THE CONSTITUTION, FEDERALISM AND
THE HIGH COURT

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ABSTRACT

In the first chapter of *The Constitution, Federalism and the High Court*, the argument is developed that constitutional law cannot be understood or applied in isolation from the foundational principles of the political system which it is designed to structure and maintain and in which it is generated. Even in constitutional systems like the British, where law is theorised as analytically distinct from political principle, the practice of law reproduces and gives effect to the political values which underlie the system of government.

In chapters 2 – 4, the federal theory underlying the Australian Constitution is examined in the context of the framers’ understanding of what they were seeking to achieve in drafting the Constitution and the constitutional role they expected the High Court would perform. The conventional understanding of the Constitution is that it is informed by a dual constitutional heritage represented by American federalism and the British parliamentary tradition. The argument is advanced that the Constitution is also informed by an indigenous colonial tradition of government through which American federalism and the British parliamentary tradition were mediated and understood. Furthermore, the colonial and American traditions reinforced each other in the process, as made manifest in the federal theory which is the foundation of the Constitution, and under which the British parliamentary tradition is subsumed. Within this framework, the High Court’s primary constitutional role is to give enduring effect to the federal principles underlying the Constitution.

In chapters 5 – 8, the approaches the High Court has taken to interpreting the Constitution and the consequences of its decisions are considered in the light of this federal understanding of the theory of the Australian Constitution. The first High Court adopted an interpretive approach through which it sought to give effect to the Constitution’s federal foundation. However, since the High Court’s decision in the *Engineers’* case in 1920, the Court has denied the relevance of that foundation to its interpretation of the Constitution’s provisions. The cumulative effect of its decisions since then has been to so augment the power
of the Commonwealth within the federation that the Constitution’s federal foundation has been substantially undermined.
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INTRODUCTION

The Australian constitutional settlement was above all else a federal settlement. The framers of the Australian Constitution sought to preserve local autonomy within a system that enhanced the capacity of local communities to act together through a national government. Consequently, the Australian Constitution was designed to create a federal Commonwealth in which the colonies that would become States retained substantial powers of self-government at the same time as a national government was created to deal with matters, as specified in the Constitution, of common concern to the States and their citizens. The Constitution has rarely been amended at referendum and none of the changes made have altered its federal nature. However, the Constitution has been subject to fairly constant and sometimes dramatic development. The vehicle for that development has been the High Court.

The High Court’s primary constitutional role is to maintain and give effect to the federal division of powers between the States and the Federal Government contained in the Constitution in deciding the cases that come before it. It is a role that the Court has for the most part only purported to perform. This is because in interpreting the Constitution it has ignored the federal theory underlying the Constitution, effectively reading the Constitution not as if it were informed by any federal purpose, but rather as if it were informed by a national one.

In making this choice, the High Court has acted consistently with what has been called the unitary preference tradition in Australia (Galligan, 1989a: 47), which is a long-standing strand of elite opinion that has seen federalism not as an essential part of Australia’s constitutional design, but as a passing element within it. It is a tradition that forms an important part of the conventional story told about Australia’s constitutional design, which is that Australia has a dual constitutional heritage derived from the external traditions of American federalism and British parliamentary democracy. According to the unitary preference tradition, the British tradition represents the authentic aspect of
Australian constitutionalism, with federalism grafted onto it as a necessary compromise on the path to full unification.

In chapter 2, I critically analyse the unitary preference tradition and the dual constitutional heritage thesis more generally and propose an alternative reading of Australian constitutionalism, one which highlights the importance of the colonial tradition in the formation of the Australian Constitution. The colonial tradition provides the framework through which both American federalism and British style parliamentary democracy were understood and mediated, providing not only continuity with Australia’s past, but also lending a coherence to Australia’s constitutional design more often than not denied by the proponents of the dual constitutional heritage thesis. British style parliamentary democracy is an important part of the Australian constitutional system, but it is the minor part, subsumed within a design which deliberately privileges federal limits on parliamentary government in ways which directly reflect Australia’s experience of colonial self-government. Building on this understanding of Australia’s indigenous constitutional tradition, I examine in chapters 3 and 4 the constitutional theory to which the framers gave effect in the Australian Constitution and the role of the High Court within it.

The framers’ theory of government drew on American federalism, but it was neither uncritically copied nor clumsily grafted onto the British parliamentary tradition. Moreover, it was not some ideal or original form of American federalism to which the framers looked, but the post-civil war federalism of the late nineteenth century in the United States. Federalism as it existed in the United States at the end of the nineteenth century was born as much of the decisions of the Supreme Court as of the original constitutional settlement in Philadelphia more than a century before. Over the nineteenth century, the Supreme Court carved out for itself a crucial role within the American federation as the guardian of a constitutional system in which national supremacy was tempered by constitutional recognition of a substantial degree of State autonomy. It was this conception of federalism which the framers moulded to Australian purposes and sought to enshrine in the Australian Constitution.
Over the course of the constitutional conventions at which the Australian Constitution was drafted, the framers developed a sophisticated conception of the role that judicial review by the High Court would play in the Australian federation. The framers neither sought to frame a Constitution which would control every future contingency of government, nor did they seek to rigidly set the shape that the federal system would take. Just as the American system had evolved over the nineteenth century as the result of experience and the decisions of the Supreme Court, so too did the framers expect a similar process to occur in Australia. They created in the High Court an institution through which the Constitution’s general provisions could be given particular and dynamic effect into the future. However, while the framers expected that application of the Constitution by the High Court would be a dynamic process, they also believed that the Court’s constitutional discretion was not unconstrained. Contrary to some claims that the framers conceived of judicial review as a political power rather than a legal duty, I argue that the framers believed that the best protection for the integrity of Australian federation lay in giving written constitutional form to political principle, precisely because the judges of the powerful constitutional court for which they had made provision in the Constitution were duty bound not to respond to the exigencies of politics, but were rather obliged to apply constitutional principle in the cases that those exigencies would inevitably bring before them.

Without a substantive approach to interpreting the general words of a written constitution, constitutional meaning will become merely ‘fortuitous’, as Sawer (1967: 200) once pointed out. And, while the High Court has not always been forthright in explaining the underlying rationale of its interpretation of the Constitution, the meaning it has given its terms has rarely been merely fortuitous. However much it may have emphasised form over substance in the process of constitutional adjudication, the Court’s constitutional decisions have generally been grounded on some substantive theory of the Constitution. What those theories have been, their consequences for the practice of federal politics in Australia and how well they measure up to the actual theory underlying the Constitution forms the subject matter of the final four chapters of the thesis, chapters 5 – 8.
So far as Australian federalism is concerned, three theories of the Constitution have informed the Court’s constitutional decisions. The first was a theory in progress, which began to emerge from the High Court soon after it was established and of which Sir Samuel Griffith had been appointed Chief Justice. The Griffith Court sought, if not with entire success, to give effect in its constitutional jurisprudence to values reflective of the federal theory underlying the Constitution. The Griffith Court looked first to an abstract and seemingly straightforward coordinate theory of federalism to guide it in its interpretation of the Constitution. On that theory, the Court assumed that its main task was to keep the States and the Commonwealth completely separate from each other in the exercise of their respective powers. However, faced with the messy federal reality of the interconnectness among the governments of the Australian federation, the Griffith Court began gradually to develop a more nuanced approach to interpretation which nonetheless retained as its centrepiece the maintenance of an effective division of powers between the Commonwealth and the States.

The centrepiece of the Griffith Court’s constitutional jurisprudence was unceremoniously removed with the decision in the Engineers’ case (Amalgamated Society of Engineers v Adelaide Steamship Co Ltd (1920) 28 CLR 129), its removal inaugurating the application of a new theory in the Court’s interpretation of the Constitution. Led by Isaac Isaacs in Engineers, the Court now assumed that the values informing the Constitution were not federal values, but those associated with the Westminster System of government—a round hole into which the Court forced the square peg of the Constitution. Responsible government replaced federalism as the foundation of the Constitution in the Court’s eyes and the standard canons of English statutory interpretation replaced the Griffith Court’s method of relying on federal implications in interpreting the meaning of its terms. As Patapan (2000: 14) has noted, ‘Engineers can be seen as the point where conventional rules of interpretation asserted their dominance over the innovation of federalism’.

The result was that federalism was interpreted out of the Constitution, the vacuum being filled by a jurisprudence of national supremacy. So far as federalism was concerned, consistent with the emphasis on the primacy of
responsible government as the key constitutional principle, the Court abrogated its constitutional role, leaving federal disputes to be resolved through a political process in which the dominant position of the Commonwealth was underwritten on an interpretation of the Constitution which now realised the broadest possible construction of Commonwealth power. The transition from the Griffith Court’s federal jurisprudence to a jurisprudence of national supremacy with the decision in *Engineers*, is dealt with in chapter 5.

*Engineers* remains the singly most important constitutional decision made by the High Court. While the constitutional theory which is the foundation of *Engineers* would be transformed under the influence of Sir Owen Dixon, first as a judge and later as Chief Justice of the High Court, and while Dixon’s interpretive approach would come to dominate the Court’s constitutional jurisprudence, his approach, nonetheless, substantially reproduced the jurisprudence of national supremacy adopted by the Court in *Engineers*. It did that not only at a substantive level—Dixon claimed that the Constitution was informed by a flawed federal theory which provided virtually no constraint on the scope of Commonwealth power—but also in its formal aspects, which retained fidelity to English jurisprudential standards. Chapter 6 focuses on Dixon’s theory of federalism and his reworking of *Engineers*, while chapter 7 focuses on how a jurisprudence of national supremacy has been applied by the Court in interpreting the Constitution’s key provisions and the effect of its decisions on the federal system provided for in the Constitution.

Dixon’s constitutional jurisprudence remained largely unchallenged as the Court’s ruling approach to interpreting and applying the Constitution until the 1980s. However, both immediately before and during Sir Anthony Mason’s tenure as Chief Justice, which began in 1987, the Court developed a strangely bifurcated jurisprudence which, on the one hand, apparently left Dixon’s formal interpretive approach behind as the Court sought and found in the Constitution substantive rights principles through which governmental power could be contained, while, on the other, Dixon’s jurisprudence was more rigorously applied in so far as it enhanced national supremacy within the federation. More recently, it seems that the conventional interpretive standards from which the
Mason Court sought to depart in developing a rights’ jurisprudence are being reasserted by the Court, a theme taken up in my concluding chapter.

The overall conclusion is that, while the first High Court began to develop a federal jurisprudence which gave effect to the federal theory informing the Constitution, the Court has, since the Engineers’ case was decided in 1920, given effect to a jurisprudence of national supremacy. So much is generally accepted. The difficult question is why it should matter. My attempt to argue that it does matter begins in the first chapter of this thesis.

In chapter 1, I argue that constitutions embody the values which inform a governmental system and that those values control not only the nature of the political process, but the legal process as well. This argument is developed in the first instance through a comparative analysis of two paradigmatic examples of English and American legal theory, the legal positivism of Herbert Hart and Ronald Dworkin’s general theory of law as integrity. English legal theory is dominated by legal positivism and Hart’s concept of law remains the most authoritative modern expression of legal positivism (note Dworkin, 1986: 34; Murphy and Coleman, 1990: 26-27; Kerruish, 1991: 46). Legal theory in the United States is far more diverse, but the choice of Dworkin’s theory of law as broadly representative is justified on two grounds: first, it is one of the most carefully and consistently argued within the American jurisprudential tradition; and secondly, it has been consciously developed in opposition to the main claims of legal positivism, and Hart’s version in particular. The points at which it distinguishes itself from legal positivism highlight the extent to and the ways in which legal positivism and Dworkin’s own theory are expressions of the national political and legal order in which they are generated.

Hart’s legal positivism, while denying any essential link between legal and political principle, in fact described a limited role for the courts in applying law by reference to relatively formal standards of validity in a way which gives effect to the underlying values of the English Constitution and the theoretically unlimited law-making power of the Westminster Parliament. Dworkin, on the other hand, develops a theory of law and a more robust and substantive conception of the process of legal decision-making in which courts engage actively in constraining
governmental power. It is a theory consistent with the American system of government in which political power is constitutionally dispersed and limited.

If it can be demonstrated that the application of the law of a constitution is contingent upon and gives effect to the particular purposes and values underlying a political system, then it suggests that constitutional law and the role of the courts in giving it effect can be understood only on the basis of those purposes and values. It suggests that political and legal principle are inextricably connected, even where such a connection is denied, as it is within the English jurisprudential tradition.

More particularly, this analysis of English and American jurisprudence provides a means of understanding the two external legal and political traditions which most influenced the making of the Australian Constitution and the ways in which Australian constitutionalism draws on and departs from those traditions. How it does that provides the basis for arguing in favour of an Australian jurisprudence, one which was still born through the High Court's substantial attachment since Engineers to the interpretive standards of English jurisprudence. Those standards are not neutral in their application. In applying those standards to interpretation of the federal division of powers under the Constitution, the Court has imposed on the Constitution the substantive political values that underlie the Westminster system of government. The consequence of their application has been to empower the Commonwealth and remove from the Constitution the core of its federal foundation.

The law of a constitution is a special kind of law that establishes institutions of government and also controls and conditions the practice of politics and law within the system. It is the outward expression of the principles and purposes underlying the political and legal system that a constitution creates and maintains. For this reason, the question of what a constitution means cannot be answered without getting to the point where politics and law collide. That collision point is not at the level of the cut and thrust of day-to-day politics, but at the level of the background principles that inform a governmental system through its constitutional arrangements and through which concepts of law and politics are generated and reinforce each other. For this reason, a constitution
cannot be interpreted without understanding and applying the theory that underpins it. To do otherwise is to deny both what distinguishes constitutional adjudication from ordinary politics and the reason for a constitution existing in the first place.

In discussing judicial activism, Michael Kirby (1997: 10) refers to comments reportedly made by Justice Bryee of the Supreme Court of the United States to the effect that ‘a “brightline” between permissible and impermissible judicial creativity did not exist’. That may be so, but a line nonetheless exists and in the first instance it is determined by the constitution of the polity in question and the type of system it embodies. The Australian Constitution is underpinned by a coherent constitutional theory that requires the High Court to perform an active judicial role in maintaining the integrity of the federal system. In declining to perform that role and in reading the Constitution instead as if it were informed by a transcendent national purpose, the High Court has crossed the line.
The most general purpose a constitution fulfils is to provide for an enduring system of government. For that reason, constitutions are not usually composed of narrow and specific rules designed to control minutely every possible contingency that may arise in government. The language of constitutions tends to be broad rather than precise and, where written, relatively open-textured and brief, thereby leaving room for interpretation and at least some flexibility to accommodate changing circumstances. Australia’s Constitution is like this, as is the American. This does not mean that the language of a constitution can be made to mean whatever its interpreters say it means. If a constitution cannot structure and control the range of meanings open to development and how that development will occur, that is, if it can mean anything at all, then it means nothing at all. In that case, why have a constitution in the first place?

On another level, constitutions are inherently ambiguous. A constitution must balance both the need for government and its limitation (McIlwain, 1947: chapter 6). The attempt to achieve that balance is represented by two primary models of constitutional government. The first is a majoritarian model in which power is concentrated, but subject to political controls in the form of parliaments and elections. The second is the consensus model in which the major institutions of government are coordinate, power being shared and dispersed among them (Lijphart, 1984; and note Sharman, 1990b: 206). The Westminster system is the classic example of a majoritarian form of government and the American an example of a consensual system of government. In the Westminster system the constitution is not written but grounded on convention and the role of courts is limited and subject to the legislative will through Parliament. In the American system, however, with a written constitution

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through which power is shared among the major institutions of government, including the judiciary, and distributed federally between a national government and the States, the courts perform a much more obvious political role through judicial review of government action by reference to the higher law of the Constitution.

While in the United States there is enormous argument about how its constitution should be interpreted in the courts,¹ the debate in England is obviously not about interpretation of a written constitution, but rather about legal interpretation more generally and the role of the courts within the overall system.² For this reason, the English debate is necessarily more muted than in America. Without a written constitution that controls the acts of government and which is interpreted and applied by the courts, the political role of the courts is less obvious within the English system and, consequently, the political gains to be made in successful argument before the courts concerning public power and its exercise appear less extraordinary.

In England, the orthodox answer to the question of what law is denies any essential connection between law and politics, claiming instead that law is a system made up of relatively certain rules logically distinct and separate from politics and morality (note Hart, 1961). The law of a constitution represents a part of that system, perhaps the most important part in terms of the hierarchy of

¹ Without being even remotely exhaustive, the modern literature on constitutional interpretation in the United States includes Richard Posner’s (1992) economic analysis of the law, Justice Scalia’s (1997) strong and eloquent support of originalism, Christopher Wolfe’s (1986; 1996) long-standing criticism of judicial activism, John Ely’s (1980) case for limited judicial review on the basis of a representation-reinforcing theory of judicial review and Ronald Dworkin’s (1986) arguments for dynamic and progressive interpretation of the law, for which he nonetheless claims an interpretivist foundation.

² There has long been an attachment within English legal culture to the doctrine of parliamentary sovereignty and the associated idea that judges do not make law, but only apply it. However, it has been accepted for some time now that judges do make law from time to time, a reality often noted with reference to Lord Reid’s famous description of the declaratory theory of the law as a ‘fairytale’ (1972: 22). More recently, Sir Robin Cooke’s comments as President of the New Zealand Court of Appeal, that ‘[s]ome common law rights presumably lie so deep that even Parliament could not override them’ (Taylor v New Zealand Poultry Board [1984] 1 NZLR 394 at 398), have received some support in the United Kingdom (Goldsworthy, 1999: 2). While the views expressed by Sir Robin Cooke are far from orthodox, developing European integration, devolution of power to Scotland and Wales, the passing of the Human Rights Act 1998 (UK) and the internationalisation of law generally are seeing increased debate about the constitutional role of the judiciary and the practice of law in the United Kingdom.
rules within a system, but it has nonetheless the character of law. On this theory, application of the law of a constitution, as with any other application of the law, is not a political or moral act so much as a neutral, declaratory one. A law may reflect certain moral standards or political policies, but its status as law does not depend on that content, it depends only on whether it is valid by reference to its source, which is to say that it is valid if it has satisfied the system's formal requirements for the creation of law.

American legal realism proposes the opposite answer to the question of what law is. Rather than law being completely separate from politics, law, according to the realists, is virtually indistinguishable from politics. Contrary to the positivist theory of law as a self-contained system of rules which judges largely declare and apply, legal realism sees law as highly open-textured. The content of 'law' is not determined by reference only to legal standards of validity internal to the legal system, but also by reference to values outside of law, which may include those of the individual judge and materials from other disciplines. Within this tradition, Llewellyn distinguished between what he called 'real rules' and 'paper rules'. Real rules are descriptions of the actual practices of officials within a legal system, whereas paper rules are literally the words on paper in statutes, judgments and textbooks (Llewellyn, 1930: 439). Real rules identify the policy considerations that inform judicial decision-making. Rules of law are no more than tools to achieve particular social ends and have no intrinsic value in themselves (Llewellyn, 1930: 452). Far from being a determinative set of rules, law is no more than '[t]he prophesies of what the courts will do in fact', as Holmes (1897: 461) so famously said. Making a virtue of this, realism looks to the courts as one means of advancing enlightened social policy.

One problem with making law synonymous with politics is that law then loses its distinctiveness and the courts then simply become another institutional means to achieving desired policy outcomes. Consequently, realism is unable to provide criteria by which judicial decision-making can proceed, other than policy based criteria.

However, law is necessarily political in the sense that it is an integral part of a nation's system of government. Consequently, what it is can only be
understood and grasped within the context of that system. As Atiyah and Summers (1987: 416) point out:

Most philosophers and legal theorists have assumed that there is one universal subject matter of legal theory, which is abstracted from the variant phenomena of law in all societies, past, present, and future ... as if it were possible to provide universal answers to fundamental questions about the ‘true’ nature of law, or the ‘proper role’ of the judges, or the ‘correct’ approach to statutory interpretation usually without due regard to general contexts and problems of particular legal systems.

Atiyah and Summers make that statement within the context of an overall argument ‘that the American and English legal systems, for all their superficial similarities, differ profoundly: the English legal system is highly ‘formal’ and the American highly ‘substantive” (Atiyah and Summers, 1987: 1). This thesis was borne out in their comparison of American and English legal theory, practice and culture. In the application of law the English system relies far more heavily on ‘source-oriented standards’, while in the United States ‘content-orientated standards’ are more significant, and legal reasoning under English law generally displays much higher levels of ‘interpretive’ and ‘mandatory’ formality. Conflicts between laws in the English system tend to be resolved on the basis of formal standards of validity rather than for reasons of substance arising in the actual conflict before the court. Precedent too is applied more strictly in English law than in the United States, where the substantive reasons underlying a precedent have significance over and above its status as such. Where statutes are interpreted under English law, meaning tends to be derived from the ‘literal or plain meanings of the words used’. In America, ‘the purposes and rationales behind the words’ of a statute play a much more important role. All this contributes to ‘a rather narrow law-making role for the courts in England, as compared with a much larger law-making role in America’ (Atiyah and Summers, 1987: 409).

There are substantial differences in law between the two cultures. A fundamental reason for this is because the respective constitutional arrangements in England and America represent very different conceptions of law and politics and the role of the courts within the system overall.
Dicey first published an *Introduction to the Study of the Law of the Constitution* in 1885. As Mount (1993: 47) notes, it was still said, some hundred years after its first publication, that ‘Dicey’s word has, in some respects, become the only written constitution we [the English] have’. The essence of Dicey’s understanding of the English Constitution lies in the doctrine of parliamentary sovereignty, by which he meant:

… that Parliament ... has, under the English Constitution, the right to make or unmake any law whatever; and, further, that no person or body is recognised by the law of England as having a right to override or set aside the legislation of Parliament (Dicey, 1959: 39-40).

Parliamentary sovereignty, therefore, includes a positive and a negative component, as Craig (1990: 13-14) has pointed out. The negative component refers to the supremacy of Acts of Parliament as a source of law. All other potential sources, ‘The Queen’, ‘Resolutions of either House of Parliament’, ‘The Vote of Parliamentary Electors’ and ‘The Law Courts’, are subordinate to Parliament (Dicey, 1959: 50-61). The positive component refers to the unlimited legislative authority of Parliament (Dicey, 1959: 39-50). There is no distinction between constitutional laws and ordinary laws. There is, consequently, no law and no court that can render an Act of Parliament void.

However, as Vile (1967: 230) notes, while Dicey was critical of the idea of separating powers as a constitutional maxim, his conception of English constitutionalism is run through with an abridged version of the doctrine. One of the central points Dicey sought to establish is that enacting and applying the law were two separate and distinct functions. It is the rule of law institutionally entrenched by this separation that best protects individual liberty and guarantees limited government (Dicey, 1959: 183-205).
Dicey’s constitutional theory also carefully distinguished legal from political sovereignty and he was at pains to point out that he uses the term in its legal sense (Craig, 1990: 15). Accordingly he said:

... the term “sovereignty” ... is merely a legal conception, and means simply the power of law-making unrestricted by any legal limit (Dicey, 1959: 72).

As to political sovereignty, underpinning his constitutional theory was a theory of representative government upon which the legitimacy of the political system rests (Craig, 1990: 14-15). Dicey (1959: 73) argued that the exercise of legal sovereignty by the Parliament should, and did, reflect the political sovereignty of the electorate:

... we may assert that the arrangements of the constitution are now such as to ensure that the will of the electors shall by regular and constitutional means always in the end assert itself as the predominant influence in the country.

In these ways, despite parliamentary sovereignty being ‘the very keystone of the law of the constitution’ in Dicey’s view (1959: 70), his constitutional theory overall rests upon a limited separation of powers and majoritarian representative democracy as the means of limiting executive power. The key to this constitutional arrangement is ministerial responsibility (Vile, 1967: 231).

Under the Westminster system the ministry, or cabinet, is the locus of governmental power. The bureaucracy is responsible to individual ministers, ministers are responsible to Parliament and Parliament to the electorate. Law is supreme in the sense that members of the executive, as with any other person or body, are subject to the control of the courts insofar as they must act in accordance with the law. As the judiciary has been independent since the late seventeenth century the rule of law is a political reality (Maitland, 1908: 312-313). Parliament is supreme in the sense that it controls government and makes law, though, ultimately, on this account, it is the people who are the supreme authority, as Parliament answers to them through regular elections. In theory then, under the Westminster system, politics and law can coincide in the manner Dicey suggested. Insofar as the executive relied on the support of shifting parliamentary majorities, the practice could be said to match the theory.
However, with the rise of mass, disciplined political parties in the twentieth century and the formation of governments with the support of stable parliamentary majorities, it is now less Parliament that controls the executive, than the executive that controls Parliament (note Sharman, 1990a: 209). Despite this gap between theory and practice within the English system, the doctrine of parliamentary sovereignty remains 'the modern orthodoxy' (Allan, 1993: 1; note also Goldsworthy, 1999).

Legal positivism is the legal theory side of this constitutional coin and even in its most authoritative modern formulation in the work of Hart, the correspondences between the theoretical basis of English constitutionalism as argued by Dicey and legal positivism are strong. In his key text, *The Concept of Law*, Hart (1961) claimed to provide merely an objective account of modern legal systems free of any moral or political content. On Hart's account, consistent with the central tenet of positivism, law is a phenomenon distinct from morality or politics. However, far from presenting an objective description of law in modern societies, Hart presented an account of law infused with the substantive principles of English constitutionalism. This outcome is unsurprising if law is not a universal phenomenon, but one that is informed by the values of the system in which it is generated.

In *The Concept of Law* Hart distinguished legal from pre-legal society. 'Legality' involves the introduction of 'secondary rules' that regulate 'primary rules'. Primary rules impose obligations, while secondary rules 'specify the ways in which primary rules may be conclusively ascertained, introduced, eliminated, varied and the fact of their violation conclusively determined' (Hart, 1961: 92). The most important secondary rule is the rule of recognition, the 'ultimate' rule within a legal system, which provides the criteria for the identification of rules in the system, that is the criteria by which laws can be identified, and which exists as a matter of fact evidenced by the practices of officials (Hart, 1961: 108). As legal validity is established by a mechanism internal to the system, legal obligation is distinguished from moral obligation and law can be conceptualised as an autonomous system of determinate rules.
Legal reasoning on this account is specific to the law and does not draw on other disciplines or sources of knowledge to determine the answer to legal questions. It is a technical and formal process by which legal rules are identified and applied. It eschews consideration of the content or substance of those rules as being logically unnecessary to the process.

Such an account of law corresponds to the conception of the rule of law articulated by Dicey and upon which the Westminster system is grounded. As positivism theorises law as autonomous, legal validity is established, not on the basis of the authority of a particular person or on some standard external to law, but rather on the legality of the procedure by which rules are made. Legality in this sense constrains political power. As Dicey (1959: 184) noted, it is the supremacy of law under the English Constitution that best protects citizens’ rights.

Positivism is also instrumental in maintaining the argument that the judiciary is subordinate to Parliament and performs the distinct function of applying laws made or sanctioned by Parliament. On the basis of the positivist argument that laws are relatively determinate and legal reasoning a formal exercise of determining legal validity, it can be said that judges merely apply the law and do not usurp the supremacy of Parliament.

Dicey's distinction between legal sovereignty and political sovereignty is also reflected within Hart’s concept of law. Hart (1961: 113) considered there were two minimum conditions necessary and sufficient for the existence of a legal system. The first is that valid laws are generally obeyed. The second is:

... [the legal system’s] rules of recognition specifying the criteria of legal validity and its rules of change and adjudication must be effectively accepted as common public standards of official behaviour by its officials.
Just such a concept of legal efficacy underpins Dicey's idea of sovereignty. As Dicey (1959: 47-48) explained:

... in a legal point of view Parliament is neither the agent of the electors nor in any sense a trustee for its constituents. It is legally the sovereign legislative power in the state, ... .

The system of law described in *The Concept of Law* would seem to leave little room for judicial discretion. However, in *The Concept of Law*, Hart (1961: 144) sought to deny the scepticism inherent in American legal realism by steering a course between the 'Scylla and Charybdis' of 'formalism' and 'rule-scepticism' and arguing that the 'truth lies between them'. Hart conceded that judges do sometimes make law, but law nonetheless, 'consists to a very large extent ... [of] determinate rules which ... do not require ... fresh judgment from case to case' (Hart, 1961: 132).

Judicial law-making is distinguished from legislative law-making in that judges apply the criteria of 'relevance' and 'closeness of resemblance' in deciding to apply a rule to a particular case, criteria which themselves depend on 'the aims or purpose which may be attributed to the rule' (Hart, 1961: 124). Like legislative law-making, however, judicial law-making will balance competing interests in reaching a decision where these criteria do not in themselves provide a settled answer (Hart, 1961: 132). In the end, 'where the existing law fails to dictate any decision as the correct one', the judge can do no more than act as 'a conscientious legislator would by deciding according to his own beliefs and values' (Hart, 1994: 273).³

'Hard cases' like this are the point at which law and politics intersect; the point at which the substantive values underlying the political and legal system of a particular constitutional order reveal themselves. Underlying the English system of government and law is the belief that it is in the positive law and the process of its making that the interests and rights of citizens are best realised.

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³ A second edition of Hart's *The Concept of Law* was published in 1994. The original text remains, but a postscript has been added representing work Hart was in the process of completing at the time he died which has been edited by Penelope Bulloch and Joseph Raz. References in this thesis to Hart (1994) are references to that postscript.
and protected. Arguments from natural law have historically had little political purchase in England and no legal purchase. In theory, at least, citizens’ interests and rights are protected by the coincidence of politics and law in the way that Dicey described it: the representative political process through Parliament in which the interests of the people are balanced, laws made and the executive controlled; and the rule of law through which the positive law as made or sanctioned by Parliament is impartially and universally applied. They are not protected by the courts through the application of substantive higher law principles which control or condition the application of ordinary law. Consequently, within the English legal system, where a hard case arises and gaps in the existing law are revealed, in the final analysis, all a judge can do is bring into the court the values underlying the political system overall and decide the case as a ‘conscientious legislator would’.

DEMOCRACY IN AMERICA: THE RULE OF THE COURTS

A general characteristic of law, certainly in the Anglo-American tradition, is its relative certainty. ‘No legal system can operate without a considerable body of concepts, rules and standards having a fair degree of rigidity’, as Sawer noted (1967: 197). Even the American system, which is imbued with a much more substantive concept of law, ‘must and does rely significantly on formal legal reasoning’ (Atiyah and Summers, 1987: 410). But it is the hard cases that matter, and, as I have suggested in relation to Hart’s conception of judicial discretion, it is in such cases that the substantive values of the political and legal system are revealed.

The most consistent modern attack on legal positivism comes from Dworkin. He opposes Hart’s positivism with a vision of law as an institution which ‘calls some issues from the battleground of power politics to the forum of principle,’ (Dworkin, 1985: 71), a vision in which the courts and not the legislature are the locus of democracy.

In Law’s Empire, Dworkin (1986) distinguishes his theory of law from what he calls pragmatism in law. By pragmatism he means American legal realism and not philosophical pragmatism. He sees in pragmatism the devaluation of a
substantive conception of the rule of law. His argument against legal positivism is itself grounded on this, for, as we shall see, Dworkin collapses positivism into pragmatism at the crucial point of judicial disagreement in hard cases.

Dworkin (1985) characterises the rule of law as derived from positivism as the 'rule-book' conception of the rule of law. In this conception of the rule of law, state power can only be exercised in accordance with rules set out in the positive law. The obligation of citizens to obey the law is simply legal and substantive justice is an ideal independent of the law (Dworkin, 1985: 11). He opposes the rule-book conception of the rule of law with a 'rights' conception. This conception of the rule of law:

... assumes citizens have moral rights and duties with respect to one another, and political rights against the state as a whole. It insists upon recognition of these in the positive law, so that they can be enforced upon the demand of individual citizens through the courts ... The rule of law on this conception is the ideal of rule by an accurate public conception of individual rights. It does not distinguish between the rule of law and substantive justice; on the contrary it requires, as part of the ideal of law, that the rules in the rule book capture and enforce moral rights (Dworkin, 1985: 11-12).

Dworkin (1985: 13) argues that these conceptions of the rule of law reflect very different ideals of democracy, law and legal adjudication. Under the rule-book conception, judges are supposed to impartially apply the law in the rule book and not substitute for it their own political judgment (Dworkin, 1985: 13). This conception of the rule of law is justified on a majoritarian vision of democracy through which citizens’ equality of political power is supposedly realised. ‘Political decisions’, which under this conception include decisions about what rights citizens should have, are made by officials who are elected and subject to replacement through a democratic electoral process (Dworkin, 1985: 27). Under the rights conception, the ideal is that the moral rights of citizens, whether or not they are given expression in the rule book, will be available to them in court (Dworkin, 1985: 16). It is a conception of the rule of law which Dworkin believes promotes equality and democratically empowers citizens in way which a vote does not because, 'if their rights are recognised by a court,
these rights will be enforced in spite of the fact that no Parliament had the time or the will to enforce them’ (Dworkin, 1985: 27).

In *Taking Rights Seriously*, Dworkin (1977: 31-32) made a distinction between what he calls ‘weak discretion’ and ‘strong discretion’. Weak discretion has two forms: it can mean that a person has discretion to make a decision within certain defined standards or it can mean that a decision is final. Strong discretion is not contained by any standards. In Hart’s version of legal positivism, if the rules do not determine an answer then the judge has to exercise discretion in the strong sense (as Dworkin frames it). Dworkin’s contrary argument is that legal adjudication is an interpretive process and judges never exercise ‘strong’ discretion. Even in hard cases, judges do no more than decide cases on the basis of principles immanent in the law, an argument Dworkin (1986) has developed in *Law’s Empire* into a general theory of law as integrity.

In arguing for law as integrity, Dworkin also draws on another distinction he made in *Taking Rights Seriously* between arguments from policy and from principle. Policy arguments are claims that a particular decision will promote the collective welfare of the political community, whereas arguments from principle are claims that a political decision is justified because it ‘respects or secures’ the rights of citizens (Dworkin, 1977: 82). Policy is the concern of the legislature; principles as rights, however, are the concern of the courts.

In *Law’s Empire*, policy and principle are considered within the framework of a general principle of ‘political integrity’, which ‘requires that government speak with one voice, to act in a principled and coherent manner toward all its citizens, to extend to everyone the substantive standards of justice and fairness it uses for some (Dworkin, 1986: 165). Dworkin (1986: 167) divides this general principle of political integrity into what he calls two ‘practical principles’: a legislative principle of integrity, ‘which asks those who create law by legislation to keep that law coherent in principle’, and an adjudicative principle of integrity, which ‘asks those responsible for deciding what the law is to see and enforce it as coherent in that way’; that is, as a coherent body of principle. Law as integrity:
... argues that rights and responsibilities flow from past decisions and so count as legal, not just when they explicit in these decisions but also when they follow from the principles of personal and political morality the explicit decisions presuppose by way of justification (Dworkin, 1986: 196).

The decisions legislatures make are legitimately made on policy grounds. The legislative principle of integrity requires only that where legislators create new rights or duties, they do not make that choice arbitrarily but ‘for the overall good of the community as a whole’ (Dworkin, 1986: 244). Judges, however, are not legislators. They cannot make policy decisions which create new rights and impose new duties. If judges did so, it would be inconsistent with the idea of law as integrity, because it would mean in effect that judges have legislated retrospectively through enforcing duties against people that did not exist at the time they engaged in the conduct that gave rise to the legal dispute before the court (Dworkin, 1986: 244). This is the argument from integrity against the positivist conception of judicial discretion.

On Dworkin’s account, democracy is ‘communal’, rather than simply majoritarian (Dworkin, 1990). His vision of democracy is realised not primarily through the electoral process and legislative decision-making, but through the courts. He conceives of democracy in terms which sees the enforcement of rights claimed in the court by citizens as an exemplary example of democratic participation though which expression can be given to a community’s fundamental values, whereas the decisions of legislatures need only give effect to policies which reflect the will of temporary, aggregated majorities (note Dworkin, 1990). In this sense, far from the courts detracting from democracy in enforcing rights which constrain legislative choice, they perfect it:

The rule of law, in the conception I support, enriches democracy by adding an independent forum of principle, and that is important, not just because justice may be done there, but because the forum confirms that justice in the end is a matter of individual right, and not independently a matter of public good (Dworkin, 1985: 32).

