June 1899, 2261; Queensland, *Queensland Government Gazette*, No 58, 26 April 1893, 1173; entries of the persons named in the National Centre of Biography, *Australian Dictionary of Biography* <<http://adb.anu.edu.au>>. Palmer’s entry in the *Australian Dictionary of Biography* says that he ceased to be Lieutenant-Governor in 1896, but the prefatory pages to that year’s ‘Hansard’ have him still occupying the post in 1897. There is no other evidence that he was deprived of the title although not acting as Governor *sede vacante*; there appears to be confusion in the *Australian Dictionary of Biography* on this point.

¹⁴ *London Gazette*, No 27119, 22 September 1899, 5811.

¹⁵ *London Gazette*, No 11247, 6 November 1900, 6767.

¹⁶ However, the fact that one of the Colonial Office’s last Australian judicial appointments was Boothby J did nothing to increase confidence in its judgement!

and indeed the judicial incompatibility clause recognised this by applying its prohibition at federal level both to permanent Lieutenant-Governors and to Administrators appointed when the need for a stand-in arose.

In South Australia, Way CJ had had to wait nearly fifteen years after his appointment as Chief Justice for the honour of being appointed to the permanent post of Lieutenant-Governor, and when it occurred in early 1891¹⁷ it was considered a marked sign of royal favour and a high personal honour; significantly, the Governor himself had put forward the proposal without reference to the local government, taking the view that the representation of the Crown in South Australia was a matter for London to decide without local interference.¹⁸ At the time it was not quite yet established that the colonies had a right or even a legitimate expectation that they would be consulted before the appointment of the permanent Governor,¹⁹ but it is nevertheless plain that the failure even to mention the proposed elevation of Way CJ to the Premier of the day, the first Thomas Playford, was taken amiss by him.²⁰

B *Objection, your Honour*

Another decidedly underwhelmed spectator of Way CJ's apotheosis was (Sir) Josiah Symon QC. He and Way CJ had fallen out at the time of the latter's advancement to the bench in 1876, as they had been partners in a law firm and Symon felt that his partner should have consulted him before accepting the appointment.²¹ Even 15 years later, Symon QC had not forgiven this conduct, and that despite the fact that he as a practising lawyer naturally had on occasion to appear before Way CJ! Symon QC was, recorded a chronicler of his infamous dispute as federal Attorney-General with the newly constituted High Court of Australia in 1905 over travelling and other expenses, 'a good hater – perhaps the best Australian politics has ever produced';²² although those words were written in 1978 and might accordingly require some qualification today, they were still a large claim when written. The Prime Minister of Australia, writing anonymously as a newspaper correspondent, thought that Symon KC's fight against the judges in 1905 had been 'long, tedious and petty', and Symon KC's decision to continue firing pot-shots on the issue even

¹⁷ *London Gazette*, No 26125, 16 January 1891, 290.

¹⁸ State Records of South Australia, GRG 2/14/2, despatches of 26 November 1890; 3 January 1891; 21 February 1891.

¹⁹ Victoria, Parl Paper No 124 (1889) contains despatches denying such a right; for subsequent developments in which Playford also features, see Anne Twomey, *The Chameleon Crown: The Queen and Her Australian Governors* (Federation Press, Leichhardt, 2006), 26–29.

²⁰ State Records of South Australia, GRG 2/14/2, despatch of 21 February 1891; A J Hannan, *The Life of Chief Justice Way* (Angus & Robertson, 1960) 122–6.

²¹ *Ibid* 94.

²² W G McMinn, 'The High Court Imbroglia and the Fall of the Reid-McLean Government' (1978) 64 *Journal of the Royal Australian Historical Society* 14, 15.

after his relegation to Opposition was explicable only by ‘strong ... personal resentment’.²³ Another historian points out Symon QC’s pronounced streak of spitefulness and venom, and refers to his proposal to introduce our judicial incompatibility clause as a continuation of his vendetta against Way CJ.²⁴ This characteristic was not mellowed by age, for in Symon QC’s biography in the *Australian Dictionary of Biography* we find that ‘a Court ordered that certain words in his will, “scandalous, offensive and defamatory to the persons about whom they were written”, be omitted from probate’.²⁵

In Symon KC’s reminiscences on the federal struggle written in 1930 we find a further attack on Way CJ for his actions in the dispute with the Colonial Office on Privy Council appeals — Way CJ having supported their continuation and thus taken the side of the Colonial Office, while Symon QC was one of the leading voices against the Privy Council. By 1930 that dispute was over three decades in the past, and Way CJ had been dead for about half that time.²⁶ Not that our hero waited until passions had cooled to give the world the benefit of his assessment of Way CJ: in 1900 at a public meeting reported in the newspapers he gave a rabble-rousing speech attacking Way CJ for attempting to go behind the *Australian Constitution* as approved at referenda and seeking alterations to ‘the people’s charter by a foreign Parliament, a Parliament in which we are not represented’. He pronounced that this was ‘the first time our freedom had been assailed and the prerogative had been supported by one holding the high office of an English Judge’,²⁷ suggesting that Symon QC’s emotions had got the better of him and he had temporarily forgotten the far greater harm wreaked only a few decades earlier by Boothby J — and also omitted to notice the obvious contradiction between referring to the Imperial Parliament as ‘foreign’ but the Chief Justice of the Supreme Court of South Australia as ‘English’.

It was therefore entirely in character for Symon QC not to rejoice gracefully in the success of others when Way CJ was appointed Lieutenant-Governor and put long-settled disputes to rest, or even take note of this honour in dignified silence, but rather to bide his time and wait for an opportunity to attack an old foe. At least

²³ John Andrew LaNauze (ed), Alfred Deakin, *Federated Australia: Selections from Letters to the “Morning Post” 1900–1910* (Melbourne University Press, 1968) 156.

²⁴ D I Wright, ‘Sir Josiah Symon, Federation and the High Court’ (1978) 64 *Journal of the Royal Australian Historical Society* 73, 79, 85.

²⁵ The author contacted the Probate Registry in the Supreme Court of South Australia and was advised that the offending comments had nothing to do with the topic presently under discussion or any person connected with it.

²⁶ Symon and D I Wright (ed), ‘The Dawn of Federation: Some Episodes, Letters and Personalities and a Vindication’ (1976) 15 *South Australiana* 13, 137.

