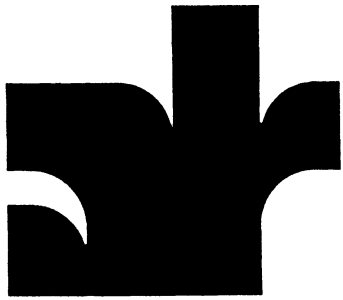

ARTICLES

*Paul E von Nessen**

THE USE OF AMERICAN PRECEDENTS BY THE HIGH COURT OF AUSTRALIA, 1901-1987

INTRODUCTION

IN Australia, as with other countries whose legal systems are based upon English concepts, the merits of the common law system are considered at an early stage in the study of law. Central to the common law process is the recognition of judicial decisions as primary sources of law which must be accorded authoritative value. In a unitary system, efficient administration of the common law requires that the higher a court stands in the appellate hierarchy, the greater the authoritative value of its judgments. The use of foreign judgments by the courts of any common law jurisdiction, however, involve greater discretion. As such their use reveals much about both the development of the common law

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internationally and the attitudes of judicial authorities within a jurisdiction about their role in the common law process.

The term "common law" connotes a process of uniform application throughout the common law world. Initially, common problems were thought to be capable of a common solution throughout the British Commonwealth,[1] and appeals from the numerous and diverse jurisdictions of the Commonwealth were allowed to one court, the Privy Council.[2] Additionally, judgments of English Courts were accorded great weight under the Commonwealth practice,[3] providing binding precedent in absence of local authority to the contrary.[4]

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1 See Jackson, "The Judicial Commonwealth" (1970) 28 *Cam LJ* 257; MacGuigan, "Precedent and Policy in the Supreme Court of Canada" (1967) 45 *Can B Rev* 625 at 639; Windeyer, "Unity, Disunity and Harmony in the Common Law" (1966) *NZLJ* 193; Lee, "Uniformity of Law in the British Empire" (1916) 36 *Can L T* 298. One interesting expression of the desire for uniformity in the common law is found in the judgment of Justice Dixon in *Wright v Wright* (1948) 77 CLR 191 at 210:

> Diversity in the development of the common law (using that expression not in the historical but in the very widest sense) seems to me to be an evil. Its avoidance is more desirable than a preservation here of what we regard as sounder principle.

The institutions protecting such uniformity are discussed in Elias, "Colonial Courts and the Doctrine of Judicial Precedent" (1955) 18 *Mod LR* 356.

2 *Judicial Committee Act* 1833 (UK), 3 & 4 Will 4, ch 41, s3; *Judicial Committee Act* 1844 (UK), 7 & 8 Vic, ch 69, s1. The historical genesis of the appellate jurisdiction of the Judicial Committee of the Privy Council is discussed in *A-G for Ontario v A-G for Canada* [1947] AC 127 at 145 and *Hall & Co v McKenna* [1926] IR 402 at 404.

3 See, for example, Parsons, "English Precedents in Australian Courts" (1949) 1 *W Aust Ann L Rev* 211; Note, "High Court of Australia and the House of Lords" (1963) 79 *LQR* 313; Brett "Overseas Influence of English Law: Australia" (1961) 105 *Sol J* 754.

4 In Australia, for example, it was asserted as late as 1975 that, in absence of High Court authority, State Supreme Courts should follow the decisions of the English House of Lords and Court of Appeal. See *Public Transport Comm (NSW) v J Murray-More (NSW) Pty Ltd* (1975) 132 CLR 336 at 341, per Barwick CJ; at 349, per Gibbs J. See also Davis, "Judicial Precedent in New Zealand: House of Lords and Privy Council, III" (1955) 31 *NZLJ* 42; Davis, "Judicial Precedent: The Authority of the House of Lords" (1956) 32 *NZLJ* 296; Bentil, "Authority of English Appellate Courts, Jurisprudence before Australian Supreme Courts" (1978) 5 *U Tas LR* 299; Brayebrooke, "Authority of the House of Lords: In New Zealand Courts" (1956) 32 *NZLJ* 347. The current position in Australia is discussed in

In contrast, the United States legal system has evolved quite independently of the countries of the British Commonwealth in its application of common law principles.[5] The severing of legal ties with Britain in 1776 coupled with the limited role assigned to the United States Supreme Court in common law matters[6] meant that the common law of the United States evolved without direct unifying influence either externally or internally.

The development of the common law in the United States both as a system separate from the remainder of the common law world and as a collection of fifty independent jurisdictions[7] has resulted in attitudes and processes different from those found in the British Commonwealth. The American judiciary (and particularly that of the final appellate courts in each state) has been able to approach common law issues with a creativity which might not be possible under the constraints of a unified system.[8] As a further consequence of this judicial freedom, judgments from other American state jurisdictions have often provided such an abundance of authority on

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Current Topics, "Statement by High Court on Respect to be Paid Precedents of Other Legal Systems" (1987) 61 *ALJ* 263.

5 See Goodhart, "Case Law in England and America" (1930) 15 *Corn LQ* 173; Tunc, "The Not So Common Law of England and the United States, or Precedent in England and the United States, A Field Study by an Outsider" (1984) 47 *Mod LR* 150. Differences in the American and English attitudes toward legal reasoning are discussed in Christie, "The *Ratio Decidendi* of a case - the 'Official' English View of Legal Reasoning" and "The Predominant American View of Legal Reasoning".

6 *Murdock v City of Memphis*, 87 US (20 Wall) 590 (1875). In this case, the US Supreme Court reviewed the statutory pronouncement of its appellate powers contained in the *Judiciary Act* 1789, 1 Stat 73, s25, and amended by the *Judiciary Act* 1867, 14 Stat 385, s2. It concluded, that in relation to matters arising under state law not involving a federal issue (at 626):

> the State courts are the appropriate tribunals, as this court has repeatedly held, for the decision of questions arising under this local law, whether statutory or otherwise.

7 See Jones, "Our Uncommon Common Law" (1975) 42 *Tenn L Rev* 443 at 455-56. This is reflected in the Supreme Court's decision in *Erie v Tompkins* 304 US 64 (1938), requiring federal courts to resolve common law problems by application of local law, rather than some general common law. For a review of this issue and a discussion of the problems which this has caused to federal courts, see Holland, "Federal Judiciary Act, Stare Decisis, Decisions of State Courts Other than the Highest as Being Binding Precedents in Federal Courts" (1941) 15 *S Cal L Rev* 71.

8 Tunc, "The Not So Common Law of England and the United States, or Precedent in England and the United States, A Field Study by an Outsider" (1984) 47 *Mod LR* 150.

common law issues (often if not usually contradictory) that reference to non-American authority has been unnecessary.[9] Further, as the United States system diverged from the remainder of the common law world, judgments from other countries within that common law world could more easily be disregarded by the American judiciary as irrelevant. This attitude, however, was inappropriate for the judiciary from such other common law systems as valued the conformity which the common law could offer.[10]

This study concentrates upon the use made by the High Court of Australia of the decisions of the various courts of the United States. This choice was determined in part by the unique position in the common law world which the United States occupies, having a common law system which has evolved separately from all the others. While the decision to concentrate upon the use made of the independent development of United States common law by the Australian High Court was influenced by the predilections of the author, this choice can be justified by the peculiar and fascinating relationship between the legal cultures of the United States and Australia. Australia, a federation of six states, sought guidance from the United States in the establishment in 1901 of its Commonwealth[11] more so even than from Canada, an obvious model from the British Commonwealth.[12] The Australian Constitution, consequently, includes numerous provisions modeled upon the United States Constitution as well as many others specifically modified therefrom.[13] Further, the commercial and cultural connections of the United States and Australia, particularly

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9 In the United States, reference to foreign opinions in the resolution of common law problems is largely limited to decisions from other states. See Tripathi, "Foreign Precedents and Constitutional Law" (1957) 57 *Colum L Rev* 316.

10 Compare Comment, "True Value of American Cases" (1917) 62 *Sol J* 157 and Comment, "The Value of Foreign Precedents" (1927) 100 *Cent LJ* 6.

11 The effect of the Australian constitutional framers is neatly summarised in *R v Kirby; ex parte The Boilermakers Soc of Aust* (*Boilermakers*) (1956) 94 CLR 254 at 275:

> Probably the most striking achievement of the framers of the Australian instrument of government was the successful combination of the British system of parliamentary government containing an executive responsible to the legislature with American federalism.

12 See Quick & Garran, *Annotated Constitution of the Australian Commonwealth* (Angus and Robertson, Sydney 1901).

13 See Hunt, *American Precedents in Australian Federation* (Columbia University Press, New York 1930).

since the Second World War, have been reflected in common legal issues, and often in similar efforts[14] to meet those problems.

