JUDICIAL REVIEW IN THE AUSTRALIAN FEDERAL SYSTEM: ITS ORIGIN AND FUNCTION

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Dr Galligan examines the origin of judicial review under the Australian Constitution through an analysis of the Conventions and Conferences preceding its drafting. A political scientist, he disputes the claim that there is no basis for judicial review in the Australian federal system and argues that the intention of the founders, influenced by Inglis Clark, was to create a powerful American-style court primarily to interpret the Constitution in the resolution of federal disputes. As a case study of the founders' intentions he considers the debates and "solution" of the question of control of Australia's inland river system.

The High Court is a powerful branch of the Australian federal government. In a parliamentary system such as Australia's where the efficient executive is, by the conventions of responsible government, simply the leadership of the legislature, the judiciary provides the basic institutional check on majority rule. The Court can disallow executive and legislative initiatives that go beyond the limited powers of these two branches of government. More importantly, the Court defines the limits of federal and State powers and is the final arbiter in jurisdictional disputes. By making key decisions at important moments of history, the Australian High Court has kept the nation's dynamic political and economic forces within constitutional limits: sometimes it has adjusted the Constitution; at other times, as during the two world wars, it has virtually suspended it; and quite often it has overruled challenging legislation, forcing the challengers, frequently federal Labor governments, to moderate their objective and modify their policies. The Constitution forms and moulds the political forces of the nation. By interpreting and applying the Constitution, the High Court is the active agent in that process. Judicial review is a crucial part of the Australian federal system.

In this article it is argued that judicial review was both intended by the Australian founding fathers and is an integral part of the structural logic of a federal system. The article examines the origin and function of judicial review, not in terms of its exercise by the Court in striking down Commonwealth and State legislation, but from an analysis of the founders' design and intention and in terms of the structural logic of the Constitution.

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Disputed Origin and Basis

Although judicial review is an established part of the Australian Constitution, there is some dispute over its origin. The Australian cum Canadian constitutional scholar, Edward McWhinney, has said:

> So far as the institution of judicial review of the constitution exists in the various Commonwealth Countries today as an effective limitation on the claimed sovereign law-making powers of their legislatures, it is a vestigial survival of the Privy Council's old judicial hegemony in relation to the Overseas Empire, rather than a direct derivation or borrowing from American constitutional experience.[1]

This may be a correct generalisation of Canadian experience but it does not hold for Australia. An article on the 1975 constitutional crisis claimed more generally that "While the influence of American federal theories is obvious in the provisions for sharing power between the national and state governments, the document is above all a summary of British experience".[2] Australia's greatest judge, Sir Owen Dixon, rejected the view that the predominant influence on the Australian Constitution was British. Dixon claimed to belong to a court "fashioned upon the model of the Supreme Court of the United States", and described the Australian Constitution as "framed after the pattern of that of the United States".[3] Dixon was right, as we shall see directly.

There is also dispute over the basis of judicial review in the Australian Constitution. Despite the fact that the High Court has been prominent and active in deciding major political issues, it has never been seriously threatened and has not had to justify its office. While judicial review is a fundamental part of the Australian political system, judges have usually taken their role for granted or appealed to the justificatory reasoning of *Marbury* v. *Madison*[4] as self evident and sufficient. For instance Mr Justice Fullagar asserted in 1951 that "in our system the principle of *Marbury* v. *Madison* is accepted as axiomatic".[5] These were not empty words, as Fullagar J. was then sitting with the Court that struck down legislation banning the Communist party even though the anti-Communist legislation implemented a key plank of the Menzies Government's successful election platform. Likewise Dixon maintained:

> To the framers of the Commonwealth Constitution the thesis of *Marbury* v. *Madison* was obvious. It did not need the reasoned eloquence of Marshall's utterance to convince them that simply

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[1] McWhinney, *Federal Constitution-Making for a Multi-National World* (1966) 9.
[2] Archer and Maddox, "The 1975 Constitutional Crisis in Australia" (1976) 14 Journal of Commonwealth & Comparative Politics 141, 147.
[3] Dixon, "Two Constitutions Compared" in *Jesting Pilate* (1965) 100, 101.
[4] (1803) 1 Cr. 137.
[5] *Australian Communist Party* v. *Commonwealth* (1951) 83 C.L.R. 1, 262.

> because there were to be legislatures of limited powers, there must be a question of ultra vires for the courts.[6]

Legal commentators, for the most part, have followed the judiciary in taking for granted the Court's most important political function. Recently, Geoffrey Lindell pointed out that "many of the text books and articles which deal with judicial review of legislation seem to assume, rather than discuss in any great detail, the proper basis for the doctrine of judicial review".[7]

Professor Lane is one leading constitutional scholar who has probed the basis of judicial review in the Constitution and found it insufficient. Lane says "I can find no express constitutional basis for such a doctrine".[8] He rejects the reasoning in *Marbury* v. *Madison* on the grounds that it slides over from the ordinary role of courts to an unproved federal role. Lane concludes: "Thus, the best that I can offer as a basis for judicial review by the High Court is the historic practice of the United States Supreme Court, the Privy Council and pre-Federation Colonial courts."[9] This is a rather vague foundation for such a potent and crucial political procedure. Lane does acknowledge that "what was introduced by history has now been sanctified by prescription. Parliament and people throughout this century have tacitly acquiesced in the role assumed by the High Court in the government of the Commonwealth".[10] Professor Lane's position on judicial review in the Australian Constitution can be summarised in three propositions: (1) judicial review has no express constitutional basis; (2) it was introduced by history and is now sanctioned by the tacit acquiescence of the people and Parliament; and (3) it is a role assumed by the High Court in the government of the Commonwealth. If Lane is right the important function of judicial review has been built on insufficient foundations.

In response to Lane, Lindell has argued that judicial review, and moreover the duty of courts to exercise judicial review, is properly based in law. Lindell's position relies on the common law role of judges and "the general duty of a court to apply and interpret all laws",[11] including the Constitution. The extensive evidence that Lindell gleans

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[6] Dixon, "Marshall and the Australian Constitution" in *Jesting Pilate* 166, 174.

[7] Lindell, "Duty to Exercise Judicial Review" in Zines (ed.), *Commentaries on the Australian Constitution* (1977) 150, 186. Controversy over the justiciability of aspects of the 1974 double dissolution has given the question of the proper basis and scope of judicial review an immediate practical relevance. This is discussed by Zines, "The Double Dissolution and Joint Sitting" in Evans (ed.), *Labor and The Constitution 1972-1975* (1977) 229.

[8] Lane, *The Australian Federal System* (1972) 913. Geoffrey Sawer correctly points out that the Australian founders had two great models in the United States and Canadian Constitutions. *Australian Federalism in the Courts* (1967) 76.

[9] Lane, *op. cit.* 918.

[10] Lane, *op. cit.* 919.

[11] Lindell, *op. cit.* 183. Lindell's argument in support of judicial review is essentially the same as that of Marshall.

from English and Australian case law establishes that judicial review has deeper roots in law than Lane acknowledges. Whether his argument meets the main thrust of Lane's objection that judicial review is, in the last analysis, a function that judges have usurped for themselves depends on the view one takes of the basic character of the Australian Constitution. If the Constitution is essentially just another statute passed by Westminster and deriving its authority from that source, then Lindell's analysis that relies on common law principles of interpretation would seem to be conclusive.[12] If this is a legal "fantasy" and there is an essential difference between the Constitution and an ordinary statute, as Lane claims[13] and I tend to agree, then the gap that Marshall sought to bridge in *Marbury* v. *Madison* remains. Thus, in the author's view, only a systematic study of the structural logic and original design of the Constitution can properly substantiate judicial review and get round the problem posed by Professor Lane.

As Professor Lane points out, Marshall's reasoning in *Marbury* v. *Madison* does slide over from the ordinary role of judges to an unproved federal role. Where the Constitution is silent, judicial proofs must beg the question.[14] Arguments can be advanced on behalf of the federal executive, or legislature, or all three branches of government having the right of interpreting the Constitution in matters that concern them. The Court's deciding the question authoritatively in its own favour already presupposes that the Court has the power of interpreting the Constitution definitively. And that is precisely what has to be established. As Alexander Bickel has pointed out, Marshall's proofs of judicial review are "too strong; they prove too much. *Marbury* v. *Madison* in essence begs the question. What is more, it begs the wrong question".[15]

That Marshall's insufficient argument formally established judicial review in the American federal system is proof of his political finesse and masterly rhetoric. In the words of the American constitutional historian, Robert McCloskey, "The decision is a masterwork of indirection, a brilliant example of Marshall's capacity to . . . advance in one direction while his opponents are looking in another."[16] In their own turn the Australian judges have been shrewdly discreet in relying on

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[12] Lindell argues that "the Commonwealth Constitution . . . derived its legal existence by reason of the exercise of the Imperial Parliament's legislative powers. . . . [and] that courts in Australia are required to perform the same duties in relation to the Constitution as they are required to perform in relation to any other kind of law in force in Australia." *Op. cit.* 165.

