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Sharing water from transboundary rivers in Australia - an interstate common law?

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SHARING WATER FROM TRANSBOUNDARY RIVERS IN AUSTRALIA — AN INTERSTATE COMMON LAW?

ADAM WEBSTER*

In Australia, the sharing of water from a river — such as the Murray River — that flows through or forms the boundary between two or more states (a ‘transboundary river’) has historically been resolved by political agreement. Since colonial times, one of the great unanswered questions is how to resolve transboundary river disputes in the absence of an intergovernmental agreement. One argument that has been made is that the solution lies in the development of an ‘interstate common law’ on the basis that there must be equality between states. In evaluating this potential solution, I demonstrate that one difficulty with the argument is that the common law would be placing a limit on state legislative and executive power. I argue that if a limit on state power does exist, it is more appropriately derived directly from the text and structure of the Australian Constitution; however, the argument that an implication of ‘equality of states’ can be derived from the text and structure of the Constitution so as to place a limit on state power is not without difficulty.

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I INTRODUCTION

The year 2014 marked the centenary of the first intergovernmental agreement signed after federation dealing with the allocation and regulation of the waters of the Murray River.¹ Since the *River Murray Waters Agreement* was signed in 1914, a number of subsequent agreements regulating the waters of the river have been reached between the states and the Commonwealth.² However, the making of these political agreements has not always been easy; at times it has strained relations and has not been without threats of litigation.³ Despite those threats, no such legal action has been forthcoming. In contrast, in the United States, interstate disputes over water from a river that flows through or

¹ Agreement was reached on 9 September 1914 when the Prime Minister and the Premiers of New South Wales, Victoria and South Australia signed the *River Murray Waters Agreement*. The agreement was implemented by the Commonwealth and the relevant States passing separate but substantially similar legislation: *River Murray Waters Act 1915* (Cth); *River Murray Waters Act 1915* (NSW); *River Murray Waters Act 1915* (SA); *River Murray Waters Act 1915* (Vic).

² Two recent examples are the 2004 National Water Initiative and the 2008 Murray Darling Basin Agreement: *Intergovernmental Agreement on a National Water Initiative* (25 June 2004) (the Tasmanian and Western Australian Governments signed the agreement in June 2005 and April 2006 respectively: Council of Australian Governments, *National Water Initiative* <<http://www.coag.gov.au/node/105>>); *Agreement on Murray-Darling Basin Reform* (3 July 2008).

³ See, eg, Lucille Keen, 'Canberra Expects River Writs', *The Australian Financial Review* (Sydney), 4 April 2012, 10; Lucille Keen, 'SA Mulls Legal Redress', *The Australian Financial Review* (Sydney), 29 May 2012, 11. Former Premiers Mike Rann and John Olsen made similar threats of legal action with respect to the waters of the Murray: Michael Owen, 'Murray Brawl "Easier in Court"', *The Australian* (Sydney), 27 May 2011, 6; Michael Owen, 'Rann's Murray Warning to States', *The Australian* (Sydney), 15 June 2011, 10; Greg Kelton, 'Olsen's Warning at Interstate Plans to Divert Murray Water: I Will Take Court Action over River', *The Advertiser* (Adelaide), 1 October 2000, 16. In 1906 the South Australian government had considered legal action and briefed counsel for an opinion: Adam Webster and John M Williams, 'Can the High Court Save the Murray River?' (2012) 29 *Environmental and Planning Law Journal* 281, 281.

forms the boundary between two or more states (a ‘transboundary river’) have not always been able to be resolved by negotiation. Consequently, states in the United States have litigated against each other as a means to resolve these disagreements and this has led to the United States Supreme Court developing the common law to resolve these disputes. The Supreme Court labelled the common law doctrine the ‘doctrine of equitable apportionment’.⁴

If future disputes between the states of Australia over the sharing of water from a transboundary river are unable to be resolved by agreement, what, if any, are the substantive principles of law by which the High Court of Australia could resolve such disputes? Can the common law be developed in Australia in a similar way to the United States to resolve transboundary river disputes?⁵

In the early days after federation, Australian constitutional scholars were aware of the developments of the law in the United States in the early 20th century. Australian academic Harrison Moore noted in 1910 in his book, *The Constitution of the Commonwealth of Australia*:

The American cases ... show that the right of a State to abstract waters is in any case subject to the right of other States to do the same, and that a balance has to be struck between them on grounds of reasonableness.⁶

The unanswered question — which is examined in this article — is whether a similar doctrine applies within Australia.

The application in Australia of an equitable apportionment doctrine similar to that developed by the United States Supreme Court was considered by

⁴ See below n 12.

⁵ These questions could become live legal issues if a state were to withdraw support for the intergovernmental agreement that establishes the existing legal regime. In times of drought, threats of withdrawal and an assertion of legal ‘rights’ by the states — especially South Australia — are not uncommon: see Adam Lyall Webster, *Defining Rights, Powers and Limits in Transboundary River Disputes: A Legal Analysis of the River Murray* (PhD thesis, University of Adelaide, 2014) 1. However, even in the absence of a legal challenge by a state asserting a ‘right’ to water, an examination of these issues might also inform any future negotiation.

⁶ W Harrison Moore, *The Constitution of the Commonwealth of Australia* (Maxwell, 2nd ed, 1910) 564. There was a strong feeling after federation among some legal scholars that litigation in a similar form to that initiated in the United States would solve the problem in Australia. South Australian Patrick Glynn made references to the jurisprudence from the United States: P McM Glynn, ‘The Judicial Power and Interstate Claims’ (1905) 2 *Commonwealth Law Review* 241, 242, 247–9; see also Isaac A Isaacs, *Re Waters of the Murray River and its Tributaries and Interstate Rights to Divert Them* (Opinion, 22 March 1906) 17. A copy of the legal opinion can be found in the South Australian Parliamentary Library.

Ian Renard in the 1970s in the *Melbourne University Law Review*.⁷ While Renard concluded that the equitable apportionment doctrine was not applicable in Australia,⁸ he argued that the Australian common law could be developed to resolve an interstate dispute over the waters of a transboundary river by way of a doctrine that he described as the ‘doctrine of reasonable sharing’.⁹ Renard’s doctrine, like that developed in the United States, is based upon the notion of equality between states. However, since Renard developed that argument, the High Court has provided further explanation of the interaction between the *Australian Constitution* and the common law, which assists in re-evaluating the concept of an interstate common law in Australia as a mechanism for resolving transboundary river disputes.

The purpose of this article is to examine the possible creation of an interstate common law in Australia as a means for resolving transboundary river disputes. In Part II of this article I explain the approach that the United States Supreme Court has developed in using the common law to resolve transboundary river disputes in that country and highlight some of the general difficulties that a common law solution presents. In Part III, I examine whether an ‘interstate common law’ solution as proposed by Renard could be developed in Australia and demonstrate that the approach might be problematic against the current Australian constitutional landscape. One potential difficulty is that such an approach develops the common law in a manner that places an impermissible limit on state legislative power. In light of more recent developments in constitutional law, I examine in Part IV whether a solution to transboundary river disputes in Australia can instead be found in the text and structure of the *Australian Constitution* based upon a principle of equality between states.

⁷ Ian A Renard, ‘The River Murray Question: Part III — New Doctrines for Old Problems’ (1972) 8 *Melbourne University Law Review* 625. For further analysis by Ian Renard of the development of an interstate common law see also Ian Renard, ‘Australian Inter-state Common Law’ (1970) 4 *Federal Law Review* 87.

⁸ Renard, ‘The River Murray Question’, above n 7, 659. Renard stated that ‘[t]here is strong reason to believe that [the equitable apportionment doctrine] is not strictly a judicial doctrine at all but merely an arbitral award of quantities of water which, in the opinion of the Supreme Court of the day, appear “equitable”’.

⁹ *Ibid* 659–63.

II THE DEVELOPMENT OF A 'FEDERAL COMMON LAW' IN THE UNITED STATES

In the United States, transboundary river disputes are resolved in one of three ways: by interstate compact;¹⁰ by congressional apportionment of the waters using the commerce clause in the *United States Constitution*;¹¹ or by litigation before the United States Supreme Court.¹² The third mechanism — litigation — has provided a method of resolution that requires neither cooperation between state governments nor the approval of Congress. Unlike in Australia, there have been a number of occasions on which states of the United States have litigated in an attempt to resolve these disputes.

In this Part of the article, I examine the approach that the United States Supreme Court has developed to resolve transboundary river disputes with a view to determining whether a similar approach could be adopted by the Australian High Court. It is important to examine the development of the law in the United States as, historically, Australian legal scholars have turned to the United States jurisprudence in analysing the possible legal solution to a transboundary river dispute in Australia.¹³

In engaging in any comparative constitutional analysis, care must be taken not to transplant principles of law from one legal system into another without

¹⁰ See, eg, *Colorado River Compact* (1922) between the States of Colorado, New Mexico, Utah, Wyoming, Nevada, Arizona and California and the *Red River Compact* (1978) between the States of Arkansas, Louisiana, Oklahoma and Texas. This is what would be described in Australia as an 'intergovernmental agreement': see, eg, above nn 1–2. Interstate compacts also require congressional approval: *United States Constitution* art I § 10.

¹¹ *United States Constitution* art I § 8.

¹² See, eg, *Kansas v Colorado*, 206 US 46 (1907); *Arizona v California*, 373 US 546 (1963). For discussion of the doctrine developed by the Court see generally Joseph L Sax et al, *Legal Control of Water Resources — Cases and Materials* (Thomson West, 4th ed, 2006) 858–90; A Dan Tarlock et al, *Water Resource Management — A Casebook in Law and Public Policy* (Foundation Press, 6th ed, 2009) 938–77.

¹³ See above n 6 and accompanying text. Further, in the period immediately after federation it was not uncommon for the High Court to refer to decisions of the United States Supreme Court. See, eg, *D'Emden v Pedder* (1904) 1 CLR 91, 112 (Griffith CJ for the Court):

So far, therefore, as the *United States Constitution* and the *Constitution* of the Commonwealth are similar, the construction put upon the former by the Supreme Court of the United States may well be regarded by us in construing the *Constitution* of the Commonwealth, not as an infallible guide, but as a most welcome aid and assistance.

See also *Deakin v Webb* (1904) 1 CLR 585, 604–6 (Griffith CJ); *Jumbunna Coal Mine NL v Victorian Coal Miners Association* (1908) 6 CLR 309, 357–8 (O'Connor J).

having regard to the uniqueness of each country's constitutional landscape and methods of constitutional interpretation.¹⁴ In the context of transboundary river disputes, the comparison with the law of the United States is undertaken as a way of providing greater understanding of the complexities associated with resolving transboundary river disputes in the Australian legal system. In this Part, I explain that the approach adopted by the United States Supreme Court is unlikely to be adopted by the High Court of Australia.

The *United States Constitution* vests the Supreme Court with the judicial power of the United States,¹⁵ and art III § 2 expressly states that the judicial power of the Supreme Court 'shall extend to all cases in law and equity, arising under this *Constitution* ... to all controversies between two or more states'. Like s 75(iv) of the *Australian Constitution*, art III § 2 grants the Supreme Court original jurisdiction to deal with interstate disputes without defining the substantive law to be applied in the resolution of such disputes.¹⁶ The challenge for the Supreme Court was in developing substantive principles of law to resolve a transboundary river dispute. Similarly, in Australia, the High Court will have jurisdiction so long as there are substantive principles of law governing the dispute.¹⁷ The difficulty is in determining those substantive principles of law.

¹⁴ Cheryl Saunders, 'The Use and Misuse of Comparative Constitutional Law' (2006) 13 *Indiana Journal of Global Legal Studies* 37, 51–2; Sujit Choudhry, 'The *Lochner* Era and Comparative Constitutionalism' (2004) 2 *International Journal of Constitutional Law* 1, 52–4.