Whether or not Dworkin’s grand vision of democracy and the role of the courts within it is sustainable is not at issue here. The important point is that his
argument is even possible. Its possibility reflects the origins of the American system of government in a constitutional structure which gives effect to general principles of right, in many cases based on ideas of natural law, which can trump the majority will where it is found to be inconsistent with those principles. As Corwin (1955: 89) explains in his well known discussion of the higher law foundation of the American Constitution, a written constitution representing a higher law combined with judicial review undermined completely in the American context the basis for any absolute authority of the legislature:

In the first place, in the American written Constitution, higher law at last attained a form which made possible the attribution to it of an entirely new sort of validity, the validity of a statute emanating from the sovereign people. Once the binding force of higher law was transferred to this new basis, the notion of the sovereignty of the ordinary legislative organ disappeared automatically, since that cannot be a sovereign law-making body which is subordinate to another law-making body. But in the second place, even statutory form could hardly have saved the higher law as a recourse for individuals had it not been backed up by judicial review. Invested with statutory form and implemented by judicial review, higher law, as with renewed youth, entered upon one of the great periods of its history, and juristically the most fruitful one since the days of Justinian.

Dworkin’s argument against positivism, while it focuses on challenging the positivist conception of the nature of judicial decision-making in hard cases, is at bottom an argument against a system of government and law which, in the ultimate analysis, necessarily leaves to judges in hard cases nothing more to apply than a discretion analogous to that exercised by a legislator through which competing interests are balanced and law made.

Law and politics are structured by the constitutional systems that generate them. Dworkin’s conception of democracy and the nature of law and the role of the courts within it, tends to universalise those aspects of the American tradition through which the principles of limited government contained in a written constitution are given substantive effect through the courts over and above the enforcement of the majority will. In contrast, Hart, while having denied that there is any necessary connection between law and politics or morality, described a system of law which operates in such a way as to give effect to the majoritarian principles of the Westminster system and the values which inform
it. In that sense, Hart's concept of law is as much a necessary corollary of the English political and legal system as Dworkin's theory of law as integrity is of the American.

INTERPRETIVISM AND NON-INTERPRETIVISM

In examining the extent to which Hart and Dworkin's theories of law reproduce the values of the systems in which they were produced, I have sought to show that a country's constitution controls the meaning and practice of law within that system, by reflecting the values underlying the system and which in turn inform the language of its constitution. For this reason, where constitutional arrangements are to be interpreted, they must be understood within the context of the theory underlying the constitution as a whole. This will not only provide the foundation from which a constitution's language can be given meaning, but also determine the role of the courts in giving effect to those arrangements.

In making this argument, I have not sought to argue the merits of particular approaches to constitutional interpretation. Nonetheless, I have argued that the standards of legal realism are inconsistent with the idea of a constitution. Constitutions are made to provide for enduring institutions of government embodying enduring principles. The effect of applying the standards of legal realism is to deprive a constitution of that content.

The distinction between interpretivism and non-interpretivism, a distinction which has arisen in the context of the debate in the United States over the role of the Supreme Court, usefully highlights the differences between realist approaches to constitutional interpretation and the approach advocated in this thesis. Legal realism finds its analogue in what Ely (1980: 1) calls non-interpretivism, the idea that judges in interpreting a constitution should 'enforce norms that cannot be discovered within the four corners of the document'. In contrast, interpretivism '[insists] that the work of the political branches is invalidated only in accordance with an inference whose starting point, whose underlying premise, is fairly discoverable in the Constitution' (Ely, 1980: 2).
Whereas with non-interpretivism constitutional interpretation may proceed on the basis of principles and purposes which are not derived from the constitutional document, interpretivism requires that constitutional interpretation must rest on principles and purposes which are immanent in the constitution itself. The legitimacy of judicial review on an interpretivist account is based on a court's fidelity to those principles and purposes and the terms of the constitution in which they are reflected. Legitimacy on the non-interpretivist argument is based on whether a court's decision in any particular instance is 'right' by reference to standards external to the constitution.

While these distinctions are useful in explaining what interpretivism is not, interpretivism is still a broad church. Ely equates interpretivism with legal positivism, but there is a problem with that connection. Constitutions deal with the creation, facilitation and containment of government and there are different ways of doing that, some of which will invite a more substantive approach to interpretation than that associated with positivism. In a majoritarian system positivism makes perfect sense. From the judiciary's point of view, deferral to the legislature is what it is all about. However, where a consensual system is enshrined in a constitution, then deference, rather than being consistent with judicial duty, is an abrogation of it. Under a consensual system, the courts, where judicial review is mandated, are required not to defer to the other branches of government, but to ensure that they remain within the limits prescribed by the constitution. Given that those limits are usually framed in general terms, their application requires the development of a substantive jurisprudence and consequently an active and dynamic role for the judiciary in shaping the law and politics of a community quite different from that usually associated with majoritarian constitutional systems.

Ely (1980) makes the case for a form of judicial review which is consistent with a relatively majoritarian conception of American democracy. On Ely's account, judicial review is legitimate on democratic grounds where it supports and enhances the processes of representative government, but not where it concerns itself with the 'substantive merits of the political choice under attack' (1980: 181). Dworkin's theory of law, on the other hand, is at the consensual end of the spectrum and gives to the courts much greater scope in controlling
government action. However, Dworkin would claim that his argument is no less interpretivist than Ely's. The difference between the two lies not in their interpretivist claims, but in different conceptions of the American constitutional system and the type of the democracy it entails. What both accounts share is that, while each assumes that constitutional courts can and should engage in interpretation, that process is controlled by the constitution itself and the values to which it gives effect. The flipside of that argument highlights the flaw in realist accounts of constitutional interpretation, which treat the words of a constitution as empty vessels to be filled by the courts and so remove from under a constitution the very reason for a constitution's existence.

More generally speaking, almost any strand of liberal constitutionalism would deny the legitimacy of an extreme non-interpretivist theory. As McLlwain (1947: 22) notes:

... the most ancient, the most persistent and the most lasting of the essentials of true constitutionalism still remains what it has been almost from the beginning, the limitation of government by law.

That is why constitutional provisions are often entrenched in such a way that altering them requires more than a legislative majority. In Australia the Constitution is entrenched through section 128, which provides that no amendment can be made unless approved by a majority of electors in a majority of States. The assumption underlying the entrenchment of constitutional provisions is that the limits on government contained in a constitution can and will be maintained. One of the strongest arguments against non-interpretivism is that it effectively allows the courts to so extend or alter the terms of a constitution through judicial review that the limits which are imposed on, or the permissions which are granted to, government find their foundation not in the constitution being 'interpreted', but in the policies preferred by the deciding judges. As has happened in the United States, non-interpretivist approaches to judicial review can be used to justify the implementation of either conservative or progressive policy preferences by the courts. Both Galligan (1987: 259) and McHugh (1988: 126) consider this fact of American constitutional history in warning against the adoption of non-
interpretivist approaches to constitutional interpretation by the High Court in Australia. As McHugh (1988: 126) says of the American experience:

 Obviously, many critics and advocates of judicial law-making are concerned not so much with the merits of the question of whether judges should make law or with the appropriate scope of the judicial function, but with concern over the content of judge-made law which affects their interests.

Constitutional courts exist not to replace the political process, but to contain that process within constitutionally prescribed limits.

Arriving at this point is to reach the limits of the concept of interpretivism. Interpretivism tells us that a legitimate judicial application of a constitution is one which is consistent with its structure and language and the purposes and principles informing those. It does not answer the question of how to do that, it only points the way to the work that needs to be done: the development of a background theory of the constitution that is to be interpreted.

Constitutions embody the values which inform a governmental system and control not only the nature of the political process but the legal process as well. Arguments about how to interpret a constitution, the role of courts, the scope (if any) of their judicial review function and indeed the nature of law itself can only be settled by understanding the purposes and principles which underlie a particular political and legal order made manifest in its constitutional arrangements and which together form a theory of that constitution.

This is an argument which has, necessarily, not prescribed a detailed approach to constitutional interpretation. Instead, what has been suggested is that the theory underpinning a constitution will provide the framework for and outer limits of the judicial role in giving effect to its provisions. In the broadest terms, a consensual system of government in which the courts perform a role in containing governmental power by reference to a written constitution invites a more substantive and dynamic approach to interpretation by the courts and the development of a jurisprudence that gives effect to and fleshes out, through decisions in individual cases, the purposes and principles underlying the system. A constitutional system, however, which is based on a majoritarian
model promotes a more formal approach to legal interpretation and leaves much less scope for a substantive and dynamic process of review by a court. As was argued in relation to Hart's concept of law, a formal approach to legal interpretation nonetheless gives effect to the substantive principles of government underlying majoritarian systems like the Westminster system.

There is no reason in logic, why a constitution cannot combine elements of both systems, promoting judicial deference to the choices of the political branches of government in some areas and inviting a more active judicial approach in controlling their choices in others. This is attempted through the Australian Constitution, in which a degree of majoritarianism in the institutions of government established at national level and continued at the State level is contained within an overarching federal system in which power is dispersed between both levels of government and a constitutional court created to ensure the continuing integrity of that dispersal.
There is no settled theory of the Australian Constitution so much as variations on the theme that the Australian Constitution is informed by two incompatible constitutional traditions, these being the majoritarian parliamentary tradition of Westminster and American federalism. The Westminster tradition is represented through Australia's parliamentary institutions and the conventions that govern the office of prime minister, the responsibility of the political executive to Parliament and the relationship between the political executive and the head of state. American federalism is represented by a written, entrenched constitution through which powers are divided between the States and the Commonwealth, a bicameral legislature in which equal State representation is provided for in the upper house and an independent, federal supreme court able to review government action by reference to the Constitution.

Three main arguments have emerged from the dual constitutional heritage thesis and the place of federalism within it. The first is that the majoritarian elements of the Australian Constitution are either the dominant ones or should be the dominant ones and federalism is anything from a temporary to an illegitimate constraint upon the proper operation of the system. This strand of the dual constitutional heritage thesis has been described as the unitary preference tradition (Galligan, 1989a: 47). The second is that the two traditions are mixed more or less equally, are incompatible and, as a result, the Constitution is incoherent. The most recent is the third, which introduces republicanism into the equation and suggests that the Constitution is more republican and federal than monarchic and parliamentary (note Wright, 2000).
All theories which draw on the dual constitutional heritage thesis necessarily assume a degree of incoherence in the Australian Constitution because they characterise the parliamentary and federal elements as irreconcilable, hence either one or the other is dominant, or the mix radically incoherent. One reason for that is, because the Australian institutional structure incorporates elements of the American and British systems, it is assumed that the philosophical purposes underlying those respective traditions are incorporated into the Constitution as well, however incongruously. From this perspective, such theories tend to cast less light on the Constitution than the values of their authors. It is a form of top-down reasoning, as Wright (2000: 345-346) calls it, which imposes values on the Constitution, rather than being a theory developed from an understanding of the values which inform the Constitution. As Wright (2000: 357) concludes, ‘in order to analyse the fundamental nature of the Australian Constitution, we must engage the Constitution in historical context’. The dual constitutional heritage thesis fails to do that because, rather than looking to Australian constitutionalism as it developed in the colonies as a source for the values that inform the Australian Constitution, it looks to two external traditions for its foundation. In doing that it cuts the Australian Constitution off from its origins and denies it the relative coherence it actually embodies.

THE DUAL CONSTITUTIONAL HERITAGE THESIS

For much of the twentieth century the conventional wisdom about the Australian Constitution was that it was not born of high principle, but merely pragmatic compromise among the colonial politicians who drafted it at the conventions of the 1890s. The sectional interests of these politicians apparently prevented the realisation of true nationhood through full unification, resulting in an unsatisfactory marriage between British derived responsible government and American federalism. As Greenwood (1976: 55)\(^4\) described it, the convention debates revealed a ‘preoccupation with immediate problems rather than a

\(^4\) First published in 1946.
concern for those of the future'. Similarly Crisp (1983: 39)\(^5\) concluded that the restrictions on the legislative powers of the Commonwealth were the, 'scars of the battles of the 1890s, or, at any rate, evidence of the high price of the federalists' victory'. Beliefs such as these are part of the unitary preference tradition (note Galligan 1989a: 47-50 and 1995: 53-61; note also Moffat, 1965: 81-83).

The unitary preference tradition is a long-standing one in Australia. While Edmund Barton's statement to the National Australasian Convention held in Sydney in 1891, that '[i]t is state interests we have to deal with, and unless the state interests are effectually preserved in a federal scheme, that scheme will be worth nothing' (Federation Debates, Sydney, 1891, 90), was largely accepted and federation was seen as the only way forward if the Australian colonies were to come together, not all were enamoured with it or saw federation as an end in itself. Even some of those closely involved in the federal movement expressed views seemingly consistent with the idea that federalism was but only a step along the way to Australia becoming a unitary nation:

For some years the national principles may be weak or dormant—the occasion may not arise to call them into marked activity. ... in the fullness of time, when the opportunity comes, the nation will arise like a bridegroom coming forth from his chamber, like a strong man to run a race. This change will not necessarily imply any conflict with the States, because the people of the States, who are also the people of the nation, will throb with the new life, and will be disposed to yield to the irresistible pressure of nationhood (Quick and Garran 1901: 340-341).

The newly developing colonial Labor parties of the 1890s were also among those ambivalent about federalism; in particular the New South Wales party, which opposed the referenda proposing adoption of the Constitution in 1898 and 1899 (Galligan, 1995: 94). By the end of the second decade of federation, the federal Labor Party adopted as a plank to its platform the effective abolition of federalism in Australia (Crisp, 1955: 245). Federalism inhibited Labor's

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\(^5\) This work, *Australian National Government*, went through many editions of which the 1983 edition was the last. It was preceded by Crisp (1949), *The Parliamentary Government of the Commonwealth of Australia* (noted by Sharman, 1975: 12).
capacity to deliver on its broad ranging proposals for social and economic reform. An institutional structure based on a unitary, majoritarian model would have allowed direct delivery on its policies if it won government in a way in which federal institutions and the federal division of power made virtually impossible. Federalism was seen to amount to conservative control of Labor’s popular and political progress. Resignation to the fact of Australian federalism would come eventually, but not until the late 1970s, at Labor’s National Conference in 1979, where, as Galligan (1995: 107) describes it, ‘the ALP thoroughly revamped its platform in a way that finally adjusted its formal aspirations to the established constitutional system’. However, by then, the established constitutional system was one in which the powers of the Commonwealth had a scope much wider than would have been expected at the turn of the century.

A related strand of nationalism was born in opposition to Empire rather than federalism per se and mythologised in the form of the unique Australian spirit embodied in the ‘archetypical’ Australian, a taciturn bloke tempered by the bush with a capacity for hard physical work, disdainful of social convention and the pretensions of class and city and embodying the values of mateship and egalitarianism. Ward (1958) sought to immortalise that spirit in The Australian Legend. In the late 1880s and early 1890s, it was that spirit which famously imbued The Bulletin. It was also embodied in a vision for Australia as a society free of the inequality and injustice of the old world:

This is the last of all the lands
Where Freedom’s fray-torn banner stands,
Not wrested yet from freemen’s hands (Evans, 1928: 102).6

The consistency between radical nationalism and Labor was in shared opposition to the forces of conservatism, which were symbolised in the Imperial connection and given institutional form through federalism, so making the realisation of a progressive, national vision for Australia that much more difficult. ‘Fetteration’ was the derisive term given to the proposed Australian federation by ‘labour men’ (Turner, 1976: 36) and Quick and Garran (1901: 144) note the

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6 These lines are taken from the poem ‘Australia’ and are quoted in Bennett (1971: 80).
'imaginary dangers' New South Wales Labor saw lurking in the draft federal constitution that emerged from the first convention of 1891:

It conferred 'enormous powers' on the Governor-General; it was steeped in 'Imperialism,' it meant the crushing of the workers by a 'military despotism.'

Radical nationalism, while it had a certain currency in symbolic and rhetorical terms, was more imagined than real (de Garis, 1974: 258-259). By the time of federation it had been accepted by Labor and even The Bulletin that retention of the Imperial connection was 'appropriate for the new nation' (McKenna, 1996: 205). Australian federation and the promise of nationhood were inevitably conceived in the context of Empire. To the framers of the Australian Constitution, and indeed for most of the Australian people, there was no contradiction in that (note Kelly, 2001: 1-8; McQueen, 1986: 9-13).

Among scholars of Australian politics and history, Greenwood and Crisp were the standard bearers for the unitary preference tradition in the immediate period following World War II (note Sharman, 1975: 11-12 and 1990a: 4; Galligan, 1989a: 47-48). Drawing on Laski's thesis that federalism was an obsolete form of government, Greenwood concluded that federalism had 'outlived its usefulness' in Australia (Greenwood, 1976: xii; note Laski, 1939; Galligan, 1989a: 48 and 1995: 56-59). Federalism was a brake on national development. It was the States that retained power to address '[t]he major problems of development and social experiment', whereas it was those very areas that 'necessitated legislative action by the national parliament' (Greenwood, 1976: 117-118). These views echoed Dicey's criticisms of the inherent conservatism of federal systems and their constitutional rigidity, making them inflexible in the face of change and ultimately redundant (Dicey, 1959: 173-174; note Greenwood, 1976: 2). For Greenwood (1976: xii), federalism was but 'a necessary stage in the evolution of Australia's nationhood'. The time had come, 'to recognise that the federation should be replaced by a unified state' (note also Greenwood, 1976: 172-173). Crisp followed Greenwood in suggesting that federalism was at best a transitional form of government (Crisp, 1983: 104-105).
The degree of control exercised by the Commonwealth Government during the Second World War, combined with post war optimism and a general belief in the efficacy of government, provided the context for either arguing that the dominant elements in the Australian Constitution were its majoritarian ones or that they should be (Sharman, 1990a: 4). Federalism in the form of the Senate, the division of powers between the States and the Commonwealth and a High Court given to finding the legislative initiatives of the Commonwealth unconstitutional from time to time, was seen as a conservative, undemocratic and illegitimate constraint on the majority will and the delivery of effective government (note Sharman, 1990a: 4; Galligan, 1995, 56-57).

Whatever the hopes and expectations about Australian federalism coming to an end in the post-war period, it was realised with a shock in 1975 that that was unlikely. The government was dismissed through the actions of the Senate and the decision of the Governor-General. Among the delegates to the constitutional conventions of the 1890s, concern had been expressed that ‘if we adopt this Cabinet system of Executive it will either kill Federation or Federation will kill it; because we cannot conceal from ourselves that the very fundamental essence of the Cabinet system of Executive is the predominating power of one Chamber’ (Baker, Federation Debates, Adelaide, 1897: 28). It appeared that those concerns had been realised in 1975 and responsible government had been trumped by federalism. Those events prompted a re-evaluation of the nature of the Australian Constitution, which saw it not as having given birth to a nation that would mature into a unitary state, but one which was hybrid or mutant (note Howard and Saunders, 1977: 286; Emy and Hughes, 1991: 336-372; and see generally Archer and Maddox, 1976; Thompson, 1980; Rydon, 1985; Saunders, 1989). The dual constitutional heritage thesis remained the foundation of analysis, but now the Australian Constitution was seen as informed by two constitutional traditions neither of which was dominant and which were, while internally consistent in themselves, incompatible, as the events of 1975 apparently revealed. On this reading, Australia has a flawed and incoherent constitution or at best a highly ambiguous one.

The conjunction of relatively benign constitutional politics for a significant part of the post-war period and the belief in the efficacy of government had generated
a degree of complacency about Australian politics and the role of federalism that could not be sustained. The States had not only asserted themselves in response to 'explorations and adventures with Commonwealth powers' during the Whitlam period in government between 1972 and 1975 (Crommelin and Evans, 1977), but even before then in response to Commonwealth policy affecting the States under the Gorton administration (Sharman, 1992: 13). Federalism's persistence in Australia was apparent well before the events of 1975. While those events themselves directly provoked a reconsideration of the Australian form of government, less dramatically, but more significantly, it is the reality of federalism's persistence which shifted the ground from under the unitary preference tradition and invited a more realistic assessment of the place of federalism in the Australian system of government (note Galligan, 1995: 59-61).

In the past, two concerns have been largely absent in the literature on Australian federation: one is a discussion of federal theory and Australian federalism and the other is a lack of more than cursory consideration of the colonial influence on Australian constitutionalism. Galligan (1989a; 1995) has gone some way to addressing the first. His work on the origins and principles of American federalism and their relevance to Australia examines federalism in a more positive and theoretical light than associated with those strands of the dual constitutional heritage thesis which promote unification or characterise the Australian Constitution as radically incoherent.

For Galligan (1995: 39), federalism as it is known in Australia was invented by the Americans following the war of independence. The American Constitution was drafted by representatives of the American States at the Philadelphia Convention of 1787. In the campaign to secure its ratification, James Madison, Alexander Hamilton and John Jay published a number of articles under the pseudonym Publius (Hamilton, Madison and Jay, 1992). It is those articles that comprise The Federalist and through which the philosophical purposes underlying the American constitutional settlement were articulated and the Constitution justified.
The innovation of the American founders was to combine national supremacy in those areas of legislative authority given to the nation with federalism, thereby creating a system in which both the constituent entities, namely the regions and a national government, possessed independent powers of government and dealt directly with the citizenry in the exercise of that power (note Elazar, 1987: 7). It was that innovation which so appealed to the framers of the Australian Constitution.

Of the three men who wrote as Publius, Galligan (1995: 41) describes Madison as the ‘intellectual father of the American Constitution’. Madison argued in The Federalist, No. 10 that the most pressing political problem to address within a nation was the problem of containing faction: controlling the natural desire of like minded citizens to join together to promote their particular interests at the expense of others (Hamilton, Madison and Jay, 1992: 41-48). Democracy is one way of addressing this problem. Popular sovereignty can overcome minority faction, but what of the majority faction itself, should that then be left to overwhelm the interests of the minority? Madison thought not.

Classical political theory had associated democracy with small states and direct citizen participation. Such democracies were supposed to work on the basis of the promotion of civic virtue and the containment of selfish impulses through participation. Madison was sceptical of such idealism pitting it against history:

... such democracies have ever been the spectacles of turbulence and contention; have ever been found incompatible with personal security and the rights of property; and have in general been as short in their lives as violent in their deaths (Hamilton, Madison and Jay 1992: 45).

One reason these democracies died violent deaths was that small communities were vulnerable to attack. If, however, the state was going to be large enough to be secure then many theorists concluded that some form of absolutism was required at the expense of democracy and liberty. The framers of the American republic turned these ‘truths’ on their head (Krouse, 1983: 62-67).

Through dividing governmental power, the power of faction could be contained and made to work for the common good. That was the promise contained in the
American Constitution. Under it state power was divided across several dimensions: institutionally, through separating the three main branches of government—the executive, the legislature and the judiciary—and making each coordinate; federally, through the division of powers between the States and the national government; and democratically, through state and national representation. Through this structure, a plurality of interests would be promoted which balanced and checked each other to the benefit of all. With it would come the security and stability of a large state without compromising individual liberty. This is the vision of the compound republic promoted by Publius (Galligan, 1995: 39-44; note Ostrom, 1987).

Galligan (1995: 51) argues that federalism on this model performs a negative and a positive function, both of which enhance the Australian system of government overall. The negative is its counter-majoritarian effect: ‘federalism has been a major structural component in restricting centralised government’. The positive is its promotion of democratic participation. It creates ‘multiple majorities’ through national and State representation, combining ‘the national strength of a large nation with the enhanced participatory qualities of smaller democratic states’ (Galligan, 1995: 51).

The source of difficulty with federalism in Australia, however, has been its counter-majoritarianism in a system and society that has strong majoritarian elements. It has survived, according to Galligan, because of its positive participatory effect, which has the continuing support of the Australian people, if not all Australian elites (Galligan, 1995: 51-52).

The relevance of federal theory in understanding Australian constitutionalism on this account is twofold. It explains the federal framework of the system and the principles underlying it, while exposing the incongruity of those elements drawn from the British majoritarian tradition within that federal framework:
Responsible government, understood as an umbrella term for the more direct majoritarian practices and institutions entailed in executive dominance of a single, popularly elected chamber that is legislatively superior, presupposes a democratic theory of politics at odds with federal theory. The purpose of responsible government is to unify and consolidate political power whereas that of federalism is to fragment and circumscribe its exercise (Galligan, 1995: 47).

Galligan (1995: 46-51), like many he critiques, accepts the thesis that Australia has a ‘dual constitutional heritage’ which combines federalism with responsible government in an uneasy balance. However, where earlier critics have focused on the elements of the system reflecting British antecedents, Galligan (1995: 29) focuses on the federal and republican strands, seeing in them the dominant elements of the Australian constitutional tradition: ‘[t]he usual legal emphasis on the British statutory origins and character of the Australian Constitution obscures its essentially federal and republican character’.

Federalism in this context is seen as part of a whole package through which the Australian Constitution is given relative coherence as an expression of a republican ideal of limited government based upon the sovereignty of the people. While the formal origin of the Constitution is as a statute of the Imperial Parliament and while Australia is also a monarchy, Galligan (1995: 12-37) argues the reality is that Australia is a crowned, federal republic. Just as Bagehot described the formal monarchical elements of the English Constitution as masking its fundamentally republican qualities, so too do they mask Australia’s even more republican nature. The Australian Constitution was democratically approved by the people, it is entrenched and can only be altered by the people at referendum and the formal elements of the system are in reality subject to their sovereign will.

While these observations are true up to a point, the difficulty is that Galligan finds relative coherence in the Australian Constitution on a federal republican model, the philosophical foundation for which he finds not in any Australian source, but in The Federalist. The Australian framers ‘copied’ the American model of federalism, as Galligan describes it, and with it apparently its philosophy. It is, of course, reasonable to argue that The Federalist provides a good explanation and justification for a federal system on the American model,
that it remains relevant today and that it can cast light on the Australian federal system. However, although the Australian framers drew on the American model in many respects, it was far from copied and it does not provide a theory of Australian federalism. Like those members of the unitary preference tradition who took the Westminster system and sought to impose its values on the Australian Constitution, Galligan to an extent does something similar by drawing on alternative external sources to provide an alternative reading of the Australian Constitution, but one which still fails 'to engage the Constitution in historical context'.

Warden (1992) also looks to Publius as a way into understanding Australian federalism, but he seeks to understand the application of federal theory in Australia from the perspective of the framers. In a welcome departure from the story that the Australian framers did not look beyond their sectional interests in their approach to institutional design, Warden says:

... the framers of the Australian constitution were concerned with understanding and deploying ideas and arguments about federal systems which, in totality, can be regarded as a theory of federalism (Warden, 1992:143).

Warden's argument, though, is that they got it wrong. It is *The Federalist* mediated through Bryce that Warden sees as the foundation for Australian federal theory. Therein he finds the explanation for the failure of Australian federalism to contain central power. The American civil war had called into question the foundation of the federal side of *The Federalist's* theory, which was based on an assumption that the States and the national government were coordinate and could operate independently of the other. The civil war, however, threw that theory into question by revealing the subordinate status of the States to the Federal Government. The ambiguity of the States' position in America was reproduced in Australia because the lessons of the war were not properly assimilated, because Bryce himself had not assimilated them and it was federalism seen through Bryce's eyes that so conditioned the thinking of the Australian framers. Ever increasing centralisation in Australia, 'was facilitated by an inherent weakness in their constitutional design which was the consequence of the assumptions that the Australians adopted about the federal
system as it really operated' (Warden, 1992: 157). The framers may have tried
to implement a coherent and stable federal theory, but they did not succeed.

In reaching the conclusion that the framers adopted a flawed federal theory,
Warden, like so many others, concludes that the Australian Constitution is an
inherently ambiguous document. He also argues it is a derivative one: '[t]he
hegemony of American federal thought was so great that not only did the
Australians not deviate from the model of assigning powers but they barely
departed from the actual list of federal powers' (Warden, 1992: 152).

COLONIAL GOVERNMENT AND AUSTRALIAN FEDERALISM

Authors critical of Australia's federal settlement are right of course to say that
federation involved compromise and that the motives that animated many of the
framers were particular ones. But the pejorative gloss put on this is misplaced.
The framers clearly were not Platonic guardians denying their particular
interests to further the common good. Nor did they deliberate behind some veil
of ignorance in the Rawlsian sense. Rather they carried to the conventions of
the 1890s their ambitions for the colonies with which they were so intimately
related and the relative independence for which they had struggled over the
previous decades. That these ambitions should be asserted rather than denied
in the constitution-making process is to say no more than that the process was
political: it was not an abstract or passionless exercise. However, without the
recognition that real interests were being served through federation with the
likelihood of real gains for all, the process would never have occurred in the first
place. Moreover, while those particular concerns were there and the battles
between different interests and views hard fought, it was not mere political
horse trading, but was grounded on careful consideration of the options, a
profound understanding of what was realistically achievable and a belief that a
coherent and enduring instrument of government could be crafted.

A number of factors point to a more positive conclusion regarding the framers'
deliberations than some suggest. First, it was an almost wholly local process.
Among intended constitutional changes for the Australian colonies first raised
by Earl Grey, the Colonial Secretary, in a despatch to the Australian colonies in
1847, was the idea that a general assembly for the Australian colonies should be established. This federal proposal was set out in more detail in a subsequent report of a Committee of the Privy Council in 1849, which had been commissioned 'to enquire into constitutional changes which it might be advisable to make in the Government of the Australian Colonies' (Quick and Garran, 1901: 83 and see generally 81-92). However, opposition from the colonies and their own preoccupations put paid to 'Earl Grey's schemes'. As Quick and Garran (1901: 88-89) noted, '[e]ach colony was chiefly bent on securing absolute power to manage its own affairs, and the importance of the union was rather future than present' (Quick and Garran, 1901: 88-89; note also Moore, 1902: 20-21). If federation were going to come at all, it would have to come from the colonies themselves. The role of the British Parliament would be to act only as the means of giving it legal form (La Nauze, 1972: 4).

Secondly, the formal process of federation and constitution drafting took almost ten years to complete and was fully documented. Over that time two lengthy national conventions were held and the process ended up being both democratic and popular. The framers were concerned to protect the interests of the colonies they represented, but that is not in anyway inconsistent with taking the task of constitution-building seriously.

The first convention, the National Australasian Convention of 1891, was held in Sydney over a period of some six weeks, the delegates to which were chosen by the Parliaments of each of the Australian colonies and included three observers from New Zealand. From that convention emerged the draft Commonwealth of Australia Constitution Bill of 1891. However, after initial debate in the colonial Parliaments, the Bill failed to go further in the face of the largest colony, New South Wales, losing interest. New Zealand was subsequently not involved in the process.

Quick and Garran (1901: 150) start their consideration of what followed with Sir John Robertson's declaration that 'Federation is as dead as Julius Caesar'. As far as the colonial Parliaments were concerned that was the case. The colonies had become preoccupied with worsening economic conditions and more pressing domestic concerns. For all that, grassroots interest had been ignited
and a popular movement developed and was represented in the work of the
Australian Natives Association, the Federation Leagues, the Corowa
Conference of 1893 and the Bathurst People's Convention of 1896 (Quick and
Garran, 1901: 150-165). If popular support had been lacking in the first
convention, in the second it provided an impetus to implementation and also the
form the convention and later approval process took.

The second National Australasian Convention took place in three sessions in
Adelaide, Sydney and Melbourne respectively over 1897 and 1898. Queensland
did not send any representatives, but all the other colonies did, and, except for the Western Australians, they were all popularly elected. At the
convention's conclusion, the Constitution Bill drafted there went to referendum
in the southern and eastern colonies in early June in 1898, but it failed in New
South Wales to achieve the majority required to approve it under its Enabling
Act. Following a Premiers' conference in 1899, the draft constitution, with some
amendment, was again put to the people in all the Australian colonies, except
Western Australia. It was approved. A referendum was held in Western
Australia and the Constitution approved there also, but not until 31 July 1900.
This was after the Commonwealth of Australia Constitution Act 1900 had been
passed by the British Parliament and assented to by the Queen, but still in time
for Western Australia to join the federation as an original State. The
Commonwealth of Australia was inaugurated on 1 January 1901. From an
unpromising beginning not only was federation realised, but it was realised on
the back of popular support and with democratic authority.

Finally, a large amount of material about federation was made available to
delegates about federation and what it meant for Australia (La Nauze, 1972:
272-275 and note 358-359). Whether the delegates read and assimilated it is
another matter, but 'even the Western Australians' probably read and consulted
three basic texts: Richard Baker's manual (1891),7 Robert Garran's The Coming
Commonwealth (1897) and 'the great textbook for them all', James Bryce's The
American Commonwealth, first published in 1888 and the revised edition in

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7 A Manual of Reference to Authorities for the use of the Members of the National
Australasian Convention which will assemble at Sydney on March 2, 1891, for the
Purpose of drafting a Constitution for the Dominion of Australia
1891 (La Nauze, 1972: 273; note also pp. 18-19). Baker's manual provided a comparative discussion of federal systems and included documents such as the American and Canadian Constitutions. Garran's _The Coming Commonwealth_ provided an analysis of federalism, federal systems and Australian federation, including discussion of what were likely to form the main parts of an Australian federal constitution. Bryce's _The American Commonwealth_ was a sprawling work, which ranged from detailed discussion of American politics and government to its social institutions. While most of the framers were far from being scholars, their deliberations were not completely uninformed and were based on consideration and study of the options, filtered through their own considerable experience of government. All bar one were colonial politicians (Warden, 1992: 146).

The framers' experience of colonial government as a foundational source for their deliberations is overlooked in much of the analysis of Australia's constitutional design. This is a somewhat incongruous omission, for it suggests that the framers' second-hand and necessarily abstract understanding of overseas models was more significant than their day-to-day experience of politics in the Australian colonies and the institutions through which it was structured. The experience of colonial government brought with it an intimate understanding of parliamentary institutions and responsible government, not as they existed in England, but as they had been transformed in the colonial context.

At the time when a general assembly for the colonies was first mooted by Earl Grey, not all of the six colonies which were to become the original States of the Australian Commonwealth existed and none had been granted self-government. In 1847, only New South Wales, Van Diemen's Land (which became Tasmania in 1853), South Australia and Western Australia had been established. Victoria and then Queensland were created in 1850 and 1859 respectively from what had been parts of New South Wales.

The Australian colonies' gradual acquisition of self-government was achieved through colonial campaigning for increased independence and autonomy and the granting by the Imperial authorities, in response to that, first representative
institutions and ultimately responsible government (see generally Quick and Garran, 1901: 35-78). In relation to New South Wales, ‘within fifty years, the new settlers had persuaded England that what it saw as a penal colony should be regarded as a free society, entitled to its own elected political institutions’, is how Neal (1991: 22-23) described this ‘radical transformation’. The desire for responsible government in the colonies was matched by Imperial preparedness to grant it. Free trade policy had combined with colonial policy to support the idea that Britain’s colonial settlements should be seen as ‘developing nations’ (Irving, 1974: 127). All the Australian colonies had acquired self-government by the end of the 1850s, except Western Australia, which had to wait until 1890.

The achievement of self-government was marked by the passing of Constitution Acts under or through the authority of Imperial legislation. In between the transition from first settlement to self-governing colony in most of the Australian colonies a number of phases of government came to pass and only Queensland was born fully formed as it were, beginning its constitutional history with responsible government. The transition was from government by governor alone, through periods in which the governor was advised by first nominated and later partly elected legislative councils, to the creation of bicameral legislatures, with at least the lower house elected, and the governor responsible to those legislatures in matters of local concern through an executive council comprising ministers of the Crown.

The grant of legislative power to the colonial Parliaments was expressed in general terms. They were given power to make laws for ‘the peace, order, and good government’ or the ‘peace, welfare, and good government’ of the colony. Within their competence, and subject to the overarching sovereignty of the British Parliament, their powers were plenary: ‘the local legislature is supreme’ with ‘authority as plenary and as ample ... as the Imperial Parliament in the plenitude of its power possessed and could bestow’ (Hodge v R (1883) 9 App Cas 117 at 132). Plenary power, however, did not mean absolute power and colonial self-government only extended to matters of local concern and was, at least on some authority, limited geographically to the colonies’ boundaries (Macleod v Attorney-General (NSW) [1891] AC 455).
As Zines (1977: 1) points out, the concept of local concern was the 'guiding principle of colonial rule'. Once self-government was achieved, colonial Parliaments and ministers were increasingly left to manage their own affairs. In such matters the governor acted on the advice of ministers responsible to the colonial Parliament. Gradually the range of matters of local concern expanded and came to include responsibility for revenue, taxation and land management. This required no formal constitutional change, but rather involved changes to the conventions which governed the exercise of executive power. The result was that in more and more matters State governors acted on the advice of colonial ministers, rather than British, though the Imperial authorities retained control of matters which affected foreign nations and the Empire overall.

