PHILOSOPHICAL FOUNDATIONS OF THE AUSTRALIAN CONSTITUTIONAL TRADITION†

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I INTRODUCTION

Robert Burns' wise old words about seeing ourselves "as others see us" are too infrequently applied—to nations as well as to people. And it is particularly in the realm of political and legal studies that the opinions of foreign observers may have great value. The United States certainly has benefited greatly from the penetrating insight of foreign observers such as James Bryce[1] and Alexis de Toqueville.[2] These observers, from England and France respectively, looked on the young nation of the United States with a clarity of thought which produced highly perceptive analyses of the new political institutions being developed and utilized. The indebtedness of the United States to foreign observers has not declined in recent years, for foreign scholars have continued to study the American scene with greater and different insights than could be achieved by domestic observers. This debt has been particularly large in the field of foreign affairs and American attitudes toward international relations where, only in the last generation, the analyses of Gabriel Almond,[3] Denis Brogan,[4] and Max Beloff[5] have shed great light on the American scene.

Foreign analysis is no less valuable in the study of legal institutions than in other fields. Indeed, the study of comparative law has led to many important insights. This activity, however, has been restricted mainly to comparison between civil law and common law systems; cross-analysis between the common law countries has been somewhat more limited.[6] Even when we take into account such important studies as A. L. Goodhart's analysis of American legal realism,[7] and the more recent attempt by the present Dean of the Harvard Law School, Erwin Griswold,[8] to return the favour with a comparative analysis of the legal institutions of the United States and Great Britain, it is clear that much more remains to be done.

The general paucity of such studies is especially true of Australia. The

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[1] J. Bryce, *The American Commonwealth* (1888) 3 vols.

[2] A. de Toqueville, *Democracy in America* (1830-35) 2 vols.

[3] G. Almond, *The American People and Foreign Policy* (1950).

[4] D. Brogan, *Politics in America* (1954). See also *The American Character* (1944); *American Foreign Policy* (1941); *The American Political System* (1943).

[5] M. Beloff, *Foreign Policy and the Democratic Process* (1955).

[6] See J. Stone, *Legal System and Lawyers' Reasonings* (1964) chs. 1, 5 (hereafter cited Stone, *Legal System*). Professor Stone's own work is a welcome exception to this rule.

[7] A. L. Goodhart, "Some American Interpretations of Law" in *Modern Theories of Law* (1933) 1-20 (dealing with American Legal Realism). Goodhart, of course, though treated here as English, is an American. However, his particular position must itself be considered a significant kind of linkage between the two countries.

[8] E. Griswold, "Two Branches of the Same Stream", Third Maccabean Lecture in Jurisprudence (1962), reprinted in *Harvard Law School Bull.*, February 1963, 4.

comparative study of legal institutions in Australia has been largely neglected. There have been notable exceptions to this rule, mostly however, by Australian scholars.[9] The uninformed American observer may perhaps be misled into a neglect of the subject by a too easy assumption that such a study would merely reduplicate similar studies of Great Britain; an uninformed Englishman might similarly think that it would be redundant of American comparisons. But Australia is far from being either a poor man's England or a slavish imitator of the United States. Yet, because Australia has inherited to some extent from both countries, the tendency of each has been to notice the differences which lead it mistakenly to ignore its own influence. An overly paternalistic attitude which claimed sole parenthood would, of course, be just as wrong. Thus, Australia has attempted to preserve the common law system characteristic of Britain and follows basically the parliamentary system which evolved in that country. On the other hand, since Australia, unlike England, is a federation, it turned initially to the United States for a pattern of federal government.[10] And the American pattern has had particular influence upon the judicial system of Australia,[11] especially on the early constitutional jurisprudence of the High Court[12]—although that influence is now largely non-existent.[13]

Because of this dual heritage, however, Australia seems to be caught in the tension of a conflict between adherence to the traditional English legal forms and residual elements of the constitutional influence of the United States. To the extent that this tension has been resolved, distinctively Australian developments have occurred. To the extent that this tension remains, the answer for the future must lie in a casting off of self-consciousness about imitation of either Great Britain or the United States whenever advantage may lie in that course, and even more in a willingness to display ever greater originality and individuality.

In the midst of such an ambivalent situation, however, it is not surprising that considerably differing opinions should arise in trying to place Australia in the spectrum between Britain and the United States. Notions seem to flourish that Australian institutions are much like England's; others believe fervently that the Australian Constitution is a near carbon-copy of the United States'. Obviously, some clear concept of where Australia *does* stand is essential to unconfused consideration of what she should do in the future. No advice as to a future course is offered here, only some re-evaluation of the respective influences of England and America on the development of Australia's legal-political institutions and practice. Any attempt to gauge influences, however, is really an effort to write a history of ideas, which involves a study not only of institutions but of the philosophies which underlie them and of the social facts as to how far the philosophies are accepted and in what manner the institutions are made to operate.

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[9] See authorities cited *infra*, especially nn. 156, 202. The two American works are E. Hunt, *infra* n. 157, and S. Kadish, *infra* n. 202.

[10] Sir Owen Dixon states:

> The framers of our own Federal Commonwealth Constitution (who were for the most part lawyers) 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.

Quoted in Z. Cowen, *Federal Jurisdiction in Australia* (1959) v.

[11] *E.g.*, Sir Owen Dixon, "Concerning Judicial Method" (1956) 29 *A.L.J.* 468 at 468.

[12] G. Sawer, "The Supreme Court and the High Court of Australia" (1957) 6 *Journal of Public Law* 482 at 482; W. A. Wynes, *Legislative, Executive and Judicial Powers in Australia* (3 ed. 1962) 12-15 (criticizing this influence).

[13] See the statistics showing the proportionate decline of citation of U.S. Supreme Court cases by the High Court in Sawer, *supra* n. 12 at 484. See also Wynes, *supra* n. 12 at 26-28.

But an attempt to judge Australia's place in the spectrum between the United States and Great Britain obviously requires that the evaluation of all these factors be made for all three countries. This, however, is not a simple task, for the diversity of Anglo-American thought makes it impossible to present philosophies, institutions, and historical settings in neat bundles, carefully sorted for comparison and contrast. Indeed, the extent of interchange between the three countries makes it difficult to identify separate thought strains or compute the source of influences in philosophic development. Yet, in the intellectual history of each country it seems possible to describe a central strain of historically developing philosophy or political theory which, more than any other, has influenced the thinking of governmental theorists and architects of legal systems. Within the broad scope of such a comparative survey, it may be possible to draw insights from certain general contrasts which emerge in the histories of the respective systems.

II THE UNITED STATES

A. The Philosophic Influence of John Locke

Among the political philosophers who influenced the Founding Fathers of the United States one name stands out above all others: John Locke.[14] In England, Locke's political theory has been treated with historical interest as an apologetic for the Glorious Revolution of 1688; otherwise his significance has been principally as a forerunner of Berkeley and Hume. But, in the United States, both the Declaration of Independence and the Constitution have been declared to be almost pure translations of the words of John Locke.[15] Even more moderate estimates recognize Locke as a tremendous influence. A. T. Mason points out that Thomas Jefferson "incorporated in the Declaration of Independence several basic sentences" from Locke's *Second Treatise on Civil Government*.[16] And William Ebenstein noted that the "Fourteenth Amendment to the Constitution of the United States embodies this Lockean idea" of protection above all of "life, liberty and property".[17] The reason for Locke's great popularity may have been that the frontier was "a veritable state of nature",[18] but its most solid ground seems to have been that his theories seemed to provide answers to pressing problems.

The most obviously pressing problem at the time of the Revolution was to justify it, and the original purpose of Locke's theory had been the justification of a revolution. Thus, Jefferson's affinity for Locke in the Declaration of Independence is hardly surprising. But the jump from this specific influence to making Locke the forerunner of the Constitution ignores much. Jefferson disapproved and distrusted both the Convention and its Constitutional product, and he fought against ratification and, later, centralization of power by the new government. Moreover, many new factors had arisen in the power struggle during the thirteen years between Independence and the Constitution. The power struggle was not between political parties in the usual sense but between

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[14] See A. T. Mason, *Security Through Freedom* (1955) 3. To this generalisation Mason, however, adds important caveats with which, it will be seen, the present article agrees and which, in several cases, it expands. In several instances, the presentation is also indebted to Mason's work for supporting references collected therein.

[15] *E.g.*, Mr. Justice Sutherland, quoted in A. T. Mason, *Free Government in the Making* (1949) 5-6.

[16] Mason, *Security Through Freedom* 4; see *id.*, *Free Government in the Making* 5.

[17] Wm. Ebenstein, *Great Political Thinkers* (1951) 369. *Cf.* Thomas Jefferson's version in the Declaration of Independence: life, liberty and the pursuit of happiness.

[18] Louis Hartz, "American Political Thought and the American Revolution" (1952) 46 *American Political Science Review* 321, quoted by Mason, *Security Through Freedom* 3, 4 n. 6.

the masses and the propertied élite. In reaction to the strong Royal Governors, a number of the States in their new Constitutions had established strong legislatures elected frequently by the people with little or no real balancing power in the executive. Popular uprisings such as Shay's Rebellion made the propertied classes desire stronger central authority (for the protection of property) than the Continental Congress could provide under the Articles of Confederation. In short, the more radical elements in the Revolution such as the Sons of Freedom had exceeded the restraining influence of the aristocracy. Thus, the Constitutional Convention set about to establish a strong central government. Yet, at the same time, the delegates feared unlimited democratic power. The result was the intricate system of checks and balances designed to make separation of power effective, that is, to make certain that democratic power was restrained by property-protecting institutions.

How much of this constitutional theory may be ascribed to Locke is debatable. The very act of coming together to surrender sovereignty to a government over all sounds like a replay of the social contract bringing an end to the state of nature. Moreover, the Preamble to the Constitution begins, "We, the people of the United States. . . ." Historical research[19] has shown, however, that the reason for this beginning was not to express a political philosophy but because it was impossible to know in advance which States would ratify the Constitution and therefore it could not begin "We, the peoples of the States of New York, Massachusetts, ..." Rather than thinking of the Founders as endeavouring to enact a certain philosophy into reality, it seems far more plausible to see them as genuine pragmatists adapting philosophies to suit their purposes. In this light, Locke was apparently useful in justifying the revolution, but of strictly limited value for more positive purposes. Indeed, even the strength of his negative values must be questioned when examined prior to their appropriation by the moulding hand of Thomas Jefferson.

Locke's strength for negative purposes was his insistence upon natural rights, such as the right of revolution. The Constitutional Convention, too, believed in natural rights but felt that they were so well recognized that specific protection of them was unnecessary. A number of Southern States disagreed, and to woo these natural followers of Jefferson away from his anti-federalist stand, it was promised specifically to protect these rights in the first ten Amendments to the Constitution—commonly known as the Bill of Rights. The rights these protected are arguably consistent with Locke's political philosophy, but the complexity of the question may be illustrated by his all-important right of revolution.

Upon examination, Locke's right of revolution is really rather illusory; indeed, its existence is chiefly necessary in order to preserve the Commonwealth against its exercise,[20] the argument being that if men know they have the right to revolt they will not feel the anxiety to prove that they do and will therefore endure governmental wrong with greater patience. While it is true that the government stands in a fiduciary relationship to the people and failure to perform their will is a breach of trust, grounds for disobedience, and destructive of the very governing character of the government, the concept of the general will in Locke is vague. And assuredly, it is no minority right

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[19] *E.g.*, the work of Henry Steele Commager.

