A BRIEF HISTORY OF THE JUDICIAL REVIEW OF LEGISLATION UNDER THE *AUSTRALIAN CONSTITUTION*

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ABSTRACT

Although lacking an express mandate, since Federation courts have declared legislation *ultra vires* if they find it contrary to the *Australian Constitution*. This article undertakes an historical examination in four parts, to determine whether this judicial review of legislation is legitimate.

First, objections to the institution are identified. Second, the justifications for judicial review of legislation developed in the United States, and expressed in the seminal 1803 decision of *Marbury v Madison*, are examined. Having identified the twin justifications as the supremacy of the *Constitution* and the primacy of the judiciary in its interpretation, the third section analyses Australian Federation records to see if these justifications are supported, and whether they rebut the objections raised. Finally, the persistence of these justifications after Federation is demonstrated.

It is concluded that evidence of the supremacy of the *Constitution*, and the primacy of the judiciary in its interpretation, is sufficient to justify judicial review of legislation under the *Australian Constitution*.

I INTRODUCTION

Do Australian courts legitimately possess the power to find legislation invalid on the basis that it conflicts with the *Australian Constitution*? The *Constitution*, which came into effect in 1901, contains no express provision for judicial review of legislation.[1] Nonetheless, since Federation, Australian courts have reviewed the constitutionality of Commonwealth and State laws and declared them *ultra vires* if they are contrary to the *Constitution.*

Very little academic writing in Australia has considered the justifications for judicial review of legislation under the *Australian Constitution*.[2] It might be thought that there is no need to do so — after all, judicial review of legislation is now a settled

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1 George Williams, 'Judicial Review' in Tony Blackshield, Michael Coper and George Williams (eds), *Oxford Companion to the High Court of Australia* (Oxford University Press, 2002) 376, 377.

2 See, eg, ibid; Geoffrey Lindell, 'Duty to Exercise Judicial Review' in Leslie Zines (ed), *Commentaries on the Australian Constitution* (Butterworths, 1977) 150, 186.

institution.[3] Nonetheless, given the extraordinary nature of the power of judicial review in a democracy (which otherwise trusts to the wisdom of the elected representatives of the people),[4] that institution should be capable of being demonstrated to be legitimate. Moreover, to say only that judicial review is accepted begs the question of *why* it is accepted.

This article examines the bases for judicial review of legislation under the *Australian Constitution* in order to determine whether this power, frequently exercised by Australian courts, is legitimately held. The focus is historical — because judicial review of legislation has been exercised since Federation, its justifications are sought primarily in material which elucidates relevant understandings at the time the *Australian Constitution* entered into force. In the first section, the objections to judicial review of legislation under the *Australian Constitution* are identified. The second section looks to the United States, analysing both the seminal 1803 decision in *Marbury v Madison*[5] and earlier relevant statements, to identify the justifications for judicial review of legislation advanced in America. In the third section, the Australian Federation records are investigated to locate evidence of the acceptance of these American justifications for judicial review of legislation. In the fourth section, judicial decisions under the *Australian Constitution* are scrutinised to determine what justifications for judicial review of legislation have in fact been relied upon by Australian courts.

This article traces the justifications for judicial review of legislation, beginning with early American writings and their reflection in *Marbury v Madison*, and continuing through the Australian Federation records into relevant Australian judicial decisions. It will be shown that the same justifications are evidenced in each context. Moreover, it will be demonstrated that these justifications are sufficient, and therefore that judicial review of legislation is a legitimate institution under the *Australian Constitution*.

II A PROBLEM OF JUSTIFICATION

Two main objections to the judicial review of legislation under the *Australian Constitution* have been raised. The first was made by the Earl of Halsbury, delivering the advice of the Judicial Committee of the Privy Council in *Webb v Outtrim* (1907).[6] This decision remains the only judicial disavowal of judicial review of legislation under the *Australian Constitution*. In *Webb v Outtrim*, the Privy Council did not accept that legislation (in this case, of the Victorian Parliament) could be held invalid for conflicting with the *Australian Constitution*:

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3 Although the abandonment of judicial review of legislation after a century of that practice under the *Australian Constitution* is unlikely, this does not mean *of itself* that the practice is constitutionally legitimate (although it has been suggested that judicial review might now be justified on the basis of tacit acquiescence: P H Lane, *The Australian Federal System* (Law Book, 1972) 913). This paper provides an assessment of the justifications for judicial review of legislation, allowing a determination as to its legitimacy rather than a mere acceptance of its usage.

4 Thus, it has been observed that: 'judicial review represents an attempt by the American Democracy to cover its bet': Edward S Corwin, 'Book Review' (1942) 56 *Harvard Law Review* 484, 487.

5 5 US (1 Cranch) 137 (1803).

6 4 CLR 356.

> Every Act of the Victorian Council and Assembly … when it is assented to it becomes an Act of Parliament as much as any Imperial Act … If indeed it were repugnant to the provisions of any Act of Parliament extending to the Colony it might be inoperative to the extent of its repugnance (see The Colonial Validity Act 1865), but, with this exception, no authority exists by which its validity can be questioned or impeached. The American Union, on the other hand, has erected a tribunal which possesses jurisdiction to annul a Statute upon the ground that it is unconstitutional. But in the British Constitution, though sometimes the phrase "unconstitutional" is used to describe a Statute which, though within the legal power of the legislature to enact, is contrary to the tone and spirit of our institutions, and to condemn the statesmanship which has advised the enactment of such a law, still, notwithstanding such condemnation, the Statute in question is the law and must be obeyed. It is obvious that there is no such analogy between the two systems of jurisprudence as the learned Chief Justice suggests.[7]

According to this statement by the Privy Council, there could be no judicial review of legislation under the *Australian Constitution* because it is an American institution foreign to Australia's British legal heritage.

Despite being a decision of the Privy Council, *Webb v Outtrim* has never been followed on this point.[8] However, although the decision has been widely condemned, there has been little comprehensive analysis of *why* it was wrong. Thus, Sir Gerard Brennan has stated that it 'manifested a want of understanding of the nature of the Constitution',[9] without elaborating on why the decision was erroneous. This paper undertakes to provide such an analysis.

The second objection to judicial review of legislation under the *Australian Constitution* has been raised more recently by James Thomson, whose concern relates to what he regards as a lack of support for judicial review of legislation in the historical record:

> Attempts to provide a basis for judicial review in the Constitution by postulating implications from the text and a conglomeration of provisions are endeavours to rest a prodigious power on a slender reed.[10]

Thomson's supporting arguments will be addressed in more detail below. For now, it is sufficient to state how this historical objection is to be refuted. The chief premise of Thomson's argument is that the Framers failed 'to identify any textual foundation for judicial review' in the provisions of the *Australian Constitution*.[11] The correctness of this conclusion will be challenged through the presentation of further historical evidence below.

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7 Ibid 358–9.

8 For the High Court's treatment of the decision, see below at 24.

9 Gerard Brennan, 'The Privy Council and the Constitution' in H P Lee and George Winterton (eds), *Australian Constitutional Landmarks* (Cambridge University Press, 2003) 312, 315. Similarly: 'its decision was flawed by an elementary misconception of the Australian Constitution and the role it assigns to the courts': Tony Blackshield and George Williams, *Australian Constitutional Law and Theory: Commentary and Materials* (Federation Press, 5th ed, 2010) 139.

10 James Thomson, 'Constitutional Authority for Judicial Review: A Contribution from the Framers of the Australian Constitution' in Gregory Craven (ed), *The Convention Debates 1891–1898: Commentaries, Indices and Guide* (Legal Books, 1986) 173, 201.

11 Thomson, above n 10, 177. See also at 176, 179–83, 185, 187.

These two objections to the judicial review of legislation under the *Australian Constitution* must be confronted. The analysis that follows will seek to demonstrate that, properly understood, the historical record provides ample evidence for judicial review of legislation under the *Australian Constitution*, refuting both Thomson's historical objection and the Privy Council's institutional confusion in *Webb v Outtrim*.

III THE AMERICAN CONTEXT

Judicial review of legislation was not invented by the Framers of the *Australian Constitution*. Rather, at the time of Australian Federation, judicial review of legislation was a settled institution in the United States of America. A proper understanding of the American approach to judicial review of legislation is, therefore, essential to understanding that same institution in Australia. Moreover, it will be necessary to delve deeper into the American records than *Marbury v Madison* itself. Thomson has criticised judicial review of legislation under the *Australian Constitution* on the basis of the Framers' 'apparent ignorance of *Marbury v. Madison*'.[12] However, in this section it will be demonstrated that the underlying principles upon which *Marbury v Madison* was decided pre-date the case itself. It is those principles that later sections of this paper will show were understood by the Framers of the *Australian Constitution*, and provide the justification for judicial review of legislation in Australia.

A *Marbury v Madison*

The enduring significance of the seminal decision of the Supreme Court of the United States in *Marbury v Madison*, reached in highly-charged political circumstances,[13] lies in

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12 Ibid 177.