[13] Lane, *op. cit.* 915.

[14] Although Lindell does not address himself to this particular issue, the way he sets up his argument that the Court has a duty to exercise judicial review does explicitly assume at the beginning that the Court possesses jurisdiction. *Op. cit.* 150.

[15] *The Least Dangerous Branch* (1962) 2.

[16] *The American Supreme Court* (1960) 40.

Marshall's authority or simply taking for granted their function of judicial review rather than attempting to establish it by their own proofs.

The reasons why judicial review was not spelt out in the various constitutions are less clear. In the Australian case, as we shall see, and probably also in the American, judicial review was implied by judicial power and the paramountcy principle. We can speculate that there were other reasons of political expediency and prudence. To spell out judicial review would violate that discreet reticence which tends to disguise the court's delicate political function and to enhance its ability to exercise such a function. Judicial review is a political function, albeit of a peculiar kind, and it is exercised by a legal body. That implies a certain tension or contradiction. The court performs the key function of ensuring federal paramountcy in enumerated areas while at the same time confining it to those areas. That is an absolutely crucial function in a federal system. It cannot be given to either level of government, national or State, because to do so would make that level superior over the other and thereby destroy the federal balance. Moreover, the adjudication of federal disputes is not left immediately to the people, save in the exceptional instances of constitutional amendments, because the people are generally considered to lack the qualities necessary for its proper exercise.[17]

Thus the court is given the important function of federal adjudication for two reasons: negatively, because it cannot prudently be given to any other body and so the court assumes it by default; and positively, because the court possesses institutionalised attributes derived from its legal character which fit it for such a role. Those attributes include independence, learning, experience and reflection. The court's arbitral role is a very delicate political power that has to be exercised in a judicious manner. The court's legal characteristics tend to disguise the political nature of the role and thereby remove it from a disputatious and charged political atmosphere. The formal procedure of the court tends to narrow the focus of the issue to a manageable form. The full ritual, sober dignity and calm deliberation of the court lend an air of finality and objectivity that plays an important part in legitimating the resolution. Judicial review removes a political dispute to a traditionally non-political arena for resolution. Partisans are forced to transpose their positions from the more passionate rhetoric of political dispute to the neutral rationalisations of the law. In this indirect transposition and calm resolution the exhilaration of the victor is considerably tamed and the disappointment of the loser lessened.

The court then is the arbiter in federal disputes. That clearly is a political function, so in this respect Lane is correct in describing the

[17] Madison makes the classic argument for this position in *Federalist* No. 49.

Court's role as government.[18] But the court's role in constitutional adjudication is not simply government. Its function is governmental or political only in a special sense. The court cannot govern in the normal sense of legislating about a general class of things, nor can it govern with the flexibility of the executive in directing specific actions. Generally speaking it can only decide disputes between parties that are brought to it and that involve conflicting laws. In Alexander Hamilton's famous words, the judiciary has "neither *force* nor *will* but merely judgment", and is therefore the "least dangerous" branch of government.[19]

Since judicial review has no express constitutional basis, it is a truism to say that it cannot be studied directly from the words of the constitutional text or from judicial decisions. But fortunately for judicial review, those are not the only sources of constitutional truth. It does not matter whether judges have given an adequate account of judicial review, provided that the function can be shown to be an integral part of the system's design and structural logic. There is ample evidence in the federation debates and the theory of federalism to establish that judicial review was not introduced by history, as Professor Lane claims, but by the framers of the Australian Constitution who deliberately followed the American model. Likewise judicial review was not assumed by the High Court but was fully intended and clearly specified as an integral part of the federal system. That judicial review is not spelt out explicitly in the Constitution is not evidence to the contrary.

The Founders' Design and Intention

The Australian Constitution was the product of a protracted series of constitutional Conventions that spanned the last decade of the nineteenth century. The Australian founders grafted the American federal system onto the traditional British executive of responsible government. Though federalism was by then a mature and well-tried system of government in North America, it was quite novel to the Australians. As Dixon has pointed out, "In many respects the plan or scheme of government, which we took from the United States and adapted to our British system of ministerial responsibility, involved, not a development of conceptions then current among us and familiar to us, but a departure from them."[20] The fundamental principle of dividing powers between two autonomous levels of government and the corollary of a powerful court to police that division were strange and novel doctrines for the Australians who were nurtured and practised in the traditions of parliamentary supremacy. The federation debates combined political negotiation with an intensive learning process. The Australian founders adopted the American formulation of judicial power and a federal court at the beginning, but only gradually worked out their full implications.

[18] Lane's chapter titled "Judicial Review or Government by the High Court", *op. cit.* 911.

[19] *Federalist* No. 78.

[20] Dixon, "The Law and the Constitution" in *Jesting Pilate* 38, 51.

Presentiments, Melbourne 1890

From the very beginning of the federation discussions, it was asserted that the court would play a vital role in the federal system. At the preliminary Melbourne Conference in 1890, when delegates made only broad and tentative suggestions about the future federation, it was becoming evident that the American Constitution would serve as the model for the Australian, and that the proposed federal court, like the American Supreme Court, would have a larger-than-legal role. Alfred Deakin, the youngest but one of the ablest and best-read of the delegates, who was responsible for the first Judiciary Act thirteen years later, recommended the adoption of an American-style federal judiciary. Drawing upon Bryce's recently published *American Commonwealth*[21] which he described as a first-class "text-book for the philosophic study of constitutional questions" and a "magnificent work", Deakin explained the essential characteristic of the American federal system. The central government, he pointed out, acted "directly and immediately on every citizen of the entire country" in certain specified powers. The judiciary was an important organ of such direct central action. Deakin expressed himself as "glad to think that we shall see a Sovereign State in Australasia which will be able to act directly through its judiciary, and in other ways, on every citizen within its borders".[22] Future Conventions were to adopt Deakin's recommendation for an American-style system and federal court, and to accept Bryce as an authoritative reference.[23]

Andrew Inglis Clark, Attorney-General for Tasmania, spoke immediately after Deakin. He endorsed Deakin's recommendation for an American-style court and spoke more generally about the character of a federal union for the Australian colonies. Clark preferred "the lines of the American Union to those of the Dominion of Canada".[24] He cited the Dominion veto power in the Canadian Constitution as a method of amalgamation antithetical to the federal structure. Clark predicted that the Canadian Provinces would be reduced to the status of municipalities, a view that did not take sufficient account of the strength of regionalism in Canada and the remarkable juridical feat of the Judicial Committee of the Privy Council in legitimating the turn-around of the constitutional division of powers. Clark's evaluation of the American system was more accurate. He attributed the cause of the Civil War to slavery and not to any deficiency in the American federal system. This analysis undercut the Canadian founders' reasons for departing from the American model. According to Clark, the enviable success and prosperity of the American nation were due to its federal system. Local public life and regional differences of custom and industry

[21] Bryce, *The American Commonwealth* (1888).

[22] Federal Conference Debates (1890) 89, 91.

[23] La Nauze, *The Making of the Australian Constitution* (1972) 273. La Nauze records that Bryce's book lay on the official table throughout the proceedings of the 1897-1898 Convention.

[24] Federal Conference Debates (1890) 96, 106.

were preserved within a strong national grouping. Since Australia had the territory and potential for such national growth and at the same time the regional differences and established colonial governments to preclude a unitary system, Clark argued that they should adopt the American federal system. He proposed American bicameralism as the only way round the question of federal finances that Samuel Griffith had raised as the principal difficulty in the way of federation. All in all, the American system appeared tailor-made for the Australian colonies in 1890.

Clark's Influence and the First Draft, Sydney 1891

Inglis Clark's influence on the formation of the Australian Constitution was profound. "[M]ore American than the Americans in his admiration of American institutions", as Bernhard Wise described him,[25] Clark was instrumental in moulding the broad lines, and especially the judiciary sections, of the Australian Constitution to the American federal model. Clark's role in the founding of the Australian Constitution has not always been properly appreciated, nor have the extent and implications of the American political principles in the Australian founding been fully realised.[26] No doubt the former partly explains the latter. We can identify several reasons for this dual neglect. First, Clark's influence on the federal Constitution occurred at the beginning. He did not attend the second round of conferences in 1897-1898 that finally produced the Constitution. Clark tended to lose touch with the federal movement as federation approached. He actually opposed federation in the 1898 referendum because he thought the financial security of the smaller States was not sufficiently protected. He held no public office in the new Commonwealth Government and narrowly missed out on a seat on the original High Court. Moreover, Clark was a shy man who avoided the public limelight; he was a man of ideas rather than a leader of men. Secondly, the High Court's break with the constitutional jurisprudence of the earlier Griffith Court in the famous *Engineers' Case*[27] in 1920 was a break with the old Court's close identification with the American Court and American jurisprudence. At that point the Court broke with its own origins and adopted a rhetoric that has tended to obscure them.