While responsible government formed the basis of the colonial constitutions, the colonial experience translated responsible government in the colonial Parliaments into something quite different from British parliamentary practice as it had developed in the nineteenth century (Lumb, 1983: 44-47; Sharman, 1990b: 210-211).

A major modification was the creation of powerful upper houses under the colonial constitutions through which self-government was achieved. The *Australian Constitutions Act 1850* (UK), provided that the eastern and southern colonies had control to an extent over their own constitutions and could, through their legislative councils, provide for bicameral legislatures, subject to royal assent. As Irving (1974: 127) says, at the time this 'most important concession' was 'scarcely noticed'. The invitation was taken up in all the colonies. In Van Dieman's Land and South Australia this occurred through colonial legislation within the ambit of the Australian Constitutions Act, but in New South Wales and Victoria, as their draft constitutions went outside of that framework, Imperial legislation was passed to give them effect. In South Australia, Tasmania and Victoria the legislative council was elected on a property franchise, while in New South Wales the Council was nominated. The New South Wales model was subsequently followed in Queensland. Self-government in Western Australia came later. It too created a nominated legislative council, but not long after it was formed on an elective basis. The lower houses of all the colonial Parliaments were elected, and while the franchise was also restricted, it was
less so than existed where the legislative councils were elected. Whether appointed or elected on a restricted franchise, the legislative councils claimed power to reject supply and generally supervised the lower houses (note Quick and Garran, 1901: 57-58, 62, 66-67, 74; Lumb, 1983: 45; Sharman, 1990b: 213-214).

Secondly, there were two senses in which the plenary powers of the colonies were limited by the idea of higher law and judicial review by the courts. Not only were the colonial constitutions written instruments and key provisions entrenched, but the colonial governments and constitutions were also subject to the sovereignty of the British Parliament. With this came the idea that English law existed as higher law. These limits on the power of colonial executives and legislatures became part of the colonial tradition of government in Australia.

The degree to which English law existed as higher law and could modify colonial law generated considerable confusion and dispute in the colonies. One reason was because of Judge Boothby’s certainty that the superiority of English law could form the basis for striking down colonial legislation, which he did with some regularity in South Australia following his appointment to the South Australian Supreme Court in 1853 (Castles, 1963: 23). The result was the passing of an Imperial Act, the *Colonial Laws Validity Act 1865*, which clarified that colonial legislatures could pass statutes which overrode English law received in the colony. The exception was Imperial legislation which applied by ‘paramount force’, which was legislation passed by the Imperial Parliament expressly or necessarily intended to apply to the colonies. Consequently, the sense of English law as higher law was retained because at least some English law remained superior to colonial law by virtue of its paramount force. The Colonial Laws Validity Act also required compliance with ‘manner and form’ provisions in the colonial constitutions that provided for how they could be altered. The superiority of English law in some cases and written constitutions provided for a far more substantial judicial role in reviewing government action than existed in England (Lumb 1983: 46; note also Thomson, 1988: 61-67; Sharman, 1990a: 3).
The framers experience of colonial government influenced federation in two distinct ways. First, the vitality of the colonies as active polities in their own right meant that union through federation was the only possible path to union at all and dictated the type of federation Australia would become. Secondly, colonial political institutions provided a foundation for developing national institutions of government. The framers’ understanding of responsible government carried with it the experience of limited government and, in particular, a familiarity with written constitutions, bicameralism and judicial review, all of which diverged from the animating principle of the Westminster system: parliamentary sovereignty. All these institutions in one form or another found their way into the Australian Constitution, as Sharman (1990a; 1990b) has noted.

This thesis is not universally accepted. Colebatch (1992) looks to the first white Australian settlement in New South Wales in seeking the foundations of Australian government. Instead of finding there a concern for limited government, he finds a state under the authority of a governor without the administrative means of enforcing his authority, but control over the resources to which the population looked for survival. Colebatch (1992: 4) says:

> The Australian colonists ... saw government neither as the repository of traditional authority, nor as the defender of the liberties of the individual, but as a source of services.

Colebatch (1992: 4) uses this reading of early Australian political history to affirm the conventional story told about Australian government and its origins. In this regard he quotes from Hancock’s *Australia*:

> Thus Australian democracy has come to look on the state as a vast public utility, whose duty it is to provide the greatest happiness for the greatest number (Hancock, 1961: 55).8

Collins (1985) also expanded on Hancock’s argument in an article on Australia as a Benthamite society, and Emy and Hughes (1991: 117) drew on it in explaining the framework of political debate in Australia.

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8 First published in 1930.
The idea that Australia is imbued with an almost completely instrumental view of government, which was fostered in the first settlement, is very common. Another common story associated with early Australia is its characterisation as a prison or a precursor of the twentieth century Gulag (Hancock, 1961: 25; Hughes, 1987). Neal (1991) takes a contrary view to these conventional readings of early Australian history in discussing how important a rich conception of the rule of law was in the first settlement in New South Wales. On this argument, ‘utilitarian’ readings of the Australia’s political and legal history are at best partial and misrepresent its character.

Neal (1991: 1-6) illustrates the argument with a story about a convict family, Susannah and Henry Kable and their child, who were transported on the first convict ship to New South Wales. The Kables met in Newgate where Susannah became pregnant and the couple decided to marry. Prior to leaving England they had attracted some publicity and their story was romanticised. They subsequently received through donations a parcel worth about twenty pounds. Once in Australia they discovered it had been lost and they successfully sued the ship's captain for fifteen pounds in the Court of Civil Jurisdiction. The case was the first civil case heard in the first civil court in Australia. Such an event does not seem at all consistent with a reading of the New South Wales settlement as a brutal prison. Moreover, it would have been impossible in England: felons could not sue as they were regarded as already executed.

The story of the Kables is an important element of Neal's account. It symbolises the arrival of the rule of law with the arrival of the colony and its immediate adaptation to local circumstances. The Kables also come to symbolise the emancipist class in the colony. Henry Kable becomes a constable, later the chief constable, and later still a wealthy merchant and ship owner. Their story was not unusual. It was the emancipists who struggled hardest to transform New South Wales from a penal colony to a free society. In their frequent struggle for civil rights against the will of the governor and against conservative forces generally they greatly influenced the political development
of the colony. The language through which this struggle took place was the language of the rule of law and the place where it occurred was in the courts.

The rule of law most simply defined means that government acts on the basis of general laws laid down in advance and that the law applies equally to all. It requires at least a minimal separation of powers through which the judiciary has relative independence from the government. Neal (1991: 61-83) argues the people who came to Australia with the first fleet understood these basic requirements, but brought with them a far fuller and integrated conception of the rule of law. The colony was established in New South Wales as eighteenth century Britain consolidated its political institutions after the turmoil of the seventeenth century. Those consolidations, combined later with representative democracy, resulted in what is called the Westminster system of government. While, by the late eighteenth century ideas of fundamental law were irrelevant from a practical point of view, it is nonetheless true that the rule of law was understood in a less prosaic sense than it is today (Gough, 1955). The rule of law was the central concept by which society was held together and the basis on which political authority was exercised. There was still a strong attachment in England to the ancient constitution and the rights and freedoms of Englishmen associated with it.

As had the American colonists, the Australian colonists brought with them their birthright as freeborn Englishmen and the corresponding belief in their natural freedom and rights. It was just such beliefs that inspired the American Revolution, through which a quasi-republican strand of English political thought found expression in the institutions of the United States (Pocock, 1985: 73-88). Pocock describes 1776 as the third British revolution. While it is commonly recognised that Montesquieu was an important influence on the American form of government, it was Blackstone’s interpretation of Montesquieu that was most influential (Vile, 1967: 103). The Americans, discovering the irrelevance of the idea of fundamental law when matched against parliamentary supremacy, nonetheless maintained the concept as an essential part of their Constitution.

Natural rights did not inspire the Australian colonists to revolution and it did not have to. British experience in America had tempered its attitude to its colonies
and their claims for independence, as we have seen. Neal (1991: 9-14) also discusses other related factors that influenced the British attitude to its colonies at the end of the eighteenth century and into the nineteenth. They include the complex reaction to social forces challenging the privileges and certainties of wealth and status and the claims to natural rights on which those interests were staked. Quite apart from the war of independence in America, the terror of the French Revolution crossed the channel with considerable effect on both sides of the social equation. One way that was manifested was in changing attitudes to crime and punishment, in particular the death penalty, but also ultimately transportation. The end of transportation was both a consequence of forces in the colonies pushing for representative institutions and self-government and a prerequisite to its achievement.

Before that, however, the rule of law played a more obvious and instrumental role in the day-to-day life of the colony than it did in England, at least among the settlers. The indigenous population was not completely excluded from its protection, but it may as well have been (note Neal, 1991: 17-18). The colony had a much smaller population than Britain and settler society was much more fluid in terms of the social and political relationships amongst its members. The various classes in the colony pursued their interests through the courts. The courts were rudimentary but powerful and the main limitation on the governor's rule of 'despotism', as Quick and Garran (1901: 36) describe it (see generally Neal, 1991: 85-114; Evatt, 1975: 78-79; Parkinson, 1994: 133-136; and note Quick and Garran, 1901: 35-37). They remained so after the first small step towards self-government was taken in 1823 in New South Wales in the form of a nominated legislative council. The Imperial Act which created the Council also abolished the Military Courts and provided for a Supreme Court and Court of Appeal. Before 1823 the governor could make regulations, but could not legislate. The courts determined where the line was drawn between regulation and legislation. After 1823 the courts could review legislation on the basis that it was repugnant to English law. The experience of higher law, which was noted as an element in the colonies after they had achieved responsible government, was an integral element in the political life of the colony from early on.
Neal (1991: 18-19) characterises the fundamental political struggle in the New South Wales colony as being between ‘Emancipists’, a group whose membership extended beyond former convicts, and the more established free settlers, whom he called ‘Exclusives’. The Exclusives sought to limit actual emancipists’ access to the civic life of the colony because of their previous convict status. The issues at the heart of the struggle were the rights of emancipists to be magistrates, practise as lawyers, serve on juries, vote and sue. Their struggle illustrates how the rule of law operated within the colony in such a way that it did not drive those who came to it without wealth, power or social position, to stake their claims for equality and civil rights on the abstract rights of man, but on their rights as they existed within the existing constitutional order. The emancipists most significant campaign was for acceptance of trial by jury (Neal, 1991: 177). It was a long struggle and not until 1839 was legislation extending trial by jury to criminal trials confirmed (Neal, 1991: 186). Its acceptance marked, however, recognition of emancipists as equals in civil terms with free setters in the political life of the colony. After that came representative institutions and responsible government. It is not that Neal denies the brutality associated with the early colonial settlement in Australia, or that arbitrary decisions were made by governors, or that the colony was reliant on government stores to survive, but he denies that it is the whole story.

Neal’s account qualifies the conventional wisdom brought to bear on Australia’s early history in ways which are important for how we see Australia’s subsequent political history. The language of the rule of law was far more significant in Australia’s early history than is often accepted. The rule of law and the political struggles which were undertaken within its framework influenced and shaped the development of Australian political and legal institutions though colonial self-government and ultimately federation.

It is from the time of the first settlement that the principles of government in Australia began a life of their own. They were given form through the courts and later in the institutions of self-government. Ultimately, the colonial experience of constitution-making, written constitutions, bicameralism and judicial review were all sources of experience which informed the making of the Australian Constitution. That is the major and most significant continuity from
first settlement through to federation and beyond; not unlimited executive power and a crude utilitarian ethic through which the rabble was kept happy. Law from the first settlement, as with the later development of self-government, reflected the social forces at work in the colony and its particular needs. Law and politics were influenced by, but did not reproduce the patterns of political and legal practice in Britain. The colonists created their own political and legal practice, as they later created the Constitution through which they federated.

From the beginning of the first white settlement in Australia, Australian constitutionalism began its separate development from English constitutionalism. At the same time as institutions of limited government were developing within the colonial context, the Westminster system was taking on its modern form in Britain. Parliamentary sovereignty, if it was not accepted as the 'dominant characteristic' of the English Constitution before then, certainly became so during the nineteenth century (Dicey, 1959: 39; note Goldsworthy, 1999). During the twentieth century the separation between Australian and English constitutionalism has become even more marked as the logic of the Westminster system has played itself out.

In the twentieth century, the coincidence between politics and law in which Dicey saw the essence of English constitutionalism started to unravel. With the rise of disciplined mass political parties, it was not Parliament that controlled executive power, but the executive that controlled Parliament. The logic of the Westminster system is informed by a hierarchical and autocratic past, the institutions of which were not replaced so much as transformed through a series of incremental changes over several hundred years in the contest between King and Parliament (Sharman, 1990b: 208). The underlying values which promoted this transformation were a belief in individual liberty and limited government as the means to achieving that end. These values were originally based on ideas of natural law. However, by the end of the eighteenth century, positive law had begun to replace natural law as the reigning orthodoxy under the influence of Bentham and his later followers. Hand in hand with that development the modern idea of parliamentary sovereignty developed, culminating in the conception of English constitutionalism which Dicey articulated so well, albeit uncritically. Parliament became the vehicle for delivering enlightened social
policy and democracy the institutional device for assuring that the rule of Parliament coincided with the will of the people, the Reform Act of 1832 marking the major transition in English politics during the nineteenth century. As Parliament asserted its legislative will on the back of democratic authority, the common law became correspondingly less significant and the courts in England retreated from what was already a diminishing policy role (note Atiyah and Summers, 1987: 229).

In this way, the richer conception of the rule of law with its antecedents in natural law which the Australian colonists originally brought with them was replaced in England by a more instrumental conception of the rule of law. Law increasingly came to be seen as something created entirely for human purposes and not as a reflection of any transcendent ideals. With these developments the potential for institutions other than Parliament to check executive power was lost as there was no authority superior to Parliament.

In Britain, the supreme authority that once belonged to the monarch is reproduced in the supreme authority of Parliament. Representative democracy is the means to bringing about the coincidence between legal sovereignty and political sovereignty on which Dicey placed so much importance. However, Parliament has come to be controlled by the political party which commands a majority in the lower house and its leaders, who form the government. The disciplined mass political party has effectively exploited the incentives for political actors generated by the residual autocratic logic of the institutions represented in the idea of parliamentary sovereignty resulting in the modern reassertion of executive power, as Sharman (1990b: 208-210) argues. With this development the crux of the Westminster system, namely ministerial responsibility, has been eroded as the executive and legislature are effectively fused. In the absence of other constraints on government the executive dominates the system.

In Australia, however, those aspects of limited government lacking under the British parliamentary tradition—a written constitution, the federal system enshrined in that, a bicameral legislature with a powerful upper house at the national level of government and constitutionally grounded judicial review of
government action by the courts—have moderated the extent of executive dominance within the Australian system. Except for federalism, those institutions first found expression in the development of Australia’s colonial political and legal institutions. However, the logic of the institutions of limited government complement the logic of federalism, as Sharman (1990b: 211) suggests:

This colonial tradition was a critical one since it carried within it an idea of limited government that was both a significant departure from the British parliamentary tradition and a bridge to the constitutional values underpinning federalism.

On this reading of the origins of Australian constitutionalism, it is the British parliamentary tradition that is alien, not federalism as argued by those within the unitary preference tradition.

The broad thrust of Galligan’s (1995: 29) argument that ‘[t]he usual legal emphasis on the British statutory origins and character of the Australian Constitution obscures its essentially federal and republican character’ is right, not because an external tradition provided that content, but because that content is derived from the experience of government in the colonies. This experience came together with the ambitions of the framers to create an Australian nation in which the colonies transformed into States would retain a significant degree of autonomy and independence.

The Australian Constitution is informed by purposes and ideas which find their origins in the Australian colonies and through which the Constitution gains a coherence more often than not denied. Contrary to the assumptions of the dual constitutional heritage thesis, the Australian Constitution is not informed by two incompatible governmental traditions, but by three traditions, the British parliamentary tradition, American federalism and the colonial tradition (note Sharman, 1990a: 3). Of these, the colonial is the most significant as it is through this tradition that the framers’ understanding of both the British parliamentary tradition and American federalism was mediated. Moreover, the colonial and federal traditions complement and reinforce each other so that the logic of Australian political institutions inclines in the direction of a consensual
model of limited government in which power is dispersed throughout a range of institutions.

The experience of colonial government was translated into a federal context that saw the elements of colonial government through which governmental power was contained become part of the Australian Constitution. Consequently, while a national legislature was created under the Constitution with its members elected on a broad, democratic franchise and a government formed on the basis of majority support in the lower house, the national government's powers and their exercise are constrained. Those powers are plenary, but they are also defined and limited under the Constitution, the Parliament itself is bicameral and a High Court exists to maintain the Constitution through judicial review and, in particular, the division of powers between the States and the Commonwealth under it. Majoritarianism is an element in this system, but it is far from the dominant one. This was no accident or fault in design. The limitations on the power of the Commonwealth Government represent deliberate and principled choices in constitutional design by the framers of the Australian Constitution born of history, experience and purpose.
CHAPTER 3
THE FRAMERS’ THEORY OF THE CONSTITUTION, AMERICAN INFLUENCE AND THE ROLE OF THE HIGH COURT

The framers of the Australian Constitution sought to give effect in the Constitution to their primary purpose, which was to create a federal nation in which the colonies as States would remain vital and independent political communities in their own right. To that end they provided for a new central government under the Constitution with specific and limited powers, intending to leave most areas of government activity under State control. In doing that they drew on American federalism and British style parliamentary institutions, each mediated through the colonies’ experience of self-government and the making of colonial constitutions over the previous century.

The model of American federalism was adopted because it was understood to be the first and best example of a modern federation. This model of federalism combined the idea of a strong, national government independent from the constituent elements of the federation with the idea that the national government’s capacity to act could be limited to defined heads of legislative power, leaving State legislative power otherwise unimpaired. The British parliamentary tradition also informed the institutions of national government. However, that tradition was modified through the combined effect of federalism and those elements of the colonial tradition which represented its evolution in a direction different from the more absolute majoritarianism which came to characterise the Westminster system of government in the nineteenth century. In the most general terms, the colonial experience of written constitutions and limited government diluted the fundamental principle of the English Constitution, parliamentary sovereignty, through a division of power set down in an entrenched, written constitution. More specifically, the Australian Senate represents an amalgamation of the colonial experience of bicameralism with the federal idea of a Senate with equal State representation derived from the United States, whereas, in the High Court, judicial review by colonial courts merged
with the idea of a constitutional court drawn from the model of the United States Supreme Court.

While the framers of the Australian Constitution did not specifically draw on the philosophy of limited government contained in *The Federalist*, they drew on the American model of federalism with a very clear idea of what they wished to achieve. The framers gave effect to an overarching federal principle in the Constitution that took account not only of the American federal theory, but America's experience of federalism as well. Drawing on that experience and their own experience of government they sought to improve on the original model and to give it greater theoretical coherence. For this reason, the proximate source of the federalism the Australian framers originally turned to is not found in *The Federalist* or even directly the American Constitution, but American federalism at the end of the nineteenth century, following a century of judicial review and after the American civil war. Over the nineteenth century the United States Supreme Court had transformed its role under the American Constitution into an active one in the political life of the United States on the back of a robust conception of judicial review through which it gave effect to a substantive jurisprudence of dual federalism. It was with dual federalism and the Supreme Court in the latter part of the nineteenth century that the framers of the Australian Constitution began in designing the Australian federal system. Under that model federalism was ultimately a matter for the courts, and the High Court, in its constitutional role, was the key institution through which the Constitution's overarching federal purpose was to be given continuing effect.

**THE FRAMERS' THEORY OF THE CONSTITUTION**

To talk of the framers' theory of the Constitution and the framers' theory of federalism is virtually one and the same thing. The Australian Constitution is above all a federal constitution. The purpose for which it was designed was to provide for an enduring and complete federal nation. At the time the Constitution was devised, 'it was taken for granted that the union should be along federal lines', an overwhelming majority of the framers regarding 'federation not as a stage, but as something more permanent', as Greenwood (1976: 39-41) noted. That intention was expressly stated at the start of the
convention process through which the Constitution was drafted. The first resolution put before the first convention held in Sydney in 1891 by Sir Henry Parkes provided:

That the powers and privileges and territorial rights of the several existing colonies shall remain intact, except in respect to such surrenders as may be agreed upon as necessary and incidental to the power and authority of the National Federal Government (Federation Debates, Sydney, 1891: 23).

The colonies had been fast developing as self-governing political communities during the latter half of the nineteenth century. It was that development which had stood in the way of earlier union when first proposed by Earl Grey: ‘[l]ocal politics, and the development of local institutions, engrossed the attention of the people; and probably no colony would have been prepared to accept the compromises and the partial sacrifice of local independence which a federal union would have involved’ (Quick and Garran, 1901: 99-100). Western Australia’s difficulty with joining the federation as an original State, reflects in part the fact that its local institutions were only just beginning their mature development in the form of responsible government at the time the federal process began in earnest in the 1890s. However, by then the federal movement in the other colonies was becoming a reality. They wanted to unite, but if they were going to do so then the relative independence and autonomy for which they had struggled would have to be guaranteed into the future. A national government could be created, but it would necessarily be one whose authority and powers were constitutionally limited, consistent with the first resolution before the convention of 1891. The characterisation by some from within the unitary preference tradition that federation represented a conservative victory over the forces of progress is false. The framers were concerned to protect the real interests of the colonies they represented and not in promoting conservative ideology (note La Nauze, 1972: 281-282).

At the time of federation there were three main federal models the framers could look to—the Swiss, the Canadian and the American. Switzerland had, from a confederation, become a federation in 1848 and its Constitution was revised extensively in 1874. The Canadian colonies had been transformed into a federation through the British North America Act 1867 (UK). The American
Constitution had been framed by representatives of the American States towards the end of the previous century in Philadelphia in 1787. It was the American model to which the framers ultimately turned.

Under the American Constitution a central government is established and provided with a list of specific, primarily concurrent, legislative powers, and supremacy within its sphere. All remaining powers belong to the States. The Swiss federation also conforms to this model. However, under the Canadian Constitution, in general terms, residual legislative power flows to the centre and it is the provinces’ powers that are listed and limited. Writing soon after federation, Inglis Clark (1901: 7) noted that these are the ‘two fundamentally distinctive patterns of federalism to one or the other of which it seems practically inevitable that every federal nation or community must substantially conform in the distribution of political authority’. It was to these two patterns of distributing power that the framers originally looked.

The Canadian scheme was the most obvious model for Australian federation insofar as it was a federation created among a number of British colonies linked by geography, which combined federation under the British Crown with British style parliamentary institutions. However, the negative response to Parkes’ expressed assumption at the Melbourne Australasian Federation Conference of 1890 that the Canadian scheme would be followed soon put paid to that idea. There was to be ‘no simple adoption of the Canadian model’ (La Nauze, 1972: 17).

The Melbourne conference was not considered highly significant by the time Australia federated, but it was here that the broad outline of the Constitution first began to take shape (note La Nauze, 1972: 19; Warden, 1992: 152). At the conference, Clark stated his view that he ‘would prefer the lines of the American Union to those of the dominion of Canada’, Canada being an example of ‘amalgamation rather than federation’ (Federation Conference, Melbourne, 1890: 106). Thomas Playford, James Lee Steere and John Cockburn expressed views similar to Clark’s (note Federation Conference, Melbourne, 1890: Playford at 71; Lee Steere at 119 and Cockburn at 134), ‘[a]ll men from
the smaller colonies', as La Nauze (1972: 17) commented. But Alfred Deakin also concluded late in the conference that:

The cardinal distinction between the United States and Canada is that in the United States the Central Government has its powers limited, while in Canada the Provincial Legislatures have their powers limited; and it appears to me that the model of the United States, preserving state rights with the most jealous caution, is that most likely to commend itself to the people of these colonies (Federation Conference, Melbourne, 1890: 252).

As Clark said, '[w]hat they [the Australian colonies] want is federation in the true sense of the word' (Federation Conference, Melbourne, 1890: 106), which meant federation on the American model, not the Canadian. He unfavourably contrasted the Canadian scheme with the American in the following terms:

The British North America Act, under which the Dominion of Canada was established, not only goes on the principle of defining the powers of the local Legislatures, as well as the powers of the Central Legislature, but also says that everything not included in the jurisdiction of the former is included in the jurisdiction of the latter, and it enables the Central Executive to veto the Acts of the local Legislatures. Well, I believe that, in the course of time, those who live to see the outcome will find the local Legislatures of the Dominion reduced to the level of the position of large municipalities, and that Canada will have ceased to be, strictly speaking, a federation at all (Federation Conference, Melbourne, 1890: 106).

By these criticisms, Clark pointed not just to the division of powers as problematical under the British North America Act, but also the extent to which it strongly favoured the central government by entrenching its constitutional supremacy through provisions for reservation and disallowance of provincial legislation by the Lieutenant Governor.9

For the convention in 1891 that followed the Melbourne conference of 1890, the delegates were to have the benefit of a draft constitution prepared by Clark. It

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9 Clark set out similar concerns regarding the Canadian model in a memorandum he prepared for Tasmanian delegates to the convention of 1891, dated 6 February 1891. In that memorandum, Clark noted that the effect of the Canadian model in its structure and key provisions was to 'practically make the Dominion of Canada much more nearly a unified community than a federation', whereas the Constitution of the United States, 'proceeds in the very opposite direction' (see further La Nauze, 1972: 27).
provided for federation on the American model of dividing legislative power, within a framework of constitutional monarchy and in a manner consistent with Australia's status, as it would be, as a dominion within the British Empire.

The convention started sitting on 2 March 1891. Following discussion over many days of the resolutions with which the convention opened, three committees—a Constitutional Committee, a Finance Committee and Judiciary Committee—were established to put the convention's resolutions into the form of a draft constitution. Overall responsibility for preparing a draft Constitution Bill was given to the Constitutional Committee. The work of the convention’s committees was brought together in a draft constitution prepared by a drafting sub-committee established for that purpose under the leadership of Sir Samuel Griffith and which reported to the Constitutional Committee (see generally La Nauze, 1972: 45-46). It was to Griffith that the main task of drafting fell and it was with Clark's draft that he began (La Nauze, 1972: 49, 76). Inglis Clark and Charles Kingston, and later Edmund Barton, who replaced Clark when he became ill, assisted Griffith in that task (La Nauze, 1972: 46; Quick and Garran, 1901: 129-130).

The draft constitution went before the convention on 31 March 1891, eight days after Griffith and the sub-committee he led had first begun the drafting process. Few amendments of substance were made. With this draft, '[t]he real work of the Convention was now practically finished' (Quick and Garran, 1901: 130). Griffith was seen as the main architect of the draft Constitution Bill that was the outcome of the convention (Quick and Garran, 1901: 130; Garran, 1924: 217; Deakin, 1944: 31 and 50; Lane, 1974: 194; note La Nauze, 1972: 74-75). Today, however, Clark's importance is increasingly recognised (see generally Haward and Warden (1995); note also Galligan, 1987: 50; La Nauze, 1972: 81; Reynolds, 1958). Griffith himself, two years after the convention, noted that the preparation of the Bill 'was not the work of any one man', acknowledging Clark's influence through his initial draft constitution and the work he was do on the

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10 Kingston had also prepared a draft constitution (see further La Nauze, 1972: 24, 26 and 295-298). Either Clark's or Kingston's draft could have served as a starting point for Griffith, but, as La Nauze (1972: 49) notes, 'he [Griffith] must have put Kingston's draft aside'. Kingston's was the derivative document and less consistent with the 'decisions' of the convention's Constitutional Committee.
drafting sub-committee, as well as the contributions of Barton and Kingston (quoted in La Nauze, 1972: 76).

From the beginning, neither the Canadian nor the Swiss models were to be a dominant influence, though the Swiss Constitution did provide the initial example of a referendum procedure for constitutional alteration. The Canadian model seemed altogether too centralised to satisfy the ambitions of the framers and the Swiss model was not going to attract great attention in the presence of the more commanding and familiar American one. The method of dividing powers under the American Constitution whereby the national government’s powers are limited to specific heads of power with the States otherwise retaining power was present in Clark’s draft constitution prepared before the 1891 convention and it remains the foundation of Australian federalism.

Many who have studied the Australian Constitution, seem to consider that was the end of the matter. The framers, having decided on the American model, somehow perfunctorily grafted it onto a Westminster style parliamentary system, and Australia has suffered the consequences ever since. Of the adoption of the American model, Dixon (1965: 44) said derisively that the framers ‘could not escape from its fascination’. Thomson (1988: 131) too refers to ‘the Framers’ often slavish adherence and devotion to the American model’ and Warden (1992: 152) to the ‘hegemony’ of American federal thought. But the framers did not just copy, plagiarise or otherwise take over unh thinkingly the American model of federalism. The choice of the American model was carefully considered and reflected the seriousness with which they undertook the task of building an Australian federation among the Australian colonies. As Garran (1897: 14) said, and no doubt many of the framers thought:

> Even the founders of the United States of America—the first great modern Federation—did not mean by federalism all we mean, and did not fully understand its import.

Garran was Secretary to the Drafting Committee at the 1897-1898 convention (La Nauze, 1972: 135; note Thomson, 1988: 121). While not a delegate to either convention, he was none the less influential. La Nauze (1972: 277) notes that ‘he was often assumed to have been officially a “father” of the Constitution’.
His contribution, both in his work as Secretary to the Drafting Committee and through *The Coming Commonwealth*, was expressly acknowledged at the end of the convention process in Melbourne (Federation Debates, Melbourne, 1898: 2520-2521).

In *The Coming Commonwealth*, Garran (1897: 15-16) defined federalism as, ‘binding a group of States into a Nation without destroying their individuality as States—a result which is effected by dividing the functions of government and the attributes of sovereignty between a central national government and a group of local state governments’. This is the conception of federalism which the framers had in mind in designing the Australian Constitution. It was not, as the framers saw it, what the Canadian Constitution achieved. The Canadian model suffered not only from being too centralised, but also on a more abstract level, from a lack of theoretical consistency. For the reasons that Clark first expressed in 1890, the framers believed Canada was neither a federation nor a unitary government, but ‘a mongrel between both’, as Barton put it when the second convention met in Adelaide in 1897 (Federation Debates, Adelaide, 1897: 952).

The framers’ preference for the American model of federalism over the Canadian represented a determination on their part to construct a ‘true’ federation. They saw the American form of federalism as embodying a structural federal principle perfectly designed to realise union and maintain State autonomy; not as one mechanism within a whole through which a theory of limited government was given effect. The essence of federalism on the framers’ understanding lay in the constitutional division of powers between the States and the centre: ‘[t]he indispensable function of a federal constitution is to distribute the powers of the Nation and the State—to draw the line between what the national government and what the state governments may do’ (Garran, 1897: 27). The best way to do that was to strictly demarcate the powers of the regions and the centre by specifying and so limiting, it was believed, the powers of the centre, leaving the regions with their general legislative power otherwise unimpaired. The United States represented for the framers of the Australian Constitution the first and best realisation of the federal principle in a complete system of government in its own right, through which a fully formed national
government acted with direct authority over the nation’s citizens on subjects of national concern, while at the same time maintaining and continuing regional autonomy. It offered a win-win solution to the problem of union. Through a federal union on this model the colonies believed they could do what they could not do alone, while retaining what they already had.

Having decided upon the model, the task of the constitution building was to provide for institutions of government at the federal level and to set out that government’s legislative powers, while also providing for the continuation of the colonial governments as States with their legislative powers otherwise unimpaired. This was effected for the States by continuing their Constitutions under section 106, subject to the Constitution. The powers of their Parliaments are reserved to them under section 107 to the extent that they have not been removed by the Constitution.

Determining the legislative powers of the Commonwealth was seen as a relatively straightforward task. In general terms the powers listed did not change greatly between the draft constitution of 1891 and the draft constitution which was the product of the 1897-1898 convention. Indeed, Griffith, in introducing the draft constitution to the 1891 convention, elaborated little on the powers of the Commonwealth contained therein noting that many ‘will be admitted as being powers which ought to be within the province of any federal legislature’ (Federation Debates, Sydney, 1891: 524). As to the powers of the States under the Constitution, he reassured delegates that their legislatures would not be deprived of their autonomy. Endorsing the American method of dividing power, Griffith declared it ‘unscientific’ and ‘impossible’ to enumerate the powers of the States, though he did provide examples of the breadth of power which remained with them:
Their constitutions, the borrowing of money, the complete control of the government of the state, all the laws relating to property and civil rights, the whole subject of public lands and mines, registration of titles, education, criminal law and its enforcement, hospitals and such matters, all local works and undertakings, municipal institutions, imposition of licenses, the administration of justice, both criminal and civil, and the establishment of courts, and an absolute power to dispose of their revenue in any way they think fit (Federation Debates, Sydney, 1891: 525-526).

Under section 51 of the Constitution as it was enacted in 1901, 39 heads of power are listed under which the Commonwealth may legislate, including an incidental power. They are a broad range of powers which reflect the influence of a range of sources, including the American Constitution and the British North America Act, as well as powers giving effect to the more specific concerns of the Australian colonies (note La Nauze, 1972: 50-52 and 282-287; Lucy, 1991). They were far from slavishly copied from the American instrument (Hunt, 1930: 255-256; Greenwood, 1976: 36-37). For the most part, the powers of the Commonwealth under the Constitution do not extend beyond powers that one would expect a central government to exercise. The subject matters of power include major ones such as defence, external affairs, taxation and immigration, but also more specific powers such as lighthouses, lightships, beacons and buoys. Among the important powers which were added to those originally included in substance in the 1891 draft constitution were two which were more unusual. At the Melbourne session of the 1897-1898 convention, power over conciliation and arbitration for the prevention and settlement of industrial disputes extending beyond the limit of any one State and power over invalid and old age pensions were added to the list. Some of the Commonwealth’s powers are expressly limited by federal considerations. The conciliation and arbitration power is an example, as are the Commonwealth’s powers over trade and commerce, banking and insurance. The Commonwealth’s legislative powers are for the most part held concurrently with

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11 Some had been included in the Federal Council of Australasia Act 1885 (UK), which established the ill-fated Federal Council (note Quick and Garran, 1901: 109-115; La Nauze, 1972: 2-4; Bennett, 1971: 65-67). While the existence of the Council reflected the fact that there were matters of growing common concern among the colonies, it was of such limited power and received such little support—New South Wales never joined and South Australia only for a time—that it came to nothing. Federation eclipsed and overtook its existence.
the States subject to the paramountcy of Commonwealth law under section 109, which provides that in the event of inconsistency between a State law and a Commonwealth law on a subject of concurrent power, Commonwealth law prevails. The Commonwealth was granted few exclusive powers. Section 52 provides for exclusive Commonwealth control of the seat of government, places acquired for public purposes by the Commonwealth and matters relating to Commonwealth public service departments and it is also a general provision relating to the Commonwealth's exclusive powers. Under section 90 the Commonwealth has exclusive power over customs, excise, and bounties. Exclusivity is also granted under section 114, which provides that States may not raise naval or military forces or tax the property of the Commonwealth, and section 115, which prevents the States from coining money.

The institutions of government at the federal level are set out, as in the American Constitution, in separate chapters dealing with The Parliament, The Executive Government and The Judicature respectively. The framers did not thereby import the strict separation of powers between those branches of government that exists under the American Constitution. That structure has been interpreted as providing for at least a separation of powers with respect to the judiciary (R v Kirby; Ex parte Boilermakers' Society of Australia (the Boilermakers' case) (1956) 94 CLR 254), but with respect to the legislature and the executive, they are blended, as in the British system and as they were under the colonial Constitutions. At the federal level of government British style parliamentary institutions were established and the conventions of responsible government incorporated into the Constitution, modified by the federal requirements of the system overall. The prime minister and ministers of state are drawn from Parliament and are responsible to it, as obliquely provided for under section 64 of the Constitution. The formal executive, represented by the Crown and generally embodied in the office of Governor-General, acts on the advice of the political executive, excepting under circumstances where the Governor-General may be required to exercise the so-called reserve powers.\textsuperscript{12}

\textsuperscript{12} It is generally accepted that the Governor-General may exercise on his or her own discretion certain reserve powers under extraordinary circumstances. They include the power to appoint or dismiss a prime minister and the power to refuse to act on advice to dissolve Parliament. The reserve powers of the Governor-General are discussed in detail in the Report of the Republic Advisory Committee (1993: Appendix 6).
and also excepting that before Australia became independent the Crown could act in some matters of Australian concern on the advice of British ministers.