13 The outgoing administration of President John Adams attempted to 'stack' Federal courts with Federalist judges, appointing 16 new Circuit Court judges and 42 new Justices of the Peace, the latter being confirmed by the Senate the day before the new President was to be sworn in. The outgoing Secretary of State, John Marshall, signed and sealed the commissions, but was not able to deliver all of them before he swore in (in his new role of Chief Justice) the new President, Thomas Jefferson. William Marbury did not receive his commission and sued the new Secretary of State, James Madison, in an attempt to obtain it. The political atmosphere was tense:

> 'Everyone in Washington D.C. fully expected John Marshall to accomplish forthwith, through his newly acquired power as Chief Justice of the Supreme Court, what a scant few hours' time had thwarted him from accomplishing, on behalf of the Federalists, as Secretary of State. As well, it was a widely publicized "secret" that President Jefferson, in anticipation of the clearly expected outcome of Marbury, was preparing impeachment proceedings against Chief Justice Marshall and the rest of the Federalist-appointed Supreme Court bench': Tony Baker, '*Marbury v Madison*: A Brief Foray Into American Constitutional History: For "Charter-Watchers" and Their Friends' (1984) 5(9) *Ontario Criminal Lawyers' Association Newsletter* 26.
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> The result defused the political tension: although Marshall CJ found that Marbury was entitled to his commission, the Court ruled unconstitutional the statute empowering it to issue the writ of mandamus to the Secretary of State. Thus, President Jefferson enjoyed a victory over the Federalists because Marbury did not get his commission, but Marshall CJ secured for the Supreme Court the power of judicial review of legislation. (See, eg: Blackshield and Williams, above n 9, 3–4; Sujit Choudhry and Robert Howse, 'Secession: Constitutional Theory and The

the justifications advanced for the institution of judicial review of legislation. As will become clear in the subsequent analysis, it is not the decision itself, but rather the underlying reasoning, that is critical to an understanding of judicial review of legislation in Australia.

Chief Justice Marshall's reasons in *Marbury v Madison* can be reduced to two essential propositions: first, the *Constitution* is the supreme law; and, second, the judicial branch has primacy in its interpretation. The supremacy of the *Constitution* was said to arise from its very nature:

> The powers of the legislature are defined, and limited; and that those limits may not be mistaken, or forgotten, the constitution is written. To what purpose are powers limited, and to what purpose is that limitation committed to writing, if these limits may, at any time, be passed by those intended to be restrained? The distinction, between a government with limited and unlimited powers, is abolished, if those limits do not confine the persons on whom they are imposed, and if acts prohibited and acts allowed, are of equal obligation …
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> The constitution is either a superior, paramount law, unchangeable by ordinary means, or it is on a level with ordinary legislative acts, and like other acts, is alterable when the legislature shall please to alter it.
>
> If the former part of the alternative be true, then a legislative act contrary to the constitution is not law: if the latter part be true, then written constitutions are absurd attempts, on the part of the people, to limit a power, in its own nature illimitable.[14]

As Marshall CJ went on to state, the fundamental theory of government under a written constitution is that 'an act of the legislature, repugnant to the constitution, is void'.[15]

Establishing the supremacy of the *Constitution* was the first step.[16] The second would be to explain why the Court was to enjoy primacy in its interpretation of the *Constitution*. This Marshall CJ explained in the memorable phrase: '*it is emphatically the province and duty of the judicial department to say what the law is*.'[17] As the Chief Justice reasoned, assessing the compatibility of a law with the Constitution was a task comparable to any other situation in which the Court had to determine which of two conflicting laws applied:

> Those who apply the rule to particular cases, must of necessity expound and interpret that rule. If two laws conflict with each other, the courts must decide on the operation of each.

Quebec Secession Reference' (2000) 13 *Canadian Journal of Law and Jurisprudence* 143, 147–8; Ronald D Rotunda and John E Nowak, *Treatise on Constitutional Law: Substance and Procedure* (West Publishing, 2nd ed, 1992) vol 1, 36–9.)

14 *Marbury v Madison*, 5 US (1 Cranch) 137, 176–7 (1803). As more recently expressed: '[i]f the limitations on legislative power are to be meaningful, they must be enforced': Anthony Blackshield, 'The Courts and Judicial Review' in Sol Encel, Donald Horne and Elaine Thompson (eds), *Change the Rules! Towards a Democratic Constitution* (Penguin Books, 1977) 119, 125.

15 *Marbury v Madison*, 5 US (1 Cranch) 137, 177 (1803).

16 This, alone, is not sufficient, because 'constitutional supremacy … is agnostic on the practical question of which institution is best suited to enforce constitutional provisions': Choudhry and Howse, above n 13, 147.

17 *Marbury v Madison*, 5 US (1 Cranch) 137, 177 (1803) [emphasis added].

> So if a law be in opposition to the constitution; if both the law and the constitution apply to a particular case, so that the court must either decide that case conformably to the law, disregarding the constitution; or conformably to the constitution, disregarding the law; the court must determine which of these conflicting rules governs the case. This is of the very essence of judicial duty.[18]

Thus, the Court enjoyed primacy in the interpretation of the *Constitution*, itself the supreme law, and the Court would declare void any act of the legislature repugnant to the *Constitution*. Any other rule, Marshall CJ declared, 'would subvert the very foundation of all written constitutions … giving to the legislature a practical and real omnipotence, with the same breath which professes to restrict their powers within narrow limits'.[19]

The judgment of Marshall CJ in *Marbury v Madison* is of undoubted importance. However, it is not itself the genesis of the principles underpinning the judicial review of legislation to which it gives expression. Rather, the justifications for judicial review of legislation pre-date *Marbury v Madison*, making it imperative to examine earlier evidence of these justifications. This is especially so given that the decision in *Marbury v Madison* might be criticised,[20] or seen as a non-obvious result,[21] and because of the equivocal understanding of *Marbury v Madison* itself by the Framers of the *Australian Constitution*, which will be shown below.[22]

B Judicial review of legislation before *Marbury v Madison*

The justifications for the judicial review of legislation expressed by Marshall CJ in *Marbury v Madison* are evidenced in earlier American writings.[23] In James Iredell's 1786 letter 'To The Public', he wrote (identifying himself merely as 'An Elector', although he was a prominent North Carolina lawyer and Superior Court judge at the time, and would later be an inaugural Justice of the Supreme Court of the United States) that the *Constitution*:

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18 Ibid 177–8.

19 Ibid 178.

20 See, eg, Learned Hand, *The Bill of Rights* (Harvard University Press, 1958) 1–11; William Van Alstyne, 'A Critical Guide to *Marbury v Madison*' [1969] *Duke Law Journal* 1; Choudhry and Howse, above n 13, 147–8. The correctness of *Marbury v Madison* has never been challenged by the Supreme Court. As early as 1819, it treated the issue as definitively resolved, holding that any question of the constitutional validity of legislation:

> 'must be decided peacefully, or remain a source of hostile legislation, perhaps of hostility of a still more serious nature; and if it is to be so decided, by this tribunal alone can the decision be made. On the Supreme Court of the United States has the constitution of our country devolved this important duty': *McCulloch v Maryland*, 17 US (4 Wheat) 316, 400–1 (1819) (Marshall CJ, for the Court).

21 '*Marbury v Madison* might never have happened': Transcript of Proceedings, *Kable v Director of Public Prosecutions for New South Wales* [1995] HCATrans 430 (7 December 1995) (Toohey J).

22 See also Thomson, above n 10, 176.

23 See William Michael Treanor, 'Judicial Review Before *Marbury*' (2005) 58 *Stanford Law Review* 455, 471. See also Gerald Leonard, 'Iredell Reclaimed: Farewell to Snowiss's History of Judicial Review' (2006) 81 *Chicago-Kent Law Review* 867; Matthew P Harrington, 'Judicial Review before John Marshall' (2003) 72 *George Washington Law Review* 51.

> is the *fundamental* law, and unalterable by the legislature, which derives all its power from it. … an act of Assembly, inconsistent with the constitution, is *void,* and cannot be obeyed, without disobeying the superior law to which we were previously and irrevocably bound.[24]

This statement of the supremacy of the *Constitution* was followed by a statement of the judicial role in interpreting it: '[t]he judges … must take care … that every act of Assembly they presume to enforce is warranted by the constitution, since if it is not, they act without lawful authority'.[25]

In the Philadelphia Convention of 1787 at which the Constitution of the United States was drafted, 'no fewer than a dozen delegates in almost two dozen instances discussed judicial review of federal legislation'.[26] Examining those instances, Prakash and Yoo conclude that judicial review of legislation was 'an accepted product of a written constitution with a separation of powers'.[27] In the ensuing process of State ratification, judicial review of legislation was identified and justified on the twin grounds of constitutional supremacy and the primacy of judicial interpretation. In the Pennsylvania Ratifying Convention of 1787, James Wilson (who played a leading role in the drafting of the Constitution, and, like Iredell would later be an inaugural Justice of the Supreme Court), explained that:

> under this Constitution, the legislature may be restrained, and kept within its prescribed bounds, by the interposition of the judicial department. … it is possible that the legislature … may transgress the bounds assigned to it … but when it comes to be discussed before *the judges,*–when they consider its principles, and find it to be incompatible with the superior power of the Constitution,– it is their duty to pronounce it *void*.[28]

Of even greater influence, and similar clarity in its expression of the concepts of the supremacy of the *Constitution* and the primacy of the judiciary in its interpretation, was Alexander Hamilton's writing in *The Federalist #78* (1788):

> The complete independence of the courts of justice is peculiarly essential in a limited Constitution. By a limited Constitution, I understand one which contains certain specified exceptions to the legislative authority; such, for instance, as that it shall pass no bills of attainder, no *ex post facto* laws, and the like. Limitations of this kind can be preserved in practice no other way than through the medium of courts of justice, whose duty it must be to declare all acts contrary to the manifest tenor of the Constitution void. Without this, all the reservations of particular rights or privileges would amount to nothing.[29]

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24 James Iredell, 'To the Public' in Griffith J McRee (ed), *Life and Correspondence of James Iredell* (D Appleton, 1858) vol 2, 145, 147.

25 Ibid 148.

26 Saikrishna B Prakash and John C Yoo, 'The Origins of Judicial Review' (2003) 70 *University of Chicago Law Review* 887, 928. See also Robert J Steinfeld, 'The Early Anti-Majoritarian Rationale for Judicial Review' in Daniel Hamilton and Alfred Brophy (eds), *Transformations in American Legal History: Essays in Honor of Professor Morton J Horwitz* (Harvard University Press, 2010) 143, 144.