[20] John Locke, *The Second Treatise of Government* (1690, T. Peardon ed. 1952) 126-27 (¶226):

> This doctrine of a power in the people of providing for their safety anew by a new legislative, when their legislators have acted contrary to their trust by invading their property, is the best fence against rebellion, and the probablest means to hinder it.

in any event. The difficulties of determining this will, in or out of rebellion, and its relationship to natural rights—these *must* be personal and individual—are glossed over but leave certain conclusions clear. One is that the so-called rights involved are "largely paper safeguards, verbal admonitions against abuse of power".[21] Moreover, the right is really only parliamentary since checking Parliament by any other means than the will of the majority is "foreign to Locke's thought".[22] Indeed, the people have "no power to act as long as the government stands" after their will has been expressed in the election of the legislator.[23] In reality, Locke is not preoccupied with minority rights but with a justification of parliamentary power—to be more truthful, parliamentary supremacy. And the natural rights become submerged in law.[24]

In this light, Locke must be seen as a successor to Lord Chief Justice Coke, who at the beginning of the same century had provided such frustrating opposition to James I's exposition of the divine right of kings by championing judicial and parliamentary reason.[25] In 1688, when that power struggle between king and Parliament was finally resolved, Locke stood as the apologist for parliamentary supremacy and sought to base his justification on a view of the state of nature different from that taken by Thomas Hobbes a generation earlier.[26] Moreover, Locke affinity for the thinking of Coke is clearly demonstrated by his ultimate faith in reason[27] which (it may be understated) is far from foreign to the philosophical framework of the era.

Considering the fact that Locke assumed as natural Britain's parliamentary system and unwritten constitution,[28] the considerable limitations of his thought for American constitutional purposes become apparent. To begin with, absence of the English Crown as a fundamental repository of sovereignty after the Revolution made a written Constitution essential. Moreover, the American leaders did not share Locke's optimistic rationalism, nor, on the other hand, did they show any signs of Jacobin romantic ideas of a coming utopia. They were distrustful of unchecked power, and sceptical of human motives. Human nature was full of "infirmities and depravities". Men were "ambitious, vindictive, and rapacious", dominated by "monetary passions and immediate interests" in the political forum.[29] Locke may have proposed separation of powers[30] but only as a mark of "well-ordered Commonwealths". The concept became a "power-breaking device acceptable to Americans"[31] only in the hands of Montesquieu, who held government by unseparated powers to be tyrannical.[32] To the Americans, effectively separated powers necessitated the elaborate system of checks and balances devised by the framers of the Constitution. In stark contrast, Locke held that the prerogative of the executive

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[21] N. C. Phillips, "Political Philosophy and Political Fact: The Evidence of John Locke" in *Liberty and Learning*: *Essays in Honour of Sir James Hight* (1950) 208.

[22] H. R. G. Greaves, quoted in Phillips, *supra* n. 21 at 212.

[23] Locke, *op. cit. supra* n. 20 at 90 (¶157).

[24] *Cf.* the somewhat similar thesis of T. Scott-Craig, "John Locke and Natural Right" in *Natural Law and Natural Rights* 29-47 (Harding ed. 1955).

[25] See Sir William S. Holdsworth, *Some Makers of English Law* (1938) Lecture VI.

[26] See *infra* nn. 60-71 (on Hobbes).

[27] Phillips, *supra* n. 21 at 208, says that Locke was unreasonable "only in his faith in reason".

[28] W. Harrison, "Introduction" to Bentham, *Fragment of Government and Principles of Morals and Legislation* (1948 ed.) at xxi:

> Locke's general political position was a re-formulation of traditional interpretations of English institutions: in this respect there is more continuity between his ideas and those of Burke than is generally supposed.

[29] *The Federalist*, No. 37; *id.* No. 6.

[30] Locke, *op. cit. supra* n. 20 at 82 (¶143).

[31] Mason, *Security Through Freedom* 5.

[32] C. Montesquieu, *L'esprit des Lois* (1748).

was to act "for the public good, without the prescription of the law, and sometimes even against it".[33] This, because the individual in entering civil society from the state of nature "wholly gives up" the executive power.[34] Moreover, even his freedom is given up "to be regulated by laws made by the society, so far forth as the preservation of himself and the rest of that society shall require".[35] Thus, though great deference was paid to Locke by the Americans, the utility of his concepts was for their purposes strictly limited.

B. Judicial Review and Judicial Tradition

Yet, because of the wide association of Locke's name with long-favourite slogans of American government such as "life, liberty and property", it is possible to contend that his name has been praised through American history as productive of institutions and values with which his thought had little genuine connection. This "Locke-cult" has, indeed, tended to be an aggregation of those interests which valued highly freedom of property[36] and the absence of governmental interference. Thus, they have been most pleased with institutions and devices which were most foreign to Locke's ideas:[37] those of negative governmental power, such as the restraints of the checks and balances, which may prevent action but do not ordinarily produce it. An important example to the early Americans was judicial review, which contrary to popular impression was not invented by Chief Justice Marshall in *Marbury* v. *Madison*.[38] Coke, of course, advanced it in *Bonham's Case* in 1610, and in America, James Otis of Massachusetts advanced the thesis as early as 1761 in his arguments against the hated British use of writs of assistance: "An Act against the Constitution is void, an Act against Natural Equity is void. . . . The Executive courts must pass such Acts into disuse."[39] The concept was propounded by Marshall's teacher, Chancellor Wythe; it was considered by the Constitutional Convention; and it was advocated by *The Federalist*,[40] where it was seen as a check on the power-seeking propensities of human nature.

A generation later, such propensities held even greater terror. Chancellor James Kent of New York typified the common fear that unchecked mass democratic power would lead to a situation in which the masses would "covet and . . . share the plunder of the rich".[41] At stake for such guardians of the aristocracy was James Harrington's dictum that "power always follows property".[42] The prospect terrified Daniel Webster in Massachusetts, who felt the unpropertied ones "ready, at all times, for violence and revolution".[43] Neither could John Randolph in Virginia conceive "of a Government which

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[33] Locke, *op. cit. supra* n. 20 at 92 (¶160).
[34] *Id.* at 73 (¶130).
[35] *Id.* at 72 (¶129).
[36] For examples in the Constitutional Convention, see Mason, *Security Through Freedom* 15-18.
[37] That Locke's thought could be used "to foster an all too individualistic conception of rights" is all too generously conceded by Scott-Craig, *supra* n. 24 at 42. And criticisms of Locke on this point, *e.g.*, Dunbar, 6 *Emory Quarterly* (1950) No. 1, misconceive Locke as fully as do the "cultists".
[38] *Marbury* v. *Madison* (1803) 1 Cranch (5 U.S.) 137. Coke's doctrine, expressed in *Bonham's Case* (1610) 8 Co. Rep. 118 and *Case of Proclamations* (1610) 12 Co. Rep. 74, never received judicial approval through systematic usage.
[39] John Adams' summary quoted in E. S. Corwin, *Liberty Against Government* (1948) 39.
[40] *The Federalist*, No. 78.
[41] *Proceedings and Debates of the Convention of 1821, Assembled for the Purpose of Amending the Constitution of the State of New York* (1821) 221.
[42] *Oceana* (1656).
[43] *Journal of Debates and Proceedings in the Convention of Delegates Chosen to Revise the Constitution of Massachusetts, 1820-21* (1853) 312.

was to divorce property from power".[44] Nonetheless, this was exactly the purpose of the Jacksonian Revolution, and to a considerable extent, it succeeded. But the success was only temporary as the rise of great industry during and after the Civil War created a new and powerful propertied class.[45] Like their predecessors, they, too, appealed to fundamental rights, and judicial review was reactivated.[46] This reactivation was philosophically inspired not only by the property-oriented thinking of the Founding Fathers, but also by the tremendously popular Social Darwinism of Herbert Spencer[47] whose "survival of the fittest" suited the American love of competition with its emphasis on free and individual enterprise[48]—notwithstanding the contradictory fact of the growing domination by the giant business trusts in the post-Civil War era.[49] Spencer's philosophy was mediated to the American legal world particularly through the work on constitutional limitations of Thomas M. Cooley[50] and remained dominant for almost half a century.

During this same period of time, however, the distinctively American philosophy Pragmatism[51] was developing, and despite its strongly individualistic overtones,[52] it came to be the basis upon which social reform was built. In law, pragmatism[53] led to the constitutional development which became known as judicial restraint, championed on the Supreme Court itself for such a long time by Mr. Justice Holmes. Finally, in 1936, his position broke through to the majority side of judicial judgment, though by this time Holmes himself was gone, and Mr. Justice Stone (later Chief Justice) was left to carry on the crusade. He was shortly joined by Mr. Justice Frankfurter who pressed the position ardently for over twenty years on the basis of an attempt to balance governmental rights against personal freedoms. Thus, his position went far beyond merely eliminating interference by the Court in governmental regulation of economic matters and sometimes resulted in conflict over personal freedoms even with Mr. Justice Stone.[54] Indeed, Frankfurter's restraint, in the opinion of Mr. Justice Black, came "close to the English doctrine of legislative

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[44] *Proceedings and Debates of the Virginia Constitutional Convention of 1829-30* (1830) 319.

[45] Mason, *Security Through Freedom* 23-25.

[46] The Court, as always, was a bit slow in catching up with the current pressures, and judicial review was not truly reactivated for the protection of property until *Chicago, Milwaukee and St. Paul R.R.* v. *Minnesota* (1890) 134 U.S. 418.

[47] See H. Spencer, *Social Statics* (1868); *The Man Versus the State* (1885). See also J. Stone, *Social Dimensions of Law and Justice* (1965) ch. 1, §12 (hereafter cited as Stone, *Social Dimensions*).

[48] According to Spencer, "the state exists simply in order to enable individual human beings to pursue their private interests in peace. The individual is everything, and the more the importance of society or of the state is minimized the better". F. Copleston, *Contemporary Philosophy* (1956) 111.

[49] A similar ambivalence between promoting and restraining competition in the American Anti-trust laws is pointed out by Stone, *Social Dimensions* ch. 8, §2.

[50] Thomas Cooley's role in this reactivation of judicial review is adverted to in Mason, *Security Through Freedom* 31-33. For an interesting explication of the social Darwinism of Cooley and the period, see A. L. Harding, "The Ghost of Herbert Spencer" in *Origins of the Natural Law Tradition* (Harding ed. 1954) 69-93 at 81ff.

[51] The classic statement is William James, *Pragmatism* (1907). However, applications in the social and political fields were made by John Dewey (see *e.g.*, *The Public and Its Problems* (1927)), and in law by Roscoe Pound (see Stone, *Human Law and Human Justice* (1965) 263-86 (hereafter cited as Stone, *Justice*)).

[52] Hence, James "employed the word 'personalism' to express his philosophy". Copleston, *op. cit. supra* n. 48 at 108.

[53] Stone, *Justice* 235 identifies as the principal members of the Pragmatic period Pound, Morris Cohen, John Dickinson, Karl Llewellyn and Mr. Justice Holmes.

[54] The outstanding example is the "flag-salute" cases. *Minersville School District* v. *Gobitis* (1940) 310 U.S. 586, overruled, *West Virginia State Board of Education* v. *Barnette* (1943) 319 U.S. 624. The background of the cases is given by Mason, *Security Through Freedom* 112-47: "The Supreme Court in Search of a Role."

omnipotence".[55] Yet such an accusation need not be too surprising since Frankfurter's doctrine of restraint—and, indeed, his entire juristic philosophy—has been attributed with justification to his long-standing Anglophilism.[56]

Mr. Justice Frankfurter's philosophy of the weak judiciary has now been superseded, however, by judicial activism, which uses the powers of the Court to achieve broader reforms in the social and political spheres than had previously been thought either possible or permissible. As such, they stand in marked contrast to Frankfurter's restraint in protecting personal freedoms, and instead of a balance of governmental power and individual liberty, Mr. Justice Black sees "absolutes" of individual freedom in the Constitution.[57] Activism, the philosophy of the present Court majority, seems more reminiscent of Chief Justice Marshall's approach than any other previous judicial outlook. It is also notable that the activists do not *per se* contravene the canon of judicial restraint, as held by most of the pragmatists. For the large part, the concept of judicial restraint was simply to allow legislators to find their own solutions to social problems, refraining if at all possible from striking down the legislation. The activists are not invalidators either, but instead they do move into areas where the legislator has failed to take action to correct defects in the political system and remedy social injustices. Hence, their "activism" fits into the predominant historical pattern which the Court has followed: using the power of judicial review to make itself architect of the nation's social, political and economic foundations.

