

CAN PARLIAMENT DEPRIVE THE HIGH COURT OF JURISDICTION WITH RESPECT TO MATTERS ARISING UNDER THE *CONSTITUTION* OR INVOLVING ITS INTERPRETATION?

ABSTRACT

The original jurisdiction of the High Court with respect to matters arising under the *Constitution* or involving its interpretation is not entrenched in the *Constitution*. It is conferred upon the High Court by s 30(a) of the *Judiciary Act 1903* (Cth). Parliament enacted s 30(a) pursuant to its power in s 76(i) of the *Constitution* to confer additional original jurisdiction on the High Court. This article examines whether the failure of the framers to entrench the original jurisdiction of the High Court with respect to matters arising under the *Constitution* or involving its interpretation has left its access to those matters vulnerable. It considers one far-fetched possibility — that the interplay between ss 71, 73, 76 and 77 of the *Constitution* may confer upon Parliament the power to create a new federal court with exclusive jurisdiction over matters arising under the *Constitution* or involving its interpretation from which no appeal may be made to the High Court. Ultimately, it argues that, whilst Parliament could attempt to create such a court, it could not rely upon its power in s 73 to prescribe exceptions to the High Court's appellate jurisdiction to oust the High Court's access to constitutional questions, and suggests that s 76(i) should be moved into s 75.

I INTRODUCTION

Consider the following hypothetical series of events. The Australian people become gripped by some kind of fear. They elect to power in each state and the Commonwealth a party with an authoritarian bent. The newly elected Commonwealth Parliament enacts laws that make it an offence to criticise the government. The government issues preventative detention orders for the arrest of its most prominent opponents. These opponents seek relief in the original jurisdiction

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of the High Court. The High Court declares the legislation and arrests to be invalid. It holds that they violate the implied freedom of political communication and separation of powers doctrine. The government reacts by repealing s 30(a) of the *Judiciary Act 1903* (Cth) (*'Judiciary Act'*). Section 30(a) provides: 'In addition to the matters in which original jurisdiction is conferred on the High Court by the *Constitution*, the High Court shall have original jurisdiction ... in all matters arising under the *Constitution* or involving its interpretation'. The Prime Minister, a lawless fool who has never read the *Constitution*, believes that repealing s 30(a) will prevent the government's opponents from invoking the original jurisdiction of the High Court. The government introduces new legislation that in substance is the same as that held to be invalid. Its opponents again seek relief in the original jurisdiction of the High Court. This time they engage ss 75(iii) and (v) of the *Constitution* by suing the Commonwealth and several of its officers. The High Court declares the new legislation to be invalid.

The Prime Minister is enraged and considers stacking the High Court with an additional eight judges loyal to the government. But the Attorney-General advises against that course and presents a more legitimate solution to the problem. The state Parliaments could re-enact the legislation so that neither the Commonwealth nor its officers are party to any consequential litigation. The Commonwealth Parliament could use its power under s 71 of the *Constitution* to create a new federal court. It could confer jurisdiction on this new court with respect to matters arising under the *Constitution* or involving its interpretation, pursuant to its power in s 77(i) to define the jurisdiction of federal courts. It could make the jurisdiction of this new federal court exclusive to that of the courts of the states, pursuant to its power in s 77(ii) to confer exclusive jurisdiction on federal courts. And it could create an exception to the appellate jurisdiction of the High Court with respect to matters arising under the *Constitution* or involving its interpretation, pursuant to its power in s 73 to prescribe exceptions to the appellate jurisdiction of the High Court.

The effect of this scheme would be to prevent the High Court and state Supreme Courts from enforcing the implied freedom of political communication and the separation of powers doctrine. This unlikely path to oppression appears to be possible because the jurisdiction of the High Court over matters arising under the *Constitution* or involving its interpretation is not entrenched in the *Constitution*. The jurisdiction of the High Court with respect to those matters is contingent upon s 30(a) of the *Judiciary Act*, set out above. Parliament enacted s 30(a) pursuant to the power conferred upon it by s 76(i) of the *Constitution*. Section 76(i) provides that '[t]he Parliament may make laws conferring original jurisdiction on the High Court in any matter ... arising under this *Constitution*, or involving its interpretation'.¹ Section 76(i) has been described as an 'odd fact of history'.² This is an apt description. It is odd that the original jurisdiction of the High Court over matters arising

¹ *Constitution* s 76(i) (emphasis added).

² Australian Law Reform Commission, *The Judicial Power of the Commonwealth: A Review of the Judiciary Act 1903 and Related Legislation* (Report No 92, October 2001) 258 [12.16] (*'ALRC 2001'*).

under the *Constitution* or involving its interpretation is contingent upon an Act of Parliament.³

This article is about the High Court's jurisdiction with respect to constitutional matters — those 'arising under the *Constitution* or involving its interpretation'.⁴ It examines whether the Commonwealth Parliament really does have the power to bring about the events just described. It does so in seven parts. The first part explains the means by which the High Court accesses constitutional matters. The second provides an analysis of the jurisdiction invoked by constitutional cases heard in the 12 years between 2005 and 2016. The third to seventh parts answer five questions. Why did the framers make the original jurisdiction of the High Court with respect to constitutional matters contingent upon an Act of Parliament? Can Parliament repeal s 30(a) of the *Judiciary Act*? What would happen if Parliament did repeal s 30(a) of the *Judiciary Act*? Can Parliament create a constitutional matter exception to the appellate jurisdiction of the High Court? And can a federal constitutional court truly evade High Court scrutiny? The article concludes by recommending that the jurisdiction of the High Court over matters arising under the *Constitution* or involving its interpretation be entrenched in s 75.

II THE JURISDICTION OF THE HIGH COURT WITH RESPECT TO CONSTITUTIONAL MATTERS

The High Court hears cases involving matters arising under the *Constitution* or involving its interpretation in both its original and appellate jurisdiction. Its original jurisdiction is contained in ss 75 and 76 of the *Constitution*.

Section 75 provides:

In all matters:

- (i) arising under any treaty;
- (ii) affecting consuls or other representatives of other countries;
- (iii) in which the Commonwealth, or a person suing or being sued on behalf of the Commonwealth, is a party;
- (iv) between States, or between residents of different States, or between a State and a resident of another State;
- (v) in which a writ of Mandamus or prohibition or an injunction is sought against an officer of the Commonwealth;

the High Court shall have original jurisdiction.

³ See also Australian Law Reform Commission, *The Judicial Power of the Commonwealth: A Review of the Judiciary Act 1903 and Related Legislation* (Discussion Paper No 64, December 2000) 46 [2.47] ('ALRC 2000').

⁴ *Judiciary Act* s 30(a).

Section 76 provides:

The Parliament may make laws conferring original jurisdiction on the High Court in any matter:

- (i) arising under this *Constitution*, or involving its interpretation;
- (ii) arising under any laws made by the Parliament;
- (iii) of Admiralty and maritime jurisdiction;
- (iv) relating to the same subject-matter claimed under the laws of different States.

These two sections contain the only matters that can be brought at first instance to the High Court.⁵ But they operate in different ways. Section 75 contains the entrenched original jurisdiction of the High Court. The jurisdiction is said to be ‘entrenched’ because it is conferred upon the High Court by the *Constitution* itself. The fact that it is entrenched means that it is beyond the control of Parliament,⁶ and may only be altered or removed via referendum.⁷ Section 76 contains the additional original jurisdiction of the High Court. The jurisdiction is said to be ‘additional’ because the section heading uses that description. Unlike s 75, it does not confer original jurisdiction on the High Court; rather, it confers legislative power on the Parliament to confer original jurisdiction on the High Court.⁸ And it is the exclusive source of that legislative power. Parliament cannot confer original jurisdiction on the High Court in respect of any matter that is not included in s 76.⁹

Section 30 of the *Judiciary Act* confers original jurisdiction upon the High Court in respect of two of the four matters listed in s 76:

In addition to the matters in which original jurisdiction is conferred on the High Court by the *Constitution*, the High Court shall have original jurisdiction:

⁵ *R v The Licensing Court for the Licensing District of Maryborough* (1919) 27 CLR 249, 253 (Knox CJ); *Re Judiciary and Navigation Acts* (1921) 29 CLR 257, 265 (Knox CJ, Gavan Duffy, Powers, Rich and Starke JJ), cited in *Re Wakim; Ex parte McNally* (1999) 198 CLR 511, 542 (Gleeson CJ), 555 (McHugh J), 575 (Gummow and Hayne JJ).

⁶ Commonwealth Constitutional Commission, *Final Report of the Constitutional Commission* (Report, 30 June 1988) 374 [6.48]; PH Lane, *Lane’s Commentary on the Australian Constitution* (Lawbook, 2nd ed, 1997) 554–5, 595, citing *Commonwealth v New South Wales* (1923) 32 CLR 200, 206–7, 216 (Knox CJ).

⁷ *Constitution* s 128.

⁸ Lane, *Lane’s Commentary on the Australian Constitution* (n 6) 595–6.

⁹ *Re Wakim; Ex parte McNally* (1999) 198 CLR 511, 575 (Gummow and Hayne JJ).

- (a) in all matters arising under the *Constitution* or involving its interpretation; and
- (c) in trials of indictable offences against the laws of the Commonwealth.