27 Prakash and Yoo, above n 26, 952.

28 Philip B Kurland and Ralph Lerner (eds), *The Founders' Constitution* (University of Chicago Press, 1987) vol 4, 229.

29 Alexander Hamilton, *The Federalist #78* in Kurland and Lerner (eds), above n 28, vol 4, 42.

Hamilton went on to expressly state that 'the courts were designed to be an intermediate body between the people and the legislature, in order, among other things, to keep the latter within the limits assigned to their authority,'[30] adding that 'the courts of justice are to be considered as the bulwarks of a limited Constitution against legislative encroachments'.[31]

After the *Constitution* entered into force, authority in support of judicial review of legislation emerged in the decisions of the Supreme Court of the United States. In *Vanhorne's Lessee v Dorrance* (1795), Paterson J (who was later a member of the unanimous Court in *Marbury v Madison*) clearly articulated both bases for judicial review of legislation.[32] First, he observed that '[t]he Constitution … is the supreme law of the land … there can be no doubt, that every act of the Legislature, repugnant to the Constitution, is absolutely void'.[33] Second, he stated that 'if a legislative act oppugns a constitutional principle … it will be the duty of the Court to adhere to the Constitution, and to declare the act null and void'.[34] Further, in *Calder v Bull* (1798), Iredell J reiterated the propositions he had advanced earlier, first stating that '[i]f any act of Congress, or of the Legislature of a state, violates those constitutional provisions, it is unquestionably void', adding that the Constitution, 'must be our guide, whenever we are called upon as judges to determine the validity of a legislative act'.[35]

By the time of *Marbury v Madison*, therefore, the institution of judicial review of legislation had considerable foundations in the United States,[36] and had been widely justified on the twin bases of the supremacy of the *Constitution* and the primacy of the judiciary in its interpretation. At the very least, *Marbury v Madison* cannot be viewed as a radical departure from previous authority, irrespective of what might be said of the political nature of the issues addressed by the Court.[37] The decision in *Marbury v Madison* itself, and the justifications for judicial review advanced by Marshall CJ (building on earlier authorities), are the essential comparative and historical context in the light of which the judicial review of legislation under the *Australian Constitution* can now be examined.

IV *MARBURY V MADISON* IN AUSTRALIA:AN UNCERTAIN GRASP

An easy justification for judicial review of legislation under the *Australian Constitution* would be to say that *Marbury v Madison* was simply inherited. This section will examine the considerable support for such an approach, but it will also consider Thomson's criticism that the historical record provides insufficient evidence to support

30 Ibid.
31 Ibid 143.
32 *Vanhorne's Lessee v Dorrance*, 2 US (2 Dall) 304 (1795).
33 Ibid 308.
34 Ibid 309.
35 *Calder v Bull*, 3 US 386, 399 (1798).
36 Judicial review of legislation had also been practised in the judicial decisions of seven States prior to *Marbury v Madison*: Prakash and Yoo, above n 26, 933.
37 It was 'a highly contentious and "political" case': *Wilson v Minister for Aboriginal and Torres Strait Islander Affairs* (1996) 189 CLR 1, 45 (Kirby J); referring to: *INS v Chadha*, 462 US 919, 943 (1983) (Burger CJ, for the majority).

this common assertion,[38] and, further, it will question the timeliness of references to *Marbury v Madison* as the justification for judicial review of legislation in Australia.

There is ample support for judicial review of legislation in Australia being justified by the inheritance of *Marbury v Madison*. A prominent exponent of this view is Sir Anthony Mason, who wrote, in a passage later adopted by the Australian Law Reform Commission,[39] that: '[a]ware of *Marbury v Madison* and having the American practice before them, the framers plainly intended that the Court should undertake that function'.[40] Judicial statements have also justified judicial review of legislation by reference to the decision in *Marbury v Madison*, beginning with the statement of Fullagar J in *Australian Communist Party v Commonwealth* (1950): 'in our system the principle of *Marbury v. Madison* is accepted as axiomatic'.[41]

However, there are two fundamental historical problems with linking judicial review of legislation in Australia directly to the decision in *Marbury v Madison*. First, no such link was drawn until the judgment of Fullagar J in the *Communist Party Case*, after nearly half of century of judicial review of legislation under the *Australian Constitution*. This reference, and all of the subsequent opinions building upon it,[42] are, at best, *ex post facto* justifications for the judicial review of legislation. As noted earlier, this article seeks to identify arguments that can justify judicial review of legislation from the moment of its first exercise.

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38 Thomson, above n 10, 177.

39 Australian Law Reform Commission, *The Judicial Power of the Commonwealth: A Review of the Judiciary Act 1903 and Related Legislation*, Report No 92 (2001) [12.1]–[12.2].

40 Anthony Mason, 'The Role of a Constitution Court in a Federation: A Comparison of the Australian and the United States Experience' (1986) 16 *Federal Law Review* 1, 6. Similar statements indicating that judicial review of legislation was intended, or at least assumed, abound. See, eg, Sanford H Kadish, 'Judicial Review in the High Court and the United States Supreme Court' (1959) 2 *Melbourne University Law Review* 4, 8; Robert C L Moffat, 'Philosophical Foundations of the Australian Constitutional Tradition' (1965) 5 *Sydney Law Review* 59, 84; Brian Galligan, 'Judicial Review in the Australian Federal System: Its Origin and Function' (1979) 10 *Federal Law Review* 367, 396; Murray Gleeson, *The Rule of Law and the Constitution: Boyer Lectures 2000* (ABC Books, 2000) 132; Michael Coper, 'Court's role in Democracy' in Blackshield, Coper and Williams (eds), above n 1, 203, 203; Williams, above n 1, 377; Blackshield and Williams, above n 9, 8.

41 *Australian Communist Party v Commonwealth* (1950) 83 CLR 1, 262 (Fullagar J)('*Communist Party Case*'). *The Oxford English Dictionary* relevantly defines axiomatic to mean 'self-evident; indisputably true' and defines an axiom to be 'a well-established or universally-conceded principle': J A Simpson and E S C Weiner, *The Oxford English Dictionary* (Clarendon Press, 2nd ed, 1989) 838. *The Macquarie Dictionary* relevantly defines axiomatic to mean 'self-evident' and defines an axiom to be 'a recognised truth' and 'an established and universally accepted principle or rule': Arthur Delbridge et al, *The Macquarie Dictionary* (Macquarie University, 2nd ed, 1991) 117.

42 Subsequent adoptions of Fullagar J's approach include: *Victoria v Commonwealth and Hayden* (1975) 134 CLR 338, 379 (Gibbs J); *Harris v Caladine* (1990) 172 CLR 84, 135 (Toohey J); *Commonwealth v Mewett* (1996) 191 CLR 471, 547 (Gummow and Kirby JJ), 497 (Dawson J); Christos Mantziaris, 'The Executive — A Common Law Understanding of Legal Form and Responsibility' in Robert French, Geoffrey Lindell and Cheryl Saunders (eds), *Reflections on the Australian Constitution* (Federation Press, 2003) 125, 136; Henry Burmester, 'The Presumption of Constitutionality' (1983) 13 *Federal Law Review* 277, 284.

The second problem is even greater: evidence of the founders' awareness of *Marbury v Madison* is much less certain than Sir Anthony Mason's comment suggests. This is illustrated strikingly by the drafting history of s 75(v) of the *Australian Constitution*, a provision which overcomes what Gummow J has identified as 'the actual decision in *Marbury v Madison*',[43] that mandamus could not be issued to a non-judicial officer. The sub-section was proposed by Andrew Inglis Clark,[44] the great Tasmanian jurist described as 'more American than the Americans in his admiration of American institutions'.[45] Inglis Clark's sub-section was included in the 1891 and 1897 drafts of the *Australian Constitution*.[46] However, in 1898 it was deleted,[47] with Edmund Barton and Isaac Isaacs, both leading lawyers and later Justices of the High Court, in rare agreement fearing that naming mandamus and prohibition in s 75(v) would risk excluding the availability of other writs.[48] Isaacs directly contradicted *Marbury v Madison*, telling the Convention that: 'I think I am safe in saying that the power is not expressly given in the United States Constitution, but undoubtedly the court exercises it.'[49] Inglis Clark's remedial telegram to Barton elicited the reply: '[n]one of us here had read the case mentioned by you of Marbury v. Madison or if seen it had been forgotten – It seems however to be a leading case'.[50] Section 75(v) was restored.[51] However, this episode dispels the suggestion that the Framers had *Marbury v Madison* in mind as a justification for judicial review of legislation so obvious that it was unnecessary to discuss it at length.[52]

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43 *Truth About Motorways Pty Ltd v Macquarie Infrastructure Investment Management Ltd* (2000) 200 CLR 591, 633 [111] (Gummow J).

44 Thomson, above n 10, 179. The evolution of s 75(v) is described in detail in: *David Jones Finance and Investments v Federal Commissioner of Taxation* (1991) 99 ALR 447, 454–7 (Morling and French JJ); *Ruddock v Vadarlis* (2001) 183 ALR 1 (Black CJ and French J).

45 Bernhard Wise, *The Making of the Australian Commonwealth* (Longmans, Green & Co, 1913) 74.

46 John M Williams, *The Australian Constitution: A Documentary History* (Melbourne University Press, 2005) 451 (Sydney 1891), 601 (Adelaide 1897), 784 (Sydney 1897).

47 *Official Record of the Debates of the Australasian Federal Convention*, Melbourne, 31 January 1898, 349.

