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The Constitution

> *The constitutional law of a country may be defined as that portion of its fundamental law which prescribes or determines the structural character of the various governmental organs included in its total political organisation, their relations inter se, and the particular powers and functions of each of them.*[1]

I Introduction

So wrote Andrew Inglis Clark, one of the chief architects of the Australian Constitution. As he pointed out, constitutional law is only one part of the entire law of a country, but it is arguably the most fundamental. Constitutional law defines and regulates the institutions by which a country is governed. These governing institutions typically have the authority to make law, to enforce the law and to resolve disputes about the content and application of the law. Constitutional law is thus concerned with ultimate questions about *what* the law is, *how* the law can be changed and *who* has the authority to make law, interpret its meaning and enforce it.

Another highly influential framer of the Australian Constitution, Robert Garran, defined a constitution as follows:

> A Constitution is a general law for the government of a political community, unamendable and unrepealable, except in the manner and on compliance with the conditions prescribed by the authority which created it. It deals with the sovereign power of Government and the various forms, organs, and agencies through which that power is brought into action and the relations, interdependence, and co-operation of those forms, organs, and agencies, in the performance of the work of government.[2]

On Garran's view, a constitution is a special type of law which not only defines and regulates the government, but which exists by virtue of an authority that is distinct from the ordinary institutions of government and which can only be altered in accordance with conditions prescribed by that authority. When Garran

1 Andrew Inglis Clark, *Studies in Australian Constitutional Law* (Charles F Maxwell, 1901) 2.
2 John Quick and Robert Randolph Garran, *The Annotated Constitution of the Australian Commonwealth* (Angus and Robertson, 1901) 314.

said this, although he was speaking generally, he undoubtedly had the Australian Constitution specifically in mind. This leads to several questions. What, on his view, was the authority by which the Australian Constitution had come into being? By what authority or special procedures could it be amended? How does it define the sovereign power of government? What are the institutions that it recognises, establishes and regulates? What is the proper operation of those institutions, and how are they meant to relate to one another? It is with questions such as these that this book is chiefly concerned.

The Australian Constitution established the Commonwealth of Australia in 1901 as a federation of the six self-governing British colonies which then occupied the Australian continent. The Constitution contains the constitutional terms on which these colonies – the constituent States – agreed to federate. Prior to federation, each of the colonies had its own constitution under which it governed itself, independently of the others but ultimately subject to British authority. To understand Australian constitutional law properly, it is necessary to appreciate the history of the making of the Constitution and the motivating ideas lying behind it. There is no better way to begin to understand those ideas than to consider what the framers of the Constitution believed themselves to be establishing. They gave expression to this understanding in the preamble to the Australian Constitution.

II Historical origins

1 Preamble to the Constitution

The Constitution of the Commonwealth of Australia is contained within a British statute entitled the *Commonwealth of Australia Constitution Act 1900*.[3] Although a British statute, the Constitution was drafted by elected Australian politicians and approved by Australian voters prior to its enactment into law. Because the Constitution created a federation of the Australian colonies it was also influenced by the leading model of federalism at the time, the United States of America.The Australian Constitution thus reflects a history and embodies values and ideas that are partly British and partly American, combined into a unique Australian synthesis. This history and those ideas are well summarised in the preamble to the *Constitution Act*. Several important propositions are contained within its succinct and eloquent statement of political history and constitutional principle:

> Whereas the people of New South Wales, Victoria, South Australia, Queensland, and Tasmania, humbly relying on the blessing of Almighty God, have agreed to unite in

3 The *Commonwealth of Australia Constitution Act 1900* (UK) consists of nine sections (often called 'covering clauses'), the ninth of which contains the Constitution of the Commonwealth of Australia, which itself consists of a further 128 sections divided into eight chapters.