²⁷ ‘The Commonwealth Bill: Mr Symon Criticizes the Chief Justice’, *South Australian Register* (Adelaide), 16 May 1900, 5. See also John Hirst, *The Sentimental Nation: The Making of the Australian Commonwealth* (Oxford University Press, 2001) 241. For interesting comparable views in New Zealand shortly afterwards, see John Tate, ‘The Privy Council and Native Title: A Requiem for *Wi Parata*’ (2004) 12 *Waikato Law Review* 99.

as initially proposed, without the three final words ‘of the Commonwealth’ added towards the end of its life, the judicial incompatibility clause applied, as a matter of language at least, to state judges and state executive offices as well as federal ones, as Symon QC confirmed in moving its insertion;²⁸ if so read literally, it would therefore have compelled Way CJ to relinquish his prized post of Lieutenant-Governor even if he took no federal office. Had the clause been finally accepted without those three words, perhaps it would have come to be understood as limited to federal posts only, but it did not say so on its face, and when the judicial incompatibility clause was being proposed the idea was not yet fully accepted that no interference would be essayed by the *Australian Constitution* in the states’ own constitutional arrangements unless essential for federating. Thus, for example, Alfred Deakin proposed, albeit unsuccessfully, a clause on the same day as the judicial incompatibility clause was inserted requiring the states to communicate with the Imperial authorities through the Governor-General.

C A postlude – s 8 of the Judiciary Act 1903 (Cth)

However, it may be that Symon QC had not merely seized on an entirely random issue as a stick with which to beat Way CJ, for we find him in 1931 deprecating the appointment of Sir Isaac Isaacs as Governor-General because, he claimed, the appointment again sullied the judiciary given that Isaacs had until recently been Chief Justice. Symon KC claimed that the appointment was not merely undesirable, but invalid. Of course, Isaacs’ appointment as Governor-General was controversial for a number of well-known reasons, but Symon KC’s arguments that it was invalid were of a standard usually to be found in vexatious litigants’ submissions or, nowadays, Facebook posts. The argument was in brief that s 8 of the *Judiciary Act 1903* (Cth), which then prohibited a justice of the High Court of Australia from accepting any other office ‘within the Commonwealth, except any such judicial office as may be conferred upon him by or under any law of the Commonwealth’, attached to each judge even after resignation from the judicial office!²⁹

²⁸ *Official Report of the National Australasian Convention Debates*, Adelaide, 22 April 1897, 1174. However, Symon QC did say that the clause was ‘particularly desirable’ at federal level, and later realised that applying it at state level was an overreach and modified his opinion: *Official Record of the Debates of the Australasian Federal Convention*, Melbourne, 1 February 1898, 358, 364; see also *Official Record of the Debates of the Australasian Federal Convention*, Melbourne, 1 March 1898, 1715. See also the exchange between C C Kingston, Sir John Forrest and Bernard Wise in *Official Record of the Debates of the Australasian Federal Convention*, Melbourne, 2 February 1898, 1704.

²⁹ J H Symon, ‘Governor-General’s Appointment’, *The Advertiser* (Adelaide) 7 February 1931, 16. Equally improbable, although different arguments are advanced by our hero in ‘Appointment of Sir Isaac Isaacs: Sir Josiah Symon Returns to the Charge’, *The Advertiser* (Adelaide), 22 December 1930, 9; J H Symon, ‘Governor-Generalship: ‘Violation of Judiciary Act’, *The Advertiser*, 24 December 1930, 12. See also John Waugh, ‘Appointing the First Australian-Born Governor-General: Legal and Vice-Regal Opposition’ (2012) 23 *Public Law Review* 50, 57, 59.

Symon KC was certainly familiar with s 8. As a senator in 1903 he had pointed out that it did what the judicial incompatibility clause in its final form was meant to do and a little more, namely ‘precluding the possibility of any Judge of the High Court occupying an executive position such as that of Acting Governor-General or Lieutenant-Governor, or any office of similar description within the Commonwealth and, of course, within a State’ — a description with which the government’s Senate Leader, none other than Richard O’Connor QC, completely agreed.³⁰ Accordingly, we can see that although the judicial incompatibility principle was finally rejected as part of the *Australian Constitution*, a version of it made it on to the statute books and survived until 1979. (Section 10 of the *High Court of Australia Act 1979* (Cth) became its successor, with the important difference that the prohibition now is ‘of accepting or holding any other office of profit within Australia’. The rule is now merely that justices of the High Court of Australia — there appears to be no comparable statutory restriction on judges of other federal courts — must not be paid for doing anything else; there is no general statutory principle that they must keep themselves separate from other branches of the government).

Symon KC even pursued his “No Way” obsession³¹ to the length of moving an amendment to change s 8 so that Australian Privy Councillors could not be appointed judges of the High Court of Australia. This was allegedly in the interests of making the Court ‘truly Australian’.³² While, in fairness, this was a clear reference to recent suggestions for an Empire-wide appeals court with colonial representation that the Imperial authorities had used to try to head off restricting the Privy Council’s

³⁰ Commonwealth, *Parliamentary Debates*, Senate, 5 August 1903, 3074; see also Commonwealth, *Parliamentary Debates*, House of Representatives, 30 June 1903, 1565–7, where Deakin A-G states that s 8 will prevent a justice of the High Court of Australia from acting as State Governor. Nevertheless, it could certainly have been questioned whether the expression ‘law of the Commonwealth’ in s 8 had the effect of including state offices.

It is also interesting to note that the government originally went so far as to propose in its Bill that a contravention of s 8 should effect an avoidance of the office of justice of the High Court of Australia until it was pointed out that this was unconstitutional: Commonwealth, *Parliamentary Debates*, House of Representatives, 25 June 1903, 1441.

³¹ I am indebted to my friend Valerie Scovell for this clever pun.

³² Commonwealth, *Parliamentary Debates*, Senate, 5 August 1903, 3075; see also the phrase ‘absurd anomaly’: Commonwealth, *Parliamentary Debates*, Senate 31 July 1903, 2945. Nevertheless, it would seem that the amendment missed its mark, for s 8 as enacted continued to include the words ‘within the Commonwealth’ in the prohibition and accordingly appointments to the Privy Council did not debar a judge from appointment to the High Court of Australia. It is strange that Senator Symon KC did not notice this; perhaps others did and refrained from pointing it out to him, realising what game he was playing. A further possible difficulty for Griffith CJ arising from s 8 was disposed of as shown in Patrick Brazil and Bevan Mitchell (eds), *Opinions of the Attorneys-General of the Commonwealth of Australia* (Australian Government Publishing Service, 1981) vol 1, 196. Way CJ did not accept federal judicial office and therefore the question did not arise for him.

jurisdiction in Australia,³³ it will cause no surprise that the principal victims of the ‘truly Australian’ approach would have been Way CJ, who had been appointed to the Privy Council in 1897 in accordance with the *Judicial Committee Amendment Act 1895* (Imp), along with Griffith CJ who had also found a place on the Privy Council as well as, as we shall see, on the enemies list.

