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In 2012, Thomas Mann and Norm Ornstein wrote of a paralysed US legislative branch, citing a major source of dysfunction as a “serious mismatch between political parties, which have become as vehemently adversarial as parliamentary parties, and a governing system that, unlike a parliamentary democracy, makes it extremely difficult for majorities to act.”¹ They went on to cite Austin Ranney, who over sixty years ago argued that Westminster-style parliamentary parties “would be a disaster within the American constitutional system, given our separation of powers, separately elected institutions, and constraints on majority rule that favor cross-party coalitions and compromise.”²

In its own constitutional conventions, from 1891 to 1898, Australia modelled large portions of their federalist government on the US Constitution, and is perhaps the most successful example of a fledgling nation borrowing extensively from the US Constitution and having a functional government result, creating, like America, “a successful federation of former British colonies under a written Constitution that preserved a balance between State and Federal powers.”³ Yet despite

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² Ibid.
sharing so many fundamental federalist principles with the US, Australia's Constitution also embraces elements of the Westminster system – such as parliamentary-style parties and a responsible ministry housed within the legislative branch – without exhibiting the same dysfunction currently seen in the American system. This essay seeks to identify what it is in the US Constitution that causes America's government to grind to a halt when the parties begin behaving like parliamentary parties, while Australia's government, so similar to the United States' in its adoption of federalism, is able to function with a parliamentary-style system.

Australia's founders in 1890, writes John S.F. Wright, were “conscious of a need to incorporate American institutions within the new commonwealth, but to also adapt them to Australian circumstances.” Through an examination of which elements of the US Constitution the Australian framers expressly changed or excluded from their own Constitution, it is possible to identify elements that are either too idiosyncratic to America to allow for transfer or that were identified as problematic prior to 1898. This essay will first outline the influential role of the US Constitution in the drafting of the Australian Constitution and how the US Constitution was approached by the Australian framers. The paper will then identify similarities in the social, political, and geographical environments that brought about each constitution, leading to a summary of the major features that Australia adopted from the US Constitution. It will then outline the differences in environment between America in the late 18th century and Australia in the late 19th century, identifying the philosophical differences between Australia's and America's framers. This will allow us to examine why Australia chose not to adopt certain elements of the US Constitution and, consequently, why these elements are idiosyncratic to the history and philosophy of America. Finally, by examining contemporaneous American responses to Australia's Constitution we will gain further insight into the attitudes of Americans towards their own Constitution.

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There were a handful of men among Australia’s framers familiar with US history and institutions who were able to bring in-depth insights of America's Constitution and political system into the Australian drafting process. Andrew Inglis Clark was, in particular, “probably the only one who really comprehended many of the all-important nuances of the political contexts which have always been a necessary background to really understanding the working of the United States Constitution…” 5 In contrast, most other Australian framers were familiar with the US Constitution only through James Bryce's *The American Commonwealth*, published in 1888, and had themselves not personally experienced the ordering of American governmental affairs, nor had any great correspondence with Americans. As such, *The American Commonwealth* became a focal point of the Conventions’ deliberations. 6

John Reynolds wrote in 1958 “That our Constitution so closely resembles that of the United States is due in a very large degree to the influence of Mr A. I. Clark.” 7 Whilst most of our framers were aware of American Constitutional institutions through the writings of Bryce, divorced as they were from the historical and philosophical context behind those institutions, it still took someone with knowledge of, and reverence for, those institutions on a philosophical level to push for them to be in Australia's Constitution. As such, Australia's departures from the US Constitution can be seen not just as pragmatic departures but also philosophical ones, largely due to the representation of American history and philosophy in the Australian conventions through the presence of AI Clark and a few others which were then tempered and deliberately resisted by the rest of the assembly. *The American Commonwealth* was kept on the table for reference during the conventional debates and at the Melbourne convention was cited far more commonly than any other work, with 70 citations recorded. By contrast, *The Federalist Papers* themselves – a series of essays that speak, to

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6 Ibid.
a large part, to the philosophical arguments in favour of republican federalism – were referenced only 25 times. 8 By far the most important precedent for Australia's framers were the United States, and Bryce's work was the chief point of access and elucidation for the majority of them. 9 It "provided guidance as to the operation of federalism in a general sense and illustrated the pitfalls and benefits of particular constitutional arrangements." 10