Seen in this light, the activists have merely resumed the enforcement of constitutional rights in the so-called Lockean tradition without, however, any desire to protect propertied interests. Broken into significantly only by pragmatist judicial restraint, this tradition has been so dogmatic[58] that, regardless of individual theories, it has tended very much to look like a system of judicially enforced natural law in operation. Moreover, American theory has for the greater part been drawn toward some sort of natural law, influenced, no doubt at least in part, by the constitutional system itself. Regardless of predominating theory, however, the significance of the constitutional tradition[59] with its combination of judicial review and individual rights, can be underestimated only at the expense of greatly misunderstanding the American system.

III GREAT BRITAIN

A. Thomas Hobbes and Monarchic Sovereignty

If American theory has been dominated by the Locke-cult, American eyes have found it easiest to see Great Britain, by contrast, as dominated by the thought of Thomas Hobbes.[60] Only a generation before Locke's Second

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[55] Quoted in *Time*, Oct. 9, 1964, 44.

[56] See "Recent Development" (1963) 17 *Southwestern* L.J. 313.

[57] Mr. Justice Black, "The Bill of Rights" (1960) 35 *N.Y.U.L. Rev.* 882: *id.*, "The Bill of Rights and the Federal Government" in E. Cahn (ed.), *The Great Rights* (1963) 41-63. His position is criticised by E. N. Griswold, "Absolute is in the Dark" (1963), the Wm. H. Leary Lecture, University of Utah School of Law. But see A. Meiklejohn, "The First Amendment Is an Absolute" in P. Kurland (ed.), *The Supreme Court Review* (1961) 245-66.

[58] Arnold Brecht states that American "acceptance of inalienable individual rights and of general democratic principles and ideals is highly dogmatic in character. . . ." Brecht, "The Rise of Relativism in Political and Legal Philosophy", in *The Political Philosophy of Arnold Brecht* (Forkosch ed. 1954) 62.

[59] *Cf.* K. Llewellyn's remarks on judicial tradition in *The Bramble Bush* (2 ed. 1951) 157.

[60] For a typical example of the American conception of Locke ("good-guys") versus Hobbes ("bad-guys"), see Scott-Craig, *supra* n. 24 at 31-32 and sources there cited.

Treatise, Hobbes had written his *Leviathan*,[61] a justification of monarchical government based, like Locke's work, on the idea of a social contract. At this very beginning, however, the similarity came to an end. For Locke, life in the state of nature was pleasant and unrestrained, so that, even though government was required, it was not necessary for the preservation of life, but only to protect property.

Hobbes' view was quite different; for him, life in the state of nature was dominated by the war "of every man against every man"[62] arising just because of the effective equality which exists among men.[63] The resulting unrestrained competition made life in the state of nature "solitary, poore, nasty, brutish, and short".[64] Consequently, out of "Feare of Death"[65] and desire for security,[66] individuals living in the state of nature come together in a social compact to surrender their individual sovereignty to a "Common Power",[67] who would keep order among them.[68] And this "Sovereign" indivisible power,[69] Hobbes thought, would be more apt to produce peace if constituted in the form of a Monarchy.[70] For a monarch would be able to make more effective use of the "Power and Strength conferred on him", by which "terror" he is "inabled to forme the wills of them all".[71]

The obviously unpalatable quality of such thinking for Americans concerned with limiting the power of government is immediately apparent. Coupled with its preference for monarchy and the absence of natural "rights", Hobbes' thought has been easily identified by the Locke-cult as providing the cornerstone of British political philosophy (just as Locke's has for the Americans). Indeed, a scheme of parallel contrasts seems initially as plausible on the British-Hobbesian side as it at first seemed on the American-Lockean side. Thus, in the nineteenth century, the political and legal thought of Jeremy Bentham and John Austin came gradually to obtain the stranglehold on British thought which it has since held. Their primary concern with legislation for reform purposes[72] seems modelled upon Hobbes' "clear enunciation to the necessary supremacy of statute over common law".[73] Hobbes, of course, was concerned with refuting Coke's natural law of reason much as Bentham wished

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[61] T. Hobbes, *Leviathan* (1651).

[62] *Leviathan* (Everyman ed. 1928) 64.

[63] *Id.* at 63.

[64] *Id.* at 65. Moreover, justice is unknown in the state of nature, for justice (or injustice) can only exist in society and can only be present where there is "Law". *Id.* at 66. See also Stone, *Justice* 69-70 on "Natural Law and Hobbesian Scepticism".

[65] *Id.* at 66.

[66] *Id.* at 87-88.

[67] *Id.* at 89. The "Common Power" may be "one man, or assembly of men".

[68] Unlike Locke's contract, Hobbes' fearful citizens do not covenant with the sovereign to provide justice but "every man with every man" agrees "to submit their Wills, every one to his Will"—*i.e.*, to the will "of that great LEVIATHAN" *Id.* at 89. For this reason, there can be no claim of a breach of fiduciary trust by the citizens against the sovereign (as in Locke), for the sovereign has contracted with no one. *Id.* at 104. Moreover, the test of his success would be not how he preserved everyone in the enjoyment of his natural rights, but rather how effective he was in the exercise of his naked power to maintain peace within the Commonwealth. The residual question of whether peace was possible without striving for justice did not directly concern Hobbes, although he would have contended that both peace and justice can be produced only within his Commonwealth. See his discussion of "Natural Lawes", *id.* at 66-86, and note 64 *supra*. Note, however, that the natural laws must be promulgated by the Sovereign in order to be binding. *Id.* at 152.

[69] *Id.* at 97.

[70] *Id.* at 98-100.

[71] *Id.* at 89-90.

[72] H. L. A. Hart, "Positivism and the Separation of Law and Morals" (1958) 71 *Harvard L.R.* 593, 595.

[73] A. D. Lindsay, "Introduction" to Hobbes, *Leviathan* (Everyman ed. 1928) xiii.

to break the influence of Blackstone's natural law ideas.

A further apparent similarity lies in the fact that Hobbes' notion of sovereignty seems *prima facie* tailor-made for Austin's system,[74] but Austin instead criticised Hobbes' theory for failure to conform to the facts.[75] Closer analysis has shown that, despite a similarity of emphasis, Austin's concept of sovereignty was not designed to "describe either actual or desirable political and social conditions".[76] Unlike Hobbes, who wrote within the framework of the social struggles of his own time,[77] Austin's purpose was to build an analytical apparatus "for criticising legal propositions by reference to their mutual consistency within a system of law"[78]—paradoxically, a quasi-metaphysical system.[79]

The example of Austin's sovereignty seems symptomatic of Hobbes' apparent but unreal influence. Indeed, the noted historian, R. G. Collingwood, has lamented the unpopularity of Hobbes' work from its seventeenth century writing up to the present time.[80] Collingwood himself, however, felt sufficiently inspired by the Nazi menace and Hobbes' thought to write *The New Leviathan* in the Preface to which he pays homage to the original *Leviathan* as "the greatest work of political science the world has ever seen".[81] Such heady praise for theories entirely ignored since their formulation is singular enough, but Collingwood has been joined in such unqualified admiration by other modern British voices such as Michael Oakeshott and even, apparently, H. L. A. Hart.[82] Oakeshott, for example, has called the Leviathan "the greatest, perhaps the sole, masterpiece of political philosophy written in the English language".[83] How is such praise to be reconciled with the apparent bankruptcy of Hobbes' influence? Perhaps, Hobbes' theories must be distinguished from his thought. The former are couched very much in the terms of the arguments of his times; they seem quaint and rather unappealing. But the basic concerns of his thought have dominated English thinking to such an extent that the Americans must be forgiven if they have oversimplified in seeing a basic contrasting parallel between the influence of his thought on the English and the influence of Locke's on the Americans.

Despite the inaccuracies of the Locke-cult conceptions discussed in the previous sub-section and the corresponding misconceptions concerning Hobbes, a good case may be made for contrasting Locke, as the cult *thought* he was, with Hobbes, in the basic emphases of his thought, as formulators of the

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[74] Lindsay, *id.* at xxiii, claims that Austin followed Hobbes' theory of sovereignty.

[75] J. Austin, 2 *Lectures on Jurisprudence* (5 ed. 1885) 234ff. See Stone, *Legal System* 71.

[76] Stone, *Legal System* 73.

[77] See *id.* at 72.

[78] *Id.* at 73.

[79] Which, also paradoxically, would exempt him (at least, with reference to his analytical system) from the criticism of the Utilitarians made by the neo-Humian intuitionists, *e.g.* G. E. Moore, *Principia Ethica* (1903) 59-109, but, at least arguably, subject him instead to Moore's arguments against metaphysical ethics, *id.* 110-41. The point is *arguable* because it seems that escape from the dilemma might be made on the ground that Austin is not concerned with ethics at all. But this would rest on successfully distinguishing the purpose of his analytical tool as revealing self-consistency rather than defining what is good. Or, to state it in another way, it is arguable whether Austin intended that his metaphysical system be a picture of reality or merely an artificial model—which is in fact one point under debate between W. L. Morison, "Some Myth About Positivism" (1958) 68 *Yale L.J.* 212-33 and Stone, *Legal System* 63-97 *passim.*

[80] R. G. Collingwood, *The New Leviathan* (rep. 1947) iv.

[81] *Ibid.*

[82] See H. L. A. Hart, *The Concept of Law* (1961) 189-95, whose discussion there of the "minimum content of natural law" parallels in detail many of Hobbes' basic points, *e.g.* "Approximate Equality", *id.* at 190-91.

[83] M. Oakeshott, *Hobbes's Leviathan* (1949) viii.

dominant trends in political-legal thought in America and Britain, respectively. Hobbes' fundamental concern with sovereignty as "indivisible and unlimited"[84] is a representative issue. It has dominated British thought to the present day.[85] But the idea is anathema to Americans concerned with limitation of government, who, when they think of it at all, simply dismiss sovereignty as residing in the people who delegate part of it to the government. Perhaps Englishmen with the unifying symbol of the Crown find it natural to think of sovereignty as "indivisible and unlimited". For the Americans, it has never been either.

A further comparative point may be made regarding the view of human nature. Hobbes "was a thorough-going exponent of a mechanical view of the universe and of man"[86]—a determinist. Men could not help themselves; their motivation was determined by causes. And since they desired above all to preserve their lives, they surrendered to Leviathan. But once deny the fundamental assumption that "men desire security above all things"[87] and Hobbes' thought moves no further. Men who are willing to die for the sake of a principle will find no interest in Hobbes' thought, and the American revolutionaries thought, at least, that they were such men. They were convinced of man's free will and obsessed with protecting the exercise of that freedom. David Hume's empirical determinism[88] was undoubtedly too sophisticated for their home-spun tastes, and determinist elements in Utilitarian thought were ignored by post-Revolutionary Americans. The Americans did, however, share Hobbes' pessimistic view of human nature as naturally power-seeking. But their solution was not to secure peace by giving all power into the hands of one but to attempt to secure freedom by *preventing* power from coming into the hands of only one person or body.[89] "Checks and balances" was the antithesis of "indivisible and unlimited" sovereignty. The Americans had experienced Royal power, and they wanted no more of it.

This basic contrasting dichotomy may be further illustrated by the English thinkers who subsequently became popular in America. Adam Smith's *laissez-faire* economic theories, based on the thesis that men act out of self-interest,[90] were tailor-made for American thinking. Later in the nineteenth century, Herbert Spencer's social Darwinism achieved far greater popularity in the United States than it ever did in Britain.[91] So, for that matter, did Blackstone's natural law thinking a century earlier.[92] Americans took unto themselves as their very own his well-known dictum:

> This law of nature being coeval with mankind and dictated by God Himself, is, of course, superior in obligation to any other . . . no human laws are of any validity if contrary to this; and such of them as are valid derive all their force, and all their authority . . . from this original.[93]

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[84] Lindsay, *supra* n. 73, at xxiii.