Though the frequency with which the High Court of Australia refers to the judgments of United States Courts may not reflect perfectly either the influential power of the United States legal culture or the receptiveness of the Australian legal culture,[15] it is nevertheless one means by which the transmission of legal concepts may be observed and measured.[16] Just as the analysis of voting patterns within particular courts has been used to explore political biases within those courts,[17] so a review of the frequency of foreign case authority may reveal whether there is a significant variation in such frequency over particular periods of time or in reference to specific

14 For example, the *Trade Practices Act* 1974 (Cth) reflects a limitation upon anti-competitive behaviour similar to that enacted in the United States in the *Sherman Act* 1890 (US) and the *Clayton Act* 1914 (US), as amended by the *Robinson-Patman Act* 1936 and the *Celler-Kefauver Act* 1950 (US). The areas of securities regulation, corporations laws, bankruptcy law, and environmental law provide other examples where similar issues have been faced and addressed legislatively; however, direct use of United States legislation is rare.

15 However, the frequency of citations of foreign courts has been used as a starting point for studies of such influence. See Mathieson, "Australian Precedents in New Zealand Courts" (1963) 1 *NZULR* 77.

16 See, for example, Gorney, "Australian Precedent in the Supreme Court of Israel" (1955) 68 *Harv L Rev* 1194 and MacIntyre, "The Use of American Cases in Canadian Courts" (1966) 2 *U Brit Colum L Rev* 478. See also Friedman, Kagan, Cartwright & Wheeler, "State Supreme Courts: A Century of Style and Citation" (1981) 33 *Stan L Rev* 773 in which a project analysing the citation practice of various American state courts included a study of the pattern of citations by these courts of the judgments of other states' courts.

17 See, for example, Pritchett, "Divisions of Opinion Among Justices of the US Supreme Court, 1939-1941" (1941) 35 *Am Pol Sci Rev* 890; Ulmer, "Supreme Court Behaviour and Civil Rights" (1960) 13 *W Pol Q* 288; Brown & Haddad, "Judicial Decision-Making on the Florida Supreme Court: An Introductory Behavioural Study" (1967) 19 *U Fla L Rev* 566; Fair, "An Experimental Application of Scalogram Analysis to State Supreme Court Decisions" (1967) *Wis L Rev* 449; Beatty, "Decision-Making on the Iowa Supreme Court - 1965-1969" (1970) 19 *Drake L Rev* 342; Leonard, "Ideology and Judicial Behaviour: A Statistical Study of the Ohio Supreme Court: 1970, 1975, 1980 and 1985 Terms" (1989) 57 *U Cin L Rev* 935; Richards, "The Supreme Court of Michigan during the Survey Period: A Statistical Analysis" (1986) 32 *Wayne L Rev* 215; Schubert, *The Judicial Mind: Attitudes and Ideologies of the Supreme Court Justices*, 1946-1963 (Northwestern University Press, Evanston 1965); Schubert, *The Judicial Mind Revisited* (Oxford University Press, New York 1974).

areas of law.[18] From these trends, conclusions about the development of the legal culture in the two subject countries may be attempted.

DESCRIPTION OF PROJECT

As originally envisaged, this project was intended to establish by reference to observable criteria, the extent to which the High Court of Australia had, since its inception in 1901, referred to legal developments in the United States in its own deliberations. A review of the reported judgments of the High Court of Australia was undertaken to measure the American influence upon Australian jurisprudence since the founding of the Australian federation in 1901.

Due to the constitutional connections, it was expected that the Australian High Court, the final court of appeal in Australia, would make great use of American decisions in initially establishing its own approach to constitutional interpretation and in interpreting those constitutional provisions modelled upon the United States Constitution. Moreover, the fact that the High Court, unlike the United States Supreme Court, acts as the final court of appeal for both common law matters and the interpretation of Australian state statutes means that subject areas in which the High Court might potentially find American decisions relevant would not be limited to federal matters. In regard to non-federal matters, however, any hesitation of the Australian judiciary to treat United States decisions similarly to those of other common law countries[19] could be reflected through infrequent citation of American authority.

In order to estimate how the High Court of Australia had been influenced by cases decided in the United States, the number of American opinions

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18 See, for example, Merryman, "Toward a Theory of Citations: An Empirical Study of the Citation Practice of the California Supreme Court in 1950, 1960, and 1970" (1977) 50 *S Cal L Rev* 381; Landes & Posner, "Legal Precedent: A Theoretical and Empirical Analysis" (1976) 19 *J of Law & Econ* 249; Merryman, "The Authority of Authority: What the California Supreme Court cited in 1950" (1950) 6 *Stan L Rev* 613.

19 The United States is not a member of the Commonwealth yet it retains its common law heritage. Each American decision, emanating as it does from beyond review of the Privy Council or any other Commonwealth Court, must be accepted on the merits of its reasoning rather than by virtue only of the standing of the court which authored it. See notes 70-80.

cited by the High Court of Australia had to be identified and measured. Identification and quantification of the American citations by the Australian High Court would make it possible to establish whether the use of American cases occurred in identifiable historical trends, whether they occurred in particular subject areas, or whether they were used by particular justices of the High Court more frequently than others. All of these matters, once identified, could shed light upon the processes by which the legal culture of Australia has been affected by developments within the United States.

DESCRIPTION OF METHODOLOGY

To ascertain whether the judiciary of the High Court of Australia relied to any extent upon American judicial pronouncements, the judgments of the Australian High Court from 1901 to 1987 reported in the Commonwealth Law Reports were reviewed for references to decisions of United States courts.[20] Each reference to a United States report found in the Commonwealth Law Reports was catalogued by page appearance in the Commonwealth Law Reports.[21] At the time of the cataloguing, the topic

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20 Unfortunately, The Commonwealth Law Reports were not, at this time, available on computer retrieval. Consequently, the American cases referred to in each volume of the Commonwealth Law Reports (through volume 65) were identified by reviewing the list of cases cited in each volume for references to American case report series. All American cases identified were listed by reference to the Commonwealth Law Report page number indicated in the table of cases cited. As cases cited in the Commonwealth Law Reports are normally included in the table of cases cited with reference only to the first page of each High Court cases upon which they appear, subsequent pages of each Australian case were reviewed for repeat references to identified United States cases. Unfortunately, volumes 66 and subsequent of the Commonwealth Law Reports contain only name references (rather than full citations) in the table of cases cited. Consequently, American cases were identified by reviewing each page of the Commonwealth Law Reports. All cases referred to in the Commonwealth Law Reports are given their full citation in a separate footnote each time mentioned, easing the task of identifying American cases greatly.

21 This process, though somewhat inexact, was applied consistently throughout the survey. All references, no matter how brief, were noted. On the other hand, repeated references to the same case within close proximity were identified as only one reference. Thus, the mentioning of a particular case followed by a brief extract from the case was identified as only one reference. Where a repeat of a reference occurred at a significant interval from the original citation, the repeat reference was also noted.

area for which the case was used and the name of the Justice in whose opinion the case appeared were noted.[22]

A basic method of identifying case references was utilised to minimise any discretionary bias in the observations. No distinction between a case name citation and a reference indicating some value judgment of the case (either positive or negative) was made.

While it is accepted that the method of analysis may be subject to criticism for its lack of sophistication, the elective nature of references to American authority by the Australian judiciary[23] makes analysis by even this method useful in that it identifies the number of times the Australian judiciary felt that the American perspective should be considered at all. An analysis of whether the American authorities, once turned to by an Australian justice, were accepted in Australia, was beyond the purview of this current study.[24]

At the completion of the cataloguing of each volume of the Commonwealth Law Reports, a summary of the total references found within that volume was made. In order to give proper weight to opinions delivered for more than one justice, references made in such multiple opinions were weighted by multiplying the number of judges represented by each judgment times the references found within it.[25] The total number of citations to United States cases found in each volume of the Commonwealth Law Reports was

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22 The Commonwealth Law Reports also include summations of the arguments of counsel, including questions from the bench. While the references to American decisions found outside of the actual judgments were also identified and catalogued, these reference did not form the subject of major analysis.

23 American authority which does not support a particular point of view may, of course, be totally disregarded.

24 In many cases, there is no direct judicial statement indicating how the Australian justice viewed the American case due to the fact that such cases are not strictly authoritative in Australia, and thus need not be reconciled with the judicial pronouncement made. Despite this difficulty, it is hoped that an analysis of this aspect of Australian use of American case authority may provide the subject of further study in the future.

25 An analysis of the practice of the High Court in relation to the delivery of joint judgments and separate judgments can be found in McWhinney, "Judicial Concurrences and Dissents: A Comparative View of Opinion-writing in Final Appellate Tribunal" (1953) 31 *Can B Rev* 595. That article compares the practice of the Privy Council with those of the final courts of appeal of Australia, South Africa, India, Ireland, Canada and the United States.

summarised. These totals provided the basis for analysis through calculation of the total number of citations to United States cases by the High Court of Australia in each year or decade.[26]

The second stage of the collection of data for this study involved the characterisation of the area of law to which each reference related. Five categories were selected for specific identification: constitutional law, public law, contract and commercial law, tort law, and criminal law. These subject areas were chosen as being likely to reveal different aspects of the processes by which legal thought crosses from one culture to another. The remainder of the cases were classified as belonging to other common law areas, other statutory areas, or miscellaneous other legal areas. A brief explanation of each of the five selected topic areas and the reason for its selection indicates that even the characterisation process was not totally without difficulty.