¹⁵ *United States Constitution* art III § 1 provides: 'The judicial power of the United States, shall be vested in one Supreme Court, and in such inferior courts as the Congress may from time to time ordain and establish'.

¹⁶ The second paragraph of art III § 2 of the *United States Constitution* states: 'In all cases ... in which a State shall be party, the Supreme Court shall have original jurisdiction'. The similarities between art III of the *United States Constitution* and ch III of the *Australian Constitution* are a function of the framers of the *Australian Constitution* drawing on the *United States Constitution* during the drafting process: see, eg, *Official Report of the National Australasian Convention Debates*, Adelaide, 20 April 1897, 968 (Bernhard Wise).

¹⁷ Section 75(iv) of the *Australian Constitution* provides the High Court with jurisdiction 'in all matters ... between States'. For there to be a 'matter' there must be substantive principles of law governing the dispute: *South Australia v Victoria* (1911) 12 CLR 667, 675 (Griffith CJ), 706 (Barton J), 709–10 (O'Connor J), 715–16 (Isaacs J) ('*Boundary Dispute Case*'). For a detailed discussion of the question of jurisdiction see Webster and Williams, 'Can the High Court Save the Murray River?', above n 3, 284–9.

A Kansas v Colorado

In the early 20th century the State of Kansas commenced the first litigation in the United States between states over the allocation of water from a transboundary river.¹⁸ The dispute involved the sharing of water from the Arkansas River between Kansas and Colorado. The Arkansas River is a tributary of the Mississippi River and its headwaters are in eastern Colorado. From Colorado, the Arkansas River flows east through Kansas and then south through Oklahoma and Arkansas, where it meets the Mississippi River.

Before 1885 very little water was extracted from the Arkansas River.¹⁹ However, in the last 15 years of the 19th century large scale irrigation works were established in Colorado. The increase in irrigation in the region corresponded to a rapid growth in population in eastern Colorado.²⁰ In the region of eastern Colorado through which the Arkansas River flows, cultivation of crops without irrigation was more difficult than in Kansas due to differences in environmental and climatic conditions. In Colorado, ditches were constructed to divert water from the river to irrigate surrounding land,²¹ and dams were put in place to capture the increase in water from the snow melt in late spring.²² From 1890 to 1900 the volume of water taken by Coloradan²³ irrigators increased, increasing crop yields as a result. Kansas complained that Colorado was withholding and diverting too much water upstream and thereby diminishing the flow of the Arkansas River through its territory.

After accepting jurisdiction in the earlier decision of *Kansas v Colorado*, (*Kansas I*),²⁴ the more difficult task for the Supreme Court was to identify

¹⁸ *Kansas v Colorado*, 185 US 125 (1902).

¹⁹ *Kansas v Colorado*, 206 US 46, 107–8 (Brewer J for the Court) (1907).

²⁰ *Ibid.*

²¹ *Ibid* 108. A ‘ditch’ is a narrow channel used to carry water.

²² *Ibid* 106.

²³ The United States Government Printing Office designates that natives of the State of Colorado should be described as ‘Coloradans’: United States Government Printing Office, *Style Manual — An Official Guide to the Form and Style of Federal Government Printing* (16 September 2008), 93. However, that view is not universally accepted within the State of Colorado, with the most obvious exception being the local newspaper of Fort Collins, the *Fort Collins Coloradoan*: see Ed Quillen, ‘Coloradan or Coloradoan?’, *The Denver Post* (online), 18 March 2007 <http://www.denverpost.com/opinion/ci_5447358>.

²⁴ 185 US 125 (1902).

the legal principles on which the substantive dispute would be resolved. It was another five years before the Court would decide this question.

In *Kansas v Colorado* ('*Kansas II*'), Brewer J, writing the opinion for the Court, acknowledged the complexity of the transboundary river dispute, while at the same time recognised that from a practical perspective a solution to the conflict needed to be found:

Controversies between the States are becoming frequent, and in the rapidly changing conditions of life and business are likely to become still more so. Involving as they do the rights of political communities, which in many respects are sovereign and independent, they present not infrequently questions of far-reaching import and of exceeding difficulty.²⁵

The relative frequency of interstate disputes (or the belief that these disputes would become more frequent in the future) was given as a further reason for a solution needing to be found.²⁶ That concern was well founded as the Supreme Court has had to resolve a number of transboundary river disputes since the decision in *Kansas II*.²⁷ In contrast, the Australian High Court has had to resolve comparatively few cases solely between states (and not involving the Commonwealth), and no cases involving the sharing of water from transboundary rivers between states.²⁸

Brewer J referred in his judgment to the position at international law as well as to the common law riparian rights doctrine. His Honour reasoned that at international law '[i]f the two States were absolutely independent nations [a

²⁵ 206 US 46, 80 (1907).

²⁶ *Ibid.*

²⁷ See, eg, *Wyoming v Colorado*, 259 US 419 (1922); *Nebraska v Wyoming*, 325 US 599 (1945); *Arizona v California*, 373 US 546 (1963). For a discussion of the development of the equitable apportionment doctrine in the United States see A Dan Tarlock, 'The Law of Equitable Apportionment Revisited, Updated and Restated' (1985) 56 *University of Colorado Law Review* 381.

²⁸ One notable exception being the *Boundary Dispute Case*. In 2009, South Australia commenced legal proceedings against Victoria alleging that the Victorian water trading rules, which restricted the amount of water that could be traded outside of water districts, were an impermissible restriction on interstate trade and commerce (and were therefore contrary to s 92 of the *Australian Constitution*). The action settled out of court in the early stages of the litigation: Government of South Australia and Government of Victoria, 'Joint Statement from Victorian and South Australian Governments' (Media Release, 14 June 2011); Jason Murphy and Matthew Dunckley, 'Constitutional Challenge Off as SA and Vic Settle', *The Australian Financial Review* (Sydney), 15 June 2011, 8.

transboundary river dispute] would be settled by treaty or by force. Neither of these ways being practicable, it must be settled by decision of this court'.²⁹ The fact of the litigation itself suggested that settlement by agreement (akin to a treaty) was not possible.

Brewer J also explained that the *United States Constitution* must be interpreted in the context of the common law. With respect to the riparian rights doctrine, Brewer J held:

[Each state] may determine for itself whether the common law rule in respect to riparian rights or that doctrine which obtains in the arid regions of the West of the appropriation of waters for the purposes of irrigation shall control. ... It is undoubtedly true that the early settlers brought to this country the common law of England, and that that common law throws light on the meaning and scope of the *Constitution* of the United States, and is also in many States expressly recognized as of controlling force in the absence of express statute.³⁰

Within each State a different regulatory regime with respect to rivers applied. In Colorado, the prior appropriation doctrine — that is, first in time, first in right — had existed 'from the date of the earliest appropriations of water'.³¹ In Kansas, water regulation drew upon common law riparian rights principles, which focused on maintaining the natural flow.³² The Supreme Court held that neither State could attempt to impose its own regulatory regime on the other and, consequently, that the matter must be resolved by the Court.³³

The differences between the *intrastate* regimes did not preclude a separate set of common law principles operating as between states. Brewer J concluded that, despite the fact that there was no uniform common law across the United States (a point of difference with Australia)³⁴ there must be an

²⁹ *Kansas II*, 206 US 46, 98 (1907).

³⁰ *Ibid* 94.

³¹ *Coffin v Left Hand Ditch Company*, 6 Colo 443, 446 (Helm J) (1882).

³² *Kansas II*, 206 US 46, 95 (Brewer J for the Court) (1907).

³³ *Ibid* 95–6. Brewer J stated '[i]ndeed, the disagreement, coupled with its effect upon a stream passing through the two States, makes a matter for investigation and determination by this court'.

³⁴ There is 'but one common law' in Australia: *Lange v Australian Broadcasting Corporation* (1997) 189 CLR 520, 563 (Brennan CJ, Dawson, Toohey, Gaudron, McHugh, Gummow and Kirby JJ).

‘interstate common law’³⁵ — sometimes referred to as a ‘federal common law’³⁶ — applicable to cases such as this. Brewer J first examined the nature of the common law and recognised that the development of any new common law doctrine must inevitably start with a single case. His Honour explained that as the common law

does not rest on any statute or other written declaration of the sovereign, there must, as to each principle thereof, be a first statement. Those statements are found in the decisions of courts, and the first statement presents the principle as certainly as the last. Multiplication of declarations merely adds certainty. For after all, the common law is but the accumulated expressions of the various judicial tribunals in their efforts to ascertain what is right and just between individuals in respect to private disputes.³⁷

The declaration that each state had a ‘right’ to water was not something that could be done incrementally — there needed to be a bold ‘first statement’ declaring the existence of the right. Subsequent cases could then develop and refine the doctrine.

Another consideration in the Court’s decision was the fact that Congress was not in a position to resolve the dispute. Before determining whether the Court must resolve this dispute, Brewer J explained that while the ‘National Government’ was not ‘entirely powerless’ in these matters,³⁸ Congress did not have express power to determine the rules by which water was to be shared between two states if the Court declined to resolve the dispute.³⁹ Similarly, the *Australian Constitution* does not expressly provide the Commonwealth with power to determine the allocation of water from transboundary rivers between states.⁴⁰ As is explained later in this article,⁴¹ in the Australian

³⁵ *Kansas II*, 206 US 46, 98 (1907).

³⁶ *Colorado v New Mexico*, 459 US 176, 183 (Marshall J for Burger CJ, Marshall, Brennan, White, Blackmun, Rehnquist, and Stevens JJ) (1982).

³⁷ *Kansas II*, 206 US 46, 96–7 (1907).

³⁸ *Ibid* 92. Brewer J noted that there were certain circumstances in which the ‘National Government’ could acquire land and regulate the use of water on that land.

³⁹ *Ibid* 95. See also *United States Constitution* art I.

⁴⁰ Early drafts of the *Australian Constitution* did suggest that the Commonwealth should have express power in this regard. For a discussion of the history of drafting of the *Australian Constitution* with regard to the regulation of rivers see John M Williams and Adam Webster, ‘Section 100 and State Water Rights’ (2010) 21 *Public Law Review* 267, 268–74.

⁴¹ See below Parts III and IV.

context, it is also necessary to consider any implied power vested in the Commonwealth by the *Australian Constitution* as well as any implied limit on state legislative and executive power.

B *Equality between States*

Brewer J gave two reasons for the need to create an interstate common law. First, the resolution of such disputes by force under the system of government established by the *United States Constitution* was not possible and '[t]he clear language of the *Constitution* vests in this court the power to settle those disputes'.⁴² Secondly, the 'cardinal rule' was that of 'equality of right' between the states:

Each State stands on the same level with all the rest. It can impose its own legislation on no one of the others, and is bound to yield its own views to none. Yet, whenever ... the action of one State reaches through the agency of natural laws into the territory of another State, the question of the extent and the limitations of the rights of the two States becomes a matter of justiciable dispute between them, and this court is called upon to settle that dispute in such a way as will recognize the equal rights of both and at the same time establish justice between them.⁴³

'Equality of right' did not mean that each state was entitled to the same amount of water, but rather there was to be an 'equal level or plane on which all the states stand, in point of power and right, under [the United States] constitutional system'.⁴⁴

By identifying these two principles the Court was taking into account not only the express provisions of the *United States Constitution* that granted it jurisdiction over interstate disputes, but also what it believed to be broader principles or assumptions underlying the *United States Constitution*. The notion that there is an 'equality of right' between states is not expressly provided for in the *United States Constitution*; however, the Court recognised that it not only created a new 'political body' but also changed the nature of

⁴² *Kansas II*, 206 US 46, 97 (1907).

⁴³ *Ibid* 97–8.