[85] R. F. V. Heuston, "Sovereignty" in *Oxford Essays in Jurisprudence* (Guest ed. 1961) 198-222, gives an entertaining history.

[86] Lindsay, *supra* n. 73 at xx.

[87] *Id.* at xxi-xxii. *Cf.* Hart's contemporary English linguistic view of a "minimum content of natural law" based on the premise "that the proper end of human activity is survival". Hart, *op. cit. supra* n. 82 at 187 citing with approval Hobbes and Hume.

[88] See David Hume, *A Treatise of Human Nature* (1739-40).

[89] See text accompanying nn. 28-32 *supra.*

[90] A. Smith, *The Wealth of Nations* (1776; Cannan ed. 1937) 14.

[91] See text accompanying nn. 47-50 *supra.*

[92] See J. Frank, "A Sketch of an Influence" in *Interpretations of Modern Legal Philosophies* (P. Sayre ed. 1947) 189; R. Pound, *Formative Era of American Law* (1938) 23-26.

[93] Sir Wm. Blackstone, *Commentaries* (1765; 12 ed. Christian, 1793) 41. *But cf.* 41 n. 3 on the inability of a judge to overrule an evil law passed by Parliament. *But see* P. Lucas, "*Ex Parte* Sir William Blackstone, 'Plagiarist': A Note on Blackstone and the Natural Law" (1963) 7 *Am. J. Leg. Hist.* 142-58, for the interesting thesis that Blackstone used the natural law dicta to disguise his Hobbesian positivism. Lucas is

His effect was pronounced in America, of course, principally because his book was the only general legal treatise "available in a land where well-trained lawyers were almost non-existent".[94] Nonetheless, Americans did seem to manage to ignore Blackstone's contrary, though grudging, admission that "True it is, that what the parliament doth, no power upon earth can undo".[95] Moreover, no great reaction to Blackstone arose in America to diminish his influence; frontier lawyers apparently found his work to their liking.[96]

B. Jeremy Bentham and Sovereignty for Reform

Although Blackstone's *Commentaries* were proportionately not as popular in England as in the Colonies,[97] they did represent an important advance in the comprehensive statement of English law. The English political and social climate, however, was not destined to be so conducive to Blackstone's extended popularity. Indeed, the first rumbling of discontent was soon to be heard from sixteen-year-old Jeremy Bentham, who sat through Blackstone's lectures "and was inspired with a violent repugnance which he expressed in his *Fragment on Government*".[98] There, as well as in his *Principles of Morals and Legislation*,[99] he expressed his principle of utility as the criterion by which the success of government and its laws must be measured. But in the *Fragment*[100] the principle was used in addition to censure Blackstone for his failure not only as a Censor of the Law but as its Expositor as well.[101] His failing on both grounds arose from his apparent identification of the *is* and the *ought* of the Law; it was "hostile to Reformation" to ignore the principle of utility as the standard by which to judge what the Law *ought to be*.[102] And Bentham was obsessed with "the reform of existing laws by means of a science of law".[103]

The circumstances of his time, however, did not favour reform. Complacent "attitudes favoured the maintenance of the status quo; and the status quo was one in which Parliament's function was conceived as lying in the supervision of administration rather than in the creation of new law by

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certainly correct to point out the positivist elements in Blackstone's thought, although these elements—whatever judgment may be passed on Lucas' thesis—were apparently well-enough disguised to fool the American frontiersmen. To this extent, too, it seems correct to place Blackstone in the same category as Locke, in that neither would have recognized his own thought as it was adapted by the Americans to meet their distinctive needs. On this issue see generally Stone, *Justice* 88-89; D. J. Boorstin, *The Mysterious Science of Law* (1941); H. L. A. Hart, "Blackstone's Use of the Law of Nature" (1956) 73 *So. African L. Rev.* 169.

[94] J. McKnight, "Blackstone, Quasi-jurisprudent" (1959) 13 *Southwestern L.J.* 399, 401.

[95] 1 *Commentaries* (ed. *supra* n. 93) 161. Nonetheless, "the omnipotence of parliament" is "a figure rather too bold". James Wilson, however, appears to be one American who did take note of Blackstone's position and used it as a ground for rejecting him. See Lucas, *supra* n. 93 at 150-51.

[96] The *Commentaries* were cited 10,000 times in reported American cases between 1789 and 1915. D. A. Lockmiller, *Sir William Blackstone* (1938) 181.

[97] Prior to the Revolutionary War, almost as many sets of the *Commentaries* had been sold in the Colonies as in England. McKnight, *supra* n. 94 at 401.

[98] J. Stone, *Justice* 106. *But see* for the thesis that without Blackstone's work, Bentham's would not "have been what it is", A. E. Sutherland, "Blackstone After Two Centuries" in *Perspectives of Law* (Pound *et al.* ed. 1964) 359-81 at 378. Indeed, Bentham himself admitted that Blackstone had done "more and better than was ever done before by anyone". See J. Bentham, *Fragment on Government* (1776; W. Harrison ed. 1948) 27 (Preface §64).

[99] Bentham, *Principles of Morals and Legislation* (1789; 2 ed. 1823; W. Harrison ed. 1948) 125-31 (ch. 1).

[100] Bentham, *Fragment* 3 (Preface §2).

[101] *Id.* at 7-22 (Preface §§13-43). On this ground, Lucas, *supra* n. 93 at 154 has suggested that as between Blackstone and Bentham, it is in the latter that "one recognizes a rational and a priori, normative and censorial, general and supra-legislative principle of a truly 'nature-rightly' provenance".

[102] *Id.* at 16 (Preface §32).

[103] W. Harrison, *supra* n. 28 at xviii.

statute."[104] Against this background of judicial and legislative inactivity (so far as reform was concerned), Lord Mansfield attempted reform through judicial legislation, but to the extent that his efforts were successful, they were largely thwarted by his uninspired successors. His experience caused A. V. Dicey to conclude, "If the body of English law was to be remodelled or amended the work could be done by Parliament, and by Parliament alone."[105] Such, thinks Dicey, was Bentham's position,[106] and it was, at least the position to which his thought eventually brought him and the position taken by his followers.[107]

The natural drive of Bentham's thought was a "quest for reasonable solutions to social problems of a practical nature",[108] and in this respect he sounds much like the pragmatist-influenced Roscoe Pound. The difference, however, is that Pound was primarily concerned with the administration of justice while Bentham seemed to hold judicial proceedings almost in contempt. Nonetheless, legislation seems to have won its role as a vehicle of reform more by default than anything else, apparently since Bentham felt that Parliament was the real possessor of "indefinite authority" in England. It was certainly no particular love of Parliament which caused him to make it his chosen instrument, for he was content to work with despots such as Catherine the Great simply in the hope that some good might result from his efforts.[109] Indeed, he apparently thought that their "absolute" powers might be more effective instruments of reform.

It is not surprising then that, in his early work at least, Bentham seemed to find very little ground upon which even to distinguish free from despotic government; the former, in fact, he differentiated not on the basis of its possession of less power than the latter, but on the ground that free government is characterized by "frequent and easy *changes* of conditions between govern*ors* and govern*ed*; whereby the interests of the one class are more or less indistinguishably blended with those of the other".[110] The significant point, however, is that in his eyes the power of government, "though not *infinite*, must unavoidably, I think, *unless where limited by express convention*, be allowed to be *indefinite*."[111] And, although his qualification might seem arguably to allow for such constitutional limitations upon the power of government as were provided in the American model, his definition[112] seems to limit an "express convention" to a partial submission by one government to another (thus, comprehending a federal system but not a separation of powers). Apart from such a limitation from outside, supreme indefinite power must be found somewhere in the governmental structure.

Since his concern is for the use of this sovereignty for the purpose of reform, the thrust of his argument is to clear away foggy notions about imaginary limitations upon this power so that it may be given untrammelled use. He notes arguments that the people or the judges should exercize some check or limitation upon the power of the legislature and argues against these positions upon a number of grounds. For one thing, he asks, where is

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[104] *Ibid.*
[105] A. V. Dicey, *Law and Opinion in England* (2 ed. 1914; rep. 1962) 167; see 165-67.
[106] *Id.* at 167.
[107] *E.g.*, Harrison, *supra* n. 28 at xiii: "establishment of legislation as the primary means of reform."
[108] *Id.* at xviii.
[109] See generally Stone, *Justice* 107.
[110] Bentham, *Fragment* 94 (ch. 4 §24). The emphasis, as in the following quotation, is Bentham's.
[111] *Ibid.* (ch. 4 §23).
[112] *Id.* at 94 n. 1 (§23n.).

the executive power in England,[113] and thereby demands that Blackstone and others face up to the facts rather than the fictions of Royal power in practice. Moreover, he desires to know how the legislative and executive powers can be so neatly and easily distinguished, and contends that independence has been inaccurately attributed to the three branches of the government.[114] For example, the judiciary is not independent of the executive because it is "appointed solely by the Crown".[115] Hence, it is rather self-defeating to give "to the judges a power of annulling (Parliament's) acts" when the influence of the King "is the very grievance you seek to remedy".[116] More than this, to give the judges such a power, even though too much, is still only to give them a negative power rather than a positive power and therefore does not succeed in transferring "the supreme authority from the legislative to the judicial".[117] In this particular argument, however, Bentham does not seem to consider the possibility either of an independent judiciary or judicial law-making, and it seems that if confronted by contemporary U.S. Supreme Court practice in construing the Bill of Rights, he might have to admit supreme authority in at least some areas to reside in the judicial. Clearly, however, he is correct to see the judicial power of nullifying legislation as a negative one, and the Americans would have admitted freely that this was their purpose.

Yet, Bentham would not anticipate so active a role for the judges as enforcing constitutional limitations upon the exercize of governmental power. Contrary to his previous definition of "express convention", he seems to think that such limitations can be provided, but their enforcement lies in the habit of obedience. For the government to attempt to breach the express convention by which its power is limited, is "a fact notorious and visible to all" and the "disposition to obedience" will not extend to such attempts at law-making.[118] At the foundation of such a view, there does seem to be a degree of social realism, but it must surely be doubted that the breach will always, or even often, be "notorious and visible to all". Moreover, because of the disagreement possible in such a matter of interpretation without any judge agreed upon to settle the matter, the probability of anarchy seems great—although in practice the issue would probably resolve itself into a power struggle with Macchiavellian overtones of "guiding" public opinion. The net result, then, was to make constitutional limitations usually meaningless and, in England, to assure the Parliament of power limited, as a practical matter, only by what public opinion would not tolerate.

The unacceptability of such a position to Americans is apparent, and the fundamental dichotomy is illustrated again by the fact that, since Bentham's time, his basic ideas have dominated British theory almost completely. Thus, the most important elements of the Benthamite tradition for the legal theorist were brought together in the work of John Austin, who, on the basis of Bentham's political theories, worked out the first concepts of analytical jurisprudence. In the process, of course, he also worked out his theories of sovereignty and of law, both tending to provide legislation with its exalted place in the reformed theology of utilitarianism. In this guise, Benthamite principles have continued dominant, since "for practical purposes the general background of thought of most English lawyers has continued to be Austinian".[119] As such, they have continued to help to place British emphasis

[113] *Id.* at 71-72 (ch. 3 §5).
[114] *Id.* at 72-73 (ch. 3 §6).
[115] *Id.* at 98 (ch. 4 §32).
[116] *Ibid.*
[117] *Id.* at 98 (ch. 4 §33).
[118] *Id.* at 99 (ch. 4 §36).
[119] Harrison, *supra* n. 28 at xiv.

on parliamentary power[120] in stark contrast to the usual American emphasis on judicial power.