48 Ibid 320–1 (Edmund Barton), 321 (Isaac Isaacs).

49 Ibid 321 (Isaac Isaacs).

50 Thomson, above n 10, 179; J A La Nauze, *The Making of the Australian Constitution* (Melbourne University Press, 1972) 234.

51 *Official Record of the Debates of the Australasian Federal Convention*, Melbourne, 4 March 1898, 1885.

52 There is clearly a relationship between judicial review of legislation and judicial review of executive action (see, eg: Williams, above n 1, 376). However, their justifications under the *Australian Constitution* differ because of the express provision for judicial review of executive action in s 75(v). Judicial review of executive action is, therefore, frequently justified *both* on the basis of s 75(v) *and* by the *Marbury v Madison* expression of the judicial role. Thus, in *Plaintiff S157/2002 v Commonwealth* (2003) 211 CLR 476, Gaudron, McHugh, Gummow, Kirby and Hayne JJ held that 's 75(v) introduces into the Constitution of the Commonwealth an entrenched minimum provision of judicial review': at 513; but continued:

> 'Such jurisdiction exists to maintain the federal compact by ensuring that propounded laws are constitutionally valid and ministerial or other official action

The point of this section is not that judicial review of legislation under the *Australian Constitution* is illegitimate; but rather that bare reference to the decision in *Marbury v Madison* is not a sufficient justification. To refer to *Marbury v Madison* alone is historically inaccurate: the passages from the Convention Debates extracted above are evidence of the Framers' ignorance of *Marbury v Madison*, and the reference in the *Communist Party Case*, and its later reiterations, came too late. A more nuanced historical search must now be undertaken, therefore, to identify evidence of the acceptance in Australia of the principles underpinning judicial review of legislation

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lawful and within jurisdiction. In any written constitution, where there are disputes over such matters, there must be an authoritative decision-maker. Under the Constitution of the Commonwealth the ultimate decision-maker in all matters where there is a contest, is this Court. The Court must be obedient to its constitutional function. In the end, pursuant to s 75 of the Constitution, this limits the powers of the Parliament or of the Executive to avoid, or confine, judicial review': at 514.

In these passages, their Honours rested judicial review of administrative action on the twin pillars of s 75(v) *and* the judicial role argument from *Marbury v Madison*. See also: *Plaintiff M61/2010E v Commonwealth* (2010) 243 CLR 319, 355 (French CJ, Gummow, Hayne, Heydon, Crennan, Kiefel and Bell JJ); Stephen Gageler, 'The Underpinnings of Judicial Review of Administrative Action: Common Law or Constitution' (2000) 28 *Federal Law Review* 303, 310; W M C Gummow, 'The Permanent Legacy' (2000) 28 *Federal Law Review* 177, 180–1.

The relationship between *Marbury v Madison* and s 75(v) has long been recognised: *Ah Yick v Lehmert* (1905) 2 CLR 593, 609 (Barton J); *Tramways Case [No 1]* (1914) 18 CLR 54, 82 (Gavan Duffy and Rich JJ); *Collins v Charles Marshall Pty Ltd* (1955) 92 CLR 529, 544 (Dixon CJ, McTiernan, Williams, Webb, Fullagar and Kitto JJ); *Deputy Commissioner of Taxation v Richard Walter Pty Ltd* (1994) 183 CLR 168, 179 (Mason CJ), 204 (Deane and Gaudron JJ); *Truth About Motorways Pty Ltd v Macquarie Infrastructure Investment Management Ltd* (2000) 200 CLR 591, 633 [111] (Gummow J); and *Re Refugee Review Tribunal; Ex parte Aala* (2000) 204 CLR 82, 138–9 (Hayne J).

In *A-G (NSW) v Quin* (1990) 170 CLR 1, Brennan J observed that: '[t]he essential warrant for judicial intervention is the declaration and enforcing of the law … that is the characteristic duty of the judicature as the third branch of government': at 35; and quoted from *Marbury v Madison*: 'The duty and the jurisdiction of the courts are expressed in the memorable words of Marshall CJ in *Marbury v Madison*: 'It is, emphatically, the province and duty of the judicial department to say what the law is'': at 35–6. This link has been approved on many subsequent occasions: *Re Minister for Immigration and Multicultural Affairs; Ex parte Abebe* (1999) 197 CLR 510, 560, 579 (Gummow and Hayne JJ); *Minister for Immigration and Multicultural Affairs v Eshetu* (1999) 197 CLR 611, 652 (Gummow J); *Minister for Immigration and Multicultural Affairs v Yusuf* (2001) 206 CLR 323, 348 (McHugh, Gummow and Hayne JJ); *Corporation of the City of Enfield v Development Assessment Commission* (2000) 199 CLR 135, 153–4 (Gleeson CJ, Gummow, Kirby and Hayne JJ).

However, the judicial review of legislation under the *Australian Constitution*, unaffected by s 75(v), must be justified by the *Marbury v Madison* description of the judicial role alone.

stated by Marshall CJ in that case: the supremacy of the *Constitution* and the primacy of the judiciary in its interpretation.[53]

V THE JUSTIFICATIONS FOR JUDICIAL REVIEW OF LEGISLATION IN FEDERATION RECORDS

There is ample historical evidence of Australian acceptance of the twin justifications for judicial review of legislation: the supremacy of the *Constitution* and the primacy of the judiciary in its interpretation. The intelligence conveyed by Inglis Clark in 1898, correcting the Convention's error in removing s 75(v),[54] was passed on to the entire Convention in Melbourne by Barton in his role as leader of the Convention and Chair of the Drafting Committee. Barton explained the significance of *Marbury v Madison* as follows:

> It is only such Acts of Congress as are within the scope of their powers as conferred by the Constitution that became the supreme law of the land. Where such Acts are in violation of the Constitution, it is the province of the courts of the United States to declare the law void and refuse to execute it.[55]

This information was received without specific comment from any delegate. As the following analysis will demonstrate, Barton here merely expressed the institution of

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53 An alternative historical justification, that judicial review of legislation was well established in the Australian Colonies, has been frequently advanced. As Chief Justice Gleeson noted (extra-judicially): 'From the earliest days of European settlement, Australians have been accustomed to governments of limited authority, and to judicial power to decide the limits': Murray Gleeson, 'Legality — Spirit and Principle' (Lecture delivered as the 2nd Magna Carta Lecture, New South Wales Parliament House, 20 November 2003) <http://www.hcourt.gov.au/assets/publications/speeches/former-justices/gleesoncj/cj_20nov.html> and '[t]he enactments of Australian colonial legislatures were frequently scrutinised for validity, both by the Supreme Courts of the respective colonies and by the Privy Council': Gleeson, above n 40, 132–3. Indeed, Selway and Williams placed considerable weight on the practice of judicial review of Colonial legislation as the basis for judicial review of Commonwealth legislation by the High Court in the first 50 years of the Australian Commonwealth: Bradley Selway and John M Williams, 'The High Court and Australian Federalism' (2005) 35 *Publius* 467, 474. Judicial review of legislation was certainly well-known in the Australian Colonies. Moreover, it was the over-zealous judicial review of legislation by Justice Benjamin Boothby in South Australia that led to numerous crises and eventually the *Colonial Laws Validity Act 1865* (Imp) (see, eg: John McLaren, *Dewigged, Bothered and Bewildered: British Colonial Judges on Trial from 1800–1900* (University of Toronto Press, 2011) 190–216). However, as Thomson points out, this extraordinary history (which includes other instances of Colonial uproar over judicial invalidation of legislation) was largely ignored in the *Convention Debates*: Thomson, above n 10, 177–8. Although the historical experience can justify the *existence* of judicial review of legislation, the focus of this paper is on the *justifications* for the institution. Moreover, the situation in the Colonies is not entirely analogous to that under the *Australian Constitution*.

54 Barton told the Convention that 'it was scarcely wise of us to leave it out' and 'we came to rather a hasty conclusion upon that matter': *Official Record of the Debates of the Australasian Federal Convention*, Melbourne, 4 March 1898, 1875 (Edmund Barton).

55 Ibid.

judicial review of legislation and its justifications in terms that had been familiar throughout the process of drafting the *Australian Constitution*.

Before examining the Federation records, it is important to note that both the institution of, and justifications for, judicial review of legislation, were clearly explained in the key contemporary constitutional texts. James Bryce's *The American Commonwealth*, first published in 1888, provided the Framers with their chief distillation of the experience of the most comparable model of federal government.[56] Bryce thoroughly examined the institution of judicial review of legislation, writing that:

> No feature in the government of the United States has awakened so much curiosity in the European mind, caused so much discussion, received so much admiration, and been more frequently misunderstood, than the duties assigned to the Supreme Court and the functions which it discharges in guarding the ark of the Constitution. Yet there really is no mystery about the matter. It is not a novel device. It is not a complicated device. It is the simplest thing in the world if approached from the right side.[57]

Bryce clearly identified the dual justifications for this institution. First, the supremacy of the *Constitution*, a document he described as: 'one comprehensive fundamental enactment … altogether out of the reach of Congress'.[58] Second, the primacy of the judiciary in the interpretation of the *Constitution*:

> How and by whom, in case of dispute, is the validity or invalidity of a statute to be determined? Such determination is to be effected by setting the statute side by side with the Constitution, and considering whether there is any discrepancy between them. … It is a question of interpretation, that is, of determining the true meaning both of the superior law and of the inferior law … Now the interpretation of laws belongs to courts of justice. … It is therefore obvious that the question … must be determined by the courts.[59]

Judicial review of legislation was similarly explained by A V Dicey in his *Lectures Introductory to the Study of the Law of the Constitution*, first published in 1885. Juxtaposing English Parliamentary supremacy against American federalism, Dicey (whose influence on English and Australian legal thought was significant)[60] defined the 'leading characteristics of federalism' to be: 'the supremacy of the constitution — the distribution among bodies with limited and co-ordinate authority of the different powers of government — the authority of the Courts to act as interpreters of the

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56 James Bryce, *The American Commonwealth* (Macmillan, 2nd rev ed, 1891). See, eg: John Williams, 'The Emergence of the Commonwealth Constitution' in H P Lee and George Winterton (eds), *Australian Constitutional Landmarks* (Cambridge University Press, 2003) 1, 14, 24–5; La Nauze, above n 50, 18.