Constitutional Law

As previously mentioned, the Australian Constitution is based in part upon the United States Constitution. For this reason, it was anticipated that the references to cases arising under the American Constitution would be utilised by the Australian judiciary frequently. In identifying constitutional law cases, the context of the case as applied in Australia rather than its American generic origin was considered. Thus, most of the cases arising under the United States Bill of Rights were not classified as constitutional cases unless used in reference to one of the few Australian Constitutional equivalents (for example, freedom of religion). Similarly, certain aspects of the separation of powers doctrine, though constitutionally based in the United States, find no basis in the Australian Constitution and were not included under this heading.

Public Law

Because of the differences between the Australian and American Constitutions, many of the topic areas dealt with in the United States Constitution, but not covered in the Australian Constitution, are matters related to the proper process of government (such as the requirements of "representative government"). Thus, public law was selected to

26 Australian cases were included in particular periods by the date of the judgment.

supplement the constitutional law heading, and in particular, to cover matters of American Constitutional theory which, though relevant to the Australian Constitution, did not find express mention therein. In particular, Administrative Law and the interplay of the legislative and judicial branches of government (including statutory interpretation) were categorised as public law. Foreign affairs, immigration, and customs were also included under this heading.

Contract and Related Commercial Law

This category consisted predominantly of cases dealing with the basic principles of contract law and other closely related areas such as agency. In addition, other commercial areas such as banking, insurance, and aspects of partnership were placed in this group. Commercial law was selected as worthy of specific identification in order to ascertain whether the extensive commercial power and contacts of the United States are reflected in the transmission of legal concepts covering commercial transactions.

Tort Law

This category included cases relating to negligence and the intentional torts. As opposed to commercial law, tort law rarely involves international aspects or direct contact with more than one legal system. Nevertheless, tort law is a legal area where judicial policy considerations are quite prevalent and thus provides fertile ground for reception of novel legal concepts. Its selection as a specific category for analysis was intended to reveal aspects of the transmission of legal theory unaffected by the pragmatic necessities arising from direct contact found in commercial law.

Criminal Law

With the exception of the inclusion of cases concerning the concept of double jeopardy, this classification (as with that of torts) is fairly straightforward. Criminal law was chosen as an area of law most likely to be quite local in character, and thus one least likely to be subject to influence from foreign jurisdictions. Many of the American Bill of Rights cases, arising in the context of criminal prosecutions, were included in this heading (for example, self-incrimination, search and seizure).

In addition to the five categories specifically identified, all remaining cases were classified into one of the following three categories.

Other Common Law Areas

This heading covered areas which have historically been considered common law areas, notwithstanding that legislative interventions of some magnitude may have occurred in Australia or the United States. Thus, property law, equity (including common law fiduciary duties of partners, agents, and directors), evidence, and family law were included in this area.

Statutory Areas

Included in this topic area were areas originally statutory in basis. This included statutes of long standing, such as bankruptcy, companies (corporations), and copyrights. Likewise, areas covered by statutes of more current vintage, such as taxation and trade practices (anti-trust) were included in this category.

Miscellaneous Other

Predominant in this group of cases were international law, maritime law, and labour law (industrial relations).

These three general classifications were used in the hope that the data would reveal whether legal culture is more likely to be influenced by foreign legislative processes or judicial processes. The use of American statutes as direct models in Australia is somewhat rare; however, both Australia and the United States have numerous statutes originally based upon similar English antecedents which have shown parallel evolutionary changes. Thus, the legislative similarities of various Australian and American statutes indicated an area of study with some potential.

As a final preliminary point, the analysis of trends by the High Court of Australia in its use of American authority over the past eight and a half decades could only properly proceed where the data used was appropriate for direct comparison. During this century, however, the High Court of Australia had significant changes in its practice, both in its workload during

each decade and in the total page volume of reported cases.[27] Although these differences in the High Court's workload and verbosity during the

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27 A test study of the reported decisions of the High Court during the period is reproduced below:

Decade	Volumes	Sample	Pg/Vol	Cases/Vol	Pg/Case
01-10	10	1 - 9*	851.6	46.7	18.2
11-20	19	10 -28	671.6		
21-30	15	30 -39	598.2	33.1	18.1
31-40	21	46 -55	680.5		
41-50	18	72 -81	652.9	28.3	23.1
51-60	22	85 -94	654.3		
61-70	19.5	85 -94	655.1	32.1	20.0
71-80	22.5	125 -46	675.9		
81-87	18	154 -64	685.5	25.0	27.42

*Includes volumes 4 (pt 1) and 4 (pt 2) as two volumes.

There were two counterbalancing trends identified in relation to the practice of the High Court during the period of the study: the number of judgments selected for publication in the Commonwealth Law Reports from each decade has decreased while the length of each judgment reported therein has increased in size.

As might be expected with these two counterbalancing trends in Australia, the reported decisions for each decade since 1901 have required a fairly consistent number of volumes (between 18 and 22) of standard size (approximately 650). When the total pages required per decade are estimated by multiplying the volumes for each decade by the sample average pages per volume, a more precise comparison of the page volume for each decade's reported judgments can be achieved:

Decade	Total Pages	Comparison to Ave*	Over (under) Ave*
01-10	8 516	69.1	(30.9%)
11-20	12 760	103.5	3.5
21-30	8 973	72.8	(27.2)
31-40	14 290	115.9	15.9
41-50	11 752	95.3	(4.7)
51-60	14 388	116.7	16.7
61-70	12 774	103.6	3.7
71-80	15 207	123.3	23.3
81-87	12 339	100.0 (7 yrs)	42.9

*Average (12,333 pages/decade) calculated without inclusion of 1980-87 period.

The 1980's appear to show a marked increase in the total output of pages reported by the High Court, with the first seven years requiring as many pages (12,339) as the average number of pages for each already completed decade (12,333).

Similar patterns regarding length of opinions emerge in Goutal, "Characteristics of Judicial Style in France, Britain, and the USA" (1976) 24 *Am J Comp L* 43 and in

century were noted, such were not considered material to the findings of this study relating to the topic areas in which the High Court's use of American authority was found.[28] The remainder of this article presents the total incidents of American authority by decade, without regard to the number of cases reported during the decade or the number of pages used to report such cases. Alternative calculations to account for the changing practice of the High Court are presented, however, where conclusions are in relation to total use of American cases by decade.[29]

DATA SUMMARY - HIGH COURT

A summary of the data derived during this project is included as Table 1. That schedule lists the total number of United States citations by decade and by topic area. Decades, rather than years, were chosen in order that historical trends would be readily identified. Additionally, the use of decades rather than years eliminated short term fluctuations (such as the inclusion of large constitutional law cases in particular years and the absence of such cases in other years).

Friedman, Kagan, Cartwright & Wheeler, "State Supreme Courts: A Century of Style and Citation" (1981) 33 *Stan L Rev* 773.

28 This aspect of the study's findings are unaffected by population size.

29 Although there are some major differences in the total volume for each decade, these do not detract from the findings of this study, but rather would accentuate the trends observed if this data were adjusted to account for these volume differentials as is done in note 31.

TABLE 1

References to United States Cases by the High Court

Decade	Total	Con	Pub	Comm	Tort	Crim	CL	SL	Misc
01-10	565	404	46	23	7	9	22	47	7
11-20	474	341	46	11	22	2	30	16	6
21-30	273	203	6	21	8	0	28	5	2
31-40	269	130	7	16	36	7	22	45	6
41-50	366	284	29	6	0	7	16	11	13
51-60	296	190	22	4	42	3	31	3	1
61-70	190	95	14	6	37	8	14	16	0
71-80	329	92	52	12	10	30	90	17	26
81-87	779	228	86	36	31	96	270	28	4
Total	**3 541**	**1 967**	**308**	**135**	**193**	**162**	**523**	**188**	**65**

The data represented in Table 1 reveals three aspects of Australian use of American authority during the period of the study:

1. Cases related to constitutional law and theory represented the largest portion of American cases cited by the High Court.

2. The Australian High Court's use of American cases varied significantly during the century. American cases were most frequently referred to by the High Court in its first decade and during the period 1971-1987; and

3. While the use of cases relating to constitutional issues predominated in the early years of the High Court, recent years have seen a significant increase of the High Court's use of American cases within a broadening range of legal areas.

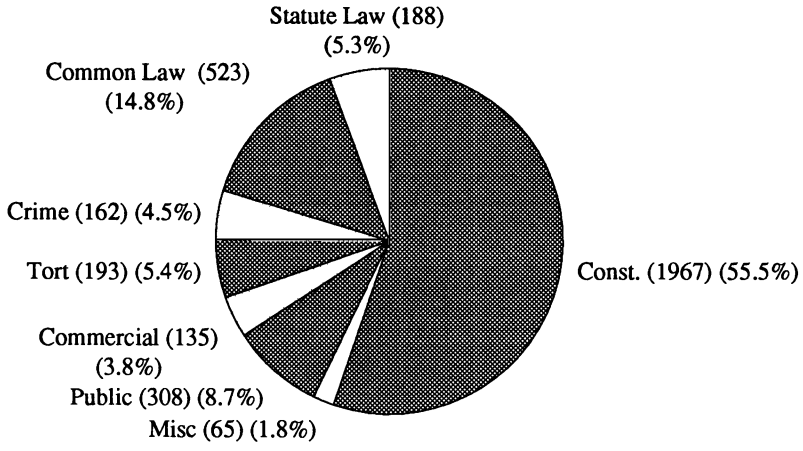
The three findings from the data included in Table 1 arise by comparison of the use of American cases by the High Court by topic area and by decade. The three graphs below concentrate upon those aspects of the raw data supportive of the three findings identified above.