At any rate, Symon KC argued in the early 1930s that the prohibition on judges of the High Court of Australia holding non-judicial offices embodied in s 8 continued even after departure from judicial office and prevented Sir Isaac Isaacs from becoming Governor-General. This is such a ridiculously long bow, and indeed inconsistent with something that Symon QC had himself pointed out in the debates on the judicial incompatibility clause in 1898,³⁴ that one is driven to wonder whether Isaacs must also have been on Symon KC’s enemies list; although I know of no clear evidence of that as there is with the earlier cases mentioned, it is noticeable that Isaacs KC was Symon KC’s replacement as federal Attorney-General at the fall of the Reid ministry in 1905, and Isaacs A-G KC conceded virtually all the High Court of Australia’s travelling and establishment demands that had been so stoutly resisted by his predecessor.³⁵ In 1906, moreover, Isaacs took for himself a judicial appointment that might equally have been conferred on another prominent and legally qualified member of the federal movement.³⁶ But another explanation, not even necessarily contradicting the first hypothesis, is that the principle of separating judicial from executive office, even when the two are held consecutively and not concurrently as was the case with Isaacs, was not merely a convenient stick with which to beat Way CJ, although it clearly was that — but that our hero did also hold, as he himself put it after the battle for the judicial incompatibility clause was lost, ‘the very strongest view’ that appointing Chief Justices to Vice-Regal positions constituted ‘an anomaly and blemish on the judicial office’,³⁷ and that he believed this so strongly that it sometimes affected his legal judgment.

³³ David Swinfen, *Imperial Appeal: The Debate on the Appeal to the Privy Council, 1833–1986* (Manchester University Press, 1987) 63. When the *Judiciary Act 1903* (Cth) was sent to the Colonial Office, as was then standard practice, it forwarded advice of the Act to the Registrar of the Privy Council but there was no reply from him; neither the Governor-General nor the Colonial Office remarked in any way upon s 8: CO 418/26/740ff (AJCP 2159).

³⁴ *Official Record of the Debates of the Australasian Federal Convention*, Melbourne, 4 March 1898, 1895 — the prohibition applies to ‘any person in active service’, not to retired judges.

³⁵ McMinn, above n 22, 28; Susan Priest, ‘Archives, the Australian High Court and the “Strike of 1905”’ (2013) 32 *University of Queensland Law Journal* 253. See also Stephen Gageler, ‘When the High Court Went on Strike’ (2017) 40 *Melbourne University Law Review* 1098.

³⁶ Cf Hirst, above n 27, 229; Brian Galligan, *Politics of the High Court* (University of Queensland Press, 1987) 83.

³⁷ Commonwealth, *Parliamentary Debates*, Senate, 31 July 1903, 2945.

III RISE OF THE JUDICIAL INCOMPATIBILITY CLAUSE

After the initial speechifying was over the Adelaide Convention, meeting at the first of the three locations chosen for the honour in 1897–8, formed three committees to consider how to proceed (or how the 1891 Bill could be re-worked). The Judiciary Committee's chairman was Symon QC, but there is no record of any discussion in that committee of a new clause along the lines of the judicial incompatibility clause or even of the general topic.³⁸

Symon QC first raised the topic in full Convention on Wednesday 14 April 1897, when the Convention was discussing what became the latter half of s 4 of the *Australian Constitution* prohibiting an Administrator from receiving a salary from the Commonwealth for any other office. He asked whether the Constitutional Committee or Drafting Committee had considered the issue (which, it transpired, they had not) and suggested that he and Edmund Barton QC should discuss an amendment along the lines of the judicial incompatibility clause. Barton QC responded, '[i]t will give me the greatest pleasure to discuss that question with my learned friend. I think we are somewhat in sympathy on the matter.'³⁹

The records of the Convention include printed drafts of the judicial incompatibility clause dated 17 April 1897, after the Judiciary Committee had reported and disbanded, showing that it was to be proposed in the full Convention not only by Symon QC but also by P M Glynn, his colleague in the legal profession, on the Judiciary Committee and from South Australia.⁴⁰ Both of them were proposing to place the clause at the end of Chapter II on the executive government, which included the provisions about the Vice-Regal representative, rather than in the chapter on the judiciary. There is no record of why they changed their minds, but this suggests that over the next five days, before the clause was moved and added to the draft *Australian Constitution*, they came to see that their primary focus was not the executive office, but the need to keep the judiciary free from non-judicial tasks. That certainly explains why the Judiciary Committee had not dealt with the question, for it was only after its work was done that Symon QC realised that his hobbyhorse was really about the judiciary.

No doubt further discussions occurred behind closed doors before, on Thursday 22 April 1897, the day's debate started with a consideration of the ancestor of s 101 of the *Australian Constitution* giving the Inter-State Commission 'such powers of adjudication and administration' as Parliament determined; Symon QC, who spoke frequently and at length in the debate, showed no anxiety on the separation of powers

³⁸ State Archives of South Australia, GRG 72/8/12; 72/11/5; 72/11/11 (held on microfilm in the State Library of Victoria, MS 8871, MSM 47–49); Williams, above n 3, 491; 'Judiciary Committee', *Sydney Morning Herald* (Sydney) 7 April 1897, 7.

³⁹ *Official Report of the National Convention Debates*, Adelaide, 14 April 1897, 635.

⁴⁰ State Archives of South Australia, GRG 72/12/3/14; 72/12/4 (held on microfilm in the State Library of Victoria, MS 8871, MSM 47–9).

front when confronted with this arguable breach of it.⁴¹ After dealing with some other proposals and most notably rejecting Isaacs A-G's proposal for a referendum as a device to break the deadlock, the Convention agreed after a remarkably short debate and by 19 votes to 11 to insert the judicial incompatibility clause.⁴²

As previously noted,⁴³ Symon QC confirmed that the clause as originally proposed would apply at state level as well, but clearly his focus was on the High Court of Australia as the arbiter between the states and Commonwealth and the interpreter of the *Australian Constitution*; thus, it could not be said that the later express restriction of the clause to offices at the federal level was a major change in its purpose (and even if restricted to the federal level, it could still have been seen as an implied rebuke to State Chief Justices holding the position of Lieutenant-Governor). Two Premiers opposed the clause: C C Kingston from Symon QC's home state and Sir George Turner of Victoria. The former thought that the existing system with Way CJ as Lieutenant-Governor had worked well,⁴⁴ and the latter that in the selection of a representative the Queen's hands should be free and the imperial authorities trusted not to commit improprieties. Sir George Turner proposed extending the prohibition so that not only no judicial, but also no executive or legislative officer could be or act as Governor-General, which Symon QC rightly saw as a wrecking amendment designed to expose the principle he favoured to ridicule. It also failed to take into account that, as he himself had come to realise only a week or two earlier, his concern was not the Vice-Regal office as such but the purity of the judiciary. The proposed extension was rejected without a division and the clause accepted by a majority of eight, including one Premier, Sir Edward Braddon of Tasmania, and both Barton QC and O'Connor QC.⁴⁵ Of the members of the Judiciary Committee which Symon QC had chaired, five voted in favour of his clause and two — including H B Higgins — against, while three were not present. The judicial incompatibility clause was in the draft *Australian Constitution*.