Clark's role was better appreciated by his peers. Bernhard Wise, a distinguished delegate to the 1897-1898 Convention where he was a

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[25] Wise, *The Making of the Australian Commonwealth 1890-1900* (1913) 74.

[26] Important exceptions on whose work the author draws are Reynolds, "A. I. Clark's American Sympathies and His Influence on Australian Federation" (1958) 32 A.L.J. 62; Neasey, "Andrew Inglis Clark Senior and Australian Federation" (1969) 15:2 Australian Journal of Politics and History 1; and La Nauze, *op. cit.* 23-28, 75-76.

[27] *Amalgamated Society of Engineers* v. *Adelaide Steamship Co. Ltd* (1920) 28 C.L.R. 129.

member of the judiciary committee, gave the following glowing account of Clark's influence:

> No one in Australia, not even excepting Sir Samuel Griffith, had Mr Clark's knowledge of the constitutional history of the United States; and, when knowledge of detail is combined with zeal, its influence on a deliberative body becomes irresistible. 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. His speech at this Conference [1890] . . . is interesting as containing the germ of the ideas which dominated the Convention of 1891.[28]

Clark's was the predominant influence on the overall design of the Australian Constitution. Other men such as the Convention leaders Griffith (1891) and Barton (1897-1898) made greater practical contributions towards shaping the instrument and having it adopted, but Clark's influence on its general principles and structure was pre-eminent. Of course, in Samuel Griffith's words, the 1891 bill "was not the work of any one man. It was the work of many men in consultation with one another".[29] And the 1891 bill was itself only the blueprint for the new beginning that was made in 1897. Moreover, as La Nauze points out, Griffith was technically capable of doing what Clark did. But the honour of first drawing up a Constitution to federate the Australian colonies goes to Inglis Clark. Clark circulated his draft to leading delegates before the 1891 Sydney Convention called to frame an Australian Constitution.

As early as 4 July 1876, when Clark gave the presidential address to a small group of devotees gathered at Hobart's Beaurepair's Hotel to celebrate the centenary of the American nation, Clark had advocated American principles. Those principles he declared to be "permanently applicable to the politics of the world and the practical application of them in the creation and modification of the institutions which constitute the organs of our social life to be our only safeguard against political retrogression".[30] Clark had become a champion of Australian federation at about the same time and naturally turned to American principles as a basis for federating the Australian colonies. As we have seen, Clark advocated the American model at the preliminary Melbourne Conference in 1890. Later that year he made the first of three extended trips to the United States, "a country to which in spirit he belonged, whose Constitution he revered and whose great men he idolized".[31] There Clark supplemented his extensive reading in American history and politics with first-hand observations. He met leading Americans including Oliver Wendell Holmes Jr, then a judge of the Supreme Court of

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[28] Wise, *op. cit.* 75.
[29] Quoted La Nauze, *op. cit.* 76.
[30] Quoted Reynolds, *op. cit.* 62-63.
[31] Deakin, *The Federal Story* (1944) 30.

Massachusetts, and began a lifelong friendship and correspondence with him.

Returning to Australia, Clark prepared a draft Constitution that embodied his beloved American political principles. Clark's draft[32] closely followed the American model in its overall federal arrangement, in the division of powers between federal and State governments, in its bicameral legislature with Senate constituted by equal State representation and House elected by majority franchise, and finally in its strong and independent federal judiciary. Clark retained the traditional formulation of executive rule by the Monarch through the Governor-General, but left open the option of having the Executive Council or efficient executive constituted either in the traditional form of responsible cabinet government or in the American cabinet form. Clark's personal preferences were republican and American, but the British tradition was too deeply engrained to be directly challenged on this point.

Clark circulated his draft Constitution to influential delegates before the 1891 National Australasian Convention in Sydney. Clark's draft provided the Convention with a concrete plan that was significant in focusing thinking and general discussion. It also provided the original groundplan for Samuel Griffith's drafting committee.[33] Clark's draft Constitution played a similar role in the framing of the Australian Constitution to that of the Randolph Plan in the 1787 American Convention, although it was not directly debated. Despite a new beginning to the task of drafting in 1897 and innumerable amendments, the final Australian Constitution bears the stamp of Clark and embodies the substance of his first draft and his beloved American principles.

Clark was active in the 1891 Convention as chairman of the judiciary committee, as a member of the constitutional committee and of the select three-man drafting committee. The real work of the 1891 Convention was done in special committees— constitutional, finance and judiciary—after general discussion of broad principles had indicated a general consensus sufficient for such detailed work. "In those few days", report Quick and Garran, "Federation came down from the clouds to the earth; it changed from a dream to a tangible reality. The idea was once for all crystallized into a practical scheme, complete in all its details."[34] This statement overlooks the role of Clark's first draft but it does capture something of the importance of the first official drafting of a constitutional Bill. Clark was chairman of the judiciary committee and dominated its work. He was deputed to draw up a set of resolutions which he did by simply polishing up the judiciary sections from his draft Bill. These were then submitted to the committee and all

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[32] Clark's draft bill is printed as an appendix to Reynolds, *op. cit.* 67.

[33] La Nauze, *op. cit.* 76.

[34] Quick and Garran, *The Annotated Constitution of the Australian Commonwealth* (1901) 129.

accepted, but three of them only with the aid of Clark's casting vote.[35]

The constitutional committee reconsidered Clark's judiciary proposals and the drafting committee rewrote them. Though a member of both committees, Clark was absent with an attack of influenza when the judiciary sections were recast. He was unhappy with the changes but was apparently unable to do anything about them. As he acidly commented, "they altered all the clauses relating to the judicature . . ." and "messed it".[36] Most of the changes, however, were stylistic ones. The important exception was to substitute a Canadian-style formulation that Parliament "shall have power to establish a Court" for the stronger American expression, reverted to in 1897, that "The judicial power of the Commonwealth shall be vested in a Federal Supreme Court".[37]

Despite a second reformulation in 1897, the judiciary sections of the Constitution contain the substance of the American clauses and reflect Clark's original draft. There are of course significant differences between the Australian and American clauses: section 71 allows the Parliament to invest State courts with federal jurisdiction; section 72(ii) adopts the more traditional Canadian method of dismissing a judge after an address from both Houses of Parliament;[38] section 73 gives the Court a more extensive appellate jurisdiction including appeals from State Supreme Courts in matters of non-federal law; and parts of sections 73 and 74 deal with Privy Council appeals. Otherwise Article III, sections 1 and 2 of the American Constitution which are the charter of the American Supreme Court are reproduced in slightly different form.[39]

La Nauze points out that "The draft of 1891 is the Constitution of 1900, not its father or grandfather."[40] Despite fairly extensive modifications in the several sessions of the 1897-1898 Convention, the form of the 1891 Bill is apparent. As we have seen, the main lines of that 1891 Bill were sketched by Clark in his original draft proposal. As author of the first draft Constitution and as chairman of the judiciary committee in the 1891 Convention, Clark was instrumental in writing an American-style federal court into the Australian Constitution.

There was little time for detailed discussion of the judiciary clauses in 1891, but we can surmise from the development of the debate over the Court in the 1897-1898 Convention that they were not fully understood or appreciated. The Australians adopted the stark formulations of an American court through the instrumentality of Inglis Clark but

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[35] Proceedings of the Judiciary Committee printed in Federal Convention Debates (London ed. 1891) cxxvi-cxxvii.

[36] Quoted La Nauze, *op. cit.* 66.

[37] Ch. 3, s. 1 of the 1891 draft bill in Federal Convention Debates (1891) 956, and s. 71 of the final Constitution.

[38] British North America Act 1867, s. 99(1).

[39] For detailed comparison of Clark's bill and the U.S. Constitution, see Neasey, *op. cit.* 21-26.

[40] La Nauze, *op. cit.* 78.

only gradually came to understand their full meaning. The next section traces the evolution of that understanding.

Judicial Review Intended, Adelaide 1897

The 1891 draft Constitution "had been constructed in six weeks. It was to be 'put by' for six years."[41] The immediate cause was the dramatic entry of the recently-formed Labor Party into New South Wales politics in the June election of 1891. Labor won 36 of the 141 seats and held the balance of power. It traded support for concessions. Labor's single-minded concern with social legislation at the Colonial level was combined with an ignorance and suspicion of federation. It seemed to the fledgling Labor Party that a new level of government that was perceived to be undemocratic in its bicameralism and proposed amendment procedures was being added just as Labor was beginning to make inroads into the first level. As a result of Labor's entry into politics, the attention and political skills of New South Wales politicians were focused internally on Colonial matters. The other Colonies could not proceed with federation while New South Wales, the key to any federal union, was absorbed in accommodating this new political force.