The breakdown of American cases cited during the entire period is represented in the pie-graph reproduced below, Graph 1. During this century, constitutional law cases represented 55.5% of the American cases cited by the High Court. Over the entire period of the study, constitutional

and public law cases accounted for 64.2% of all the American citations. With the exception of the general "Other Common Law" heading at 14.8%, no other group of cases accounted for as much as 6% of the total references.

GRAPH 1

American Citations by High Court 1901-87

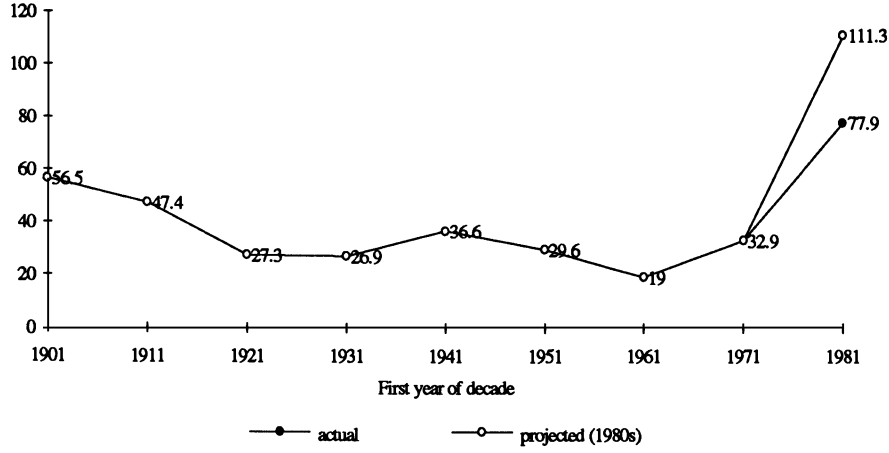


A second matter revealed by the data was that the number of American cases cited in the study was largest in the period 1901-1910 and 1981-1987. The number of American cases referred to by the High Court by decade is indicated in Graph 2. This graph charts the American citations found in the Commonwealth Law Reports on an annual basis for each of the High Court's nine decades. The High Court referred to American cases 56.5 times per year in its first decade. The use of American citations dropped fairly consistently until the 1960's, when the High Court referred to a mere 19.0 American cases per year. While there was a slight increase

in American citations in the 1970's, the first seven years of the 1980's revealed a dramatic increase in the High Court's use of American cases resulting in 111.3 references per year, more than the number of references in any of the prior decades.

GRAPH 2

Annual American Citations by High Court 1901-87



Due to changes in the High Court's total output during the century,[30] at least a portion of the trend indicated in Graph 2 is attributable to changes in the volume of reported judgments during the latter decades of the study. After adjusting for the variance in the output of the High Court in total

30 Note 27.

page volume from one decade to another,[31] the High Court most often referred to American decisions in its first decade (66.3 references per 1,000 pages in the Commonwealth Law Reports). The use of American case authority was at its low point in the 1960's (14.9 references per 1,000 pages in the Commonwealth Law Reports), but returned to levels similar to those of the 1901-1910 decade in the years of the 1980's (63.1 references per 1,000 pages in the Commonwealth Law Reports). Thus, the trend originally identified above continues to appear, though in a less pronounced way, when the comparison of the High Court's use of American cases from one decade to another neutralises the differences in page output among the decades.

Finally, the study reveals not only that there was a discernible trend in relation to the total number of American citations by the High Court when compared by decade, but also that the mix of citations also varied during the period. Graph 3 produces the total number of citations by topic area for each of the decades. The period of 81-87 represents actual citations for the seven year period. Were it extrapolated, each of the segments in the bar for that period would be 42.9% (3/7) larger than represented.

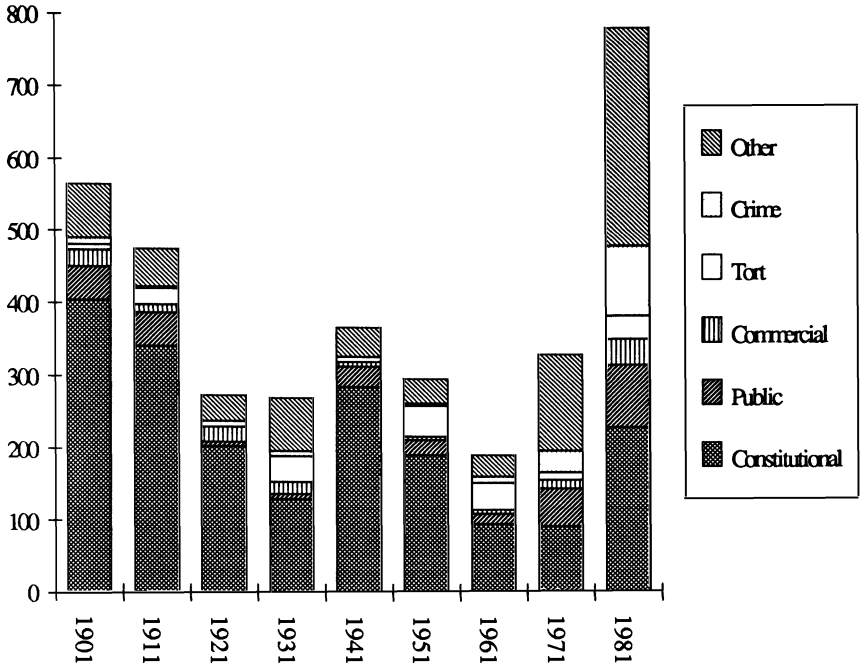
31 After adjusting for differences in the total page volume (note 27), the data (citations per 1,000 pages in the Commonwealth Law Reports) would indicate similar trends:

Decade	Citations	CLR Pages in Decade*	Citations per 1000 CLR Pages
01-10	565	8 156	66.3
11-20	474	12 760	37.1
21-30	273	8 973	30.4
31-40	269	14 290	18.8
41-50	366	11 752	31.1
51-60	296	14 388	20.6
61-70	190	12 774	14.9
71-80	329	15 207	21.6
81-87	779	12 339	63.1

*As estimated note 27.

GRAPH 3

American Cases Cited by High Court 1901-87



Even disregarding the difficulty faced by including the incomplete data from the 1980's, there are two clearly discernible trends. First, the total number of constitutional law cases referred to by the High Court decreased steadily from the first decade to the eighth decade, with the exception of the brief surge noted during the 1941-50 and 1951-60 decades. This trend, however, has clearly ended in the 1980's. The proportion of constitutional law cases to total American citations is highest in the first decade of the

1900's and lowest in the 1980's (following a fairly consistent reduction in the interim periods). Conversely, most of the other categories increased between 1901-10 and 1981-87, with the largest increase occurring for "Other" cases.[32] The vast majority of this increase was attributable to "Other Common Law" references, which grew from a mere 3.9% of all American cases referred to by the High Court in 1901-10 to 34.7% in 1981-87.[33]

Graphs 4a and 4b dramatically indicate this change of emphasis away from the use of American cases predominantly in constitutional matters though a detailed comparison of the subject matter of American cases referred to by the High Court of Australia in the periods 1901-10 and 1981-87. Between the 1901-10 decade and the period 1981-87, the percentage of constitutional law cases referred to by the High Court dropped from 71.5% of all American cases cited (1901-10) to 29.3% of all American cases cited (1981-87).

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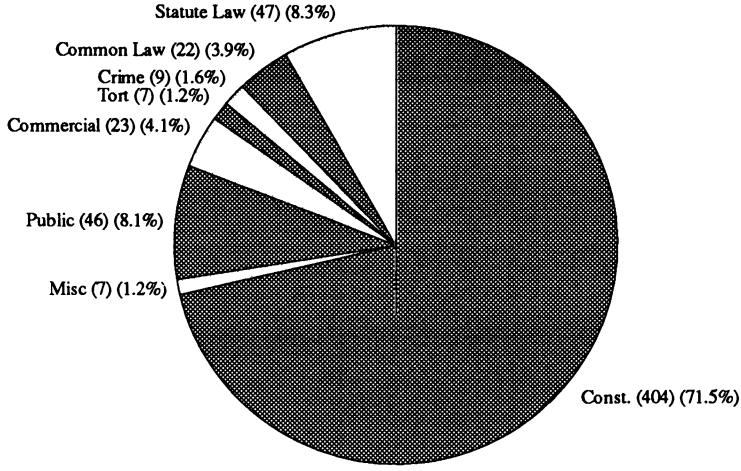
32 Due to limitations on the graph capabilities, "Other" in Graph 3 includes other common law, statute law and miscellaneous references.