C. A. V. Dicey and Individual Liberty

All this is not to say, however, that either American or British thought patterns have been anything close to univocal. America has had its pragmatists and positivists and England its Blackstones and Diceys. But even inherent in the minority Whig tradition of Dicey, for example, may be found elements which shed light on the majority tradition. Thus, Dicey showed the same ambivalence regarding the power of Parliament which had characterized his Vinerian predecessor, Blackstone. On the one hand, he avowed that Parliament has "the right to make or unmake any law whatever" and no one had "a right to override or set aside the legislation of Parliament".[121] On the other hand, he believed that the supremacy of the law of the land, though above Parliament, was still compatible with its sovereignty.[122] The reason for his ambivalence, of course, was his Whig individualism by which he sought protection for individual rights.[123] The lengths, however, to which this drive to reconcile parliamentary sovereignty with individual rights led him were, to say the least, considerable.

For one example, he was led to see Bentham as an individualist, as he himself was. Adam Smith and Bentham "both represented the individualism of the time.[124] Indeed, "Benthamism was . . . little else than the logical and systematic development of those individual rights, and especially of that freedom which has always been dear to the common law of England".[125] Such a view, however, is hardly consistent with the ideas of Bentham as they have been reviewed here, and recent studies have confirmed that this is an erroneous, though widespread, understanding of Bentham's position.[126] No doubt a fair degree of the "widespread" must be attributed to the influential opinion of Dicey himself. Nonetheless, Dicey's nineteenth century liberalism did make him capable of being considerably more appreciative than Bentham ever could have been of the power-limiting Constitution of the United States.

Quite unlike Bentham's ambiguous and antipathetical attitude toward the limitation of governmental power by express convention, Dicey's position gave full recognition to the American distribution of powers as the "exact opposite" of the unlimited authority of the English Parliament.[127] Champion of the separation of powers as he was, however, he was careful to add that even in England such expressions as the separation of powers "have a real meaning. But they have quite a different significance as applied to England from the sense which they bear as applied to the United States".[128] This quite different sense was in the United States due to "completely developed federalism" which necessitated the supremacy of the constitution, the separation of powers, and judicial review.[129] And, though one may wish to dispute that federalism makes

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[120] *Cf.* Heuston, *supra* n. 85, on parliamentary sovereignty.

[121] Dicey, *Law of the Constitution* (9 ed. 1948) 40, quoting Blackstone, *id.* at 41-42.

[122] *Id.* at 406-7. On this illusory quality of the "Rule of Law" especially in Dicey's hands, see Stone, *Social Dimensions* ch. 13 §11.

[123] See W. I. Jennings, *The Law and the Constitution* (2 ed. 1938). E. C. S. Wade, "Preface" to Dicey, *op. cit. supra* n. 121 at xii, states that Dicey's emphasis on the rule of law "assumes that the purpose of the constitution is to protect individual rights".

[124] Dicey, *op. cit. supra* n. 105 at 63 n. 3.

[125] *Id.* at 176.

[126] *E.g.*, J. Brebner, "*Laissez Faire* and State Intervention in 19th Century Britain" (1948) *J. Economic History* Supp. VIII (*The Tasks of Economic History*) 59-73; Stone, *Justice* 107-8.

[127] Dicey, *op. cit. supra* n. 121 at 139.

[128] *Id.* at 156.

[129] *Id.* at 144.

these requirements, Dicey must be conceded to have stated a good case for his point.

Distinguishing the separation of powers in the United States was not merely the rigid separation of legislative and executive departments but more strikingly the equality of standing of the judicial branch with the other two, which feature resulted in the wielding of great power by the Supreme Court of the United States even to the extent of being "at a given moment, the master of the constitution".[130] By contrast, in England "the judicial department does not pretend to stand on a level with Parliament; its functions might be modified at any time by an Act of Parliament".[131] All this, however, is principally due to the supremacy of the constitution in the federal republic, which for protection against the encroachment of the central government (Bentham to the contrary) requires the independent judgment of the courts as to the conformity of statutory law with the supreme law. "But," Dicey notes, "with us there is no such thing as a supreme law, or law which tests the validity of other laws."[132] The result in his mind is that power-limiting federal government inevitably means "weak government",[133] "tends to produce conservatism",[134] and results in "legalism".[135]

Despite all these differences, however, Dicey believed that "the institutions of America are in their spirit little else than a gigantic development of the ideas which lie at the basis of the political and legal institutions of England".[136] This belief, though quite accurate, led him to view the protection afforded to individual rights as being for all practical purposes the same under the American and British constitutions.[137] And, in Dicey's eyes, this was obviously a compliment to the American system, since it is apparent that he believed the English system to afford far greater and more effective protection to individual rights than the written constitutions of Continental countries.[138] English protection, of course, was rendered through adherence to the rule of law; "principles of the constitution are inductions or generalisations based upon particular decisions pronounced by the courts as to the rights of given individuals."[139] And even though it might be conceded that "Liberty is as well secured in Belgium as in England", the main point for Dicey was still that English protection was superior because it afforded a legal remedy rather than a mere verbal guarantee.[140]

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[130] *Id.* at 175; see 175-80.
[131] *Id.* at 156.
[132] *Id.* at 145.
[133] *Id.* at 171.
[134] *Id.* at 173.
[135] *Id.* at 175.
[136] *Id.* at 139.
[137] *Id.* at 200 n. 1.
[138] *Id.* at 197-98, 204-5.
[139] *Id.* at 197-98.
[140] *Id.* at 198; see 200. At 207, he warns,

> The proclamation in a constitution or charter of the right to personal freedom, or indeed of any other right, gives of itself but slight security that the right has more than a nominal existence, and students who wish to know how far the right to freedom of person is in reality part of the law of the constitution must consider both what is the meaning of the right and, a matter of even more consequence, what are the legal methods by which its exercise is secured.

Later, at 221, in speaking of the Habeus Corpus Acts, he says that they have "done for the liberty of Englishmen more than could have been achieved by any declaration of rights". The general impression of such statements must be admitted to be the position that the difference between the systems is formal in that one is unwritten and the other written, though the latter may not be enforced and therefore illusory. That the unwritten English right is not always the same, however, he seems to admit at 239 in his discussion of freedom of the press, but he quickly retrenches the freedom in the rule of law (at 251).

His point, no doubt, was well-taken in regard to the declarations of individual rights in Continental constitutions where court powers to protect the rights did not exist. But his preoccupation with the Continent caused him to ignore a difference of fundamental importance between Britain and the United States created by the existence in the latter country of a written Bill of Rights enforced by judicial review. By thus making the courts arbiters of governmental action, individual rights could be largely removed from the area within which the legislative and executive could act as they chose with unquestioned constitutional validity. In Britain, the freedom of the press could be restricted or eliminated by Parliament at any time it wished without interference from anyone; in the United States, any such attempt would be reviewable by the courts to judge the constitutionality of the act. A recent example of this difference is that, in contrast to the still strict law of libel in both Britain and Australia, the Supreme Court has considerably broadened the scope of constitutionally protected, libel-free publication in the United States,[141] and such Justices as Hugo Black are pressing the view that, under the constitutional guarantee of free speech, any libel law is constitutionally impermissible.[142] For such a contention to be made seriously in modern England would be patently absurd.

Although it seems astonishing that such an eminent scholar as Dicey should gloss over such a significant point, there seems ground for believing that his error is attributable to his view of the relationship of the constitution and the judiciary. As noted above, he correctly saw the great power of the Supreme Court, but he seems to have looked at this great power almost solely in regard to the interpretation of what he considered constitutional matters, that is, the actual form of the government. Such a view, of course, slights the limitations on all power which Americans considered so important. In somewhat tacit recognition of this American predilection, he observed that the "inflexibility of the constitution tempts legislators to place among constitutional articles maxims which (though not in their nature constitutional) have special claims upon respect and observance".[143] Quite accurately, Dicey noted that such non-constitutional matters given the stature of supreme law may often be trivial, and, almost in the same breath, implied his contempt for such " 'guaranteed' rights".[144] Indeed, he apparently regarded the American Bill of Rights in this same class of "principles or petty rules which are supposed to have a claim of legal sanctity".[145] It is not, of course, that he disparaged the protection of such rights, but rather that he felt the difference between a written and unwritten protection immaterial except perhaps that the idea of having to write them down was somewhat *gauche*.

Undoubtedly, a further reason why he overlooked the significance of this difference was his preoccupation with the rule of law: it was America's inheritance of this principle which caused her to share in the protection of individual rights which the British system afforded. In short, though his propensity to power-limitation produced his appreciation of the American model, this same preoccupation with individual rights led him, paradoxically, to ignore perhaps its single most important distinctive characteristic. Thus, generations of undergraduates may have been greatly misled (if personal confessions to the present writer are any evidence) into failing to realize that written rights *do* make a difference when those rights are enforced by an independent judiciary.

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[141] *E.g.*, *New York Times* v. *Sullivan* (1964) 376 U.S. 254.
[142] See n. 57 *supra*.
[143] Dicey, *op. cit. supra* n. 121 at 153. [144] *Id.* at 154. [145] *Ibid.*

D. Parliamentary Sovereignty and Judicial Technique

It would, of course, be naive to think that the mere use of these constitutional forms necessarily produced these results, but the existence of these forms has undoubtedly fostered a judicial tradition[146] which, regardless of the deviations from its norm, has taken an independent, often stubborn, and greatly improvisory attitude. In short, the American institutional structure seems to have encouraged judicial creativity and uninhibitedness. The American judicial tradition, of course, was forming when Coke's free-swinging, anti-power judicial posture was still the outstanding defence of freedom. And events in America led to the institutionalizing of this power-negating role of the judiciary, for not only was it a fundamental popular drive[147] but it had also become the judicial habit in measuring acts of Colonial assemblies against the Charters under which they were governed.[148]

Different events in England shifted the democracy-protecting role to the Parliament, and the judges could only tag along. Thus the English judicial tradition has grown increasingly submissive as the supremacy of Parliament has been ever more strongly affirmed. For this reason, it is unquestionably unfair to blame Dicey alone for English misunderstandings of the American system. Indeed, as the importance of the English judiciary waned, it probably became increasingly easy to see the queer American practices as a necessary concomitant of their federal situation, although such a relationship is certainly not inevitable. But the root of English misunderstanding lies really in the progressively narrower limits of judicial reasoning and ambit of judicial action, both of which the English judicial tradition has imposed upon itself. If a judge is only an interpreter of legislative acts and then only within the limits of a very narrow legal logic, it is understandably difficult to conceive of a judge passing upon the validity of legislation as if he were equal or superior to the legislator himself. In fact, the first question would likely be how the judge could possibly perform such a task, for in the policy-blind eyes of the questioner the judicial tools would not be adequate to cope with the job.

Representative of this judicial self-circumscription is the English House of Lords' decision holding itself absolutely bound by its own prior decisions.[149] This circumscription, however, was the perfectly natural result of the Austinian view dominant in England that the judge should be concerned with legality alone; a judge "is there to enforce the law of the land, else he does not administer that justice or that equity with which alone he is immediately concerned".[150] If concerns of justice (what the law *ought* to be) are involved, then it is a matter with which the sovereign Parliament should concern itself. The judge's task is to decide what the law *is*. This tradition of judicial positivism, moreover, continues as markedly as ever, emphasizing *stare decisis* and legal certainty as the goals of the submissive judge who awaits only to interpret what Parliament commands. Significantly, however, this approach also stifles the growth of the common law itself, which would expand to meet

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[146] See Llewellyn, *supra* n. 59.

[147] A. T. Mason, "Foreword" to *Security Through Freedom* at vii:
> Americans, unlike most free peoples, are disinclined to rely on political checks as adequate for obliging government to control itself. Our most characteristic devices—written constitutions, bills of rights, separation of powers, judicial review, federalism and states' rights—all these reflect ancestral distrust of government.