⁴⁴ *Wyoming v Colorado*, 259 US 419, 465 (Van Devanter J) (1922).

sovereignty and the relationship between the states.⁴⁵ The Court relied on these changes as an underlying principle rather than identifying specific constitutional provisions that supported the argument that there was an 'equality of right' between states. In Australia, the High Court has been unwilling to use broader principles or assumptions underlying the *Australian Constitution* to support implications.⁴⁶ Instead, as I explain in Part III, the High Court has held that implications must be derived from the text and structure of the document.⁴⁷

Ultimately, the United States Supreme Court in *Kansas II* took the view that it was a matter of balancing the interests of the two States.⁴⁸ The Court rejected the argument that Colorado, the upstream state, had the sovereign right to deplete the waters of the river as it saw fit. The Court held that while the water taken for irrigation in Colorado had caused some reduction to the flow of the Arkansas River, it did not call for the relief sought by Kansas.⁴⁹ However, the Court warned that if Colorado were to increase the amount of water it took from the river, it would be open to Kansas to commence fresh proceedings.⁵⁰

What the Court appeared to be doing here was balancing the respective detriments and benefits that the existing allocation would cause. It was an attempt to find some palatable middle ground. Similarly, in the 1931 decision

⁴⁵ *Kansas II*, 206 US 46, 81 (Brewer J for the Court) (1907), citing *Dred Scott v Sandford*, 60 US 393, 441 (Taney CJ) (1857). In the latter case, Taney CJ acknowledged that the adoption of the *United States Constitution* created a new 'political body' and also changed the nature of sovereignty within the nation.

⁴⁶ See below n 127 and accompanying text.

⁴⁷ See below nn 77 and 118 and accompanying text.

⁴⁸ 206 US 46, 100 (1907). In searching for a solution Brewer J stated that:

We must consider the effect of what has been done upon the conditions in the respective States and so adjust the dispute upon the basis of equality of rights as to secure as far as possible to Colorado the benefits of irrigation without depriving Kansas of the like beneficial effects of a flowing stream.

⁴⁹ *Ibid* 114. Brewer J explained:

when we compare the amount of ... detriment [to Kansas] with the great benefit which has obviously resulted to the counties in Colorado, it would seem that equality of right and equity between the two States forbids any interference with the present withdrawal of water in Colorado for purposes of irrigation.

⁵⁰ *Ibid* 117–18. In any subsequent proceedings it would then be for Kansas to show that the increase in water taken caused harm to the 'substantial interests of Kansas'.

of *New Jersey v New York*, Holmes J explained that resolving these interstate disputes required a balancing of the interests of the states:

A river is more than an amenity, it is a treasure. It offers a necessity of life that must be rationed among those who have power over it. New York has the physical power to cut off all the water within its jurisdiction. But clearly the exercise of such a power to the destruction of the interest of lower States could not be tolerated. And on the other hand equally little could New Jersey be permitted to require New York to give up its power altogether in order that the River might come down to it undiminished. Both States have real and substantial interests in the River that must be reconciled as best they may be. The different traditions and practices in different parts of the country may lead to varying results, but the effort always is to secure an equitable apportionment without quibbling over formulas.⁵¹

It appears also that the reliance that each State placed on the waters played an important part in the reasoning. Like Brewer J's reasoning in *Kansas II*, Holmes J's judgment is heavily influenced by the practicalities of the situation rather than developing and explaining the legal principles by which such disputes must be resolved.⁵²

One factor influencing this reasoning was a desire to balance the legislative and executive power of the states and to ensure that one state does not use its power to defeat the interests of another.⁵³ However, Holmes J did not explain why the water must be equitably apportioned to prevent such destruction; his Honour merely applied the equitable apportionment doctrine as first explained in *Kansas II*.⁵⁴ One of the questions that this approach raises is whether there is a difference between preventing destruction to the downstream state and ensuring that the downstream state has an equitable share; preventing destruction to the downstream state might still allow an upstream

⁵¹ 283 US 336, 342–3 (1931).

⁵² Reasoning that focuses on the practical outcome (at least so explicitly) is very foreign to the reasoning adopted by the High Court of Australia. Such an approach would likely be criticised as 'top-down' reasoning; see, eg, *McGinty v Western Australia* (1996) 186 CLR 140, 231–2 (McHugh J) ('*McGinty*'); *Roxborough v Rothmans of Pall Mall Australia Ltd* (2001) 208 CLR 516, 544 (Gummow J); *Lumbers v W Cook Builders Pty Ltd (in liq)* (2008) 232 CLR 635, 662 (Gummow, Hayne, Crennan and Kiefel JJ).

⁵³ Holmes J explained that one state must not have the power to cause destruction to the other by cutting off all water: *New Jersey v New York*, 283 US 336, 342 (1931).

⁵⁴ *Ibid* 343.

state to retain a greater amount of water from the transboundary river. There is arguably a difference between a community being destroyed because it has insufficient water to function and not having as much irrigable land as one might like. The latter might be a function of an inequality between states, but does not necessarily cause harm to the state.

C *The Basis for the Equitable Apportionment Doctrine*

Brewer J's decision in *Kansas II* was a significant development in the common law in the United States, both from a common law and constitutional perspective. However, understanding the basis for the decision is difficult. As Tarlock explained:

The opinion [of Brewer J] does not positively identify the source of the legal rules governing interstate resource disputes. When one probes the basis of the decision, a mass of contradictory principles and doctrines emerges.⁵⁵

While conceding that the United States Supreme Court 'has never been very precise about the source of the law of equitable apportionment',⁵⁶ Tarlock sought to explain the basis for the equitable apportionment doctrine as a necessary corollary of the grant of jurisdiction; without it, one state could 'use its law to gain an unfair advantage over another'.⁵⁷ However, one problem with that reasoning is that what constitutes unfairness depends upon the principles employed to assess the conduct of the states. For example, if the Court was to adopt a doctrine of prior appropriation to resolve transboundary river disputes there may be no 'unfairness' in an upstream state retaining significant amounts of water if it had done so before the downstream state had commenced appropriating the water.

From an Australian perspective, the difficulty with the approach that the United States Supreme Court has taken is that the Court has failed to explain from where the principle of equality between states is derived beyond a general notion that federalism arguably encapsulates equality between states. While Brewer J first explained that art III § 2 of the *United States Constitution*

⁵⁵ Tarlock, 'The Law of Equitable Apportionment Revisited, Updated and Restated', above n 27, 386.

⁵⁶ *Ibid* 394.

⁵⁷ *Ibid*. Usually that will be the upstream state preventing water from flowing into the downstream states.

granted the Court jurisdiction over interstate disputes, no further reference is made to the text or structure of the document to support the 'cardinal rule' that there exists an 'equality of right' between the states. If this principle is implicit from the *United States Constitution*, the basis for such an implication is not fully articulated. The argument is made at a high level of generality without descending into the specific provisions of the *United States Constitution* that may support the claim.⁵⁸ As I explain below in Part IV, in Australia the foundation for the principle of equality between states is important because the source of the principle may dictate the nature of the right. One question that must therefore be examined in the Australian context is whether the text and structure of the *Australian Constitution* can support a solution to this problem.

While Brewer J stated that the common law 'throws light' on the *United States Constitution*,⁵⁹ precisely *how* it does so is less clear from the judgment. As I explained above, the Supreme Court drew upon the fact that the *United States Constitution* granted jurisdiction to the Court in interstate disputes, the notion of equality between states and the flexibility of the common law to create a new body of law. In these circumstances, perhaps this is an instance of the *United States Constitution* 'throwing light' on the development of the common law as opposed to the other way around. If that is so, what the Court might in fact be examining is whether the development of the common law is based upon a constitutional implication. As I explain in Part III of this article, if an approach to resolve transboundary river disputes in Australia relied upon the common law, understanding the interaction between the *Australian Constitution* and the common law is an important aspect of resolving such a dispute in this country.

The creation of the equitable apportionment doctrine must be situated in the context of the Supreme Court's earlier decisions, as the timing of the decision was important. At the time of the decision in *Kansas II*, the Supreme Court had accepted the proposition that there was a common law separate from the common law of each of the respective states that could be applied by the federal courts.⁶⁰ While the notion of a general 'federal common law' was

⁵⁸ Ian Renard has questioned whether the approach adopted by the United States Supreme Court is one based on legal principle and has suggested it is merely an 'arbitral award': Renard, 'The River Murray Question', above n 7, 659.

⁵⁹ *Kansas II*, 206 US 46, 94 (1907).

⁶⁰ *Swift v Tyson*, 41 US 1 (1842).

rejected subsequently by the Court,⁶¹ the principle that the common law can be used to resolve interstate disputes over matters such as transboundary rivers and boundaries has not been questioned.⁶²

The effect of the approach taken by the Supreme Court in the United States was to develop a separate body of what are described as ‘common law’ principles that are protected from legislative amendment. While states are free to enter into intergovernmental agreements with respect to the allocation of water between them, the equitable apportionment doctrine will operate in the absence of an agreement and cannot be abolished. The effect of the equitable apportionment doctrine is to create an aspect of the common law that limits state legislative power and cannot be modified unilaterally by the states. It appears — although it is not expressly stated — that the *United States Constitution* protected the common law, as for the common law doctrine to be effective it needed to be immune from modification by the states. An alternative way of conceptualising the Court’s approach is that the equitable apportionment doctrine is not a common law solution at all, but rather a constitutional protection that is drawing an inference from the broader principles or assumptions underlying the *United States Constitution*. Such a description perhaps more accurately reflects the fact that the equitable apportionment doctrine is protected from abolition by state legislation. One of the important issues in the Australian context is whether an ‘interstate common law’, such as that proposed by Ian Renard, could be developed that, in effect, ‘trumps’ state legislative power. In the alternative, there is a question of whether the *Australian Constitution* might provide support for a legal doctrine for resolving transboundary river disputes. It is this interplay between the common law and the *Australian Constitution* (and whether a solution lies within the common law or the *Constitution*) that is developed further in Parts III and IV in examining the potential source of a solution to the transboundary river problem in Australia.

In summary, an examination of the United States jurisprudence shows that the Supreme Court developed a solution to transboundary river disputes

⁶¹ *Erie Railroad Co v Tompkins*, 304 US 64, 78 (Brandeis J for the Court) (1938).

⁶² Jay Tidmarsh and Brian J Murray, ‘A Theory of Federal Common Law’ (2006) 100 *Northwestern University Law Review* 585, 596–9. See also Henry P Monaghan, ‘The Supreme Court 1974 Term — Foreword: Constitutional Common Law’ (1975) 89 *Harvard Law Review* 1, 14; Martha A Field, ‘Sources of Law: The Scope of Federal Common Law’ (1986) 99 *Harvard Law Review* 881, 908.

based upon a principle of equality between states. Faced with no easy or express solution within the *United States Constitution*, the Supreme Court took a practical approach to develop the common law in a way that provided a solution. The *United States Constitution* and the federal system of government that it created were influential in the development of the 'federal common law', although this aspect of the reasoning is not clearly developed. In the period immediately after federation in Australia, the United States experience might well have been influential in any High Court decision.⁶³ Whether a similar approach could fit within the existing Australian legal framework requires further and close attention and will be examined in the next Part of this article.

III AN 'INTERSTATE COMMON LAW' IN AUSTRALIA?

Perhaps the attraction for the United States Supreme Court in using the common law to find a solution to the transboundary river problem was the flexibility it provided in developing the applicable legal principles. In Australia, in the period immediately after federation in circumstances when the High Court was yet to develop a body of constitutional jurisprudence, one can see the appeal the common law might have had as the foundation of a solution to a transboundary river dispute. While the ability of the common law to evolve and develop solutions to new problems is one of its defining attributes,⁶⁴ the development of the common law must also have regard to the constitutional setting within which it operates.

In Australia the attractiveness of the common law as a means of resolving transboundary river disputes is also a function of the fact that there is no express solution provided within the *Australian Constitution*. Section 100 — the only section of the *Constitution* to mention expressly the 'waters of rivers' — provides a limit on the Commonwealth's trade and commerce power.⁶⁵ The question of whether, by implication, s 100 also places a limit on state legislative power is not a question that the High Court has had to

⁶³ See above n 6 and accompanying text. Australians were certainly aware of the United States Supreme Court decisions dealing with transboundary river disputes.