Wright argues that Bryce's particular approach to the US Constitution was suited to the Australian framers' approach to their own Constitution. Contrasting himself with Tocqueville, Bryce argued that Tocqueville's conclusions were based "not so much on an analysis of American phenomena as on general views of democracy which the circumstances of France had suggested." 11 Bryce, rather, sought to "paint the institutions and the people of America as they are," describing the function of U.S. institutions in isolation from their philosophical origins and development. 12, 13 Consequently, the Australian framers, after reading Bryce, were predisposed to make only an assessment of what worked and what didn't in the US Constitution, almost completely divorced from a reading of why it ought to work and what the intended outcomes were.

According to Wright, Bryce had interpreted American Government in Darwinian terms, "implying that environmental conditions had controlled both the intellectual and political development of American government." 14 Reviewing the book in 1889, Woodrow Wilson had both praise and criticism for Bryce. He wrote that Bryce had approached the US Constitution in the "practical, every-day light of comparative politics" and identified Bryce's chief contribution of the work as his impartial description of the political institutions that had developed in America: "The forms and principles of the federal system are explained both historically and practically and are

10 Ibid, 363.
12 Ibid.
14 Ibid, 110.
estimated with dispassionate candor.”¹⁵ Yet he also cautioned that if philosophical factors were ignored, there could be nothing particularly novel about American institutions when compared to British institutions.¹⁶ They became “simply the normal institutions of the Englishman in America.”¹⁷

It is this interpretation of US Institutions, divested of their philosophical and historical origins, which formed the framework through which Australia's framers adopted these institutions. Absent of the philosophical reasoning behind the US Constitution, they were able to adopt only those elements that would be practically appropriate for Australia. Most often, those elements that Australia chose to adapt came about due to similarities in Australia's circumstances and environment to America's.

Take, for instance, Woodrow Wilson's argument that Bryce's view reduced America's institutions to “simply the normal institutions of the Englishman in America.” Jack P. Greene points out that many of the individual legal protections in America's colonies did not change before and after the US revolution,¹⁸ indicating that, to some extent, America's tradition of the protection of individual rights has its ancestry in the principles of English common law.¹⁹ In this context, that America's legal institutions can be seen as an American adaptation of English institutions, so too can Australia's legal institutions be interpreted as simply the normal institutions of the Englishman in Australia. If the institutions of the English functioned in America when suitably adapted, then Australia, being also a 'country of Englishmen', would be able to adopt those elements in instances where Australia's and America's environments were similar.

There are many similarities in the environments and conditions of Australia's and America's founding. Both were founded predominantly by English emigrants. Both nations occupy whole

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¹⁶ Wright, "Anglicizing the United States Constitution,” 110.
¹⁹ Ibid, 95.
continents, each of similar size, meaning that stronger localised governments would better serve a unified, federal government than in a smaller nation. Due to the concentration of Australia's population in each of the colonies' capital cities, and because the cities were separated by such vast distances, the centralised Canadian model would not do for Australia. As such, America's model served as the best example, for Australians, of federalism over a continent.

As in America’s original thirteen colonies, pre-federation Australia consisted of both powerful colonies and less influential ones. The smaller colonies wanted full recognition of states' rights under federation, arguing that “a stronger House of Representatives would advance the interests of the large colonies at the expense of the smaller ones.” This situation is analogous to the circumstances and conflicts embodied in America's Great Compromise.

Pre-federation Australia experienced a shift towards democracy as the arrival of free emigrants from England grew in number, and this landless emigrant majority sought to upset the balance of power with those wealthy land-owners and squatters who had arrived before them. This dynamic bears a resemblance to the formation of the “latently republican” local governments in pre-revolutionary America, where societies were developing absent an aristocracy or legally established system of ranks, even long before the revolution. When James Bryce visited Australia in the early twentieth century, he attributed the speedy arrival of democracy in the colonies to sociological factors. Whereas ancient social and economic traditions had frustrated reform of the British Constitution, the early free immigrants to New South Wales had, like Americans, been without a tradition of deference to social rank.