IV COMMENTARY AND REACTION

Fatal to the clause's survival was the fundamental criticism now to be directed at it by Griffith CJ, for which, along with his Honour's other reflections on the drafting style of the Judiciary Chapter, he earned a place on Symon QC's enemies list — a fact which fully explains the latter's extraordinarily tactless, petty and confrontational approach towards the Chief Justice of the High Court of Australia in the lead-up

⁴¹ It was, of course, resolved, although not to universal satisfaction, in *New South Wales v Commonwealth* ('Wheat Case') (1915) 20 CLR 54.

⁴² *Official Report of the National Convention Debates*, Adelaide, 22 April 1897, 1174–6.

⁴³ See the text surrounding footnote 28.

⁴⁴ This view was shared by a future Premier of New South Wales, (Sir) Joseph Carruthers: *Official Report of the National Convention Debates*, Adelaide, 25 March 1897, 89.

⁴⁵ *Official Report of the National Convention Debates*, Adelaide, 22 April 1897, 1174–6.

to the Court's 'Strike' of 1905 already mentioned.⁴⁶ Yet again, 'ἐπιστάμενος ὧν ὡς περιυβρισμένος εἶη πρὸς αὐτῶν, ἐπενόεε τίσασθαι τοὺς διώξαντας.'⁴⁷ Symon QC's own view, expressed behind closed doors to fellow Convention delegate (Sir) William McMillan, was that Griffith CJ's criticisms of his drafting in 1897 were spiteful: he resented interference with his own drafting from 1891 (when he had been Premier rather than Chief Justice of Queensland and thus available to take a leading part in deliberations).⁴⁸

On some points Griffith CJ's criticisms of the 1897 draft completely missed the mark: there was, for example, no prospect of a return to the 1891 draft's indirectly elected Senate that his Honour continued to advocate. But on technical issues relating to the judiciary, his voice naturally carried great weight. He was particularly displeased about the judicial incompatibility clause. It may well have been with it in mind that he wrote in his introductory remarks: 'I fear that the constitutional position and functions of the Sovereign as Head of the Federation were, for the moment, lost sight of'.⁴⁹ Writing on the judicial incompatibility clause in particular, his Honour described it as 'remarkable', by which he did not mean remarkably good, and the arguments in favour of it merely 'on the surface'. '[S]ome' of the arguments against it were that the Sovereign's choice of her representative was an essential personal right; that any comments upon that choice would be best made, if necessary, by parliamentary address; and that there was no obvious candidate for the role of substitute other than judges, especially given that the person must always be available and identifiable by reference to an existing office.⁵⁰ This was certainly a 'remarkable' barrage of criticism to direct publicly at a clause that had received the public support of several eminent Queen's Counsel including the acknowledged leader of the Federation movement.

Broader opinion was divided. Under the process agreed upon for keeping the Federation ball rolling, the Parliaments of the five colonies which had participated in the Conventions (Queensland was the exception) now subjected the Bill to detailed review. The Legislative Assemblies of New South Wales and Victoria both suggested excising the clause. In New South Wales (Sir) Joseph Carruthers, an advocate of the existing system in his colony of judges as stand-in Vice-Regal officers,⁵¹ thought that if there were difficulties with appointing a judge as step-in, they could be provided

⁴⁶ See the text surrounding footnotes 22, 35.

⁴⁷ Herodotus, *Histories*, 2.152.3: 'having concluded that he had been grossly mistreated by them, he decided to avenge himself on his persecutors'.

⁴⁸ Symon QC was able to bring himself to refer to Griffith CJ as possessing 'much facility as a draftsman': Josiah Symon, 'United Australia' (1900) 9 *Yale Review* 129, 137, although he immediately follows this up with an attack on him for misreading the public mood: 138. However his real view is found in Williams, above n 3, 615; and see La Nauze, above n 6, 169; J H Symon, 'Federation and Western Australia', *Sydney Morning Herald* (Sydney) 5 February 1900, 8.

⁴⁹ Williams, above n 3, 616.

⁵⁰ *Ibid* 622.

⁵¹ See n 44.

against later;⁵² in Victoria Griffith CJ's memorandum was quoted at length, and Isaacs A-G was not above making the suggestion that the real aim of the clause was to have the President of the Senate appointed as Vice-Regal stand-in, on the Queensland model — thus possibly enhancing the power of the smaller states.⁵³ The fear was that, if granting a double dissolution involved exercising Vice-Regal discretion, the President of the Senate might be able to boost the Senate's power by refusing one. The debate in the Victorian lower house is also interesting because of the opposition to the clause expressed by a young member named Irvine, later Premier and then Chief Justice of the State. As Chief Justice, he was made Lieutenant-Governor, and administered the State during an interregnum of almost three years, from 1931 to 1934; as Chief Justice also, he was the author of a memorandum, still quoted and applied today, suggesting that judges should not conduct public enquiries for the executive because of the potential for political controversy.⁵⁴

However, the clause also met with parliamentary support: a motion in the Victorian Legislative Council to delete it for the reasons given by Griffith CJ was lost without a division,⁵⁵ and in Tasmania also the Legislative Council supported it after a short speech advocating that the Chief Justice should not be distracted from his judicial duties to act vice-regally.⁵⁶ The Tasmanian House of Assembly let the clause stand without recorded debate,⁵⁷ as did both Houses in Western Australia⁵⁸ and South Australia⁵⁹ — where Symon QC was not a member of Parliament and the local delegation had been divided in the Convention with ministers voting on opposite sides.

The attention of the public was naturally directed to other clauses that were more likely to have a direct effect upon the populace, but three recorded comments outside official fora can be found. In a public lecture to the Law Students' Society of the University of Melbourne on the federal Judiciary, attended by three professors but very few others, H B Higgins (who, it will be recalled, had voted against the clause in Convention) was reported to have said that 'the object of the clause was to secure

⁵² New South Wales, *Parliamentary Debates*, Legislative Assembly, 28 July 1897, 2389.

⁵³ Victoria, *Parliamentary Debates*, Legislative Assembly, 20 July 1897, 542; Victoria, *Parliamentary Debates*, Legislative Assembly, 5 August 1897, 1095.

⁵⁴ Greg Taylor, *Constitution of Victoria* (Federation Press, Leichhardt, 2006) 440.

⁵⁵ Both Victoria, *Parliamentary Debates*, Legislative Council, 20 August 1897, 1656 and 'Parliament: Legislative Council', *The Argus* (Melbourne), 21 August 1897, 11 record neither debate nor division.

⁵⁶ 'Mercury', 20 August 1897, 3 (there were no Tasmanian 'Hansard' reports at this time).

⁵⁷ 'Draft Commonwealth Bill: Further Consideration in Committee', *The Mercury* (Hobart), 13 August 1897, 3.

⁵⁸ Western Australia, *Parliamentary Debates*, Legislative Council, 24 August 1897, 243; Western Australia, *Parliamentary Debates*, Legislative Assembly, 25 August 1897, 294.