The federal cause was rejuvenated in 1897 and the first of three long convention sessions began at Adelaide in the late summer. The 1897-1898 Convention was attended by delegates elected by the people of the Colony rather than appointed by Colonial legislatures as in 1891. Many new men were present and several of the old leaders did not attend. The 1891 Convention leader, Samuel Griffith, was now Chief Justice of Queensland, and Inglis Clark was absent because of illness and a second recuperative trip to the United States. Armed with a new mandate, the Convention made a new beginning, though the 1891 draft bill provided an unofficial blueprint. Edmund Barton, who had stood in for Inglis Clark when he was absent from the 1891 drafting committee, was elected Convention leader and chairman of the constitutional drafting committee. Barton was responsible for overseeing the debate on the Convention floor and preparing successive drafts of the Bill, an immense task that called forth all of Barton's great abilities.

As in the abortive Sydney Convention of 1891, the Adelaide Convention began with a general discussion of broad principles, mainly to hear the views of the new men who included three future Justices of the High Court, O'Connor, Isaacs and Higgins. To focus discussion, Barton presented a set of resolutions specifying the basic federal principles that would be embodied in the new Constitution. These resolutions stipulated that the Colonies and Colonial powers would remain intact except that powers over defence, customs and trade would be given over to the federal government. They proposed that the federal government should consist of a bicameral parliament, responsible

[41] *Id.* 87.

government executive and a federal judiciary.[42] This of course was the essence of the 1891 draft Bill.

What concerns us here is Barton's exposition of the federal court. Detailed comment on the judiciary was largely absent from the 1891 record of the debates. Apparently Barton saw the need to explain the character and functions of the federal court at the very beginning of this Convention.

Barton's resolution regarding the federal judiciary read: "There shall be a Supreme Federal Court, which shall also be the High Court of Appeal for each colony in the Federation." Like the formulation of the judiciary sections in the Constitution, these brief words are deceptively simple. What they implied was forcefully stated by Barton in his explanatory speech.[43] Barton thought the need for a federal court was so obvious that he doubted whether more than one or two delegates would oppose it. What was more to the point was the role of such a court. In this respect Barton noted that most of those who discussed the matter saw the court principally as a court of appeal. But for him the court's appellate role was secondary to its role of arbiter in federal disputes. Barton claimed that the "peaceful arbitrament of a Federal Court" was the best means of holding the Federation together and preserving the honor of the Constitution. In Barton's powerful rhetoric, judicial arbitration was the alternative to negotiation and the final "arbitrament of blood".[44]

Disputes between the States and between the federal government and the States would invariably arise under a federal Constitution, predicted Barton. He saw the federal court as providing "a continuous tribunal of arbitration" where States could bring their differences. "The peaceful and calm atmosphere of a court" would replace the "perturbed imagination" and "infuriated party politics" of the political arena. Barton claimed that

> One of the strongest guarantees for the continuance and indestructibility of the Federation is that there should be some body of this kind constituted which, instead of allowing the States to fly to secession because they cannot get justice in any other way, will enable them to settle their differences in a calm judicial atmosphere.[45]

Barton pointed out that giving the arbitral role to the court would prevent the federal government's being a judge in its own case. Both State and federal parliaments would be bound by the constitutional division of powers and that would be policed by the court. This was something quite novel to the traditional parliamentary system.[46] It proved

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[42] Federal Convention Debates (Adelaide, 1897) 17.
[43] *Id.* 24-25.
[44] *Id.* 25.
[45] *Ibid.*
[46] Nineteenth century British jurists had so firmly entrenched parliamentary

a hard lesson for the Australians to learn and was to be stressed over and over again in the debates.

With the exception of Privy Council appeals, the judiciary sections of the Constitution aroused little substantial controversy compared with such contentious matters as finance and equal State representation in the Senate. The judiciary committee of the 1897 Convention was the smallest of the three committees and carried out its work with the least trouble. Its resolutions were well drawn and went straight into the draft Bill. This was in marked contrast to the controversial and vague recommendations of the finance committee which were repudiated by leading committee members on the Convention floor.[47] From its earliest conception the federal judiciary enjoyed a certain apolitical status.

The judiciary sections were essentially a rewrite of the 1891 Bill with a few important exceptions. At the instigation of a delegate from impecunious Western Australia, the novel expedient of investing State courts with federal jurisdiction as an alternative to creating subsidiary federal courts was added. This change was first cleared by wiring Samuel Griffith[48] who, along with Inglis Clark, was now a respected authority on federal matters and continued to exert a powerful influence on the Convention *in absentia.* A far more significant change was to reinstate Inglis Clark's original intention of entrenching the Court into the Constitution rather than leaving its creation to Parliament's discretion, a change with which Clark was reported to be "flattered".[49]

The most blatant disagreement regarding the judiciary was over retaining the Privy Council as an appeal court. The majority, including all the eminent lawyers in the Convention, was adamantly committed to establishing a powerful Australian court as the final court of appeal. A vocal minority supported retention of Privy Council appeals, making pompous appeals to monarchic and imperial sentiment. They were strongly supported outside the Convention by a mixed alliance of powerful interests that included the British Colonial Office, a group of colonial Chief Justices and retired judges, and wealthy English corporate investors who distrusted the impartiality of an Australian court as a safeguard for their colonial investments.[50] The debate was often quite heated with the Convention leaders giving short shrift to the arguments of the pro-Privy Council faction and making disparaging remarks about

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sovereignty as a pivot of the legal system that British settlers in Australia and Australian lawyers and politicians were inclined to attribute such sovereignty to their Colonial Parliaments, even though it belonged strictly only to Westminster. See Dixon, "The Law and the Constitution" in *Jesting Pilate* 38, 45, 50-51.

[47] Federal Convention Debates (Adelaide, 1897) 432, 448-453.

[48] La Nauze, *op. cit.* 130-131. It became s. 71 of the Constitution.

[49] Quoted from the Hobart *Mercury* (29 July 1897) in Scott Bennett, *The Making of the Commonwealth* (1971) 166.

[50] La Nauze, *op. cit.* 173, 220-221, 248-249. Also Higgins' speech Federal Convention Debates (Adelaide, 1897) 988.

the quality of the Privy Council.[51] One of the best arguments used against retention of the Privy Council was that it would have no competence in Australian constitutional cases since it would lack an intimate knowledge of Australian history and local conditions.[52] The force of this argument depended on the fact that constitutional questions were not abstract legal matters that could be decided by a foreign legal body. The attempt to reinstate Privy Council appeals at this stage failed by a majority of two to one.

Our main concern, however, is not with the formulation of the judiciary sections which, with the few exceptions noted earlier, remained virtually the same as in 1891. It is with the Convention's understanding of judicial review. Judicial review was not spelt out as such in the constitutional text and so was not directly debated in Convention, but it was a dominant theme constantly recurring throughout the debate on the judiciary clauses. The bald formulations of the text need to be fleshed out with the substance of the debates if we are to appreciate the design and intention of the founders in this matter.

It is quite clear from the debates that the founders intended to create a strong, American-style court that would be an independent branch of government and exercise judicial review over both State and federal legislation. Convention leaders Barton, Downer, O'Connor and Kingston along with judiciary committee members Symon, Wise and Glynn dominated the debate and all supported a strong judicial power. Trenwith, the sole Labor delegate, was no exception and gave one of the best accounts of the court's role in the federal system:

> We are creating a Constitution in connection with which we are fixing all kinds of matters for protecting State rights; but, whatever we do, unless we provide a competent tribunal to act as custodian of the Constitution, the people will have doubts as to whether the Parliament will exceed the powers that were intended by the Constitution, and thereby curtail the State rights about which we are all so anxious. We want to create unification in a central body for specific purposes, but we are extremely anxious that the central body shall deal with nothing else but what we submit to it. Therefore, we shall have a strong and dignified custodian of the Constitution.[53]

The founders were quite clear that they were establishing the court as an independent branch of government. In heading off a proposal to delete the requirement setting the minimum number of judges at five,

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[51] See for example Federal Convention Debates (Adelaide, 1897) 969-973, 981. Also Federal Convention Debates (London ed., 1891) cxlii-cxlviii, for Inglis Clark's defence of a local court that was final.

[52] Federal Convention Debates (Adelaide, 1897) 987. See also Barton's subsequent statement that "if Australia is to be the maker of its own Constitution, it is fairly competent to be the interpreter of its own Constitution". Federal Convention Debates (1898) Vol. 2, 2330.