In Federalist #39, Madison offered an analysis of the US Constitution that mediated between two views on the source of sovereignty in American federalism. Each view held that there

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20 Wright, "Anglicizing the United States Constitution,” 119.
could only be one sovereign entity within a particular system, but each view differed as to where that sovereignty rested – with the people of the nation as a whole; or with the several individual states. As such, Madison suggested that the US Constitution consisted of both 'national' and 'compactual' elements.25, 26

Australia's framers were familiar with this debate as Bryce had couched it in terms consistent with Madison's: a “Commonwealth of commonwealths, a Republic of republics, a state which, while one, is nevertheless composed of other states even more essential to its existence than it is to theirs.”27, 28 Richard Chaffey Baker, an influential Australian framer, concurred with this view. Though he preferred that sovereignty should be derived from the nation's people, his chief objective was the increase of powers of self-government for the Australian people, and believed this would best be served by the delegation of those powers to both a federal government and the pre-existing colonial governments. For Baker, equal representation of the people in the House and the states in the Senate, in line with the US model, was seen as 'the very essence' of federation.29

Australia's adoption of federalism in this manner was shaped profoundly by the US interpretation of federalism, as this was the system best suited to Australia's needs.

Although similarities between their respective environments resulted in Australia adopting the federalist principles of the US Constitution, the differences between their environments resulted in significant adaptations to and departures from the US Constitution. As Walter G. Beach (an American observer) noted in 1899, Australia was a “notable instance of the formation of a federation without immediate external danger upon the people.”30 One of the chief differences between the two environments was that America, at the time of its founding, had recently won

28 Aroney, "Imagining a Federal Commonwealth,” 272.
29 Ibid, 283.
independence from England and was wary of further and continued threats to its security. Australia's founders recognised this, John Cockburn stating that in 1787, America was “surrounded by enemies, north and south, and the navigation of their rivers was impeded by foreign interference. … their case was altogether different from that which presents itself to us.”

Having fought a war to free themselves from sovereignty to a distant monarch, America was also seeking to distance itself from the monarchic and aristocratic institutions of England, whereas Australia was still nominally under British control. Under that circumstance, it makes sense that Australia adopted a parliamentary system that resembled the party system of their 'rulers', as it had been informally passed down through the formation of the colonial governments; whereas America sought a system of checks and balances predicated on compromise and the frustration of both factional influences and popular will to exert total authority, in rebellion against the idea that too much power should be concentrated within any one person or institution.

Andrew Inglis Clark “saw a continuity between the English Revolution of 1688 and its resulting Bill of Rights and the American Revolution of 1775 and the consequent “United States Constitution and Bill of Rights.” Australia, a nation founded from a position of peace and stability, has no bill of rights, although one was drafted but not included in the Australian Constitution. The US Constitution's Bill of Rights and its greater emphasis on the protection of individual freedoms can be attributed to its struggle for independence, which led to its greater sensitivity to potential infractions upon these freedoms.

America's heavy reliance on checks & balances and a separation of powers may be seen as another result of this major difference in environment. America was the first modern nation to attempt republican federalism on a large scale. Many of the choices that Australia made differently to America, such as the direct election of Senators and the refusal of an executive external to the

legislative branch, hinged upon being able to observe how those institutions had operated in America over the previous 100 years. So much of what is idiosyncratic to the US Constitution is simply on account of their having gone first. Their only prior, comparable, contemporaneous example of republican and federalist ideas was their own Articles of Confederation, a hastily constructed wartime document so glaringly ill equipped to govern a confederation of colonies (lacking, as it did, the ability to enforce legislation) that it led to major economic and security issues within less than a decade and only the broadest lessons of federalism could be discerned from it as a negative role model.

The Australian Constitutional debates took place over seven years and their Constitution was drafted by “experienced parliamentarians, honed in the practice of drafting legislative proposals, amendments, etc., at great speed, all whilst negotiating the sometimes chaotic colonial parliaments of Australia.” These 'parliamentarians' had behind them a political tradition of stable colonial self-government of almost fifty years and were more practiced in the art of parliamentary democracy than even the members of the British Cabinet in the House of Commons. Contrast this to the American experience, where they had recently come out of a war and were compelled to form a largely new Constitution over a period of only a few months. By comparison, the Americans were winging it.