57 Bryce, above n 56, vol 1, 237.

58 Ibid 238.

59 Ibid 241–2.

60 See, eg: Haig Patapan, 'A Return to Dicey? The Philosophical Foundations of the High Court's Implied Rights Jurisprudence' in Charles Sampford and Kim Preston (eds), *Interpreting Constitutions: Theories, Principles and Institutions* (Federation Press, 1996) 146, 147–9. Patapan refers to Menzies' statement that he had been 'brought up on the fundamental constitutional studies of A V Dicey and Lord Bryce': Robert Menzies, *Central Power in the Australian Commonwealth* (University Press of Virginia, 1967) 2.

constitution'.[61] For Dicey, the essence of federalism was not merely the distribution of powers, but their enumeration in a supreme constitution,[62] and the primacy of the judiciary in its interpretation — as its 'final interpreter'[63] and 'ultimate arbiter',[64] making the judiciary 'the pivot on which the constitutional arrangements of the country turn',[65] and ultimately 'not only the guardian but also the master of the constitution'.[66]

The writings of Bryce and Dicey, therefore, provided the Framers with an introduction to the institution of judicial review of legislation, and with a statement of the justifications for it: the supremacy of the *Constitution* and the primacy of the judiciary in its interpretation. Evidence of Australian acceptance of these justifications must now be sought in the Federation records.

A The supremacy of the *Australian Constitution*

The legal supremacy of the *Australian Constitution* was widely understood by its Framers. In his *Manual of Reference to Authorities for the Use of the Members of The National Australasian Convention* (1891), Richard Chaffey Baker (a South Australian lawyer, and later Chairman of Committees for the Conventions at which the *Australian Constitution* was drafted) wrote that the American constitution was 'the supreme law of the land' which 'limits and defines the scope of' legislative powers, which the constitution 'overrides … whenever they come in conflict',[67] noting that the same principle prevailed in Canada.[68] In *The Coming Commonwealth* (1897), Robert Garran (who, although not an elected delegate, rendered distinguished service as Secretary to the Drafting Committee at the Conventions) identified '[t]he supremacy of the Federal Constitution' in Australia as one of the 'essential characteristics of federal government which follow necessarily from the nature of the system'.[69] He explained that:

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61 A V Dicey, *Lectures Introductory to the Study of the Law of the Constitution* (MacMillan, 1885) 132. See also at 152.

62 Ibid 134–46.

63 Ibid 146.

64 Ibid 149.

65 Ibid 160.

66 Ibid 161. In the note on Australian Federalism that he added to his last edition in 1915, Dicey stressed the institution of judicial review of legislation and its link to the primacy of the judiciary in the interpretation of the *Australian Constitution*:

> 'That this duty is laid upon the Courts is not indeed expressly stated in the Constitution of the Commonwealth, any more than in the Constitution of the United States; but no English lawyer can doubt that the Courts, and ultimately the Federal Supreme Court, are intended to be the interpreters, and in this sense the protectors of the Constitution': A V Dicey, *Introduction to the Study of the Law of the Constitution* (MacMillan, 8thed, 1915) 531.

67 Richard Chaffey Baker, *A Manual of Reference to Authorities for the Use of the Members of The National Australasian Convention* (W K Thomas, 1891) 127.

68 Ibid.

69 Robert Garran, *The Coming Commonwealth: An Australian Handbook of Federal Government* (Angus and Robertson, 1897) 23.

> To say that the constitution is 'supreme' … mean[s] … that it is a fundamental law which has a higher sanction than ordinary acts of legislation, and which the legislature, acting in its ordinary capacity, cannot modify or repeal.[70]

The supremacy of the *Australian Constitution* was clearly stated in the three great contemporary commentaries published around the time of its entry into force.[71] William Harrison Moore, Professor of Law at the University of Melbourne, described the *Constitution* as 'a superior part' of the law of Australia.[72] Andrew Inglis Clark wrote that:

> limitations are imposed by the Constitution of the Commonwealth, and they are therefore legal limitations in the strictest sense of the word, because the Constitution supplies the fundamental and organic laws of the Commonwealth.[73]

In the classic *Annotated Constitution of the Australian Commonwealth* (1901), Dr John Quick (a Victorian lawyer and member of the Conventions) and Robert Garran similarly described the *Constitution* as 'the supreme law of the Commonwealth',[74] making express the significance of this supremacy:

> Not all enactments purporting to be laws made by the Parliament are binding; but laws made under, in pursuance of, and within the authority conferred by the Constitution, and those only, are binding on the courts, judges and people. A law in excess of the authority conferred by the Constitution is no law; it is wholly void and inoperative; it confers no rights, it imposes no duties; it affords no protection.[75]

There is ample evidence from the historical record of the intended supremacy of the *Australian Constitution*. To establish the legitimacy of judicial review of legislation, it remains to also produce evidence for the primacy of the judiciary in its interpretation.

B The judicial duty to interpret and apply the *Constitution*

The nature of the judicial role, and the duty it imposes on Courts to interpret and apply the supreme law of the *Constitution* in all cases coming before them, was also well understood by the Framers. Baker's *Manual* rejected the criticism of the primacy of the Courts' interpretation of the *Constitution* that 'the Judiciary was placed above the Legislatures',[76] instead explaining, with reference to a quotation from Bryce, that:

> it was not the Judiciary but the Constitution which was placed above the Legislatures; that the Constitution and all powers exercised under it … must in case of doubt be

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70 Ibid 25.

71 It has been noted that these texts provide analysis of 'a Constitution in pristine condition': John M Williams, 'Introduction' in Andrew Inglis Clark, *Studies in Australian Constitutional Law* (Maxwell, 1901, 1997 reprint) vii.

72 William Harrison Moore, *The Constitution of the Commonwealth of Australia* (John Murray, 1902) 236.

73 Andrew Inglis Clark, *Studies in Australian Constitutional Law* (Charles F Maxwell, 1901) 3–4.

74 John Quick and Robert Randolph Garran, *The Annotated Constitution of the Australian Commonwealth* (Angus and Robertson, 1901) 791.

75 Ibid 346.

76 Baker, above n 67, 125. This same objection was made, but rejected, in the *Convention Debates* when Frederick William Holder sought to restrict judicial review of legislation on the basis of an objection that 'over everything is the High Court': *Official Record of the Debates of the Australasian Federal Convention*, Melbourne, 1 March 1898, 1718 (Frederick William Holder). See below n 99.

> interpreted by some one, and that the Judiciary acted not so much as a third authority in the Government, but rather as "the living voice of the Constitution, the unfolder of the mind of the people whose will stands expressed in that supreme instrument."[77]

Baker accepted that the power of judicial review of legislation was 'very great' but noted that 'it is exercised in a manner and by a body which affords the least possible chance of friction and quarrels'.[78] Barton similarly stated at the Sydney Convention of 1891 that 'where it becomes necessary to construe the validity of a statute … the safest course is to trust to the interpretation of the federal court'.[79]

Baker went on to describe the Supreme Courts in America and Canada as 'guardians of the public' who 'enquire and determine … whether [any] Act is beyond the authority conferred' by their respective Constitutions.[80] In the 1897 Convention in Adelaide, Barton also made clear the guardianship role of the Courts, and its link to the primacy of judicial interpretation of the *Constitution*: 'The Federal Judiciary must be the bulwark of the Constitution. It must be the supreme interpreter of the Constitution...'[81] Similarly, South Australian lawyer Josiah Symon described the High Court as 'the keystone to the federal arch',[82] and the sole Labor delegate, William Trenwith (from Victoria), supported the High Court as 'a strong and dignified custodian of the Constitution'.[83]

Garran in *The Coming Commonwealth* also described the judiciary as a 'guardian',[84] explaining its role in the following terms:

> Wherever there is a body with limited powers … it is important that there should be some authority whose decision on every such point is final. The question is properly a judicial one, and ought to be submitted to an impartial and independent tribunal. … This duty is cast upon the Court, not by any express provision of the constitution, but by a well-known principle of British common law that where a body with limited authority (whether it be a school-board or a Federal Parliament) exceeds that authority, its action is simply void.[85]

Garran distinctly approved the role of federal courts in performing judicial review of legislation in the United States[86] and Canada,[87] and berated Switzerland's lack of this function with the observation, quoting Dicey, that '[a]ccording to any English

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77 Baker, above n 67, 125–6; citing Bryce, above n 56, 348.
78 Baker, above n 67, 126.
79 *Official Record of the Debates of the Australasian Federal Convention*, Sydney, 6 March 1891, 96 (Edmund Barton).
80 Baker, above n 67, 128.
81 *Official Report of the National Australasian Convention Debates*, Adelaide, 20 April 1897, 952 (Edmund Barton).
82 Ibid 950 (Josiah Symon).
83 *Official Report of the National Australasian Convention Debates*, Adelaide, 19 April 1897, 940 (William Trenwith).
84 Garran, above n 69, 28. Similar expressions remain in use today: the High Court has been described as the 'defender of the Constitution': David Jackson, 'Internationalisation of Rights and the Constitution' in French, Lindell and Saunders (eds), above n 41, 105, 108.
85 Garran, above n 69, 28.
86 Ibid 65–6.
87 Ibid 87.