[53] Federal Convention Debates (Adelaide, 1897) 940.

Bernhard Wise stressed that the whole object of the judiciary committee had been to "make the High Court in all essential parts independent of Parliament".[54] He warned that in future controversies between parliament and the court it was imperative that parliament not have the power of dismissing judges.[55] Wise advocated a powerful court with a sufficient number of judges to command the respect both of the legislature and the State Supreme Courts. The judiciary committee chairman, Symon, went further and claimed that the federal principle was to "make the judges of the High Court once appointed, irremovable. The High Court in its position should be equal to, if not above, the Parliament and Executive."[56]

The draft Bill as it emerged from the special committee had entrenched the court in the Constitution, reversing the 1891 Bill in this important respect. Now the Convention sitting as a committee of the whole adopted Kingston's amendment for strengthening judicial tenure. Where previously judges could be removed by the Governor-General after an address from both Houses of Parliament, now the conditions of "proved misbehaviour or incapacity" were added. Kingston's purpose was to "preserve intact the absolute independence of the judges, both in relation to the Federal Executive and the Federal Parliament".[57] Glynn, who firmly supported him, had drawn attention to the lag in political complexion of the court which made it especially vulnerable to political disfavour from the legislature. He cited the early American experience and the attempted impeachment of Justice Chase in 1803 to demonstrate the kind of political pressures a federal court might have to withstand.[58]

The most significant difference of opinion regarding the court was a division within the majority who favoured a final court of appeal in Australia. The difference was over the character of such a court and throws light on subsequent jurisprudential changes by the court. Isaacs and Higgins preferred to stay closer to the English legal tradition, with the court restricted to a narrower scope in its legal interpretation. Their view is important because it is in germ the view that became dominant on the High Court after 1920. It was also significant because it called forth strong statements from the others regarding the intended character of the court and of judicial review.

Higgins spoke and voted against the majority over retaining a specified minimum size for the court. He admitted there were very strong reasons for having a court of five justices but held that it was properly a matter for the future legislature to decide.[59] Isaacs tried

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[54] *Id.* 935.
[55] *Id.* 935-936.
[56] *Id.* 942.
[57] *Id.* 947. The amendment became s. 72(ii) of the Constitution.
[58] *Id.* 944-947.
[59] *Id.* 938-939.

unsuccessfully to have the British law regarding removal of judges retained. He ably explained that under such a law a judge could be removed for two reasons: first, if he were guilty of misbehaviour; and secondly, if the parliament wanted him removed for its own good reasons. Isaacs stressed that in the latter case it was Parliament's opinion of the matter which was to be paramount. Since this procedure had worked well in the British Constitution for two centuries without abuse, he advocated its retention.[60] Higgins supported him: "I hope we shall adhere to the British Constitution so far as we can", he said, "because we are more used to it."[61]

Such a stance by Isaacs and Higgins stirred the others to strong statements in support of their preferred American-style court. Symon was quick to take issue with Isaacs. The position of judges under the British Constitution was well known to the Convention, he said, but they were creating a federal system that was closely modelled on the American Constitution. Symon claimed that Isaacs did not discriminate sufficiently between a unified state and a federation; what applied to one did not apply to the other. In support of his case, Symon approvingly quoted Hamilton's strong argument from *Federalist* No. 78. In the passage he quoted, Hamilton argued for permanent tenure for judges because the courts were the "bulwarks of a limited Constitution against legislative encroachments". Symon called the court "the keystone to the federal arch".[62]

Backing up Symon, Barton claimed that the Canadian model of the court should not be followed. Canada, he said, had neither a true federation nor a true union: it was "a mongrel between both". Barton had in mind the centralising mechanism of Dominion veto over Provincial legislation which was an alternative to judicial review by an independently entrenched court. Since they were creating a proper federation, argued Barton, they needed a strong and independent court. Barton's account of what judicial review would be in the Australian Constitution was essentially a combination of Hamilton's 78th *Federalist* paper and Marshall's opinion in *Marbury* v. *Madison*:

> The Federal Judiciary must be the bulwark of the Constitution. It must be the supreme interpreter of the Constitution, and it is not true that in the United States the Supreme Court is above the Constitution, and the Parliament below it. That is the way in which the matter has been stated by Englishmen who have not thoroughly studied the question. The truth of the matter is this, as laid down in the American Constitution in few and stately words: This Constitution is the supreme law of the land. . . . When the Federal Judiciary or the Supreme Court of the United States has

[60] *Id.* 947-949.
[61] *Id.* 953.
[62] *Id.* 950.

> confided to it the maintenance of the Constitution, which is confided to it by that very phrase, the settlement of any question in which Parliament makes an attempt to transgress the law of the land comes within their jurisdiction. Acrimony may arise between the Parliament and the Supreme Court, and we have to ensure that the judges shall not be removed upon the occurrence of that acrimony.[63]

Quoting his colleague O'Connor in a follow up speech, Barton stated that the most important questions the court would have to decide would be "between the States and the Commonwealth, the validity of State laws, and the validity of Commonwealth laws which may overlap or override them".[64]

Downer, the third member of the constitutional drafting committee with Barton and O'Connor, was equally determined that the American model of judicial review should be followed in Australia. "We should make our Supreme Court so strong and powerful", he said, "that no Government will be able to set the Constitution at defiance owing to the presence of a majority in either House, whereby an authority would be obtained that was never intended by the founders of the Constitution."[65]

We must be careful, however, not to exaggerate the difference between the majority opinion as formulated by the drafting committee members Barton, O'Connor and Downer along with judiciary committee members Symon, Wise and Glynn on the one hand, and the view of Isaacs and Higgins on the other. While the majority were persuaded by the dominating influence of the American Supreme Court, Isaacs and Higgins preferred a slightly weaker court along more traditional English lines. This was a difference in preferred style and scope, not in the intended function of judicial review. For example, even Higgins admitted the need for a strong and independent court "especially as it has to decide between the States and the Federation and upon encroachments by the Federation upon the States".[66]

Despite these differences over judicial style and the degree of independence of the court from the legislative branch, all the Convention leaders came out strongly in favour of judicial review. In order that that function could be properly performed, and they saw it as necessary to the federal system, they structured their court accordingly. It was entrenched into the Constitution and the tenure of judges was guaranteed. Constituting such a powerful court, and investing it with the key role of arbitration of federal disputes and keeping each level of government within its appointed powers, was, for the most part, an adoption of the American model.

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[63] *Id.* 952-953.
[64] *Id.* 962.
[65] *Id.* 957.
[66] *Id.* 953.

Judicial Review Reaffirmed, Melbourne 1898

The Adelaide session had produced a draft Bill but had left many matters unsettled. There had been serious divisions within the Convention, but now the Bill would be thoroughly vetted by both Houses of Parliament in each of the Colonies. This was the occasion for every would-be constitutional drafter to have his day and the last chance for such anti-federalist chambers as the New South Wales Legislative Council to indulge in a spoiling campaign. The Colonial Premiers hurried off to England to attend the Diamond Jubilee celebrations of Queen Victoria and a Colonial Conference called by the Secretary of State for the Colonies, Joseph Chamberlain. They were mercifully absent during the public debate on the constitutional Bill for which they were jointly responsible. In this period the British Colonial Office was also busy. Chamberlain lectured the Premiers on the importance of retaining Privy Council appeals in private law cases while his office prepared schedules of detailed criticisms and suggested improvements to the draft Bill. These were discreetly passed on via Reid to Barton and a few others in the Convention.[67]

After a short Sydney session in September of 1897, the Convention adjourned to Melbourne for the longest and final session in January 1898. The Sydney and Melbourne sessions were occupied with settling all outstanding matters and disposing of the various suggested amendments from the Colonial Parliaments. There was necessarily much attention to fine detail.

The sections on the court were considered at Melbourne. There was no change to the basic view of a powerful and independent court exercising judicial review over both State and federal legislation. The debate on the court was reopened, however, to consider diverse sets of suggested amendments from Colonial Legislatures. In the event, the minimum size of the court was reduced after a narrow vote to a chief justice and two justices. A penny-pinching scheme from South Australia to staff the court with State Chief Justices on a part-time basis, surprisingly supported by Glynn and Kingston who had championed the court's independence at Adelaide, was defeated. The question of allowing appeals to the Privy Council in private law cases was reopened. Despite the beefing up of the minority position by Chamberlain's considerable weight—all Premiers except the radical Kingston spoke and voted for allowing such appeals—the Adelaide clauses were upheld by a substantial majority.