By repeating exactly the words of the *Constitution*, s 30(a) fully implements the potential jurisdiction contained in s 76(i).¹⁰ The High Court has original jurisdiction over all matters that arise under the *Constitution* or involve its interpretation.¹¹ In contrast, s 30(c) implements only part of the potential jurisdiction contained in s 76(ii). Rather than conferring original jurisdiction over any matter ‘arising under any laws made by the Parliament’,¹² s 30(c) confers original jurisdiction only with respect to laws that create an indictable criminal offence.¹³

The jurisdiction conferred by s 30(a) of the *Judiciary Act* contains two separate limbs: (1) matters arising under the *Constitution*; and (2) matters involving interpretation of the *Constitution*. According to Lane, in practice there is no need to distinguish between the two, and a party may claim jurisdiction under s 30(a) on either ground in the alternative.¹⁴ But the two limbs of s 76(i) are different. As Latham CJ explained in *Ex parte Barrett*,¹⁵ a matter may arise under the *Constitution* without involving its interpretation, and a matter may involve interpretation of the *Constitution* without arising under it.¹⁶ Matters arising under the *Constitution* are those in which a right, title, privilege or immunity is claimed under the *Constitution*.¹⁷ Matters involving interpretation of the *Constitution* were originally held to be only those matters that presented ‘necessarily and directly, and not incidentally, an issue upon its interpretation’.¹⁸ The modern approach is that where a case may be resolved on several grounds, one of which involves interpretation of the *Constitution*,¹⁹ or where interpretation of

¹⁰ *ALRC 2001* (n 2) 258–9 [12.16]–[12.18]; Lane, *Lane’s Commentary on the Australian Constitution* (n 6) 597.

¹¹ *A-G (NSW) v Commonwealth Savings Bank of Australia* (1986) 160 CLR 315, 322–3 (Mason, Wilson, Brennan, Deane and Dawson JJ) (‘*Commonwealth Savings Bank*’).

¹² *Constitution* s 76(ii).

¹³ Lane, *Lane’s Commentary on the Australian Constitution* (n 6) 602.

¹⁴ PH Lane, *A Manual of Australian Constitutional Law* (Lawbook, 6th ed, 1995) 278. See also W Anstey Wynes, *Legislative, Executive and Judicial Powers in Australia* (Lawbook, 5th ed, 1976) 477–8.

¹⁵ *R v Commonwealth Court of Conciliation and Arbitration; Ex parte Barrett* (1945) 70 CLR 141.

¹⁶ *Ibid* 154 (Latham CJ), cited in Lane, *Lane’s Commentary on the Australian Constitution* (n 6) 598.

¹⁷ *James v South Australia* (1927) 40 CLR 1, 40 (Gavan Duffy, Rich and Starke JJ) (‘*James*’), quoted in Lane, *A Manual of Australian Constitutional Law* (n 14) 278.

¹⁸ *James* (n 17) 40 (Gavan Duffy, Rich and Starke JJ).

¹⁹ *Commonwealth Savings Bank* (n 11) 326 (Mason, Wilson, Brennan, Deane and Dawson JJ).

the *Constitution* is ‘essential or relevant’ to a question of statutory interpretation,²⁰ the matter falls within the second limb of s 76(i).²¹

In practice, the original jurisdiction of the High Court under s 30(a) of the *Judiciary Act* may be invoked in two ways. An action involving a constitutional matter may be commenced in the High Court itself; alternatively, a cause or part of a cause involving a constitutional matter pending in another court may be removed to the High Court pursuant to s 40(1) of the *Judiciary Act*. Section 40(1) provides that the High Court may order removal upon the application of a party that shows sufficient cause and shall order removal ‘as of course’ upon the application of the Commonwealth or a state Attorney-General.²² Where a cause or part of a cause involving a constitutional matter is not removed to the High Court, but is determined by the court in which it originated, the matter will fall for determination by the High Court only if one of the parties appeals to the High Court and the High Court grants special leave to appeal.

III EXERCISE OF CONSTITUTIONAL MATTER JURISDICTION IN PRACTICE

According to a compilation of the annual statistical analyses by Andrew Lynch and George Williams,²³ the High Court heard 110 cases involving constitutional matters

²⁰ Ibid 327 (Mason, Wilson, Brennan, Deane and Dawson JJ), citing *Nelungaloo Pty Ltd v Commonwealth* [No 4] (1953) 88 CLR 529, 540–2 (Dixon CJ).

²¹ PH Lane, *Lane’s Commentary on the Australian Constitution* (n 6) 598; PH Lane, *A Manual of Australian Constitutional Law* (n 14) 278–9.

²² See, eg, *Commonwealth Savings Bank* (n 11).

²³ Andrew Lynch and George Williams, ‘The High Court on Constitutional Law: The 2005 Statistics’ (2006) 29(2) *University of New South Wales Law Journal* 182; Andrew Lynch and George Williams, ‘The High Court on Constitutional Law: The 2006 Statistics’ (2007) 30(1) *University of New South Wales Law Journal* 188; Andrew Lynch and George Williams, ‘The High Court on Constitutional Law: The 2007 Statistics’ (2008) 31(1) *University of New South Wales Law Journal* 238; Andrew Lynch and George Williams, ‘The High Court on Constitutional Law: The 2008 Statistics’ (2009) 32(1) *University of New South Wales Law Journal* 181; Andrew Lynch and George Williams, ‘The High Court on Constitutional Law: The 2009 Statistics’ (2010) 33(2) *University of New South Wales Law Journal* 267; George Williams and Andrew Lynch, ‘The High Court on Constitutional Law: The 2010 Term’ (2011) 34(3) *University of New South Wales Law Journal* 1006; Andrew Lynch and George Williams, ‘The High Court on Constitutional Law: The 2011 Statistics’ (2012) 35(3) *University of New South Wales Law Journal* 846; Andrew Lynch and George Williams, ‘The High Court on Constitutional Law: The 2012 Statistics’ (2013) 36(2) *University of New South Wales Law Journal* 514; Andrew Lynch and George Williams, ‘The High Court on Constitutional Law: The 2013 Statistics’ (2014) 37(2) *University of New South Wales Law Journal* 544; Andrew Lynch and George Williams, ‘The High Court on Constitutional Law: The 2014 Statistics’ (2015) 38(3) *University of New South Wales Law Journal* 1078; Andrew Lynch and George Williams, ‘The High Court on Constitutional Law: The 2015 Statistics’ (2016) 39(3) *University of*

between 2005 and 2016. Of those 110 cases, 96 were cases in which the Commonwealth or an officer of the Commonwealth was a party,²⁴ and six involved more than one state.²⁵ At first blush, these numbers seem to suggest that repealing s 30(a) of the *Judiciary Act* would be of little consequence — only eight of the 110 constitutional cases heard between 2005 and 2016 were outside the entrenched original jurisdiction of the High Court — and that s 76(i), whilst not a dead letter, is not living a full and prosperous life. However, this suggestion is misleading, as these numbers do not take into account Commonwealth and state intervention.

The Commonwealth and states have the power to intervene in proceedings before the High Court that relate to a matter arising under the *Constitution* or involving its interpretation under s 78A of the *Judiciary Act*. Section 78B provides that notice must be given to the Commonwealth and state Attorneys-General whenever such a case is pending in the High Court. But the case itself must have commenced before intervention is possible. This means that cases where the Commonwealth, an officer of the Commonwealth or more than one state are a party only by intervention are not cases that could have been commenced within the entrenched original jurisdiction.

If the numbers are adjusted to take into account intervention, the true scope of the additional original jurisdiction becomes clearer. Of the 110 cases involving a constitutional matter heard by the High Court between 2005 and 2016, 40 would not have involved the Commonwealth, an officer of the Commonwealth or more than one state if the Commonwealth or a state had not intervened.²⁶ Only two of those 40 cases involved a matter arising under a treaty or affecting consuls or other representatives of other countries.²⁷ This means that the 38 remaining cases could not have been heard in the High Court's entrenched original jurisdiction. The additional original and appellate jurisdictions — both of which are shaped by Parliament — were the High Court's sole source of jurisdiction.

New South Wales Law Journal 1161; Andrew Lynch and George Williams, 'The High Court on Constitutional Law: The 2016 and French Court Statistics' (2017) 40(4) *University of New South Wales Law Journal* 1468.

²⁴ See Appendix A for the list of cases.

²⁵ *Port of Portland Pty Ltd v Victoria* (2010) 242 CLR 348; *The Public Service Association and Professional Officers' Association Amalgamated (NSW) v Director of Public Employment* (2012) 250 CLR 343; *Pollentine v Bleijie* (2014) 253 CLR 629; *Tajjour v New South Wales* (2014) 254 CLR 508 ('*Tajjour*'); *Duncan v Independent Commissioner Against Corruption* (2015) 256 CLR 83; *New South Wales Aboriginal Land Council v Minister Administering the Crown Lands Act* (2016) 260 CLR 232.

²⁶ See Appendix B for the list of cases.

²⁷ *Maloney v The Queen* (2013) 252 CLR 168; *Tajjour* (n 25).

IV WHY DID THE FRAMERS MAKE THE ORIGINAL JURISDICTION OF THE HIGH COURT WITH RESPECT TO CONSTITUTIONAL MATTERS CONTINGENT UPON AN ACT OF PARLIAMENT?