In keeping with the practical scientific spirit of the late 19th century, Australia's framers “approached the drafting of the federal constitution as if it were a professional, even quasi-scientific discipline.” In this sense, Australia's founders were very much unlike the American founders of the previous century, “not interested in establishing whether the basis of government lay in a social contract, or whether a mixed form of government was preferable to either a monarchic, a

33 Castles, "The Voyage of the 'Lucinda'," 278.
democratic, or an aristocratic regime,” as the Americans were.36 For the Australians, “this old period of philosophical debate had closed,” whereas for Americans, their engagement with these choices and the political philosophy behind their approach formed the basis of their Constitution.37 America's Constitution is idiosyncratic to the debates over democracy and republicanism that were being held at that time.

Beach also recognised these philosophical differences. He noted that in Australia's conventions the example of the United States was quoted on nearly every subject, and that there was a strong tendency to be guided by the US Constitution in areas such as the question of a federal supreme court, the relative position of the two legislative houses, the method of electing senators, money bills, and state equality. But Beach also recognised that “on many other points the disapproval of our system was marked; and the federal type itself was adopted, not so much because of our example, as because the conditions of Australian political life demanded it.”38

The American framers’ approach towards government can be seen in Baker's objections to the relationship between the Executive and the Legislature in the US Constitution:

“The administration does not even work as a whole. It is not a whole; it is a group of persons each individually dependent on and amenable to the President, but with no joint policy and no collective responsibility; its branches are unconnected – their efforts are not devoted to one aim, do not produce one harmonious result.”39

Whereas Australia desired a harmonious result, the US framers, by contrast, concerned as they were with the “tyranny of faction”, sought to avoid situations where a harmonious result could be too easily attained and crafted a Constitution that did not necessarily allow for the efforts of their

36 Ibid, 113-114.
37 Ibid, 114.
various branches to be 'devoted to one aim'.

America's employment of extensive checks and balances can also be viewed in context of their free standing as an independent nation. Australia's framers “faced the position that they were going in for absolute legislative independence for Australia as far as it could possibly exist consistent with allegiance to the Crown, and also consistent with the power of the Imperial Parliament to legislate for the whole Empire when it chose.” America's federal government, formed without deference to a legislative power above it, required greater internal stability, in the form of balancing and diffusing power between a greater number of branches.

Over the course of Australia's conventions, the Senate moved away from the American model of republican checks and balances and more toward the utilitarian ideal of democratic participation and review. In debate over money bills, the Senate's powers were defended in terms of the chamber's lesser connection with the national people, rather than on the basis of the American precedent. This supports the notion that the US Constitution is more grounded in the republican philosophy that all men oscillate between virtue and corruption than in a utilitarian ideal. This balance in the US Constitution away from utilitarianism, as a whole, may account for why the US Government is experiencing such partisan gridlock today. When the political actors within the system begin to behave in an ideologically rigid manner rather than a utilitarian one – i.e. failing to compromise within a system that, due to its structured lack of utilitarianism, is predicated upon compromise – a system already weighted against utilitarianism will struggle to function.

Beach noted that Australia's adoption of the cabinet system – housing a responsible ministry in the House of Representatives – afforded more power and influence to the lower house, writing that “the house to which the ministry is responsible must, in the nature of things, be the ruling

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42 Wright, "Anglicizing the United States Constitution,” 128.
43 Ibid.
44 Ibid, 125.
Evidence of the reasons behind Australia's willingness to give greater influence to their lower house may be found in Bryce's *American Commonwealth*: “American politics have never turned upon an antagonism between these two sets of commonwealths ... although small states might be supposed to be specially zealous for States' rights, the tendency to uphold them has been no stronger in the Senate than in the House.” Australians were able to observe that there was no less likelihood of larger states than smaller states to want to uphold states' rights, so they could afford more power to their lower House by placing the formation of Government there. The US House of Representatives and US Senate are afforded equal power largely due to the American framers' commitment to the principles of federalism and the maintenance of an equal balance between the people's rights and states' rights. In the Americans' view, the existence of an executive branch external to the legislative branch is necessary to ensure that the two houses of Congress retain equal power and thus maintain the sanctity of The Great Compromise, as alluded to by Beach: “Substantial equality between the two legislative houses is possible under our system, but the cabinet system makes this quite impossible.”