33 "Other Common Law" represented 14.8% of all American cases referred to by the High Court during the entire period. During the period 1901-1960, this category was somewhat insignificant representing only 6.8% of all American cases noted. The breakdown of this category of cases from 1971-80 (27.4% of the American cases then noted) and 1981-87 (34.7% of the American cases then noted) was as follows:

	1970s		1980s	
	Cases	**Percent**	**Cases**	**Percent**
Property	89	33.0	9	10.0
Privilege	42	15.6	4	4.4
Evidence	34	12.6	1	1.1
Contempt	24	8.9	28	31.1
Prof Admission	23	8.5		
Fiduciaries/Equity	17	6.3		
Procedure	12	4.4	32	35.6
Damages	12	4.4	15	16.7
Family	7	2.6	1	1.1
Other	10	3.7	00	
	270		90	

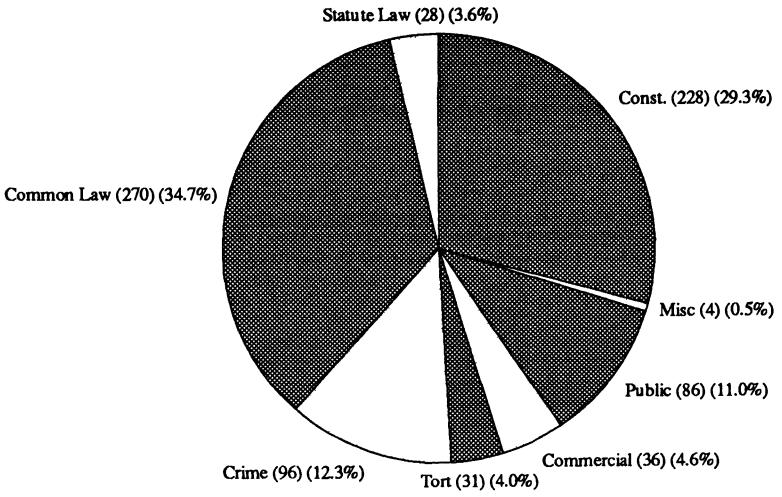
GRAPH 4A

American Citations by High Court 1901-10



GRAPH 4B

American Citations by High Court 1981-87



The study of the High Court's practice in using American authority during this century is informative in several ways. In addition to the three positive findings already discussed, the inconclusive nature of other aspects of the data is itself revealing. For example, there was no significant use of American case authority in the areas of commercial law, tort law, or criminal law. The data collected did reveal, however, that the High Court has come to use American authority more frequently in areas with a common law basis than those with a statutory law basis and the predominance, within that group, of cases interpreting legislation with no direct correspondence to United States enactments reflects that Australia directly copied such legislation rarely during the study period. Both the lack of direct legislative copying and any hesitancy by the Australian judiciary to use American precedent related to statutory interpretation is undoubtedly attributable to the different approaches taken in the two countries to the interpretation of statutes.[34] Not only would the techniques for interpretation have been foreign to the Australian judiciary prior to 1981, but also legislative drafting would undoubtedly have been influenced by the differing roles assigned the judicial interpreter.

In the specific case of Australia and the United States, the study confirmed that the use of the American Constitution as a model for portions of the Australian Constitution was most significant. In particular, the use of American Constitutional cases in the first decade of the Australian High Court's existence can be attributed its attempt to benefit from American experience both in establishing interpretive techniques for its own Constitution and in resolving particular Constitutional issues.

COMPARISONS TO OTHER JURISDICTIONS - CONTROL

While the findings of the Australian study are revealed through the illustrations fairly readily, a comparison of the Australian High Court's practice to that of other non-American judicial tribunals was undertaken in

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34 Prior to the addition of ss15AA and 15AB of the *Acts Interpretation Act* 1901 (Cth) in 1981, the construction of a statute proceeded without reference to extrinsic evidence of Parliament's intention. These sections express that a construction promoting the purpose or object underlying an Act should be preferred to one that does not, and that use of extrensic evidence in ascertaining what construction is to be placed upon a statute is permitted. This has long been the practice in the United States.

order to assure that the trends identified would be properly attributed to circumstances arising from the attitudes of the Australian High Court itself.

To ascertain whether the Australian High Court practice in relation to use of American cases was unique to the Australian High Court, a sample study of the American cases referred to by the Victorian and New South Wales (Australia) Supreme Courts, the New Zealand Supreme Court and Court of Appeal, and the Supreme Court of Canada was undertaken. These courts were chosen to provide some basis by which trends identified in their practice which coincided with those observed for the High Court could usefully be further pursued.

Both the Victorian Supreme Court and New South Wales Supreme Court are representative Australian State Courts. While, like the High Court, the state courts of Australia have competence to entertain constitutional matters, they are the courts of first instance and thus have a proportionately smaller number of federal cases. Further, these two states, the largest two by population in Australia, have historically provided the jurisprudential leadership for the rest of the country.

The New Zealand Appellate Courts provided a study group similar to that of the Australian High Court in many ways. New Zealand, for example, is both culturally and geographically proximate to Australia. Unlike Australia, New Zealand does not have a federal structure. Other differences abound, most obviously the smaller population of the country in comparison to Australia.

The Supreme Court of Canada, like that of Australia, presides over a federal system. Further, Australia and Canada are of roughly equivalent size and population. Unlike Australia, Canada's commercial contacts with the United States are extensive, reflecting the geographical proximity of Canada to the United States which Australia does not share.

Victoria

A search of the Victorian Reports for American citations revealed a minimal use of American cases by the Victorian Supreme Court. In the period from 1901 to 1958, the Victorian Reports were reviewed in the same manner as the Commonwealth Law Reports. During this period, the number of references found did not vary significantly. A comparison of the

American references for each decade by the Victorian Supreme Court and by the High Court of Australia, Table 2, reveals how insignificant the Victorian Court's use of such cases was.

TABLE 2

American Cases Cited by Decades

Decade	High Court	Victorian Supreme Court[35]
1901-10	565	79
1911-20	474	45
1921-30	273	17
1931-40	269	4
1941-50	366	50
1951-60	296	53 (1951-58)

Subsequent to 1958, comparison of High Court and Victorian Reports was undertaken[36] through a review of select American citations in the Victorian Reports identified by computer retrieval.[37] Though direct comparison of

35 The Victorian Reports during the period included reports of the High Court's determination on cases originating in Victoria which were subsequently considered by the High Court. The figures for Victoria in this table do not include references in the report of such decisions of the High Court. The American references in High Court cases reported in the Victorian Reports were 11 in 1911-20 and 28 in 1921-30.

36 The Victorian Reports ceased to provide full citations for each case in its list of cases cited in 1958. Unlike the Commonwealth Law Reports, the Victorian Reports from 1958 did not footnote each case referred to in the text of reported judgments, making identification of all American cases quite difficult.

37 A search of the Victorian Reports for American cases was undertaken by searching for the most common citation abbreviations. For example, US, S Ct, L Ed, F Supp, F, F 2d were searched for federal cases. The American state decisions were searched by use of regional reporter abbreviations. As might be expected, references for the first editions of the regional reporters and the Federal Reporter unproductive. Likewise, Supreme Court cases were more efficiently found through use of the L Ed and S Ct citations rather than by use of the abbreviation US. Fortunately, the Australian courts have in recent times abandoned the practice of citing only the US Reports in their references to US Supreme Court cases and have adopted standard recitation styles for American cases. Nevertheless, it is much less likely that all American references (as that term is used in relation to the search of the Commonwealth Reports and the Victorian Reports from 1901 to 1958) for the period were found due to the possibility that incorrect citation styles were used and

comparison of the Victorian and High Court data would be improper due to the dissimilar methods of identification used, the study did indicate that the use of American cases by the Victorian Court has increased in the last eight years.[38] American references by the Victorian Supreme Court must still be considered insignificant in comparison to the use made of such cases by the High Court.

New South Wales

A test search of the New South Wales Reports for American citations revealed an even lower use of American cases by the New South Wales Supreme Court than that of the Victorian Supreme Court. In the search period (1901 to 1987), the New South Wales Reports were reviewed in the same manner as the Commonwealth Law Reports. During this period, the number of references found, like those of the Victorian Supreme Court, was somewhat insignificant; however, the test did reveal an increased use of such authority by the New South Wales Supreme Court in the last two decades. This development is particularly noteworthy given the low incidents of citation of American cases by the same court in earlier years. Though there are differences, the increased use of American authority since 1970 is similar to that found in the use of American citations by the High Court of Australia. Table 3 indicates how the New South Wales use of American cases compares to that of the High Court in the same period.

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due to the fact that repeat references often referred only to a case name without repeating the full citation. Consequently, the data provided in this regard is offered primarily for internal comparison for the period 1958 to 1987.