The decision of the framers not to entrench the original jurisdiction of the High Court with respect to matters arising under the *Constitution* or involving its interpretation is often considered to be unusual. For example, the authors of the current edition of *Blackshield and Williams* say in relation to the original jurisdiction of the High Court that “[o]ddly, [the] areas of jurisdiction left to Parliament’s discretion include matters ‘arising under the *Constitution*, or involving its interpretation’”.²⁸ Similarly, the Australian Law Reform Commission, in its inquiry into the *Judiciary Act*, described the inclusion within s 76 of original jurisdiction with respect to constitutional matters as an ‘odd fact of history’.²⁹ It is easy to understand why s 76(i) comes across as odd. The failure of the framers to entrench the High Court’s jurisdiction with respect to constitutional matters makes it seem as if the framers considered those matters to be less significant than those they did entrench. But this does not appear to be the case. The records of the convention debates contain numerous examples of members referring to the High Court as the ‘guardian’ and ‘interpreter’ of the *Constitution*.³⁰ For example, in the course of a passionate argument against giving the now defunct Inter-State Commission any role in interpreting the *Constitution*, Tasmanian barrister Henry Dobson said:

I have heard every honorable member who is a frequent speaker at this Convention ram home with all his force and weight the fact that the High Court is our guardian, is the interpreter of the *Constitution*, is the tribunal which is there to say whether a state on the one hand or the Commonwealth on the other infringes the principles of the *Constitution*.³¹

If, as Dobson said, the framers rammmed home with all their force and weight the fact that the High Court was to be the interpreter of the *Constitution*, why did they make its original jurisdiction over matters arising under the *Constitution* or involving its interpretation contingent upon an Act of Parliament?

The drafting history of Ch III provides no real answers to that question. The additional jurisdiction first appeared in the first official draft of the *Constitution* prepared by Sir Samuel Griffith for the National Australasian Convention in 1891. The relevant provisions of Griffith’s draft were cls 59, 61 and 63:

²⁸ George Williams, Sean Brennan and Andrew Lynch, *Blackshield and Williams: Australian Constitutional Law and Theory* (Federation Press, 7th ed, 2018) 532 [13.35].

²⁹ *ALRC 2001* (n 2) 258 [12.16]. See also *ALRC 2000* (n 3) 46 [2.47].

³⁰ *Official Record of the Debates of the Australasian Federal Convention*, Melbourne, 31 January 1898, 297 (Josiah Symon); *Official Record of the Debates of the Australasian Federal Convention*, Melbourne, 17 March 1898, 2471, 2477 (Edmund Barton).

³¹ *Official Record of the Debates of the Australasian Federal Convention*, Melbourne, 24 February 1898, 1497 (Henry Dobson).

59. The Judicial power of the Commonwealth shall extend—
- (1) To all cases arising under this *Constitution*: ...
- ...
61. In all cases affecting Public Ministers, Consuls, or other Representatives of other Countries, and in all cases in which the Queen in Her capacity as Sovereign of any State or any person sued on behalf of the Queen in the capacity of Sovereign of any State is a party, or in which a Writ of Mandamus or Prohibition is sought against an Officer of the Commonwealth, the High Court shall have original jurisdiction, and in all other cases the High Court shall have appellate jurisdiction both as to law and fact, with such exceptions and under such regulations as the Federal Parliament shall authorize.
- ...
63. The Federal Parliament may confer original jurisdiction on the High Court in such other cases within the judicial power of the Commonwealth as it may think fit.³²

These provisions were amended in three relevant ways throughout the remaining conventions. First, the words ‘or involving its interpretation’ were inserted after ‘arising under this *Constitution*’ by the Adelaide Convention held in 1897.³³ This was a significant expansion, as the class of matters arising under the *Constitution* is narrower than the class of matters involving its interpretation.³⁴ Second, the clause setting out the extent of judicial power was removed by the Melbourne Convention held in 1898.³⁵ According to Quick and Garran, the clause was removed because it ‘involved the use of the phrase “judicial power” with exclusive reference to original jurisdiction, and therefore in a different sense than that which it bears in section 71’.³⁶ Third, the clause conferring power on Parliament to confer additional original jurisdiction was expanded to refer to specific matters. This was necessary because it had previously referred to other matters ‘within the judicial power’ — a phrase made redundant by the removal of the clause setting out the scope of judicial power.

None of these changes had any bearing upon the High Court’s original jurisdiction with respect to matters arising under the *Constitution* or involving its interpretation. The additional original jurisdiction extended to constitutional matters from the

³² John M Williams, *The Australian Constitution: A Documentary History* (Melbourne University Press, 2005) 151.

³³ *Ibid* 491.

³⁴ Lane, *Lane’s Commentary on the Australian Constitution* (n 6) 598.

³⁵ Williams (n 32) 1040–1.

³⁶ John Quick and Robert Garran, *The Annotated Constitution of the Australian Commonwealth* (Angus & Robertson, 1901) 789.

moment of its invention by Sir Samuel Griffith. There is no evidence from the drafting that the framers ever considered moving constitutional matters into the entrenched original jurisdiction. Nor is there any evidence from the debates — the additional original jurisdiction was barely discussed.³⁷ The framers appear not to have turned their minds to the possibility that failing to entrench original jurisdiction with respect to constitutional matters could jeopardise the High Court’s access to constitutional questions. They must have assumed that constitutional matters would arise in the entrenched original jurisdiction or come to the High Court on appeal.

The explanation of s 76 provided by Quick and Garran supports this proposition:

The cases mentioned in [s 76] are cases in which the Convention did not think it absolutely essential, at the outset, that the High Court should have original jurisdiction; but in which, on the other hand, such jurisdiction was appropriate and might prove to be highly desirable.³⁸

This statement provides more insight into ss 75 and 76 than the primary sources. The learned authors suggested that the framers did not think it ‘absolutely essential’ that the High Court have original jurisdiction over the matters included in s 76. The corollary of this is that the framers did consider it absolutely essential that the High Court have original jurisdiction over the matters contained in s 75. An examination of the text tends to confirm this proposition. The matters contained in s 75 — those arising under any treaty, those affecting consuls and other representatives of other countries, those in which the Commonwealth is a party, those that cross state borders, and those in which writs are sought against officers of the Commonwealth — would likely be beyond the jurisdiction of state courts. That is why it was ‘absolutely essential’ that they be placed within the entrenched original jurisdiction of the High Court. Failure to place them within the High Court’s entrenched original jurisdiction could have led to a situation where there was no court in Australia with jurisdiction to determine disputes relating to those matters. Matters arising under the *Constitution* or involving its interpretation were not entrenched because, to the extent that they do not involve the Commonwealth or a dispute that crosses state boundaries, they may be determined by state courts. It was not absolutely essential to make provision for them in the entrenched original jurisdiction.

³⁷ At the National Australasian Convention in 1891, Henry Wrixon expressed concern that the additional original jurisdiction could be used to oust the states. Andrew Inglis Clark joined in his attempt to have the clause excised. Clark said that he had ‘strenuously fought against [the] provision’ during the meeting of the Judiciary and Constitutional Committees: see *Official Report of the National Australasian Convention Debates*, Sydney, 1 April 1891, 536 (Henry Wrixon), 547–8 (Andrew Inglis Clark). The retention of the provision suggests that their attempt to excise it failed. But evidence of at least partial success may be found in the Bill submitted by the Drafting Committee on 30 March 1891, in which the clause conferring additional original jurisdiction was visibly struck out: see Williams (n 32) 179, 200.

³⁸ Quick and Garran (n 36) 790.

V CAN PARLIAMENT REPEAL S 30(A) OF THE *JUDICIARY ACT*?

In its inquiry into the *Judiciary Act*, the Australian Law Reform Commission said ‘[t]he High Court’s constitutional role could presumably be diminished by amendment to s 30(a) [of the *Judiciary Act*] unless it could be said that the *Constitution* impliedly prohibits that course’.³⁹ It seems unlikely that the *Constitution* impliedly prohibits repeal of s 30(a) of the *Judiciary Act*. The text is clear. Section 75 contains the matters over which the High Court has original jurisdiction, and s 76 contains the matters in relation to which Parliament ‘may make laws conferring original jurisdiction’. Nevertheless, as the Australian Law Reform Commission has suggested the possibility, it warrants full investigation.

To suggest that Parliament cannot repeal s 30(a) of the *Judiciary Act* seems to suggest that the conferral of power to make laws in 76(i) does not carry with it the power to repeal those laws. In *Kartinyeri v Commonwealth*, Brennan CJ and McHugh J said: ‘[t]he power to make laws includes a power to unmake them’.⁴⁰ If it were otherwise, one Parliament would be able to deny or qualify the power of itself or of a later Parliament.⁴¹ But Brennan CJ and McHugh J also said:

To the extent that a law repeals a valid law, the repealing law is supported by the head of power which supports the law repealed unless there be some constitutional limitation on the power to effect the repeal in question.⁴²

This is a hint that the *Constitution* might in some circumstances limit the power to repeal a law. The question is whether it applies to s 30(a) of the *Judiciary Act*. Is there some implied right, duty or principle in the *Constitution* so powerful that it outweighs the presumption that Parliament can repeal a law enacted under s 76(i)? Two possibilities spring to mind. Neither is convincing.