The major federal modification of the parliamentary model was the constitutional limitation on legislative power granted the Federal Government. While responsible government was incorporated into the system, parliamentary sovereignty as it existed in England was not. The Commonwealth Parliament was created to be a sovereign parliament with plenary power, but only within that range of subjects that are granted to it under the Constitution. The corollary of this was that the executive power of the Commonwealth was also apparently limited, as executive power was seen at the time of federation as coextensive with legislative power (note Quick and Garran, 1901: 340).

Another and related modification was the constitutional role of the judiciary. On the constitutional theory the framers adopted, it was through the division of powers under the Constitution that the federal principle was given effect and a federal government created. As with the Commonwealth, the States' position in the federation was guaranteed by the law of the Constitution. Where either overstepped the boundary of their power, the courts, and ultimately the High Court, were there to push them back behind it, or so it was assumed. Unlike the British Parliament, the powers of the Commonwealth Parliament were limited by a written constitution and judicial review. Under the Constitution, the High Court, while being an ordinary court on the English model in the sense that it deals with the general law in its role as the highest appellate court for all Australian jurisdictions, is also a constitutional court modelled on the American Supreme Court.

The structure of Parliament itself also represents a modification of the classic Westminster parliamentary model. The design of the Commonwealth Parliament was not taken directly from Britain, but was mediated through the colonial experience of bicameralism combined with the idea of equal State representation in an upper house derived from the American system. Hence the Australian Parliament is constituted by two houses of virtually equal power: a lower house, the House of Representatives, popularly elected on a national basis and an upper house, the Senate, with equal State representation, but also
popularly elected within each State, the Senate limited only to not originating or amending money bills. The colonial experience of bicameralism alerted the framers to the possibility that the relationship between the executive and the legislature as it existed under the British system could be subverted by the creation of a powerful upper house. By adopting that model, albeit with provision for the resolution of deadlocks between the two houses under section 57, they implied that tension was an acceptable outcome and perhaps even a desirable one (note Sharman, 1990b: 213).

As Warden (1992: 144) notes, ‘[t]he protection of states’ rights was foremost in the minds of the majority of delegates to the conventions and that majority won most of the crucial divisions in the committees against the liberal nationalists’. By insisting on a Senate and judicial review by the High Court the framers provided for both a political and a legal solution to containing Commonwealth power. However, of these, it is judicial review that is the most significant. Under the Australian Constitution and on the theory informing it, it is the High Court and not the Senate that is the key institution through which the federal principle underlying the Constitution is to be maintained.

While the creation of the Australian Senate under the Constitution was inevitable, its role was also ambiguous (note Sharman, 1987: 92-93). Many delegates to the conventions perceived the Senate as an institution through which the States would be protected from an overreaching Commonwealth, but at the same time others did not see it as either a necessary or effective protection. In this regard, Galligan (1995: 81-84) notes the views expressed at the conventions by Deakin, among others, which sought to reassure delegates fearful of a compromise on the Senate’s powers that it was not through the Senate that States’ rights would be protected, but through the very structure of the Constitution itself. Reflecting the ambiguity around the Senate’s role, Galligan (1995: 89) argues that the value of the Senate lies in its potential to limit executive power. He suggests that the Senate should not be seen primarily as a States’ house, but one which serves ‘multiple purposes of governance’. He sees the Senate then as not so much an institution at odds with responsible government as a modification of it in the direction of a more consensus style of government. The link between federalism and the Senate is
not represented by the Senate as a protector of States’ rights, but in its consistency in a more abstract way with the power dispersing effects of federalism.

Warden (1992: 154 and 156-7), on the other hand, sees the Senate as an institution that was intended to represent directly State interests at national level. For Warden (1992: 154) the purpose of the Senate was to keep the Commonwealth within its ‘sphere’ (note also Crommelin 1995: 170). He argues that the Senate is the primary mechanism under the Constitution through which the framers expected the boundary between the States and the Commonwealth would be maintained, not the High Court.

The Senate originally neither dispersed power structurally nor represented the States directly. Whatever role the Senate was expected to perform either in controlling executive power or in protecting the States was overwhelmed by emerging party discipline early on in the federation (note, Garran, 1924: 218; Moore, 1933: 468-469; Rydon, 1985: 70). It was not until proportional representation for Senate elections was adopted in 1948 that a stronger basis was unintentionally provided for the Senate to fulfil the democratic purpose Galligan attributed to it (note Sharman, 1987: 94-95; Sharman, 1990b: 218-219; Lijphart, 1999). In terms of the framers’ intentions, both conceptions can find support in the historical record and the reality was, whether or not a States’ House was required under the Constitution on the federal theory informing it, the smaller colonies were not going to federate without it (Quick and Garran, 1901: 415).

Warden (1992: 152) rightly argues that the division of powers is the key to the framers’ theory of federalism. However, on his account, the model of federalism the framers adopted was flawed. Rather than protect the position of the States in the federation, it entrenches national power (Warden, 1992: 146-150). Warden ascribes to the framers a theory of federalism drawn from The Federalist, mediated through Bryce, which he believes incorporates the ambiguities of the American constitutional settlement relating to the compact theory of federalism and States’ rights; ambiguities which revealed themselves first in the discontent of the southern States expressed through theories of
nullification and secession and which ultimately culminated in civil war and the successful assertion of supremacy by the national government.

According to Warden (1992: 145-150) Bryce’s formulation of federalism ignored the lessons of the civil war and the gap in logic between Union ascendancy and the compact theory of federalism. He is right, of course, that the mechanistic notion of federalism that Bryce expounded is an inadequate explanation or description of federalism and that attempts politically and legally through the Supreme Court to contain the aspirations of the southern States originally failed. He is also right that the critical issue of the civil war and the position of the southern States received short shrift in Bryce's account. But it is not right to argue that Bryce simply returned to *The Federalist* to explain American federalism. It was not just the separate spheres of *The Federalist* that Bryce drew on, but also the contemporary conception of federalism given expression through the Supreme Court and reflecting the attempt during reconstruction to articulate a vision of federalism that reconciled national supremacy with States' rights, while denying that the Constitution was founded upon any 'compact' among the States (note Bryce, 1891: 314-317). That reconciliation is not something which received great or detailed attention in Bryce (and nor was his understanding one which particularly favoured the position of the States within the federation), but it is there, and perhaps it was sufficient to have alerted the framers of the Australian Constitution to the issue, for something did. It permeates the federalism the framers sought to give effect to in the Constitution.

The framers themselves and others closely involved in Australian federation were acutely aware of the American civil war and the tensions that gave rise to it, but they thought that they could deal with those through applying and refining an idea of federalism very similar to that which emerged in the United States following that war. The preamble to the Constitution itself declared that the States would 'unite in one indissoluble Federal Commonwealth' and, as Warden (1992: 147) himself notes, the framers believed the division of powers secured the place of the States within the federation. Warden is also right that many of the framers expected the Senate would ensure the integrity of that division, but
the logic of the division of powers as the framers saw it was not in politics so much as in law.

In *The Coming Commonwealth*, Garran (1897: 26) rejected the ‘treaty’ or ‘compact’ theory of federalism in favour of the ‘constitution theory’ of federalism, as he described it, ‘which holds that a Federation is something more than a ‘perfected alliance,’ and is, in fact, a completely organised ‘State’ or ‘Government’’. The High Court’s role, and the role of the courts more generally, was central to that conception of federalism. The assumption on which the whole model rests is that power can be divided legally through a constitution in such a way that State autonomy and independence is maintained at the same time that a national government is created. This is why Garran referred to the ‘constitution theory’ of federalism and why he went on to say:

> The duty of the Supreme Court [High Court], ... , as ‘guardian of the Constitution’, is the purely judicial one of interpreting the law. To do this, it has to test the validity of a lower law by a higher; and thus it preserves the balance of the Constitution by preventing the central government and the state governments from unauthorized encroachment (Garran, 1897: 66).

It is why Barton said:

> One of the strongest guarantees for the continuance and indestructibility of the Federation is that there should be some body of this kind [the High Court] constituted which, instead of allowing the States to fly to secession because they cannot get justice in any other way, will enable them to settle their differences in a calm judicial atmosphere (Federation Debates, Adelaide 1897: 25)

It is what Deakin meant when he said that ‘State rights’, ‘are enshrined and preserved under the Constitution and protected by the courts to be established under the Constitution’ (Federation Debates, Adelaide, 1897: 293).

Those points were not isolated, but represented the consensus at the conventions about the centrality of the division of powers under the Constitution to the federalism the framers gave effect to in the Constitution and the primary role of the High Court would play within the federation through maintaining the integrity of that division. Time and again these and a range of other delegates
made similar statements to the conventions. Josiah Symon, for instance, spoke of the High Court as safeguarding 'the liberties of the subject and the rights of the individual States against the encroachment of the legislature' (Federation Debates, Adelaide, 1897: 940). William Trenwith cautioned that 'unless we provide a competent tribunal to act as a custodian of the Constitution, the people will have doubts as to whether the Parliament will exceed the powers that were intended by the Constitution and thereby curtail the State rights about which we are all so anxious' (Federation Debates, Adelaide, 1897: 940). Henry Higgins stated that an 'independent and strong' High Court was required, 'especially as it has to decide between the States and the Federation and upon encroachments by the Federation upon the States' (Federation Debates, Adelaide, 1897: 953). William Downer referred to the experience of every permanent federation, and specifically the American, in eloquently supporting the 'necessity' of there being an independent and dignified tribunal 'to stand between the States and the Commonwealth' (Federation Debates, Melbourne, 1898: 275). The constitutional role of the High Court was defended even by delegates who did not 'pretend to possess any great legal knowledge', such as John Forrest from Western Australia. Late in the Melbourne session of the second convention, in the debate over appeal to the Privy Council, Forrest spoke of his understanding that the High Court would 'be the bond of union between the various states', but expressed his concern that 'the high position in the estimation of the people of this continent which we all desire it should occupy' would be 'destroyed' if appeals to the Privy Council were allowed except through the High Court itself (Federation Debates, Melbourne, 1898: 2338-2339). At the end of the convention process, in summing up the work of the second convention after the draft constitution had been adopted, Barton took time to emphasise the key constitutional role the High Court was expected to play in the federation:
... if you, after making a Constitution of this kind, enable any Government or Parliament to infringe or twist its provisions, then by slow degrees you may have that Constitution—if not altered in terms—so whittled away in operation that the guarantees of freedom which it gives your people will not be maintained; and so in the highest sense, the court you are creating here, which is to be the final interpreter of that Constitution, will be such a tribunal as will preserve the popular liberty in all these regards, and will prevent, under any pretext of constitutional action, the Commonwealth from dominating the states, or the states from usurping the sphere of the Commonwealth (Federation Debates, Melbourne, 1898: 2477).

Only some of the delegates to the conventions had direct knowledge of the American federalism and the role of the courts within it, though they included some of the most influential. Apart from Clark, La Nauze (1972: 275) lists Griffith, Barton, O’Connor, Isaacs, Higgins, Symon and ‘a few others’ as having such knowledge. Among them, only Isaacs could match Clark’s familiarity with the American system and its political and legal history (see generally La Nauze, 1972: 273-275; note Castles, 1995a: 15-18). However, for most, their knowledge was not direct, but was assimilated through debate and discussion at and surrounding the conventions and reliance on key secondary sources. Bryce was an important secondary source, but he does not give an account of American federalism which coincides with the Australian model in all respects and in key aspects it diverges significantly. Bryce eulogised Marshall and also to an extent national supremacy. It is true that he pointed out that the American Constitution was not just made by its framers, but also by the courts, and it is also true that he acknowledged the role of the judiciary in maintaining the federation, but then that making and maintenance on Bryce’s account had resulted in increasing centralisation of power, something about which Bryce was not overly perturbed (Bryce, 1891: 248-249, 316 and 380). This is not how the framers saw the dynamics of federalism or the role of the High Court. Garran in The Coming Commonwealth gives a better and more systematic account of federal theory, but more importantly, unlike Bryce’s, it accords not only more closely with the consensus expressed at the conventions about what federalism is and the role of the courts within it, but the American Supreme Court’s post-civil war jurisprudence of dual federalism, which that consensus so reflects. Perhaps Bryce’s The American Commonwealth was not as crucial to the framers’ deliberations as is so often assumed.
The proximate source for the framers’ conception of federalism and the role of the High Court within it is not directly found in the Constitution drafted in Philadelphia in 1787 or *The Federalist* written in support of it, but the model of the American federation a century and more later, after the civil war. In that model secession was denied, but at the same time the Supreme Court’s active role within the federation was asserted and accepted in its application of a jurisprudence of dual federalism through which the local independence and authority of the States within the Union was confirmed.

**TWO VISIONS OF AMERICAN FEDERALISM: NATIONAL SUPREMACY AND DUAL FEDERALISM**

Writing in 1905, before his appointment to the High Court bench, Higgins (1905: 560) described the constitutional jurisprudence of the United States Supreme Court as a ‘great and continuous stream of masterly decisions’. That view did not prevent him from presaging those arguments he would later deploy as a member of the High Court to oppose the implied immunities doctrine derived from those decisions. Nor were the decisions of the Supreme Court a continuous stream. The nineteenth century constitutional jurisprudence of the Supreme Court was developed in the context of the conflicting political demands associated with the establishment of the United States, the tensions between the Federal Government and the States and the enormous turmoil of the civil war. Two Chief Justices, John Marshall and Roger Taney, are representative of the competing approaches taken by the Supreme Court in the determination of federal disputes over that century.

Marshall’s approach was to defer to Congress, whereas Taney, while not radically departing from the jurisprudence of the Court under Marshall, supported a more robust version of federalism and a more active role for the Court in relation to the issues of federalism upon which it was called to adjudicate. By the 1890s, American constitutional law was dominated by a Supreme Court that saw itself as the guardian of the American Constitution, its role to act as arbiter between the Federal Government and State Governments and to maintain the place of each within the federation on the basis of a jurisprudence of dual federalism, originally developed by the Supreme Court.
under Taney in response to Marshall’s nationalism. It is in the Supreme Court as it had evolved in the latter part of the nineteenth century that we see the model for the High Court, and in dual federalism that we see the outline of the federalism the framers sought to give effect in the Australian Constitution.

MARSHALL AND NATIONAL SUPREMACY

Marshall’s tenure as Chief Justice of the Supreme Court was characterised by an undisguised nationalism combined with strong support for the vested rights of individuals to control their private property. It was these views which were to dominate the Court during his tenure, in spite of the fact that they often opposed the views of those who held executive office in the United States over that period. The principles of constitutional interpretation Marshall developed and which the Court of which he was Chief Justice applied cannot be described as constituting a federal jurisprudence. Marshall’s position was founded on the belief that a national purpose underlay the Constitution of the United States rather than any federal purpose, leaving no room for a federal jurisprudence to develop.

The first major case in which the Supreme Court under Marshall dealt with the relationship between the Federal Government and the State Governments was *McCulloch v Maryland* (1819) 17 U.S. (4 Wheat.) 315. In 1816 Congress passed legislation creating a Bank of the United States. The following year a branch was established in Baltimore, Maryland. The year after that Maryland legislated to tax all banks and bank branches in the State not chartered by the State legislature. McCulloch, the cashier at the Baltimore branch of the Bank of the United States, was sued for the amount of the tax after refusing to pay. The State court found for Maryland. The case went on appeal to the Supreme Court.

Two questions needed to be answered by the Court: first, could Congress incorporate a bank; and secondly, if Congress could, could Maryland tax it? The short answers were yes to the first and no to the second.
In the course of reaching the first conclusion, Marshall, in the judgment for the Court, set out the foundation for a broad interpretation of the scope of the powers granted the national government. Under the American Constitution the national government is ‘one of enumerated powers’, as Marshall noted. It contains no express power for Congress to incorporate a bank, but it does contain the powers:

... to lay and collect taxes; to borrow money; to regulate commerce; to declare and conduct war; and to raise and support armies and navies. The sword and the purse, all external relations, and no inconsiderable portion of the industry of the nation, are intrusted to its government (*McCulloch v Maryland* (1819) 17 U.S. (4 Wheat.) at 407).

Granted such important powers, Marshall stated the national government must also have, as an incident to them, power to give them effect: ‘a government, intrusted with such ample powers, on the due execution of which the happiness and prosperity of the nation so vitally depend, must also be intrusted with ample means for their execution’ (*McCulloch v Maryland* (1819) 17 U.S. (4 Wheat.) at 408). Congress has the power to choose the means through which its ‘great powers’ will be executed, and incorporation of a bank was among those means:

Let the end be legitimate, let it be within the scope of the constitution, and all means which are appropriate, which are plainly adapted to that end, which are not prohibited, but consist with the letter and spirit of the constitution, are constitutional (*McCulloch v Maryland* (1819) 17 U.S. (4 Wheat.) at 421).

The basis for Marshall's reasoning was general and he used it in effect to argue for a broad interpretation of the necessary and proper clause in the United States Constitution.13 State banks could have performed the banking functions the national government required, but Marshall found that ‘necessary and proper’ did not mean absolutely necessary. Rather than the necessary and proper clause constraining the breadth of any implied power for Congress to choose the means through which it would give effect to its powers, the opposite appeared true. On Marshall's reasoning, it was necessary that the clause be

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13 'The Congress shall have power ... [t]o make laws which shall be necessary and proper for carrying into effect the foregoing powers, and all other powers vested by this Constitution in the government of the United States or any department or officer thereof' (Article I, section 8 (18)).
not so confined. The implied power overrode any narrow interpretation that might be put on the words ‘necessary and proper’:

It must have been the intention of those who gave these powers, to insure, so far as human prudence could insure, their beneficial execution. This could not be done, by confining the choice of means to such narrow limits as not to leave it in the power of congress to adopt any which might be appropriate, and which were conducive to the end. This provision is made in a constitution, intended to endure for ages to come, and consequently, to be adapted to the various crises of human affairs. To have prescribed the means by which government should, in all future time, execute its powers, would have been to change, entirely, the character of the instrument, and give it the properties of a legal code (McCulloch v Maryland (1819) 17 U.S. (4 Wheat.) at 415).

Important in the argument that Marshall developed for a broad reading of national power was the supremacy of the laws made by the United States under the Constitution, an ascendancy given effect in the supremacy clause, but ultimately derived from the people themselves. Marshall argued that the American Constitution was not formed by the States, but was an expression of the will of the American people. It was from the people that the Constitution drew its authority and through them that the States were bound to the Union:

... the government of the Union, though limited in its powers, is supreme within its sphere of action. This would seem to result, necessarily from its nature. It is the government of all; it represents all, and acts for all. ... The government of the United States, then, though limited in its powers, is supreme; and its laws, when made in pursuance of the constitution, form the supreme law of the land, ‘anything in the constitution or laws of any state to the contrary notwithstanding’ (McCulloch v Maryland (1819) 17 U.S. (4 Wheat.) at 405-406).

National supremacy was to play a more pivotal role in the reasoning through which the State tax on the bank was found invalid. If the Congress had the power to create a bank, but the State the power to destroy it through taxation, then State power had to give way. That was ‘the unavoidable consequence of

14 This Constitution, and the laws of the United States which shall be made in pursuance thereof; and all treaties made, or which shall be made, under the authority of the United States, shall be the supreme law of the land; and the Judges in every State shall be bound thereby, anything in the Constitution or laws of any State to the contrary notwithstanding’ (Article VI, section 2).
that supremacy which the constitution has declared', a supremacy which left the States with ‘no power, by taxation or otherwise, to retard, impede, burden, or in any manner control the operations of the constitutional laws enacted by Congress to carry into execution the powers vested in the general government’ (McCulloch v Maryland (1819) 17 U.S. (4 Wheat.) at 436). As to how destructive the tax actually had to be, Marshall famously declared, ‘[w]e are not driven to the perplexing inquiry, so unfit for the judicial department, what degree of taxation is the legitimate use, and what degree may amount to the abuse of power’ (McCulloch v Maryland (1819) 17 U.S. (4 Wheat.) at 430).

The decision that the law establishing the tax, which was in fact a requirement that the bank’s notes be on stamped paper provided by Maryland, was unconstitutional and void, rested on the principle that the power of a State to tax is coextensive only with State sovereignty and ceases once in contact with the sphere of national sovereign power. National power was not necessarily constrained in the same way. Marshall noted that national sovereign power was derived from the people as a whole, not merely those of one State, and that whole was represented only in the Congress:

In the legislature of the Union alone, are all represented. The legislature of the Union alone, therefore, can be trusted by the people with the power of controlling measures which concern all, in the confidence that it will not be abused (McCulloch v Maryland (1819) 17 U.S. (4 Wheat.) at 431).

In Gibbons v Ogden (1824) 22 U.S. (9 Wheat.) 1, another leading Supreme Court case on the relationship of national to State power during Marshall’s tenure as Chief Justice, on this occasion in the context of the commerce clause, the broad construction of national power Marshall adopted in McCulloch v Maryland was continued and strict construction as a method of constitutional interpretation was expressly rejected. Marshall, delivering the majority opinion of the Court, dismissed that approach with a typically well turned phrase, arguing that its application would, ‘explain away the constitution of our country, and leave it, a magnificent structure, indeed, to look at, but

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15 ‘The Congress shall have power ... [t]o regulate commerce with foreign nations, and among the several States, and with the Indian tribes’ (Article I, section 2 (3)).
totally unfit for use’ (*Gibbons v Ogden* (1824) 22 U.S. (9 Wheat.) 1 at 222 and note 187-189). It is true that in *Gibbons v Ogden* Marshall did restrict the power of Congress to regulate commerce ‘among the several States’ to ‘that commerce which concerns more states than one’ (22 U.S. (9 Wheat.) at 194), but ‘concerns’ is a fairly open field and one that within Marshall’s jurisprudence of national supremacy Congress was competent to determine the scope of rather than the Court:

> The wisdom and the discretion of congress, their identity with the people, and the influence which their constituents possess at elections, are, in this, as in many other instances, as that, for example, of declaring war, the sole restraints on which they have relied, to secure them from its abuse. They are the restraints on which the people must often rely solely, in all representative governments (22 U.S. (9 Wheat.) 1 at 197).

This is a majoritarian argument for judicial deference to the will of the national legislature, leaving federal issues to be resolved politically (note Kelly, Harbison and Belz, 1991: 196). At best for the States, Marshall recognised they had a power to legislate on matters touching interstate commerce in the absence of national legislation (note *Gibbons v Ogden* (1824) 22 U.S. (9 Wheat.) at 209-210).

Marshall was Chief Justice from 1801 until he died in 1835. The two cases discussed above are among the most important of the many decided on federal matters during that period and give a sense of the constitutional jurisprudence the Supreme Court developed under Marshall in relation to those issues. Not only was the Marshall Court prepared to contain State power by striking down State legislation and overturning decisions of the State courts by reference to the Constitution, but it also read national power in such broad terms that it was relatively unconstrained. During Marshall’s long tenure as Chief Justice the Supreme Court deferred to Congress and augmented national power on the basis of a jurisprudence of national supremacy.
TANEY AND DUAL FEDERALISM

Taney was appointed Chief Justice of the Supreme Court in 1835. Under Taney the Court deferred less to Congress and sought to rise above the fray of intergovernmental conflict through interpreting the Constitution in a way which accommodated the interests of the States and the Union. The theoretical foundation of that approach is referred to as ‘dual federalism’, by which was meant a commitment to the United States as a nation combined with the idea that sovereignty was shared and divided between the national government and States (note Kelly, Harbison and Belz, 1991: 202 and 212; Corwin, 1988). This did not mean that federal supremacy was abandoned, but it was balanced by the constitutional recognition of an autonomous sphere of State action, something which had been effectively absent in Marshall’s interpretation of the Constitution.

Corwin (1988: 249-251) noted that the American Constitution provides two opposing answers to the question of, where there is conflict between the levels of government in the United States, which government prevails? The first is found in the supremacy clause, which declares the Constitution and valid laws of the United States ‘the supreme law of the land’. Looking to that foundation for deciding the question tends to favour the national government. The second is found in the Tenth Amendment, ‘[t]he powers not delegated to the United States by the Constitution, nor prohibited by it to the States, are reserved to the States respectively, or to the people’. In answering the question by reference to the Tenth Amendment a foundation is provided for arguing that the powers ‘reserved’ to the States may of themselves constrain the scope of federal legislative power.

Marshall gave prominence to the first at the expense of the second, considering the Tenth Amendment merely declaratory (note McCulloch v Maryland (1819) 17 U.S. (4 Wheat.) at 406), whereas following Taney’s appointment as Chief Justice, national supremacy was tempered by the notion of equality between the States and the national government and a preparedness to take into account State power in construing the scope of national power. Under Taney the Supreme Court developed a jurisprudence which gave much greater
recognition to the ‘reserved powers’ of the States, sometimes referred to as the State police power or State sovereignty, which national legislation could not invade, than had the Court under Marshall (note Corwin, 1988; Kelly, Harbison and Belz, 1991: 234).

This approach reflected a conception of the federal system in which a degree of independent power was provided not only to the national government, but also to the States, the Supreme Court being the institutional mechanism through which the power of each was guaranteed. Whereas under Marshall the Supreme Court deferred to Congress and acted as a national institution promoting national imperatives, interpreting the Constitution as if it embodied a national purpose, the Court under Taney took a much more equal approach. The Court was not so much a national institution as a federal one, which, in exercising judicial power under the Constitution, was required to act as impartial arbiter in conflicts between the States and the national government, keeping both within their constitutional boundaries. As Corwin (1988: 251) said of the Taney Court’s constitutional jurisprudence:

Yet this did not signify that the states, acting through either their legislatures or their courts, were the final judge of the scope of these ‘sovereign’ powers. This was the function of the Supreme Court of the United States, which for this purpose was regarded by the Constitution as standing outside of and over both the national government and the states, and vested with authority to apportion impartially to each center its proper powers in accordance with the Constitution’s intention.

Dual federalism was a fine line to tread for the Supreme Court in the context of the tensions that would give rise to the civil war. The theory as applied and developed by the Court under Taney was for the most part a moderate one, except in relation to the enormously important issue of slavery. Taney’s commitment to slavery aggravated rather than defused the tensions that gave rise to the civil war (note Kelly, Harbison and Belz, 1991: 223). That commitment found its most infamous expression in the Dred Scott case (Dred Scott v Sandford (1857) 60 U.S. (19 Howard) 393) in which the property rights of slave owners were asserted over the individual rights of slaves, a decision, as Bryce (1891: 257) noted, which ‘did much to precipitate the civil war’.
Neither *Dred Scott* nor the civil war put an end to dual federalism. It survived well beyond Taney’s tenure as Chief Justice and was significant in the process of reconstruction following the war. The post-civil war dual federalist doctrine was set out in a number of cases. In *Lane Co v Oregon* (1868) 74 U.S. (7 Wall.) 71 Chief Justice Chase referred to the Constitution as representing ‘a more perfect union’ created by the people to establish a supreme national government, but only within the scope of its powers, so reserving to the States an independent existence and extensive powers:

The people of the United States constitute one nation, under one government; and this government, within the scope of the powers with which it is invested, is supreme. ... But in many articles of the Constitution the necessary existence of the States, and, within their proper spheres, the independent authority of the States, is distinctly recognized. To them nearly the whole charge of interior regulation is committed or left; to them and to the people all powers not expressly delegated to the national government are reserved (74 U.S. (7 Wall.) at 76).

In *Texas v White* (1868) 74 U.S. (7 Wall.) 700, Chase asserted the indissolubility of the United States at the same time as confirming State autonomy:

But the perpetuity and indissolubility of the Union by no means implies the loss of distinct and individual existence, or of the right of self-government by the States. ... It may be not unreasonably said that the preservation of the States and the maintenance of their governments are as much within the design and care of the Constitution as the preservation of the Union and the maintenance of the National Government. The Constitution, in all its provisions, looks to an indestructible Union composed of indestructible States (74 U.S. (7 Wall.) at 725).

It was the Supreme Court’s task to ensure that it remained so.

Not long after *Texas v White* was decided, the Supreme Court found in *Collector v Day* (1871) 78 U.S. (11 Wall) 113, contrary to dicta in *McCulloch v Maryland*, that the implied immunity the national government enjoyed from attempts by the States, ‘by taxation or otherwise, to retard, impede, burden, or in any manner control, the operations of the constitutional laws enacted by congress’, was reciprocal. Federal taxation was held not to apply to a State
judge. While Marshall's jurisprudence of national supremacy protected the national government from the States, dual federalism protected the States equally from the national government. Within the jurisprudence of dual federalism the Supreme Court's role was to act as a neutral arbiter between the two.

Dual federalism did not, however, survive the New Deal. Severe economic circumstances combined with a federal government determined to push through its programmes, saw the Supreme Court of that time effectively overturn the jurisprudence of dual federalism. In doing that the Court returned to the jurisprudence of national supremacy that had been originally developed under Marshall. One of the leading cases is United States v Darby (1941) 312 U.S. 100, which concerned the Federal Fair Labour Standards Act 1938. This Act provided for certain minimum working conditions and wages for employees engaged producing goods for interstate commerce. Two major issues were before the Court. The first was whether Congress could regulate interstate shipping of manufactured goods. The second related to the exclusion of products produced by child labour from interstate commerce. On both issues the Court found for the Federal Government. As Corwin (1988, 253) noted:

... Chief Justice Stone went straight back to Marshall's opinions in McCulloch v Maryland and Gibbons v Ogden, extracting from the former his latitudinarian construction of the 'necessary and proper' clause and from both cases his uncompromising application of the 'supremacy' clause.

One of the interesting things about the modern examination of judicial review in the United States is that some American scholars look to Marshall's jurisprudence as providing the foundation for a less active judicial role than presently adopted by the Supreme Court (Clinton, 1989; note also Wolfe, 1986). These arguments arise in the context of the last century in which the Court developed a liberal rights jurisprudence in interpreting the American bill of rights that saw it play an increasingly active role in containing and controlling the political branches of government (see, for example, Brown v Board of Education (1954) 347 U.S. 483). The judicial review of Marshall can be looked at with some fondness under these circumstances because of the degree to which he, while affirming judicial power, did not use it to actively contain executive or
congressional power. Issues of federalism in this debate appear as something of a dead letter insofar as the influence of Marshall's doctrines have been ascendant in that area since the early 1940s. It appears that what some contemporary critics of an active Supreme Court would like to see is the Marshall Court's dominant approach to federal issues applied to the bill of rights, leaving rights issues to be settled as political questions, much as issues of American federalism have now been left to that field.16

DUAL FEDERALISM IN THE AUSTRALIAN CONSTITUTION

The key to the success of the theory of federalism which the framers adopted and refined was a constitutional division of powers protected by the courts and principally the High Court. Their model reflected the experience of federalism in the United States and the role of the Supreme Court as 'Guardian of the Constitution' as it had developed over the nineteenth century. The shifts which occurred over that century and the ambiguities in American federalism which the framers believed they had resolved are represented in Quick and Garran's summary of the High Court's role, which sees the role of the United States' Supreme Court as Marshall saw it, while claiming for the High Court a role like that of the Supreme Court first under Taney and later following the civil war:

The High Court, like the Supreme Court of the United States, is the "guardian of the Federal Constitution;" that is to say, it has the duty of interpreting the Constitution, in cases that come before it, and of preventing its violation. But the High Court is also—unlike the Supreme Court of the United States—the guardian of the Constitutions of the several States; it is as much concerned to prevent encroachments by the Federal Government upon the domain of the States as to prevent encroachments by the State Governments upon the domain of the Federal Government (1901: 725).

The New Deal denial of federalism as a relevant principle in the task of interpreting the Constitution was affirmed by the Supreme Court in Garcia v San Antonio Metropolitan Transit Authority (1985) 469 U.S. 528 at 550: 'the principal means chosen by the Framers to ensure the role of the States in the federal system lies in the structure of the Federal Government itself', though gestures towards a limited federal jurisprudence have been made since then (New York v United States (1992) 505 U.S. 144 and United States v Lopez (1995) 514 U.S. 549; note Powell, 1993; Tolley and Wallin, 1995). In United States v Lopez the Court held by a 5-4 majority that the Federal Gun Free School Zones Act 1990, which made it an offence for an individual to knowingly possess a firearm in a place known to that person to be a school zone, was invalid as it did not come within Congress' commerce power.
But Warden's claim is that the framers adopted a theory of federalism derived from *The Federalist* as given contemporary expression in Bryce's *The American Commonwealth*, which, far from protecting the States, entrenched national supremacy (Warden, 1992). Arguing that the Senate was to be the primary mechanism through which the States and Commonwealth were kept within their 'separate spheres' on his account of the framers' theory of federalism, Warden (1992: 149-150 and 154-157) contends that, with the failure of the Senate to fulfil the framers' expectations as he sees them, the High Court was left to give effect to the logic of national supremacy apparently embedded in the theory.

The problem with Warden's argument is that the theory of federalism the framers adopted was not simply an abstract theory derived from *The Federalist* or from Bryce, but one which reflected the post-civil war conception of federalism in the United States in which the judiciary played such a crucial role. Understandably separateness between the States and the national government within the Union continued to be emphasised during the period of reconstruction after the conflict of the civil war and within the theory of dual federalism (note Elazar, 1962: 11-24). The idea of separateness also found its way to Australia (note Garran, 1897: 66-69), and it is certainly there in Bryce, but most important are the other aspects of the system which came with it. They are a conception of a federation as a whole and distinct system of government which at one and the same time creates a union composed of a fully formed national government, but one of defined and limited powers, and regional governments which retain a significant degree of independence and autonomy, the key to the system being the entrenchment of the division of powers in a written constitution the maintenance of which is entrusted generally to the courts and ultimately a supreme constitutional court. Under this theory as applied in Australia it is not the Senate, but the High Court that closes the federal circle. It does this not by keeping the governments of the federation in their separate spheres but by ensuring that those governments operate, whether independently or interdependently or whether in conflict or agreement, within the boundaries of governmental power provided and protected under the Constitution. Insofar as the High Court has not done that, it is less a fault of design than an abrogation of the Court's duty under the Constitution.
The real problem for the framers' theory of the Constitution is not in their theory of federalism, but in their mixing it with responsible government (note Sharman, 1990a). What the Australian framers failed to realise, unlike their American counterparts (albeit through a combination of design and accident), is that the separation of powers through which governmental power is dispersed among the institutions of government within the States and the national government is complemented and reinforced by the power dispersing effects of federalism. The American system overall has a relatively high degree of philosophical coherence. The purposes and principles underpinning the Australian Constitution are clear enough, but they cannot be said to amount to a theory of government with the same degree of philosophical coherence. There is tension between the competing constitutionalisms represented by the majoritarianism of Australia's parliamentary institutions and the consensual elements of the system through which that majoritarianism is constrained, a tension which has exercised the minds of so many who have examined the Australian Constitution and which has been given expression in the various strands of the dual constitutional heritage thesis.

However, while there is tension in the competing logics of the majoritarian and consensual aspects of the system, the Australian Constitution is far from radically incoherent: quite the opposite. There is a real coherence in the logic of the system overall as a result of the coincidence between colonial history and federal purpose in the design of the Australian Constitution, which on the whole transcends the inconsistencies so often focused on by those who accept the dual constitutional heritage thesis. The Constitution is informed by the traditions of parliamentary government on the Westminster model and American federalism, but these traditions were neither appropriated nor unthinkingly combined. First, it was not the federalism of the United States given form in its Constitution in the eighteenth century that is the proximate source for the Australian model, but the post-civil war federalism of the United States given effect by an active Supreme Court through a jurisprudence of dual federalism. Secondly, the proximate source for the parliamentary model adopted by the framers is not the Westminster Parliament, but the Parliaments of the colonies. Thirdly, the colonial tradition dovetails into the federal in terms of providing the
foundation for federation and representing an experience of limited government compatible with federation.