38 While only 12 and 16 case citations were found for the periods 1961-70 and 1971-80 respectively, the 1981-87 period revealed 54 citations using the same search technique. This indicates that the use of American authority by the Victorian Supreme Court can be confirmed as being as frequent in the period 1981-87 as in any other period since 1901-10, notwithstanding the shortcomings in identifying such references in these latter years.

TABLE 3

American Cases Cited by Decades

High Court		NSW Supreme Court Findings				
Decade	References per Year	Sample Years		Volumes	Cases[39]	References per Year
1901-10	56.5	1903	1907	2	4.5	4.5
1911-20	47.4	1913	1916	2	1.0	1.0
1921-30	27.3	1924	1928	2	1.0	1.5
1931-40	26.9	1934	1940	2	0.5	1.0
1941-50	36.6	1943	1948	2	1.0	1.5
1951-60	29.6	1954	1958	2	*1.5	*2.0
1961-70	19.0	1962	1964-5	2	1.0	1.5
1971-80	32.9	1976	1978	4	6.5	10.0
1981-87	111.3	1981	1984	4	16.5	19.5

*References within an appellate judgment of a case stated for appeal.

New Zealand

As with the study of the Victorian Supreme Court, a review of the New Zealand Reports revealed that American cases were used by the New Zealand judiciary far less during the period 1901-1987 than by the High Court of Australia. The New Zealand use of American case authority was ascertained by examination of two years' reported judgments during each of the nine periods from 1901 to 1987 (calculating references to American cases in the same manner as with the Australian High Court study). During

39 During this period, the total number of American cases in each volume of the State Reports of New South Wales and New South Wales Law Reports includes only those cases used by the judiciary in the relevant volume (and thus excludes references in cases reported in the Weekly Notes). The following number of American cases per year were referred to in the briefs and arguments of counsel, but were not used in the judgments themselves:

Sample Years		References/Year	Sample Years		References/Yr
1903	1907	4.0	1954	1958	0.5
1913	1916	0.0	1962	1964-5	0.0
1924	1928	0.0	1976	1978	0.0
1934	1940	0.0	1981	1984	7.5
1943	1948	0.5			

There were also included within the list of cases cited in the New South Wales Law Reports, American cases cited in the Weekly Law Reports during 1903 (3), 1924, 1934 and 1940.

this period, the New Zealand Supreme Court and Court of Appeal were found to refer to American decisions less than ten times per year,[40] compared to the High Court's use of such cases at nearly three times that frequency.

TABLE 4

American Cases Cited by Decades

High Court		New Zealand Courts Findings			
Decade	References per Year	Sample Years	Volumes	Cases	References per Year
1901-10	56.5	1902-3	3	5.5	7.0
1911-20	47.4	1912-3	2	4.0	5.5
1921-30	27.3	1922-3	2	3.0	3.0
1931-40	26.9	1932-3	2	3.5	4.0
1941-50	36.6	1942.3	2	0.5	0.5
1951-60	29.6	1952-3	2	0.5	0.5
1961-70	19.0	1962-3	2	1.5	2.5
1971-80	32.9	1972-3	3	2.5	3.5
1981-87	111.3	1981-2	4	10.5	14.5

Canada

In contrast to the sample studies of the Victorian, New South Wales, and New Zealand Courts, the study of the practice of the Canadian Supreme Court during the twentieth century revealed significant references (calculated as with the High Court and New Zealand studies) to American case authority.[41] As with the Australian High Court's use of American

40 The total number of American cases in each volume of the New Zealand Reports refers only to cases used by the judiciary. During the period 1901 to 1943, the following number of American cases per year were referred to in the briefs and arguments of counsel, but were not used in the judgments themselves:

Years	Cases
1902-03	12.5
1912-13	9.5
1922-23	5.0
1932-33	4.0
1942-43	1.5

41 In comparison to the Australian High Court, the Canadian Supreme Court delivers far less individual judgments. See McWhinney, "Judicial Concurrences and

cases, the Canadian Court used American authority most frequently in the first decade of this century and in the last seven year period. The dramatic increase in the last period (exceeding the combined number for all previous decades), confirms that the Canadian trends do not coincide directly with those of Australia.

TABLE 5

American Cases Cited by Decades

High Court			Canada Courts Findings		
Decade	References per Year	Sample Years	Volumes	Cases[42]	References per Year
1901-10	56.5	1902	2	42.0	103.0
1911-20	47.4	1912	3	15.0	15.0
1921-30	27.3	1923-4	2	12.0	33.0
1931-40	26.9	1932-3	2	12.5	48.5
1941-50	36.6	1942-3	2	2.5	8.0
1951-60	29.6	1954-5	2	7.0	11.0
1961-70	19.0	1965-6	2	6.0	20.5
1971-80	32.9	1973-4	2	22.0	81.0
1981-87	111.3	1983 1987	4	61.25	228.5

Unlike Australia, the Canadian use of American authority can not generally be attributed to the inclusion of provisions modelled upon the American

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(1953) 31 *Can B Rev* 595. Because of the weighting applied to joint judgments, the number of references to American cases is thus quite high in relation to the actual number of American cases used by the Canadian Supreme Court. This calculation, though somewhat inflationary, is consistent with the methodology applied to the Australian High Court study.

42 During the period 1901 to 1930, the total number of American cases in each volume of the Canadian Supreme Court Reports refers only to cases cited by the judiciary. During this period, the following number of American cases per year were referred to in the briefs and arguments of counsel, but were not used in the judgments themselves:

Years	Cases
1902	42
1912	5
1923-24	5

Unlike Australia, the Canadian reports include as "cases cited" only the cases directly referred to by the judiciary. Cases indirectly cited (contained within quoted extracts from primary American cases) were disregarded for purposes of these statistics.

Constitution. The dramatic increase in the last seven years, however, is attributable to the acceptance by Canada of a Charter of Rights,[43] numerous aspects of which find similar expression in the United States Bill of Rights. A review of the topic areas of American cases cited by the Canadian Supreme Court in the last test period confirms that its reference to American Bill of Rights cases when considering Charter of Rights issues is responsible for this trend.[44] A comparison of the two selected sample years from the 1980's, one immediately after the adoption of the Charter of Rights and one six years later indicates the predominance of usage of American cases in the latter year:

1983	2 volumes	8.5 cases/yr	44.0 ref/yr
1987	2 volumes	104.0 cases/yr	413.0 ref/yr

Further analysis of the cases referred to in 1987 confirms that cases used in relation to the Charter of Rights comprise the vast majority of those American cases cited by the Canadian judiciary in the sample:

TABLE 6

1987 American References - Canadian Supreme Court

In Charter cases	83.0 US cases	311.0 references
In other cases	21.0 US cases	102.0 references

The study of the Victorian, New Zealand, the Canadian Courts reveals no discernible trends present in the Australian High Court study. For this reason, it can be concluded that the observations arising from the Australian High Court study are attributable to factors particularly relevant to the High Court rather than to any more universal explanation.

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43 *Canadian Charter of Rights and Freedoms*, Part I of *The Constitution Act* 1982, being Schedule B of *The Canadian Act* 1982 (UK) c11 (hereinafter "the Charter of Rights").

44 See Nelson, "Canadian Use of American Precedent under the New Charter of Rights and Freedoms" (1986) 3 *Can-Am L J* 161 and Hogg, "The Charter of Rights and American Theories of Interpretation" (1987) 25 *Osgoode Hall LJ* 88.

CONCLUSION

The High Court of Australia's changing practice in its use of American case authority demonstrates that factors which lead to the use by the judiciary of one country of the cases of another can change greatly over the duration of a century. Because the United States and Australia have comparable Constitutions as well as legal systems based upon common fundamental principles, the judiciary of Australia has been able to make use of American judgments concerning legal issues encountered in both countries. Nevertheless, the frequency with which American cases have been used by the High Court of Australia has changed dramatically from decade to decade.

It is quite likely that the significant changes in the High Court's practice in its use of American authority are attributable both to developments in the United States and in Australia itself. Shifts in the United States Supreme Court's view of the United States Constitution in the 1930's, for example, may have resulted in the Australian High Court's becoming less attracted to American constitutional jurisprudence.[45] Given the nature of most of the findings identified in this study (generally applying to decisions arising from American courts of all descriptions), the trends identified in the Australian High Court's practice are attributable more to Australian events which had effect upon the receptiveness of the High Court to the use of American judicial authority than to any change in American judicial practice.

Of the trends identified in this study, simple explanations are tenable for only a few. The frequent use of American cases by the Australian High Court in the first decade of the century, for example, could arise from the adoption by Australia of constitutional provisions modelled upon the United States Constitution.[46] This is consistent with the predominance of

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45 See Currie, "The Constitution in the Supreme Court: The New Deal, 1931-40" (1987) 54 *U of Chicago L Rev* 504.