⁵⁹ South Australia, *Parliamentary Debates*, Legislative Council, 17 August 1897, 158; South Australia, *Parliamentary Debates*, House of Assembly, 18 August 1897, 458.

Her Majesty's dormant commission for the President of the Senate instead of the Chief Justice, and thereby add a tower of weight to the Senate that would be most improper in the case of a dispute between the two Houses'.⁶⁰

The 'Geelong Advertiser'⁶¹ devoted a short leader to the topic, in which it referred to what was becoming a frequently made point on various issues: that the Convention and the people should trust the federal Parliament and not attempt to tie its hands in advance by conjuring up all sorts of frightening possibilities and then ruling them out by constitutional provision.⁶² The leader ran:

The debate on this clause indicated on the part of the Convention the same distrust of the future in relation to the federal Constitution and Parliament that has characterised the proceedings throughout. For example, the Chief Justices of all the colonies are not to be trusted to sit as a high Court of appeal, and now Her Majesty may not appoint as *locum tenens* of an absent Governor-General any gentleman holding judicial office under the Constitution. It is admitted that the clause is a direct interference with the Queen's prerogative, but that might not be so serious an affair if the Convention had pointed out how the federal government would be carried on in the case of the decease of the Governor-General. It seems to us that the Convention has closed up every possible avenue of selection for such a post, and that a deadlock must necessarily ensue. ... [I]t is certainly possible that the President of the Senate might fill the office. Supposing, for example, that Sir William Zeal occupied that position, will it be pretended that the gubernatorial mantle would fit him as gracefully as our own Chief Justice ... There might come a time when the question would be asked, "Shall there be a

⁶⁰ 'The Federation Proposals', *The West Australian* (Perth), 19 July 1897, 5; similar 'The Western Australian Delegates: The Attendance Doubtful', *South Australian Register* (Adelaide), 17 July 1897, 6. 'A Federal Judicature', *The Age* (Melbourne), 20 July 1897, 7, has him raising the spectre of states' upper houses' Presidents as stand-in Viceroy; perhaps he did that as well, or perhaps he merely drew a federal analogy using states' upper houses' Presidents as Vice-Regal stand-ins. Higgins' papers are held in the National Library of Australia (MS 1057/3), but Mr Andrew Sergeant of that organisation has kindly advised me that there are no records relating to this lecture in them.

⁶¹ 2 February 1898, 2; reprinted in the 'Framing a Constitution', *The Daily News* (Perth), 14 February 1898, 2. Sir William Zeal was President of the Victorian Legislative Council. His biography in the *Australian Dictionary of Biography* suggests that he might not have been well suited to the ceremonial and social aspects of the Vice-Regal role: National Centre of Biography, *Australian Dictionary of Biography* <<http://adb.anu.edu.au/biography/zeal-sir-william-austin-1073>>.

⁶² There is an echo of this view in the *Amalgamated Society of Engineers v Adelaide Steamship Co Ltd* (*The Engineers' Case*) (1920) 28 CLR 129, 151, and, as Gavan Duffy J points out in the *Wheat Case* (1915) 20 CLR 54, 104, this point has been forgotten even in cases which stand till this day. Perhaps Sir Josiah Symon KC came to share this view as well, for in his evidence to the Royal Commission on the *Australian Constitution* (*Minutes of Evidence, Part 4* (Government Printer, Canberra *s.d.*) 1085) he said 'I trust the Judges' to work the provisions relating to the Privy Council, and was therefore now satisfied with them.

dissolution of the House of Representatives alone, or shall there be a dissolution of both Houses simultaneously?”, and it would be a fearful position to put the President of the Senate, or the Speaker of the House of Representatives in, if he were asked to decide. They had gone the length of saying that no judicial officer should be eligible for the position, and they were bound to go the full length, and prohibit anybody who had the slightest interest from getting it.

These were all cogent points, although the writer missed the central purpose of the clause — the preservation of judicial officers in particular from executive contamination.

Even less concerned with the official purpose of the clause was the ‘Bulletin’,⁶³ which condemned the system of Chief Justices as Lieutenant-Governors as an ‘immoral practice’. But this was because, by reason of society gatherings at Governor House, the Chief Justice ‘puts himself on terms of intimacy with the moneyed class’ and accordingly ‘[t]he law lays itself open to be “nobbled” by the Nicest people, and in a great measure it is “nobbled”’ — in a way that was also unheard of in England, where judges were unlikely to know any titled or wealthy person who appeared before them as accused persons. Unconcerned with the constitutional question, the ‘Bulletin’ concluded its ruminations by asking:

Should a Judge be tempted into close society contact with the ruling class which, under any circumstances, must always be a somewhat favo[u]red class? Or should he live up to his professional character by striving to be as unapproachable off the Bench as he is whilst upholding the dignity of his wig?

However much or little justice there may have been in these comments in relation to the State Chief Justices, they did not apply with such force to the federal judges who were the principal targets of the judicial incompatibility clause given that the federal judiciary was likely to be small and conduct few if any trials. Even so, the ‘Bulletin’ is to be reckoned with the supporters of the clause and, indeed, of its extension to state judges; in fact, Senator Sir Josiah Symon KC, in the debates on s 8 of the *Judiciary Act 1903* (Cth), expressed essentially the same view about the undesirability of social contacts between judges and the public as possible litigants only a few years later.⁶⁴

Surprisingly, the appointed guardian of royal interests, the Colonial Office, took only a very muted objection to the clause, suggesting that Australian worries about stepping on royal toes or being unable to find a suitable stand-in outside the ranks of the judiciary might have been overblown. In its comments upon the Bill, the Colonial Office prepared two lists: the first list contained alterations that it considered essential for the Bill’s smooth passage through the Imperial Parliament, and the second was a list of friendly suggestions and comments on less essential matters that had occurred

⁶³ *The Bulletin* (Sydney) 12 March 1898, 7. After the death of the judicial incompatibility clause, *The Bulletin* (Sydney) repeated similar views on 2 September 1899, 7.

⁶⁴ Commonwealth, *Parliamentary Debates*, Senate, 31 July 1903, 2945.

to its staff while reading through the Bill.⁶⁵ The judicial incompatibility clause appeared only on the second list, and the Colonial Office's comments were, in full: 'Is this quite consistent with clause 119? The clause is a limitation on the Queen's prerogative.'⁶⁶ Clause 119 was what is now s 126 authorising the appointment of deputies to the Governor-General. This was a good question which no-one else had picked up on, for the judicial incompatibility clause did not in terms apply to deputies but appointing them might well have become an easy way around it.