Federation was not an abstract phenomenon for the framers, but came about for real reasons and to serve real interests. The modifications of the Westminster model in the colonial constitutions combined with federal principle in the Australian Constitution to provide a constitutional structure through which the core principle of the English Constitution, parliamentary sovereignty, is limited in its application and made subsidiary to the Constitution's overarching federal principle. The experience of constitution-making and colonial self-government in the Australian colonies and federalism, which itself was the only form of union that the colonies would countenance given their experience of self-government, moderates structurally and institutionally the majoritarian logic that there is within the national Parliament, so that the logic of the system overall tends towards one of limited government on a consensual model. Far from the system being driven by a logic of national supremacy as Warden suggests, it is the opposite. The logic of the institutions within the system contains the executive power of the national government to a far greater extent than exists in Westminster, and federalism generally disperses governmental power among the constituent governments of the federation.

Indeed, Clark set in motion a Constitution with his draft constitution for the first convention in Sydney in 1891, which, at least initially, did not have to follow the English model (note Galligan, 1987: 51; Roe, 1995: 96-97). Clark desired a constitution sufficiently 'elastic', 'so that if it is found that responsible government, as we understand it, cannot be worked under the constitution, there may be room and opportunity left to adopt some other system'; a constitution which allowed for a federal executive drawn from other than the ranks of the Commonwealth Parliament to emerge (Federation Debates, Sydney, 1891: 244). The draft constitution adopted by the convention of 1891 did not close the door on that possibility, requiring only that members of the Government, 'shall be capable of being chosen and of sitting as Members of either House of Parliament' (Commonwealth of Australia Bill, chapter II, clause 4, Federation Debates, Sydney, 1891: 955). That was to change at the later conventions when responsible government was written into the Constitution,
however sparsely, in the requirement, under section 64, that ‘no Minister of State shall hold office for a longer period than three months unless he is or becomes a senator or a member of the House of the Representatives’. Nonetheless, the model of limited as opposed to majoritarian government in the frame of the Constitution set there by Clark is embedded in the dominant logic of the system through which the majoritarianism of responsible government is modified and contained.

Moreover, whatever inconsistencies may exist in the operation of the Commonwealth Parliament, the nature of the federal system to which the Australian framers sought to give constitutional form is clear, as is the role of the courts and the High Court, in particular, within it. For all the general philosophical coherence underlying the American Constitution, the nature of the relationship between the States and the national government and the answer to the question of how conflict between the two would be resolved was uncertain under the original American constitutional settlement (note Claus, 2000). The answer provided through the Supreme Court over the nineteenth century was an evolving one which saw the Supreme Court eventually develop an active role in maintaining the federal system and the place of the States within it. It was this role which the framers envisaged the High Court performing under the Australian Constitution. As Norris (1975: 14) said:

The framers took the American Supreme Court, as it appeared in the last decade of the nineteenth century, as their model. They expected the High Court to function as an independent brake on the central parliament and government, stopping any possible excesses (Norris, 1975: 14)

Castles (1988: 380-381) also has noted that the role which the framers expected the High Court to perform within the Australian federation may have ‘owed more in fact to the American civil war and its consequences than abstract theories on the nature of judicial authority’, consequences which resulted in ‘a more affirmative role’ in government by the American Supreme Court.

The framers of the Australian Constitution recognised the likelihood of conflict among the governments of the Australian federation and clearly provided for its resolution through the High Court where that conflict could not be resolved
politically. There is little ambiguity about the role of the courts generally and the constitutional role of the High Court in particular under the Australian settlement. On the theory underlying the Australian Constitution, the High Court is the key institution through which such intergovernmental disputes would be finally resolved and the Constitution maintained.

The framers wanted to create a ‘true’ federation. They wanted to do that because in uniting the Australian colonies they were determined to retain the relative autonomy and independence that the colonies had only recently gained from Britain. The framers looked to the American model of federalism as it operated in the United States in the late nineteenth century for reasons which suited that end and adapted it to their understanding and experience. It combined the idea of a strong, national government with continuing regional autonomy guaranteed by a constitutional division of powers through which the national government’s powers were specified and limited. This model was endorsed as the most appropriate one for the new Australian Commonwealth because it reflected and satisfied the concerns of the framers to lay a solid foundation for the creation of a new nation while ensuring that the colonies in their transformation into States would continue as independent political communities within the Commonwealth. The division of powers was enshrined in law through a Constitution and, hence, if politics failed to contain intergovernmental conflict within the federation the High Court necessarily would, or so they believed.
CHAPTER 4
‘GUARDIAN OF THE CONSTITUTION’
THE HIGH COURT, FEDERALISM AND THE MEANING OF JUDICIAL REVIEW

In the last chapter I argued that the High Court was the key institution through which federalism under the Australian Constitution was to be maintained, not the Senate. This argument is not universally accepted, as Warden’s thesis illustrates. However, if the sources and theory of the Constitution are examined the central role of the Court seems incontrovertible. The High Court closes the federal circle in theoretical terms in a way that the Senate simply cannot. On the framers’ theory of federalism the Senate was federalism’s insurance policy, the High Court its guarantee.

There was greater certainty about the role of the courts in maintaining the Australian Constitution than existed in the United States at the time the Constitution of the United States was drafted and ratified. That certainty itself reflects the evolution of the American federal system over the nineteenth century and the role which the Supreme Court came to perform within that system as ‘supranational and suprapolitical guardian of the Constitution’ (Kelly, Harbison and Belz, 1991: 238). At the end of the nineteenth century when the Australian Constitution was drafted, it was accepted in the United States that not only was it within the duty of the courts to maintain the Constitution by reviewing government action by reference to the Constitution, but that role involved the development and application of a substantive federal jurisprudence. That jurisprudence is the proximate source for the framers’ conception of federalism and the High Court’s constitutional role.

However, the American example was not simply copied by the Australian framers, but was taken over by them and made their own. The influences on the making of the Australian federal system are diverse and cannot be reduced to a single source. What is clear is what the framers wanted to do. That was to create an effective national government, while retaining for the States a
significant degree of the local control they had struggled for and gradually gained from Britain. It was the contemporary American system as mediated and understood through the framers’ own understanding and experience of government and law which seemed to promise that outcome. It was a system refined over the long process of making the Australian Constitution, resulting in a constitution that embodied a theory of federalism through which was sought a permanent union embracing a powerful national government. However, it was a system in which the national government was to be one limited in the subjects over which its power could be exercised and the colonies transformed into States were to retain substantial local legislative authority. Integral to the framers’ theory of federalism was their developing understanding of the crucial role the High Court would perform within the federation as a constitutional court.

THE MAKING OF THE HIGH COURT: COURT OF APPEAL AND CONSTITUTIONAL COURT

Deakin (1944: 31) reported in *The Federal Story* that the response of the 1891 convention to the work of its Judiciary Committee was equivocal in relation to only one matter, ‘the right of appeal to the Privy Council which it proposed to abolish being the only subject of any feeling’, and that remained the case. The judicature sections of the Constitution occasioned relatively little debate at the conventions of the 1890s at which the Constitution was drafted. There were few substantial changes from the original draft completed by the Judiciary Committee at the 1891 convention to what was sent to London nine years later. The only sections that presented significant difficulty were those relating to appeals to the Judicial Committee of the Privy Council, sections around which national feeling, Imperial attachment and private interest clashed. From the beginning the idea of creating a national court of appeal came together with the idea of creating a constitutional court modelled on the American Supreme Court.

Prior to federation a number of proposals for a national court of appeal for the Australian colonies had been made in the context of attempts to bring the colonies closer together. The first came from the Committee of the Privy Council in 1849, which had been established to enquire into constitutional
changes for the Australian colonies (Quick and Garran, 1901: 85; note also Moore, 1902: 20; Bennett, 1971: 166; Bennett, 1980: 3-4). As with the general federal proposals made at the time, it was not realised. Subsequent proposals from the colonies themselves for closer union also included suggestions that a national court of appeal be established, but they also came to nothing (note Bennett, 1971: 166; Bennett, 1980: 4-5; Moore, 1902: 34-35 and 245).

With the movement towards federation in the 1890s, desire for a national court of appeal combined with the belief that a constitutional court was a necessary concomitant of Federation. Under the proposed constitution drafted at the Sydney convention in 1891, Parliament was empowered to create a system of federal courts to apply federal law, including a ‘Supreme Court of Australia’, which, like the United States’ Supreme Court, was granted original jurisdiction in cases arising under the Constitution or the laws of the Commonwealth. Unlike the American Supreme Court, the Australian Supreme Court was also designed to be a final court of appeal on all matters of Australian law whether State or federal.

A federal supreme court and a federal court system were perceived by many of the framers of the Australian Constitution as crucial to the proper operation of a federal system. Without these institutions they thought the national government would be neither whole nor complete. This is the reason why from early on in the process of federation a number of influential delegates to the conventions argued for a separate federal judiciary. At the Melbourne conference in 1890 preceding the 1891 convention, Deakin, drawing on Bryce, argued that, beyond any ambition to establish a court of appeal for Australia, federation required a separate federal judiciary as a primary and essential means through which the national government would act independently and directly on the Australian people (Federation Debates, Melbourne, 1890: 89-92; note Bryce, 1891: 225-226 and 318-319; Galligan, 1987: 49). At the 1891 convention, Clark supported Deakin in putting the case for a separate federal judiciary:
You must have an independent legislature, an independent executive, and an independent judiciary, and you can have only a mutilated government if you deprive it of any one of these branches. I therefore hope to see a complete system of federal courts, distinct from the provincial courts (Federation Debates, Sydney, 1891: 253).

Clark’s influence on the overall structure and wording of the Australian Constitution has already been referred to. His influence is most obviously seen in the judiciary provisions of the Constitution (Galligan, 1987: 50; Haward, 1995: 51 and 56; note Castles, 1995b: 33-36; Reynolds, 1958).

At the 1891 convention, responsibility for the drafting of the proposed constitution lay with the convention’s Constitutional Committee, but the Judiciary Committee was charged with the task of initially preparing the judicature clauses. Under the chairmanship of Clark, the Judiciary Committee made recommendations regarding the judicature clauses of the proposed constitution that closely reflected the draft constitution Clark had prepared before the convention (La Nauze, 1972: 56; note Bennett 1980: 6-7). Clark was keen to see established a federal government consistent with the ideas underlying the American constitutional settlement, modified to reflect Australian experience. In terms of the judicature clauses, those modifications included the ‘innovation’ of creating a federal supreme court that would also be a final court of appeal for all Australian jurisdictions. Acceptance of even a limited appeal to the Privy Council was not an outcome Clark favoured, though it was one he was to concede (Federation Debates, Sydney, 1891: 253-254).

La Nauze (1972: 56) notes that Deakin referred in correspondence to the recommendations of the Judiciary Committee as ‘not thought clear or complete’ and ‘roughly handled’, although Deakin’s public assessment of the Committee was that it ‘did its work well’ (Deakin, 1944: 31). Its recommendations in any case received the attention of the Constitutional Committee’s drafting sub-committee led by Griffith. An important phase of the sub-committee’s work took place while meeting on the yacht Lucinda over the Easter break in 1891, and, at that point, largely without Clark’s involvement, as he was ill with influenza. It was here that Barton joined the sub-committee’s ranks (La Nauze, 1972: 64-65). In spite of Deakin’s private criticism, most of the changes made concerned
style rather than substance. As La Nauze (1972: 65) concluded, 'the corrections were draftsmen’s work, aimed at clarity, consistency and precision' (note also Hunt, 1930: 188). However, two changes of substance were made. The first reduced limitations on appeals to the Privy Council and the second saw the Constitution merely authorise the establishment of a federal supreme court by the Commonwealth Parliament, rather than that remaining a mandatory requirement. Primarily because of the latter change, Clark was to comment that the drafting sub-committee had 'messed it' (La Nauze 1972: 56, 66-67). The judicature clauses of the Constitution as initially drafted by the Judiciary Committee and amended through the Constitutional Committee and its drafting sub-committee were approved by the 1891 convention.

Beginning with Clark’s draft of 1891, the framework was set for a separate federal judiciary as part of the Federal Government, but more significantly, as it turned out, the crucial constitutional role the High Court would perform was recognised, if not extensively discussed. At the 1891 convention, Barton married the idea of the direct operation of a federal supreme court on the Australian citizenry with a constitutional role for the court in speaking of preserving the ‘harmonious working of the constitution’ by ‘intrusting’ its interpretation ‘to a tribunal which will deal with the citizen in his individual relations’ (Federation Debates, Sydney, 1891: 96). Discussion about including in the Constitution a clause limiting the purposes for which the Commonwealth could make appropriations to those within the scope of its enumerated powers also saw reference made to the constitutional role the Australian Supreme Court would perform. Clark argued that such a clause was redundant. As he saw it, the prohibition against the Commonwealth making an appropriation which would be for a purpose outside the scope of the powers conferred upon it lay already in the very structure of the Constitution, a structure which would be maintained by the Supreme Court: ‘I am very sure that the supreme court would very soon declare any such law invalid’ (Federation Debates, Sydney, 1891: 699).

While the scope for a separate federal judiciary was to be watered down at the 1897-1898 convention, the position of the High Court as a constitutional court was to become more entrenched as the crucial role the Court would play in the
Federation became generally accepted. That developing understanding is reflected in the decision of the delegates to the convention in its Adelaide session to reverse the decision of the earlier convention regarding constitutional provision for a federal supreme court. In Adelaide, provision for the judicial power of the Commonwealth vested that power directly in the High Court, thereby making the Court an integral part of the Constitution, as it had been in Clark’s draft Constitution (note Federation Debates, Adelaide, 1897: 445; Commonwealth of Australia Bill, clause 71, Federation Debates, Adelaide, 1897: 1234). It was also in Adelaide that provision was made to give the Federal Parliament power to invest State courts with federal jurisdiction (note Federation Debates, Adelaide, 1897: 445; Commonwealth of Australia Bill, clause 76(iii), Federation Debates, Adelaide, 1897: 1236). This decision was described in the joint judgment in the Boilermakers’ case as ‘the autochthonous expedient’, a description attributed to Dixon by La Nauze (1972: 131 and 342). As La Nauze (1972: 131) explains, the decision was not made with any high constitutional purpose in mind, but largely as an economy. The convention at this stage also gave the High Court its present title, the High Court of Australia (note Federation Debates, Adelaide, 1897: 445; Commonwealth of Australia Bill, clause 71, Federation Debates, Adelaide, 1897: 1234).

None of these changes, however, was particularly controversial. It was only when debate at the convention moved to the question of appeals to the Privy Council that the judicature clauses of the draft Bill excited any great interest. This debate occurred for the most part at the Melbourne session of the convention in 1898. It concentrated the minds of the framers in a way that no other part of the judicature clauses did. As Quick and Garran (1901: 736) explain, the key to the long and complicated debate over the role of the Privy Council in Melbourne, was to understand the dilemma in which the framers found themselves:

Everyone wanted a federal court of appeal; everyone did not wish to abolish the appeal to the Privy Council; and yet no one wished to multiply appeals.

The appeal clause as drafted in Sydney in 1891 made provision for the Parliament to end direct appeals from the State Supreme Courts to the Privy
Council, requiring instead that they go for final determination to the Australian Supreme Court. The exception was that leave to appeal to the Privy Council could be granted by the Queen, ‘in any case in which the public interests of the Commonwealth, or of any State, or of any other part of the Queen’s dominions, are concerned’ (Commonwealth of Australia Bill, chapter III, clauses 4, 5 and 6, Federation Debates, Sydney, 1891: 957). The idea was that in general appeals to the Privy Council would cease except in public cases of particular importance. Those cases would include important constitutional cases, and, while not generally acknowledged, might have involved the Privy Council deciding appeals in private cases affecting property of considerable amount (La Nauze, 1972: 218). When the second convention met in Melbourne in 1898, the judiciary clauses and, in particular, those affecting the right of appeal to the Privy Council received more extensive consideration. Pressure for change came not only from the Secretary for State to the Colonies, Chamberlain, but also from private business interests, which wished to ensure that a right of appeal to the Imperial institution was retained as a means of maintaining and encouraging British investment in Australia (La Nauze 1972: 219-220; note Quick and Garran 1901: 749).

At the Adelaide session of the second convention in 1897, the substance of the appeal clause as drafted in 1891 had been in large part retained, though appeals to the Privy Council from the State Supreme Courts were abolished. Consequently, appeals from the State Supreme Courts would necessarily go to the High Court, whose decisions would be final, except that the Queen could grant leave to appeal to the Privy Council, ‘in any matter in which the public interests of the Commonwealth, or of any State, or of any other part of Her dominions, are concerned’, the major change from the 1891 clause being that the word ‘matter’ had been substituted for the word ‘case’ (Commonwealth of Australia Bill, clause 75, Federation Debates, Adelaide, 1897: 1235; note Quick and Garran 1901: 748).

Late in the Melbourne session a shift occurred resulting in an amended Privy Council appeal clause. The new clause prevented appeals in those matters ‘involving the interpretation of this Constitution or the Constitution of a State, unless the public interests of some part of Her Majesty’s Dominions, other than
the Commonwealth or a State, are involved' (Commonwealth of Australia Bill, clause 74, Federation Debates, Melbourne, 1898: 2536; see further Quick and Garran 1901: 204 and 749-750; La Nauze 1972: 218-223). In making this change the convention ended up endorsing the view of Richard O'Connor, who spoke to the proposition that the limitation of appeals to the Privy Council to only those cases involving the 'public interests of the Commonwealth, or of any State' was skewed as it was these very cases, involving as they would the resolution of constitutional issues, that should be decided in Australia (Federation Debates, Melbourne, 1898: 2310; note also Quick and Garran, 1901: 749). Somewhat incongruously, however, the new provision appeared to leave open direct appeal to the Privy Council from the State Supreme Courts.\(^\text{17}\) Whether this was the intended result is far from clear (note La Nauze, 1972: 222-223; Higgins, CPD 13 (1903): 534). Quick and Garran (1901: 246) did not think so:

This, however, was not the generally received interpretation of the original clause, nor was it the intention of the Convention, which clearly intended that the prohibition of appeals to the Privy Council in constitutional matters should include appeals from the State Courts.

However it occurred, the Privy Council appeal clause, now clause 74, was turned on its head at the Melbourne session.

This was not the end of the matter. The Colonial Office, keen to safeguard Imperial interests, sought to alter the effect of clause 74 once the Bill to Constitute the Commonwealth of Australia made its way to Britain. The Bill, however, travelled there with a delegation, originally invited by Joseph Chamberlain, Secretary of State for the Colonies, representing all the colonies and charged with 'urging the passage of the Bill through the Imperial Parliament

\(^{17}\) As finally approved in Australia, clause 74 provided that:

No appeal shall be permitted to the Queen in Council in any matter involving the interpretation of this Constitution or the Constitution of a State, unless the public interests of some part of Her Majesty's Dominions, other than the Commonwealth or a State, are involved.

Except as provided in this section, this Constitution shall not impair any right which the Queen may be pleased to exercise, by virtue of Her Royal Prerogative, to grant special leave of appeal from the High Court to Her Majesty in Council. But The Parliament may make laws limiting the matters in which such leave may be asked (Commonwealth of Australia Bill, Federation Debates, Melbourne, 1898: 2536; see also La Nauze, 1972: 303).
without amendment' (Quick and Garran, 1901: 228). At first the Colonial Office left out clause 74 in its entirety and altered Covering Clause 5 so as to allow prerogative appeal by special leave to the Privy Council from decisions of the State Supreme Courts and the High Court. In response to the Australian delegates' protests, however, it was agreed a compromise would be made.

The purpose of the changes proposed by the colonial office to clause 74 was to allow appeal to the Privy Council from the High Court even on constitutional questions. Conservative and private financial interests in England and Australia, both of which had some support in the colonial office, believed that the Privy Council would serve their interests better than a local court, this particularly so where private British interests were concerned (La Nauze, 1972: 220; 260-263; Deakin, 1944: 142). Extending the path of appeal to constitutional cases was not so much supported on arguments from logic as from prudence: Chamberlain ‘did not propose to take chances’ on this matter (La Nauze, 1972: 261).

Once it was agreed that the Australian delegates and the colonial office would compromise their respective positions, proposals for a new clause began to emerge. The first compromise proposed was designed to allow appeal to the Privy Council where that was the desire of the governments affected by a decision of the High Court. To achieve this end the right of appeal was made subject to the approval of the executive governments involved (Quick and Garran 1901: 245). Griffith, wiring from Australia, raised two objections to this first compromise. The first related to concern over the involvement of the executive in the judicial process. The second was that the proposed amendments limited the scope for appeal to the Privy Council even more than clause 74 as it had been originally approved in Australia, which had, however inadvertently, left open direct appeal to the Privy Council from State Supreme

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18 La Nauze (1972: 249) notes that the delegation was formed following an official cable from Chamberlain in December 1899 expressing the hope that a delegation would attend the presentation of the Bill in Britain to ‘confer’ with the British government. It appears Chamberlain hoped to be able to secure some ‘alterations’ through consultation with the delegates. It was agreed at a conference of the colonial premiers in January 1900 that a person from each colony should be appointed to form such a delegation. The delegation’s brief was to pursue the passing of the Bill as it had been approved in Australia.
Courts. The final compromise on clause 74 was designed to retain scope for appeal to the Privy Council from State Supreme Courts, while addressing the concern over judicial independence (Quick and Garran 1901: 248).

Under clause 74 as it was finally agreed to, appeals from the State Supreme Courts were reinstated through a form of words which, but for an important exclusion, left open appeals to the Privy Council from not only the Supreme Courts, but also the High Court. The new clause did allow that the Commonwealth Parliament could limit such appeals, but any law providing as such had to be reserved for the Queen. The exclusion concerned matters 'inter se'. Clause 74 now provided that no appeal lay from the High Court 'as to the limits inter se of the Constitutional powers of the Commonwealth and those of any State or States, or as to the limits inter se of the Constitutional powers of any two or more States', unless the Court granted a certificate for that matter to go before the Privy Council.19

In its entirety, clause 74, now section 74 of the Constitution, provided:

No appeal shall be permitted to the Queen in Council from a decision of the High Court upon any question, howsoever arising, as to the limits inter se of the Constitutional powers of the Commonwealth and those of any State or States, or as to the limits inter se of the Constitutional powers of any two or more States, unless the High Court shall certify that the question is one which ought to be determined by Her Majesty in Council.

The High Court may so certify if satisfied that for any special reason the certificate should be granted, and thereupon an appeal shall lie to Her Majesty in Council on the question without further leave.

Except as provided in this section, this Constitution shall not impair any right the Queen may be pleased to exercise by virtue of Her Royal Prerogative to grant special leave of appeal from the High Court to Her Majesty in Council. The Parliament may make laws limiting the matters in which such leave may be asked, but proposed laws containing any such limitation shall be reserved by the Governor-General for Her Majesty's pleasure.

Two cases only went before the Privy Council on inter se questions, Webb v Outtrim [1907] AC 81 and Attorney-General (Cth) v Colonial Sugar Refinery Co Ltd [1914] AC 237, the first directly from the Victorian Supreme Court and, consequently, without a certificate from the High Court. The decision in Webb v Outtrim was not followed by the High Court (Baxter v Commissioners of Taxation (NSW) (1907) 4 CLR 1087). Constitutional questions which did not come within the section 74 proviso and matters of general law could go to the Privy Council and they did—the cases on section 92 being the most notorious of the constitutional cases. However, beginning with the Commonwealth's Judiciary Act 1903 and culminating in the Australia Acts 1986 (Cth and UK), appeals to the Privy Council from the High Court and the State Supreme Courts were gradually limited and finally completely abolished, but for the remaining possibility of a section 74 certificate being issued by High Court (see generally Crawford, 1982: 169-177; Crawford, 1993: 35-36; note also Garran, 1924: 212-213; Sawer, 1967: 22-28). That possibility, however, is merely theoretical. The High Court made it clear in Kirmani v Captain Cook Cruises Pty Ltd (No 2) (1985) 159 CLR 351 that it would never again issue such a certificate.

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The term ‘inter se’, meaning ‘between themselves’, was employed ‘by an unknown official of the British colonial office in 1900’ (Sawer, 1967: 28). It had no legal analogy and its scope was undetermined. Its indeterminacy apparently left both sides feeling comfortable with the outcome. The Australian delegates believed that most constitutional questions would be reserved for the High Court under the new clause, whereas the colonial office probably had a somewhat narrower conception (note Sawer, 1967: 28). Deakin (1944: 154-157) was in no doubt that the Australian delegates to London had secured in the compromise paramountcy for the High Court in matters of local concern, including therefore most constitutional questions, leaving to the Privy Council only those matters ‘trenching upon Imperial issues’. As it turned out, the Australian delegates were to be proved largely right (on the meaning and history of ‘inter se’ matters see generally Crawford, 1982: 171-172, Goldring, 1996: 77-80; Sawer, 1967: 28-30; Thomson, 1988: 160; note also La Nauze, 1972, 266).

During the course of debate on the High Court at the first Adelaide session and final Melbourne session of the second convention in 1897-1898 the importance of the Court as a constitutional court was repeatedly affirmed, as we have seen. Most importantly, that affirmation was given concrete effect in the decisions of the convention and the words of the Constitution. By the end of the Adelaide session, not only was the High Court again an integral part of the fabric of the Constitution, but judicial independence had been also strengthened in other ways. The 1891 convention provided in its Constitution Bill that a federal judge could be removed only by the Governor-General in Council following an address from both Houses of The Parliament (Commonwealth of Australia Bill, chapter III, clause 3, Federation Debates, Sydney, 1891: 956). In Adelaide, the requirement was added that such removal could only proceed on the grounds of ‘misbehaviour or incapacity’ (Commonwealth of Australia Bill, clause 72(iii), Federation Debates, Adelaide, 1897: 1235).

Aspects of the judiciary provisions reflected a degree of trust in the Commonwealth Parliament and also a concern to limit the cost of providing for a federal judiciary, the decision allowing federal jurisdiction to be vested in State courts being an example representative of both. Other proposals, however, were defeated or, at least, modified, in the interests of protecting the
independence of the High Court, just as its independence was to be later protected in the final compromise in London on clause 74. On this matter there would be no deliberate concession at the conventions.

At the Adelaide session of the 1897-1898 convention, the Commonwealth’s judicial power was provided for under the draft constitution in the following terms:

The judicial power of the Commonwealth shall be vested in one Supreme Court, to be called the High Court of Australia, and in such other courts as The Parliament may from time create or invest with federal jurisdiction. The High Court shall consist of a Chief Justice, and so many other Justices, not less than four, as The Parliament may from time to time prescribe (Commonwealth of Australia Bill, clause 71, Federation Debates, Adelaide, 1897: 1234).

The Commonwealth’s judicial power was to be revisited at the Melbourne session. The South Australian Legislative Council had suggested that the words ‘until Parliament otherwise provides’ be inserted at the beginning of clause 71, thereby leaving to Parliament complete discretion as to how Commonwealth judicial power would be ultimately exercised. This suggestion was not accepted. Barton, in response to it, noted how often the convention had placed faith in the Commonwealth Parliament through the use of the words ‘until Parliament otherwise provides’ under the Constitution. He argued forcefully that the judicial power of the Commonwealth should not be one of them. Given the crucial role the courts and the High Court, in particular, would perform ‘as the arbiter between state and state or state and Commonwealth’, it was essential that ‘the foundation of the judiciary system should stand on the bedrock of the Constitution’ (Federation Debates, Melbourne, 1898: 268).

The convention also concluded that a necessary element of the foundation of the judiciary system was constitutional provision fixing the minimum number of High Court judges. The suggestion was put to the convention that the then existing requirement that the Court be comprised of a Chief Justice and not less than four other justices be amended to remove the minimum requirement, thereby leaving Parliament to determine the size of the Court. This suggestion was also rejected, though the outcome of the debate was that the minimum size
of the Court was reduced from a Chief Justice and not less than four other justices to a Chief Justice and not less than two other justices (Federation Debates, Melbourne, 1898: 306, Commonwealth of Australia Bill, clause 71, Federation Debates, Melbourne, 1898: 2535). The decision to maintain an unchangeable minimum reflected the convention’s continuing commitment to ensuring the independence of the High Court. Consistent with that commitment, the amendment to the removal provisions for federal court judges saw the convention in Melbourne clarify and strengthen them by requiring removal only on the grounds of ‘proved’ misbehaviour or incapacity (note Federation Debates, Melbourne, 1898: 311-318; Commonwealth of Australia Bill, clause 72(ii), Federation Debates, Melbourne, 1898: 2535).

The framers came to the conventions with knowledge and experience of a single, hierarchical system of general courts within each colony at the apex of were the colonial Supreme Courts from which appeals lay to the Privy Council. With the federal movement came both the opportunity to create a court of appeal for Australia and a unified legal system in Australia and, conversely, the option of creating a separate federal judiciary along the lines of the United States Constitution (note Crawford, 1993: 26-27). Rather than opting for one or the other, ‘the autochthonous expedient’ created the possibility of an effectively unified judicial system on the English model developing in Australia without closing the door on a separate federal judiciary on the American model. The Commonwealth Parliament could create a federal court system dealing with matters of federal jurisdiction or it could use the State systems by investing State courts with federal jurisdiction. Either way, though, there would be unity in Australian law to the extent that the High Court would stand above both the State and federal systems as a final court of appeal, subject, of course, to any appeal to the Privy Council. In one crucial respect, however, the High Court was always going to be much more like the Supreme Court of the United States than any English court: in addition to its general appellate role, the High Court would be a constitutional court, at least once it was established.

The early establishment of the High Court was anticipated (La Nauze, 1979: 288), but it was not until 1902 that Deakin, the Attorney-General, introduced the Judiciary Bill through which the High Court would be established into the
Commonwealth Parliament. In introducing the Bill, Deakin (CPD 8 (1902): 10967) famously summarised the constitutional reasons why the High Court had been created under the Constitution:

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

In spite of Deakin's strong advocacy of the Judiciary Bill, it was not until 1903 that Parliament again considered it. Following federation, increasing opposition to the Court arose both within and outside the Commonwealth Parliament. The early expectation that the High Court would be established soon after federation was to be frustrated for reasons ranging from Parliament’s preoccupation with tariff measures to the argument that establishing the Court was a premature and unnecessary expense. However, for all the opposition against the immediate establishment of the Court, the government finally prevailed and the High Court came into being in 1903 (see generally Bennett, 1980: 12-19; Galligan, 1987: 72-77; La Nauze, 1979: 287-296). Griffith, Barton and O'Connor were appointed to the first bench, Griffith as Chief Justice. The Court began sitting in November 1903. In its first year, forty-one cases are reported, and the business of the Court has continued to expand (Bennett, 1980: 15; note La Nauze: 1979: 296). The concerns of those who believed the Court would have little to do were not borne out.

But for the torturous and confusing convolutions around the Privy Council appeal and a weakening of the requirement for a separate federal judiciary, the broad outline of the judicature clauses had been set by Clark in his initial draft constitution. It was accepted from the beginning, if not fully understood until later, that a High Court should be created that was not only a court of appeal from all State and federal courts, but also a constitutional court able to measure
the acts of government, both State and federal, against the Constitution and to strike them down where the Court concluded they contradicted it. The continuity that exists between the first drafts of the judicature clauses in the early 1890s, through to those that were sent to the Imperial Parliament to enact in 1900, reflects the general consensus among the framers regarding constitutional provision for a federal judiciary and the extent and nature of its dual role.

MARBURY V MADISON

The historical record in the United States is less clear than the Australian as to the extent to which judicial review was accepted as either a crucial judicial function or even a legitimate one at the time the Constitution of the United States was drafted and ratified (Thomson, 1988: 17; Galligan, 1987: 66-67; though note Berger, 1969; Cox, 1976: 15; Clinton, 1989: 102-103; Tribe, 2000: 212). However, as we have seen, in spite of any early uncertainty, judicial review came to be recognised as both a crucial and legitimate element of the system of government provided for under the American Constitution over the course of the nineteenth century. The most important step in establishing judicial supremacy in this regard was taken by the Court some fifteen years after it was first established in the judgment for the Court delivered by Chief Justice Marshall in the case of Marbury v Madison (1803) 5 U.S. (1 Cranch) 137.

Marbury v Madison concerned a petition for a writ of mandamus from the Supreme Court seeking to compel the then Secretary of State, James Madison, to deliver a commission to Marbury making him a justice of the peace. That commission was one of forty-two made by the previous Federalist President, John Adams. While Marshall had been appointed Chief Justice of the Supreme Court on 4 February 1801, he still held the position of Secretary of State at the time the commissions were to be delivered at the beginning of March 1801. Four commissions, including Marbury’s, were not delivered before the end of Adams’ administration. The justices of the peace had been commissioned as part of a bid to strengthen the federal judiciary before the Republicans took office, having won in the recent Presidential election, as indeed was Marshall’s
appointment to the Supreme Court. Once in office, the new President, Thomas Jefferson, ordered his Secretary of State not to deliver the remaining four commissions. Marbury’s case went before the Supreme Court in 1803.

At that time the authority of the Supreme Court with respect to the other coordinate branches of government was not firmly established. While for the Federalists the federal judiciary was one of the bedrocks of national power, the Republicans were completely suspicious of it, seeing in the federal judiciary a continuing and illegitimate bastion of Federalist power following the Federalist’s loss in the elections of 1800. The Republicans were determined to reduce the authority of the federal judiciary. In this fraught political context, the Chief Justice and the Court were trapped in a dilemma: on the one hand, the Court could order mandamus, but, it had no way of enforcing the order should the new President choose to disregard it; on the other, if it did not, the Court’s authority would be further undermined. Marshall’s finesse was to find that the statute under which Marbury had applied to the Court for a writ of mandamus was invalid (McClosky, 1960: 41-42; Cox, 1976: 10-11).

Section 13 of the Federal Judiciary Act 1789 provided that:

The Supreme Court ... shall have the power to issue ... writs of mandamus, in cases warranted by the principles and usages of law, to any courts appointed, or persons holding office, under the authority of the United States.

Article III of the American Constitution provides:

In all cases affecting ambassadors, other public ministers and consuls, and those in which a state shall be party, the Supreme Court shall have original jurisdiction.

Marshall concluded that, because the original jurisdiction of the Court was fixed by the Constitution, Congress could neither restrict nor enlarge it. As section 13 of the Judiciary Act attempted to extend the original jurisdiction of the Court it was unconstitutional and therefore invalid. With this conclusion the Supreme Court asserted its right and duty to be the final interpreter of the Constitution and its authority to declare invalid Acts of Congress found to be beyond Congress’ authority under the Constitution.
Marshall’s judgment for the Court treats the Constitution as an ordinary law to be dealt with by the courts in the same way as all other laws, save that where it and another law conflict, the Constitution, by virtue of its supremacy, prevails. Marshall justified the Court’s conclusion regarding judicial review on the argument that it was obliged to decide, where statute and Constitution conflicted, which applied in a particular case. In Marshall’s words:

If a law be in opposition to the constitution; if both the law and the constitution apply to a particular case, so that the court must either decide that case conformable to the law, disregarding the constitution, or conformable to the constitution, disregarding the law; the court must determine which of these conflicting rules governs the case; this is of the very essence of judicial duty (Marbury v Madison (1803) 5 U.S. (1 Cranch) at 177-178).

In this, Marshall echoed Hamilton’s views on the role of the courts under a written constitution from The Federalist:

The interpretation of laws is the proper and peculiar province of the courts. A constitution is, in fact, and must be regarded by the judges, as a fundamental law. It therefore belongs to them to ascertain its meaning, as well as the meaning of any particular act proceeding from the legislative body. If there should happen to be an irreconcilable variance between the two, that which has the superior obligation and validity ought, of course, to be preferred; or, in other words, the Constitution ought to be preferred to the statute, the intention of the people to the intention of their agents (Hamilton, Madison and Jay, 1992: 400).

In these terms, judicial review of the actions of government by reference to the Constitution is conceived of as a duty that the Supreme Court undertakes as an extension of its ordinary judicial duty. A constitution may be ‘a fundamental law’ against which ordinary law is measured, but it is nonetheless law and as such it falls within the province of the courts to interpret and apply.