[148] As Dicey so accurately points out, *op. cit. supra* n. 121 at 164-65.

[149] *London Street Tramways Co.* v. *London County Council* (1898) A.C. 375. But *cf.* the recent reservations of the Scot, Lord Reid, in *Midland Silicones Ltd.* v. *Scruttons Ltd.* (1962) A.C. 446, 472 at 475-77.

[150] J. Austin, Lectures on Jurisprudence (5 ed. 1885) 218.

new social situations.[151] From the perspective of this judicial tradition, the American concept of judicial action must appear quite outlandish.[152] Indeed, the contemporary British positivist might begin to understand the American situation only if it were put in the terms that Americans have adopted *moral* principles (as in the Bill of Rights) as court-enforceable supreme *legal* principles—which might also go some way in explaining to him the American predilection for natural law thinking.

All this, however, merely serves to point up once more the contrast between the modern English emphasis on legislation with its power-affirming drive and the American emphasis on power-negating judicial action. The former obviously values majority rights and democratic activity while the latter tends to exalt protection of minority rights and individual liberties.[153] Such a thrust seems a natural preoccupation for a frontier society, and, since the pragmatic hesitation ended, this thrust has turned to protect freedoms amid the crush of modern society. Whether the possibility of uninhibited action by the modern state would be more worthwhile than these efforts to protect individual freedom is a question that can be answered only by the weighing of a society's values. And, whatever those values may be, they will influence the growth and operation of institutions, and will both influence and be influenced by the philosophic foundations. Thus, in viewing the present English scene, one could not say that positivism has been more or less important than either Parliamentary sovereignty or the submissive judicial tradition in establishing the present shape of things, for each has combined to play its own part in producing the whole.

IV AUSTRALIA

It is quite insufficient for an understanding of the Australian situation to note, as has already been done here,[154] that her legal and philosophical traditions have been largely inherited from England. For the significance of English legal and philosophical traditions within the Australian social and historical setting may be vastly different. One obvious reason militating in this direction is that, despite this English inheritance, Australia has also

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[151] All of these points are neatly presented in one statement by Viscount Jowitt, Lord Chancellor of Great Britain, to the Seventh Legal Convention of the Law Council of Australia, held during August 1951 in Sydney, reported in (1951) 25 *A.L.J.* 233 at 296:

> I do most humbly suggest to some of the speakers to-day that the problem is not to consider what social and political conditions of to-day require; that is to confuse the task of the lawyer with the task of the legislator. It is quite possible that the law has produced a result which does not accord with the requirements of to-day. If so, put it right by legislation, but do not expect every lawyer . . . (to) decide what the law ought to be. He is far better employed if he puts himself to the much simpler task of deciding what the law is. . . . If this case does come to the House of Lords, if we examine it and discover that there is a case which is precisely in point, then whether we like the decision or whether we do not, whether we think it accords with modern requirements and conditions or whether we think it does not, we shall follow loyally the decision which has already been come to. In that way and that way only can we introduce some certainty into the law.

[152] A nice example of the difference between the two countries in the view taken of the tasks of the judiciary is provided by a comparison of the treatment of the problem of interpretation in the well-known Hart-Fuller debate. *Compare* Hart, *supra* n. 72 at 606-15, with L. L. Fuller, "Positivism and Fidelity to Law—A Reply to Professor Hart" (1958) 71 *Harvard L. Rev.* 630, 661-69.

[153] See Mason, "Foreword" to *Security Through Freedom* at viii:

> Nevertheless, the judiciary is still valued as a bulwark against the danger that has always terrified Americans—unrestrained majority rule. The view that "law emanates solely from the will of the majority of the people and can, therefore, be modified at any time to meet majority wishes" has been described as "absolutely totalitarian".

[154] See Introduction, ***supra.***

borrowed some federal features of its government from the United States. In view of some of the fundamental conflicts and contrasts of the British and American systems, it should now be possible to consider to what extent Australia has been influenced by this ambivalent background.

A. The Foundations of Federalism in Constitutional History

Some contemporary Australian commentators, however, seem to deny the existence of this ambivalence. This group advocates a unitary government and criticizes the present Constitution for its federal features. But they also tend to too easy dismissal of the historical background of the Constitution. Instead, they contend, as has Sir Owen Dixon, that the contemplation of the American Constitution by the framers of the Australian document "damped the smouldering fires of their originality".[155] It is quite true that the framers devoted more attention to the American model than to any other, but to accuse them of ignoring their own interests by Americaphilism is both erroneous and unjust.

Nonetheless, those who advocate a unitary government on the English model commonly levy the charge that the Australian Constitution[156] is a slavish copy of the American. This was, indeed, the charge made by the anti-Federalists during the debate on Australian federation.[157] Despite a number of superficial similarities, however, there are only two institutions for which the Australian Constitution is basically indebted to the United States Constitution. But even these, the Senate and the High Court, apparently do not operate in the manner in which the framers intended. Their intention, of course, was not to mimic the Americans but to establish a national union; because of the conflicting interests of the various states, however, unity was acceptable only on the federal basis. Because the small and remote states were mortally afraid of losing their identity, they were prepared to remain apart rather than submerge their interests irretrievably in the nationally oriented concerns of the populous states.

An examination of the debates and the public discussion makes it clear that without the inducement of the apparent protections afforded by union on federal principles the smaller states would probably have rejected the proposed constitution.[158] The most populous states, on the other hand, were determined that numbers should prevail and wanted a unitary government modelled on the English pattern.[159] Not surprisingly, it was pressure from these same quarters which demanded responsible government and that any Senate be shorn of participation in the executive power.[160] The result of these opposing pressures was a compromise in which the populous states accepted a Senate in which each state had equal representation while the less populous states accepted responsible government and a Senate with watered-down powers. This same opposition made its appearance in the ensuing public discussion. For example, the position of the press in the larger states showed itself in the disjunct that either the constitution was good because the Senate did not

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[155] See n. 10, *supra*.

[156] On the Australian Constitution in addition to works cited below see generally 2 J. Bryce, *Modern Democracies* (1921) 181-290; F. A. Bland, *Government in Australia* (1939) 369-435; J. Colwell (ed.), "Governing a Continent", 5 *The Story of Australia* (1925); A. S. Nicholas, *The Australian Constitution: An Analysis* (2 ed. 1952), and more recently Z. Cowen, "A Comparison of the Constitutions of Australia and the United States" (1955) 4 *Buffalo L. Rev.* 155.

[157] See E. M. Hunt, *American Precedents in Australian Federation* (1930) 15, 230.

[158] *Id.* at 99-101, 167.

[159] *Id.* at 99, 167.

[160] *Id.* at 100.

have much power or it was bad because the Senate had as much power as it did.[161]

In all of this debate and discussion, each side frequently sought support for its own point of view in the American Constitution and experience. However, "the lessons to be drawn apparently were not very clear, for the debaters . . . generally found support for whatever view they already held".[162] On this basis it seems clear that the Australian Constitution could not have been a mere copy of the American one, but that for the most part the American document simply happened to serve the purposes of the debaters who used it to bolster their arguments.[163] Thus, the Senate, as already observed, was a compromise between the large and small states. Because the small states demanded equal representation, the Canadian upper house of superannuated politicians would not suffice. Nor, for the same reason, would an upper house based on peerage be acceptable. The small states demanded an institution which, at least in appearance, preserved their integrity and equal voice with the large states; such an example they thought they saw in the American Senate.

Because of the contrary demand for responsible government, however, the Senate managed to achieve this objective in appearance only. In the Constitutional compromises, the Senate was deprived of its role of advising and consenting to such executive actions as treaty-making and the appointment of ministers. And this role, of course, has contributed greatly to the importance of the Senate in American government. In the contrasting Australian practice, the exigencies of responsible government have effectively prevented the Senate from exercising any significant role in the government of the nation. Instead the Senate seems to have evolved into an elective House of Lords without, however, either the prestige of the peerage or the assurance of absolute harmlessness. In short, its value in practice as a protector of the equal power of the states has been insignificant,[164] and its legislative contribution, negligible. Indeed, its principal potential seems to lie in the threat of its nuisance value. Because of responsible government, its voice has been inconsequential when the government in power has had the majority in both houses. When, however, the minority has controlled the Senate, the position of the Senate has usually remained unchanged, because neither government nor opposition have been willing to accept the penalties involved in taking advantage of their opportunity.[165]

Under these circumstances it is not surprising that the quality of the Senate should atrophy and that political commentators should complain of its uselessness. Moreover, it seems clearly to demonstrate that the role of federalism in contemporary Australian national government is not greatly significant. This development has been greeted with unabashed enthusiasm by the descendants of the early Australian advocates of unitary government, who have usually been Labor supporters of strictly democratic government. For example, Professor L. F. Crisp comments that "the general failure to the Senate to realize in practice anything like its intended stature is . . . truly remarkable. It serves once again to throw the spotlight full upon party—

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[161] *Id.* at 223-29.

[162] *Id.* at 100.

[163] *Cf. id.* at 254-56.

[164] See F. R. Beasley, "The Parliament of the Commonwealth" in R. Else-Mitchell (ed.), *Essays on the Australian Constitution* (2 ed. 1961) 49-69 at 49.

[165] The only two double dissolutions in Australian history are described in Beasley's essay, *ibid.* The threat of larger D.L.P. representation in the Senate on a double dissolution seems to provide an especially strong deterrent to A.L.P. resort to such a move.

and on the broad class basis of party—rather than upon federalism as being the positive force in the national parliamentary process of Australia."[166] That Crisp seems impeccably correct in his conclusion does not alter, but simply emphasizes, the fact that Australian federalism has been left with no defenders. Labor has been forthright in its demand that numbers alone prevail. The upper-class parties have tended to be English-oriented and therefore to tend toward English rather than American patterns of government despite their affinity for the power-limiting aspects of federalism. Only the interests represented by the Country Party have maintained a real stake in federalism, simply because it affords one more manner in which representation is given to area as well as people and a protection of rural states' interests against national intervention. Even here, however, the tendency of their pressure has not been to "Americanize" the form of government in any significant respect.

B. The Pressure for Unitary Government

The protection which Country Party interests have found in federalism, however, has not been for the most part at the level of national government but in the judicial review to which the competing efforts of the states and the federal government are subject. Hence, it is not surprising that this last bastion of federalism has been the principal object of attack by the unitary forces. These forces quieted after federation and only the emergence of a greater national consciousness in World War I rekindled the unitary flame. Thus, considerations of Australia's responsible government were given prominent though dubious place in the *Engineers' Case* of 1920.[167] Significantly, that case did serve to free the national government from any uncomfortable restriction it had experienced as a result of the doctrine of separation of powers.

Perhaps it was partly this mitigation which enabled the Royal Commission on the Constitution of 1929 to find that federal government was most appropriate for Australia.[168] It did not, however, prevent a strong minority report from advocating that the Commonwealth Parliament be given the power to amend the Constitution in order to effectuate an easy conversion to a unitary system.[169] Hindering the undivided sovereignty and responsible cabinet government they desired was judicial review, an institution they deplored:

> The present position is such that the Commonwealth Constitution is broad or narrow according to the way it is construed by the High Court, and the Constitution depends upon the trend of thought of the individuals who for the time being form that body. The personnel of the Court has been changed recently, and it is possible that some decisions now standing and accepted as the law of the Constitution may be upset in the future. Such uncertainty should be ended and the remedy appears to be to entrust the Commonwealth Parliament with the necessary powers, rather than to trust to the accident of the occupancy of a High Court Bench lacking in the responsibility of a Parliamentary Legislature. We believe that the authority of the Commonwealth Parliament as a law-making body has been impaired by the paramount and incalculable power of the High Court in its capacity as arbiter of the powers, and that the responsibility of Parliament and of the Cabinet have been lessened

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[166] L. F. Crisp, *The Parliamentary Government of the Commonwealth of Australia* (1949) 183.