V FALL OF THE JUDICIAL INCOMPATIBILITY CLAUSE

On the resumption of the Convention in 1898 the clause initially withstood challenge in a long and 'breezy'⁶⁷ debate on 1 February — the sort of thorough debate which should have taken place when it was first inserted. The debate was noticeable for the manner in which the arguments on either side did not connect: those in favour of the clause argued for the need to keep the judiciary pure, while those against referred to the need to find someone to stand in when necessary and the inadvisability of restricting the royal prerogative. Each side of the debate concentrated on one aspect of the clause while meeting with arguments that attacked only from the flank. A further Premier joined the side of the clause's proponents, namely Sir John Forrest of Western Australia, while another was against — G H Reid of New South Wales.⁶⁸ The latter 'showed justifiable warmth (born of conflicts with his Legislative Council)'⁶⁹ — Sir Alfred Stephen had been both a member of that body until 1891 and Lieutenant-Governor, and the idea of the President of the Senate as a possible candidate for the Vice-Regal office was particularly odious in Reid's nostrils. As will be recalled, the other colony with an unelected upper house, Queensland, still had a Lieutenant-Governor who was President of the Legislative Council.

The circle of the arguments on both sides was, however, neatly closed by Sir John Downer QC, who, responding to the argument that appointing the President of the Senate, for example, as Vice-Regal stand-in might be undesirable, admitted that there might be 'strong reason' for not making such an appointment, but it was 'not a reason that goes to the root of the Constitution', as the separation between judicial

⁶⁵ B K De Garis, 'The Colonial Office and the Commonwealth Constitution Bill' in A W Martin (ed), *Essays in Australian Federation* (Melbourne University Press, 1968) 96–106. It is also interesting to note the suggestion by the Administrator of Victoria, Madden CJ, to seek public endorsement of Australian Federation from other parts of the Empire — although the suggestion itself was not made publicly: *ibid* 114.

⁶⁶ Williams, above n 3, 729.

⁶⁷ 'News of the Day', *The Age* (Melbourne), 2 February 1898, 4. It is unfortunate that a more precise word was not chosen, and we do not know whether the meaning here is 'windy', 'vigorous' or 'mildly jovial'.

⁶⁸ *Official Record of the Debates of the Australasian Federal Convention*, Melbourne, 1 February 1898, 355–75.

⁶⁹ 'The Convention Debate', *Bacchus Marsh Express*, 5 February 1898, 2 — this is an obscure newspaper, but the writer states he was personally present at the debate.

and other powers did: ‘the protector of the Constitution’, he continued, ‘must not be a portion of the executive’.⁷⁰ That was why the clause deserved support. Importantly for the future of the clause, Barton QC revealed that his mind had wavered: while he had been ‘strongly’ in favour of it when it was inserted, he had since been ‘very much impressed’ by the argument that the question should be left to the future operators of the *Australian Constitution*, but ‘perhaps it might be better and safer to retain the clause’.⁷¹ He dismissed the argument from the prerogative put forward by Griffith CJ on the ground that it was irrelevant to the merits of the issue. The clause was saved by 25 votes (including two Premiers’) to 20 (three Premiers’). A renewed attempt to extend the prohibition to parliamentarians, moved by the clause’s enemies ostensibly as a way of preventing serving politicians (such as the bogeyman President of the Senate) from taking the role, was then rejected by 17 votes to 20 on the grounds previously urged by Downer QC: such a course might indeed be objectionable in a particular case, but it was not flawed as a basic constitutional principle. According to ‘The Age’,⁷² however, which was still worried about the President of the Senate, the amendment failed because ‘[t]he small States again proved too strong’. The 20 votes against the change had consisted of 15 from the small colonies and five from the two large ones, while the 17 in favour were divided almost evenly (nine from the two large colonies and eight from the three small).⁷³

A month later, on 4 March 1898, the Convention was still, according to Barton QC, of the ‘strong opinion’ that the clause was desirable, and the final three words ‘of the Commonwealth’ were added without a division and with little debate in order to clarify, as he put it, that it prohibited ‘all judicial officers from holding offices in the Commonwealth’.⁷⁴ In earlier discussions there had been, as already noted, some idea that the federal judiciary or the High Court of Australia at least was special, as the arbiter between the states and the Commonwealth; now it was made quite clear that existing Chief Justices holding the office of State Lieutenant-Governor in hypostatic union were to be spared anything more than the implied rebuke constituted by an analogous prohibition at federal level, as an executive office would fall under the constitutional prohibition if it were federal only. However, state judges also were to be ineligible for appointment to federal Vice-Regal and other executive offices.

It was understood, however, that that amendment did not mean that the clause was settled; and on 11 March 1898 it met its end in a debate that was as short as that which had seen it added in the first place.⁷⁵ The most curious incident in it is the dog that did

⁷⁰ *Official Record of the Debates of the Australasian Federal Convention*, Melbourne, 1 February 1898, 362.

⁷¹ *Ibid* 368.

⁷² *Official Record of the Debates of the Australasian Federal Convention*, Melbourne, 2 February 1898, 4.

⁷³ Recall that Queensland was not represented at the Convention.

⁷⁴ *Official Record of the Debates of the Australasian Federal Convention*, Melbourne, 4 March 1898, 1895.

⁷⁵ *Official Record of the Debates of the Australasian Federal Convention* Melbourne, 11 March 1898, 2341–3.

not bark — Symon QC was present but said nothing in favour of his clause. He had just spoken, to considerable effect, in debates on the appeals to the Privy Council, which was of course the bigger battle — yet he must have known from behind-the-scenes discussions that the judicial incompatibility clause was a lost cause, or else he would surely have said something to attempt to rescue it. Indeed, the whole debate on it was perfunctory. Symon QC will have comforted himself with the thought that the latter half of s 4 of the *Australian Constitution* prohibiting an Administrator from receiving a salary from the Commonwealth for any other office would deter some judges from taking on that role at least, and we can now also see that he was biding his time and took the question up again with success and the government's support in the debates on the *Judiciary Act 1903* (Cth). It is quite conceivable that he did not defend his clause because it had been suggested to him that his principle would likely meet with success after Federation in being accepted in the ordinary statute law (which was easier to modify if necessary and not subject to quite as much scrutiny in London and thus less of a gamble). Certainly the idea of leaving the matter to be regulated by the new legislature clearly had some appeal even to Barton QC,⁷⁶ who was a co-initiator of the clause⁷⁷ and would vote against its deletion.

In the debates on 11 March 1898 leading to the deletion of the clause from the draft *Australian Constitution*, again the two sides of the argument simply did not share any common ground: for H B Higgins, the clause 'has got nothing whatever to do with Judicature' and should not even be in the chapter of the *Australian Constitution* on that topic — although it is somewhat strained to speak in this debate of there being two sides to the argument, for really no-one sprang to the defence of the doomed clause. It was deleted by 11 votes to 26, a most decisive margin. Except Symon QC, all the members of the Judiciary Committee of April 1897 who were present voted against it. While it could still, as noted, benefit from the votes of the future Justices Barton and O'Connor and of one Premier (Forrest), six of those who had voted for it only a few weeks before, on 1 February 1898, changed sides; the most notable defector was Sir Edward Braddon. Little notice was taken of this change in the press — understandably, given that the appeal to the Privy Council dominated discussions.