⁶⁴ See *Australian Conservation Foundation v Commonwealth* (1980) 146 CLR 493, 552 (Mason J).

⁶⁵ *Commonwealth v Tasmania* (1983) 158 CLR 1, 153 (Mason J), 182 (Murphy J), 248–9 (Brennan J), 251 (Deane J) ('*Tasmanian Dam Case*').

answer.⁶⁶ As I have explained elsewhere,⁶⁷ s 100 might well be nothing more than a limit on the Commonwealth's trade and commerce power. If that is so, does the common law provide a legal solution to transboundary river disputes?

It is well established in Australia that the common law will inform constitutional interpretation.⁶⁸ However, it is the converse — the influence that the *Australian Constitution* has on the development of the common law — that is most relevant to the present problem. The interaction between the *Constitution* and the common law was considered by the High Court in *Lange v Australian Broadcasting Corporation* ('*Lange*').⁶⁹ In *Lange*, the question for consideration was whether the common law defamation defence of qualified privilege could be diminished or abolished such that it would not protect what the Court had identified in the text and structure of the *Constitution* as an implied freedom of political communication.⁷⁰ Four important principles emerge from that case. First, the Court stated that the interpretation of the common law must be consistent with the text of the *Constitution*.⁷¹

⁶⁶ However, the Court has alluded to the question: *Ibid* 153 (Mason J); *Arnold v Minister Administering the Water Management Act 2000* (2010) 240 CLR 242, 257 [24] (French CJ).

⁶⁷ I have argued elsewhere that s 100 is a limit on Commonwealth power, and not the source of a transboundary water right: see Williams and Webster, 'Section 100 and State Water Rights', above n 40. Cf Nicholas Kelly, 'A Bridge? The Troubled History of Inter-state Water Resources and Constitutional Limitations on State Water Use' (2007) 30 *University of New South Wales Law Journal* 639. Kelly has argued that a similar 'on water use may be implied from section 100 ... or may stem from a broader limitation on State power implied from the equality of states in a federation': at 663. Kelly suggests that this argument might also find support in international law: at 641.

⁶⁸ Sir Owen Dixon, 'The Common Law as an Ultimate Constitutional Foundation' (1957) 31 *Australian Law Journal* 240, 240. As Sir Owen Dixon explained: 'in the working of our Australian system of Government we are able to avail ourselves of the common law as a jurisprudence antecedently existing into which our system came and in which it operates'. The *Constitution* must be interpreted in the context of the 'whole law', which includes the common law: 'To me the lesson of all this appears to be that constitutional questions should be considered and resolved in the context of the whole law, of which the common law, including in that expression the doctrines of equity, forms not the least essential part': at 245. See also Sir Owen Dixon, 'The Common Law as an Ultimate Constitutional Foundation' in Severin Woinarski (ed), *Jesting Pilate — And Other Papers and Addresses* (Lawbook, 1965).

⁶⁹ (1997) 189 CLR 520.

⁷⁰ *Ibid* 566, 569–75 (Brennan CJ, Dawson, Toohey, Gaudron, McHugh, Gummow and Kirby JJ). The Court went on to consider whether s 22 of the *Defamation Act 1974* (NSW) abolished or diminished the common law defence of qualified privilege.

⁷¹ *Ibid* 566. The Court explained:

Secondly, the Court noted that since 1901 there had been only one common law of Australia.⁷² This position can be contrasted with the United States where the common law of each state in the United States is unique.⁷³ Despite that fact, and largely for practical reasons,⁷⁴ the United States Supreme Court developed a ‘federal common law’ to resolve transboundary river disputes. Thirdly, the common law may respond to changing conditions.⁷⁵ Fourthly, the common law operates within a federal system.⁷⁶ The first of these factors — that the common law must conform to the *Constitution* — was a critical factor in the Court developing the implied freedom of political communication.

In *Lange* the Court examined the *Constitution* to show that the text of the document established a system of representative and responsible government in Australia.⁷⁷ As is well known, the Court concluded that the implied

Of necessity, the common law must conform with the *Constitution*. The development of the common law in Australia cannot run counter to constitutional imperatives. The common law and the requirements of the *Constitution* cannot be at odds.

⁷² Ibid 563. The Court stated:

There is but one common law in Australia which is declared by this Court as the final court of appeal. ... [T]he common law as it exists throughout the Australian States and Territories is not fragmented into different systems of jurisprudence, possessing different content and subject to difference authoritative interpretations.

⁷³ While not expressly stated, the relationship between the *United States Constitution* and the common law of the states in that country was important in the development of the equitable apportionment doctrine: see *Kansas II*, 206 US 46, 94 (Brewer J for the Court) (1907).

⁷⁴ See above nn 51–2 and accompanying text.

⁷⁵ In *Lange* (1997) 189 CLR 520, 565 (Brennan CJ, Dawson, Toohey, Gaudron, McHugh, Gummow and Kirby JJ), the Court explained this in the following way:

Since 1901, the common law — now the common law of Australia — has had to be developed in response to changing conditions. The expansion of the franchise, the increase in literacy, the growth of modern political structures operating at both federal and State levels and the modern development in mass communications, especially the electronic media, now demand the striking of a different balance from that which was struck in 1901.

⁷⁶ Ibid 563–4. The Court stated:

that one common law operates in the federal system established by the *Constitution*. ... The *Constitution*, the federal, State and territorial law and the common law in Australia together constitute the law of this country and form ‘one system of jurisprudence’.

See also *R v Kirby; Ex Parte Boilermakers’ Society of Australia* (1956) 94 CLR 254, 267–8 (Dixon CJ, McTiernan, Fullagar and Kitto JJ) (*‘Boilermakers’ Case’*).

⁷⁷ (1997) 189 CLR 520, 558 (Brennan CJ, Dawson, Toohey, Gaudron, McHugh, Gummow and Kirby JJ). The Court noted that ‘[t]he effect of ss 1, 7, 8, 13, 24, 25, 28 and 30 therefore is to ensure that the Parliament of the Commonwealth will be representative of the people of the

freedom of political communication was an ‘indispensable incident’ of and ‘central to’ the principle of representative government.⁷⁸ The effect of the decision was that the implications derived from the *Constitution* placed a limit on the common law: the common law doctrine of qualified privilege had to be consistent with the implied freedom of political communication.⁷⁹ Similarly, legislation of the Commonwealth and the states must also conform to the implied freedom.⁸⁰ The Court in *Lange* was not creating a ‘constitutional defence’ that could be derived from the document itself, but was instead explaining how the common law must conform to the *Constitution*.⁸¹ Critical, therefore, to the development of an interstate common law in Australia to resolve the transboundary river problem is that the common law solution must have regard to the *Constitution*.

A Ian Renard’s ‘Interstate Common Law’

In 1971, Ian Renard examined the legal ‘rights’ associated with the waters of transboundary rivers in Australia.⁸² Renard’s thesis and associated publica-

Commonwealth’. The Court also made reference to ss 6, 49, 62, 64, 83 and 128 in showing that ‘[o]ther sections of the *Constitution* establish a formal relationship between the Executive Government and the Parliament and provide for a system of responsible ministerial government’: at 558–9.

⁷⁸ Ibid 559–60.

⁷⁹ Ibid 566. The Court stated that ‘the common law may be developed to confer a ... privilege in terms broader than those which conform to the constitutionally required freedom, but those terms cannot be any narrower’.

⁸⁰ Ibid. The Court held that ‘[l]aws made by Commonwealth or State Parliaments or legislatures of self-governing territories ... cannot derogate from the common law to produce a result which diminishes the extent of the immunity conferred by the *Constitution*’.

⁸¹ In explaining the modification of the common law in Australia, the High Court, in *ibid* 570 (citations omitted), stated:

the common law doctrine as expounded in Australia must now be seen as imposing an unreasonable restraint on that freedom of communication, especially communication concerning government and political matters, which ‘the common convenience and welfare of society’ now requires. Equally, the system of government prescribed by the *Constitution* would be impaired if a wider freedom for members of the public to give and to receive information concerning government and political matters were not recognised.

⁸² Ian Andrew Renard, *Australian Interstate Rivers — Legal Rights and Administration* (LLM Thesis, The University of Melbourne, 1971).

tions⁸³ were an important contribution to the academic literature as the first detailed consideration given to the issue of allocating water from transboundary rivers between states.⁸⁴ He argued that as Imperial, Commonwealth and state legislation did not resolve the problem, it was for the common law to develop a solution as to how to share between states the water from transboundary rivers. Renard labelled his approach the doctrine of 'reasonable sharing'.⁸⁵ In this section I first set out the doctrine and explain its foundation. I then critique the approach and identify the limitations of Renard's approach in light of subsequent constitutional jurisprudence. I conclude that the primary difficulty with the doctrine is that it fails to explain adequately how the common law can be used to place a limit on state legislative and executive power.

Renard's work was developed at a different time and in a different constitutional setting. This critique of Renard's approach benefits from an additional 40 years of constitutional jurisprudence. To the extent that this article questions the doctrine developed by Renard, that questioning is a product of the more recent developments in constitutional doctrine; specifically, the High Court's description of the interaction between the *Constitution* and the common law and the explanation of a number of implications that can be drawn from the text and structure of the *Constitution*.

Renard explained that in a transboundary river dispute the High Court would be faced with two alternatives: either accept that there is a lacuna in the law or develop a new body of common law to resolve these disputes.⁸⁶ This

⁸³ Renard, 'The River Murray Question', above n 7; Renard, 'Australian Inter-state Common Law', above n 7.

⁸⁴ Renard's work, together with the work of his colleague, Sandford Clark, provided the first comprehensive study of Australian water law. Sandford Clark's PhD thesis carved out the transboundary river question and expressly acknowledged that Ian Renard was dealing with this problem in his LLM thesis: Sandford Delbridge Clark, *Australian Water Law — An Historical and Analytical Background* (PhD Thesis, The University of Melbourne, 1971) 276, 425. See generally Sandford D Clark and Ian A Renard, 'The Riparian Doctrine and Australian Legislation' (1970) 7 *Melbourne University Law Review* 475; Sandford D Clark, 'The River Murray Question: Part I — Colonial Days' (1971) 8 *Melbourne University Law Review* 11; Sandford D Clark, 'The River Murray Question: Part II — Federation, Agreement and Future Alternatives' (1971) 8 *Melbourne University Law Review* 215. Enid Campbell also briefly considered this issue in the context of interstate disputes more generally: Enid Campbell, 'Suits Between the Governments of a Federation' (1971) 6 *Sydney Law Review* 309.

⁸⁵ Renard, *Australian Interstate Rivers*, above n 82, 199.

⁸⁶ *Ibid* 191.

starting premise is open to question: the 'gap' exists only because the Court is yet to pronounce on how to determine the resolution of these disputes; the gap will be closed (irrespective of the doctrine developed by the Court) once the Court has determined the principles (if any) upon which such disputes are to be resolved. Further, whether there is a 'gap' depends upon how the problem is framed. If one contends — as Renard does — that each state is entitled to a share of the water from a transboundary river then, as the law currently stands, there is no law dealing with how to share the water and, in that sense, there is a lacuna in the law. However, if it is reasoned that there are no limits on the legislative power of an upstream state with respect to transboundary rivers, then there is no 'gap' in the law; the upstream state is able to regulate the waters of the transboundary river within its territory as it sees fit and the downstream state is entitled to whatever water (if any) remains. Renard's argument that there is a 'lacuna' in the law is a function of the assumptions upon which the analysis is based. In this Part III(A), I examine those assumptions.