Marshall’s justification for judicial review in Marbury v Madison did not stop at arguing that judicial review arose as an incident of judicial duty. He also developed an argument from the nature and structure of the Constitution and the system of government it entailed for judicial review. Judicial review was the
necessary means to keeping government within its constitutionally prescribed limits. If the judiciary were to lack the authority to find Congress had acted beyond its constitutional authority, that is, if Congress itself were to judge the extent of its power, '[i]t would be giving to the legislature a practical and real omnipotence, with the same breath which professes to restrict their powers within narrow limits' (5 U.S. (1 Cranch) at 178). Judicial review, on Marshall's account, arose as a logical and practical necessity from the constitutional provision for government and its limitation. Without it, 'the very foundation of all written constitutions' would be 'subverted' (5 U.S. (1 Cranch) at 178).

*Marbury v Madison* is a crucial decision because it was the first case in which the Supreme Court held an Act of Congress invalid and, as it turned out, the last in which the Marshall Court would so find. In the United States, in the absence of express provision, *Marbury v Madison* has provided the precedent for judicial review and, in a manner of speaking, it has also provided the precedent for judicial review in Australia as well. The framers of the Australian Constitution drew on a conception of federalism and the role of the courts very different from that given effect by the Supreme Court under Marshall, but, it was Marshall's judgment for the Court in *Marbury v Madison* which laid the foundation for judicial review from which the American Supreme Court could later build the substantive federal jurisprudence which the framers did draw on.

**JUDICIAL REVIEW UNDER THE AUSTRALIAN CONSTITUTION**

There was no doubt expressed at the constitutional conventions of the 1890s at which the Australian Constitution was drafted that, once Australia federated and the High Court was established, the High Court would have the authority to judicially review the acts of government, both Commonwealth and State, and to declare them invalid if they did not conform with the Constitution. However, as in the United States, there is no express provision in the Constitution for judicial review, though that is not to say that the Constitution is silent on the issue.

There are a number of sections that clearly indicate that the framers expected the courts would exercise judicial review. Of these the most important are Covering Clause 5 and sections 74 and 76(i).
Covering Clause 5 provides that:

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

These words reflect the supremacy clause of the American Constitution which, on one interpretation of the American framers' deliberations in Philadelphia, was inserted on the understanding that, in making the Constitution supreme, it would fall to the courts in the final instance to interpret and apply it (Thomson, 1988: 17). As with the supremacy clause under the American Constitution, Covering Clause 5 does not constitute express provision for judicial review under the Australian Constitution.

Section 74, providing as it does for the High Court to issue a certificate allowing an appeal from it to the Privy Council on *inter se* questions, carries with it the implication that the framers intended that such questions would be dealt with in the courts. The term *inter se* was used in the provision to refer generally to questions relating to the respective powers of the Commonwealth and the States.

Section 76 (i), in providing that the Parliament may confer original jurisdiction on the High Court in any matter, '[a]rising under this Constitution or involving its interpretation', again suggests that the framers expected the High Court to perform the function of judicial review, but it is a legislative grant of power and does not of itself entrench judicial review in the Constitution.

These provisions support the contention that the framers intended the courts to exercise judicial review, but they do not provide an explicit foundation for judicial review. The best that can be said is that they are 'unintelligible' unless judicial review was intended (Sawer, 1967: 76).

Partly for this, vigorous debate has continued since the time of the conventions about the proper function of the High Court in the Australian federation, in spite
of all the consistency of consensus expressed at the conventions about the role of the High Court and its capacity to exercise judicial review. Everyone agrees both that the framers intended the High Court to be a constitutional court and that there is no express provision for judicial review in the Constitution. However, there is disagreement as to why there is no express textual warrant for judicial review in the Constitution and a wide range of opinion about exactly what it is. Moreover, in some cases, there is uncertainty about whether judicial review is even justified (note generally Lane, 1966; Lindell, 1977 and 1992; Galligan, 1987; Gagaler, 1987; Thomson, 1988).

JUDICIAL REVIEW – DUTY OR POWER?

The most extensive and thorough examinations of the convention debates and related contemporary sources in relation to judicial review under the Australian Constitution have been undertaken by Galligan (1987; note 1979) and Thomson (1988; note 1986). Both have, in different ways, sought to engage the Constitution in historical context and through that to examine the foundation for judicial review and the role of the High Court under the Constitution. Each thinks of judicial review as an independent power and each assumes that judicial review conceived of as an independent power was intended by the framers to be an integral part of the Australian governmental system. However, the two commentators differ regarding the adequacy of the constitutional foundation for judicial review.

Thomson (1986: 201; 1988: 176) denies the connection between judicial review and legal duty that Marshall made, describing judicial review as an ‘awesome’ and ‘prodigious’ power. Thought of as such, the question of its foundation represents ‘the most fundamental question concerning the judiciary which can be asked’ (Thomson, 1988: 176). Thomson (1988: 175) answers this fundamental question by finding no solid constitutional foundation for judicial review. Constitutional provisions such as Covering Clause 5 and sections 74 and 76(i), while assuming judicial review, do not expressly provide for it, and arguments from ‘the role, duty, function and power of courts under a written constitution’ for its foundation are no more than ‘unsupported and unproved
assumptions’ (Thomson, 1988: 175). On Thomson’s account, the very authority against which the High Court claims that it can measure government action, the Constitution, does not itself grant authority to the Court for that function and no amount of original intention can get around that problem:

Delegates who assembled during the final decade of the nineteenth century to debate and draft the Australian Constitution intended judicial invalidation of legislation to be an aspect of the constitutional framework. Their intention was not, however, embodied in the text of the Constitution. Attempts to provide a basis for judicial review in the Constitution by postulating implications from the text and a conglomeration of provisions are endeavours to rest a prodigious power on a slender reed (1986: 201; note also 1988: 176-177).

Thomson does not so much argue the point that judicial review is a power as take it as given, though he does contrast the vast range of enquiry concerning the nature and legitimacy of judicial review in the United States with the relative paucity of material on the subject in the Australian literature (though that is now changing) (Thomson, 1988: 1 and 14-20). More generally, in addition to considering in detail the framers’ positive expectations with respect to judicial review by the High Court, Thomson (1988: 1) considers the claims made by courts in Australia from the time of the first colonial settlements to the modern High Court about the legitimacy of judicial review, introducing that thorough examination with the conclusion that historically in Australia, ‘there has been a general and uncritical acceptance of judicial power to declare legislation unconstitutional’.

Galligan also does not think that judicial review is an extension of the ordinary duty of the courts to interpret and apply the law as Marshall suggested in Marbury v Madison. Galligan’s view is that the Constitution is no ordinary law but something quite different. In describing what judicial review is, he adopts Bickel’s formulation of judicial review as ‘a present instrument of government’ (Bickel, 1962: 16; Galligan, 1987: 44; note also Thomson, 1988: 9). Judicial review on this view is no mere legal duty, but an independent power exercised

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20 Thomson (1988: 143-148) also considers the effect of section 71, which provides for the judicial power of the Commonwealth. He concludes, as with Covering Clause 5, and sections 74 and 76(i), that the words of this section are not sufficient to ‘constitutionally establish judicial power to set aside legislative acts’ (Thomson 1988: 148).
by the courts through which they perform a function more political than legal. If judicial review is an independent power and not a legal duty then Marshall’s reasoning in *Marbury v Madison* fails to provide an adequate foundation for judicial review, deriving from the ordinary role of the courts an unproved constitutional one, which is what Galligan (1987: 45-46) concludes, following Lane (1979) and Bickel (1962).

Thomson could not find any satisfactory constitutional foundation for an independent power of judicial review, but Galligan (1987: 42-70), while accepting the lack of textual warrant, considers there are other sources of validity for such a power. In particular, he looks to the intentions of the framers and the logic of the system they designed and here finds not unproved assumptions, but a more than adequate foundation for the power of judicial review as he sees it. The framers’ understanding of federalism, their reliance on the American Supreme Court as the model for the High Court in its constitutional role and the consensus expressed at the conventions regarding the High Court’s capacity to exercise judicial review provides the foundation that is lacking in the express words of the Constitution.

Galligan sees judicial review as a function which the High Court of necessity must perform. The federal division of power under the Constitution requires a neutral arbiter between the States and the Commonwealth, because to give to either the role of determining the validity of their executive and legislative acts, ‘would tend to make that level of government superior to the other and thereby destroy the federal balance’ (Galligan, 1987: 46). That task then falls to the High Court by default, failing other provision in the Constitution, such as an extensive referendum procedure through which constitutional disputes can be adjudicated by the people as exists in Switzerland, and because the Court’s institutional characteristics provide the means to defuse and settle politically charged disputes (Galligan, 1987: 46-47). Galligan (1987: 47) argues that this role is not political in the sense of it being the same as the work of the executive and legislature, but that it is nonetheless ‘political’. Galligan describes judicial review under the Australian Constitution variously as an ‘important power’ and a ‘delicate political power’, the ‘political nature’ of which has been ‘disguised’ by the ‘[t]he [High] court’s legal characteristics’ (Galligan, 1987: 46-47).
Galligan (1987: 42-46) not only rejects Marshall's reasoning in *Marbury v Madison*, but also reviews a range of historical and modern material before reaching his conclusions about the 'political' basis and American origins of judicial review. That material includes Bryce's *The American Commonwealth*, as well as McWhinney's comments on the origins of judicial review in Commonwealth countries and Lindell's more recent discussion of the common law foundation of judicial review (Bryce, 1891; McWhinney, 1966; Lindell, 1977). Bryce's argument that judicial review is a duty which arises from the ordinary duty of the courts to interpret and apply the law is described by Galligan as 'simplistic'. While McWhinney, consistent with his realist critique of legalism (1969: chapter 5; note Galligan, 1987: 32-33), referred to judicial review by the Privy Council as a power (McWhinney, 1966: 9), his argument that judicial review is 'a vestigial survival of the Privy Council's old judicial hegemony' within the British Empire is rejected by Galligan in favour of American antecedents for the Australian High Court and judicial review (McWhinney, 1966: 9; Galligan, 1987: 43). Galligan is right in highlighting American antecedents as an important source for judicial review and the constitutional role of the High Court. However, within those antecedents, judicial review was generally considered to be a duty and not a power, as is reflected in Marshall's reasoning in *Marbury v Madison* and Hamilton's comments in *The Federalist*. Lindell's arguments for a common law foundation for judicial review are rejected for the same substantive reason that Galligan rejected Marshall's reasoning in *Marbury v Madison*: the argument that there is an 'essential difference' between a constitution and an ordinary law and therefore an essential difference between applying an ordinary law and interpreting a constitution.

This last argument constitutes the major source of Galligan's disagreement with those who conceive of judicial review as a duty. It is an argument that begins with a generally accepted understanding of how written constitutions which sanction judicial review work. Within such a constitutional framework, a constitutional court's capacity to interpret a constitution's meaning with finality and to apply that interpretation in the disputes before it profoundly affects the operation of a system of government not just in the moment of the decision, but also into the future. Through the constitutional decisions of a court the general
words of a constitution are given specific form and a jurisprudence developed which shapes the practice of government and law within the system. As the law of the constitution cannot usually be changed or modified except by subsequent decisions of the constitutional court or through an amendment procedure such as a referendum where that exists, where a constitutional court exercises judicial review and finds government action unconstitutional, its decision, unlike the decisions of the courts with respect to the ordinary law, is not subject to any overriding law-making authority of a legislature. The decision of the court in effect becomes part of the higher law of the constitution being applied. In this sense judicial review is a function manifestly different from the application of the ordinary law by the courts. The question is whether that fact constitutes sufficient reason for distinguishing a constitution from ordinary law in such a way that the application of it by a court becomes less a duty arising from the vesting of judicial power in the courts than an independent power exercised by the courts.

Galligan (1987: 2-3) thinks that it is, but more than that he suggests that the structural logic of a written constitution, where judicial review is an accepted element of the system, means that the courts, in being called upon to shape the political process, are necessarily drawn into it. Judicial review is a political exercise distinguishable from politics only in the institutional limitations on the courts (note Galligan, 1987: 46-47; 256-258). Thomson (1988: 6) suggests a similar line of argument in referring to ‘the various policy interests which lie close to the surface in every constitutional case’, while later suggesting that the main difference in approach to constitutional interpretation between the American Supreme Court and the Australian High Court is that the Supreme Court has tended to be more open about its balancing of those interests.

DENYING THE OBVIOUS – THE CONCEALMENT OF JUDICIAL REVIEW BY THE FRAMERS THEORY

A question which of necessity arises from Galligan’s and Thomson’s conception of judicial review as an independent power is why, if judicial review so conceived was so obviously intended to be among the High Court’s functions, did the framers not provide for it expressly in the Constitution? Both suggest an
explanation in terms of a conspiracy to submerge the type of politics they see as inherent in judicial review. Galligan (1987: 46), while noting the weak argument, given his position on the substantive nature of judicial review, that judicial review was perhaps necessarily implied from the paramountcy principle in both the Australian and American Constitutions, also suggests the framers may not have included express provision for judicial review in the Constitution for prudential reasons:

To spell out judicial review would violate that discrete reticence which tends to disguise the court's delicate political function and to enhance its ability to exercise such a function.

Thomson (1988: 73-74) considers 'the possibility' that no express provision was made for judicial review in the Constitution because the framers deliberately concealed their intentions in that regard:

Such a dichotomy between clearly expressed intention in the convention debates and, at best, opaque constitutional provisions concerning judicial review makes it more plausible to suggest as a possible answer that the Framers of the Australian Constitution concealed, from those who turned merely to the Constitution's written words, their belief that judicial review would be part of the new federal system.

While Galligan only suggests that prudential reasons arising from the Court's expected political role may account for this apparent omission, Thomson (1988: 130-131) is more specific, arguing that if judicial review was perceived as a conservative device for containing the legislative will in relation to the protection 'private rights and property', then, in view of the developing political significance of the Labor Party, 'the Framers had reason to conceal their expectations regarding judicial review'.

The very strength of Galligan's and Thomson's arguments in establishing that judicial review was intended and assumed by the framers (1987: 48-70 and 1988: 73-131 respectively), which rely on the increasingly frequent and unambiguous statements contained in the contemporary public record throughout the formal federation process in the 1890s, including, most importantly, the words of the framers themselves, mitigates against any
conclusion that the framers sought ‘to conceal their expectations regarding judicial review’. It is incongruous to suggest in the face of the openly and plainly expressed intentions of the framers regarding judicial review that they sought prudentially or otherwise to be so much less open and plain in the Constitution they drafted.

There are many reasons why ‘the concealment of judicial review by the framers’ is highly implausible. Neither Galligan nor Thomson present evidence that any of the framers either within or outside the conventions sought to deliberately exclude express provision for judicial review or veil the role they expected the High Court would perform in the Australian federation. Barton did refer at the 1891 convention to how judicial review was dealt with expressly under the British North America Act, suggesting consideration be given to some similar provision being included in the Australian Constitution, but it was not subsequently taken up in discussions about judicial review at the 1891 convention or at the later convention of 1897-1898 (Federation Debates, Sydney, 1891: 96; note Thomson, 1988: 86-87). There is no indication that the reason for this was concern over any potential controversy that such a provision might arouse. There was relatively little controversy over the High Court performing this function and where there was discussion the framers were in no way reticent or cautious in expressing what judicial review might mean in practice; in fact, quite the opposite, as we have seen. Time and time again, the framers expressed the unequivocal view that judicial review meant that the High Court, and indeed the courts generally, would interpret and apply the Constitution to strike down Commonwealth and State laws found to be in conflict with it. Even more than that, all the evidence suggests that, for the overwhelming majority of the framers, judicial review was approved of and seen as crucial to the proper operation of the federal system. Of all the delegates to the conventions, only two, John Gordon and Frederick Holder, suggested that the scope for judicial review should be restricted. The response of their fellow delegates to their suggestions is revealing not only in terms of the attitudes of the framers to judicial review, but also their understanding of the form of limited government they sought to give effect to in the Constitution.
At Melbourne in 1898, Gordon proposed the introduction of a clause 74A through which judicial review would be limited only to cases bought by the Parliament of a State or the Commonwealth Parliament (Federation Debates, Melbourne, 1898: 1679). Gordon received no support for this clause and acknowledged the hopelessness of his case before it was even submitted to the convention (Federation Debates, Melbourne, 1898: 1690). As he expected, it was negatived. One interesting point about the debate on Gordon’s proposal was that he expressly staked his claim on the basis that it supported the principles of parliamentary sovereignty and majority rule against ‘the strict interpretation of the courts’ (Federation Debates, Melbourne, 1898: 1682; note also 1680-1681 and 1684). These points were taken up by the two main speakers against Gordon’s proposal, Bernhard Wise and Henry Higgins. Wise affirmed the intention of the convention as he saw it to create a constitution under which would be established a federal government of limited powers and a High Court to ensure those powers remained so limited. He noted that Gordon’s proposal necessitated only a constitution of ‘about six clauses’ as everything would be left under it to the various Australian Parliaments to determine (Federation Debates, Melbourne, 1898: 1685-1686). Higgins’ shorter intervention presented an argument in favour of judicial protection of minority rights against the majoritarianism of Gordon’s proposal (Federation Debates, Melbourne, 1898: 1688-1689). The complete lack of support for Gordon’s proposal is indicative of not only the convention’s approval of a judicial arbiter between the States and the Commonwealth in the High Court, but also its support for and understanding of how intrinsically important that role was to maintaining the form of limited government the convention was giving effect to in the Constitution.

Holder’s later proposal, while accepting the High Court as interpreter of the Constitution for the purpose of keeping both the Commonwealth and States ‘within the four corners of the deed to which they have agreed’, sought to include a provision by which a Commonwealth law found to be ultra vires by the High Court could go before the people for approval in a referendum under the procedures provided in the draft constitution under clause 121, which became section 128 of the Constitution (Federation Debates, Melbourne, 1898: 1717-1719). In the face of negative interjections to the proposal, he anticipated its
defeat and later withdrew it with leave, while stating his intention to reintroduce a modified proposal to the convention (Federation Debates, Melbourne, 1898: 1721 and 1731-1732). This he never did.

Thomson (1988: 106) suggests one reason why Holder did not later put before the convention an amended proposal to limit the scope of the judicial review was because Holder and, citing Gordon, ‘delegates who agreed with him’, hoped that the absence of an express provision would lead the High Court once established to conclude ‘that it was without constitutional warrant to strike down legislation’. The simpler and more credible explanation is that Holder and Gordon, along with every other delegate to the convention, thought that the High Court would exercise judicial review for the purpose of maintaining the Constitution as a matter of course. That is why Holder and Gordon sought to limit its scope. To conclude otherwise is to assume that they engaged in the seemingly pointless exercise of seeking to limit the scope of a function that was not provided for in the first place. Far from constituting evidence that judicial review was not part of the Constitution, their very attempts to contain its effect and the convention’s rejection of those is evidence of the consensus at the conventions that judicial review was already there. The overwhelming belief of the framers of the Australian Constitution was that they were making a constitution which was grounded on a division of power between the States and the Commonwealth which would to be maintained by the High Court as a constitutional court.

Indeed, it is curious that the judiciary sections of the Constitution, for all the recognition of the importance of judicial review, occasioned relatively little acrimonious debate. As we have seen, in many important respects, those provisions as drafted at the first convention remained intact throughout the process. The only parts over which the delegates really divided related to appeals to the Privy Council and the main part of that debate did not take place until rather late in the convention process at the Melbourne session of the second convention in 1898. It is also curious that the discussion of judicial review was not a particularly coherent or organised one. It was largely incidental to other questions, such as the size and independence of the Court and the limitation of the right to appeal to the Privy Council (note Thomson,
1988: 74). Debate over those issues provided the opportunity for key delegates to affirm the important role of the Court and ultimately for it to be supported by the convention. All these factors tend to indicate less an attempt to conceal the nature of judicial review by the framers than an unstated consensus among them about what it was.

For all this, the fact remains, if judicial review is thought of as an independent power, then it necessarily requires an express or necessarily implied constitutional grant of power, hence Galligan’s concern to look for implied sources of constitutional validity and Thomson’s that no express provision was provided. Omission of explicit provision by the framers is anomalous on this account, for, without such provision, how could the Court once established exercise judicial review? Did the framers hope that the Court would somehow assume this task? On this aspect of judicial review, all the evidence is also to the contrary. From the framers’ unequivocal statements regarding judicial review, as well as those provisions of the Constitution which clearly indicate that the framers expected the Court would perform this function, it is plain that the framers assumed the governmental system provided for in the Constitution allowed for judicial review. It was simply unnecessary to include any provision for judicial review. In this case, perhaps the framers did not think of judicial review in the way that Galligan and Thomson do.

THE DUTY TO EXERCISE JUDICIAL REVIEW

The reason why judicial review is not spelt out in the Constitution is because it was not conceived of as a power, but as a duty that arises from the ordinary duty of courts to interpret and apply the law. For that reason judicial review was assumed by the framers and is assumed under the Constitution.

That assumption was not made because of direct reliance on the American Constitution or authority, though the foundation for that assumption is substantially the same. While the Australian Constitution was not born of revolution and, as a statute of the British Parliament, the foundation of its authority did not formally come from the Australian people, the common law duty of the courts to declare and apply the law can be seen as otherwise
analogous to the duty which Marshall articulated in *Marbury v Madison*. As Dixon (1965: 174) said:

To the framers of the Commonwealth Constitution the thesis of *Marbury v Madison* was obvious. It did not need the reasoned eloquence of Marshall’s utterance to convince them that simply because there were to be legislatures of limited powers, there must be a question of ultra vires for the courts. In the course of administering the law the courts must say whether purported legislation did or did not possess the force of law.

Marshall’s reasoning in *Marbury v Madison* would have been self-evident to the framers if they had been aware of it. However, it appears most were not, as a telegram from Clark to the 1898 convention and Barton’s subsequent reply suggests. That correspondence concerned the removal from the draft constitution of provision for the High Court to issue certain types of writs, including the original writ of mandamus the American Supreme Court had found it had no jurisdiction to issue in *Marbury v Madison*. The removed provision had been included in the Constitution Bill produced by the 1891 convention. Its genesis is found in Clark’s original draft of which it had been made part for the purpose of overcoming the deficiency found in *Marbury v Madison*. Barton, in response to Clark, noted, ‘none of us here has read the case’ (La Nauze, 1972: 233-234). The clause was subsequently reinstated (Federation Debates, Melbourne, 1898: 1885).

While judicial review as it evolved in the United States over the nineteenth century is reflected in the framers’ constitutional theory, it was assimilated through the framers’ own experience and understanding of law and judicial review in the colonies. Important contemporary commentators, like Bryce, Dicey, Garran and Moore, also understood judicial review through the prism of their English or Australian backgrounds.

Judicial review of colonial legislation was undertaken by the courts without there being any express provision for it in the constitutions of the Australian colonies. It is true that the history of judicial review in the Australian colonies was controversial, but it nonetheless continued to be an element of the colonial system of government even after the plenary nature of the powers of colonial
Parliaments was confirmed through the Colonial Laws Validity Act in 1865. In particular, colonial legislation could be found to be repugnant to Imperial legislation extending to the Australian colonies by paramount force. However, having said this, Thomson (1988: 74-75, 109, and note generally 21-67), reveals an apparently ambiguous understanding by the framers of judicial review in the colonies. Symon and Gordon, for instance, engaged in the following exchange, in which judicial review of State laws was denied:

Mr GORDON. –

… As to a law passed by a state, at present every citizen of the state is bound by it within his own colony. Why should he be in a better position to test that law because it may inflict some injury upon him under the Federation than as at present in his own state?

Mr. SYMON. –

Because the law of the state cannot be *ultra vires*, but the law of the Commonwealth may be.

Mr. GORDON. –

It may be that the law of the state may infringe on the law of the Commonwealth.

Mr. SYMON. –

But the law of a state now cannot be *ultra vires* (Federation Debates, Melbourne, 1898: 1680).

But Symon had in Adelaide also spoken of the High Court as having, ‘the duty of interpreting, according to the general principles of common law, the Federal Constitution itself’ (Federation Debates, Adelaide, 1897: 129), the same common law duty by which the courts measured the acts of colonial governments against Imperial statutes of paramount force. Later in the same debate, Wise was to imply a State law could be *ultra vires* in referring to what would happen if a State Parliament passed a law contravening the Merchant Shipping Act, an Imperial Act. Gordon responded, ‘I am not speaking of Imperial legislation’ (Federation Debates, Melbourne, 1898: 1688). However,
Wise had earlier expressed the view, challenged by Isaacs, that 'there is no power given to any Judge under a state Constitution to declare any Act of Parliament *ultra vires*’ (Federation Debates, Melbourne, 1898: 366). Thomson (1988: 273) refers also to comments by Carruthers (Federation Debates, Adelaide, 1897: 942) and Trenwith (Federation Debates, Melbourne, 1898: 366) which suggested State laws were inviolable.

These exchanges and comments are too isolated and undeveloped to draw negative conclusions from them about the framers' understanding of judicial review by the colonial courts. Contemporary, expert opinion, some of which Thomson (1988: 123; 273) also discusses in this context, was much less ambiguous and supports the contention that judicial review by colonial courts was generally understood to be a legitimate legal function (see Bryce, 1891: 243-244; Dicey, 1959: 164; Garran, 1897: 65-66). Indeed Garran (1897: 66) was in no doubt that the principle of judicial review, 'is perfectly familiar in these colonies, where our colonial statutes have to be tested by their conformity to Imperial statutes'. That principle was not founded on its being in any way an independent power. Judicial review under the Australian Constitution, as it had been in the colonies, would come within the ordinary duty of the courts as an incident of judicial power:

> It [judicial review] is a duty ‘cast upon the Court, not by any express provision of the constitution, but by the well known principle of British common law that where a body of limited authority (whether it be a school-board or a Federal Parliament) exceeds that authority, its action is simply void’ (Garran, 1897: 28 and note 66).

This conception of judicial review was reflected not only in Garran's work, but also in the work of all significant contemporary commentators available to the framers or published immediately after federation.

Among those commentators, Bryce, concluding that it was within the province of the courts to review the acts of government under the American Constitution, did not distinguish the task of judicial review from the ordinary role of the courts, but saw it as following directly from that. Consequently, while Bryce (1891: 246-247) acknowledged that the American Constitution did not expressly provide for judicial review, relating the story of an intelligent Englishman who spent two
fruitless days looking for it, he saw no problem with this. Judicial review is not a power granted the courts which requires express provision, but a duty which they are obliged to undertake:

But the functions of the Supreme Court are the same in kind as those of all other courts, State as well as Federal. Its duty and theirs is simply to declare and apply the law; and where any court, be it a State court of first instance, or the Federal court of last instance, finds a law of lower authority clashing with a law of higher authority, it must reject the former, as being really no law, and enforce the latter (Bryce, 1891: 247).

Bryce's analysis of judicial review in the United States was based on general legal principles. Bryce saw that role as analogous to the role of courts 'in civilized countries' generally. The distinguishing character of a written constitution on this account is that, while in all other respects it is a law, it is a superior law, which overrides legislation inconsistent with it. For Bryce (1891: 240), in discussing the legislative power of the American Congress, the laws made by Congress were like the 'bye-laws' made by an English railway company or municipal corporation under powers conferred by an Act of Parliament. In saying this Bryce was not being pejorative, but rather was trying to make sense of the powers of the Congress from the point of view of an Englishman for whom the idea of a limited Parliament was unusual. Hence, while the legislative power of Congress may be similar to the power exercised by a subordinate law-making body, it is not the same. Bryce (1891: 241) was careful to explain that the powers of the subordinate body in England are subject to the overriding and controlling sovereignty of the Parliament, whereas in America the controlling body or superior authority is the people through the Constitution. The Congress itself is sovereign within the scope of its powers, which, while limited, are nonetheless plenary. While this was a 'momentous' distinction, Bryce (1891: 241) reiterated the point that, even so, when Congress passes a law that lies outside the range of its powers, like a municipal by-law made beyond power, it is null and void.

There is, unsurprisingly, great coincidence between Dicey's understanding of judicial review and Bryce's, as both were steeped in English legal and political traditions and brought those to their understanding of 'the American
Commonwealth’. Indeed Bryce (1891: 240) commented that Dicey’s analysis of the role of the courts under federal constitutions coincided in most points with his own, noting also that his work on the subject was complete before Dicey’s *Law of the Constitution* was first published in 1885. Like Bryce, Dicey (1959: 158-159) saw the American Congress as a body of limited powers under a supreme constitution and, as an incident of judicial power, the role of the courts was to make sure those limits were maintained:

The legal duty of every judge, whether he act as a judge of the State of New York or as a judge of the Supreme Court of the United States, is clear. He is bound to treat as void every legislative act, whether proceeding from Congress or from the state legislatures, which is inconsistent with the Constitution of the United States.

Following federation, Quick and Garran (1901: 725) also spoke of the High Court as having, ‘the duty of interpreting the Constitution, in cases which come before it, and of preventing its violation’, as did Moore (1902: 236):

The duty of passing upon the validity of Acts, whether of the Commonwealth or of the State Parliament, exists purely as an incident of judicial power.

A modern restatement of the argument that the foundation of judicial review under the Australian Constitution lies in the common law duty of the courts to apply the law is made by Lindell (1977; 1992: 223-229). Lindell, like Galligan and Thomson, examines carefully the foundation of judicial review under the Australian Constitution, but he finds a stronger basis in law for judicial review than either Galligan or Thomson are prepared to acknowledge. He can do that precisely because he works from the assumption that judicial review is a duty not a power and so can trace its origins and foundations through the common law duty of the courts to apply the law. It is not that Galligan and Thomson disagree with Lindell’s arguments about that duty, it is that they disagree that the essential nature of constitutional law is the same as ordinary law. In their view it is not. That is why they describe judicial review as an independent power and the reason why they believe, for judicial review to be exercised legitimately, it requires special constitutional provision. Thomson is right that there is no constitutional foundation for judicial review as he conceives it, but that is because he does not share the framers’ conception of judicial review.
The great weakness in Galligan’s argument is similar. The framers did not provide implicitly or otherwise for an independent power of judicial review under the Constitution as Galligan imagines, because they never thought of judicial review in that way.

While Lindell is not concerned primarily with the framers’ intentions, the arguments he draws on and develops are no different to those presented at the turn of the century when the Australian Constitution was made, or indeed those made by Marshall a century before. According to Lindell, the superiority of the Constitution as a fundamental and organic law means that it will be applied by the courts to control the acts of government, because it is the duty of the courts to interpret and apply the law, including the law of the Constitution, in the cases properly bought before them. Lindell, in making this assumption, unlike Galligan’s and Thomson’s assumption that judicial review is an independent power, is making one which was not only made by Bryce, Dicey, Garran and other contemporary authorities, but by the framers as well.

Almost all the many and various statements made during the federal conventions regarding the role of the High Court in the federation are consistent with a conception of judicial review as a common law duty arising from the grant of judicial power, as is the lack of express provision itself, of course. There were a number of comments made by leading delegates in which judicial review is referred to as a power. Barton expressed the view that, where the Senate failed to resolve federal disputes, ‘power must be present in the court to adjust matters’ (Federation Debates, Adelaide, 1897: 962). Downer spoke of the ‘vast powers of judicial decision’ in describing the role of the federal courts under the Constitution, but then he also used the language of ‘obligation’ in the same context (Federation Debates, Melbourne, 1898: 275). Kingston also referred to judicial review as a power (Federation Debates, Melbourne, 1898: 2040). These statements, however, do not appear to reflect a conception of judicial review as an independent power. They are rather references to judicial power in general, a power which is exercised by judges in performing their legal duty. They may also reflect a certain looseness of language, which was sufficiently common at the time for Bryce (1891: 246) to draw attention to it: ‘the so-called “power of annulling an unconstitutional statute” is a duty rather than a power’.
There are also uncontested examples of judicial review being referred to specifically as a duty at the conventions (note Federation Debates, Melbourne, 1898: Quick at 448; Isaacs at 284, 1985 and 2001). The occasional use of the descriptive word ‘power’ under these circumstances tells us little about the framers’ understanding of judicial review as a duty or a power.

What is more compelling are the many general statements of the framers regarding the role of the High Court which clearly carried within them the expectation that the Court would measure the acts of government against the Constitution. In the absence of express provision, that expectation could only be there if the framers thought of judicial review as a duty the Court would necessarily exercise. It was not a question to which the framers felt any need to turn their minds as it seemed obvious to them that the role which judicial review entailed the Court performing was a judicial one. Where, however, they did turn their minds to that question the clear conclusion was that judicial review was not an independent power, but a legal duty. Indeed, Barton had the opportunity to do this as one of the first three justices of the High Court, all of whom had been closely involved in drafting the Constitution as delegates to the conventions and otherwise. In *D’Emden v Pedder* (1904) 1 CLR 91, he and O’Connor concurred with Chief Justice Griffith in the view that:

... [i]t is ... the duty of the Court, and not of the Executive Government, to determine the validity of an attempted exercise of legislative power. ... And, even if such a duty were cast upon the Executive Government, it could neither relieve the judiciary of their duty of interpretation nor affect the principles applied to its interpretation (1 CLR at 117-118).

Griffith, as a delegate to the 1890 Melbourne conference and the 1891 Sydney convention, had not expressly referred to judicial review or its foundation (Thomson, 1988: 78), but he did elsewhere assume that judicial review was a duty that would necessarily be undertaken by the courts: ‘[t]he validity of an Act of the Federal Legislature is, ... , as much open to question as that of an Act of the Legislature of any of the States, and may be inquired into by any Court before which it comes into question (Griffith, 1896: 7; note also Thomson, 1988: 78-79).
The assumption that the courts, and not only the High Court, would exercise judicial review as a part of their judicial duty was there from the very beginning of the formal federation process. That is why there is no express provision for judicial review in any of the draft constitutions of the 1890s, including the first that Clark prepared before the 1891 convention and which was so important in terms of the subsequent shape the Constitution took. That is why after federation there could even be debate in the first Commonwealth Parliament over whether or not to establish the High Court.

The High Court's establishment is a mandatory requirement under the Constitution (note Quick and Garran, 1901: 723), but the Constitution did not prescribe when that might be. Moreover, one outcome of the system the framers created was that it was not immediately necessary after federation for the High Court to be established for the Constitution to be applied. Under Covering Clause 5, the new Constitution bound State Courts and they began to apply its provisions from 1901, and, in the absence of the High Court, the Privy Council existed as a final court of appeal on all matters of law, including the Constitution (Sawer, 1967: 20). Therefore, while the Constitution provided for a High Court whose potential jurisdiction was wide enough to see it as a replacement for the Privy Council, it also allowed for the existing system to continue without the High Court being established, at least in the short term. This ambiguity was to become a live issue when the Judiciary Bill establishing the High Court was introduced into the first Commonwealth Parliament by Deakin in 1902 and is one of the reasons why the early establishment of the Court was delayed and its eventual establishment so hard fought. Cases involving the interpretation of the Constitution could be dealt with by the existing system precisely because judicial review was a duty arising from the day-to-day execution of judicial power. Under the Australian Constitution, judicial review by the State court system and the Privy Council suffers as much from the defect of there being no express provision for it as does the High Court; that is, if it were a defect. It is not. Judicial review is a legal duty undertaken by the courts, including the High Court, and not an express or necessarily implied power.

The deliberateness and care with which the framers sought to create a strong, independent and effective constitutional court in the High Court, the provision
they made for the Court to have an extensive and original constitutional jurisdiction and the manner in which they sought to isolate that constitutional jurisdiction from Privy Council oversight similarly supports that conclusion (note Garran, 1924: 211-213). That they did not achieve the latter with complete success as the door on appeals direct from the State Supreme Courts was not properly closed does not detract from their overall intention, an intention to which fidelity was maintained in the face of Colonial Office disapproval once the Australian Constitution Bill went to England.

What is interesting about these provisions is that their purpose, apart from the positive one of creating a strong, independent and effective constitutional court, was to exclude other courts, and particularly the Privy Council, from exercising a constitutional jurisdiction. Why did the framers do that if they thought of judicial review as political power which required an express or necessarily implied constitutional foundation? If that were the case, then the Privy Council would not have had any jurisdiction unless the framers had provided for it in the Constitution. But that was not the problem, as it was not a problem following federation when the first Parliament came to consider when to establish the High Court. The problem was precisely that the Privy Council could perform the function of judicial review. That is why the framers of the Australian Constitution put so much energy into limiting the Privy Council’s appellate jurisdiction in relation to constitutional cases. Like the courts formed directly within the Australian judicial system, it would be under a duty to apply the law of the Constitution in the cases that came before it. As the Supreme Court within Australia, the High Court needed no positive grant of power beyond the general grant of judicial power to be the final interpreter of the meaning of the Constitution: all it needed was for the Privy Council to be excluded from that role.