> one indissoluble Federal Commonwealth under the Crown of the United Kingdom of Great Britain and Ireland, and under the Constitution hereby established …

Firstly, the preamble refers to an *agreement of the people*. The idea that constitutions are formed by an agreement of the people has a long and complex history. It owes much of its inspiration to the ideals of Athenian democracy and the Roman and Hebrew republics.[4] However, none of these ancient cultures had a conception of an authoritative written 'constitution' in quite the sense in which the framers of the Australian Constitution understood it.The modern notion of an 'agreement of the people' can be traced more directly to certain revolutionary political events in seventeenth-century England,[5] and to the constitutional ideas that developed around that time. Between 1647 and 1649, a series of manifestos were prepared, under the title of *An Agreement of the People*, by participants in Oliver Cromwell's New Model Army,[6] one of which read as follows:

> We the free People of England, to whom God hath given hearts, means and opportunity to effect the same, do with submission to his wisdom, in his name, and desiring the equity thereof may be to his praise and glory; Agree to ascertain our Government, to abolish all arbitrary Power, and to set bounds and limits both to our Supreme, and all Subordinate Authority, and remove all known Grievances.[7]

While these agreements never became law, an *Instrument of Government* (1653) was adopted as the written constitution of England during the rule of Oliver Cromwell, following the deposition and execution of Charles I in 1649. Around the same time, English colonists in North America had established self-governing political communities in which 'advanced ideas of colonial independence and autonomy' were developing.[8] Viewed from the perspective of British law, the constitutional foundations of these settlements derived from the authority of the Crown, but the practice of many of the colonies was to 'self-constitute' themselves into a body politic through a solemn pact or covenant. The framers of the Australian Constitution were well aware of this background.[9] James Bryce, whose book *The American Commonwealth* was cited by the Australian framers more frequently than any other, drew attention to many of these founding compacts and agreements.[10] One of the most famous was the Mayflower Compact of 1620, subscribed by the first inhabitants of the colony established at Plymouth in what is now the American State of Massachusetts. It declared the formation of the colony in the following terms:

4 David Bederman, *The Classical Foundations of the American Constitution* (Cambridge University Press, 2008); Eric Nelson, *The Hebrew Republic* (Harvard University Press, 2010).
5 Particularly during the period of the English Civil War (1642–51), Commonwealth or Interregnum (1649–60), Restoration (1660–88) and Glorious Revolution (1688–9). See Part II.2.
6 See A S P Woodhouse (ed), *Puritanism and Liberty* (Dent, 1938); David Wootton (ed), *Divine Right and Democracy* (Penguin, 1986).
7 John Lilburne, William Walwyn, Thomas Prince and Richard Overton, *An Agreement of the Free People of England* (1649).
8 Quick and Garran, above n 2, 14.
9 See, eg, ibid, 9–17, 282–310.
10 James Bryce, *The American Commonwealth* (Macmillan, 2nd ed, 1889) vol 1, ch 37.

> In the name of God, Amen. We, whose names are underwritten, the loyal subjects of our dread Sovereign Lord King James, by the Grace of God, of Great Britain, France, and Ireland, King, defender of the Faith, etc.
>
> Having undertaken, for the Glory of God, and advancements of the Christian faith and honor of our King and Country, a voyage to plant the first colony in the Northern parts of Virginia, do by these presents, solemnly and mutually, in the presence of God, and one another, covenant and combine ourselves together into a civil body politic; for our better ordering, and preservation and furtherance of the ends aforesaid; and by virtue hereof to enact, constitute, and frame, such just and equal laws, ordinances, acts, constitutions, and offices, from time to time, as shall be thought most meet and convenient for the general good of the colony; unto which we promise all due submission and obedience.[11]

Another example given by Bryce was the original constitution of the American State of Connecticut, which was based upon a federating covenant between the people of three separate towns.[12] The *Fundamental Orders of Connecticut* declared as follows:

> [W]e the Inhabitants and Residents of Windsor, Hartford and Wethersfield … do … associate and conjoin ourselves to be as one Public State or Commonwealth; and do for ourselves and our successors and such as shall be adjoined to us at any time hereafter, enter into Combination and Confederation together …[13]

Drawing inspiration from these kinds of documents, the highly influential English philosopher and publicist, John Locke (1632–1704), gave elegant and sophisticated expression in his *Second Treatise of Government* (1689) to the underlying idea of a 'social contract' by which the people constitute themselves into a political society and a 'contract of government' by which they establish a government that is accountable to them. But the basic idea of a founding covenant was much older than Locke. Johannes Althusius (*c* 1563–1638), a German jurist and early theorist of a kind of 'social federalism',[14] had more than half a century earlier set forth an account of society in which all groups – families and villages, towns and cities, guilds and religious associations, provinces and commonwealths – are formed and joined together by a series of federative compacts and agreements.[15]

Reflecting this general outlook, the Constitution of the United States recites the following:

> We the people of the United States, in order to form a more perfect union, establish justice, insure domestic tranquility, provide for the common defense, promote the general welfare, and secure the blessings of liberty to ourselves and our posterity, do ordain and establish this Constitution for the United States of America.