A Repeal of s 30(a) as a Violation of the Separation of Powers

The first possibility is that repeal of s 30(a) would amount to a violation of the separation of powers. To establish this argument, it would have to be shown that: (1) interpretation of the *Constitution* is an essential element of the judicial power; (2) revocation from the judiciary of an essential element of its powers is inconsistent with the separation of powers; (3) repeal of s 30(a) amounts to revocation of

³⁹ ALRC 2000 (n 3) 46 [2.48].

⁴⁰ (1998) 195 CLR 337, 355, approved in *Re Pacific Coal Pty Ltd; Ex parte Construction, Forestry, Mining and Energy Union* (2000) 203 CLR 346, 373–4 (Gaudron J), 399–400 (McHugh J), 444 (Kirby J), 450 (Callinan J) (*‘Re Pacific Coal’*).

⁴¹ *Kartinyeri v Commonwealth* (1998) 195 CLR 337, 356 (Brennan CJ and McHugh J) (*‘Kartinyeri’*), quoting William Blackstone, *Commentaries on the Laws of England* (Garland Publishing, 1978) bk 1, 186.

⁴² *Kartinyeri* (n 41) 356 (Brennan CJ and McHugh J). See also *Re Pacific Coal* (n 40) (Gaudron J), 399–400 (McHugh J), 444 (Kirby J), 450 (Callinan J).

the power of the judiciary to interpret the *Constitution*; and, therefore (4) repeal of s 30(a) is inconsistent with the separation of powers.

Proposition (1) is not controversial. The fifth covering clause of the *Constitution* provides that the *Constitution* is ‘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’. The *Constitution* is the highest law of the land and binds every part of Australia’s federal system. The judiciary is charged with ensuring compliance with its provisions. To this end, the judiciary has inherent power to review the constitutional validity of legislation. This principle draws from *Marbury v Madison*,⁴³ which has been accepted as ‘axiomatic’ in Australia.⁴⁴

In regard to proposition (2), it is a well-established principle that Parliament cannot confer judicial power on a non-judicial body, or non-judicial power on a judicial body.⁴⁵ This principle perhaps could be extended to prohibit Parliament from revoking judicial power from a judicial body. Consider, for example, the determination of criminal guilt, something that is undoubtedly within the judicial power.⁴⁶ In *Polyukhovich*, the High Court held that Parliament cannot validly enact a bill of attainder due to the separation of powers principle.⁴⁷ A bill of attainder is an Act of Parliament that ‘adjudg[es] the guilt of a specific individual or individuals and impos[es] a punishment upon them’.⁴⁸ By enacting a bill of attainder, Parliament does two things: first, it exercises a power that belongs exclusively to the judiciary; and second, it deprives the judiciary of the opportunity to exercise the power itself. Although the exercise of judicial power by Parliament is typically considered to account for the constitutional repugnancy of a bill of attainder, it may be that ousting the judiciary from the determination of criminal guilt is equally repugnant: if, for example, Parliament enacted legislation that prohibited judges from making determinations of criminal guilt, it would be hard to characterise the legislation as being compatible with the separation of powers.

⁴³ *Marbury v Madison*, 5 US (1 Cranch) 137 (1803) (*‘Marbury v Madison’*).

⁴⁴ *Australian Communist Party v Commonwealth* (1951) 83 CLR 1, 262 (Fullagar J) (*‘Communist Party Case’*).

⁴⁵ *R v Kirby; Ex parte Boilermakers’ Society of Australia* (1956) 94 CLR 254, 270, 289 (Dixon CJ, McTiernan, Fullagar and Kitto JJ); *A-G (Cth) v The Queen; Ex parte Boilermakers’ Society of Australia* (1957) 95 CLR 529, 540–1. See generally *Albarran v Members of the Companies Auditors and Liquidators Disciplinary Board* (2007) 231 CLR 350, 367–73 (Kirby J).

⁴⁶ *Chu Kheng Lim v Minister for Immigration, Local Government and Ethnic Affairs* (1992) 176 CLR 1, 27 (Brennan, Deane and Dawson JJ); *Polyukhovich v Commonwealth* (1991) 172 CLR 501, 536–9 (Mason CJ), 608–10, 613–14 (Deane J), 647–9 (Dawson J), 685–6 (Toohey J), 706–7 (Gaudron J), 721 (McHugh J) (*‘Polyukhovich’*).

⁴⁷ *Polyukhovich* (n 46) 536–9 (Mason CJ), 609, 612–14 (Deane J), 647–8 (Dawson J), 685–6 (Toohey J), 706–7 (Gaudron J), 721 (McHugh J).

⁴⁸ *Ibid* 536 (Mason CJ).

The same reasoning could be applied to interpreting the *Constitution*. If Parliament enacted legislation that prohibited judges from interpreting the *Constitution*, it would be hard to characterise the legislation as being compatible with the separation of powers. The problem for the present argument is that repeal of s 30(a) of the *Judiciary Act* would not strip the High Court of its power to interpret the *Constitution*; rather, it would strip the High Court of part of its *jurisdiction*. This would prevent the High Court from hearing some constitutional matters. But it would not deprive the High Court of the power to interpret the *Constitution* or to determine constitutional matters that arise under the entrenched original or appellate jurisdiction. Because the principle from *Marbury v Madison* is ‘axiomatic’ in Australia,⁴⁹ the High Court — with or without s 30(a) of the *Judiciary Act* — will always be able to interpret the *Constitution* when a question of interpretation arises, and will always have the inherent power to declare an Act of Parliament invalid. The argument therefore fails to satisfy proposition (3). Repeal of s 30(a) would not violate the separation of powers.

B *Extension of Intergovernmental Immunities Principle*

The other possible argument involves an extension of the intergovernmental immunities principle. In *City of Melbourne v Commonwealth*,⁵⁰ the High Court declared s 48 of the *Banking Act 1945* (Cth) to be invalid.⁵¹ Section 48 required banks to obtain permission from the Commonwealth Treasurer before conducting banking business for a state or any authority of a state. The reasoning of the five judges in the majority differed. Justice Dixon held that a law which was a valid exercise of Commonwealth legislative power would be invalid where it was also ‘a law which discriminates against States, or a law which places a particular disability or burden upon an operation or activity of a State, and more especially upon the execution of its constitutional powers’.⁵²

Justice Dixon’s argument was that the *Constitution* impliedly limits an otherwise valid exercise of power where it discriminates against a state or places a particular disability or burden upon an operation or activity of a state. Over time it came to form the basis of what is known as the *Melbourne Corporation Case* principle.⁵³ In *Queensland Electricity Commission v Commonwealth*,⁵⁴ Mason J said that the principle consisted of two elements. One was a prohibition against discrimination that involved placing special burdens or disabilities on the states. The other was a prohibition against laws of general application that operated to destroy or curtail the

⁴⁹ *Marbury v Madison* (n 43), cited in *Communist Party Case* (n 44) 262 (Fullagar J).

⁵⁰ (1947) 74 CLR 31 (*‘Melbourne Corporation Case’*).

⁵¹ *Ibid* 64 (Latham CJ), 67 (Rich J), 76 (Starke J), 85 (Dixon J), 101 (Williams J).

⁵² *Ibid* 79. Cf *ibid* 61–2 (Latham CJ), 99–100 (Williams J).

⁵³ Cf *Victoria v Commonwealth* (1971) 122 CLR 353, 372–3 (Barwick CJ). See generally *Queensland Electricity Commission v Commonwealth* (1985) 159 CLR 192, 208 (Gibbs CJ), 219 (Mason J), 233 (Brennan J), 248 (Deane J).

⁵⁴ (1985) 159 CLR 192.

continued existence of the states or their capacity to function.⁵⁵ In *Austin v Commonwealth*,⁵⁶ Gaudron, Gummow and Hayne JJ described it as a single implied limitation upon laws that impose a ‘sufficiently significant impairment of the exercise by the State of its freedom to select the manner and method for discharge of its constitutional functions’.⁵⁷

It could be argued by extension that the *Constitution* also impliedly prohibits legislation that impairs the High Court in the exercise of its constitutional functions. The *Melbourne Corporation Case* supports this argument, as all of the judges based their reasoning upon the existence of the federal system provided by the *Constitution*.⁵⁸ Justice Starke, for example, held that

[t]he federal character of the *Australian Constitution* carries implications of its own ... the government of Australia is a dual system based upon a separation of organs and of powers. The maintenance of the States and their powers is as much the object of the *Constitution* as the maintenance of the Commonwealth and its powers. Therefore it is beyond the power of either to abolish or destroy the other.⁵⁹

Justice Dixon similarly held that ‘the federal system itself is the foundation of the restraint upon the use of the power to control the States’.⁶⁰ And Rich J emphasised that the *Constitution*

expressly provides for the continued existence of the States. Any action on the part of the Commonwealth, in purported exercise of its constitutional powers, which would prevent a State from continuing to exist and function as such is necessarily invalid because [it is] inconsistent with the express provisions of the *Constitution* ...⁶¹

The High Court is just as much a feature of the federal system as the states. The existence of the states is entrenched by ss 106–8 of the *Constitution*. The existence of the High Court is entrenched by s 71. If the *Constitution* impliedly provides protection for the existence of the states, which in some ways are subordinate to the Commonwealth, then it must also provide protection for the existence of the High

⁵⁵ Ibid 217. See also *Commonwealth v Tasmania* (1983) 158 CLR 1, 139 (Mason J).