Again, as in Adelaide, the debates are more significant for revealing the thinking of Convention leaders on the general role of the court rather than for the substance of the disputed details. In the context of finalising the judiciary clauses, the Convention reaffirmed its commitment to judicial review by a strong and independent court. This was

[67] La Nauze, *op. cit.* 170-176.

eloquently formulated by such leading delegates as Barton, O'Connor, Symon, Downer, Isaacs and Higgins, a group that included four of the five early Justices of the future High Court.

The debate over the Glynn-Kingston amendment to staff the High Court with State Supreme Court Chief Justices on a part-time basis is interesting because it raised the issue of political bias in the Court. The delegates were rather coy about broaching this delicate issue because a court of law was traditionally above such suspicions. With masterly circumlocution, Barton raised the issue. Such an expedient would, he said, "lead to the suspicion that the Chief Justices chosen from the various states were intended to be in some sort of way the representatives of provincial interests, and that it was not intended that the court in its impartiality should be representative of the Commonwealth as distinct from the provinces".[68] Symon, an outspoken and forthright man, put the matter more bluntly and claimed that State-appointed judges would act as State partisans.[69]

Such charges of State partisanship could be easily turned around as they were by Kingston immediately afterwards. In this instance the roles were reversed with the federalists now playing coy about the possibility of federally-appointed judges having a bias—or as one delegate suggested, an "unconscious bias"—in favour of the federal government.[70]

The Australian founders were generally reluctant to dwell on the political character of judicial review, but it was sporadically aired. The matter was taken up by O'Connor who sharply distinguished between the accustomed legal role of judges and the novel political role that was to be given to the federal court. O'Connor stressed that State judges were not concerned with political questions whereas federal judges might at any time have to decide "a question which may become a matter of burning political moment—a question of the validity of a law which may affect very largely the interests of a state and the Commonwealth, and may at any time become a matter of heated controversy between a state and the Commonwealth".[71]

The general political character of the court's role was very much to the fore when the amendment reducing the minimum size of the court from five to three was debated. The danger of manipulating the court through controlling appointments was discussed. O'Connor stated that the main danger would come not from outright packing which could attract popular disapproval, but from the less blatant strategy of letting numbers dwindle. Therefore he insisted on specifying a reasonable minimum size for the court.[72] Isaacs claimed that appointments to the

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[68] Federal Convention Debates (1898) Vol. 1, 269.
[69] *Id.* 270.
[70] *Id.* 272.
[71] *Id.* 356.
[72] *Id.* 286.

American Supreme Court had been used as a means of amending the Constitution. He asserted that in America the great judges of the Supreme Court had been as influential in shaping the Constitution as the founding Convention, and he predicted the same would be the case in Australia:

> We are taking infinite trouble to express what we mean in this Constitution; but as in America so it will be here, that the makers of the Constitution were not merely the Conventions who sat, and the states who ratified their conclusions, but the Judges of the Supreme Court. Marshall, Jay, Storey [*sic*], and all the rest of the renowned Judges who have pronounced on the Constitution, have had just as much to do in shaping it as the men who sat in the original Conventions.[73]

The court would have to decide "vast issues" involving the very existence of States, their taxing powers and their rights over rivers and territories.

Higgins took a different tack that stressed the particular vulnerability of a federal court in the Australian context of responsible cabinet government. In such a system, he claimed, the executive was "the creature of the Legislature" and together they would have "every temptation to so mould the character of the High Court as to get it to adopt their views".[74] Consequently, he argued, it was even more important here than in America to constitute a strong and permanent court. On this occasion the finer differences between Isaacs and Higgins and the other Convention leaders were not apparent.

Symon's criticism of the constitutional jurisprudence of the Judicial Committee of the Privy Council was also to the point. The Privy Council's narrow legalistic approach was unsuitable for a constitutional court, claimed Symon. ". . . they are guided by a more rigid adherence to what is literal, as though they were interpreting simply an Act of Parliament, rather than by a regard for those great constitutional principles which throw light upon and assist in the efficient interpretation of a Constitution."[75] Symon approvingly quoted Bryce's eulogy of Marshall and his praise for Marshall's broad constitutional jurisprudence which had given the American Constitution an admirable flexibility and capacity for growth from the beginning. Bryce had contrasted with this the Privy Council's unsatisfactory "spirit of strictness and literality" in interpreting the Canadian British North America Act. It was well understood by the Australian constitution-makers that judicial review was not simply a legal function.

Judicial review was so fundamental a part of the founders' intention and design that the judiciary sections of the Constitution cannot be fully understood without acknowledging the fact. Furthermore, the

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[73] *Id.* 283.
[74] *Id.* 279.
[75] *Id.* 344.

founders considered that a strong court exercising judicial review of legislative acts was an integral and necessary part of the federal system that they were instituting. The federal system entailed allocating specific national powers to the federal government and making it supreme in those areas, while at the same time restricting it to those areas. Therefore, some independent arbitrator was required. That arbitrator was to be the federal court which was constituted in such a way as to equip it for the role. In carrying out such a role, the High Court was expected to apply and develop the Constitution in an innovative and creative fashion. Despite the lack of a formal statement about judicial review in the text, the evidence from the federation debates is overwhelming. I have presented some of that evidence and will sum up the founders' expectation for the High Court in the eloquent formulation of the distinguished constitutional draftsman, John Downer.

> [Federal judges] will have the greatest part in forming this Commonwealth; because honorable members must not forget that, although we form it in form, they form it, to a large extent, in substance. With them rest the vast powers of judicial decision, in saying what are the relative functions of the Commonwealth and of the states. With them rest the interpretation of intentions which we may have in our minds, but which have not occurred to us at the present time. With them rests the obligation of finding out principles which are in the minds of this Convention in framing this Bill and applying them to cases which have never occurred before, and which are very little thought of by any one of us. With this Supreme Court, particularly in the earlier days of the Commonwealth, rests practically the establishment on a permanent basis of the Constitution, because with them we leave it not to merely judicially assert the principles which we have undoubtedly asserted, but with them rests the application of those principles, and the discovery as to where the principles are applicable and where they are not. As was felt in America, and in every Federation which has had any permanence, there comes the necessity of a tribunal to stand between the states and the Commonwealth, of such dignity and held in such esteem, so free from all possibilities of influence or corruption that the general people of the Commonwealth will recognise that the jurisdiction has been well placed, and must be properly exercised.[76]

The Rivers Question: A Test Case for Judicial Review

The Australian founders considered judicial review in two main parts of the federation debates: generally in the discussion of the judiciary clauses, and as a specific solution to the contentious rivers question. The rivers question was immensely important in the founding Conventions —at the Melbourne session alone it occupied two weeks of prime convention time and took up over 400 double column pages of the

[76] *Id.* 275.

official record. The matter is of no consequence today since railways replaced river steamers within a decade, an outcome predicted by Barton in convention and urged as a reason for omitting mention of river navigation from the Constitution and cutting short the debate.[77] Moreover, a River Murray Waters Agreement regarding water usage was signed by the Commonwealth Government and the three interested States in 1914. In this respect La Nauze's representation of the protracted debate as "much ado about nothing" is quite valid.[78] This dead issue is resurrected here because it provides an excellent case study on the intended role of judicial review in the federal system.

In dispute was control of dry Australia's single great river system, the Murray-Darling, with catchments spreading from monsoonal Queensland through western New South Wales to the snow covered Australian Alps in the south. New South Wales and to a lesser extent Victoria were beginning to undertake extensive irrigation schemes and were concerned to maintain State water rights. South Australia, through which all these waters flowed via the Murray to the southern ocean, was the centre of the river steamer trade which tapped the rich rural markets of New South Wales and Victoria. The South Australian delegates were concerned with guaranteeing this trade by ensuring navigability of the Murray and, if possible, the Darling. All the elements of a classic federal dispute were present. Interstate trade and commerce were federal matters that extended to river navigation. Water conservation and irrigation came under State property and riparian rights. While navigation required maintenance of water levels and waterways, irrigation implied using water and constructing conservation and flood control works across rivers. South Australia pushed for a specific federal power over rivers to protect its interstate navigation; New South Wales was equally stubborn in insisting on entrenching State water rights.

The Sydney Convention of 1891 raised the matter but left it unresolved: as Quick and Garran aptly put it, "discussion showed that the question was too difficult to be dealt with off-hand".[79] The lines of battle were more firmly drawn at the 1897 Adelaide session of the second Convention when various formulations were tried, but none accepted as satisfactory. The third and final Melbourne session of the 1897-1898 Convention had to resolve all outstanding points, not least among which was the rivers question.

At the very beginning O'Connor, who was backed up by Barton, set out what was to be finally accepted: that federal control over river navigation was sufficiently protected in the trade and commerce clause.[80]

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[77] *Id.* 601-602.
[78] La Nauze, *op. cit.* 211.
[79] Quick and Garran, *op. cit.* 138.
[80] Constitution s. 51(i).