46 A chronicle of fifty years' use by the High Court of Australia of American precedent in cases arising under the commerce clause of the *Commonwealth of Australia Constitution Act* 1900 (UK), 63 & 64 Victoria, ch 12 (hereinafter the "*Australian Constitution*") s92, (the most frequently litigated Australian Constitutional provision) can be found in Stone, "A Government of Law and yet of Men Being a Survey of Half a Century of the Australian Commerce Power" (1950) 25 *NYUL Rev* 451.

constitutional cases among the American references utilised by the High Court during that decade.[47]

The dramatic decrease in references to all American cases from the 1920's onward might be partially attributable to the development by the Australian High Court of its own constitutional precedent and jurisprudence over time. That the decrease applies to all areas of law indicates that it is the result of a substantial development in Australian jurisprudential theory that has a broader application than to constitutional law alone.

In 1920, in *Engineers*,[48] the High Court of Australia accepted, after 19 years of receptiveness to American constitutional authority, that the interpretation of the Australian Constitution was more appropriately guided by British practice than by that of the United States. The emphasis by the High Court that the Australian Constitution, though modelled upon an American precedent, was foremost an Act of the Westminster Parliament, confirmed that Australian constitutional law should accord with British constitutional authority.[49] The reduction in the use of American cases by the High Court in constitutional matters thereafter, and noted in the study as commencing in the decade of the 1920's, is undoubtedly due to this blanket rejection of American constitutional authority.

Identification of *Engineers* as a turning point in High Court practice does not, however, explain the reasons leading to that decision, nor to the

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47 A similar pattern for Canada subsequent to its adoption of the Charter of Rights is also noted. See the discussion subsequent to note 44. See also Hogg, "The Charter of Rights and American Theories of Interpretation" (1987) 25 *Osgoode Hall LJ* 88.

48 *Amalgamated Society of Engineers v Adelaide Steamship Company* (1920) 28 CLR 129.

49 In the joint judgment Knox CJ, Isaacs, Rich and Starke JJ discussed the use of American authority in *Engineers* in the following terms (at 146):

> But we conceive that American authorities, however illustrious the tribunals may be, are not a secure basis on which to build fundamentally with respect to our own Constitution. While in secondary and subsidiary matters they may, and sometimes do, afford considerable light and assistance, they cannot, for reasons we are about to state, be recognised as standards whereby to measure the respective rights of the Commonwealth and the States under the Australian Constitution.

See also McWhinney, "Judicial Concurrences and Dissents: A Comparative View of Opinion-writing in Final Appellate Tribunal" (1953) 31 *Can B Rev* 595 at 603.

broader disregard of American decisions in the 1920-1970 period. *Engineers*, which specifically decided that there was nothing in the Australian Constitution to exempt state enterprises from the ambit of the Commonwealth arbitration power in section 51 (xxxv), rejected the notion that any grant of powers to the Commonwealth implied a reservation of powers to the States.[50] In abandoning the notion that there was an implied reservation of powers to the Australian States, the High Court encouraged full exercise of the Commonwealth power. A simultaneous and, to a certain extent, incidental product of this shift was a reversion from American constitutional thought which at this time was seen as limiting the powers of the central government through judicial embellishments which favoured the States. While *Engineers* could be regarded as a shift towards centralisation in the Australian federal context, it could also be seen as defining the judicial role in quite a limited way, requiring judges merely to interpret the constitution (and legislation) rather than to implement it by reference to the underlying policy.[51]

One quite remarkable development in the growth of the federal power in the United States was that judicial activism (or perhaps absence of literalism) which placed limitations upon the federal power in the early part of the twentieth century was also directly responsible for the great expansion of federal powers in the Roosevelt era.[52] Consequently, both the United States Supreme Court and the High Court of Australia changed their views on the exercise of powers by the relevant central governments within fifteen years of each other. The High Court did it through a stricter adherence to the words of the Australian Constitution while the United States Supreme Court achieved a similar result through a very generous interpretive technique applied to the American commerce power.[53]

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50 See *Strickland v Rocla Concrete Pipes Ltd* (1971) 124 CLR 468 at 485, per Barwick CJ.

51 See Galligan, *Politics of the High Court: A Study of the Judicial Branch of Government in Australia* (University of Queensland Press, St Lucia 1987) p101.

52 See *National Labor Relations Board v Jones & Laughlin Steel Corporation* 301 US 1 (1937); *US v Darby* 312 US 100 (1941); *Wickard v Filburn* 317 US 111 (1942).

53 For a contrast of the interpretation of the United States and Australian provisions, see Nygh, "An Analysis of Judicial Approaches to the Interpretation of the Commerce Clause in Australia and the United States" (1965-7) 5 *Syd LR* 353.

The continuing disregard by the High Court of American constitutional authority in the 1940's, 50's and 60's can likewise be attributed to continuing differences between the two countries on the role of the judiciary. Failure by the Labor Governments in Australia to pressure the High Court into further extending the powers of central government by accepting as constitutional the legislative programs of the depression era meant that a narrow role for the judiciary and strict interpretation by literalism continued into the 1970's.[54] By contrast, the United States Supreme Court, under threat from President Roosevelt, altered its views about the extent of federal powers considerably during the 1930's, partially due to changes arising from change of personnel.[55]

Beginning with *Engineers* and continuing through to the 1960's, the High Court assured that Australian legal culture would remain essentially British, both jurisprudentially and constitutionally. It is not surprising that even common law matters were as a general rule considered by the High Court without recourse to American authority in the period 1921-1970, as is noted in this study. Just as the United States constitutional theory had developed independently from British constitutional law, so the processes of the common law as practiced in the United States diverged from the practices of other common law countries.

Two structural matters may be cited as creative of a broader judicial role in the United States than in the British Commonwealth. First, the United States judiciary was responsible for the protection of rights found within the Bill of Rights against encroachment by either state or federal legislative process.[56] During the 1950's and 1960's in particular, the American judiciary exercised the full extent of its authority as the enforcer of the American Bill of Rights to intervene in the legislative processes (both at a

54 See Lane, "Neutral Principles on the High Court" (1981) 55 *ALJ* 737.

55 See Mason, "Harlan Fiske Stone and FDR's Court Plan" (1952) 61 *Yale LJ* 791; Rotunda, Nowak & Young, *Treatise on Constitutional Law: Substance and Procedure* (West Publishing Co, St Paul 1986) pp62, 284.

56 See Galligan, "Judicial Review and Democratic Principles: Two Theories" (1983) 57 *ALJ* 69.

state and federal level),[57] a development unparalleled in the British Commonwealth prior to recent Canadian experience.

In addition to the great independence exercised by the American judiciary by virtue of its constitutional role,[58] the very structure of the common law system in the United States encouraged judicial innovation and independence. The common law, as considered by the countries of the British Commonwealth, was a unifying force in the British legal system.[59] Common problems were thought to be capable of a common solution throughout the world,[60] and this view was reflected in the provision of appeals from the numerous outposts of the common law system to the Privy Council in London.[61] The Privy Council, in this respect, must be seen as having exerted both a controlling[62] and unifying influence[63] on

57 See, for example, *Brown v Board of Education* 347 US 483 (1954); *Scherbert v Verner* 374 US 398 (1963); *Reynolds v Sims* 377 US 533 (1964); *Duncan v Louisana* 391 US 145 (1968); *Shapiro v Thompson* 394 US 618 (1969); Choper, "Consequences of Supreme Court Decisions Upholding Individual Constitutional Rights" (1984) 83 *Michigan L Rev* 4.

58 See Kadish, "Judicial Review in the High Court and the United States Supreme Court" (1959-60) 2 *MULR* 4; Hutley, The Legal Traditions of Australia as Contrasted with those of the United States" (1981) 55 *ALJ* 63.

59 See Windeyer, "Unity, Disunity and Harmony in the Common Law" [1966] *NZLJ* 193. See also Atiyah, "Common Law and Statute Law" (1985) 48 *Mod LR* 1, wherein he asserts that one reason against analogising statutes in common law is the divergence of the common law which it may cause. See also Cooke, "Divergences - England, Australia, and New Zealand" [1983] *NZLR* 297, cataloguing divergences resulting from the changing nature of the common law in the British Commonwealth.

60 Jackson, "The Judicial Commonwealth" (1970) 28 *Cam LJ* 257. This view also found expression in the United States. See Pope, "The English Common Law in the United States" (1910) 24 *Harv L Rev* 6.

61 See note 2. Appeals to the Privy Council from the High Court of Australian were limited by s74 of the *Australian Constitution* to prevent appeals from a decision of the High Court concerning the constitutional powers of the Commonwealth and Australian States, except by certificate of the High Court itself. Further limitations arose in 1975 and 1986. Consistent with the later limitations, the grant of a certificate for appeal is now considered obsolete; *Kirmani v Captain Cook Cruises Pty Ltd (No 2)* (1985) 159 CLR 351.