11 This compact and numerous others are collected in Donald Lutz, *Colonial Origins of the American Constitution* (Liberty Fund, 1998). See also Stephen Schechter, Richard Bernstein and Donald Lutz (eds), *Roots of the Republic* (Madison House, 1990).
12 Bryce, above n 10, vol 1, 415.
13 Fundamental Orders of Connecticut (1639).
14 Thomas Hueglin, *Early Modern Concepts for a Late Modern World* (Wilfrid Laurier University Press, 1999).
15 Johannes Althusius, *Politica Methodice Digesta* (Frederick Carney trans, Liberty Fund, [3rd ed, 1614] 1995).

Notably, the preamble to the Australian Constitution does not quite say that it is ordained by the people or derives directly from their authority, for it was enacted by the British Parliament. The Australian Constitution is different from the republican constitutions of the United States, Switzerland, Germany and India, which appeal directly to the people as enacting or establishing the Constitution by their own authority. But the preamble to the Australian Constitution certainly gives emphasis to the agreement of the people to unite under it, and in so doing suggests that its political legitimacy flows, at least in part, from this fact.

The second thing that is noticeable about the preamble to the Australian Constitution is that it refers specifically to the people *of the constituent States*. This reflects the fact that the Constitution was the product of a long process of deliberation, drafting and ratification that involved the active participation of the governments, legislatures and citizens of each of the Australian colonies – a process that was unprecedentedly democratic by the standards of the time, although certainly less than fully inclusive.[16] The process of federating was determined by the legislatures of the Australian colonies. The process involved a federal convention composed of delegates for each of the colonies. The delegates were directly elected by the voters of the colonies, and each colony was equally represented. The convention prepared a draft constitution that was submitted to the legislatures for comment, revised by the convention and then submitted to the voters in each colony for approval at a referendum. Not until all these steps were taken was the proposed constitution then conveyed to the British authorities for enactment by the Imperial Parliament at Westminster, London, in 1900. Only five of the Australian colonies are mentioned in the preamble, however, because the people of Western Australia had not yet agreed to federate on the terms of the proposed constitution. Rather than an affront to Western Australia, its omission from the preamble is a mark of respect, for it was a fundamental principle of the federation that no colony would be forced to join against its will. Specific provision for its inclusion was made elsewhere in the *Constitution Act* so that when its people did at last give their consent in July 1900, it was possible for Western Australia to be included among the Original States.[17] The preamble to the Constitution thus articulates what is one of the most fundamental principles of Australian constitutional law when it recites that the federation rests on the agreement of the people of *each* of the constituent States.

Thirdly, the preamble states that the people of the colonies agreed to unite in a *federal commonwealth*. The Commonwealth of Australia is declared to be a federal commonwealth because the constituent States continue to operate as mutually independent, self-governing political communities, while at the same time they are collectively united into the larger self-governing community of

16 Most women, along with most Indigenous, Chinese and South Pacific Islander people, were not counted as citizens in 1900, although women did secure the vote in South Australia and Western Australia prior to federation, and throughout all of Australia soon thereafter. Indigenous people did not secure voting rights in all Australian jurisdictions until the 1960s. See Helen Irving, *To Constitute a Nation* (Cambridge University Press, 1997) chs 6, 8–11.
17 *Commonwealth of Australia Constitution Act 1900* (UK), cl 3.

the Commonwealth. As Quick and Garran explained in their important and influential *Annotated Constitution of the Australian Commonwealth*, the term 'federal' as used in the Constitution and as understood by the framers, had at least four distinguishable meanings.[18] The 'primary and fundamental' meaning, they pointed out, is associated with the term's etymological roots, derived from the Latin *foedus*, meaning a 'league', a 'treaty' or a 'covenant', and associated with the Latin *fides*, meaning 'faith'. This sense of the term 'federal' carried with it the idea of a *union of states* in the sense of the federating agreement between the Australian colonies which established the federal commonwealth – the point being that while the preamble certainly appeals to the *people*, it just as clearly appeals to the *peoples* of each colony as having agreed to federate. The second sense in which the term 'federal' is used in the Constitution concerns the nature of the new political community created by this federating agreement. The reference here is not to the bond of union between the federating States, but to the new political community created by that bond: a *federal state*, which is itself a *union of constituent states*.[19] According to Quick and Garran, it is in this particular sense that the expression 'federal commonwealth' is used in the Australian Constitution. The idea is of a composite entity: a polity in which the incorporation of a plurality of states into one state, while preserving the separate identities of the constituent states, is taken to be the very essence of the federal commonwealth. Thirdly, Quick and Garran pointed out that the term 'federal' is frequently used to refer to a *dual system of government* consisting of two separate sets of governing institutions: a federal government with authority over the whole political community, and several state governments with authority over their respective provinces or regions. On this understanding of federalism, the federal and state governments are considered to be largely independent of each other and to exercise governing authority over different types of matters as determined by the 'distribution of powers' set out in the Constitution. This notion is closely related to a final and fourth sense of the term 'federal' which is used to designate the *federal government* in particular, which has general authority over the federation as a whole.