Renard rejected the argument that a direct analogy could be drawn between the 'rights' of the states with respect to transboundary rivers and the common law riparian rights doctrine that had regulated the rights as between individuals. He explained:

The existing common law, however, has set up a barrier against substantial diminution or alternation in the flow, independent of the reasonableness of that use, and this rule renders the doctrine quite inappropriate to inter-State river management.⁸⁷

Furthermore, the riparian rights doctrine has largely been abolished by legislation in the respective states and *intrastate* rivers are generally regulated by legislative regimes.⁸⁸ One reason for this was that the common law riparian rights doctrine was seen as unsuitable for the Australian conditions, where rivers did not flow year round.⁸⁹

⁸⁷ Renard, 'The River Murray Question', above n 7, 649.

⁸⁸ *ICM Agriculture Pty Ltd v Commonwealth* (2009) 240 CLR 140, 172–3 [54] (French CJ, Gummow and Crennan JJ), 191–2 [116] (Hayne, Kiefel and Bell JJ).

⁸⁹ Alex Gardner, Richard Bartlett and Janice Gray, *Water Resources Law* (LexisNexis Butterworths, 2009) 183. In 1896, George Reid from New South Wales summarised the position best when he explained that parts of inland Australia were so dry that 'scarcely a kangaroo could live without certain water conservation': New South Wales, *Parliamentary Debates*,

While Renard concluded that the riparian rights doctrine was unsuitable to resolve the transboundary river problem, he argued that a solution could still be founded in the common law. He described his 'doctrine of reasonable sharing' in the following way:

[The doctrine] is based on the assumption that the flow in an interstate river is not the sole preserve of the State through which, at any given time, it passes, but must be shared between users in all riparian States. The proportion of water which may be shared is determined upon what, in the light of the facts, is reasonable. Similarly, it is assumed that some pollutants will inevitably find their way into an interstate river, and a State can neither be allowed to pollute at will, nor be held liable if even a minimal degree of pollution (be it bacteria, salinity or solids) reaches the watercourse. Some middle ground between these two extremes must be found, and again a test of reasonableness would meet this requirement.⁹⁰

The basis for Renard's approach (and also the equitable apportionment doctrine developed in the United States) is that the water from a transboundary river must be shared between all states. That assumption flows from the premise that no state is entitled to legislate so as to deprive completely the other state of a share of the water because of an 'equality of States'.⁹¹ Is this a permissible constraint on state legislative and executive power?

B Can the Common Law Limit State Legislative and Executive Power?

In reaching the conclusion of the existence of an interstate common law on the basis that states cannot legislate so as to cause harm in the territory of another state,⁹² Renard drew upon decisions of foreign courts in other federal systems to support this underlying principle of equality, which he argued is an essential element of any federation:

Legislative Assembly, 15 July 1896, 1542. The word 'conservation' was used in this context to mean the storage of water.

⁹⁰ Renard, *Australian Interstate Rivers*, above n 82, 203.

⁹¹ Renard, 'The River Murray Question', above n 7, 645.

⁹² *Ibid* 644.

In every instance where both parties to a dispute have been governments and where actions undertaken in the territory of one have caused damage to the territory or inhabitants of the other, it has been held by the United States Supreme Court and the Swiss Federal Tribunal that the legislation of neither State could create or destroy liability. The reason is simply stated. Governments in a federation must be treated as equals before the Court and accordingly the statute of one could not be held to bind the other when the facts involve the territory of both. ...

In a dispute between States or the Commonwealth before the High Court, the arguments which the United States and Swiss courts found irresistible would seem to be directly applicable. The doctrine of equality of States is not based on particular constitutional provisions, but is rather a result of the very nature of a federation. ...

*The notion of equality of States is an essential attribute of federation and the express constitutional provision for settlement of 'matters' between States leads to the seemingly inescapable conclusion that no government, simply by the authority of its own legislative power, may use its territory quite regardless of the damage that this use may cause to the territory of another State.*⁹³

The fact that in other federal systems, such as the United States, courts have found notions of equality an 'irresistible' basis upon which to place a limit on the legislative power of the states does not in itself resolve the problem in Australia. Whether that same approach can be adopted in Australia must be determined in the context of the Australian legal system and existing legal principles.⁹⁴

Ordinarily, the Parliament has the ability to modify the common law. For an interstate common law solution to be effective it is necessary that a state cannot legislate in a manner so as to abolish unilaterally the interstate common law to the extent that it applies within its territory. That would defeat the purpose of the interstate common law. The effect, therefore, of creating an

⁹³ Ibid 644–5 (emphasis added). The argument that the doctrine of equality of states is a 'result of the very nature of federation' is similar to the question to that put by Inglis Clark in 1901: whether the fact that 'the States of the Commonwealth are constituent parts of the same nation' can require the development of a solution to the transboundary river problem. Cf A Inglis Clark, *Studies in Australian Constitutional Law* (Charles F Maxwell, 1901) 110.

⁹⁴ See *A-G (WA) v Marquet* (2003) 217 CLR 545, 570–1 [66]–[67] (Gleeson CJ, Gummow, Hayne and Heydon JJ). See also *Williams v Commonwealth* (2014) 252 CLR 416, 469 [81]–[82] (French CJ, Hayne, Kiefel, Bell and Keane JJ).

‘interstate common law’ as Renard advocated is to develop the common law so that it limits the legislative and executive power of the states. The High Court has not accepted the argument that there may be some fundamental aspects of the common law that can limit the legislative power of the states.⁹⁵

The critical issue is how an ‘interstate common law’ solution must be situated within the Australian constitutional framework. The *Constitution* provides for the continuance of the state constitutions after federation.⁹⁶ Importantly, s 107 of the *Constitution* provides that the power of the colonial legislatures continued after federation ‘unless it is by [the] *Constitution* exclusively vested in the Parliament of the Commonwealth or *withdrawn* from the Parliament of the State’.⁹⁷ Those powers ‘withdrawn’ from the state include not only those expressly withdrawn, but also where there is a limit on power as a consequence of a constitutional implication derived from the text and structure of the document. As McHugh J explained in *Coleman v Power* in the context of the implied freedom of political communication:

And the powers of a State continued under s 107 do not extend to those ‘withdrawn from the Parliament of the State.’ Those withdrawn from the State include not only those powers expressly withdrawn from the States such as those referred to in ss 51 [sic] and 90 but those powers which would entrench on the zone of immunity conferred by s 92 and the implied freedom of communication on political and governmental matters. ... The constitutional immunity is the leading provision; the sections ... give way to the constitutional immunity. To the extent that the exercise of legislative or executive powers, conferred or

⁹⁵ In *Union Steamship Co Pty Ltd v King* (1988) 166 CLR 1, 10 (Mason CJ, Wilson, Brennan, Deane, Dawson, Toohey and Gaudron JJ) (citations omitted), the Court stated:

Whether the exercise of [state] legislative power is subject to some restraints by reference to rights deeply rooted in our democratic system of government and the common law ... a view which Lord Reid firmly rejected in *Pickin v British Railways Board*, is another question which we need not explore.

See also *Durham Holdings Pty Ltd v New South Wales* (2001) 205 CLR 399, 409–10 [11]–[14] (Gaudron, McHugh, Gummow and Hayne JJ); *Pickin v British Railways Board* [1974] AC 765, 782 (Lord Reid). However, it must be acknowledged that those remarks were not made in the context of determining the transboundary limits of state legislation.

⁹⁶ *Australian Constitution* s 106.

⁹⁷ *Australian Constitution* s 107 (emphasis added).

saved by the *Constitution*, interferes with the effective operation of the [implied freedom of political communication], the exercise of those powers is invalid.⁹⁸

Therefore, while s 107 preserves the legislative and executive power of the states after federation, that power is subject to the *Constitution*, including any implication derived from it.

Renard's doctrine would prevent a state (or a government body or agency) from taking more than a reasonable share of the waters of a transboundary river. The doctrine would also prohibit legislative or executive actions that would authorise others from within that state to take more than a reasonable share of the waters from a transboundary river. The effect of the interstate common law doctrine in the form proposed by Renard would be to place a limit on state legislative and executive power that is not expressly stated in the *Constitution* or supported by a constitutional implication. Renard did not state that the foundation for the doctrine of reasonable sharing was, like the implied intergovernmental immunities doctrine, an implication derived from the structure of the *Constitution*.⁹⁹ Instead, he argued that it was an 'essential attribute' of federation.¹⁰⁰ However, the fact that Renard suggested that equality between states is an 'essential attribute' of federation raises the

⁹⁸ (2004) 220 CLR 1, 49 [90]. Presumably the reference to s 51 by McHugh J is a slip and should be a reference to s 52.

⁹⁹ In support of the argument, Renard stated that the High Court has 'derived a rule of law governing relations between the States and the Commonwealth from the very nature of the Australian federal system': Renard, *Australian Interstate Rivers*, above n 82, 187, citing *Essendon Corporation v Criterion Theatres Ltd* (1947) 74 CLR 1, 22 ('*Essendon Corporation*'). As Dixon J explained in *Essendon Corporation*, '[t]o my mind the incapacity of the States directly to tax the Commonwealth in respect of something done in the exercise of its powers or functions is a necessary consequence of the system of government established by the Constitution': (1947) 74 CLR 1, 22 (emphasis added).

The rules governing the relations between the Commonwealth and states to which Renard refers are a necessary implication derived from the *Constitution*. A state law purporting to restrict the capacity of the Crown in right of the Commonwealth will not bind the Commonwealth, whereas a law of general application to which the Commonwealth was subject in the exercise of its capacities will be binding: *Re Residential Tenancies Tribunal (NSW); Ex parte Defence Housing Authority* (1997) 190 CLR 410, 438–40 (Dawson, Toohey and Gaudron JJ). The principle behind the limitation is the same that lies behind the decision in *Melbourne Corporation v Commonwealth* (1947) 74 CLR 31, 77 (Dixon J). Without these limitations the capacity of the bodies politic to function would be impaired.

¹⁰⁰ Renard, 'The River Murray Question', above n 7, 645.

question of whether the presumption of equality of states can more appropriately be supported by a constitutional implication.

Here an important distinction can be drawn between Renard's proposal for a common law doctrine that purports to place a limit on state legislative and executive power and a proposed limit on the legislative and executive power of the states based on a principle of equality of states that is derived from the text and structure of the *Constitution*. As I consider in Part IV of this article, in light of the High Court's more recent decisions dealing with a number of constitutional implications, if a limit is to be placed on state legislative and executive power, a better approach would be for that limit to come from the *Constitution* (and not the common law). Such an approach removes any problems relating to *who* can modify the interstate common law and *how* it is modified.

C *Who Can Modify the Interstate Common Law?*

Assuming for a moment that the High Court was to accept the existence of an interstate common law as proposed by Renard, one further important question that would need to be addressed is: could the interstate common law be altered by legislation? It would, of course, be a strange result if the interstate common law was created and could be modified or abolished unilaterally by a state. That would defeat the purpose of the interstate common law.¹⁰¹

From a practical perspective, where an intergovernmental agreement between states exists, states will not litigate to enforce their common law 'rights' to water from transboundary rivers. However, from a legal perspective, the existence of an intergovernmental agreement would not modify the common law; the interstate common law rights would presumably still exist, it is just that the states have chosen not to enforce them.¹⁰²

¹⁰¹ However, as I explained above, if the interstate common law cannot be modified or abolished by a state, the problem arises that the common law is placing a limit on state legislative power which is not derived (either expressly or by implication) from the *Constitution*.

¹⁰² An argument that an intergovernmental agreement abolishes the interstate common law would be inconsistent with the general principle that it is for the legislature to modify or abolish the common law. Where an intergovernmental agreement is made between the states, that agreement is often implemented by each state passing identical or similar legislation in their respective Parliaments: see, eg, *River Murray Waters Act 1915* (NSW); *River Murray Waters Act 1915* (SA); *River Murray Waters Act 1915* (Vic). This raises the question of wheth-

If states cannot unilaterally modify the interstate common law, there is also the question of whether the Commonwealth Parliament has the power to modify the interstate common law. If that were so, the challenge would be to identify the source of the Commonwealth's legislative power to amend it. If such a power did exist, it would be subject to the same criticism that can be made of a state being able to modify the interstate common law: it would allow the Commonwealth to abolish the common law to the detriment of one or more states.