⁵⁶ (2003) 215 CLR 185.

⁵⁷ Ibid 264.

⁵⁸ *Melbourne Corporation Case* (n 50) 55 (Latham CJ), 65–6 (Rich J), 70 (Starke J), 81 (Dixon J), 99 (Williams J).

⁵⁹ Ibid 70, quoting *South Australia v Commonwealth* (1942) 65 CLR 373, 442 (Starke J) (*‘South Australia v Commonwealth’*); *R v Commonwealth Court of Conciliation and Arbitration; Ex parte Victoria* (1942) 66 CLR 488, 515 (Starke J).

⁶⁰ *Melbourne Corporation Case* (n 50) 81.

⁶¹ Ibid 66.

Court, which is the apex of the Australian judiciary, the highest court of appeal, and the only court guaranteed jurisdiction over the Commonwealth and its officers.⁶²

This argument is unlikely to be controversial. If the *Constitution* provides protection for one organ in the federal system, it should follow that it provides protection for other organs in the federal system. The hard part is establishing that this protection would extend to prohibiting repeal of s 30(a) of the *Judiciary Act*. That would involve establishing that the High Court needs original jurisdiction over matters arising under the *Constitution* or involving its interpretation in order to exercise its constitutional function. That proposition is doubtful. The *Constitution* provides that Parliament ‘*may* make laws conferring original jurisdiction on the High Court in any matter ... arising under this *Constitution*, or involving its interpretation’.⁶³ The word ‘*may*’ indicates that the *Constitution* contemplates the existence and functioning of the High Court without original jurisdiction over those matters. It therefore cannot be argued that the High Court requires original jurisdiction in respect of constitutional matters to exercise its constitutional function. Revocation of that jurisdiction is not an impairment of the High Court’s freedom to select the manner and method for discharge of its constitutional functions. It is the valid determination by Parliament of what those constitutional functions are. Repeal of s 30(a), therefore, would not violate the intergovernmental immunities principle.

VI WHAT WOULD HAPPEN IF PARLIAMENT REPEALED S 30(A) OF THE *JUDICIARY ACT*?

If Parliament repealed s 30(a) of the *Judiciary Act*, litigants would be unable to commence proceedings in the original jurisdiction of the High Court with respect to a constitutional matter, unless the proceedings were also with respect to one of the matters contained in the High Court’s entrenched original jurisdiction. That consequence follows from the plain text of Ch III of the *Constitution*. However, the reviewers of the original draft of this article suggested an alternative consequence — that repeal of s 30(a) may have no effect because the High Court has an *implied* entrenched original jurisdiction in respect of matters arising under the *Constitution* or involving its interpretation independent of s 76(i). The reviewers suggested that this jurisdiction could exist by virtue of the axiomatic status of *Marbury v Madison* in Australia, or by virtue of the ‘inherent jurisdiction’ of the High Court. After careful consideration, and with great respect to the reviewers, who far surpassed expectations in the level of analysis and care they put into reviewing the original article, neither suggestion appears to be convincing.

⁶² *Constitution* ss 71, 73, 75(iii), 75(v). See also James Stellios, *Zines’s the High Court and the Constitution* (Federation Press, 6th ed, 2015) 329.

⁶³ *Constitution* s 76(i) (emphasis added).

A *Axiomatic Status of Marbury v Madison*

The suggestion that the axiomatic status of *Marbury v Madison* in Australia could provide support for an implied entrenched original jurisdiction with respect to constitutional matters directly contradicts the actual decision in that case. The case is famous because Marshall CJ held that the Supreme Court of the United States had the power to declare an Act of Congress unconstitutional and therefore void.⁶⁴ But the very legislation that Marshall CJ declared void purported to confer original jurisdiction on the Supreme Court beyond the scope allowed by the *United States Constitution*. Article III of the *United States Constitution* provides that the Supreme Court has original jurisdiction in all cases affecting ambassadors or other public ministers and consuls, and in which a state is a party.⁶⁵ The legislation in question authorised the Supreme Court to issue ‘writs of *mandamus*, in cases warranted by the principles and usages of law, to any courts appointed, or persons holding office, under the authority of the United States’.⁶⁶ Chief Justice Marshall held that the legislation was unconstitutional because the *Constitution* did not make provision for Congress to confer additional original jurisdiction upon the Supreme Court.⁶⁷ Implicit in his Honour’s decision was the notion that the Supreme Court has no original jurisdiction beyond that conferred on it by the *United States Constitution*. Therefore, whilst the decision supports the proposition that a court established by a constitution has the power to declare legislation unconstitutional and therefore void, it opposes the proposition that such a court has original jurisdiction beyond that conferred upon it by the constitution. As Marshall CJ said:

When an instrument organizing fundamentally a judicial system, divides it into one supreme, and so many inferior courts as the legislature may ordain and establish; then enumerates its powers, and proceeds so far to distribute them, as to define the jurisdiction of the supreme court by declaring the cases in which it shall take original jurisdiction, and that in others it shall take appellate jurisdiction; the plain import of the words seems to be, that in one class of cases its jurisdiction is original, and not appellate; in the other it is appellate, and not original. If any other construction would render the clause inoperative, that is an additional reason for rejecting such other construction, and for adhering to their obvious meaning.⁶⁸

B *An Inherent Original Jurisdiction with respect to Constitutional Matters*

The suggestion that the inherent jurisdiction of the High Court may provide it with original jurisdiction with respect to constitutional matters misconstrues the meaning

⁶⁴ *Marbury v Madison* (n 43) 176–180.

⁶⁵ *United States Constitution* art III § 2.

⁶⁶ *Judiciary Act of 1789*, ch 20, § 13, 1 Stat 73, 81.

⁶⁷ *Marbury v Madison* (n 43) 174.

⁶⁸ *Ibid* 175.

of the phrase ‘inherent jurisdiction’. Sir Jack Jacob described the inherent jurisdiction as a

residual source of powers, which the court may draw upon as necessary whenever it is just or equitable to do so, in particular to ensure the observance of the due process of law, to prevent vexation or oppression, to do justice between the parties and to secure a fair trial between them.⁶⁹

Jacob’s definition is regarded as seminal.⁷⁰ But it has also been persuasively criticised for conflating ‘jurisdiction’ with ‘power’.⁷¹ The jurisdiction of a court should be taken to refer to the territory or sphere of activity over which the authority of the court extends. The powers of a court should be taken to refer to what the court can do in the course of hearing and determining disputes within its jurisdiction. The phrase ‘inherent jurisdiction’ is an enduring misnomer for the phrase ‘inherent powers’.⁷² It refers to the array of powers possessed by superior courts that are ‘necessary to protect their capacity to administer justice and retain their very nature as superior courts’.⁷³ But those powers do not give courts the ability to determine matters outside their statutory and common law jurisdictions. For example, the ‘inherent jurisdiction’ of the Supreme Court of New South Wales could never enable it to determine a dispute wholly within the boundaries of Victoria. Nor could the ‘inherent jurisdiction’ of the Family Court of Australia enable it to determine a dispute involving an alleged patent infringement. In relation to the present issue, the High Court probably possesses inherent powers beyond those of other courts because of its position at the apex of the court hierarchy. But those powers could not enable it to determine matters beyond the scope of its jurisdiction under the *Constitution*.

VII CAN PARLIAMENT CREATE A CONSTITUTIONAL MATTER EXCEPTION TO THE APPELLATE JURISDICTION OF THE HIGH COURT?

Repealing s 30(a) of the *Judiciary Act* would prevent the High Court from hearing constitutional matters in its original jurisdiction unless the matters arose under the entrenched original jurisdiction contained in s 75. It follows that the appellate jurisdiction would become the sole means of access to constitutional matters that do

⁶⁹ IH Jacob, ‘The Inherent Jurisdiction of the Court’ (1970) 23(1) *Current Legal Problems* 23.

⁷⁰ See, eg, Marcelo Rodriguez Ferrere, ‘The Inherent Jurisdiction and its Limits’ (2013) 13 *Otago Law Review* 107.

⁷¹ *Ibid* 111.

⁷² *PT Bayan Resources TBK v BCBC Singapore Pte Ltd* (2015) 258 CLR 1. In the judgment, their Honours stated that ‘inherent jurisdiction can be used interchangeably with “inherent power.”’: at 17–18 [38] (French CJ, Kiefel, Bell, Gageler and Gordon JJ).

⁷³ Wendy Lacey, ‘Inherent Jurisdiction, Judicial Power, and Implied Guarantees under Ch III of the Constitution’ (2003) 31(1) *Federal Law Review* 57, 64, citing Jacob (n 69) 51.

not arise under the entrenched original jurisdiction. The appellate jurisdiction of the High Court is contained in s 73 of the *Constitution*:

The High Court shall have jurisdiction, with such exceptions and subject to such regulations as the Parliament prescribes, to hear and determine appeals from all judgments, decrees, orders, and sentences:

- (i) of any Justice or Justices exercising the original jurisdiction of the High Court;
- (ii) of any other federal court, or court exercising federal jurisdiction; or of the Supreme Court of any State, or of any other court of any State from which at the establishment of the Commonwealth an appeal lies to the Queen in Council;
- (iii) of the Inter-State Commission, but as to questions of law only;

and the judgment of the High Court in all such cases shall be final and conclusive.