The Australian Constitution gives effect to the 'federal' idea in all four of these senses. The term 'federal' is used explicitly in the sense of a federating agreement and a federal commonwealth in the preamble to the Constitution,[20] and the idea of a dual system of government consisting of two sets of governing institutions – federal and state – is alluded to throughout the Constitution. All of the main governing institutions of the Commonwealth – the Parliament, the

18 Quick and Garran, above n 2, 292–4, 332–42.
19 Accordingly, the *Commonwealth of Australia Constitution Act 1900*, cl 6 defines 'the States' as constituent 'parts of the Commonwealth'. Quick and Garran, above n 2, 336–7, pointed out that the States 'are welded into the very structure and essence of the Commonwealth'; 'they are inseparable from it and as enduring and indestructible as the Commonwealth itself'; and they form 'the buttress and support of the entire constitutional fabric'.
20 The term 'federal commonwealth' also appears in the *Commonwealth of Australia Constitution Act 1900*, cl 3.

Executive Council and the High Court – are called 'Federal', as are the additional 'federal courts' that may be created and the 'federal jurisdiction' that is exercised by them.[21] As Quick and Garran observed, the federal idea 'pervades and largely dominates the structure of the newly-created community, its Parliamentary executive and judiciary departments'.[22]

A fourth thing to note about the preamble to the Australian Constitution is that it declares the federal commonwealth to be *indissoluble* – a quality that is clearly meant to attach to the federation itself, but arguably to the constituent States as well. Just as it was intended that the federation could not be dissolved by the unilateral action of any one or more of the States withdrawing or seceding,[23] it was similarly intended that the States would each continue to enjoy a constitutionally-guaranteed existence within the federation.[24] Accordingly, the Constitution effectively provides that no change to the fundamental character of the federation as a territorial composition of the Commonwealth and the States can lawfully be achieved without the consent of the Commonwealth and all of the States concerned.[25] As the Supreme Court of the United States has observed of the American federation, the Constitution establishes an 'indestructible Union, composed of indestructible States'.[26]

Fifthly, the preamble refers to the Australian people's *humble reliance on the blessing of Almighty God* – a religious reference which, in the view of its leading proponent, Patrick Glynn, served to acknowledge in a suitably non-sectarian way the important role played by religion in fortifying the kinds of social bonds which all political communities need in order to be held together.[27] Lest this acknowledgement of the divine be taken to imply anything more than a non-sectarian expression of solidarity, there was inserted in the main body of the Constitution a prohibition on the Commonwealth making any law that would establish a religion, impose a religious test for holding public office, impose a religious observance, or interfere with the free exercise of religion.[28] The Constitution is thus presented as establishing a 'secular' commonwealth which does not exclude public acknowledgment of religion and measures for its non-sectarian recognition and accommodation.[29]

Sixthly, the preamble declares that the Australian Commonwealth is to be established *under the Crown of the United Kingdom*. This statement reflects the fact that the framers of the Constitution certainly did not intend to establish a republic.[30] However, this did not mean that the recognised authority of the Crown

21 Commonwealth Constitution, ss 1, 62, 63, 64, 71, 73(ii), 77(i)–(ii), 79.
22 Quick and Garran, above n 2, 332.
23 Gregory Craven, *Secession* (Melbourne University Press, 1986).
24 Commonwealth Constitution, s 106.
25 Commonwealth Constitution, s 128, para 5.
26 *Texas v White* 74 US (7 Wall) 700 (1869), 725.
27 *Official Record of the Debates of the Australasian Federal Convention, Melbourne* (1898) 1733.
28 Commonwealth Constitution, s 116.
29 See Chapter 5, Part IV.
30 The most republican among them was Inglis Clark: John Williams, '"With Eyes Open": Andrew Inglis Clark and Our Republican Tradition' (1995) 23 *Federal Law Review* 149.