The framers’ understanding of judicial review was made no more apparent than in long debate over ‘the rivers question’, in which Galligan (1987: 63-65) locates the ‘test case’ proving the framers grudging acceptance of the political role which he argues the Court was expected to perform within the federation. The rivers question controversy concerned federal control over navigation on the Murray-Darling river system, which flowed through three states and was
enormously important to all. There was great potential for conflict with and among State interests in navigation, water conservation and irrigation and uncertainty about how it might be resolved. It was an intractable issue and ultimately a meaningless one because track and train superseded river and steamer soon after federation.

However intractable, the debate around the rivers question was not about whether the High Court should perform a political role, but about whether the issue itself was political or legal. The terms of the debate were consistently framed in disagreement over whether the rivers question raised matters which should be left to the courts to decide because they were essentially legal in nature or to the Commonwealth Parliament because they were essentially political in nature (see Federation Debates, Melbourne, 1898: Symon at 510; Higgins at 510-511; Barton at 521 and 1984-1985; Isaacs at 1985-1986).

The decision was to leave it in the hands of the courts, but it was resigned acceptance that the issues could be resolved legally even if, as a number of delegates thought, far from satisfactorily. It was not a positive affirmation of the High Court's 'political' role. Here, as elsewhere at the conventions, the language used by the framers in speaking of judicial review was the language of law and duty, not politics and power.

AN INTERPRETIVIST ARGUMENT FOR NON-INTERPRETIVISM

In the closing section of The Politics of the High Court, Galligan (1987: 252-254) refers to the realist challenge that existed at the time to the High Court's formalism in constitutional interpretation. He presciently anticipated the changing mood and method on the High Court, noting the Court's then apparent disengagement from 'policing federalism' in preparation for interpreting a bill of rights. Galligan draws on the distinction between interpretivism and non-interpretivism as a way of foreshadowing the issues that he believed would come to face the High Court as it continued its development as a constitutional court into the late twentieth and early twenty-first centuries. He argues against the High Court adopting the non-interpretivism that came to characterise the American Supreme Court over the later half of the twentieth century through
which the Supreme Court justified ‘sweeping social reforms’. He describes non-interpretivism as a form of judicial review which ‘involves judges reading their preferred values and policy views into the constitution, and overruling elected legislatures on the basis of what judges prefer to think is desirable or advantageous’ (Galligan, 1987: 259). Galligan advocates an approach to judicial review, which he defines as, ‘deciding the constitutionality of a legislative or executive act or determining the boundaries of federal and state powers by reference to the constitution, either its actual language and structure or the values and intentions of the founders which it embodies’ (Galligan, 1987: 258).

However, a conception of judicial review as a political power rather than a legal duty suggests the nature of the discretion exercised in constitutional cases by judges is relatively unconstrained and open-ended, consistent with a non-interpretivist approach to judicial review. The idea of judicial review as a duty, however, suggests that judicial discretion, even in difficult constitutional cases involving matters of high politics, is limited to giving effect to the Constitution and the purposes and principles that inform it. This is not a distinction which Galligan makes. He argues that it is possible for a court ‘to be “interpretive” rather than “non-interpretive”’ in performing the ‘highly political and judgemental function’ of judicial review (Galligan, 1987: 232). Similarly, Galligan (1987: 260) does not draw the close theoretical connection between realism and non-interpretivism that I have drawn or distinguish realism from interpretivism, arguing instead that his preferred choice of interpretivism over non-interpretivism be adopted by the High Court ‘as realist views of judging’ replace the more formal approach it took to constitutional interpretation for much of the twentieth century.

Galligan wishes to argue that the interpretation of a written federal constitution like the Australian necessarily requires a more substantive approach to legal interpretation than is conventional within the English jurisprudential tradition. To that end, he wants to recover from the Constitution and the ideas which inform it a substantive conception of judicial review. To do this he looks to the framers and their deliberations. He says in effect that the framers did not intend the High Court to be like a standard English court in its constitutional role, but like a
constitutional court on the model of the American Supreme Court, which has tended to take a much more overtly substantive approach to constitutional interpretation than has the High Court. Insofar as this is a fair representation of Galligan's argument, there is nothing here with which I would disagree. However, his analysis goes awry because, in seeking to identify an approach to interpretation as an alternative to and against which to assess the Court's formalism, Galligan in fact ends up endorsing the non-interpretivism he claims to oppose.

Galligan's argument about the foundation and nature of judicial review under the Australian Constitution is itself an interpretivist argument and so consistent with the method of interpretation he advocates the High Court adopt. He in effect says that, even though there is no express provision for judicial review in the Constitution, if an interpretivist approach is taken to this issue and 'the values and intentions of the founders' are looked to, judicial review is found embodied in the Constitution. According to Galligan (1987: 53), the framers deliberately incorporated 'the power of judicial review' into the Constitution as an inherent part of its design because they came to gradually understand that the High Court was the best institution to resolve high-level political disputes between the two levels of government. This is true, but only partially so. On the logic of the federal system the framers adopted, the High Court is the 'keystone to the federal arch' and the judicial review the reason why it is so, but it is not judicial review in the way Galligan conceptualises it. Rather than recovering from the framers their conception of the Constitution as law and judicial review as a legal duty, he ends up imposing on them and the Constitution a conception of the High Court as a political institution and judicial review as a political power. Therein lies the non-interpretivist turn his analysis takes.

Taking his political conception of the Court and its role as a starting point, Galligan develops what is less an objective account of than a justification for the High Court's 'legalism', the Court's ruling theory of constitutional interpretation over most of the last century. Galligan (1987: 31-32 and 258) defines legalism by reference to the High Court's 'preference for abstract categories and technical distinctions', while also associating it with a literal approach to
constitutional interpretation which ‘purports to look only to the plain meaning of the actual language of the text’. The term so defined is sufficient for present purposes as it identifies in general terms the formalism which has tended to characterise the High Court’s constitutional jurisprudence. Galligan’s assessment of legalism is derived from realist assumptions about the nature of law. Legal realism provides the foundation for a non-interpretivist approach to constitutional interpretation by conceiving of courts as political forums through which preferred policy decisions are made or theories of government applied. The realism in Galligan’s thesis is in its underlying premise that law, or at least constitutional law, is necessarily political, and in adjudicating cases which come within that rubric the High Court actually makes decisions which are more political than legal (note Galligan, 1987: 30-39). This premise grounds his assessment of legalism. With that approach to constitutional interpretation, Galligan argues the High Court did not so much adopt a method of constitutional interpretation in its own right as a strategy through which the Court’s essentially political decisions were made to look ‘legal’ as a means of maintaining legitimacy within a political and legal culture generally wary of the courts performing an overtly political role (Galligan, 1987: 41).

Galligan considers the political context of many cases to reveal the ‘politics’ in those cases and examines some critically in terms of their formalism (he describes the decision in South Australia v Commonwealth (the First Uniform Tax case) (1942) 65 CLR 373, for instance, as ‘absurdly legalistic’ (Goldsworthy, 1989a: 31; Galligan, 1987: 131-134)). However, Galligan’s examination ends up being not so much a substantive assessment of the decisions themselves or the High Court’s methods in making these decisions, as an argument that the Court has now, ‘as realist views of judging replace legalism’ (1987: 260), to be more upfront about the necessarily political grounds for the decisions it makes (1987: 252-261).

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21 Galligan’s definition of legalism has been critically examined by Goldsworthy (1989a and 1989b; note Galligan’s response, 1989b).

22 Legal realism has been discussed in chapter 1.

23 Thomson (1988: 4-7) also engages with ‘legalism’. In noting the congruence in outcome between decisions of the American Supreme Court and Australian High Court in similar cases, he notes also that, where the two courts’ approaches appear to have achieved different outcomes in such cases, that might depend less on ‘judicial philosophy’ than on ‘the continuing acceptance of a facade of legalism behind which High Court justices have been able to covertly implement what they consider to be
In the end, while claiming to be interpretivist in his approach and arguing that the Court itself should adopt an interpretivist approach, Galligan does not tell us what purposes and principles that approach is supposed to give effect to. All that he gives us is a general conception of the High Court as a ‘political’ institution and an overall conclusion regarding the Court’s ‘political’ role that it has done it rather well:

After initially balancing federal and state powers as befitted a nation of states, the Court subsequently adopted the *Engineers* method of interpreting commonwealth legislative powers in a plenary sense, irrespective of their impact on the states. This produced a persistent, if irregular, incremental centralization of constitutional power that roughly paralleled Australia’s growth to nationhood. The Court’s interpretive method modified the constitutional system to keep pace with Australia’s national development and integration. By so doing the Court preserved both the constitution and its own institutional position as guardian and interpreter of the constitution (Galligan, 1987: 249-250).

But neither the framers’ views, nor the Constitution, nor Galligan’s own argument about the foundation of judicial review supports that conclusion. The point of the Constitution as the framers saw it, and as is apparent in its words and structure, was to create a federal system which would be maintained by the High Court, not to create a national government which would come to dominate that system with the aid of the High Court through ‘modification’ of the Constitution. The structural argument for judicial review in Galligan’s own terms is that the federal system requires a neutral arbiter between the centre and the regions, and he maintains that the way to do this is to ‘draw out’ the ‘principles and values from the constitution’ that should be given effect (Galligan, 1987: 232). Yet, in the absence of revealing what those principles and values are, his conclusion in the *Politics of the High Court* seems to be that there are no enduring principles and values enshrined in the Constitution. Rather, the Constitution is a flexible, political instrument, the job of the High Court in relation to it being to update it as required.

preferable political theories of governmental structure and power’ (Thomson, 1988: 6). This argument, while having some similarity with Galligan’s, is less accommodating, but it is also less developed. Thomson’s thesis is primarily concerned with the constitutional foundation for judicial review rather than its nature, though his assumption about its nature as a political power is what drives his concern over its foundation.
Judicial review is a function which the High Court cannot satisfactorily perform through the application of formal methods of interpretation more appropriate to a comprehensive legal code than the general language of the Australian Constitution. Given the nature of the Constitution, it requires the High Court to apply an interpretivist approach in making constitutional decisions, one which gives effect to the substantive principles underlying the Constitution in the context of contemporary political, economic and policy considerations which are sometimes relevant and are often highlighted in constitutional cases. Galligan ignores the substantive principle side of the interpretivist equation, which is the important side, and focuses only on the political, economic and policy side.

Instead of promoting interpretivism, Galligan’s argument, in fact, invites and legitimises the High Court adopting the realist stance he takes in his assessment of ‘legalism’. Consequently, however he defines the terms, Galligan endorses a non-interpretivist approach to interpretation by the Court. Indeed, in his later uncritical observation that the High Court was preparing to give up ‘policing federalism’, Galligan seems to endorse realist disengagement by the Court from the Constitution and the federal purpose for which it and the High Court was created. Similarly, legalism, through giving effect to the national purpose which Galligan identifies as constituting the most general effect of the Court’s decisions since the Engineers’ case was decided, might promote a desirable outcome from the point of view of those who are part of the unitary preference tradition, which Galligan has elsewhere criticised (1989a: 47-50), but not in terms of the federal principles and values which inform the Constitution. ‘Legalism’ is a form of non-interpretivist review because it is inconsistent with the federal purpose informing the Constitution and the substantive role the Court was to perform under the Constitution in giving enduring effect to that purpose. From that perspective, it is wrong because it gives effect to a national purpose completely at odds with the federal purpose underlying the Constitution, not because it is a legitimating device masking the High Court’s ‘political’ role which has reached its use-by date.
Constitutions which assume or mandate judicial review may invite and require greater or lesser deference to the legislature by the courts depending on the type of governmental system provided for in the constitution. There is nothing ‘natural’ about formalism or a more overtly substantive approach to judicial review—that is something which the constitution determines. Either way though, the courts perform a judicial function through giving effect to the constitution. Whether the approach sanctioned and required by a constitution is formal or substantive, deferential or independent, passive or active, it is nonetheless the constitution that is supposed to control meaning and the scope of judicial discretion. However that discretion is exercised in these senses, to suggest that it is or should be exercised politically—that is, through the courts taking account of facts, values, principles and interests in a way similar to a legislature and determining what policy outcome is desirable—is to lose sight of what law is and the purpose the rule of law serves in liberal democracies in which the distinctions among the executive, legislature and judiciary and their respective roles have evolved, often painfully, over centuries. To say, however, that judicial discretion is exercised by reference to the Constitution and the purposes and principles it embodies is to retain what is distinctive about law even where that law most directly affects politics as it does through a constitution.

How that is done neither requires that originalism be adopted as the ruling approach to interpretation, nor does it exclude material extrinsic to purely legal sources as irrelevant to the decision-making processes of a constitutional court. What it does require, however, is that, consistent with general arguments from an interpretivist perspective, ultimately it is the words and structure of the constitution and purposes and principles which inform it which should determine its application in the cases which come before the courts. Judges do sometimes make law, as has been acknowledged by members of the High Court (Dawson, 1990: 102; Mason, 1995a: 237; McHugh, 1999). But that does not mean that the baby has to be thrown out with the bath water and a realist account of law as politics by another means accepted.
There will almost certainly always be proportionally more cases in constitutional law than in the ordinary law in which the existing law does not cover the fact situation or of which it can be fairly said that conflicting principles apply. The scope of judicial discretion is necessarily extended under such circumstances. Nonetheless, where a constitution is informed by a relatively coherent set of principles, application of that broad framework of principle should at least guide its interpretation and the application of its provisions to the fact situation of the case before the court. Indeed, as I suggested at the beginning of this thesis, without reference to the theory of the constitution being interpreted, interpretation will be either incoherent or non-interpretivist. For the most part, the High Court’s approach has not been incoherent. It has been informed by a theory of the Constitution, but a theory which sees the Constitution embodying a national purpose that is not there and which has overridden and undermined the federal purpose that is.

Through a written constitution and judicial review a government and the purposes and principles underlying it are given effect through a law that is legally and politically fundamental and organic. Through being embodied in a constitution those key elements of the system are made superior to and protected from the political process in such a way that they can continue to structure the practice of politics and law into the future. The guarantee for a system so conceived is in its legality. Legality can provide that guarantee precisely because courts give effect to the constitution and not something else. The constitutional role of the courts, and primarily, of course, a constitutional court like the High Court, is to substantially apply the law, not substantially make it. That is what judges are required and constrained by their judicial duty to do. The other side of the coin is that it is through the system’s overall legality that the legitimacy of judicial review is provided, given that through it the capacity to declare authoritatively what the constitution means is given to a small group of unelected judges. They can do that legitimately because they are not making law in the sense that a legislature makes law, but are instead applying the fundamental law of the constitution, the limits on government contained therein representing higher order democratic principles which limit and contain democratic majoritarianism. The fact that they perform a legal duty, the correlative of a limited discretion to apply the constitution, rather than
exercise a political power, the correlative of a stronger discretion to make law and in effect alter the Constitution, is what provides the theoretical and practical justification for the antimajoritarian consequences of judicial review. You do not need express provision in a constitution for judicial review in this sense; all you need is for the courts to apply the constitution and not something else.

Lindell (1992: 224) notes that the status of the Australian Constitution as an organic instrument is the same whether its authority is derived from its original status as an Imperial Act or whether it is the people who are recognised as the legal source of its authority. With the passing of the Australia Acts 1986 (Cth and UK), the relevance of the Constitution’s origins in an Imperial Act has declined and popular sovereignty as the source of the Constitution’s authority has become more significant both politically and legally (note Lindell, 1986: 37; Castles, 1988: 382; Winterton, 1998; Patapan, 2000: 30-31).

The arguments for a democratic foundation for the authority of the Constitution are found in a number of different sources: the election, for the most part, of the delegates to the 1897-1898 constitutional convention at which the Constitution was drafted; the referenda through which the Constitution was approved; the opening words of the preamble, ‘Whereas the people ... ’; the section 128 requirement that change to the Constitution can only proceed with democratic approval through a national referendum; and the continuing acquiescence of the people to the Constitution. Legal recognition of that foundation would bring about conformity between the political reality that the people are the source of the Constitution’s authority and legal form, though its necessity is another question (note Lindell: 1986: 37; Winterton, 1998).

Even though the legal status of the Constitution at the time of federation lay in the paramount authority of the British Parliament, the importance of the Constitution’s democratic foundation in itself and in its connection to judicial review was recognised by those who drafted the Constitution, as Barton’s comments at the end of the 1897-1898 convention on the role of the judiciary under the Constitution suggest:
We have provided for a Judiciary, which will determine questions arising under this Constitution, and with all other questions which should be dealt with by a Federal Judiciary and it will also be a High Court of Appeal for all courts in the states that choose to resort to it. ... We can have every faith in the constitution of that tribunal. It is appointed as the arbiter of the Constitution. It is appointed not to be above the Constitution, for no citizen is above it, but under it; but it is appointed for the purpose of saying that those who are the instruments of the Constitution—the Government and the Parliament of the day—shall not become the masters of those whom, as to the Constitution, they are bound to serve (Federation Debates, Melbourne, 1898: 2477).

Galligan is right when he argues that the framers understood that the structural logic of the federal system required a strong and independent constitutional court able to exercise judicial review. Galligan is wrong, however, in his view that that logic gives rise to a conception of judicial review as a political power. That is not how the framers’ conceived of judicial review. Indeed, the connection between the structural argument for judicial review and a conception of judicial review as a duty is a necessary one. Without it, the force of the structural argument for judicial review is undermined. The logic of constitutions and reliance on judicial review as the means of maintaining a constitution over time is founded on the premise that law is essentially different to politics, and that judges in interpreting a constitution are engaged in a legal exercise and not a political one. The whole point of a constitution is to provide for institutions of government and their continued operation on the basis of provisions and the purposes and principles underlying them, which, while general, are sufficiently clear to guide and control judicial decision-making in such a way that they continue to structure politics and law into the future. This is why provision for government and its limitation is made in a constitution. It is not so that difficult political issues can be defused by removal to the courts, but because the matters which arise under a constitution are matters of fundamental principle which, regardless of the politics involved, the courts are under a duty to apply.

Not only did the framers think of judicial review as a duty at the same time as thinking of it as a function which arose necessarily from the very structure of the Constitution itself, but also that same argument was often made in contemporary commentary. Apart from it being an integral part of Marshall’s reasoning in *Marbury v Madison*, it is there in Bryce (1891: 242) and Dicey
(1959: 144 and 174-175), each of whom thought of judicial review as a duty not a power. It is also the foundation of the Garran’s ‘constitution theory’ of federalism, under which ‘the indispensable function of a federal constitution is to distribute the powers of the Nation and the States’ and which, as such, necessarily requires a ‘guardian’ or ‘interpreter’ of the Constitution’, a function which ‘properly’ belongs to the judiciary and is performed as a legal duty (1897: 23-28).

A conception of judicial review as a duty is also entirely consistent with the framers’ desire and decision to create a strong and powerful constitutional court in the High Court. Given the political issues that would be at stake in constitutional cases which would come before the Court, the framers deliberately sought to make sure the Court was independent so as to ensure that it could apply the Constitution and the enduring principles it embodied, even where those were inconvenient to powerful political interests or inconsistent with passing political values or beliefs.

At the same time, such a conception of judicial review is also completely consistent with the expectation that the High Court would develop a substantive and dynamic jurisprudence. A conception of judicial review as a legal duty is not necessarily an unsophisticated one, even though Galligan (1987: 44-45; note also Gagaler, 1987: 174) implies it is in his criticism of Bryce’s conception of judicial review as ‘simplistic’, which he further describes as becoming the ‘orthodox’ view in Australia. Bryce (1891: 241) did describe the determination of a law’s constitutional validity in the apparently ‘mechanical’ terms of, ‘setting the statute side by side with the Constitution, and considering whether there is any discrepancy between them’, but he also later discussed how complex and interpretive the task of judicial review is. While the American Constitution is a law, it is no ordinary statute, but one which, in the ‘generality’ of its words, imposes a special kind of burden on its judicial interpreters, often requiring, over and above the ‘legal acumen and judicial fairness’ usually expected of judges, ‘comprehension of the nature and methods of government’ (Bryce, 1891: 248). In Bryce’s estimation, the complex nature of the American Constitution and the interpretive task undertaken by the judges of the Supreme Court in giving it effect was such that those judges made of the Constitution ‘a far more complete
and finished instrument' than that which emerged from the convention held more than a century before in Philadelphia (Bryce, 1891: 248-249). He did not see any incongruity in the application of such a substantive and dynamic approach to judicial review coming within a constitutional court's legal duty to apply the law and neither did the framers of the Australian Constitution.

It is also not necessary to the development of a substantive jurisprudence to conceive of judicial review as a power or the origins of the High Court as being only American. To do that is to ignore the complex development of judicial review in the United States, but more importantly it ignores the complex range of influences on the Australian framers. The form of the Australian Constitution, which reflects so much the American, belies the significance to its substance of the practice of government in colonial Australia. It was that tradition through which the framers saw and into which they brought federalism and the idea of a fully fledged constitutional court. Just because that tradition had its antecedents within an English jurisprudential tradition, did not mean it was inimical to federalism or a constitutional court which would develop a substantive jurisprudence. Federalism was the natural outcome of the evolution of colonial government not only because it promised the colonies their continuation as States within the Commonwealth, but because the principles of federalism were reinforced by those aspects of limited government which had evolved in the colonies, including judicial review.

The framers recognised that in the Constitution they had given effect to a federal form of limited government and that they had done so through broad principle rather than as a precise code. The framers also expected that the High Court, through the development and application of a substantive constitutional jurisprudence, would give effect to those principles and would give to the Constitution contemporary relevance as the circumstances of the federation changed and developed. As Galligan (1987: 62) notes, Downer made one of the clearest statements in this regard at the conventions:
[The High Court] will have the greatest part in forming this Commonwealth; because honorable members must not forget that, although we form it in form, they form it, to a large extent, in substance ... because with them we leave it not to merely judicially assert the principles which we have undoubtedly asserted, but with them rests the application of those principles, and the discovery as to where the principles are applicable and where they are not (Federation Debates, Melbourne, 1898: 275).

Those views were reflected on the first High Court once it was established and began sitting following federation. As O'Connor famously said in *Jumbunna Coal Mine NL v Victorian Coal Miners’ Association* (1908) 6 CLR 309:

... it must always be remembered that we are interpreting a Constitution broad and general in its terms, intended to apply to the varying conditions which the development of our community must involve.

For that reason, where the question is whether the Constitution has used an expression in the wider or in the narrower sense, the Court should, in my opinion, always lean to the broader interpretation unless there is something in the context or in the rest of the Constitution to indicate that the narrower interpretation will best carry out its object or purpose (6 CLR at 367-368).

No one understood better than Clark the dynamic nature of the Constitution and the substantive role the High Court would necessarily perform in giving it effect. Writing soon after federation, he noted that ‘the Constitution was not made to serve a temporary and restricted purpose’ (Clark, 1901: 21). Of its interpretation he referred to the inevitability that the Constitution would be, ‘supplemented in the course of time by a body of judicial decisions, which may either extend or restrict the application of the language used in some of its provisions beyond or below the literal and primary meanings of the words employed’ (Clark, 1901: 15).

These views were not idiosyncratic, but representative. There was much debate about most significant aspects of the Constitution at the conventions, but the dynamic nature of constitutional law and the role of the High Court in giving it effect were not among those. Around the role of the High Court as a constitutional court there was more consensus than almost any other part of the
Constitution and that consensus began developing from the beginning of the
convention process.

Endorsement of the argument that the framers' intentions should be given effect
in the interpretation of the Constitution is often thought of as an exercise in
naive originalism and ultimately futile anyway, as the historical record is often
partial and intention often capricious. However, intention is a more complex
concept than such views suggest. What is more interesting is that the framers
appeared to think so as well. The framers had a much more sophisticated
concept of intention than they are often given credit for, as the quotes from
Downer, O'Connor and Clark suggest. Clark (1901: 19) referred specifically to
this richer concept of intention in saying, 'where the intention of the makers of
the law was to provide a general rule of conduct to be observed in a multiplicity
of circumstances, the question of the intention of the lawmakers constantly
resolves itself into an inquiry whether a particular act or a particular set of
circumstances is within the general language which they have used'. Less
prosaically, he spoke of the Constitution as a 'living force' which:

... must be read and construed, not as containing a declaration of the will and
intentions of men long since dead, and who cannot have anticipated the problems
that would arise for solution by future generations, but as declaring the will and
intentions of the present inheritors and possessors of sovereign power, who
maintain the Constitution and have the power to alter it, and who are in the
immediate presence of the problems to be solved (Clark, 1901: 21).

The framers knew the Constitution could not and would not provide an answer
in a strict sense to every or even most of the contingencies of government and
politics that would arise in the future before the courts, but they believed its
language and the principles and purposes and informing it were sufficiently
certain to guide the High Court in applying the Constitution to those
contingencies. The framers were not crude originalists, they were sophisticated
interpretivists and they expected that the judges of the High Court would be the
same.

The views of O'Connor and Clark have received support in recent years on the
High Court. O'Connor's statement in Jumbunna was cited with approval in R v
Coldham; Ex parte Australian Social Welfare Union (the Social Welfare Union case) (1983) 153 CLR 297 at 314. In the Social Welfare Union case, the Court unanimously overturned earlier authority and gave an expansive interpretation to the expression ‘industrial dispute’ in the Commonwealth’s industrial relations power under section 51(xxxv) of the Constitution. In Theophanous v Herald & Weekly Times Ltd (1994) 182 CLR 104, Clark’s statement was quoted with approval by Deane in support of the development of a substantive rights jurisprudence by the High Court (182 CLR at 172-173). However, in both cases reliance on those statements occurred in the absence of the federal context in which they were made. O’Connor was a member of a Court on which he and a majority of the Court were in the process of developing a substantive federal jurisprudence through which a ‘narrower interpretation’ of Commonwealth power was justified under circumstances where such an interpretation was necessary to give effect to the Constitution’s overarching federal ‘object and purpose’. Clark’s ‘living force’ statement was made in the context of a preceding argument which located the foundation and purpose of judicial review in the federal structure of the Constitution:

... dependence upon the Judiciary for the restraint and practical abrogation of legislation by the Federal Parliament or the Parliament of a State in excess of the limitations imposed upon its powers by the Constitution is inseparable from the federal form of political organisation if its essential features are to be preserved from gradual obliteration ... (Clark, 1901: 4)

Clark’s eloquent description of the Constitution as a ‘living force’ was underscored by an understanding that the Constitution provided for government limited by federal principle given effect through law:

These limitations are imposed by the Constitution of the Commonwealth, and they are therefore legal limitations in the strictest sense of the word, because the Constitution supplies the fundamental and organic laws of the Commonwealth (1901: 3-4).

Constitutions are usually framed in broad and general terms to endure over time in the face of the exigencies of changing social and political circumstances. The Australian Constitution is framed in this way. It began life as a statute of the British Parliament, but it is not a statutory code: it is the outward
manifestation of the principles and purposes underlying the Australian political and legal system to which it gives form. Given the generality of its language, it is impossible to interpret and apply its provisions without some background theory to make sense of its words in their application to particular circumstances. In the first chapter of this thesis I argued that this theory should not be drawn from outside of the Constitution and the words made to fit the external theory's imposed requirements, but that it is the theory underlying the Constitution, the principles and purposes which inform its provisions, which should provide the basis for giving them particularity. This was also the view of the framers. They were sophisticated interpretivists who knew they could not make of the Constitution a comprehensive code, but who believed they could make a constitution informed by a federal theory of government sufficiently coherent that it would continue to structure Australian politics and law into the future. It was on this interpretivist assumption that the Constitution was framed and a constitutional court created in the High Court.

The framers understood that law was different to politics and they believed that legality was the best protection for the federation. The fundamental assumption underlying the framers' idea of federalism is that the respective powers of the centre and the regions could be divided by law through a constitution and that a constitutional court could ensure through judicial review that the division would continue to have effect into the future. The framers did not create in the High Court a political institution masking as a legal institution to resolve otherwise intractable political problems. They created in the High Court a powerful legal institution in which matters of federal principle could be decided free from political and other contingent influences.
CHAPTER 5

GRIFFITH v ISAACS: FROM A FEDERAL JURISPRUDENCE TO A JURISPRUDENCE OF NATIONAL SUPREMACY

The three judges who were appointed to the first High Court bench, Samuel Griffith as Chief Justice and Edmund Barton and Richard O’Connor, had all been closely involved in the making of the Constitution over the 1890s. They believed that the High Court was ‘the keystone of the federal arch’ and was bound by duty to apply the law of the Constitution and impartially settle the federal disputes which would come before it in a way that would give continuing effect to the federal purpose underlying the Constitution. However, a schism developed on the bench after the appointment of two new justices to the Court in 1906, Isaac Isaacs and Henry Higgins. The new members of the Court, while also closely involved in the constitution-making process as influential members of the second convention, were less enamoured with the federal aspects of the Constitution than the fact that through it a national government had been created (note Sawer, 1967: 62-63). These members were initially in the minority, but that was to change. With the appointments of Isaacs and Higgins in 1906 the Court’s membership was increased to five. In 1913, following O’Connor’s death the year before, the size of the Court was increased to seven. Frank Gavan Duffy replaced O’Connor and Charles Powers and George Rich were also appointed to the bench. Griffith retired in 1919 and Adrian Knox was appointed to replace him as Chief Justice. Barton died in 1920 and Hayden Starke was appointed as his replacement. By the time the Engineers’ case was decided, Gavan Duffy was the only dissenter from the view of Isaacs and Higgins. As the result of the decision in Engineers, the federal principles which the Griffith Court had applied in the interpretation of the Constitution were overturned and a national vision of the Constitution was entrenched in the Court’s constitutional jurisprudence. The determinative judgment in Engineers was the joint majority judgment written and delivered by Isaacs.
In the first chapter of this thesis I proposed that a written constitution framed in broad and general language like the Australian could not be interpreted without reference to a background theory of the constitution. Evidence of that necessity is found in the two competing approaches taken to constitutional interpretation during the early period of the High Court's existence. In both, a theory of the Constitution provided the foundation of the approach. At first the Constitution was interpreted on the basis of a federal theory of the Constitution. Later, with the decision in the *Engineers'* case, that federal theory was replaced by a national theory. However, while the first federal theory was an explicit ground for the decisions of the Court, the latter national theory was concealed behind the rhetoric of formalism. Moreover, as the Griffith Court tried to come to terms with the Constitution and its own constitutional role, it began to develop an approach to judicial review through which effect could be given to principles of federal government derived from the Constitution, while the later national theory was imposed on the Constitution. In this sense, the approach of the Griffith Court at least attempted to be interpretivist, whereas the approach of the Court in *Engineers* and after has been non-interpretivist.

Interpretivist assumptions formed the basic premises upon which the framers constructed the Australian Constitution and the High Court as a constitutional court under it. The framers expected that the High Court would adopt an interpretivist approach in interpreting and applying the Constitution; that is, they expected the High Court would give effect to the Constitution and the purposes and principles which inform it rather than adopting a non-interpretivist approach and moulding the Constitution's bare words and structure to fit its vision of what the Constitution should be. As to the particular theory underlying the Constitution, that is a federal theory of limited government, but this claim is hardly contentious. What is more contentious is the claim that it is a theory sufficiently coherent to ground the Constitution's interpretation. As I have argued, there is a unity and clarity of purpose in the framers' constitutional design, the concept of federalism embodied in it and the role of the High Court in giving it effect more often than not denied.
FEDERAL THEORY, FEDERAL PRACTICE AND LEGAL PRINCIPLE

Many early understandings of modern federalism have assumed one of its defining characteristics was the separateness of the governments which comprised federations. However, while this coordinate conception of federalism continued to have currency well into the twentieth century (note Wheare, 1963: 10), the abstract idea that regional governments and the national government in a federal system could operate in entirely 'separate spheres' is not one that has been borne out in reality.

The impossibility of a completely coordinate federal system forms a part of Warden's argument that the federal system which the Australian framers adopted under the influence of 'the hegemony of American federal thought', as he terms it, is fundamentally flawed (1992: 146 and 152). Warden (1992: 146) points to Elazar's (1962) work on intergovernmental relations in the American federation during the nineteenth century to demonstrate that the concept of 'separate spheres' was never a reality in the United States. However, while this is true, it is only fatal to the system designed by the Australian framers if the concept of 'separate spheres' is an essential attribute or defining aspect of the system. It is not. The essence of the framers' federal theory, as is the essence of modern federalism generally, is the division of power between the centre and the regions, not the complete separateness of the governments within a federation.

In federal systems regional and national governments have extended their reach enormously over the twentieth century and in ways which have often involved complex intergovernmental relations and overlapping jurisdictions. However little the idea of 'separate spheres' matched reality in the past, it has become even more redundant and misleading. The focus of scholars of federalism today is not on the separateness of the governments within a federation, but relations among them. Elazar (1984: 2), for instance, speaks of government policy within federations being 'made and implemented through a process of negotiation that involves all polities concerned' and which enables 'all to share in the overall system's decision-making and executing processes'.

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As to the nature of federal interactions, they have been traditionally described as taking place on a continuum from ‘cooperative’ to ‘coercive’, the two terms being used to distinguish among forms of relationships between the levels of government in federations (note Anderson, 1961: 108-115; Else-Mitchell, 1977; Cranston, 1979). Where a national government in a federation had to act with the regional governments to implement policy, regardless of how much conflict or otherwise there was in the process of reaching agreement, this has been called cooperative federalism; where, however, the national government could use its powers to force the regions to implement or deliver certain policies, this has been called coercive federalism.

Other contemporary scholars of federalism have focused on competition among regional governments in federations as an important characteristic of federalism. In contrast to a cooperative or collaborative conception of federalism, federalism as competition focuses not so much on the nature of the relationship between the centre and the regions, as on the potentially competitive and productive nature of relations among the regions themselves (Kenyon and Kincaid 1991: 9; note also Breton, 1991; Kasper, 1995; Painter, 1998: 25-31 and 189-190).

Recent attempts to understand the nature of intergovernmental relations within the Australian federation include work by Galligan on its structural foundation. Galligan (1995: 199-203) concludes that the Australian Constitution embodies not any coordinate idea of federalism, but rather a concurrent one in which power is shared between the Commonwealth and the States and jurisdictional overlap is the norm. Painter (1998) draws on Galligan’s work, in addition to other contemporary criticism of the inadequacy of the coordinate idea of federalism to provide either a useful description of federalism or any ideal to be aspired to, in examining Commonwealth-State joint policy making processes of the 1990s, which were relied upon as the means to realising broad ranging economic reform. Eschewing also the term cooperative as ‘much misused’ and ‘slippery’, he describes those processes as ‘collaborative’, indicating the degree to which the agreements made incorporated binding outcomes on all the parties concerned (Painter, 1998: 22-24 and 122-125). More generally, Painter (1998:
6) makes the point that '[i]n a federal division of powers, the flip-side of divided power and jurisdiction is shared power and jurisdiction'.

While present understandings of modern federalism tend to explain it in terms of interactions among the governments of a federation rather than the separateness of those governments, the central premise on which modern federations are founded has remained the same. It is the idea that the regions and the centre within a federation can be guaranteed relative independent authority through constitutionally protected governmental systems at each level of government and a distribution of powers among them. That premise continues to be the key to our understanding of modern federalism and is necessarily the foundation of any effective federal jurisprudence. Hence, while Elazar (1984: 2) may focus on the interactions among governments in describing how federalism works, he nonetheless defines federalism as, 'the mode of political organisation that unites separate polities within an overarching political system by distributing power among general and constituent governments in a manner designed to protect the existence and authority of both'. In this way he retains an effective division of power between the national and regional governments of a federation as the foundation of his understanding of what federalism is. Sawer (1977: 13) also, in discussing the idea of cooperative federalism, noted that the descriptive term 'co-operative' only reasonably applies if 'the assumptions of co-ordinate federalism are to some extent realised – that is, the co-operating governments have some possibility of choice, some bargaining power, some autonomy'. As Sawer (1977: 13) pointed out, in the absence of such autonomy, the use of the descriptive term 'co-operative' is akin to describing 'the victim of a hold-up as co-operating with the gunman'. A competitive federal system is similarly premised on the relative autonomy and independence of the regions, so allowing those regions to compete in the delivery of public goods and services (note Breton, 1991: 48-52; Dye 1990: 14).