standard, Swiss statesmanship has failed as distinctly as American statesmanship has succeeded'.[88] Addressing the *Australian Constitution*, Garran indicated that:

> the federal courts will assume the duties of 'Guardian of the Constitution;' that is to say, they will judicially interpret the Federal Constitution, decide as to the validity of federal laws and … [e]very law that comes before them, whether of the Commonwealth or of a State, they will test by the Federal Constitution, and pronounce it valid or void.[89]

The classic constitutional texts also made clear the role of the Courts as definitive interpreters of the *Constitution*. Inglis Clark wrote that: 'Any doubt or dispute as to the extent of the jurisdiction of the Parliament of the Commonwealth … is a matter of constitutional law to be determined by the Judiciary'.[90] Harrison Moore linked judicial review directly to the nature of judicial power and the constitutional role of the judiciary:

> The Commonwealth Judiciary … has … an independent duty … within its own sphere of judicial power, to uphold and maintain the Constitution against all attack, whether from the Commonwealth Executive or Legislature or the State Governments.[91]

Harrison Moore expanded on this judicial duty:

> The duty of passing upon the validity of Acts, whether of the Commonwealth or of the State Parliament, exists purely as an incident of judicial power. … It is the duty of every Court to administer the law, of which the *Constitution* is a part, and a superior part.[92]

This last sentence is reminiscent of Marshall CJ's statement in *Marbury v Madison*: '[i]t is emphatically the province and duty of the judicial department to say what the law is.'[93]

Quick and Garran echoed the guardianship view of the judicial role, writing that the High Court would, like its American counterpart, be 'the "guardian of the Federal Constitution"' and thus have 'the duty of interpreting the *Constitution*, in cases which come before it, and of preventing its violation'.[94] They expanded on this judicial role:

> without any express permission, the Courts of the States, and the Federal Courts, whenever they have jurisdiction over a case, have the duty of interpreting the *Constitution* so far as it affects the rights of the parties … [including a] right to declare that a law of the Commonwealth or of a State is void by reason of transgressing the *Constitution*. This is a duty cast upon the courts by the very nature of the judicial function. The Federal Parliament and State Parliaments are not sovereign bodies; they are legislatures with limited powers, and any law which they attempt to pass in excess of those powers is no law at all it is simply a nullity, entitled to no obedience. The question whether those powers have in any instance been exceeded is … a purely judicial question, on which the courts must pronounce. This doctrine was settled in the United States in 1803 by the great case of *Marbury v Madison*.[95]

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88 Ibid 77, quoting Dicey, above n 61, 156.
89 Garran, above n 69, 153.
90 Inglis Clark, above n 73, 3–4.
91 Moore, above n 72, 233.
92 Ibid 236.
93 *Marbury v Madison*, 5 US (1 Cranch) 137, 177 (1803).
94 Quick and Garran, above n 74, 725.
95 Ibid 791.

Judicial review of legislation by the Courts was also addressed by the South Australian politician and Convention delegate John Cockburn in *Australian Federation* (1901):

> In a federal form of government … it is necessary that there should be some readily accessible authority which can act as umpire when any dispute arises between the parties to the agreement. With this object in view, provision has been made for a high court of justice which shall pronounce judgment as to the validity of any of the acts of the Federal or State Parliaments when they are called in question.[96]

Further, implicit support for the primacy of Courts in the interpretation of the *Constitution* may also be found in the numerous references to the future importance of the body of decisions that would be generated by the High Court interpreting the *Constitution*. Thus, Isaacs' statement to the Melbourne Convention that:

> 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, but the Judges of the Supreme Court. Marshall, Jay, Story, 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.[97]

Isaacs was far from alone in expressing such sentiments,[98] which highlighted the power and importance of judicial interpretation on the future *Constitution*, a power which existed only because the Courts would enforce *their* interpretation of the *Constitution* to invalidate unconstitutional legislative acts.

C The sufficiency of these justifications

The above analysis demonstrates not merely that judicial review of legislation was *intended* to occur under the *Australian Constitution*,[99] but that the Framers made clear

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96 John A Cockburn, *Australian Federation* (Horace Marshall & Son, 1901) 28–9. See also at 66.

97 *Official Record of the Debates of the Australasian Federal Convention*, Melbourne, 28 January 1898, 283 (Isaac Isaacs).

98 See also Inglis Clark, above n 73, 6, 15–16; Cockburn, above n 96, 18–19; *Official Record of the Debates of the Australasian Federal Convention*, Melbourne, 28 January 1898, 275 (John Downer). Similarly, Deakin's Second Reading speech on the *Judiciary Act 1903* (Cth): the High Court would be the 'organ of the national life which preserving the union is yet able from time to time to transfuse into it the fresh blood of the living present': Commonwealth, *Parliamentary Debates*, House of Representatives, 18 March 1902, 10967 (Alfred Deakin).

99 Confirmation from the historical record of the Framers' intent that there would be judicial review of legislation is given by their rejection of two proposals made for its restriction. Frederick William Holder proposed a s 121A to refer laws held unconstitutional to referendum (*Official Record of the Debates of the Australasian Federal Convention*, Melbourne, 1 March 1898, 1717–21, 2 March 1898, 1723–32, and see Thomson, above n 10, 184), and John Hannah Gordon proposed a s 74A to permit laws to be declared *ultra vires* only in actions between a State and the Commonwealth (*Official Record of the Debates of the Australasian Federal Convention*, Melbourne, 1 March 1898, 1679–90, and see Thomson, above n 10, 185). As Sir Owen Dixon pointed out, these proposals 'were dismissed with scant consideration': Owen Dixon, 'Marshall and the Australian Constitution' in Severin Woinarski (ed), *Jesting Pilate, and Other Papers and Addresses* (Law Book, 1965) 175. The discussion was limited to strong rejections being voiced; Holder's proposal was withdrawn in the face of this opposition (*Official Record of the Debates of the Australasian Federal Convention*, Melbourne, 2 March 1898, 1732), and Gordon's proposal was rejected without being put to a formal vote

why there was to be judicial review of legislation. The justifications advanced for the institution open new lines of inquiry in the search for that textual authority for judicial review of legislation which Thomson found lacking. Rather than searching for a particular section of the *Constitution* to justify the institution, the search should be for evidence in support of its twin justifications: the supremacy of the *Constitution* and the primacy of judicial interpretation.

Three pieces of textual evidence support the supremacy of the *Constitution*. First, constitutional supremacy inheres in the very nature of the document. Second, constitutional supremacy is made express in covering clause 5 of the *Constitution* which states that:

> This Act, and all laws made by the Parliament of the Commonwealth under the *Constitution*, shall be binding on the courts, judges, and people of every State and of every part of the Commonwealth, notwithstanding anything in the laws of any State...[100]

Third, constitutional supremacy is implied by s 128 of the *Constitution*, which provides that the *Constitution* 'shall not be altered except' through that section. Because the *Australian Constitution* is not alterable by an ordinary law of the Parliament, but only in accordance with the special procedure contained in s 128, it is the supreme law of Australia.

Considerable textual and historical evidence also supports the primacy of the judiciary in the interpretation of the *Constitution*. As in other areas of constitutional law dealing with the judiciary, individual provisions are probably less significant than the entirety of Chapter III of the *Constitution* as a holistic treatment of judicial power.[101] Nonetheless, the key provision is s 71, which relevantly provides that: 'The judicial power of the Commonwealth shall be vested in a Federal Supreme Court, to be called the High Court of Australia'. Thomson rejected s 71 as a textual basis for judicial review of legislation because '[t]here was no debate, even when the delegates spoke of

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(ibid, 1 March 1898, 1690). The rejection of any limitation on judicial review of legislation under the *Australian Constitution* evidences a clear intention that this institution would exist.

100 *Commonwealth of Australia Constitution Act 1900* (Imp) 63 & 64 Vict, c 12, s 5.

101 See, eg, '... *the existence in the Constitution of Chap. III* and the nature of the provisions it contains make it clear that no resort can be made to judicial power except under or in conformity with ss 71–80': *R v Kirby; Ex parte Boilermakers' Society of Australia* (1956) 94 CLR 254, 269 (Dixon CJ, McTiernan, Fullagar and Kitto JJ) ('*Boilermakers*') (emphasis added); the identification of the question as being whether there was 'conflict' between the statutory provisions 'and Ch III of the Constitution' in *Chu KhengLim v Minister for Immigration, Local Government and Ethnic Affairs* (1992) 176 CLR 1, 29 (Brennan, Deane and Dawson JJ); 'there is no necessary inconsistency with the separation of powers *mandated by Ch III of the Constitution* if non-judicial power is vested in individual judges detached from the court they constitute': *Grollo v Palmer* (1995) 184 CLR 348, 363 (Brennan CJ, Deane, Dawson and Toohey JJ) (emphasis added); 'it is *implicit in the terms of Ch III* of the *Constitution* … that a court capable of exercising the judicial power of the Commonwealth be and appear to be an independent and impartial tribunal': *North Australian Aboriginal Legal Aid Service Inc v Bradley* (2004) 218 CLR 146, 163 (McHugh, Gummow, Kirby, Hayne, Callinan and Heydon JJ) (emphasis added); '*Ch III requires that* there be a body fitting the description "the Supreme Court of a State"': *Forge v Australian Securities and Investment Commission* (2006) 228 CLR 45, 76 (Gummow, Hayne and Crennan JJ) (emphasis added).

the High Court as the guardian of the *Constitution*, linking the phrase "judicial power" with judicial review'.[102]

However, the link from judicial power to the primacy of Courts in the interpretation of the *Constitution* is strongly supported by the historical record. Harrison Moore drew the connection explicitly: '[t]he duty of passing upon the validity of Acts, whether of the Commonwealth or of the State Parliament, exists purely as an incident of judicial power'.[103] Moreover, the Court's role as 'guardian of the *Constitution*' *was* linked to judicial review in numerous statements: Baker said the 'guardian' would 'enquire and determine … whether [any] Act is beyond the authority conferred';[104] Barton, who had described the Federal Judiciary as the 'bulwark of the Constitution',[105] stated that the '[i]t must be the supreme interpreter of the Constitution';[106] and Quick and Garran said that the Court as 'guardian' had 'the duty of interpreting the *Constitution*, in cases which come before it, and of preventing its violation'.[107]

Thus, in establishing an independent judiciary, Chapter III of the *Constitution* (and particularly s 71, which vests judicial power in the Courts it identifies) provided the textual basis for the primacy of the judiciary in the interpretation of the *Constitution*, the second of the key justifications for judicial review of legislation under the *Australian Constitution*.