VI CONCLUSION — WHAT LESSONS FOR TODAY?

What the rise and fall of this clause means must depend to a large extent on why it eventually fell. Was the principle of judicial separation wholly rejected, or were there other reasons for the clause's demise? The interesting debate in the House of Representatives on the Bill for s 8 of the *Judiciary Act 1903* (Cth) — which, like the debate in the Senate,⁷⁸ was largely a mini-recap of the debate in Convention on what became the judicial incompatibility clause with many of the same cast — suggests,

⁷⁶ *Official Record of the Debates of the Australasian Federal Convention*, Melbourne, 4 March 1898, 1895.

⁷⁷ *Official Report of the National Convention Debates*, Adelaide, 22 April 1897, 1174–6.

⁷⁸ See the text surrounding footnote 30.

in two pages of ‘Hansard’,⁷⁹ that the Founders had at least four reasons for the final rejection of the clause. This debate is more informative than the short, indeed perfunctory debate in the Convention on the deletion of the clause.

First, Sir Edmund Barton KC (by this stage, of course, the Prime Minister) said that the Convention had decided not against the principle as such, but only ‘against embedding such a provision in the Constitution, principally upon the ground that Parliament should be left free to take its own course’. Parliament does not take any ‘course’ in appointing Vice-Regal stand-ins, so the meaning is that it was not thought right for the principle to be embodied among the eternal principles of the *Australian Constitution* — although also not rejected on its merits as a principle but left open for Parliament to adopt in the statute law, as indeed it was about to do. This is in line with Barton KC’s own expressions of such a view in Convention⁸⁰ and also recalls the ‘trust the future’ slogan of the ‘Geelong Advertiser’. This point of view also clearly explains why it was that the first federal Parliament was willing to adopt the principle only a few years later in s 8 of the *Judiciary Act 1903* (Cth) although it had in the end been decisively rejected for inclusion in the *Australian Constitution*: a statute can be easily amended or even one-off exemptions legislated for, as indeed occurred twice during the Second World War to allow Latham CJ and Dixon J to hold diplomatic posts.⁸¹

H B Higgins — who, it will be recalled, was an opponent of the clause in Convention — gave two or three other reasons for the rejection of the clause there:

It was thought by some of the members of the Convention that the object of the clause, as passed at Adelaide, was obviously to let the President of the Senate be the person who should be nominated by Her Majesty for the office; and several members were opposed to the clause for that reason. The view which I placed before the Convention, and on which there was a division, was that it is our business to leave the Sovereign an absolutely free hand as to whom he shall appoint — that we have no right to dictate as to who shall be the Sovereign’s agent for any purpose. It is not a matter within the area of our constitutional rights ... It is not expedient, in my opinion, for us to dictate as to who shall be the agent of the Sovereign.⁸²

⁷⁹ Commonwealth, *Parliamentary Debates*, House of Representatives, 30 June 1903, 1566. The debate is also remarkable because Isaacs KC spoke about the idea of appointing the Chief Justice of the Commonwealth to fill temporarily the Vice-Regal position.

⁸⁰ *Official Record of the Debates of the Australasian Federal Convention*, Melbourne, 4 March 1898, 1895.

⁸¹ *Judiciary Act 1940* (Cth); *Judiciary (Diplomatic Representation) Act 1942* (Cth). Neither of these faced the wrath of Symon KC, who had died in 1934.

⁸² Commonwealth, *Parliamentary Debates*, House of Representatives, 30 June 1903, 1567.

Higgins begins with an objection to the available alternatives to judges for the post and moves on to the rights of the Sovereign on the one hand and those of the local governments on the other — recalling the more general dispute about whether the states would be consulted upon the choice of Governor to be sent to them. He finishes with a general statement about what is ‘expedient’, which is probably just a summary of the reasons that had gone before. Clearly, however, these reasons were not enough to prevent the insertion of the principle in the *Judiciary Act 1903* (Cth), where admittedly it could be more easily amended if necessary. And once the principle was enshrined in law, even if only the statute law, no-one suggested, as far as I know, that the President of the Senate should be appointed Vice-Regal stand-in.

Of other contemporary witnesses, Quick and Garran record that the clause ‘was eliminated on the ground that it contained an undue limitation of the prerogative of the Crown, and that it might prejudicially restrict the choice of the Crown in the appointment of an Administrator of the government for the time being’.⁸³ Dr Quick was a member of the Convention of 1897–8 and therefore his recollection is also that of a participant in the events described. However, these reasons do not add much to those already advanced by Higgins; they do not, however, conjure up the spectacle of the President of the Senate as designated stand-in.

A further reason for the non-acceptance of the judicial incompatibility clause is noticeably missing from this commentary: that some of the operators of the system, including some state Premiers such as C C Kingston of South Australia,⁸⁴ thought that the system involving Chief Justices was working well. That was not, of course, a point that necessarily could be made in relation to a new polity such as the Commonwealth, and as we saw not all Premiers agreed anyway. Furthermore, the federal judiciary, as the principal arbiter of entrenched federal constitutional provisions, was not necessarily comparable to the states’ judiciaries; and, given that reviews of the arrangements at state level by Premiers were decidedly mixed, much less was made of this aspect.

By way of summary, then, it may be said that there was a hierarchy of reasons behind the deletion of the judicial incompatibility clause from the draft *Australian Constitution*: the most important was that ‘ἀρίστων δὲ ἀνδρῶν οἰκὸς ἄριστα βουλευόμενα γίνεσθαι’⁸⁵ — that all actors, Sovereign, governments and Parliament, could be trusted to behave with sufficient regard to constitutional proprieties and an unalterable constitutional principle was not needed (the question of a statutory rule being reserved for the first Parliament); then, the next most important point was that suitable alternative stand-ins might be hard to find; equally important was that it was not the role of the local polity to dictate to the Sovereign the identity of his or her local representative. Finally, there was a subsidiary and contested view that, in some states, the fissure in the principle of separation of powers involved in temporarily

⁸³ Quick and Garran, above n 13, 403.

⁸⁴ See the text surrounding footnote 44.

⁸⁵ Herodotus, *Histories*, 3.81.3: ‘it is likely that the decision of the best people will be the best’.

combining in one person the offices of head of the judiciary and the local executive had in fact aided in the smooth working of constitutional arrangements.

Although it can be done only with great diffidence, it is therefore necessary to differ from J M Finnis's conclusion that the debates on the judicial incompatibility clause involved a 'rejection of separation'⁸⁶ of powers doctrine. It was not principally a rejection of the idea of the separation of powers that motivated the exclusion of the judicial incompatibility clause, but rather a decision to postpone the issue until the High Court of Australia was actually set up along with the affirmation of other values and principles. Many, if not all of those principles, such as concern for London's role in selecting the Vice-Regal representative, have now passed from the scene; and it is also clear from experience in various states⁸⁷ that, if it is desired to do so, there is nowadays little trouble selecting a non-judicial and non-political Lieutenant-Governor from the much bigger pool of today's Australian population. The system of state Governors holding dormant commissions as federal Administrators has also worked quite well.⁸⁸

Now that many of the principles that motivated those who opposed the judicial incompatibility clause have been consigned to history, and it is only a slight exaggeration to say that history has removed all the objections to it — can we say that the case law on the incompatibility of executive offices and functions with the judicial role has unconsciously reflected historical developments since 1901 and worked out more or less in accordance with the judicial incompatibility clause? This is not necessarily so, for three separate reasons.