But no exception or regulation prescribed by the Parliament shall prevent the High Court from hearing and determining any appeal from the Supreme Court of a State in any matter in which at the establishment of the Commonwealth an appeal lies from such Supreme Court to the Queen in Council.

Until the Parliament otherwise provides, the conditions of and restrictions on appeals to the Queen in Council from the Supreme Courts of the several States shall be applicable to appeals from them to the High Court.

The first paragraph of s 73 stipulates that the appellate jurisdiction is subject to exceptions and regulations prescribed by Parliament. But the power of Parliament to prescribe exceptions and regulations is subject to two possible limitations. The existence and scope of the first is not contentious. It is contained in the second paragraph of s 73 and preserves the appellate jurisdiction of the High Court with respect to matters that could be heard by the Privy Council. The second limitation is contentious: implied limits on Parliament's ability to prescribe exceptions may be derived from the words 'with such exceptions and subject to such regulations as the Parliament prescribes'. These limitations could be used to prevent Parliament from creating a constitutional matter exception to the appellate jurisdiction of the High Court.

A Express Limitation in the Second Paragraph of s 73

The express limitation in the second paragraph of s 73 provides that

no exception or regulation prescribed by the Parliament shall prevent the High Court from hearing and determining any appeal from the Supreme Court of a State in any matter in which at the establishment of the Commonwealth an appeal lies from such Supreme Court to the Queen in Council.

In *Parkin v James*,⁷⁴ the High Court explored the circumstances in which, at the establishment of the Commonwealth, an appeal could be made to the Queen in Council. It concluded that ‘[i]n all cases ... an appeal lay to the Sovereign-in-Council, but in all cases leave to appeal had to be obtained, either from the Court appealed from or from the Privy Council’.⁷⁵ Pursuant to this authority, if the Supreme Court of a state determined a matter arising under the *Constitution* or involving its interpretation, an appeal of its decision may be made to the High Court, subject to the requirements relating to leave. No exception to the appellate jurisdiction of the High Court could be used to prevent the appeal.

However, this limitation relates only to appeals from the Supreme Courts of the states. It has no application to appeals from federal courts and other state courts. This qualification is important. It means that there is no express limitation on the creation of a constitutional matter exception to the appellate jurisdiction of the High Court with respect to decisions by courts other than state Supreme Courts. This opens up an alternative way for Parliament to prevent the High Court from hearing appeals on matters arising under the *Constitution* or involving its interpretation. This alternative way was canvassed in the introduction to this article. It relies upon s 77 of the *Constitution*:

With respect to any of the matters mentioned in the last two sections the Parliament may make laws:

- (i) defining the jurisdiction of any federal court other than the High Court;
- (ii) defining the extent to which the jurisdiction of any federal court shall be exclusive of that which belongs to or is invested in the courts of the States;
- (iii) investing any court of a State with federal jurisdiction.

Parliament could: (1) create a new federal court; (2) confer upon the new federal court original jurisdiction with respect to matters arising under the *Constitution* or involving its interpretation; (3) provide that the jurisdiction of the new federal court is exclusive of that which belongs to or is invested in the courts of the states; and (4) create an exception to the appellate jurisdiction of the High Court with respect to the decisions of the new federal court. The first two steps in this process are uncontroversial. Section 71 empowers Parliament to create new federal courts and s 77(i) empowers Parliament to confer jurisdiction upon any federal court with any of the matters listed in ss 75 and 76, which include matters arising under the *Constitution* or involving its interpretation.

The third step may appear controversial. But there is existing support for the notion that it is possible to make jurisdiction with respect to constitutional matters exclusive

⁷⁴ (1905) 2 CLR 315.

⁷⁵ *Ibid* 332. See also *Smith Kline & French Laboratories (Australia) Ltd v Commonwealth* (1991) 173 CLR 194, 208–17 (*‘Smith Kline & French Laboratories’*).

of the state courts. Quick and Garran suggested that Parliament could create a federal court with exclusive jurisdiction over constitutional matters to prevent litigants appealing to the Privy Council instead of the High Court upon questions as to the limits inter se of the constitutional powers of the Commonwealth and the states.⁷⁶ Furthermore, the High Court said in *Baxter v Commissioners of Taxation (NSW)*:

It is clear that by exercise of the power conferred by [s] 77 the Parliament of the Commonwealth could have withdrawn the cognizance of matters arising under the *Constitution* or involving its interpretation altogether from the Courts of the States, and so have drawn them within the sole cognizance of federal courts, with a consequential appeal to the High Court and prohibition of appeal to the Queen in Council except in the specified cases.⁷⁷

This means that, unless there is an implied limitation in the power to create exceptions to the appellate jurisdiction of the High Court, Parliament has the power to create a new constitutional court with sole jurisdiction over all constitutional matters that do not fall within the High Court's entrenched original jurisdiction under s 75.

B Alleged Implied Limitation to the Power to Prescribe Exceptions

The existence of any implied limitation on the power to prescribe exceptions had little support in the early days of the Commonwealth. According to Quick and Garran, '[e]xcept as regards appeals from the Supreme Courts of the states in the matters defined in the second paragraph of the section, the power to except and regulate is — as it is in the United States — absolute and unlimited'.⁷⁸ Justice Isaacs adopted that position in the *First Tramways Case*.⁷⁹ There it was argued that Parliament could not exclude from the appellate jurisdiction a whole class of some proceeding but could merely provide a check or restriction upon the appeal. Justice Isaacs said: 'I wholly dissent from that. 'Exception' means what it says'.⁸⁰

⁷⁶ Quick and Garran (n 36) 754–755. Parliament acted on this suggestion to an extent when it enacted the *Judiciary Act 1907* (Cth). That Act inserted s 38A into the *Judiciary Act 1903* (Cth). Section 38A deprived state Supreme Courts of jurisdiction over matters involving questions as to the limits inter se of the constitutional powers of the Commonwealth and the states. The intention of s 38A was to prevent appeals on inter se questions going to the Privy Council: Explanatory Memorandum, Judiciary Amendment Bill 1976 (Cth) [20]–[21]. It was repealed by s 7 of the *Judiciary Amendment Act 1976* (Cth).

⁷⁷ (1907) 4 CLR 1087, 1114 (Griffith CJ, Barton and O'Connor JJ) ('*Baxter*'). This possibility was also noted in *ALRC 2000* (n 3) 47 [2.51].

⁷⁸ Quick and Garran (n 36) 738.

⁷⁹ *R v Commonwealth Court of Conciliation & Arbitration; Ex parte Brisbane Tramways Co Ltd* (1914) 18 CLR 54 ('*First Tramways Case*').

⁸⁰ *Ibid* 76.

The first hint of a limitation on the power to create exceptions arose in *Collins v Charles Marshall Pty Ltd*.⁸¹ In that case, six of the seven judges said: ‘after all it is only a power of making exceptions. Such a power is not susceptible of any very precise definition but it would be surprising if it extended to excluding altogether one of the heads specifically mentioned by s 73’.⁸² If the Inter-State Commission were established, the Court said, the power to create exceptions ‘could hardly extend to excepting all judgments decrees orders and sentences of that body from the appellate jurisdiction of the [High] Court’.⁸³

Justice Taylor said in dissent that the language of s 73 was more appropriate to authorise the prescription of exceptions by reference to the ‘specified characteristics of judgments or orders’,⁸⁴ such as an exception that prevents appeals from interlocutory orders. In doing so his Honour rejected the contrary interpretation — that it is permissible to exclude appeals from specified judgments or orders. Such an interpretation, Taylor J said, would entertain the view that appeals in specified *matters* or classes of matters might be made the subject of an exception, something that was ‘clearly inconsistent with the substance of the section’.⁸⁵

Less than two years later, the extent of the power to prescribe exceptions arose again in *Cockle v Isaksen*.⁸⁶ In that case, Sir Garfield Barwick QC adopted the reasoning of Taylor J in *Collins*. He argued that, unless a restrictive approach was taken, the power to create exceptions could destroy ‘substantially the greater part of the appellate jurisdiction’.⁸⁷ It must have come as a surprise when the entire bench, including Taylor J, disagreed with him. Justice Taylor referred to his earlier views and said: ‘Upon further consideration I am satisfied that these observations express a view that is unduly restrictive of the power under s 73 to prescribe exceptions’.⁸⁸

Each of the six judges in *Cockle* held that s 113 of the *Conciliation and Arbitration Act 1904* (Cth) (*‘Conciliation and Arbitration Act’*) could validly prohibit any appeal that could be brought to the Commonwealth Industrial Court (except an appeal from a state Supreme Court) being brought instead to the High Court.⁸⁹ Chief Justice Dixon, McTiernan and Kitto JJ held that the judgments referred to in s 113 of the Act were really defined by reference to the *matters* involved in the appeal — that if a matter arising under the Act was involved in the appeal, it could not be brought to the High Court. It was difficult to see, their Honours said, ‘why that should be

⁸¹ (1955) 92 CLR 529 (*‘Collins’*).