The above analysis demonstrates the importance of considering the *Convention Debates* in their broader context. Thomson's analysis was contained in a volume expressly devoted to the *Convention Debates*, and naturally focused on them; what the broader record shows, however, is much richer evidence in favour of judicial review of legislation under the *Australian Constitution*. Moreover, if it is necessary, as Thomson suggests, to identify a textual basis for judicial review of legislation, this can be done through the identification of textual bases for each of the twin justifications for judicial review of legislation. Thomson's assessment did not fully acknowledge the widespread support for the twin justifications advanced in *Marbury v Madison* for the judicial review of legislation: the supremacy of the *Constitution* and the primacy of the judiciary in its interpretation. In fact, there is a sufficient textual basis for both of those justifications, and thus for judicial review of legislation under the *Australian Constitution*.

In his Second Reading speech on the *Judiciary Act 1903* (Cth), Attorney-General Alfred Deakin (closely replicating Dicey's observations about federalism examined above) pointed to constitutional supremacy and the primacy of judicial interpretation to justify the establishment of the High Court of Australia:

> What are the three fundamental conditions to any federation authoritatively laid down? The first is the existence of a supreme *Constitution*; the next is a distribution of powers under that *Constitution*; and the third is an authority reposed in a judiciary to interpret

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102 Thomson, above n 10, 194.
103 Moore, above n 72, 236.
104 Baker, above n 67, 128.
105 *Official Report of the National Australasian Convention Debates*, Adelaide, 20 April 1897, 952 (Edmund Barton). See above n 81 and accompanying text.
106 Ibid.
107 Quick and Garran, above n 74, 725.

> the supreme *Constitution* and to decide as to the precise distribution of powers … What the legislature may make, and what the executive may do, the judiciary at the last resort declares...[108]

Far from resting on a slender reed, judicial review of legislation under the *Australian Constitution* rests on the twin pillars of the supremacy of the *Constitution* and the primacy of the judiciary in its interpretation, each of which has been shown by this section to be supported by ample textual and historical evidence.

VI THE PERSISTENCE OF THESE JUSTIFICATIONS AFTER FEDERATION

If judicial review of legislation is justified on the basis of the supremacy of the *Constitution* and the primacy of the judiciary in its interpretation, one would expect to see evidence of the understanding of these justifications once the *Constitution* came into force and the institutions it established came to life. This final section provides such evidence.

A Australia's *Marbury v Madison*

There is no Australian case to match the charged atmosphere of *Marbury v Madison*. There was, however, a case in which the power of judicial review of legislation was expressly challenged. In December 1901, nearly two years before the High Court of Australia came into existence, the Full Court of the Supreme Court of Victoria heard *Kingston v Gadd*, an action to apply penalties for a breach of the *Customs Act 1901* (Cth).[109] The defence claimed that the relevant sections of the act were *ultra vires* the Parliament and invalid.[110] To this, it was contended that the court enjoyed no power to hold an act of Parliament invalid, even if it did exceed the legislative powers granted by the *Constitution*.[111]

This challenge to the judicial review of legislation under the *Australian Constitution* was rejected, for the reasons that have been advanced in this paper. First, the Court relied on the supremacy of the *Constitution*. Justice Williams noted the words 'all laws made by the Parliament of the Commonwealth under the *Constitution*' in covering clause 5, explaining:

> If they are not so made they are not binding on this Court, and it is therefore our duty to inquire and ascertain whether the sections to which we have referred … constitute legislation which the Parliament of the Commonwealth has power to impose under or in pursuance of the *Constitution*.[112]

Justice Holroyd concurred in the effect of covering clause 5, stating that:

> All laws made by the Commonwealth but not made under the *Constitution* – that is, not made by virtue of the powers conferred upon the Commonwealth by its *Constitution* – are not binding upon the Courts, Judges, or people of any State, and ought to be rejected by

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108 Commonwealth, *Parliamentary Debates*, House of Representatives, 18 March 1902, 10966–7 (Alfred Deakin). See also Garran, above n 69, 23–4.
109 *Kingston v Gadd* (1901) 27 VLR 417.
110 Ibid 422–5.
111 Ibid 420–2.
112 Ibid 426 (Williams J).

> the Courts and Judges of every State as invalid whenever any question arises as to their validity.[113]

Second, the Court emphasised the primacy of the judiciary in the interpretation of the *Constitution*. As Hood J explained, stressing the difference between the position under the *Australian Constitution* and that under English law:

> The Courts … before enforcing Commonwealth law ought to investigate and determine whether or not that law is in substance one which there is jurisdiction to make. That question cannot arise in England, for there is no limit to the jurisdiction of the English Parliament so far as the Courts are concerned. But it does arise here. …when called upon by any person assailed before us under any law made by a Legislature with limited powers we are not only entitled but *it is our bounden duty to investigate and determine the question of the validity of that law* to the extent of seeing whether it is such an one as is properly included in the authority given...[114]

Thus, early in the life of the *Australian Constitution* the institution of judicial review was challenged, and it was supported on the twin bases of the supremacy of the *Constitution* and the primacy of the judiciary in its interpretation.[115] The judgment of Holroyd J commenced by expressing 'hope' that the argument against judicial review 'will not find acceptance with any Judge.'[116] With the exception of the Privy Council's opinion in *Webb v Outtrim*, it never has.[117]

B Constitutional supremacy and judicial primacy before the High Court

No dispute ever arose before the High Court about the existence of judicial review of legislation. Even after the decision of the Privy Council in *Webb v Outtrim*, all subsequent treatments of the issue by the High Court clearly confirmed the institution.

In the *Railway Servants' Case*, handed down 11 days after *Webb v Outtrim*, Griffith CJ (delivering the opinion of the Court) expressly affirmed judicial review of legislation (without referring to *Webb v Outtrim*):

> The question to be determined is primarily one of construction of a written document. If the power which the Commonwealth Parliament have asserted their right to exercise is conferred by the *Constitution* as properly construed, the duty of the Court is to say so. If, on the contrary, that instrument does not confer the power, we are bound to refuse to give any effect to the attempted legislation.[118]

In *Baxter v Commissioners of Taxation (NSW)*,[119] a clear majority of the High Court refused to follow *Webb v Outtrim*.[120] The institution of judicial review of legislation

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113 Ibid 428 (Holroyd J).
114 Ibid 430 (Hood J) (emphasis added).
115 Cf 'There is no equivalent single decision in Australia that establishes the authority of the High Court to review legislation for unconstitutionality': Williams, above n 1, 377.
116 *Kingston v Gadd* (1901) 27 VLR 417, 428 (Holroyd J).
117 *Kingston v Gadd* was appealed to the Privy Council in *Peninsular and Oriental Steam Navigation Co v Kingston* [1903] AC 471, but the report records no argument regarding judicial review of legislation, and that issue is not addressed in their Lordships' opinion.
118 *Federated Amalgamated Government Railway and Tramway Service Association v New South Wales Railway Traffic Employes Association* (1906) 4 CLR 488, 533–4 (Griffith CJ, Barton and O'Connor JJ) ('*Railway Servants' Case*').
119 (1907) 4 CLR 1087.

was strongly defended in the joint judgment of Griffith CJ, Barton and O'Connor JJ, again on the twin bases addressed in this paper. First, their Honours emphasised the supremacy of the *Australian Constitution* (and the similarity of the American position):

> The power of the Supreme Court of the United States to decide whether an Act of Congress or of a State is in conformity with the *Constitution* depends upon and follows from the Constitution itself, which is, by sec. 2 of Article VI, declared to be the supreme law of the land, as the *Australian Constitution* is declared to be by sec. 5 of the *Constitution Act*.[121]

Second, the joint judgment identified the primacy of the judiciary in the interpretation of the *Constitution*:

> English jurisprudence has always recognized that the Acts of a legislature of limited jurisdiction (whether the limits be as to territory or subject matter) may be examined by any tribunal before whom the point is properly raised.[122]

The twin justifications for judicial review of legislation are, therefore, what the High Court used when it refuted the approach taken by the Privy Council in *Webb v Outtrim*.