was in any way to be autocratic or unlimited. As early as the thirteenth century, Henry de Bracton, one of the councillors of King Henry III, had famously maintained that while the king might not be subject to any man, he is subject to God and the law, because the law makes the king, and there is no king where 'will' rules rather than 'law'.[31] This statement of Bracton's was cited by Chief Justice Coke in the case of *Prohibitions del Roy* (1607) to support the proposition that the king cannot personally act as a judge but must allow the ordinary courts to fulfil that function in accordance with the law of the land.[32] Through the tumultuous events of the seventeenth century, it eventually became firmly established in English law that not only is the Crown subject to the law and to the courts, but also to the Parliament. The supremacy of Parliament is a fundamental assumption of Australia's contemporary system of representative and responsible government.[33]

The doctrine of parliamentary sovereignty was influentially articulated by A V Dicey at the time that the Australian Constitution was being drafted, approved and enacted.[34] That doctrine maintained that the British Parliament had full authority to make laws on any topic that it wished and that British courts were under an obligation to give full effect to such statutes whatever their content might be.[35] On this view, the sovereignty of the Parliament extended to the making of laws binding in all of the Queen's overseas colonies and possessions, including those in Australia. As will be seen, it was pursuant to that authority that the Australian colonies were granted full power to make laws for their own self-government, including a capacity to alter their own colonial constitutions, subject only to any over-riding requirements that might otherwise be imposed.[36]

One of the most fundamental premises of the *Commonwealth of Australia Constitution Act* was the sovereign authority of the British Parliament to enact it. By reciting the authority of the British Crown, the preamble to the *Constitution Act* made clear that Australia's governing institutions, at both a Commonwealth and a State level, would continue to derive their legal validity from the British Crown and Parliament – unless and until Australia's constitutional links with Britain might lawfully be terminated. The Australian Constitution was not, in other words, premised on a revolutionary assertion of republican independence and constitutional autochthony.[37] And yet – despite this ultimate dependence upon British authority – the framers of the Australian Constitution insisted on

31 Henry de Bracton, *On the Laws and Customs of England* (S E Thorne trans, Harvard University Press, [c 1235–60] 1968–77) vol II, 33.
32 *Prohibitions del Roy* (1607) 12 Co Rep 63; 77 ER 1342.
33 For more detail, see Part II.2 below.
34 A V Dicey, *Introduction to the Study of the Law of the Constitution* (Macmillan, 5th ed, 1897). Dicey was Vinerian Professor of English Law at Oxford University.
35 Jeffrey Goldsworthy, *The Sovereignty of Parliament* (Clarendon Press, 1999) ch 2.
36 *Colonial Laws Validity Act 1865* (UK), discussed in Part III.1 below and Chapter 10, Parts IV.1–4.
37 The term 'autochthony', when used in this context, means 'self-constituting' or 'constitutionally autonomous'. See Kenneth C Wheare, *The Constitutional Structure of the Commonwealth* (Clarendon Press, 1960) chs 3 and 4; Geoffrey Marshall, *Constitutional Theory* (Clarendon Press, 1980) 57–72; Michael J Detmold, *The Australian Commonwealth* (Law Book Company, 1985) ch 6.

the inclusion of a provision in the Constitution enabling it to be amended by a procedure that depends solely upon decisions taken by the Commonwealth Parliament and the Australian people, voting in a referendum;[38] and they also inserted a local capacity to exercise the powers of the British Parliament within Australia, provided the Parliaments of the Commonwealth and the States agree.[39] Changes to Australia's Constitution, as well as the gradual development of Australia's constitutional independence from the United Kingdom, have all been secured in conformity and continuity with these provisions and fundamental principles.[40]

Finally, the preamble to the *Constitution Act* refers to the Constitution itself. Just as the Commonwealth was established by the authority of the British Parliament, it was also established *subject to the Constitution*. The Constitution of the Commonwealth of Australia is the primary source of positive law under which the Commonwealth was established and continues to operate to this day. The principle of the rule of law ensures that all Australian institutions of government must operate in accordance with the law – ultimately, the law of the Constitution. The Australian Constitution is not, however, the only source of fundamental law which contributes to the establishment and regulation of the Commonwealth as a federation of six constituent States. Each of the States has its own constitution which continues to operate subject to the Commonwealth Constitution.[41] Indeed, Australian constitutional law consists not only of the Commonwealth and State constitutions, but also a whole range of fundamental British statutes, along with the entire body of constitutional rules and principles derived from the common law of England,[42] including those rules and principles which regulate the legal relationships between the United Kingdom and its former colonies and dominions, now together members of the British Commonwealth of Nations.[43] To understand Australian constitutional law properly and well, it is important to have an appreciation of this wider historical, political and legal background.