One possible source of Commonwealth legislative power to amend the interstate common law could be s 61 in conjunction with s 51(xxxix) of the *Constitution*. Section 61 defines the executive power of the Commonwealth and has been held to include an ability to engage in activities unique to the Commonwealth government and necessary for the nation as a whole, which is often referred to as the 'nationhood power'.¹⁰³ In *Victoria v Commonwealth* ('AAP Case'), Jacobs J explained that the 'nationhood power' was necessary for the 'maintenance' of the *Constitution* in the following way:

Within the words 'maintenance of this *Constitution*' appearing in s. 61 lies the idea of Australia as a nation within itself and in its relationship with the external world, a nation governed by a system of law in which the powers of government are divided between a government representative of all the people of Australia and a number of governments each representative of the people of the various States.¹⁰⁴

As French CJ noted in *Pape v Federal Commissioner of Taxation* ('Pape'), the precise scope of the nationhood power is unclear.¹⁰⁵ However, perhaps the most helpful general statement of the concept is Mason J's explanation of the 'nationhood power' in the *AAP Case*:

er the implementing legislation in each state modifies the interstate common law. If that is so, we return to the difficulty of state legislation being able to modify the interstate common law.

¹⁰³ *Victoria v Commonwealth* (1975) 134 CLR 338, 397 (Mason J) See also *Davis v Commonwealth* (1988) 166 CLR 79; *Pape v Federal Commissioner of Taxation* (2009) 238 CLR 1; *Williams v Commonwealth* (2012) 248 CLR 156.

¹⁰⁴ (1975) 134 CLR 338, 406.

¹⁰⁵ (2009) 238 CLR 1, 49 [92]. See also Sarah Joseph and Melissa Castan, *Federal Constitutional Law — A Contemporary View* (Lawbook, 3rd ed, 2010) 158; Anne Twomey, 'Pushing the Boundaries of Executive Power — Pape, the Prerogative and Nationhood Powers' (2010) 34 *Melbourne University Law Review* 313, 327–41.

But in my opinion there is to be deduced from the existence and character of the Commonwealth as a national government and from the presence of ss. 51(xxxix.) and 61 a capacity to engage in enterprises and activities peculiarly adapted to the government of a nation and which cannot otherwise be carried on for the benefit of the nation.¹⁰⁶

In one sense the Commonwealth may be well placed to modify the inter-state common law, as this may be precisely the sort of national issue, spanning across state borders, that must be left to a federal government. However, the mere fact that the issue may be of national importance does not in itself expand the Commonwealth's legislative power. As the joint judgment in *R v Hughes* cautioned:

It is plain enough that s 51(xxxix) empowers the Parliament to legislate in aid of an exercise of the executive power. However, it would be another matter to conclude that this means that the Parliament may legislate in aid of any subject which the Executive Government regards as of national interest and concern ...¹⁰⁷

The existence of such power will 'be clearest where Commonwealth executive or legislative action involves no real competition with State executive or legislative competence'.¹⁰⁸ In examining this question the plurality in *Pape* noted:

the determination of whether an enterprise or activity lies within the executive power of the Commonwealth ... 'invites consideration of the sufficiency of the powers of the States to engage effectively in the enterprise or activity in question and of the need for national action (whether unilateral or in co-operation with the States) to secure the contemplated benefit.'¹⁰⁹

One important factor in the High Court's determination of this question might be whether the 'nationhood power' is being used solely in an attempt to

¹⁰⁶ (1975) 134 CLR 338, 397. See generally Leslie Zines, 'The Inherent Executive Power of the Commonwealth' (2005) 16 *Public Law Review* 279, 283.

¹⁰⁷ (2000) 202 CLR 535, 555 [39] (Gleeson CJ, Gaudron, McHugh, Gummow, Hayne and Callinan JJ).

¹⁰⁸ *Pape* (2009) 238 CLR 1, 90 [239] (Gummow, Crennan and Bell JJ), quoting *Davis v Commonwealth* (1988) 166 CLR 79, 93–4 (Mason CJ, Deane and Gaudron JJ).

¹⁰⁹ *Ibid* 91 [239]. See also *Williams v Commonwealth* (2012) 248 CLR 1, 272 [256] (Hayne J).

expand the scope of Commonwealth power. The Commonwealth Parliament having the ability to modify an interstate common law could be viewed as a somewhat unusual result in light of the history of the Murray River dispute. Providing the Commonwealth with power to regulate transboundary rivers was expressly rejected during the drafting of the *Australian Constitution* at the federal conventions in the 1890s and that was reflected in the final wording of s 100.¹¹⁰ However, that alone would not necessarily prevent the Court from holding that the Commonwealth has the requisite legislative power. The *Constitution* has, on occasions, been interpreted in a manner that was not envisioned by the framers.¹¹¹

An alternative argument is that the Commonwealth has the legislative power to amend the interstate common law by virtue of s 51(xxxviii) of the *Constitution*:

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

If it were the case that prior to federation the Imperial Parliament had power with respect to defining the rights to water from transboundary rivers as between the colonies, then s 51(xxxviii) would transfer that power to the

¹¹⁰ An early draft at the 1897 Adelaide Convention proposed to vest the Commonwealth Parliament with the power over ‘the control and regulation of navigable streams and their tributaries within the Commonwealth; and the use of the waters thereof’: Draft Constitutional Bill 1897, cl 50(XXXI), reproduced in John M Williams, *The Australian Constitution — A Documentary History* (Melbourne University Press, 2005) 511. It appears the Drafting Committee of Barton, Downer and O’Connor must have reworked the provision prior to the Convention: *Official Report of the National Australasian Convention Debates*, Adelaide, 12 April 1897, 439 (Edmund Barton). See also Williams and Webster, ‘Section 100 and State Water Rights’, above n 40, 268–74.

¹¹¹ For example, despite the fact that the industrial relations power vested in the Commonwealth by s 51(xxxv) was restricted to ‘industrial disputes extending beyond the limits of any one State’, the interpretation of this head of power, as well as the broad interpretation given to s 51(xx) (the ‘corporations power’), has greatly expanded the scope of the Commonwealth’s ability to regulate industrial relations: see respectively, *Re Australian Education Union; Ex parte Victoria* (1995) 184 CLR 188, 235–6 (Mason CJ, Brennan, Deane, Toohey, Gaudron and McHugh JJ) and *New South Wales v Commonwealth* (2006) 229 CLR 1, 114 (Gleeson CJ, Gummow, Hayne, Heydon and Crennan JJ).

Commonwealth with the consent of the states.¹¹² From a theoretical perspective, this provides a logical mechanism for amending the interstate common law. However, from a practical perspective, the fact that it requires the consent of the states means that reaching agreement to enliven s 51(xxxviii) would be no easier than the existing practice of resolving these disputes by intergovernmental agreement.¹¹³

The question of who can modify the interstate common law illustrates one of the conceptual difficulties in finding a common law solution. On the one hand there is a desire to develop a solution that creates certainty for the states by creating a doctrine that cannot be defeated (particularly by an upstream state). On the other hand is the principle that the common law can ordinarily be modified by the legislature. However, identifying the source of legislative power to modify the interstate common law does not remedy the more fundamental problem identified: that the interstate common law in the manner advocated by Renard is placing a limit on the legislative and executive power of the states not provided for in the *Constitution*. As a consequence, the preferred approach would be to examine whether the limit on state power can instead be drawn from the text and structure of the *Constitution*.

IV CAN AN 'EQUALITY OF STATES' BE DRAWN FROM A CONSTITUTIONAL IMPLICATION?

Claims that each state has a 'right' to a share of the water from a transboundary river in Australia are common (particularly from South Australians).¹¹⁴ In 2012, the South Australian Premier, Jay Weatherill, made such claims and

¹¹² Section 51(xxxviii) allows the Commonwealth Parliament 'to make laws with respect to the local exercise of any legislative power which, before federation, could not be exercised by the legislatures of the former Australian colonies': *Port MacDonnell Professional Fishermen's Association Inc v South Australia* (1989) 168 CLR 340, 378 (Mason CJ, Brennan, Deane, Dawson, Toohey, Gaudron and McHugh JJ), quoted in *Sue v Hill* (1999) 199 CLR 462, 491 [62] (Gleeson CJ, Gummow and Hayne JJ).

¹¹³ A further alternative could be that the states directly concerned could collectively refer the matter to the Commonwealth by virtue of s 51(xxxvii) of the *Constitution*. Such an approach presupposes it was within the scope of the power of the states in the first place.

¹¹⁴ These assertions are sometimes accompanied by threats of litigation: above n 3 and accompanying text. Such claims were also made at the federal conventions in the 1890s: Williams and Webster, 'Section 100 and State Water Rights', above n 40, 270–3.

declared that he would not rule out a High Court challenge to uphold these ‘rights’. Weatherill stated:

We’ve made it clear to parliament that one of our claims is that all basin states are entitled to be regarded as equals when it comes to the river.¹¹⁵

The basis for such a challenge has not been fully explained by the South Australian government; however, Weatherill’s remarks appear to echo Renard’s conclusion that there is an ‘equality of states’.¹¹⁶

While Renard argued that his interstate common law solution was founded on the ‘essential attribute of federation’ that the states were equal, he expressly disavowed any reliance on the text of the *Constitution* to support his conclusion.¹¹⁷ However, since Renard developed his doctrine of ‘reasonable sharing’, the High Court has drawn a number of implications from the text and structure of the *Constitution*.¹¹⁸ Consistent with these developments, it would be more appropriate that a limit on state legislative and executive power be determined by reference to the text and structure of the *Constitution*.

The question whether an implication of equality between states can be drawn from the *Constitution* has not been considered by the High Court. However, the notion that the *Constitution* contains an implied right to legal equality with respect to *individuals* in different states was considered and rejected by a majority of the Court in *Leeth v Commonwealth* (‘*Leeth*’).¹¹⁹ Nevertheless, there are some important differences between the unsuccessful argument made in *Leeth* of equality between individuals and equality between states. The case is important in the way in which it examined the various

¹¹⁵ Michael Owen, ‘Old Brief May Sink Murray Plan’, *The Weekend Australian* (Sydney), 31 March 2012, 2.

¹¹⁶ Elsewhere Weatherill has asserted that ‘[t]he States were created equal. We are not being treated as equals’: Jay Weatherill, ‘Response to the Revised Murray Darling Basin Plan’ (News Release, 28 May 2012).

¹¹⁷ Renard, ‘The River Murray Question’, above n 7, 645.

¹¹⁸ The Court has recognised an implied right to vote: *Rowe v Electoral Commissioner* (2010) 243 CLR 1; *Roach v Electoral Commissioner* (2007) 233 CLR 162, the implied right to freedom of political communication: *Lange* (1997) 189 CLR 520, and the implied intergovernmental immunities doctrine: *Melbourne Corporation v Commonwealth* (1947) 74 CLR 31, 83 (Dixon J); *Austin v Commonwealth* (2003) 215 CLR 185. The emphasis on deriving these implications from the text and structure is presumably an attempt by the Court to distinguish this interpretation from the reasoning that supported the now discredited reserved powers doctrine: *Amalgamated Society of Engineers v Adelaide Steamship Co Ltd* (1920) 28 CLR 129.

¹¹⁹ (1992) 174 CLR 455.

provisions of the *Constitution* in determining whether equality between individuals exists. In this Part, I examine whether the text and structure of the *Constitution* supports the existence of equality of states as the basis for any limit on state power with respect to transboundary rivers.