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

[168] *Report of the Royal Commission on the Constitution* (1929) 241.

[169] *Id.* at 243-47.

> accordingly. Moreover, we believe that the adjudication of political issues by the Court is tending to lessen the Court's prestige, decreasing popular respect for it as an instrument of justice. These evils spring from the uncertainty of and the absence of definite principle in the distribution of powers.[170]

The minority thus showed the interwoven threads of positivist concern with legal certainty, judicial submissiveness, and legislative supremacy.

These same strands wind through much of the literature since that time. In 1930, A. P. Canaway launched a head-long attack on federal government in Australia.[171] And, though nothing official ever came of such pressure, there has apparently been considerable popular support for a change to a unitary government. For example, a 1943 public opinion poll showed sixty-one per cent of the men and forty-one per cent of the women in favour of unitary government.[172] Writing in 1946, G. Greenwood felt that "the problems which are today of greatest urgency are those which can best be solved either by a unified government or by a central government possessed of vastly expanded powers. It is time to recognize that the federation should be replaced by a unified state".[173] It must be remembered that this view was taken despite the broad grant of war-time power claimed by the Parliament and sanctioned by the High Court. In the face of post-war recurrence of restrictions on that power, unitary pressures could not be expected to subside. Thus, P. H. Partridge in 1952 voiced the opinion that there was no appreciable federal sentiment remaining in Australia,[174] and A. F. Davies advocated a similar position in 1958.[175]

Australian federalism has, however, had its defenders as well as its detractors. Notable among the defenders is the former High Court Justice and Federal Parliamentary Labor leader, Dr. H. V. Evatt. Writing in 1939, Dr. Evatt expressed overall greater pleasure than displeasure with the federal system.[176] Such a position seems contrary to the usual unitary position of Labor, but the answer may lie in the fact that Evatt concluded that "although the doctrine of separation of powers applied to a limited extent in Australia, it is an exceedingly rare thing to find any legislation invalidated by reference to such doctrine".[177] Undoubtedly, he found this position easier after the *Engineers' Case*,[178] and he might well have felt some change of conviction after the post-war *Bank Nationalization Case*.[179] Whether he is understood, however, as referring only to the separation of executive from legislative from judicial powers (which has not been an appreciable hindrance to the exercise of federal power) or to the separation of federal from state powers (which is the kind of limitation involved in the *Bank Case*), there

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[170] *Id.* at 245.

[171] See A. P. Canaway, *The Failure of Federalism in Australia* (1930) v-viii.

[172] See A. F. Davies, *Australian Democracy: An Introduction to the Political System* (1958) 106 n. 1.

[173] G. Greenwood, *The Future of Australian Federalism* (1946) viii. See also 106-57 (ch. 4: "The Evil Effects of the Division of Powers Between State and Federal Authorities").

[174] P. H. Partridge, "The Politics of Federalism" in G. Sawer (ed.), *Federalism, an Australian Jubilee Study* (1952) 195.

[175] See Davies, *op. cit. supra* n. 172.

[176] H. V. Evatt, "Constitutional Interpretation in Australia" (1939) 3 *U. Toronto L.J.* 1, 22-23.

[177] *Id.* at 23.

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

[179] *Bank of New South Wales* v. *Commonwealth* (1948) 76 C.L.R. 1. See the comment by J. Stone, "A Government of Laws and Yet of Men, The Australian Commerce Power" (1950) 25 *N.Y.U.L. Rev.* 451.

is no question that the limitations imposed either by the *Bank Case* or by the *Communist Party Case*[180] arise from the judicially enforced limitation of powers in the Constitution. Thus, whether Evatt would hold the same view today is an interesting question, since he would be likely to feel some ambivalence about the judicial weapon which produced results in one case so pleasing and in the other so distressing.

Nonetheless, there are at least a few voices in modern Australia who favour federalism on grounds other than its failure to hinder legislation too greatly. The Prime Minister has, for example, issued a specific defence of federalism.[181] J. D. B. Miller, too, takes the position in his well-known text that there is still a need for federalism in Australia and that a great deal of federal sentiment remains.[182] Both Miller and Menzies, however, are somewhat unusual in *expressing* their views at all. For apart from pro-unitary government (usually Labor) views, Australian writers have, for the most part, tended to *assume* the federal system as a permanent feature of Australian government without general comment, reserving their criticism for particular institutions and practices. In this category fall most of the legal commentators, who frequently display an English-orientation because of their legal education and consequently often approach federal institutions with a rather unitary spirit. It is not surprising either that this group tends to think of Australia as rather like England, a position they share with the advocates of unitary government. The latter, of course, find Australia's supposed similarity to England as indicating the appropriateness of unitary government for this country.

A particularly good example is provided in A. F. Davies, who has been noted as favouring unitary government,[183] since he is a Victorian Laborite[184] who premises Australia's dissimilarity to the United States: Australian politics is merely a provincial replay of British politics.[185] This sociological interpretation is quite in keeping with the general unitary position taken but seems to suffer from too much overgeneralization. Similarities between Australian and British politics certainly exist, but so do profound differences. Australia is far larger, less compact and much more heterogeneous than Britain; its needs are far more diverse.[186] Whether Australia is ready for a unitary government is far too complex a question to be decided by mere dogma.

A more balanced view is provided by S. Encel who carefully analyzes the foundations and presuppositions of Australian government as different from British practice.[187] His view, which accords with the view taken here of the formation of the Australian Constitution, is that Australian frontier politics has been pragmatic, not polemical, and concerned with power rather than philosophy.[188] His conclusions, too, as to the present defects of Australian government ring with a truer tone of reality than hollow formulae of federalism or unity. There has been a failure of reform especially by the State governments, he feels, and the situation has also worsened at the federal level because

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[180] *Australian Communist Party* v. *Commonwealth* (1951) 83 C.L.R. 1. See the comment by E. McWhinney, "Judicial Positivism in Australia: The Communist Party Case" (1953) 2 *Am. J. Comp. L.* 36.

[181] R. G. Menzies, "Challenge to Federalism" (1961) 3 *Melb. U.L. Rev.* 1.

[182] J. D. B. Miller, *Australian Government and Politics* (2 ed. 1959) 137-40.

[183] See Davies, *op. cit. supra* n. 172 at 106.

[184] *E.g.*, the publication of the Fabian Society by Davies and G. Serle (eds.), *Policies for Progress: Essays in Australian Politics* (1954).

[185] Davies, *op. cit. supra* n. 172 at 69.

[186] *Cf.* Menzies, *supra* n. 181.

[187] S. Encel, *Cabinet Government in Australia* (1962) 1-16.

[188] *Id.* at 5-9.

of the atrophy of effective political opposition.[189] It is, of course, true that the first indictment can indirectly be laid at the feet of federalism, but this must not be allowed to obscure the truth that institutions can neither produce action of themselves nor hinder it for long if infused with resourceful leadership.

Evaluations which take account of such social realities, however, are rare. For the most part, verbal battles have raged over whether Australia's institutional pattern is more like the United States or Great Britain. The predominant pattern has been a denunciation of federalism as slavish copying of the Americans and unsuited to Australia's English conditions. At the same time, federalism has been attacked as conflicting with English institutions such as cabinet government. Against this attack, some have defended federalism as suited to Australian conditions and meeting certain needs which could not otherwise be met. Also on the latter side, it seems, is history, which provides more justification for Australia's present institutional mix than most critics admit. In further response to criticisms of Americanisms, it is notable that "American" institutions such as the Senate have been strongly winnowed by responsible government. In short, the Legislative-Executive branches seem to have developed into distinctively Australian institutions which own no single ancestor, either British or American.

C. Responsible Government and Judicial Review

In turning to the Australian judicial system, it is interesting to note that there may sometimes be an interconnection between positions on responsible government and the judiciary. Miller, for example, who has already been seen to be a strong supporter of federalism,[190] also emphasises the debt of the High Court as an institution to the United States Constitution.[191] It is, of course, true that American precedents were of some influence in the planning of the Australian judiciary,[192] but this influence must not be too highly rated.

Nonetheless, the debate concerning Australia's institutional heritage has sometimes pitted English responsible government against American judicial review. Significantly, this same conflict characterised the classification of the Canadian Constitution. Dicey, of course, considered cabinet government so insignificant in comparison with the more predominant federal features of the Canadian Constitution that he thought it to be clearly modelled on the United States Constitution.[193] When, a few years later, the Commonwealth of Australia Constitution Act was being debated in the British Parliament, Chamberlain said the Constitution was more like the American than the Canadian;[194] Haldane replied that responsible government made it greatly different from the American model and highly similar to the Canadian.[195] This position, however, he reversed quite famously fifteen years later, saying that it was more like the American than the Canadian model.[196] Why this should be so is an interesting question, but this same position has been taken in more recent years by another distinguished justice, Sir John Latham.[197]

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[189] *Id.* at 348-51.
[190] See text accompanying n. 182 *supra.*
[191] Miller, *op. cit. supra* n. 182 at 141-46.
[192] See Hunt, *op. cit. supra* n. 157 at 185: "There was general agreement that the American system of federal courts should be the model for the Commonwealth judiciary, and at no time did the Conventions depart from the American outline." See also *id.* at 199.
[193] See Dicey, *Law of the Constitution* (9 ed. 1948) 166 n. 1.
[194] 83 *Hansard* (4th series) 46. [195] *Id.* at 98.
[196] *Attorney-General for the Commonwealth of Australia* v. *Colonial Sugar Refining Co.* (1914) A.C. 237, 253-54.
[197] J. Latham, "Interpretation of the Constitution" in R. Else-Mitchell (ed.), *Essays on the Australian Constitution* (2 ed. 1961) 1-48 at 2-3. *Cf.* the position of W. A. Wynes,

Indeed, it cannot be denied that there is an element of truth in this view. This element of truth, however, lies in the absence in the Australian constitution of the novel Canadian distribution of powers between state and national governments. Apart from this, the issue is close; both nations have cabinet government and judicial review. Obviously, similarity to the United States cannot be based on responsible government. Apparently, the judiciary is the answer. But the American pattern can be misleading; the existence of judicial review is only one aspect of the question. Considering other factors as well, it seems that there may be more differences than similarities in the exercise of the judicial power in the United States and Australia. As G. Sawer says, there are too many exceptions to say that the Australian judicial power is patterned on the United States model, although he also quite rightly acknowledges implicitly that the superficial similarity of the two institutions is highly alluring to dangerous oversimplification.[198]

Part of this superficial similarity arises because the Australian Constitution-makers in some respects followed the pattern of the American Constitution in framing the original jurisdiction of the High Court. The consequences inappropriate to the Australian situation which have resulted have been appropriately and distinguishedly criticized.[199] Aside from these features, however, it seems to be the power of judicial review which causes so many to think of the High Court as a replica of the United States Supreme Court. Indeed, once the Canadian comparison is dropped, the notion is a plausible one, since judicial review presents such a striking and fundamental contrast with the power of the English courts.

This certainly appears to have been the attitude of the framers of the Australian Constitution. Although, as in the United States, no provision was made in the Constitution for judicial review, there can be no doubt that the Australians intended it. Speaking in the debates of the 1898 Convention, Sir Isaac Isaacs stated:

> 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.[200]

From the history of the Constitutional debate, it seems clear that Australians saw the proposed Constitution in terms of whether with reference to their own particular interests the document would allow too much or too little power to the central government. Obviously, the prospect of judicial review was a significant consideration from this perspective.[201]

D. Judicial Review and the Scope of Judicial Power

But it may be that judicial review has been *too* significant in the eyes of Australians thus causing them to think of their system as less like England's

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Legislative, Executive and Judicial Powers in Australia (3 ed. 1962) 8, that the Australian Constitution was a compromise between the Canadian and American models.

[198] G. Sawer, "Judicial Power Under the Constitution" in R. Else-Mitchell, *op. cit. supra* n. 197 at 71.