Through this example it can be argued that America may have arranged things differently had they had any like contemporaneous examples to observe, such as Australia had. America's more dogged adherence to a purer federalism, embodied in the Great Compromise, may be seen as a product of their being the first large modern federalist nation. Indeed, the United States passed the 17th Amendment to their Constitution, allowing for the direct election of senators, twelve years after Australia ratified its own Constitution, wherein the method of the election of senators was left to the incoming federal government to determine. (The first Australian government opted for the direct election of senators, as was intended.) This is not to say that the United States were directly following Australia's example, but it does show that they did modify their own Constitution in line

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with more modern federalist principles being practiced elsewhere on the globe.

Further to the election of Senators, Australia almost departed from the American model of large-scale elections, not wanting to employ state-sized electorates for the election of Senators on the belief that “enlarged electorates were riddled with 'evil' consequences.” Edmund Barton, president of the 1897-1898 convention, “acknowledged that enlarged electorates had originally been introduced into the United States Constitution 'to relieve the minds of the electors of all local, petty, and parochial interests.'”49 Whereas Australia's framers wanted to enhance democratic participation and saw large electorates as a barrier to this, James Madison believed that ordinary people were incapable of electing suitable political representatives, so he “argued for large-scale democratic elections in order to diminish participation and preserve republican liberty,”50 an argument very much grounded in philosophy. America's employment of large-scale elections is another element that serves its republican ideal over utilitarian democracy.

Australia rejected the American form of executive, opting instead for responsible ministry and a British-style cabinet. Bryce had written that America had rejected the British-style cabinet on the account that “they could not adopt it because they did not know of its existence. ... But as the idea never presented itself, we cannot say that it was rejected...”51 But Baker asserted that the rejection of the British-style cabinet was “to keep the Executive entirely apart from and uncontrolled by the Legislature. They were also greatly afraid of giving the President or his Ministers any opportunity of corrupting the Legislatures.”52 He goes on to write that the American-style executive was crafted specifically to avoid a resemblance to the British model, and that the care taken to demonstrate this in The Federalist Papers shows the state of public opinion.53 Whether Bryce or Baker is correct, the existence of a unitary executive in a branch of government

49 Ibid, 126.
50 Ibid, 125.
52 Baker, The Executive in a Federation, 10.
53 Ibid, 11.
separate to the legislature can be traced to historical context – either to the newness of the British cabinet or to the specific anti-British sentiment in America at the time. Australia was dealing with no such circumstances during its constitutional conventions and ratification.

James Lee-Steere, a delegate at the 1891 Australian convention, said that “Bryce, in his history, says that there has never been any serious deadlock between the two houses. There are often conflicts between them, but they are invariably settled by a compromise.” At the Sydney session of the 1897 convention it was said that “deadlock provisions were not necessary in the United States Constitution because the executive was not directly a party to the deadlock,” and Bryce was invoked, as he had warned in *American Commonwealth* that “the lack of a deadlock procedure led to more serious consequences where the British-style cabinet system existed.” Consequently, a means to resolve legislative deadlocks – the double dissolution election – was introduced into the Australian Constitution, while still none exists in the US Constitution. The result is a more functional Australian government whilst the US federal government has often experienced deadlocks throughout its history, occurring with increasing regularity in recent years.

This may be seen as one of the chief reasons the US Constitution falters with parliamentary-style parties. America's framers, through the use of checks & balances, and multiple points of veto, would have avoided a means for resolving legislative deadlocks as this could foreseeably have opened the door to factional influences using it to push legislation through. Such a constitutional system is appropriate when there is a political culture amenable to compromise, but it requires a political body that adheres to the philosophy and spirit with which the Constitution was written. When parties act as ideological blocs and the exact letter of the Constitution is followed absent this spirit of compromise and cooperation, it can, as noted by Mann & Ornstein, cease to function. Being a document grounded in republican ideals rather than democratic utilitarianism, for the US

Constitution to function it is necessary that American politicians operate in the same spirit of republican idealism with which it was written.