It is first necessary to explain briefly the Court's reasoning in *Leeth*. The case of *Leeth* involved the sentencing of a prisoner who had been convicted of importing drugs under the *Customs Act 1901* (Cth). The *Commonwealth Prisoners Act 1967* (Cth) required that the prisoner's non-parole period be set in accordance with the legislation of the state in which he or she was convicted. The effect of the legislation was that those convicted of the same Commonwealth offence in different states could be subject to different procedures in setting a non-parole period and could therefore receive different non-parole periods for the same offence in the same circumstances. One of the arguments made by the prisoner was that the *Constitution* prohibited this discrimination in that it did not allow for the 'unequal treatment of equals'.¹²⁰

In *Leeth*, Mason CJ, Dawson and McHugh JJ noted that aside from the implied intergovernmental immunities doctrine, '[t]here are also specific provisions prohibiting discrimination or preference of one kind or another, but these are confined in their operation'.¹²¹ Their Honours stated that the express statements in ss 51(ii), 92, 99 and 117 supported the conclusion that the concept of equality was limited to those provisions.¹²² In dissent, Deane and Toohey JJ explained that the preamble and cl 3 of the *Commonwealth of Australia Constitution Act 1900* (Imp) 63 & 64 Vict showed that the federation was achieved with the 'free agreement of "the people"' and 'implicit in that free agreement was the notion of the inherent equality of the people as the parties to the compact'.¹²³ Deane and Toohey JJ referred to the express provisions, including ss 51(ii), 92, 99 and 117, in support of an implied right to legal equality; Mason CJ, Dawson and McHugh JJ used the same provisions to support the opposite conclusion. Deane and Toohey JJ explained that

¹²⁰ Ibid 457 (D F Jackson QC) (during argument).

¹²¹ Ibid 467. See generally Jeremy Kirk, 'Constitutional Implications (II): Doctrines of Equality and Democracy' (2001) 25 *Melbourne University Law Review* 24.

¹²² *Leeth* (1992) 174 CLR 455, 467–8. Section 92 of the *Constitution* requires that trade and commerce between the states 'shall be absolutely free'. In addition, s 99 of the *Constitution* prevents the Commonwealth Parliament giving preferential treatment to one state over another with respect to trade and commerce.

¹²³ *Leeth* (1992) 174 CLR 455, 486.

the existence of a number of specific provisions which reflect the doctrine of legal equality serves to make manifest rather than undermine the status of that doctrine as an underlying principle of the *Constitution* as a whole.¹²⁴

Their Honours drew an analogy with the implied intergovernmental immunities doctrine in that they noted specific provisions of the *Constitution* ‘which reflect or implement’ the immunities doctrine ‘are properly to be seen as a manifestation of it and not as a basis for denying its existence by invoking the inappropriate rule of *expressio unius*’.¹²⁵ The approach taken by Deane and Toohey JJ is yet to the find support of a majority of the Court.¹²⁶

The approach taken by the United States Supreme Court in developing the equitable apportionment doctrine was to rely on an ‘overarching’ principle of equality between states without identifying where such a principle is found

¹²⁴ Ibid 487.

¹²⁵ Ibid 484–5.

¹²⁶ In 1997, the argument that the *Constitution* contained an implied right to substantive equality was again considered and rejected by the Court in *Kruger v Commonwealth* (1997) 190 CLR 1. In that case Dawson J explained at 63–4 (citations omitted):

An analogy for the doctrine of equality was, it was said, to be discerned in the implied prohibition against Commonwealth legislation which discriminates against the States or subjects them or their instrumentalities to special burdens or disabilities. It would be surprising, it was suggested, if the *Constitution* embodied a general principle which protected the States and their instrumentalities from being singled out by Commonwealth laws for discriminatory treatment but provided no similar protection of the people who constitute the Commonwealth and the States. With respect, I do not find that situation surprising at all. The limitation upon the powers of the Commonwealth Parliament which prevent it from discriminating against the States is derived from different considerations entirely, which were articulated by Dixon J in *Melbourne Corporation v The Commonwealth* when he said: ‘The foundation of the *Constitution* is the conception of a central government and a number of State governments separately organised. The *Constitution* predicates their continued existence as independent entities.’ That principle does not spring from any notion of equality. Moreover the *Constitution* is in many respects inconsistent with a doctrine of legal equality.

In *McGinty* (1996) 186 CLR 140, 184 Dawson J stated that implications from the text and structure of the *Constitution* can only be drawn ‘[w]here they are necessary or obvious’. Dawson J, at 184–5, warned of the risk of drawing ‘structural implications’ from the *Constitution* and explained:

Whether or not an implication is categorised as structural or not, its existence must ultimately be drawn from the text. One is brought back to the text in the end and the danger in speaking of structural implications is, it seems to me, that there is a temptation to include by implication as part of the relevant structure those values which the structure is capable of accommodating, but does not necessarily accommodate.

within the text and structure of the *United States Constitution*. Similarly, Renard's argument that the doctrine of equality between states is 'an essential attribute of federation' adopts a similar approach. Importantly, constitutional implications cannot be drawn from what might be referred to as 'underlying' principles. As McHugh J wrote:

I cannot accept ... that a constitutional implication can arise from a particular doctrine that 'underlies the *Constitution*'. Underlying or overarching doctrines may explain or illuminate the meaning of the text or structure of the *Constitution* but such doctrines are not independent sources of the powers, authorities, immunities and obligations conferred by the *Constitution*. Top-down reasoning is not a legitimate method of interpreting the *Constitution*. ... [I]t is not legitimate to construe the *Constitution* by reference to political principles or theories that are not anchored in the text of the *Constitution* or are not necessary implications from its structure. I pointed out that the *Engineers' Case* had made it plain that the *Constitution* was not to be interpreted by using such theories to control or modify the meaning of the *Constitution* unless those theories could be deduced from the terms or structure of the *Constitution* itself.¹²⁷

Brennan J issued a similar caution that implications must be drawn from the text and structure of the document.¹²⁸ However, as *Leeth* demonstrates, it is not as simple as gathering constitutional provisions that support the particular argument. In that case the same provisions were used to support diametrically opposing views.

In *Leeth* and *McGinty* the High Court was dealing with the questions of equality between *individuals* from different states as opposed to whether there was equality between the bodies politic of the states. While rejecting that the *Constitution* provided a broad protection of equality between individuals, the joint judgment in *Leeth* of Mason CJ, Dawson and McHugh JJ expressly acknowledged that the *Constitution* provided states with a protection against Commonwealth legislation that impaired their capacity to function as a result of the implied intergovernmental immunities doctrine enunciated by Dixon J

¹²⁷ *McGinty* (1996) 186 CLR 140, 231–2.

¹²⁸ *Ibid* 168. Brennan J explained that '[i]mplications are not devised by the judiciary; they exist in the text and structure of the *Constitution* and are revealed or uncovered by judicial exegesis. No implication can be drawn from the *Constitution* which is not based on the actual terms of the *Constitution*, or on its structure' (citations omitted).

in *Melbourne Corporation v Commonwealth* ('Melbourne Corporation')¹²⁹ and developed in subsequent cases.¹³⁰ However, the *Melbourne Corporation* doctrine is not concerned with interstate relations and is limited to the protection of the bodies politic.¹³¹

There are provisions within the *Constitution* that provide for equality between the states in a variety of ways. The relevance of each of those in examining whether the text and structure supports an implication of an equality of states will now be examined.

Section 7 of the *Constitution* provides for equal representation of states in the Senate.¹³² The Senate was considered the 'states' house' and was to provide each state with equal representation within the Commonwealth Parliament. The intention was to ensure that the larger states could not dominate the small states when dealing with national issues in the Commonwealth Parliament. While the practical operation of the Senate, with senators usually voting with their party, does not guarantee substantive equality between the states, equality between the states is still reflected in the composition of the Senate.

Section 92 of the *Constitution* is also premised upon equality between the states, albeit in a very different context. The underlying principle behind s 92 is to create one economic unit and ensure trade between the states 'be absolutely free', as it prevents a discriminatory burden of a protectionist kind being placed on interstate trade.¹³³ To do so, it places a limitation on state and Commonwealth legislative power.

¹²⁹ (1947) 74 CLR 31, 82–3. See also *Queensland Electoral Commission v Commonwealth* (1985) 159 CLR 192; *Austin v Commonwealth* (2003) 215 CLR 185; *Clarke v Commissioner of Taxation* (2009) 240 CLR 272.

¹³⁰ *Leeth* (1992) 174 CLR 455, 467. See also the remarks of Dawson J in *Kruger v Commonwealth* (1997) 190 CLR 1, 63–4 in which his Honour rejects the argument that a doctrine of equality can be derived from the text and structure of the *Constitution*.

¹³¹ The *Melbourne Corporation* doctrine is limited to circumstances where the Commonwealth law would impair the capacity of the state to function as a polity: see, eg, *Western Australia v Commonwealth* (1995) 183 CLR 373, 480–1 (Mason CJ, Brennan, Deane, Toohey, Gaudron and McHugh JJ) ('*Native Title Act Case*'); *Tasmanian Dam Case* (1983) 158 CLR 1, 136–41 (Mason J).

¹³² Cf *Australian Constitution* s 24. Each state is not equally represented in the House of Representatives.

¹³³ *Cole v Whitfield* (1988) 165 CLR 360, 394 (Mason CJ, Wilson, Brennan, Deane, Dawson, Toohey and Gaudron JJ). See also *Castlemaine Tooheys Ltd v South Australia* (1990) 169 CLR 436; *Betfair Pty Ltd v Western Australia* (2008) 234 CLR 418; *Betfair Pty Ltd v Racing New South Wales* (2012) 249 CLR 217; *Sportsbet Pty Ltd v New South Wales* (2012) 249 CLR 298.

Examples of the *Constitution* providing equality between the states can also be found in ss 99 and 102. Sections 99 and 102 are intended to avoid the Commonwealth giving preference to one state over another with respect to trade and commerce. In *Fortescue Metals Group Ltd v Commonwealth* ('*Fortescue*'), French CJ explained the purpose of s 99 along with s 51(ii) — the taxation power — in the following way:

the constraints imposed by ss 51(ii) and 99 of the *Constitution* serve a federal purpose — the economic unity of the Commonwealth and the formal equality in the Federation of the States inter se and their people.¹³⁴

While those specific sections may seek to establish equality between the states with respect to taxation, French CJ did not go so far as to suggest that the principle of equality between the states was a broader principle to be found within the text and structure of which ss 51(ii) and 99 were mere examples. French CJ's decision in *Fortescue* did not need to examine the question of whether there is a more general principle of equality as between states that can be derived from the text and structure of the *Constitution*.

In *Deputy Federal Commissioner of Taxation (NSW) v W R Moran Pty Ltd*, Latham CJ explained that the *Constitution* did not prevent discrimination by the Commonwealth at large as between the states.¹³⁵ In that case the Commonwealth imposed an excise duty on flour. The excise was paid by millers in all states in the same way. The excise paid by the miller would then be passed on to consumers. The money was then distributed to the states and used to give 'assistance and relief' to wheat farmers.¹³⁶ Very little wheat was grown in Tasmania and almost all of its wheat was imported. The effect of the Commonwealth legislation was that Tasmanians would be paying a higher price for bread, while its farmers would receive very little benefit from the excise.¹³⁷ It was therefore agreed that a special payment was made to Tasmania that was not subject to any conditions and was to be used by the Tasmanian govern-

¹³⁴ (2013) 250 CLR 548, 585 [49]. In addition, French CJ, at 561–2 [3], noted that:

The limitations on Commonwealth legislative power imposed by ss 51(ii) and 99 of the *Constitution* protect the formal equality in the Federation of the States inter se and their people, and the economic union which came into existence upon the creation of the Commonwealth.

¹³⁵ (1939) 61 CLR 735, 764.

¹³⁶ *Ibid* 757.