2 British constitutionalism

The British constitution is the result of a long evolution.[44] Its primary institutions, the Crown, the Parliament and the Courts, took centuries to develop into their recognisably modern forms. Relatively little is directly known of the legal

38 Commonwealth Constitution, s 128.
39 Commonwealth Constitution, s 51(xxxviii).
40 See *Statute of Westminster 1931* (UK), *Statute of Westminster Adoption Act 1942* (Cth), *Australia Acts 1986* (UK) and (Cth).
41 Commonwealth Constitution, s 106.
42 Sir Owen Dixon, 'The Common Law as an Ultimate Constitutional Foundation' (1957) 31 *Australian Law Journal* 240.
43 Bruce McPherson, *The Reception of English Law Abroad* (Supreme Court of Queensland Library, 2007).
44 Michael Rush, *Parliament Today* (Manchester University Press, 2005), 26 remarks: 'Parliamentary government in Britain is the product of a long and complex historical process. It has no clearly defined origins and its development was not continuous, or regular, or inevitable'.

customs of the Brittonic peoples of early Britain, save that which can be inferred from archaeological evidence or derived from the written observations of the occupying Romans, such as Julius Caesar, who described the priestly-judicial functions of the druids.[45] Somewhat more is known of the legal practices of the invading Germanic tribes, especially as Anglo-Saxon kings began from the beginning of the seventh century to produce written laws, often under the guidance of Christian bishops.[46] Like most Celtic and Germanic rulers of the time, it was the practice of early British kings to issue laws and to govern their domains with the advice of a group of powerful councillors or *witan* ('the wise'), the meeting of which was called a *witenagemot*. This practice, though variable, continued after the several Anglo-Saxon kingdoms were consolidated into the one realm of England, particularly under Alfred the Great (871–99), Edward the Elder (899–924) and Æthelstan (924–39).

The written laws of the Danish king Cnut (1016–35) and of Edward the Confessor (1042–66) are prime sources for our knowledge about the customary laws and practices of the time. Like Alfred's earlier collection of 'dooms', they presupposed a rich and complex variety of local customs and practices which it was the purpose of the written laws to organise, consolidate and moderate, such as through the Christian preference for showing mercy and accepting monetary compensation instead of exacting personal vengeance for wrongs.[47] But the extent to which the laws and judgments of early English kings shaped and controlled local customs was limited, for communal justice or *folcriht* ('folk-right') remained the basic law for many centuries, administered on the scale of village assemblies, as well as among the progressively larger groupings of 'tithings', 'hundreds' and 'shires' (or 'counties').[48] The feudal system, particularly after the Norman Conquest (1066), introduced yet another set of courts, based on the idea that every 'lord' held court for his 'vassals', again extending from the smallest local manor through to the court of the king himself. In this context, the provision of justice through the king's courts – especially in matters of violent crime against the 'king's peace' and to remedy miscarriages of justice in local or feudal courts – was a primary means by which the authority of English kings penetrated more deeply into the society. Another important instrument of royal influence was the king's appointment of 'reeves' to act as his local officials in the various manors, boroughs, hundreds and shires of the country; the king's control of the shires became particularly strong, and the 'shire-reeves' (or 'sheriffs') became among the most important officers in the country.[49]

As one scholar has recently observed, the early Anglo-Saxon *witenagemot* 'were often large in size, geographically and socially diverse in composition, and

45 Julius Caesar, *The Gallic Wars* (W A McDevitte and W S Bohn trans, Harper, 1869) bk 6, ch 13.
46 See Benjamin Thorpe (ed), *Ancient Laws and Institutes of England* (Cambridge University Press [1840] 2012).
47 J H Baker, *An Introduction to English Legal History* (Butterworths, 4th ed, 2002) 3.
48 Ibid, 6–8.
49 Ibid, 9.