Other judgments of the early High Court took a similar approach. The dissenting judgments of Isaacs and Higgins JJ in the *Union Labels Case*, which advocated the circumspect use of the power of judicial review of legislation, nonetheless confirmed its existence. Justice Isaacs referred to both the supremacy of the *Constitution* and the High Court's duty to interpret it:

> to question the legality of what Parliament has enacted as the will of the nation … is in one respect the special function of this Court, but the interference must be essential. The paramount law of the *Constitution* must be upheld whenever a judicial controversy in which it is involved comes properly before the Court, but this exercise of judicial power is only legitimate in the last resort.[123]

Similarly, Higgins J accepted that 'when we cannot do justice, in an action properly brought, without deciding as to the validity of the Act … we are entitled to take out this last weapon from our armoury'.[124] In the *Waterside Workers* case, Starke J similarly provided the supremacy of the *Constitution* and primacy of the judiciary in its interpretation as the justifications for judicial review of legislation:

> From the authority to ascertain and determine the law in a given case, there necessarily results, in case of conflict, the duty to declare and enforce the rule of the supreme law and reject that of an inferior act of legislation which, transcending the *Constitution*, is of no effect and binding on no one. This is … simply a necessary concomitant of the power to

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120 The joint judgment is notable for its disparaging treatment of the Privy Council's earlier decision: ibid 1106, 1108, 1117 (Griffith CJ, Barton and O'Connor JJ).

121 Ibid 1125.

122 Ibid.

123 *A-G (NSW) ex rel Tooth and Co Ltd v Brewery Employés Union of New South Wales* (1908) 6 CLR 469, 553–4 (Isaacs J) ('*Union Labels Case*').

124 Ibid 590 (Higgins J). These remarks were quoted with approval in *Deputy Federal Commissioner of Taxation (New South Wales) v W R Moran Pty Ltd* (1939) 61 CLR 735, 773 (Starke J).

> hear and dispose of a case or controversy properly before the court, to the determination of which must be brought the test and measure of the law.[125]

Important reaffirmations of the supremacy of the *Constitution* and the primacy of the judiciary in its interpretation have also come in cases addressing the ability of the executive or legislature to determine the limits of their own power. In *D'Emden v Pedder* (1904), Griffith CJ (for the Court) rejected an argument which would have enabled the executive to determine constitutionality:

> It is, however, the duty of the Court, and not of the Executive Government, to determine the validity of an attempted exercise of legislative power. … That, as already said, is the function of the judiciary. And, even if such a duty were cast upon the Executive Government, it could neither relieve the judiciary of their duty of interpretation nor affect the principles to be applied in that interpretation.[126]

The best-known case of this kind is the *Communist Party Case*.[127] There, Fullagar J first stated the supremacy of the *Constitution*: 'the legislative power of the Commonwealth Parliament is limited by an instrument emanating from a superior authority'.[128] His Honour then turned to *Marbury v Madison* to explain the primacy of the judiciary in constitutional interpretation:

> there are those, even to-day, who disapprove of the doctrine of *Marbury v Madison*, and who do not see why the courts, rather than the legislature itself, should have the function of finally deciding whether an Act of a legislature in a Federal system is or is not within power. But in our system the principle of *Marbury v Madison* is accepted as axiomatic.[129]

As George Williams has observed, this holding in the *Communist Party Case* made clear the High Court's 'position as the ultimate arbiter of the Constitution'.[130]

Subsequently, in a speech delivered at Harvard University in 1955, Sir Owen Dixon reiterated the primacy of the judiciary in the interpretation of the *Australian Constitution*:

> 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 because there were to be legislatures of limited powers, there must be a question of *ultra vires* for the courts. In the course of administering the law the courts must say whether purported legislation did or did not possess the force of law.[131]

Passages in the *Boilermakers* case also refer to the supremacy of the *Constitution* and the primacy of the judiciary in its interpretation, linking these ideals (as Dicey had

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125 *Waterside Workers' Federation of Australia v Gilchrist, Watt and Sanderson Ltd* (1924) 34 CLR 482, 551 (Starke J); quoting from: *Adkins v Children's Hospital*, 261 US 525, 544 (1923) (Sutherland J, for the Court). See also *A-G (Vic) ex rel Victorian Chamber of Manufactures v Commonwealth* (1935) 52 CLR 533, 566 (Starke J).

126 *D'Emden v Pedder* (1904) 1 CLR 91, 117–118 (Griffith CJ, Barton and O'Connor JJ).

127 *Australian Communist Party v Commonwealth* (1950) 83 CLR 1 ('*Communist Party Case*'). See also *Bonser v La Macchia* (1968) 122 CLR 177, 217 (Windeyer J); *Kartinyeri v Commonwealth* (1998) 195 CLR 337, 381 (Gummow and Hayne JJ); Gleeson, above n 40, 84.

128 *Communist Party Case* (1950) 83 CLR 1, 262–3 (Fullagar J).

129 Ibid 262 (Fullagar J).

130 Williams, above n 1, 378.

131 Dixon, above n 99, 174–5.

done) to federalism.[132] Addressing supremacy, Dixon CJ, McTiernan, Fullagar and Kitto JJ held that: 'A federal Constitution must be rigid. The government it establishes must be one of defined powers … it must be incompetent to go beyond them.'[133] To explain the primacy of the judiciary in the interpretation of the *Constitution*, their Honours wrote that:

> The conception of independent governments existing in the one area and exercising powers in different fields of action carefully defined by law could not be carried into practical effect unless the ultimate responsibility of deciding upon the limits of the respective powers of the governments were placed in the federal judicature.[134]

More recent judicial decisions have continued to justify judicial review of legislation on the bases of the supremacy of the *Constitution* and primacy of the judiciary in its interpretation.[135]

This section has demonstrated that, since Australian Federation, courts have justified judicial review of legislation on the same bases: the supremacy of the *Australian Constitution* and the primary of the judiciary in its interpretation. These principles underpinning judicial review of legislation have continued to be expressed in judicial decisions, despite the fact that commentary has frequently relied on the less

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132 The link between judicial review and federalism is important to acknowledge. See, eg, 'The position and constitution of the judicature could not be considered accidental to the institution of federalism: for upon the judicature rested the ultimate responsibility for the maintenance and enforcement of the boundaries within which governmental power might be exercised and upon that the whole system was constructed': *Boilermakers* (1955) 94 CLR 254, 276 (Dixon CJ, McTiernan, Fullagar and Kitto JJ). See also *A-G(Cth) v The Queen* (1957) 95 CLR 529, 540–1; *Mutual Pools and Staff Pty Ltd v Commonwealth* (1993) 179 CLR 155, 213; *Singh v Commonwealth* (2004) 222 CLR 322, 330 (Gleeson CJ); Galligan, above n 40, 367–71; William R Lederman, *Continuing Canadian Constitutional Dilemmas: Essays on the Constitutional History, Public Law and Federal System of Canada* (Butterworths, 1981) 281; Gleeson, above n 40, 133.
There is also a link between judicial review of legislation and the separation of powers (see, eg, 'The object of the constitution was to establish three great departments of government; the legislative, the executive, and the judicial departments. The first was to pass laws, the second to approve and execute them, and the third to expound and enforce them': *Martin v Hunter's Lessee*, 14 US (1 Wheat) 304, 329 (1816) (Story J); Anthony Mason, 'Judicial Review: A View from Constitutional and Other Perspectives' (2000) 28 *Federal Law Review* 331, 331). A link has also been drawn to the concept of the rule of law: see, eg, Gageler, above n 52, 309; Bradley Selway, 'The Principle Behind Common Law Judicial Review of Administrative Action — The Search Continues' (2002) 30 *Federal Law Review* 217, 232.
However, the critical point for judicial review of legislation (and thus for this article) is that issues such as federalism, separation of powers and the rule of law are subsumed within the broader point made in *Marbury v Madison* regarding the primacy of the judiciary in the interpretation of the *Constitution*.

133 *Boilermakers* (1955) 94 CLR 254, 267 (Dixon CJ, McTiernan, Fullagar and Kitto JJ).

134 Ibid 267–8.

135 See, eg, *Victoria v Commonwealth* (1975) 134 CLR 338, 379–80 (Gibbs J); *R v Toohey; Ex parte Northern Land Council* (1980) 151 CLR 170, 229–30 (Murphy J); *Commonwealth v Mewett* (1996) 191 CLR 471, 545–547 (Gummow and Kirby JJ); see also at 497 (Dawson J). See also *Residual Assco Group Ltd v Spalvins* (2000) 202 CLR 629, 656 (Kirby J).

persuasive arguments that it is either merely obvious or was an unstated intention of the Framers.

VII CONCLUSION

Judicial review of legislation under the *Australian Constitution* is a legitimate institution whose justifications are sufficiently evidenced both in the text of the *Constitution* and in the historical record. There is much authority to support the conclusion that the Framers intended there to be judicial review of legislation, and the institution had been a familiar one in the courts of the Australian Colonies. However, these grounds alone are not sufficient. The true justifications for judicial review of legislation in Australia are the supremacy of the *Australian Constitution* and the primacy of the judiciary in its interpretation.

These principles were incorporated into the *Australian Constitution* after having been expounded and confirmed in the United States. However, it is not enough to simply refer to the decision in *Marbury v Madison* as justifying judicial review of legislation under the *Australian Constitution*, because the historical evidence of the Framers' understanding of the case itself is questionable. Instead, the analysis in this article has shown that the justifications given in *Marbury v Madison*, reflecting earlier American thought, were clearly understood by the Framers and are evident in the Australian Federation records. There is, thus, considerable evidence of the common genesis of justifications for judicial review of legislation in Australia and America. Moreover, it has been shown that the supremacy of the *Constitution* and the primacy of the judiciary in its interpretation have been used to support the institution of judicial review of legislation since the earliest judicial decisions under the *Australian Constitution*.

Judicial review of legislation under the *Australian Constitution* exists, therefore, because of a fundamental understanding, developed long before Federation and continuing today, of the nature of the *Australian Constitution* as the supreme law of the land, and the judiciary it established as the chief interpreter of the *Constitution*. No one section of the *Constitution* provides for judicial review of legislation; its textual basis lies in those sections that separately support its twin justifications: the supremacy of the *Australian Constitution* and primacy of the judiciary in its interpretation.