⁸² *Ibid* 544 (Dixon CJ, McTiernan, Williams, Webb, Fullagar and Kitto JJ).

⁸³ *Ibid*.

⁸⁴ *Ibid* 558.

⁸⁵ *Ibid* (emphasis in original).

⁸⁶ (1957) 99 CLR 155 (*‘Cockle’*).

⁸⁷ *Ibid* 157 (during argument).

⁸⁸ *Ibid* 175.

⁸⁹ *Ibid* 166 (Dixon CJ, McTiernan and Kitto JJ), 172 (Williams J), 174 (Webb J), 176 (Taylor J).

an inadmissible ground of exception'.⁹⁰ They also noted that the exception did not 'eat up or destroy the general rule laid down by the *Constitution* that appeals shall lie to [the High Court]'.⁹¹ Similarly, Williams J said that Parliament 'is not thereby empowered to take away completely the whole of [the] jurisdiction to hear any appeal from these judgments, decrees, orders and sentences. The appeals that can be taken away are at most exceptions from such appeals'.⁹² And Webb J speculated as to what must have been the main purpose of the power to make exceptions: 'preventing this Court from being inundated with trivial appeals and thus to enable it to continue to discharge efficiently those important functions for which we may assume it was created'.⁹³

As for Sir Garfield Barwick QC, he never had an opportunity to revisit the matter. The scope of the power to create exceptions was not considered in detail again until *Smith Kline & French Laboratories*.⁹⁴ In that case, the Court held unanimously that the words 'exceptions' and 'exception' were used in the 'sense of jurisdiction or matters excluded or taken away from the general grant of appellate jurisdiction conferred by the first paragraph'.⁹⁵ The case itself involved a challenge to the constitutional validity of the special leave provisions of the *Judiciary Act*, predominantly on the basis of the second paragraph of s 73. The Court referred to but did not disturb *Cockle*.⁹⁶ As such, *Cockle* remains the authoritative case on the power of Parliament to prescribe exceptions to the appellate jurisdiction of the High Court.

As the law currently stands, that power is subject to few limitations.⁹⁷ However, as the six judges in *Collins* said, s 73 is 'only a power of making exceptions'.⁹⁸ Parliament could not enact a law creating an exception that covered every judgment of every lower court whatsoever. Such a law would be beyond the scope of its power under s 73. It would not be an exception to the appellate jurisdiction. It would be the abolition of that jurisdiction. The above authorities are unanimous on this point. However, if the inability to abolish the appellate jurisdiction is the only inherent restriction upon creating exceptions to it, the obvious problem is determining when a law crosses the threshold from being an exception to being an abolition. This problem may be exacerbated by the fact that one exception on its own may seem innocuous yet, when combined with a number of other seemingly innocuous exceptions, have a cumulative abolitionary effect. Under the position taken in *Cockle*, myriad exceptions

⁹⁰ Ibid 166.

⁹¹ Ibid.

⁹² Ibid 168.

⁹³ Ibid 173.

⁹⁴ *Smith Kline & French Laboratories* (n 75).

⁹⁵ Ibid 210.

⁹⁶ Ibid 216–17.

⁹⁷ The Commonwealth submitted during argument that it desired to keep the potential scope of the power open: *Cockle* (n 86) 159.

⁹⁸ *Collins* (n 81) 544.

could be validly made and much of the appellate jurisdiction eliminated.⁹⁹ For this reason, the judgment of Taylor J in *Collins* may merit reconsideration. It does go against the whole tenor of Ch III to suggest that within the power to define the appellate jurisdiction of the High Court there lurks the ability to abolish it.¹⁰⁰

Nevertheless, *Cockle* is authority for the proposition that appeals to the High Court in relation to certain matters may be prohibited using the power to create exceptions,¹⁰¹ and if matters arising under the *Conciliation and Arbitration Act* could be prohibited from appeal to the High Court, why not matters arising under the *Constitution* or involving its interpretation? The only reason would be the existence of some implied limitation upon the power to create exceptions that could be relied upon to argue that matters arising under the *Constitution* or involving its interpretation cannot be excluded from the appellate jurisdiction. There are grounds for suspecting the existence of such a limitation. But it cannot be conjured up simply to overcome undesirable consequences unforeseen by the framers. To have any chance at success, the limitation must ‘exist in the text and structure of the *Constitution*’.¹⁰² And to have a good chance at success, it must be compatible with previously established constitutional jurisprudence.

One approach could be to argue that a constitutional matter exception to the appellate jurisdiction would violate the separation of powers doctrine. This article argued earlier that repeal of s 30(a) of the *Judiciary Act* would not violate the separation of powers because it would affect the jurisdiction but not the powers of the High Court. The same could be said of the enactment of a constitutional matter exception to the appellate jurisdiction. But the denial of appellate jurisdiction would be more complete than the denial of original jurisdiction. In the years 2005–16, it could have prevented up to 38 out of 110 constitutional matters from being heard by the High Court. It could be argued that the power of the High Court to answer constitutional questions would be pointless if the questions themselves never arise. Perhaps the High Court would consider the abolition of its appellate jurisdiction over constitutional matters to amount in substance to the abolition of its power to interpret the *Constitution*.

Another approach could be to argue that the enactment of a constitutional matter exception to the appellate jurisdiction would violate the *Melbourne Corporation Case* principle. This article earlier concluded that the principle could not be extended to protecting the original jurisdiction of the High Court over matters arising under the *Constitution* or involving its interpretation. That conclusion was grounded upon

⁹⁹ Unless the High Court was willing to find the various laws to be ‘schemes’: see *South Australia v Commonwealth* (n 59) 411 (Latham CJ), 448 (Starke J), 456 (McTiernan J), 462 (Williams J).

¹⁰⁰ Wynes (n 14) 506–7.

¹⁰¹ For other exceptions found to be valid: see Lane, *Lane’s Commentary on the Australian Constitution* (n 6) 543–5.

¹⁰² *McGinty v Western Australia* (1996) 186 CLR 140, 168 (Brennan CJ), quoted in *Kruger v Commonwealth* (1997) 190 CLR 1, 152 (Gummow J).

the reality that the *Constitution* contemplated the existence of the High Court without that original jurisdiction. But it only contemplated the existence of the High Court without that original jurisdiction because it was assumed that constitutional matters would otherwise arise on appeal. The question is therefore whether the *Constitution* contemplates the existence of the High Court without access to a large proportion of constitutional matters. If it does not, then it could be said that determination of constitutional questions is one of the constitutional functions of the High Court, and a constitutional matter exception to the appellate jurisdiction could be an impairment of the discharge of one of its constitutional functions.

What evidence is there that determination of constitutional questions is one of the constitutional functions of the High Court? In *Baxter*, Higgins J said:

Those who have been accustomed to hear the phrases used as to the High Court — ‘the guardian of the *Constitution*’ — ‘the final authority on constitutional points’ — ‘the final arbiter of the *Constitution*’ — will be surprised to find how little there is in the *Constitution* to justify such language.¹⁰³

But perhaps his Honour was not looking hard enough. The High Court is the only court the existence of which is entrenched in the *Constitution*.¹⁰⁴ It is the only entrenched repository of the judicial power of the Commonwealth.¹⁰⁵ It has always been a final court of appeal on inter se questions.¹⁰⁶ It alone had the power to grant leave to appeal to the Privy Council on such questions.¹⁰⁷ And it has entrenched jurisdiction over other matters that in many cases also arise under the *Constitution* or involve its interpretation.¹⁰⁸

In addition to these factors, which are drawn from the text of the *Constitution* itself, there are also external indicators that determination of constitutional questions is one of the constitutional functions of the High Court. The extent to which they are relevant depends upon the approach taken to the task of interpretation. If the intentions of the framers are relevant, there is evidence that many of the framers intended the High Court to be a constitutional court.¹⁰⁹ Josiah Symon said that the High Court was to

¹⁰³ *Baxter* (n 77) 1166.

¹⁰⁴ *Constitution* s 71.

¹⁰⁵ *Ibid.*

¹⁰⁶ *Ibid* s 74.

¹⁰⁷ *Ibid.*

¹⁰⁸ *Ibid* s 75(iii)–(v).

¹⁰⁹ See, eg, *Official Report of the National Australasian Convention Debates*, Adelaide, 25 March 1897, 129 (Josiah Symon), 26 March 1897, 201 (Henry Dobson), 14 April 1897, 593–4 (Josiah Symon), 19 April 1897, 937 (Henry Dobson); *Official Record of the Debates of the Australasian Federal Convention*, Melbourne, 31 January 1898, 296 (Josiah Symon), 302 (Vaiben Solomon), 23 February 1898, 1367 (William Lyne), 1373 (Edmund Barton), 1 March 1898, 1718 (Frederick Holder).

be ‘above all things, the interpreter of the *Constitution*’.¹¹⁰ Edmund Barton called it ‘the very guardian of the *Constitution*’.¹¹¹ Furthermore, there is also evidence that a majority of the participants in the final convention in Melbourne intended the High Court to be the final interpreter of the *Constitution*. That evidence is s 74 of the draft Bill adopted on 16 March 1898:

No appeal shall be permitted to the Queen in Council in any matter involving the interpretation of this *Constitution* or of the Constitution of a State, unless the public interests of some part of Her Majesty’s Dominions, other than the Commonwealth or a State, are involved.¹¹²

It is well known that the intentions of the participants in the Melbourne Convention were never realised. They gave way to the intentions of the Colonial Secretary, Joseph Chamberlain. Chamberlain insisted that the Bill be amended to preserve appeals to the Privy Council. Section 74 in its final form was a compromise between his wishes and the wishes of the delegates who travelled to London.¹¹³ However, as appeals to the Privy Council have been abolished, that compromise is now defunct. This fact may have implications upon the interpretation of s 73. If events following Federation are relevant to constitutional interpretation, the abolition of appeals to the Privy Council may bolster the argument that interpretation of the *Constitution* is one of the constitutional functions of the High Court. That is because the only alternative expressly contemplated by the *Constitution* — interpretation on appeal by the Privy Council — no longer exists. The abolition of appeals to the Privy Council may have rejuvenated the relevance of the intentions of the participants in the Melbourne Convention. These are strong grounds to support the existence of an implied limitation on the power to prescribe a ‘constitutional matter exception’ to the appellate jurisdiction of the High Court.