O'Connor explained the American law at length and predicted that it was "only reasonable to suppose that our Judges in interpreting our Constitution will be guided very much by the same principles".[81] In other words, the court would resolve particular disputes between navigation rights that were incidental to trade and commerce and water rights that remained under State jurisdiction. This American solution of judicial review was not acceptable either to the South Australian or New South Wales partisans at this point. The New South Wales Premier, George Reid, accused the South Australians of "trying to federalize us" for their own benefit.[82]

After the first week of threshing about over "amendments innumerable", Convention leader Barton secured a short respite while the delegates from the interested Colonies discussed the matter privately.[83] Since they could not agree, the rivers question came back for a second full week of debate. In the meantime the judiciary clauses of the Constitution had been finalised and delegates were in a better position to appreciate the O'Connor-Barton proposal for leaving the whole matter to the court to sort out. O'Connor restated the court solution as the "simplest and most statesmanlike way" of solving the problem. But O'Connor alarmed many delegates when he spelt out the broad political role of the court: it would decide both the merits of a particular case and "absolutely and definitely the rights and the principles upon which the decision should proceed".[84]

Many delegates were opposed to such an extensive scope for judicial review. They had agreed to a powerful American-style court in theory but balked at leaving it with such wide powers of decision when it came down to a practical issue. Downer had recommended that in "making a new Constitution, we should place our meaning in plain and unmistakable words".[85] Reid said he was prepared to "risk legal decisions in regard to what I am giving, . . . [but] always so long as the absolute possession of these waters by New South Wales is made clear"—at which point honourable members laughed, to Reid's consternation.[86] Glynn from South Australia wanted to define navigability so as to put the matter beyond doubt: he was "not going to let the Federal Judiciary be the legislators".[87] Similarly, Isaacs wanted to spell out the meaning of navigability and have it entrenched in the Constitution lest an Australian court follow English rather than American precedents and define navigability in terms of tidal flow.[88] This was rather a laboured

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[81] Federal Convention Debates (1898) Vol. 1, 66.
[82] *Id.* 84.
[83] Quick and Garran, *op. cit.* 194-196.
[84] Federal Convention Debates (1898) Vol. 1, 388. See also Barton's speeches, *id.* 409, 594.
[85] *Id.* 113.
[86] *Id.* 442.
[87] *Id.* 614, 562-564.
[88] *Id.* 426.

and pedantic view, but it does show the extent to which even leading delegates were chary of judicial review.

Higgins took a different tack and insisted that the navigation-irrigation controversy be left with the federal parliament. It was a political rather than a legal question and would necessitate new policies as knowledge and conditions changed. Therefore it ought to be left with parliament and not the court.[89] Finally, when all attempts to spell out a specific federal power over navigation had failed, Higgins sided with Barton and O'Connor. His summing up of the outcome of the debate and the judicial review solution caught the spirit of many delegates:

> As we cannot agree upon an amendment that will secure to South Australia, and I may say to Australia, the federal control of this river system we ought to stop . . . and . . . allow the glorious uncertainty of the construction of the law to operate on the [trade and commerce clause].[90]

The final outcome, and for my purposes the significance of this large chunk of federation debates, was that judicial review was adopted as a means of resolving, or at least bypassing, this otherwise intractable problem. River navigation was not specified as a separate federal head of power because it was considered to be incidental to, and implied by, the federal commerce power. Just to be sure, however, it was spelt out in section 98 that the commerce power did extend to navigation and shipping. New South Wales carried its insistence into a special clause, section 100, specifying that the federal commerce power did not abridge the right of a State to use of its rivers for irrigation, but only after the qualifying word "reasonable" had been added.

In effect the matter was left to the court to resolve in the future as specific disputes arose. As has been noted already, this potentially rich field for litigation was neutered almost immediately because railways replaced river steamers. The important point, however, is that the difficult question had already been resolved in principle by the Convention. The solution was judicial review.

The Australian founders were forced to realise that they could not resolve the rivers question in advance through specific formulations. In the first place they could not agree. In the second place the subject was too extensive and abstract, and they lacked adequate information. Furthermore, they were forced by the strong claims of the senior State of New South Wales to respect State rights that were not essential to a federal union. That ruled out the possibility of an overarching federal power to formulate river policy and balance navigation against irrigation rights. The federal solution of national sovereignty over navigation and State sovereignty over irrigation at first appeared to most delegates to be no solution at all since navigation and irrigation were but two

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[89] *Id.* 510.
[90] *Id.* 573.

conflicting aspects of the one issue. Leaving the matter for the court to sort out under a broad commerce clause jurisdiction was enthusiastically promoted by a few, but only reluctantly accepted by the Convention as a whole after exhaustive debate proved no other solution was forthcoming. The rivers debate shows the Australian founders finally and, for the most part, only grudgingly adopted judicial review as a practical, federal solution to the rivers question. But when they did so it was with full knowledge of what it entailed. This elaborate test case shows how judicial review was intended to work as an essential part of the Constitution.

Judicial Review: An Integral Part of the Federal Structure

The Australian founders laboriously thrashed out the issue of judicial review in the federation Conventions and adopted it as the primary function of their federal court. Those who designed Australia's federal Constitution copied the great American model and continuously drew upon America's long federal experience. In Sir Owen Dixon's words,

> The framers of our own federal Commonwealth Constitution . . . found the American instrument of government an incomparable model. They could not escape from its fascination. Its contemplation damped the smouldering fires of their originality.[91]

To appreciate fully the theory of federalism and the function of judicial review in such a system, we have to go back to the American constitution-makers since federalism in its modern form is an American invention. The American founders were acutely aware of the fragility of the old federal form because that was the basis of the Articles of Confederation under which they had fought the War of Independence. In such a system central authority tended to be ineffectual. As Professor Martin Diamond has carefully documented, a federation in the old sense was a confederation or league of societies in which the central government acted not on the individual citizens but on the constituent social units.[92] By way of contrast a national government acted directly on the citizens. The American constitution was, in Madison's summing up in *Federalist* 39, "in strictness, neither a national nor a federal Constitution, but a composition of both". This fundamental innovation of grafting national powers on to the old form of federal alliance and thus making the individual a citizen of the union as well as a citizen of his own State was well appreciated by the American founding generation. It was praised by its supporters as overcoming the basic weakness of ineffectual central control and a tendency to disintegration that characterised the traditional federal form.[93] It was likewise blamed

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[91] Dixon, "The Law and the Constitution" in *Jesting Pilate* 38, 44.

[92] Diamond, "The Federalist's View of Federalism" in Benson (ed.), *Essays in Federalism* (1961) 21.

[93] For example, Alexis de Tocqueville, *Democracy in America* (1835) (New York: Vintage Books, 1945) i, 162-165. De Tocqueville calls this "a wholly novel theory, which may be considered as a great discovery in modern political science" 162.

by critics of the Constitution such as Luther Martin, the Maryland Attorney-General and champion of a loose confederation of autonomous states, as "a system neither wholly federal, nor wholly national—but a strange hotch-potch of both".[94]

The Americans created a new form of government by dividing powers between two levels of government and making each sovereign within its appointed sphere. Judicial review, combined with the elaborate system of checks and balances built into the federal government, became the practical means of keeping each level of government to its constitutionally defined limits. Influential Americans such as James Madison had originally favoured a central government power of veto over State legislation to ensure it did not infringe upon the federal domain. This was rejected by others such as Jefferson as a proposal "to mend a small hole by covering the whole garment". Jefferson proposed instead the alternative of judicial review: "Would not an appeal from the state judicatures to a federal court, in all cases where the act of Confederation controuled [*sic*] the question, be as effectual a remedy, and exactly commensurate to the defect."[95] Jefferson was writing to Madison from Paris in 1787. The same solution emerged at the Philadelphia Convention which was drafting the American Constitution at the same time.

The Randolph Resolutions that were probably drafted by Madison and provided the focus for discussion specified the paramountcy of national legislation in areas of national jurisdiction. The national legislature was empowered to "negative all laws passed by the several States, contravening in the opinion of the National Legislature the articles of Union".[96] After considerable debate this was rejected as too serious a threat to the independence of the States, and the supremacy clause, Article VI section ii, was adopted. This simply stated that the Constitution was the supreme law of the land and would take precedence over State laws. It was not stated that the Court would give practical substance to this clause by exercising judicial review but that was suggested by some during the debate. As one delegate pointed out, "A law that ought to be negatived will be set aside in the Judiciary department."[97]

Although the Americans were rather tentative about defining judicial review, it seems that many intended it to be the mechanism for resolving jurisdictional disputes between two levels of government each of which

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[94] Reply to the Landholder, 19 March 1788, in Farrand (ed.), *The Records of the Federal Convention of 1787* (rev. ed. 1937) iii, 292.