[199] See Owen Dixon's testimony in the *Report of the Royal Commission on the Constitution* (1929) 99-111; Z. Cowen, *Federal Jurisdiction in Australia* (1959).

[200] 1 *Official Record of the Debates of the Australian Federal Convention, Third Session, Melbourne, 20 January to 17 March, 1898* 283.

[201] See Hunt, *op. cit. supra* n. 157 at 229, 245-46.

and more like the United States' than it really is. Indeed, a number of factors in the two judicial systems cause considerable variations between the two in operation and result.[202] But two classes of factors seem profoundly to influence this contrast: differences in judicial tradition and variations in the grant of judicial power. The latter factor may sound somewhat strange in the face of judicial review, but the variation in the grant of judicial power lies in the constitutional limitations which the Court in each country must enforce. Because of the presence of a written Bill of Rights in the Constitution as a limitation upon the power of government, the Court in the United States has had scope for the exercise of judicial review upon an appreciably broader basis than the High Court of Australia.

Australians do not always seem to have been aware of the significance of this difference. The apparent reason, however, is the great extent to which Australians have been influenced by A. V. Dicey's presentation of constitutional law.[203] From this standpoint it can be readily understood that in comparisons from the Australian side the difference arising from the American Bill of Rights is often overlooked or at best adverted to in matter of fact terms without apparent appreciation of the significance involved.[204] At least one notable exception to this general rule, however, is Sir Owen Dixon:

> Civil liberties depend with us upon nothing more obligatory than tradition and upon nothing more inflexible than the principles of interpretation and the duty of courts to presume in favour of innocence and against the invasion of personal freedom under colour of authority. We did not adopt the Bill of Rights or transcribe the Fourteenth Amendment. It is, as it appears to me, a striking difference. It goes deep in legal thinking.[205]

The significance of the difference, as Sir Owen seems to apprehend, is that not only has the scope of the judicial power been affected, but this has affected the judicial tradition considerably. Again it would be folly to suppose that the mere presence or absence of a written Bill of Rights could of itself cause so much variation, but there can be no doubt that this factor has played an important part in influencing the development of the total situation in both countries.

Dicey's role may explain how Australians can overlook the Bill of Rights while charging that the Australian Constitution is a slavish copy of the American document. But how is the absence of a Bill of Rights to be explained among Constitution-makers who were at the least highly conscious of the American model? It seems, in any event, that the explanation is *not* that they felt with Dicey that the whole matter was rather inconsequential. Instead, it seems fair to say that the Australian Fathers included those protections which seemed appropriate. On the whole, these were quite modest. The Australians had no recent memory of a bitter struggle against tyrannical devices to make them determine to erect permanent protections against their use again. Like anyone else within the English tradition, they must have felt that the protections to individual rights provided by the traditions of acting as

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[202] These differences have been assessed comparatively by several able scholars. See Sawer, *supra* n. 12; S. H. Kadish, "Judicial Review in the High Court and the United States Supreme Court" (1959) 2 *Melb. U.L. Rev.* 4, 127; Cowen, *supra* n. 156. See generally E. McWhinney, *Judicial Review in the English-Speaking World* (2 ed. 1960), whose treatment, however, of Australia (at 76-95) was printed previously, article cited *supra* n. 180.

[203] See text accompanying nn. 140-46 *supra*.

[204] *E.g.*, G. Sawer, *Australian Government Today* (5 ed. rev. 1957) 90-91.

[205] Dixon, *supra* n. 11 at 469.

honourable men were quite sufficient for a civilised society. They did provide their answer to the currently burning question of establishment by erecting a protection from federal interference in the practice of religion.[206] For the rest, however, they apparently felt no need; only of a proposed due process clause is there a record of discussion.[207]

But if they felt no need, they were at least aware of the consequences of written protections. Tasmania proposed an almost verbatim transcript of a part of the United States' Fourteenth Amendment, which was rejected by the Convention.[208] Although a number of reasons were given for this action, it seems clear that the underlying social interest causing the rejection was that the Australian States had no desire to grant racial equality or to deprive themselves of the power to impose racial restrictions. The objective of the original proposition which was to protect citizens of one State from discrimination by another was agreed upon as necessary, and when a formula with no racial or other extraneous complications was offered, it was readily accepted.[209] From this example it seems clear that the Constitution-makers were aware of the potential effects of Constitutional protection of individual rights and refrained from providing them except when they genuinely desired a particular limitation.

A somewhat different view, however, seems prevalent in contemporary Australia, apparently attributable to Dicey's omnipresent influence. The commentary of W. A. Wynes on the absence of a Bill of Rights in the Australian Constitution is quite illuminating in this respect.

> As Dicey shewed, it is doubtful how much such general declarations (to secure the rights of the people) really achieve and we are undoubtedly as well protected under our own system which in this respect follows British precedent. Power should rarely be exercised arbitrarily where it is unlimited in extent and the presence of the "Bill of Rights" provisions in America bears eloquent testimony to the weakness of "popular" government.[210]

It is unfortunate that Mr. Wynes' scornful quotation marks—which refer to his pity for the Americans who, lacking a sovereign monarch, have been forced to resort to a notion of "popular sovereignty"— obscure the validity of his observation of American limited government. What he seems to ignore is that the desirability of limitation is a value choice. The more interesting point, however, is the dilemma in which he has placed himself by insisting both that it really makes no difference whether rights are given written protection and at the same time that the provision of such protection weakens government (inferentially, by depriving it of some of its otherwise unlimited power). This dilemma, of course, results from bringing together points which Dicey either carefully or fortuitously kept separated. So far as he was concerned, federalism's weakness resulted from the separation of powers both between state and central governments and between departments of the government. So far as written protections of individual rights were concerned, he concentrated on European constitutions and paid little attention to the American experience. Perhaps, then, it is justifiable to say that his understanding has contributed to the Australian tendency to overlook the absence of a Bill of Rights as the

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[206] Aust. Const. §116.

[207] A brief and partial history is given in W. Mendelson, "Foreign Reactions to American Experience with 'Due Process of Law'" (1955) 41 *Virginia L. Rev.* 493-97 at 494.

[208] See Hunt, *op. cit. supra* n. 157 at 206-8.

[209] Aust. Const. §117.

[210] Wynes, *op. cit. supra* n. 197 at 27.

origin of a significant difference in the operation of the High Court.

E. Legalism and Judicial Tradition

But Dicey appears to have exercised profound influence on the judicial tradition as well as on the concept of the scope of judicial power. References to his notion that federalism produces legalism are still frequent in the legal literature. It is found in Wynes,[211] for example, and Mr. Justice Else-Mitchell[212] has specifically related Dicey's notion to the judicial legalism of Sir Owen Dixon as expressed in his oft-quoted speech on assuming the office of Chief Justice of the High Court. Sir Owen's frank avowal of his judicial aims, however, is a most convenient summary of the predominant Australian legal approach:

> . . . it is not sufficiently recognised that the Court's sole function is to interpret a constitutional description of power or restraint upon power and say whether a given measure falls on one side of a line consequently drawn or on the other, and that it has nothing whatever to do with the merits or demerits of the measure.
>
> Such a function has led us all I think to believe that close adherence to legal reasoning is the only way to maintain the confidence of all parties in Federal conflicts. It may be that the Court is thought to be excessively legalistic. I should be sorry to think that it is anything else. There is no other safe guide to judicial decisions in great conflicts than a strict and complete legalism.[213]

Sir Owen's legalism is not, of course, without its parallels in American judicial pronouncement; indeed, a particularly engaging parallel is provided by Mr. Justice Roberts' famous statement. Speaking for the majority in *United States* v. *Butler*, in which the Supreme Court invalidated the New Deal Agricultural Adjustment Act of 1933, he said:

> When an act of Congress is appropriately challenged in the Courts as not conforming to the constitutional mandate the judicial branch of the Government has only one duty—to lay the article of the Constitution which is invoked beside the statute which is challenged and to decide whether the latter squares with the former.[214]

Commenting upon this soon discredited decision, Roscoe Pound is reported to have referred to this statement as "the slot-machine theory".[215] No doubt his sentiments were much the same as those of a warning by Julius Stone in Australia that "judgment whether on or off the bench is not a matter of adding up one's sums correctly".[216]

Such warnings have not, however, deterred Sir Owen, who has acknowledged the divergence of the bulk of American thinking with tactful pride in the predominant Australian position:

> Notwithstanding the great similarity in our institutions, there is, I believe, in the outlook of American lawyers and of Australian lawyers upon federal law and the functions of the highest federal courts a perceptible difference. I feel that in Australia we look upon the problems with which

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[211] *Id.* at 4.

[212] R. Else-Mitchell, "Introduction" to *Essays on the Australian Constitution* (2 ed. 1961) at xxix-xxx.

[213] Sir Owen Dixon, on assuming office, 21 April 1952, 85 C.L.R. xi at xiii-xv; 26 *A.L.J.* 2 at 4. *Cf.* Viscount Jowitt's statement, *supra* n. 151.

[214] *United States* v. *Butler* (1936) 297 U.S. 1, 79.

[215] H. J. Abraham, *The Judicial Process* (1962) 285.

[216] Proceedings of the Seventh Legal Convention of the Law Council of Australia, August 1951, 25 *A.L.J.* 233 at 294.

> the High Court deals from a much more legalistic point of view than that which is now currently adopted by lawyers towards the similar problems with which the Supreme Court of the United States deals.[217]

Quite correctly, Sir Owen pointed out that one important reason for this difference is the absence of a Bill of Rights in the Australian Constitution so that the constitutional jurisprudence of the High Court is not compelled to contend with this kind of policy-making question. He also felt that the common law jurisdiction of the High Court and the fact that Australian legal training is in the English tradition encourage legalism.[218] Significantly, however, he did not attribute his legalism to federalism.

This, of course, reveals an interesting paradox. If it is federalism which has produced legalism, then how is it possible to explain why the United States is *not* legalistic? How, too, is it possible to explain that Australia's legalism, as Sir Owen points out, is largely a result not of American federal influence but of English legal education and English legal philosophy? The answer to these questions seems to lie entirely in the fact that some Australian legalists have been misled by a literal reading of their own formulae. "Legalism" in Dicey's thought, has simply been interpolated neatly into the legalism of Dixon's constitutional jurisprudence. The latter, however, is the legalism of the Austinian tradition predominant in English legal education; the former was really nothing more than the adherence of a people to the "rule of law": "the predominance of the judiciary in the constitution—the prevalence of a spirit of legality among the people."[219] The validity of Dicey's point—a very general one—seems as good as ever, but it is no excuse for passing off the English legal tradition as an inevitable outgrowth of federalism.

V CONCLUSION

Apparently, this error has caused at least some Australians to overlook the significant difference in the operation of the judicial systems of Australia and the United States which is brought about by English legalism. Despite the common possession of the power of judicial review, the scope of judicial power (Bill of Rights) and the nature of the judicial tradition (legalism) provide fundamental differences. Both factors have been obscured because of the influence of Dicey's great work on constitutional law, but in only one of the two cases has the obscurity been Dicey's. Beyond these important differences in the judicial system, the tradition and practice of responsible government has had pronounced effect on the operation of federal institutions. Despite these developments, however, partisans of unitary government have been thwarted by the continued existence of conditions and traditions which seem to be amenable—at least for the present—only to some federal solution. All these factors seem to show that Australia has been neither as clearly English nor as clearly American as some have thought or wanted to think, and the various contradictions are eloquent proof of this. Indeed, the particular interrelationships of institutional operation, tradition, and philosophy which have developed in the Australian circumstance have been clearly, if not distinctly, its own.

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[217] O. Dixon, "Address to the Annual Dinner of the American Bar Association" (1942) 16 *A.L.J.* 192 at 194.

[218] *Id.* at 194-95.

[219] Dicey, *Law of the Constitution* (9 ed. 1948) 175-80 at 175.