62 The modern English rule, that "every court is bound to follow any case decided by a court above it in the hierarchy" (Cross, *Precedent in English Law* (Clarendon Press, Oxford, 2nd ed (1968) p6) meant that the Privy Council's decisions on matters of common law were often binding worldwide. See *Viro v The Queen* (1978) 141 CLR 88 at 120, where this view of the Privy Council's authority was cited with approval.

common law developments in the countries from which appeals to it were permitted[64] even though direct intervention may have been rare.[65]

The United States common law system, though similar in origin, developed in a much more diverse manner due to the limited role of the United States Supreme Court in matters of state competence (which include most areas of law with a common law basis).[66] The absence of effective review of local law by the United States Supreme Court meant that the common law was able to develop independently in fifty separate jurisdictions.[67] This independence of common law jurisdictions in the United States not only facilitated experimental development of common law concepts in isolated states,[68] but also, through the marketplace of legal ideas which developed, enabled the mainstream of United States common law to develop and evolve quickly, hastened its divergence from the English common law.[69] The founders of the Australian federation empowered its High Court to

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63 An example of the unifying influence which appeals to the Privy Council provided upon diverging views from England, Canada and Australia on fiduciary duties in Company Law can be found in Tunc, "The Not So Common Law of England and the United States, or Precedent in England and the United States, A Field Study by an Outsider" (1984) 47 *Mod LR* 150.

64 This role was not always universally welcomed. See McHugh, "The Appeal of 'Local Circumstances' to the Privy Council" [1987] *NZULR* 24, wherein a limitation to the Privy Council's appellate powers over New Zealand is discussed.

65 See Mason, "Future Directions in Australian Law" (1987) 13 *Mon LR* 149 at 151.

66 See note 5.

67 See Jones, "Our Uncommon Common Law" (1975) 42 *Tenn L Rev* 443 at 455-56 and Whittaker, "The Law of American Precedent" (1879) 7 *Am L Rec* 621. The development of the common law in the United States has consequently proceeded without direct unifying influence and no requirement for the judiciary of any state to accept the judgments of any other jurisdiction as binding in relation to the common law. See Black, *Handbook of the Law of Judicial Precedents* (1912) pp400-427. See also Fridman, "Reflections on American Law" (1957) 24 *Solicitor* 259.

68 In fact one benefit of the *Restatements* was thought to be a countering of legal isolationism to which the American common law might be subject. See Owens, "The Judicial Process, Stare Decisis and the Restatements" (1946) 21 *Cal St B J* 116. See also Kerr, "Uniform State Laws and the Rule of Stare Decisis" (1922) 56 *Am L Rev* 497.

69 See Tunc, "The Not so Common Law of England and the United States, or, Precedent in England and in the United States, a Field Study by an Outsider" (1984) 47 *Mod LR* 150 at 169-70 and Walker, "The Diffusion of Innovations Among the American States" (1969) 63 *Am Pol Sci Rev* 880.

review decisions of the state courts based upon common law grounds,[70] expressly rejecting the United States model on this point.[71]

While the common law of the British Commonwealth, including Australia, remained essentially uniform, developments in the United States could only be considered cautiously by tribunals within the commonwealth.[72] American cases undoubtedly provided examples of the application of conventional common law to cases with a seemingly unlimited factual variety. Nevertheless, novel American legal ideas were probably seen as heretical, with the consequence that pronouncements by American courts were not generally regarded authoritatively by the remainder of the common law world,[73] as reflected in this study.

During the 1970's and 1980's, those aspects of American law which may have inhibited its use by the High Court of Australia during earlier eras were, paradoxically, the same features which made its consideration attractive once again. The increase in the use of American cases by the High Court of Australia in the period 1971-87 is consequently more indicative of changes within Australia than to any developments in the United States during that time.

In fact, several concurrent developments must be considered as contributing to the significant increase in the use of American cases since 1970. The first compelling, though formalistic, explanation of the increased Australian reference to United States cases in recent years is the elimination of appeals from the High Court of Australia to the Privy

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70 *Australian Constitution* s73, gives the High Court of Australia appellate jurisdiction from all judgments, decrees, orders, and sentences from, *inter alia*,

> the Supreme Court of any State, or of any other court of any State from which at the establishment of the Commonwealth and appeal lies to the Queen in Council.

Whether this appellate jurisdiction is subject to Parliamentary limitation is discussed in Lane, *The Australian Federal System* pp544-46 (Law Book Co, Sydney, 2d ed 1979) pp544-546.

71 Hunt, *American Precedents in Australian Federation* (Columbia University Press, New York 1930); Quick and Garran *Annotated Constitution of the Australian Commonwealth* (Angus and Robertson, Sydney 1901).

72 See Comment, "True Value of American Cases" (1917) 62 *Sol J* 157.

73 See Comment, "True Value of American Cases" (1917) 62 *Sol J* 157; Gatley, "American Decisions as Authority in England" (1925) 3 *Docket* 282.

Council in 1975[74] and the elimination of all appeals to the Privy Council from Australia in 1986.[75] These changes meant that the High Court, as the final court of appeal for Australia,[76] could exercise greater independence and, consequently, broaden its judicial perspectives.[77]

Simultaneously, the Australian view of the judiciary as mere interpreters, the predominant view prior to the 1970's, was largely abandoned in the early 1980's. This resulted from the discrediting of the literalism of the Barwick High Court, primarily exhibited in its tax judgments during the 1970's.[78] In reaction, Parliament enabled the judiciary to look beyond the plain words of legislation to ascertain its objectives,[79] and the High Court

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74 *Privy Council (Appeals from the High Court) Act* 1975 (Cth). See also *Privy Council (Limitation of Appeals) Act* 1968 (Cth).

75 *Australia (Request and Consent) Act* 1985 (Cth); *Australia Acts (Request) Act* 1985 of each Australian State; *Australia Act* (UK) 1986.

76 The problematic relationship between the Privy Council and the Australian High Court between 1975 and 1986 is the subject of *Viro v The Queen* (1978) 141 CLR 88. The implications of *Viro* on all Australian courts are discussed in Geddes, "The Authority of Privy Council Decisions in Australian Courts" (1979) 9 *Fed L Rev* 427. See also Mason, "The Limitation of Appeals to the Privy Council from the High Court of Australia, from Federal Courts other than the High Court, from the Supreme Courts of the Territories and from Courts exercising Federal Jurisdiction" (1968) 3 *FL Rev* 1; St John, "The High Court and the Privy Council; The New Epoch" (1976) 50 *ALJ* 389; Maher, "Demise of the Privy Council in the Australian Judicial Hierarchy" (1978) 52 *L Inst J* 524.

77 In a joint judgment of Justices Mason, Wilson, Deane, and Dawson in *Cook v Cook*, (1986) 162 CLR 376, the High Court of Australia indicated that all common law courts may now be properly considered on a similar basis (at 390):

> ... The history of this country and of the common law makes it inevitable and desirable that the courts of this country will continue to obtain assistance and guidance from the learning and reasoning of United Kingdom courts just as Australian courts benefit from the learning and reasoning of other great common law courts. Subject, perhaps, to the special position of decisions of the House of Lords given in the period in which appeals lay from this country to the Privy Council, the precedents of other legal sysems are not binding and are useful only to the degree of the persuasiveness of their reasoning.

For the Canadian perspective see MacGuigan, "Precedent and Policy in the Supreme Court of Canada" (1967) 45 *Can B Rev* 625 at 644-46.

78 See Lehmann, "The Income Tax Judgments of Sir Garfield Barwick: A Study in the Failure of the New Legalism" (1983) 9 *Mon LR* 115.

79 See the *Acts Interpretation Act* 1901 (Cth) ss 15AA, 15AB and note 34 above.

quickly exhibited its willingness to accept the enhanced role necessitated by this change.

Finally, the High Court continued to face difficulties in balancing the roles of the Commonwealth and the States. While the High Court validated Commonwealth action in relation to the foreign affairs power,[80] it refused a universal rush toward centralisation. Nevertheless, the High Court in the 1970's and 80's faced numerous problems not easily resolved by reference only to the words of an increasingly aged constitution. It found ready support for the broader interpretive attitudes as applied to a constitution in United States precedent.

The major reasons for the increased use of American authority by the High Court since 1970 are attributable to an evolution in the role of the High Court itself. The last two decades have seen the enhanced constitutional status of the High Court, a greater latitude in its approach to interpretation, and that Court's increased confidence to explore a broader group of legal alternatives. While other possible factors contributing to an increased use of American cases by the judiciary of the Australian High Court may warrant further analysis, even the causes which are here identified probably arise as a result of one common development quite difficult to document - the increasing maturity and independence of Australia as a nation and as a separate legal culture. The change of High Court practice in use of American judicial authority is, given Australia's background, probably more reflective of this process than of any other.[81]

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80 *Koowarta v Bjelke-Petersen* (1982) 153 CLR 168; *Commonwealth v Tasmania* (1983) 158 CLR 1.

81 Sir Anthony Mason, Chief Justice of the High Court of Australia, emphasised these very points in the 1987 Wilfred Fullager Memorial Lecture:

> There is, however, every reason why we should fashion a common law for Australia that is best suited to our conditions and circumstances. In deciding what is law in Australia we should derive such assistance as we can from English authorities. But this does not mean that we should account for every English judicial decision as if it were a decision of an Australian court. The value of English judgments, like Canadian, New Zealand and for that matter United States judgments, depends on the persuasive force of their reasoning.

See Mason, "Future Directions in Australian Law" (1987) 13 *Mon LR* 149 at 154.