¹³⁷ *Ibid* 753, 757.

ment to refund millers in that State who had paid the Commonwealth excise duty. One of the questions that arose was whether the special grant of money pursuant to s 96 to Tasmania discriminated against the other states:

There is no general prohibition in the Constitution of some vague thing called 'discrimination.' There are the specific prohibitions or restrictions to which I have referred. The word 'discrimination' is sometimes so used as to imply an element of injustice. But discrimination may be just or unjust. A wise differentiation based upon relevant circumstances is a necessary element in national policy. The remedy for any abuse of the power conferred by sec. 96 is political and not legal in character.¹³⁸

Not only did Latham CJ accept that there was no prohibition against discrimination in s 96, but if there was an injustice in that discrimination, it was not for the Court to resolve the matter. The case was appealed to the Privy Council.¹³⁹ While the Privy Council warned that s 96 should not be used as a mechanism by which the protection in s 51(ii) can be bypassed, there was no suggestion that there was some wider or overarching principle of equality or fairness beyond what was expressly provided for in s 51(ii).¹⁴⁰ One of the difficulties with drawing an analogy with this case is that it deals with the specific prohibition in s 51(ii) and whether s 96 was being used by the Commonwealth to circumvent the protection provided in s 51(ii).

Examining the various constitutional provisions that could suggest an equality of states demonstrates that the concept of equality takes various forms, specific to each provision. For example, s 7 protects the smaller states

¹³⁸ Ibid 764 (Latham CJ) (emphasis added). See also at 767 (Rich J), 809 (McTiernan J).

¹³⁹ *W R Moran Pty Ltd v Deputy Federal Commissioner of Taxation (NSW)* (1940) 63 CLR 338.

¹⁴⁰ Ibid 349–50 (Viscount Maugham for the Privy Council). On appeal, the Privy Council issued a cautionary note that s 96 could not be used so as to defeat the prohibition in s 51(ii) that Commonwealth laws with respect to taxation must not discriminate between states:

their Lordships ... do not take the view that the Commonwealth Parliament can exercise its powers under sec. 96 with a complete disregard of the prohibition contained in sec. 51(ii), or so as altogether to nullify that constitutional safeguard. The prohibition is of considerable importance; and the *Constitution* should be construed bearing in mind that it is the result of an agreement between six high contracting parties with in some respects very different needs and interests. Cases may be imagined in which a purported exercise of the power to grant financial assistance under sec. 96 would be merely colourable. Under the guise or pretence of assisting a State with money, the real substance and purpose of the Act might simply be to effect discrimination in regard to taxation.

from the larger states, whereas s 92 prohibits the economically weak states protecting their economy. Therefore, each provision is seeking to prevent a different type of inequality and the provisions do not spring from a unifying, broader principle of equality ingrained within the text and structure of the document.

Ian Renard argued that s 100 provided 'indirect, but weighty, support' for the reasonable sharing doctrine.¹⁴¹ He explained:

Though [s 100] is primarily directed to relations between the Commonwealth and a State, its implied acceptance of a general right of reasonable use possessed by the States may well affect legal relations between States. The existence of inter-State common law is a direct consequence of the creation by the *Constitution* of a federal system, and any guide in the *Constitution* to the content of that law must be treated with the utmost respect.¹⁴²

However, s 100 is only a limit on the Commonwealth's power with respect to s 51(i) and would not entitle a state to the reasonable use of water for conservation and irrigation if the Commonwealth was regulating water with respect to another head of Commonwealth legislative power.¹⁴³ While s 100 does not *provide* a 'right' (or limit on state power), it would be consistent with the existence of an implication of equality between states. However, the mere fact that s 100 might be consistent with a 'right' to water does not advance the argument of equality between states a great deal further; it would still be necessary to find the source of the 'right' elsewhere within the text and structure of the document.

Inglis Clark contended that within a federation disputes between states must be resolved by peaceful means.¹⁴⁴ The argument that there is not to be warfare between states is supported by the *Constitution*, as s 114 forbids states raising and maintaining a military force. This gives some support to the argument that states within the Commonwealth are to resolve their disputes by peaceful means and that the High Court can play some role in the resolu-

¹⁴¹ Renard, 'The River Murray Question', above n 7, 662.

¹⁴² Ibid.

¹⁴³ *Tasmanian Dam Case* (1983) 158 CLR 1, 153 (Mason J), 182 (Murphy J), 248–9 (Brennan J), 251 (Deane J).

¹⁴⁴ A Inglis Clark, *Studies in Australian Constitutional Law* (Charles F Maxwell, 1901) 110. This is similar reasoning to that adopted by the United States Supreme Court in *Kansas II*, 206 US 46, 98 (Brewer J for the Court) (1907).

tion of transboundary river disputes; however, it does not provide guidance as to the principles upon which the disputes are to be resolved. Similarly, the fact that s 75(iv) provides the Court with jurisdiction to deal with disputes between states was also relied on by Renard.¹⁴⁵ While s 75(iv) might provide some support for the argument that a legal solution to this problem exists, as Renard correctly suggests, it provides no direct guidance with respect to the principles to be used to allocate water between states.¹⁴⁶

In addition to examining the particular constitutional provisions, it is important to examine the structure of the document and the system of government that the *Constitution* creates as a whole.¹⁴⁷ The nature of the federal compact and the way in which it came about are perhaps equally important; as the preamble of the *Commonwealth of Australia Constitution Act 1900* (Imp) 63 & 64 Vict reads, the people of the states 'agreed to unite in one indissoluble Federal Commonwealth'. There is no provision in the *Constitution* for secession, which supports the contention that interstate disputes must be resolved by other means and within the constitutional structure.¹⁴⁸ Also important in this context is the fact that the *Constitution* requires the continued existence of the states.¹⁴⁹ The question here is whether the *Constitution* requires not just the existence of the polities of the states, but also equality between states. One of the difficulties in this respect is that the *Constitution* expressly contemplates an inequality between original states and new states.¹⁵⁰

Historically, disputes between governments have largely focused on the 'vertical' relationship between the Commonwealth and the states and the limits on Commonwealth legislative power. To date, there have been very few

¹⁴⁵ Renard, 'The River Murray Question', above n 7, 653.

¹⁴⁶ Aside from the fact that in exercising power, the Court could act in accordance with the requirements set out in ch III of the *Constitution*.

¹⁴⁷ In *Commonwealth v Mewett* (1997) 191 CLR 471, 546, Gummow and Kirby JJ explained that the common law may need to adapt to the changes made to the legal system in 1901: 'This new state of affairs, established by the *Constitution*, required adjustment to habits of thought formed in a common law system with a unitary structure of government'.

¹⁴⁸ See generally Gregory Craven, *Secession: The Ultimate States Right* (Melbourne University Press, 1986); Anne Twomey, *The Constitution of New South Wales* (Federation Press, 2004) 854–5.

¹⁴⁹ *Melbourne Corporation* (1947) 74 CLR 31, 82 (Dixon J).

¹⁵⁰ *Australian Constitution* s 121.

cases involving disputes between states.¹⁵¹ While not exclusively, the focus of the *Constitution* is on the relationship between the Commonwealth and the states. Consequently, there are very few constitutional provisions dealing with the relations between states.¹⁵² It is, therefore, more difficult to draw upon the text and structure of the *Constitution* to craft an argument that the document supports an implication of equality between states.

The Australian federal system requires the existence of the states, but the states could exist without equality as between states. In the context of sharing water from a transboundary river, if an upstream state took a volume of water that was deemed to be slightly more than an equitable share, it would not necessarily upset the federal system of government established by the *Constitution*.¹⁵³ As a consequence, it is more difficult to argue that a constitutional imperative establishes equality between states that would support an 'equitable' or 'reasonable' distribution of water from a transboundary river. Here an important distinction can be drawn between the continued existence of the states (or 'survival' of the states) — an implication that has been recognised to be supported by the text and structure of the *Constitution*¹⁵⁴ — and equality between states (in the sense of equal access to resources), which may be more difficult to derive from the document.

In identifying provisions that are consistent with a principle of equality of states, one is faced with a similar problem to that which the majority dealt with in *Leeth*: while there are a number of sections that seek to achieve equality between the states (in different contexts), those provisions could equally be viewed as the limit of any principle of equality as expressed within the *Constitution*. Importantly, the concept of equality takes different forms in different contexts. It seems, therefore, that while an argument that there exists an equality of states could be made, it is not without considerable difficulty.¹⁵⁵

¹⁵¹ Notable exceptions being, for example, the *Boundary Dispute Case* (1911) 12 CLR 667; *Tasmania v Commonwealth* (1904) 1 CLR 329, although the latter case also involved the Commonwealth.

¹⁵² For perhaps the obvious exceptions see *Australian Constitution* ss 75(iv), 92.

¹⁵³ It might even be argued that there is presently an inequality with respect to how water is allocated between the states.

¹⁵⁴ See above n 129 and the cases cited therein.

¹⁵⁵ I acknowledge that the argument is open on the material I have considered in this article. Equally, I acknowledge that an argument could be made that if a constitutional implication is found, it might be coupled with the argument for an 'interstate common law' to provide a

A Additional Practical Challenges

Even if the Court were to accept that a principle of equality can be found within the text and structure of the *Constitution*, a further problem with this approach is translating the principle into a meaningful and workable solution for a transboundary river dispute. If a doctrine of equality between states was to exist, when could one state enliven the doctrine to place a limit on the legislative or executive power of another state with respect to a transboundary river dispute? A doctrine of equality of states requires not just the acceptance that the states are of equal status, but also that resources which flow across or straddle state borders must be shared consistent with that principle. Giving content to this implication raises difficult practical questions. Would a constitutional implication of equality between states require that each state have a 'reasonable' or 'equitable' share of the water from a shared water resource? The challenge then, as was case in the United States, is developing some guidance as to what would constitute a 'reasonable' or 'equitable' share. While not impossible, what constitutes a 'reasonable' share is difficult to determine when dealing with a complex river system such as the Murray-Darling Basin. The United States experience demonstrates that developing and applying such principles is neither a quick nor simple task. From a practical perspective, any state government considering litigation in preference to negotiating an intergovernmental agreement should exercise caution, and should not view litigation as a 'quick fix'. Litigation in this area would not be without both theoretical and practical challenges.

V CONCLUSION

The difficulty with developing the common law to resolve transboundary river disputes is understanding the theoretical basis for such a development. In the United States, the foundation for the doctrine of equitable apportionment is not fully understood. The comparison with the United States doctrine and the examination of the uncertainty surrounding the existence of a legal solution to the transboundary river problem in Australia highlights the Australian success in resolving these matters by negotiation in the form of an intergovernmental agreement.

solution. However, as I have explained, such an approach is not without difficulties (such as explaining *how* the interstate common law can be modified and by *whom*).

In Australia, developing an interstate common law that fits with existing legal doctrine presents its own set of unique challenges. The primary problem with such an approach is to explain how the interstate common law can, in effect, 'trump' state legislative and executive power.

If there is a limit on state legislative and executive power with respect to the taking of water from a transboundary river, it must be supported by the text and structure of the *Australian Constitution*. However, the difficulty is in finding an implication within the *Constitution* of equality between states. While there are provisions within the *Constitution* that provide for equality between states in a limited context, each provision provides for equality of states in a unique way. In identifying provisions that are consistent with a principle of equality of states, one is faced with a similar problem to that which the majority dealt with in *Leeth*: while there are a number of sections that seek to achieve equality between the states, those provisions could equally be viewed as the limit of any principle of equality as expressed within the *Constitution*. Consequently, I have argued that it would be a stretch for the High Court to conclude that the text and structure support the existence of equality between states in such broad terms so as to support the existence of a right to the 'reasonable use' of water.

Further, even if a principle of equality between states can be derived from the *Constitution*, the Court would then be faced with a practical difficulty of translating that principle into a mechanism that can resolve transboundary river disputes. It should also be remembered that the existence of a transboundary water 'right' does not necessarily mean that the 'right' has been infringed and does not guarantee the downstream state will ultimately receive a great share of the water.