The closest of the US Constitution's Amendments that ever made it into the Australian Constitution were clauses 80, 116, and 117, dealing with right of individuals to be tried by a jury of their peers, the right to freedom of religious observance, and the citizen's right to equality throughout the states. All three clauses in the 1891 draft were taken directly from the US Constitution, however each clause was later modified substantially.\(^{56}\) Clause 117 was rejected precisely because it so closely resembled the United States' 14\(^{th}\) Amendment and, given the circumstances surrounding its creation, Australians, as noted by Cockburn in the Melbourne Convention in 1898, did not want to pay “the compliment of imitating it here.”\(^ {57}\) Yet for the most part, Australia's founders believed they were forming a government “in the context of an advanced age of civilization, and they criticized the American language of natural rights as anachronistic...”\(^ {58}\) Both nations valued religious freedom, trial by jury, and equality for its citizens, but Australia, its colonies already governing themselves successfully for decades, had, through precedent, found no need for a Constitutional enforcement of these 'natural rights'. Australia, whilst adopting many of the structural federalist elements within the US Constitution, explicitly considered and then abandoned language to do with the enumeration and protection of individual rights. Due to the nature of America's origins as a society born through revolution but also infused culturally with the traditions and protections of English common law, the protections of these and other rights in their constitution – and the notion that these rights are still sufficiently prone to assault that they require constitutional protection – still shape them as a people and as a nation.

Beach wrote of Australia's new Constitution that “its legislation on economic and social

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\(^{56}\) Wright, "Anglicizing the United States Constitution,” 122.
\(^{58}\) Wright, "Anglicizing the United States Constitution,” 122-123.
issues will suggest valuable and suggestive comparisons with our own.” From his contemporaneous assessment of Australia's Constitution from a distinctly American perspective, some insights into America's view of their own Constitution can be gleaned. Whilst noting that the type of federalism that Australia adopted was in line with the “American idea,” he points out that “the powers delegated to the Australian federal government are much fuller” than is the case with America, indicating that America's Constitution favours greater power for its individual component states. Through these “large and radical” powers given to the central government of Australia, he extrapolates that “the advance of the Australian colonies in the direction of 'state socialism' has been incorporated into the new federal plan of government.” Smaller powers, by comparison, for the US federal government indicate a deference towards states’ rights in the US Constitution. His reference to 'state socialism' marks it as being distinctive from America's experience, reinforcing America's commitment towards Laissez-faire economics and their inherent distrust of both state control and concentrated power.

In the drafting of its Constitution, Australia examined and borrowed certain structural elements from the US Constitution but “omitted several key philosophical principles of the US Constitution, namely, natural rights, the separation of powers, virtue, corruption, and checks and balances.” Wright also notes that “Despite its similarity to the US Constitution, modern commentators have noticed that the federal component of the Australian Constitution exhibits a curiously democratic character.” Australia produced its Constitution by examining American political structures whilst excluding the abstractions of American history from the process. By examining what Australia, a nation similar to America in areas such as its geographic size and its English heritage, did not adopt

60 Ibid, 670.
61 Ibid, 680.
63 Ibid.
from the US Constitution we have been able to identify those elements of its Constitution that are peculiar to the United States, such as a commitment to the protection of individual rights; a commitment to republican principles through a balanced federalism; and, most importantly, a philosophical commitment to republican ideals. What is idiosyncratic to America's Constitution is not just the way its political structures are arranged, but the richness of America's history. Its Constitution is not just structurally singular – the way in which it is approached and enforced by its own people, infused with passion for the philosophical ideals and lessons of America's revolution, make it unique amongst Constitutions.

The US Constitution describes a system replete with multiple checks, balances, and veto points. That the republican spirit of America's founding, not just the structure of the institutions detailed within it, must be adhered to in order to avoid legislative gridlock goes some way towards explaining why the US Government is in such a state of dysfunction today, relative to any prior time in its history.
Bibliography


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