First, it is noticeable that the judicial incompatibility clause would have left us with a fairly black-and-white rule. Now of course no rule is entirely determinate — it was suggested in the introduction that one of the major distinctions that might have grown up under the judicial incompatibility clause is that between executive offices (which judges could not hold) and mere functions (which, presumably, they still could exercise); one can even imagine some type of principle developing such as that a set of related functions can be so numerous and extensive that they amount to an office in fact even if the word is avoided for obvious reasons in conferring them. The clause could also have been clearer about whether it applied to state judges, although some of its proponents expressed views on that point to the effect that it did prevent them from holding federal executive offices and the ambiguity might well have been removed in tidying up the drafting in the final days of the Convention, had the clause survived but a little longer.

⁸⁶ Finnis, above n 2, 171.

⁸⁷ I have not conducted a comprehensive survey, but the present Governor of South Australia is a former Lieutenant-Governor, and Victoria also has had satisfactory experiences with non-judicial Lieutenant-Governors recently.

⁸⁸ Thus, it coped even with the extraordinary circumstances recounted in George Winterton, 'The Hollingworth Experiment' (2003) 14 *Public Law Review* 139, 144.

Nevertheless, under the judicial incompatibility clause there would have been a complete prohibition on the holding of executive offices by some or all judges. The *persona designata* doctrine could not have saved any such appointments — at least, given that ‘interpretation’ can occasionally work wonders, not without some major ‘interpretative’ surgery to the plain meaning of the clause which could not be expected except from the boldest spirits. That outcome would be somewhat different from the case law as it has developed, by which the judges have vested in themselves a value judgment, sometimes carried out, as I have attempted to show elsewhere,⁸⁹ on the finest of criteria, about whether the duties and characteristics of an executive office are compatible with judicial office or not. There would certainly be a lot to be said for more certainty on such matters such as would have existed under the judicial incompatibility clause (interpreted honestly), although such certainty would come at the cost of removing judges from consideration for some tasks for which their training, experience and independence fit them admirably. As so often in the law, certainty would come at the cost of flexibility. It would not have been possible, for example, for the Administrative Appeals Tribunal’s president to be a serving federal judge, as was upheld in *Drake v Minister for Immigration and Ethnic Affairs*.⁹⁰ Perhaps we are better off without the judicial incompatibility clause, which was conceived at a time long before there was a considerable demand for judges to hold quasi-judicial executive offices short of the Vice-Regal office — on which, in the 1890s, the arguments for and against the inclusion of the clause in the *Australian Constitution* tended to concentrate.

Secondly, a major difference between the case-law doctrine that has developed and the judicial incompatibility clause is that, in its final form, the latter clearly did not apply to the holding of state offices, only federal ones. Whether or not it would have applied to the rare case of state judges holding federal offices, it would not have applied to state or, for that matter, federal judges holding any sort of state office owing to the words ‘of the Commonwealth’ added in early March 1898⁹¹ (along with a dash of the *eiusdem generis* approach for some of the earlier named offices). Accordingly, there would be no *Kable* doctrine, or at least none expressly authorised by the *Australian Constitution*. Whether such a doctrine would have developed anyway as a supplement to the principle expressed in the judicial incompatibility clause and for the same reasons as it has developed under other provisions of the *Australian Constitution* can only be speculated about; I suggest that *expressio unius* in the judicial incompatibility clause would have been thought to be *exclusio doctrinae Kable*. On the one hand, it is true that the argument for a restriction on the powers that a state Parliament could vest in its courts that succeeded in *Kable* was based on the integrated judicial system envisaged by s 77(iii), and that provision would still have been available as a support for the argument. On the other hand, with the judicial incompatibility clause in place and given that it clearly was meant

⁸⁹ Greg Taylor, ‘“Conceived in Sin, Shaped in Iniquity” — The *Kable* Doctrine as Breach of the Rule of Law’ (2015) 34 *University of Queensland Law Journal* 265.

⁹⁰ (1979) 46 FLR 409.

⁹¹ *Official Record of the Debates of the Australasian Federal Convention*, Melbourne, 4 March 1898, 1895.

to apply only to federal offices because of the words ‘of the Commonwealth’, there would have been a powerful — I suggest, irresistible — contrary argument that, if the *Australian Constitution* was intended to restrict what state judges could do, it would have included such a restriction expressly, just as it expressly included the judicial incompatibility clause at federal level while making it clear, by words deliberately inserted during debate for this very purpose, that the restriction applied to federal offices only. This argument would only have been strengthened by the fact that the idea of allowing federal jurisdiction to be invested in state courts emerged in the same month as the judicial incompatibility clause without anyone suggesting that one topic had any relationship or interaction with the other.⁹²

Finally, and perhaps most importantly: while the majority of the Convention may well, as is argued here, have not meant for a moment, by deleting the judicial incompatibility clause, to indicate that the separation of powers was of no importance to them, what they did, however, indicate is that they were willing to trust the ordinary processes of government to ensure that no atrocities were committed, just as is usually the case. Thus, any number of appalling laws could be imagined under most federal powers listed in s 51, but that was not a reason for deleting such powers or inserting a charter of rights nor for reading the powers down today.⁹³ In that sense, J M Finnis is right after all: it was not the principle itself that the majority in the Conventions objected to, but rather the idea of anchoring it in the *Australian Constitution* and making it judicially enforceable as a matter of constitutional law. The inclusion of a version of the judicial incompatibility clause in the *Judiciary Act 1903* (Cth) as originally passed shows clearly that the objection was not to the rule itself but to making it part of the constitutional fabric rather than a rule that was susceptible of adjustment by Parliament as future unforeseeable needs arose.⁹⁴

This does not mean that present-day doctrines are necessarily to be rejected. The tribe of originalists in Australia is small, and a document like the *Australian Constitution* will reveal its full meaning only over decades, if not centuries of operation. But what we can say with certainty is that, by a large majority, the Founders preferred to entrust the protection of the separation of the judiciary from the executive to the good sense of the executive and the Parliament and to the individual judges’ decisions about what offices they could prudently accept.

⁹² For the addition of s 77 (iii) to the draft just before the judicial incompatibility clause emerged, see Williams, above n 3, 485 (Symon QC telegraphed Griffith CJ for advice about it while the Judiciary Committee was sitting: 622).

⁹³ See the text surrounding footnote 62.

⁹⁴ Such as those mentioned in the text surrounding footnote 81.