VIII CAN A FEDERAL CONSTITUTIONAL COURT TRULY EVADE HIGH COURT SCRUTINY?

If, contrary to the argument just advanced, Parliament does have the power to create a new constitutional court of final appeal, the judges of that court would be officers of the Commonwealth within the meaning of s 75(v) of the *Constitution*.¹¹⁴ Therefore, if the constitutional court made a decision in which it did not apply the High Court’s interpretation of the *Constitution*, the losing party could seek a writ of prohibition

¹¹⁰ *Official Report of the National Australasian Convention Debates*, Adelaide, 22 April 1897, 1174.

¹¹¹ *Official Record of the Debates of the Australasian Federal Convention*, Sydney, 8 September 1897, 212.

¹¹² Williams (n 32) 1133.

¹¹³ JA La Nauze, *The Making of the Australian Constitution* (Melbourne University Press, 1972) 248–69.

¹¹⁴ *First Tramways Case* (n 79) 62 (Griffith CJ), 66–7 (Barton J), 79–80 (Isaacs J), 82–3 (Gavan Duffy and Rich JJ), 86 (Powers J).

or mandamus or an injunction from the High Court. But the grounds upon which such a writ might be sought would be contentious. The winning party could argue that the interpretation of the constitutional court should prevail on the ground that its decisions have been excluded from the appellate jurisdiction of the High Court. It is hard to imagine the High Court accepting that argument, which tends to demonstrate that Parliament cannot truly diminish the ability of the High Court to interpret the *Constitution*. Nevertheless, the very existence of the argument casts some doubt on the position. It at least proves that the position is not certain.

IX CONCLUSION

Not only does the *Constitution* contain few rights and freedoms, it may contain a means by which the ability of the High Court to safeguard those rights and freedoms may be thwarted. The means is the placement of original jurisdiction with respect to matters arising under the *Constitution* or involving its interpretation in s 76 rather than s 75. The consequence of that placement is that Parliament has the ability to (attempt to) prevent the High Court from hearing matters that arise under the *Constitution* or involve its interpretation. This article has chased up every loose end left by the existence of that ability. It has examined whether Parliament could create a new court with exclusive jurisdiction over constitutional matters beyond the entrenched original jurisdiction of the High Court. And it has argued that any attempt to exclude decisions of such a court from the appellate jurisdiction of the High Court would be invalid on the ground that it constitutes an impairment of the discharge of the High Court's constitutional functions. But the real point of the article was not to explore these fancy constitutional issues. It was to demonstrate the messiness of the High Court's means of access to constitutional questions. This messiness warrants amendment. If Australia ever undertakes to tidy up some of the more mechanical aspects of its *Constitution*, it should move s 76(i) into s 75. Although the High Court is not a constitutional court per se, it has become a constitutional court in practice, and steps should be taken to secure its position.

APPENDIX A

- Re Minister for Immigration and Multicultural and Indigenous Affairs; Ex parte Ame*
(2005) 222 CLR 439
- Agtrack (NT) Pty Ltd v Hatfield* (2005) 223 CLR 251
- Chief Executive Officer of Customs v El Hajje* (2005) 224 CLR 159
- APLA Ltd v Legal Services Commissioner (NSW)* (2005) 224 CLR 322
- Combet v Commonwealth* (2005) 224 CLR 494
- Theophanous v Commonwealth* (2006) 225 CLR 101
- Sweedman v Transport Accident Commission* (2006) 226 CLR 362
- Koroitamana v Commonwealth* (2006) 227 CLR 31
- Dalton v NSW Crime Commission* (2006) 227 CLR 490
- XYZ v Commonwealth* (2006) 227 CLR 532
- Vasiljkovic v Commonwealth* (2006) 227 CLR 614
- Forge v ASIC* (2006) 228 CLR 45
- New South Wales v Commonwealth* (2006) 229 CLR 1
- Campbells Cash and Carry Pty Ltd v Fostif Pty Ltd* (2006) 229 CLR 386
- Bodruddaza v Minister for Immigration and Multicultural Affairs* (2007) 228 CLR
651
- A-G (Vic) v Minister for Employment and Workplace Relations* (2007) 230 CLR 369
- Bennett v Commonwealth* (2007) 231 CLR 91
- Albarran v Members of the Companies Auditors and Liquidators Disciplinary Board*
(2007) 231 CLR 350
- Visnic v ASIC* (2007) 231 CLR 381
- A-G (NT) v Chaffey* (2007) 231 CLR 651
- ACCC v Baxter Healthcare Pty Ltd* (2007) 232 CLR 1
- Roach v Electoral Commissioner* (2007) 233 CLR 162

South Australia v Totani (2010) 242 CLR 1

Rowe v Electoral Commissioner (2010) 243 CLR 1

Plaintiff M61/2010E v Commonwealth (2010) 243 CLR 319

Wainohu v New South Wales (2011) 243 CLR 181

Haskins v Commonwealth (2011) 244 CLR 22

Nicholas v Commonwealth (2011) 244 CLR 66

Roy Morgan Research Pty Ltd v Federal Commissioner of Taxation (2011) 244 CLR 97

Jemena Asset Management (3) Pty Ltd v Coinvest Ltd (2011) 244 CLR 508

Queanbeyan City Council v ACTEW Corporation Ltd (2011) 244 CLR 530

Momcilovic v The Queen (2011) 245 CLR 1

Wotton v Queensland (2012) 246 CLR 1

Australian Education Union v General Manager, Fair Work Australia (2012) 246 CLR 117

Phonographic Performance Company of Australia Ltd v Commonwealth (2012) 246 CLR 561

Crump v New South Wales (2012) 247 CLR 1

Stanford v Stanford (2012) 247 CLR 108

PT Garuda Indonesia Ltd v ACCC (2012) 247 CLR 240

Williams v Commonwealth (2012) 248 CLR 156

Betfair Pty Ltd v Racing New South Wales (2012) 249 CLR 217

Sportsbet Pty Ltd v New South Wales (2012) 249 CLR 298

Public Service Association of South Australia Inc v Industrial Relations Commission (SA) (2012) 249 CLR 398

JT International SA v Commonwealth (2012) 250 CLR 1

Plaintiff M47/2012 v Director-General of Security (2012) 251 CLR 1

North Australian Aboriginal Justice Agency Ltd v Northern Territory (2015) 256 CLR 569

McCloy v New South Wales (2015) 257 CLR 178

Plaintiff M68/2015 v Minister for Immigration and Border Protection (2016) 257 CLR 42

Alqudsi v The Queen (2016) 258 CLR 203

Cunningham v Commonwealth (2016) 259 CLR 536

Bell Group NV (in liq) v Western Australia (2016) 260 CLR 500

Day v Australian Electoral Officer (SA) (2016) 261 CLR 1

Murphy v Electoral Commissioner (2016) 261 CLR 28

Public Service Association of South Australia Inc v Industrial Relations Commission (SA) (2012) 249 CLR 398

The Public Service Association and Professional Officers' Association Amalgamated (NSW) v Director of Public Employment (2012) 250 CLR 343

A-G (SA) v Corporation of the City of Adelaide (2013) 249 CLR 1

Assistant Commissioner Michael James Condon v Pompano Pty Ltd (2013) 252 CLR 38

New South Wales v Kable (2013) 252 CLR 118

Maloney v The Queen (2013) 252 CLR 168

Unions NSW v New South Wales (2013) 252 CLR 530

A-G (NT) v Emmerson (2014) 253 CLR 393

Pollentine v Bleijie (2014) 253 CLR 629

Kuczborski v Queensland (2014) 254 CLR 51

Tajjour v New South Wales (2014) 254 CLR 508

Duncan v New South Wales (2015) 255 CLR 388

Duncan v Independent Commission Against Corruption (2015) 256 CLR 83

Communications, Electrical, Electronic, Energy, Information, Postal, Plumbing and Allied Services Union of Australia v Queensland Rail (2015) 256 CLR 171

North Australian Aboriginal Justice Agency Ltd v Northern Territory (2015) 256 CLR 569

McCloy v New South Wales (2015) 257 CLR 178

New South Wales Aboriginal Land Council v Minister Administering the Crown Lands Act (2016) 260 CLR 232

Bell Group NV (in liq) v Western Australia (2016) 260 CLR 500