[95] Madison to Jefferson, 17th March 1787, *The Papers of James Madison* (1975) ix, 318; and Jefferson to Madison, 20 June 1787, *The Papers of Thomas Jefferson* (1955) xi, 480-481. The American historian Charles Warren credits Jefferson with being the first to suggest judicial review: *The Making of the Constitution* (1928) 168.

[96] Farrand, *op. cit.* 21. For strong speeches in favour of a national veto power, see Madison *id.* i, 164-165, 447 and ii, 27-28.

[97] Gouverneur Morris, in Farrand, *op. cit.* ii, 28.

was sovereign in its own powers.[98] It took the consummate political and legal skills of John Marshall to establish firmly judicial review as a practical part of American federalism. Once he had done so, however, there could be little dispute over its aptness. There is almost a natural inevitability linking governments of limited powers and judicial review by the court, at least in countries where the rule of law is given pre-eminance.[99] The classic answer to the question why courts and judges interpret a constitution was given by K. C. Wheare as follows:

> The substance of the matter is that while it is the duty of every institution established under the authority of a Constitution and exercising powers granted by a Constitution, to keep within the limits of those powers, it is the duty of the Courts, from the nature of their function, to say what these limits are.[1]

If the American founders were somewhat tentative about the court's key federal function of judicial review in 1787, the Australian founders in the 1890s certainly were not. By that time judicial review was well established in North America and the Australians took it over as an integral part of their federal system. Many had considerable difficulty reconciling themselves to such a broad political role for a court, but Inglis Clark, Barton and O'Connor gradually led them to accept American-style judicial review as an important part of federalism. The Australian founders had a more even-handed view of federalism than either the Americans or the Canadians who had seen the States as the main threat to the system. The Australians thought that the Federal Government was as likely as the States to overstep its defined areas of jurisdiction. Consequently they considered judicial review by a strong court as absolutely crucial for keeping both levels of government in check.

The Canadian founders in 1867 did not consider judicial review essential to the system they were devising, but as Edmund Barton so inelegantly put it, theirs was a "mongrel" brand of federalism. The Canadian system was heavily weighted in favour of the centre. The explicit powers of reservation and disallowance—of federal legislation by the Governor-General and of Provincial legislation by the Lieutenant-Governor—were practical alternatives to judicial review and the means of keeping each level of government within its proper limits.[2] The Canadians did not entrench their Supreme Court in the Constitution but left it to Parliament's discretion to establish.[3] They relied on the

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[98] The strongest case for judicial review was made by Hamilton in *Federalist* No. 78.

[99] Switzerland is an exception. There a law can be submitted to popular referendum to determine its constitutionality on both legislative and popular initiative. Sawer, *Modern Federalism* (new ed. 1976) 20.

[1] Wheare, *Modern Constitutions* (2nd ed. 1966) 101.

[2] British North America Act 1867, ss. 55, 56, 90. See also Saywell, *The Office of the Lieutenant-Governor* (1957).

[3] British North America Act 1867, s. 101. Also MacKinnon, "The Establishment

Privy Council as a final appellate court and it remained as such until 1949. As the forces of regionalism redressed the balance in favour of the Provinces and reservation and disallowance fell into disuse, the Court became an integral part of the Canadian system. The Privy Council and then the Canadian Supreme Court became indispensable parts of Canadian federalism. Professor Mallory has described the process as follows:

> [The Canadian Constitution] began as—at best—quasi-federal and became more and more truly federal by a process of constitutional evolution. . . . While it was the forces of economic, political, and ideological change which turned the Canadian State into a "classical" federal system on the American model, it was the courts which confirmed this change by giving it authoritative sanction.[4]

Thus judicial review has become an integral part of the Canadian federation as well as of the American and the Australian.

Those who would abolish the court's role in constitutional adjudication have to propose some alternative mechanism for settling jurisdictional disputes between the two levels of government. The Canadian constitutional scholar, Paul Weiler, has recently advocated the abolition of judicial review. Weiler claims that there is no necessity for judicial review "even though federalism by its very nature involves the creation of *limited* legislative powers".[5] He claims that "a federal system is precisely the kind of relationship for which an external umpire may not be necessary and in which the better technique for managing conflict is continual negotiation and political compromise".[6] Weiler is concerned that judicial review is essentially unprincipled—he charges the Canadian Supreme Court with deciding constitutional questions on the basis of rules it makes up as it goes along—and that a court is singularly unsuitable for resolving the "very complicated political and economic conflicts which are the 'stuff' of constitutional adjudication".[7] Weiler's critique of judicial review highlights many of the problems associated with this somewhat incongruous institution whereby a court of law settles great questions of state, but he goes too far. Judicial review need not be as unprincipled as he claims since the constitution provides a basic order against which conflicting claims can be weighed and to which new developments can be fitted. Of course there is a special

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of the Supreme Court of Canada", in Lederman (ed.), *The Courts and the Canadian Constitution* (1964); and Laskin, "The Role and Functions of Final Appellate Courts: The Supreme Court of Canada" (1975) 52 Canadian Bar Review 469.

[4] Mallory, "Constraints on Courts as Agencies of Constitutional Change: The Canadian Case" [1977] Public Law 406, 409.

[5] Weiler, *In the Last Resort: A Critical Study of the Supreme Court of Canada* (1974) 165.

[6] *Id.* 175.

[7] *Id.* 164.

problem for the Canadian Court since the original centralist division of powers does not fit the strongly regionalised and decentralised nation that Canada has become.

Weiler proposed political negotiation and compromise as an alternative to judicial review by the court, but what about those hard cases where neither government will compromise sufficiently to allow a negotiated settlement? Weiler acknowledges the problem and proposes the following alternative:

> There should be one easily applicable rule, singling out one jurisdiction's legislation as dominant. There seems also no doubt that, if such is the character of the rule, the dominant jurisdiction must be the Dominion Parliament which is responsive to the whole electorate, including voters in the province whose legislation is being overridden.[8]

That is a rather simple and straightforward alternative to judicial review, but unlike judicial review it is not a federal solution. Weiler would give the decision of paramountcy to the federal government, thus making it judge in its own case. Presumably courts would still have the subsidiary function of deciding when two laws were inconsistent, but that would be a considerably reduced role. This alternative was rejected by the American founders in 1787 as a dangerous threat to the States—as Jefferson said, it was a patch that covered the whole garment.

Conclusion

The federation debates demonstrate that the Australian founders created a powerful, American-style court whose prime function was to interpret the Constitution and apply it in settling federal disputes. They intended the court to exercise judicial review over both State and federal legislation and constituted it accordingly. The court was made strong and independent; it was entrenched directly in the Constitution; its minimum size was stipulated and the tenure of judges elaborately safeguarded. Moreover, the intended exercise of judicial review by the court explains why other parts of the Constitution appear as they do. The commerce clause was left in very broad terms on the assumption that the judiciary would interpret and apply it in the future. The contentious question of reconciling conflicting river navigation and irrigation claims was left essentially unresolved by the founding Conventions precisely because the court was to handle the matter. Because the court was to make such important political and economic decisions, the Australian founders were intent upon making it rather than the Privy Council the final arbiter in constitutional matters concerning the division of powers.

By making judicial review an integral part of their federal Conti-

[8] *Id.* 177.

tution, the Australian founders were working out the structural logic of the federal system. Dividing powers between two levels of government and making each sovereign in its appointed sphere required some mechanism for reconciling conflicting claims and settling disputes that would inevitably arise. That mechanism had to be independent of either level of government to ensure the balance of the system. In adopting American judicial review by a strong court, the Australians were implementing what has now become generally recognised as an essential part of federalism in Canada as well as in the United States and Australia.

The Australian federal system was completed when the High Court was set up by the first Commonwealth Parliament in 1903 and Griffith, Barton and O'Connor were sworn in as the first justices. Introducing the Judiciary Bill in 1902, Alfred Deakin, then Attorney-General and soon to replace Barton as Prime Minister, reiterated the central role of the High Court in the Australian federal system. Deakin was restating the thinking of the founding Conventions when he said:

> The Constitution is to be the supreme law, but it is the High Court which is to determine how far and between what boundaries it is supreme. The federation is constituted by distribution of powers, and it is this court which decides the orbit and boundary of every power. Consequently, when we say that there are three fundamental conditions involved in federation, we really mean that there is one which is more essential than the others—the competent tribunal which is able to protect the Constitution, and to oversee its agencies. That body is the High Court. It is properly termed the "keystone of the federal arch." . . . The High Court exists to protect the Constitution against assaults.[9]

[9] Parl Deb. 1902, Vol. 8, 10967.