While the idea of coordinate federalism had a certain currency at the time the Constitution was framed, Warden's (1992) argument that the framers thought of federalism in strictly coordinate terms is neither unequivocally supported in the literature and nor is it supported by the Constitution. Quick and Garran (1901:
commenting on a Privy Council decision, *Citizens' Insurance Co v Parsons* [1881] 7 AC 96, regarding the Canadian Constitution, describe the case as:

... a remarkably apt exemplification of the competing and overlapping operation of powers in a Federal Constitution, and of the manner in which one subject may be governed by two sets of laws.

As to the primary focus of the Constitution which the framers drafted, it is on the division of power and not any requirement that the Commonwealth and States operate somehow completely separate from each other, a requirement nowhere to be found in the Constitution. The framers' conception of federalism did not preclude interaction between the governments within the Australian federation, it only required that each bring to any interaction a degree of independence and autonomy grounded on an enduring constitutional division of power. In this sense, how the framers thought of federalism and how it is thought of today is the same.

As I have argued, it was for the purpose of ensuring that the division endure that the High Court was created. But, by the same token, enduring did not mean a rigid or unchanging application of the division of power. The framers expected the development and application of Australian constitutional law by the High Court to be dynamic, the job of the High Court being to apply the federal principles informing the Constitution in a way that ensured their continued relevance in the changing circumstances that would mark the life of Australia as a federal nation.

Even if the framers did not carry the expectation that the Commonwealth and the States would operate in complete and blissful isolation from each other, it is more than unlikely that they did not anticipate the degree of interaction that has developed among governments in modern federations. However, the accommodation of that development within the inherently dynamic development of Australian constitutional law by the High Court that they did expect was both possible and justifiable on their own interpretive premises, so long as the integrity of the division of powers was maintained. Upholding this division required two things of the Court: one was to give effect to the actual division
itself by constraining the scope of the specific powers granted to the Commonwealth so that the States retained a degree of legislative autonomy; the second was to ensure the maintenance of independent institutions of government through which power could be exercised. What was not justifiable on those interpretive premises is the extent to which federal principle has become effectively irrelevant in the Court’s constitutional jurisprudence and the consequent extent to which the Court has eroded the division of powers under the Constitution. This erosion began with the decision in the *Engineers’* case.

The *Engineers’* case represents not an adaptation of the Constitution to changing circumstances in any way consistent with the principles of government underlying the Constitution, but a fundamental alteration of its nature. Nor do the reasons for the alteration reflect ambiguities in the framers’ conception of federalism or its translation into a Constitution. What they reflect is the Court’s own view of the usefulness of the federal system of government enshrined in the Constitution and the application by it of a corporate view, as represented in the accumulated effect of the decisions the Court has made, that governmental power should reside primarily in the national government. Since the *Engineers’* case was decided the federal theory underlying the Constitution has had little or no purchase in the Court’s interpretation of the Constitution. Consistent more with the assumptions of the unitary preference tradition than those informing the Constitution, the High Court has turned the Constitution on its head, reading it not as a charter of federal government, but as a charter for national government—the task of the Court being not to give effect to the Constitution’s federal elements, but to interpret them out of it.

The approach of the first High Court under Griffith was the opposite. Federal principle formed the major premise of its constitutional decisions and the development of a federal jurisprudence its major constitutional task. However, in developing that jurisprudence the Court sought not only to give effect to the division of powers under the Constitution, but also to impose a strict separation between the operations of the Commonwealth Government and State Governments. The theory of the Constitution the Griffith Court applied in its interpretation of the Constitution was a rigidly coordinate federal theory. Consistent application of that abstract theory proved to be impossible in the
face of the reality of the interactions and overlap among the governments of the
Australian federation, providing the way in for unlike-minded members of the
Court to undo not only the unnecessary part of the theory—the requirement of
strict separateness—but also the division of powers which is the hallmark of any
effective modern federal system.

EARLY ATTEMPTS AT A FEDERAL JURISPRUDENCE

The first justices appointed to the High Court bench understood that the federal
distribution of governmental power adopted in Australia reflected the pattern of
the United States Constitution and that the High Court was expected to be, like
the American Supreme Court of the 1890s, the Guardian of the Constitution.
For those reasons, they expected to draw on the jurisprudence developed by
the Supreme Court in deciding federal disputes. As Griffith said for the Court in
_D'Emden v Pedder:_

So far, therefore, as the United States Constitution and the Constitution of the
Commonwealth are similar, the construction put upon the former by the Supreme
Court of the United States may well be regarded by us in construing the
Constitution of the Commonwealth, not as an infallible guide, but as a most
welcome aid and assistance (1 CLR at 112).

Subsequent Privy Council criticism in _Webb v Outtrim_ [1907] AC 81 of the High
Court's use of American precedent was rejected by the Griffith Court in _Baxter v
Commissioners of Taxation (NSW)_ (1907) 4 CLR 1087 (note Sawer, 1967: 73-74),
marking an early assertion by the Court that, consistent with the
constitutional provisions relating to Privy Council appeals and the intention
underlying them, in its constitutional role the High Court would brook no rival in
the Privy Council.

However, while the Griffith Court looked to the federal jurisprudence of the
American Supreme Court for guidance, its translation into an Australian context
was a far from straightforward one. The American Supreme Court of the late
nineteenth and early twentieth centuries, despite a continuing theoretical
commitment to independent and separate spheres of national and State
governmental influence, nonetheless took a relatively pragmatic approach to the
development and application of federal principle. The Griffith Court, on the
other hand, sought to give effect to a strictly coordinate conception of federalism. The first justices of the High Court assumed that the federal theory embodied in the Constitution required that the Court keep the Commonwealth and the States completely separate from each other.

The attachment to coordinate federalism came not just from the early justices’ assumptions about what federalism is, but also from their attachment to the formal standards of the English jurisprudential tradition. While the influence of that tradition has often been noted as significant in terms of the High Court’s general approach to constitutional interpretation and in particular in the development of legalism (see generally Kadish, 1959: 151-155; Sawer, 1967: 52-75; Mason, 1986: 4-5; note Dixon, 1965: 102-105), what is less often recognised is how significant that tradition was from the very beginning of the High Court’s engagement with the Constitution. What the members of the Griffith Court understood law to be, which was a reflection of their background and training in a system which to a significant extent reproduced English legal norms, influenced both their conception of federalism and how they approached the task of constitutional interpretation. Their attachment to English jurisprudential standards made it difficult for them to adjust to the more substantive and practical requirements of their constitutional role, which reflected not the limited, albeit fundamental, constitutional role of English courts, but the much more substantive constitutional role of the American Supreme Court as it had developed over the nineteenth century.

Over that century the American legal system generally evolved in a way which increasingly distinguished it from the English legal system. It was an evolution born of history and institutional logic. The United States came into existence because of a radical disjunction from Britain through revolution. Its political system, in which a strong separation of powers is entrenched, was developed and adopted in preference to the English parliamentary tradition. With that came constitutional equality for the judiciary as the third coordinate branch of government. Federalism too brought about separate independent judicial structures among the States and between the national and State levels of
government, promoting diversity in the legal system of the United States which was foreign to the unitary English legal system. The inherent constitutional authority of both State and federal courts combined with the logic of a system in which governmental power was legally provided for and limited through written constitutions, saw the American judiciary establishing and carving out for itself the powerful and independent role it performs within American democracy. These factors help explain the development within the American legal system of a much more substantive approach to interpreting and applying the law than exists within the English tradition.

In Australia, however, there is continuity in the legal system that does not exist in America. As Dixon (1957: 240) said:

In Australia we have paid little attention to a distinction, which appears to me to be fundamental, between American constitutional theory and our own. It concerns the existence of an anterior law providing the source of juristic authority for our institutions when they came into being. In America, in the case alike of the original thirteen States and of the Union itself, the authority for the establishment of their constitutions is ascribed to the will of the people and not to the operation of existing law. ... In Australia we begin with the common law.

While the formation of the Australian Constitution marked an enormous step on the way to Australian independence from Britain and provided the opportunity for the continuing development of an indigenous concept of government and law, it was an opportunity inadvertently muted by those elements of the legal system in which English form was maintained. Most significant among those was the creation of the High Court as not only a constitutional court, but also as a court of general appeal from all Australian jurisdictions.

The dual role of the High Court has inhibited the development of a more substantive jurisprudential tradition like the American in two ways: first, as the highest appellate court across all jurisdictions in Australia, unity and consistency in law is maintained and with it the positivist image of law as a system of relatively determinate rules; and secondly, the Court's substantial general law jurisdiction has influenced its approach to constitutional cases. Constitutional cases are relatively few and far between. Most of the Court's work is in other
areas of public and private law. The positivist conception of law inherited from Britain is reproduced in the development of the general law in Australia, which in turn has tended to pervade and inhibit the Court’s approach to constitutional interpretation. However, that jurisprudence, while suited to and reflective of the purposes and principles which inform the English constitutional tradition, is as removed from the actual requirements of interpreting the Australian Constitution as the Constitution is itself alien to that tradition. The Constitution is not simply a statute to be given effect by the Courts in facilitating the application of the legislative will, but rather it is a written instrument of limited government creating a constitutional court able, in the cases properly brought before it, to strike down legislation found by it to be inconsistent with that instrument.

For all the Griffith Court’s express reference to decisions of the American Supreme Court, the need to develop the robust, substantive and practical form of judicial review mandated and required by the Constitution was not immediately accepted or understood by the Court. Confusion over its constitutional role manifested itself early on in the life of the Griffith Court as the actual demands of constitutional interpretation and the actual interconnectedness of federal politics confronted the rigid, idealised vision of law and federalism with which the early justices came to the task of interpreting the Constitution.

IMPLIED IMMUNITIES AND RESERVED POWERS

The federal jurisprudence which the Griffith Court sought to develop following the High Court’s establishment in 1903 was grounded on two principles which the first members of the Court believed were implied from the federal structure of the Constitution: the implied immunities doctrine, through which the Commonwealth and the States were held to be immune from the legislation of the other, and the reserved powers doctrine—the reserved powers being those assumed to belong to the States and against which the scope of the Commonwealth’s enumerated powers could be measured.

A limited doctrine of implied immunity can be justified within a federal system as necessary to protect the operations and existence of the governments that
comprise the federation. If it is possible that either level of government could use its powers to restrain or control the operations of the other in such a way that its operations or existence were fundamentally compromised, it is a reasonable implication from federalism that such interference cannot be constitutionally sanctioned. However, the implied immunities doctrine applied by the early High Court went beyond providing this kind of fundamental protection for the system and sought to use the doctrine to give effect to a purely coordinate conception of federalism.

The origins of the doctrine of implied immunities do not lie so much in the American constitutional settlement as in the jurisprudence of national supremacy that Marshall was developing while Chief Justice of the Supreme Court. Marshall treated the national government and the States as separate, sovereign entities, but not as equal ones (McCulloch v Maryland (1819) 17 U.S. (4 Wheat.) at 427-429). Drawing an implied doctrine of intergovernmental immunity from the Constitution, he did so not to serve any federal purpose. In Marshall’s hands the doctrine shored up the position of the national government: whatever sovereignty the States had, it could not extend to interfering with the exercise of the sovereign and supreme powers of the national government (McCulloch v Maryland (1819) 17 U.S. (4 Wheat.) at 429 and 436). However, Marshall’s reliance on a concept of sovereignty in his development of his one-sided immunities doctrine left room for the promotion of the doctrine’s federal credentials through reciprocal application to States (note Claus, 2000: 112). This occurred some fifty years later in Collector v Day.

The language of divided sovereignty in the Supreme Court’s federal jurisprudence of the nineteenth century slotted neatly into the Griffith Court’s conception of federalism as strictly coordinate and the Griffith Court relied on it, enhancing in the end not federalism or the Constitution, but only the ambiguities of the implied immunities doctrine and its dubious origins.

The doctrine was first applied early on in the life of the High Court in D’Emden v Pedder. At issue in this case was the question of whether a State stamp duty of two pence could be applied to the receipt of a Commonwealth salary by a Commonwealth public servant. The Court held that it could not, justifying its
decision in the language of divided sovereignty that had been introduced by Marshall into the constitutional discourse of the United States:

In considering the respective powers of the Commonwealth and of the States it is essential to bear in mind that each is, within the ambit of its authority a sovereign State, subject only to the restrictions imposed by the Imperial connection and the provisions of the Constitution, either expressed or necessarily implied (1 CLR at 109).

The limits of a State's sovereign power were to be set by the boundary of Commonwealth sovereignty:

When a State attempts to give to its legislative or executive authority an operation which, if valid would fetter, control, or interfere with the free exercise of the legislative or executive power of the Commonwealth, the attempt, unless expressly authorised by the Constitution, is to that extent invalid and inoperative (1 CLR at 111).

Later that year, in Deakin v Webb (1904) 1 CLR 585, the Court applied the principle again, holding that a State income tax could not be imposed on a minister of the Commonwealth Government.

It was not too long before the opportunity arose to give the doctrine reciprocal effect. In Federated Amalgamated Government Railway & Tramway Service Association v New South Wales Railway Traffic Employees Association (the Railway Servants' case) (1906) 4 CLR 488, the High Court affirmed the implied immunities doctrine and held that it applied to a Commonwealth law affecting the States. This was the first case in which the provisions of a Commonwealth statute were held to be unconstitutional (note Thomson, 1988: 166). American precedent was followed insofar as the American doctrine had been held to apply to the States in Collector v Day, however, it departed from that jurisprudence in applying it to a subject outside of taxation. In this case, it was used to prevent the New South Wales Government from being made subject to the Commonwealth's Conciliation and Arbitration Act 1904.

In Baxter's case, the foundation of the immunities doctrine was explained in terms which repeated the Court's earlier reliance on the concepts of divided
sovereignty and coordinate federalism. The Court, through Griffith, Barton and O'Connor's joint majority judgment, noted that the Commonwealth and States could each pass laws, which, 'although unobjectionable in form, and prima facie within the competence of the legislature which enacted them, would, if literal effect were given to them, interfere with the exercise of the sovereign powers of the other two of the sovereign authorities concerned' (4 CLR at 1121).

The Griffith Court boldly applied the implied immunities doctrine as a limitation on Commonwealth power and State power across the board. Its rigid application of the doctrine went well beyond any that it had been given in the United States. As Sawer (1967: 127) noted:

The High Court, in line with the general tone of Anglo-American legal thinking, rejected the American trend since Collector v Day to treat intergovernmental 'interference' as a matter of degree and fact to be determined from case to case, and instead treated it as an absolute doctrine admitting no such graduations.

In the process the Court lost sight of the federal purpose any such immunity may serve in protecting the existence of the Commonwealth Government and State Governments, giving effect instead to a coordinate vision of federalism which would prove impossible to sustain. The doctrine was necessarily modified by the Court in the face of the reality of the interconnectedness among the governments of the Australian federation. Most famously, in R v Sutton (the Wire Netting case) (1908) 5 CLR 789 and Attorney-General (NSW) v Collector of Customs (NSW) (the Steel Rails case) (1908) 5 CLR 818, the Commonwealth successfully argued that the States were subject to Commonwealth customs regulation and liable to pay customs duty on imported goods.

Whereas the implied immunities doctrine was a principle which affected the Commonwealth and the States equally and was concerned with keeping the governments of the States and the Commonwealth separate and free of interference from the other, the reserved powers doctrine was used to set limits on the scope of the legislative powers granted the Commonwealth. Through the reserved powers doctrine the Commonwealth's legislative powers were balanced against powers over local matters assumed to be reserved to the
States. As with the implied immunities doctrine, the reserved powers doctrine received its first application in the first year of the Court's existence.

In *Peterswald v Bartley* (1904) 1CLR 497, the High Court held that a New South Wales brewers licence fee was not a duty of excise. If it had been (because section 90 of the Constitution provided that only the Commonwealth could impose duties of excise) New South Wales would have been prevented from levying the fee. In reaching its conclusion, the High Court relied in part on a doctrine of reserved powers:

The Constitution contained no provisions for enabling the Commonwealth Parliament to interfere with the private and internal affairs of the States, or to restrict the power of the States to regulate the carrying on of any businesses or trades within their boundaries, or even, if they think fit, to prohibit them altogether. That is a very important matter to be borne in mind in considering whether this particular provision ought to be construed so as to interfere with the State's powers in that respect.

The Court's comments on the reserved powers doctrine in *Peterswald v Bartley* were approved and developed in *R v Barger* (1908) 6 CLR 41, which also concerned Commonwealth regulation of the manufacturing industry within the States. The Commonwealth's *Excise Tariff Act 1906* imposed a tax on manufacturers of certain farming machinery from which they were exempted if conditions as to 'fair and reasonable' wages were met. Griffith, Barton and O'Connor, forming the majority, held that the Act was not a law within the power of the Commonwealth to enact, because it was in substance a law with respect to conditions of labour, a matter within the legislative competence of the States.

In reaching this decision, the majority explained that the task of determining 'the true nature and character of the Act' had to be undertaken in the context of the Constitution considered as a whole (6 CLR at 72-73). The majority believed that the powers of the Commonwealth could not simply be given literal effect, because to do so would defeat the scheme of the Constitution, which was to, 'confer certain definite powers upon the Commonwealth, and to reserve to the States, whose powers before the establishment of the Commonwealth were
plenary, all powers not expressly conferred upon the Commonwealth’ (6 CLR at 67).

Isaacs and Higgins dissented. They concluded that if the literal operation of the Act brought it within the Commonwealth’s taxation power, this was as far as the Court’s inquiry need go. In Isaacs’ terms, ‘[o]n its face the Act is a taxing Act, and on precedent that is conclusive’ (6 CLR at 95).

Later cases saw the doctrine applied to narrowly define the Commonwealth’s power to legislate over trade marks, section 51(xviii), (Attorney-General (NSW) v Brewery Employees Union of New South Wales (the Union Label case) (1908) 6 CLR 469), and its corporations power, section 51(xx), (Huddart Parker & Co Pty Ltd v Moorehead (1909) 8 CLR 330).

In general, unlike the implied immunities doctrine as applied by the Griffith Court, a foundation for the reserved powers doctrine could be found in the text and structure of the Constitution and particularly, as the Court indicated in Barger’s case, in the constitutional division of power. Section 107 of the Constitution, which continues the powers of the States subject to the grant of power to the Commonwealth, is an express reference to that division. A number of the Commonwealth’s specific powers are also expressed in terms which limit them to only matters within the subject of power that extend beyond State boundaries or which except State control of an aspect of the subject of power from the general grant to the Commonwealth. They include: the banking and insurance powers, sections 51(xiii) and 51(xiv) respectively, which reserve to the States both State banking and State insurance other than that which extends beyond the limits of a State; the trade and commerce power, which is limited to ‘[t]rade and commerce with other countries, and among the States’ (section 51(i)), so assuming an area of exclusive State legislative power in relation to intrastate trade and commerce; and the industrial relations power (section 51(xxxv)), which limits the exercise of the power to only those industrial disputes which extend ‘beyond the limits of any one State’. Reading the Constitution as a whole, the majority on the Griffith Court could reason that, quite apart from any general implication arising from the structure of the Constitution through which the scope of Commonwealth power could be
contained, the Commonwealth’s other powers should be read in the light of express reservations of power to the States under the Constitution. Of these, the reservation in the trade and commerce power proved to be the most important. It provided one of the reasons why the Commonwealth’s power over trade marks was given a restricted interpretation in the Union Label case and why in Huddart Parker the Commonwealth’s power over corporations was also limited.

The purpose of the reserved powers doctrine was to protect State legislative competence over matters of local concern from a broad construction of the Commonwealth’s enumerated powers. In practical terms, the doctrine actually gave effect to the division of powers under the Constitution and in this sense directly addressed that which is essential to the effective operation of a federal system: the maintenance of a division of power between the centre and the regions which protects, as Elazar put it, ‘the existence and authority of both’. In placing emphasis on the powers of the States as a constraint on the scope of Commonwealth power, the Griffith Court followed the example of the nineteenth century American Supreme Court under Taney and after, which, by reference to the Tenth Amendment of the American Constitution, the equivalent of section 107 under the Australian Constitution, tempered claims to national supremacy. However, the manner in which the Court sought to apply the doctrine of reserved powers reflected the rigidity it had brought to the application of the immunities doctrine, a rigidity which invited less reliance on American, than on Canadian, precedent.

In spite of the framers having rejected the Canadian model of federalism and having looked to the American, in spite of their having created a fully fledged constitutional court in the High Court like the American Supreme Court, as opposed to the weaker institution that was the Canadian Supreme Court, and in spite of the Court having been granted the authority to largely ignore the Privy Council in interpretation of the Australian Constitution, an authority which it asserted, the High Court nonetheless adopted an approach to the application of the reserved powers doctrine which had much in common with the Privy Council’s interpretation of the division of powers under the Canadian Constitution. Not only did the Griffith Court’s focus on the reserved powers of
the States make ‘the Canadian cases relevant’, as Zines, (1997: 5) points out, but those decisions served to reinforce the prejudices of the Griffith Court in favour of a strictly coordinate conception of federalism and the application of the familiar standards of English jurisprudence in interpreting the Australian Constitution.

While the Canadian Constitution was intended to be a centralising document, the Privy Council interpreted exclusive provincial powers, and particularly provincial power over trade and commerce and property and civil rights under sections 91 and 92, as excluding the exercise of power by the national government in ways which promoted provincial autonomy from the centre. The jurisprudence was one based on the idea of ‘watertight compartments’: if the provinces had the power to legislate on a particular subject then there was no room for central government legislation on that subject, a conclusion logically consistent with the idea of coordinate federalism. The Privy Council also interpreted those powers as being primary and broad, and the Canadian Parliament’s powers, consequently, as secondary and narrow (see further Monahan, 1997: 205-206). This is the approach the Griffith Court took in relation to interpreting the reserved powers of the States, which were given a broad reading, substantially limiting the scope of the enumerated powers of the Commonwealth:

... the ‘reserved power’ was treated as the major power with the result that Commonwealth powers that might have impinged on that area were regarded as exceptions to be interpreted strictly, which meant restrictively (Zines, 1997: 6).

The appeal of the Privy Council approach lay not only in its reinforcement of an idea of federalism as purely coordinate, but how it did that. A strict theory of coordinate federalism is premised on the assumption that through a constitution a clear and unequivocal demarcation can be made between the powers of the regions and the centre, the function of the courts being the apparently straightforward one of giving effect to that demarcation as it would any ordinary law and otherwise leaving each level of government to get on with the business of governing within its sphere. Monahan (1997: 205) describes the general approach which the Privy Council took at the time as follows:
The JCPC conceived of its function (at least in its written judgments) as being strictly legal rather than political. This meant that the law lords favoured doctrines and concepts that set out clear points of demarcation — "bright lines" — around and between the categories in sections 91 and 92 of the Constitution Act, 1867. Such a "categorical" mode of reasoning allowed them to eschew the appearance of entering into a "political" consideration of the wisdom of the legislation that came before them.

The attempt to find the 'bright line' between provincial and national authority reflected not federal reality, but the positivist belief that strict legal categories could be discovered and formulaically applied in future constitutional cases. It represented an attempt by the Privy Council, falling back on the familiar standards of English jurisprudence, to relieve itself of the kinds of principled and politically fraught decisions that a constitutional court is often required to make. This approach attracted the members of the first High Court, who knew, on the one hand, that their main constitutional task was to give effect to the federal limitations on government in the Constitution, but, on the other, had to find a way forward to doing so. They initially sought to apply legal standards with which they were, like the Privy Council, familiar, namely the formal standards of the English tradition, and a concept of federalism consistent with those standards, that is, a strictly coordinate theory of federalism, only to find how inadequate they were when confronted by the political realities of federalism and the complex constitutional role they were actually called upon to perform.

The justices of the early Griffith Court hit the wall of the Constitution in seeking to apply their theory of the Constitution and they were forced, by the logic of the Constitution and the federal system it created, to modify their approach. In the process, despite their prejudices, they began gradually to develop an interpretivist federal jurisprudence through which continuing effect could be given to the federal system provided for in the Constitution. In doing that they began also to generate an indigenous concept of law, a concept of law which was not a simple reproduction of either the American or English traditions, but one, reflected in the dual role of the High Court under the Constitution, which arises from the creation of national institutions of government on a parliamentary model, and a role for the High Court as an ordinary court of final appeal consistent with that model, within an overarching federal constitutional
framework that requires a substantive and active role for the High Court in applying federal principle and containing governmental power.

Whether they would have got there, we will never know. The creative development of the law of the Australian Constitution which was begun by the Griffith Court was shattered in the *Engineers'* case as the formal rules of English statutory interpretation in all their mundane and conventional glory were to be used by a new majority led by Isaacs as a kind of Trojan horse for an anti-vision of the Constitution to be smuggled into it.

**THE ENGINEERS’ CASE**

The *Engineers'* case was described in the Argus newspaper on 1 September 1920 as ‘a judgment of momentous importance’ (quoted in Starke, 1990: 755). Sir Robert Menzies (1967: 39) said of the case in which he had appeared as counsel:

... when the judgment came to be delivered, it proved to be a great landmark in the history of interpretation. The Court did overrule the earlier decisions, and, because the judgement gave a new and what one legal authority had called an 'extensive' interpretation of Commonwealth powers, it is a great landmark in Australian constitutional development, and in the development of Commonwealth power.

Today, the *Engineers'* case remains a profound influence on the manner in which the High Court decides constitutional cases:

After more than seventy years, it probably remains the most important case in Australian Constitution law, at any rate, from the point of view of general principles of interpretation (Zines, 1997: 7).

The case is the hub from which an expansive reading of the Commonwealth's legislative powers by the High Court has radiated.

The main issue in the *Engineers'* case was the extent to which the laws of each level of government could bind the other. Of course, this was the issue which had been before the Court so often since its creation and which had caused
difficulty not only because of the schism on the bench regarding the basic principle, the implied immunities doctrine, but the exceptions from the principle which had been found. The Court overturned earlier authority and found against any implication of intergovernmental immunity. However, it was not only the implied immunities doctrine that was called into question and ultimately rejected, but also the whole fabric of the federal jurisprudence that the Griffith Court had sought to develop. This jurisprudence was destroyed in the Engineers’ case and, while under Dixon the use of federal implications in the Court’s interpretation of the Constitution were resurrected, that resurrection was more apparent than real. The Engineers’ case dealt federalism as a principle of constitutional interpretation in Australia a blow from which it has never recovered, putting in its place the foundation for a jurisprudence of national supremacy.

THE CASE

The Engineers’ case arose from a log of claims served by the Amalgamated Society of Engineers on a large number of respondents. In the furtherance of its claims, the union made an application to the Commonwealth Court of Conciliation and Arbitration.

Section 4 of the Commonwealth’s Conciliation and Arbitration Act provided:

“Industrial Dispute” means an industrial dispute extending beyond the limits of any one State and includes –

(i) any dispute as to industrial matters, and

(ii) any dispute in relation to employment in an industry carried on by or under the control of the Commonwealth or a State or any public authority constituted under the Commonwealth or a State, and

(iii) any threatened or impending or probable industrial dispute.

The employers on which the log of claims had been served included two instrumentalities of the Western Australian State Government and their
supervising minister, the Western Australian Minister for Trading Concerns. The Minister argued, against the intention of the Act, that no dispute could arise with these enterprises because the government of the State operated them. He relied on the then still existing general rule as stated in the Railway Servants' case that just as State laws could not bind the Commonwealth, so too could Commonwealth laws not bind the States.

Higgins, who was both President of the then Commonwealth Court of Conciliation and Arbitration and a member of the High Court, referred the following two questions to the Full Court:

- Has the Parliament of the Commonwealth the power to make laws binding on the States with respect to conciliation and arbitration for the prevention and settlement of industrial disputes extending beyond the limits of one State?

- As to the respondents named in the special case – is the dispute which has been found to exist in fact between the claimant and the Minister for Trading Concerns (WA) an industrial dispute within the meaning of sec. 51(xxxv)?

Howard (1985: 161) notes that Higgins probably expected to provide an opportunity for the rule in the Railway Servants' case to be held applicable to only strictly governmental activities, leaving the general principle intact. As it turned out, the rule in the Railway Servants' case was overturned.

Menzies appeared as counsel for the union. He intended to run the argument which Higgins apparently thought would succeed:

> The Western Australian Government bodies were not immune from the Commonwealth conciliation and arbitration powers, [because] ... their functions were those of trading not government (Menzies, 1967: 37).

Starke's response from the bench to this argument was blunt: '[t]his argument is a lot of nonsense!'. Menzies' 'inspired' response, as he himself described it,
was, 'Sir, I quite agree'. At the prompting of Chief Justice Knox, Menzies explained to the Court that he was bound to make the case for the union as he had because of the Court's earlier decisions. He requested the opportunity to question those decisions and to develop an alternative argument. The Court retired. On its return, it adjourned the case for argument at Sydney, inviting counsel to challenge earlier decisions of the Court (Menzies, 1967: 38-39). The other States and the Commonwealth were invited to intervene and all, but for Queensland, did.

The joint majority judgment of Knox, Isaacs, Rich and Starke was delivered by Isaacs and written by him (Sawer, 1967: 130). Higgins delivered a separate judgment agreeing with the majority. The only dissent was from Gavan Duffy.

The joint judgment was described by Sawer (1967: 130) as 'one of the worst written and organised in Australian judicial history'. However, it is the joint judgment that has given the Engineers' case its enduring significance. For all its shortcomings, it gave effect to a far-reaching vision of what the Australian polity should be that has more or less held the High Court in thrall since then.

The first question presented to the Court by Higgins regarding the bindingness of the Commonwealth's Conciliation and Arbitration Act on the States, was answered in the affirmative. In the words of the joint judgment:

> We therefore hold that States, and persons natural and artificial representing the States, when parties to industrial disputes in fact, are subject to Commonwealth legislation under pl. xxxv of sec. 51 of the Constitution, if such legislation on its true construction applies to them (28 CLR at 155).24

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24 In the conclusion of the Court on the first question, the qualifying clause, '... if such legislation on its true construction applies to them', refers to the issue of Crown immunity. Before the Court could deal with the question of intergovernmental immunity, it had first to determine if the legislation under question applied to the Crown.

Australia was then and remains today a monarchy, and the executive of the Commonwealth and also of each of the States is embodied in the Queen. Historically, certain rights and privileges inhere in the Crown. One of these is that a statute does not bind the Crown unless in the statute there is a clear intention that its provisions will do so. The statutory rule of construction is that a competent legislature's intention to bind the Crown, which in the case of Australia may be the government of a State or of the Commonwealth, must be manifested through express words, like those of section 4 in the now repealed Act in question in Engineers, or by necessary implication.
In other words, the Commonwealth Act could apply to an industrial dispute between a State and its employees and, more generally, Commonwealth laws could bind the States.

With respect to the question of State power to bind the Commonwealth their Honours said:

The principle we apply to the Commonwealth we apply also to the States, leaving their respective acts of legislation full operation within their respective areas and subject matters, but, in the case of conflict, giving valid Commonwealth legislation the supremacy expressly declared by the Constitution, measuring that supremacy according to the very words of s109 (28 CLR at 155).

The second question, regarding whether or not the dispute was an 'industrial dispute' within the terms of section 51(xxxv), was also answered in the affirmative.

In reaching the conclusion that there is no scope for intergovernmental immunity under the Constitution, it was declared in the joint judgment that 'no clear principle' could be identified in the earlier cases. Not only were they seen as inconsistent with each other, but also with the text of Constitution. Most of the earlier immunities cases, which dealt with State laws purporting to bind the Commonwealth, were explained away as examples of the paramountcy of Commonwealth law under section 109, but the Railway Servants' case could not be assimilated with the reasoning in the joint judgment and it was overruled. The most enduring legacy of Engineers, however, was to be in its rejection of the reserved powers doctrine generally and its dismissal of section 107 in particular as a foundation for that doctrine:

While in formal terms the Crown was considered to be indivisible, in Australia, with seven governments, the doctrine of the indivisibility of the Crown was never a practical one, despite the importance apparently attached to it in Engineers (28 CLR at 152-153; note Sawer, 1967: 131; Hanks, 1996: 230; Zines, 1997: 314). The usual way in which the issue has been dealt with is to speak of the Crown either in the right of a particular State or in the right of the Commonwealth, so expressing the separateness of the State Governments and the Commonwealth Government as legal entities.
... it is a fundamental and fatal error to read sec. 107 as reserving any power from the Commonwealth that falls squarely within the explicit terms of an express grant in sec. 51... (28 CLR at 154).

The *Engineers'* case asserted that the construction of the scope of the Commonwealth’s legislative powers was to be determined by application of ‘the settled rules of construction’ and its powers were to be allowed their full operation, regardless of the effect that would have on the States or their agencies, unless the Constitution itself provided an express limitation. Each level of government could bind the other, though the Commonwealth held the advantage as it could pass legislation which, pursuant to the supremacy clause, section 109, would prevent it from being bound by State legislation. Section 107 preserved State legislation, but only to the extent that it did not conflict with a valid Commonwealth law.

**THE SETTLED RULES OF CONSTRUCTION**

The High Court in *Engineers* did not adopt an obviously national interpretation of the Constitution to replace the federal one which had informed the judgments of the majority on the Griffith Court. Rather it emphasised the status of the Constitution as a statute of the British Parliament to which ‘the settled rules of construction’ should be applied in its interpretation. The underlying purpose of those rules is to determine the intention of those who made the law, as Higgins explained in the *Engineers’* case:

> The fundamental rule of interpretation, to which all others are subordinate, is that a statute is to be expounded according to the intent of the Parliament that made it; and that intention has to be found by an examination of the language used in the statute as a whole (28 CLR at 161-162).

In the joint judgment, Isaacs expressed this principle, the ‘golden rule’ or ‘universal rule’ of statutory construction (28 CLR at 148), as it applied to the Constitution in the following terms:
... it is the chief and special duty of this Court faithfully to expound and give effect to it [the Constitution] according to its own terms, finding the intention from the words of the compact, and upholding it throughout precisely as framed (28 CLR at 142).

The golden rule was relied on to attack the federal jurisprudence developed by the majority led by Griffith on the early Court. The methods and doctrines of the Griffith Court were characterised as inconsistent with it, the error in the Court's approach under Griffith being manifested through the exceptions that it had resorted to in giving practical effect to its rigid immunities doctrine:

This method of interpretation cannot, we think, provide any secure foundation for Commonwealth or State action, and must inevitably lead—and in fact has already led—to divergences and inconsistencies more and more pronounced as the decisions accumulate (28 CLR at 145; note also 151).

The difficulties the Griffith Court had experienced in applying it's immunities doctrine suggested the doctrine itself was flawed, but the views expressed in the joint judgment went much further than that. The claim was that the first judges of the High Court stepped outside of the judicial role. Ignoring the Court's duty to apply the law faithfully as it stands, they brought into it their own values and beliefs, the standard applied being not the intention of the lawmaker, but 'the personal opinion of the Judge who declares it' (28 CLR at 141-142).

However Isaacs caricatured the approach to interpretation of the first members of the High Court, they themselves believed that they operated within conventional limits, at least insofar as it was possible to do so in interpreting a written constitution (note Brennan, 1935: 163-166; Zines, 1997: 12-14). In Tasmania v Commonwealth (1904) 1 CLR 329 the invitation by counsel to step outside the bounds of the rules of statutory construction was declined by the Griffith Court. Indeed, Griffith expressly rejected the proposition, 'that the ordinary rules for construing Acts of Parliament do not apply to the Constitution' (1 CLR at 338). He went to rely on the same line authorities as to the rules to be applied as had been relied on in the majority judgments in Engineers.
What the majority members of the Griffith Court eschewed was the literalism apparently approved of in *Engineers*. As they discovered in coming to terms with their constitutional role, a more substantive approach was required in the interpretation of the Constitution than is usually consistent with common law principles of legal interpretation because of the special status of the Constitution and the generality of its language. This was not a radical position.

It was Higgins in the early years of the High Court who most eloquently expressed what distinguished the Australian Constitution from ordinary law and why that required an extraordinary approach to its interpretation:

... although we are to interpret the words of the Constitution on the same principles of interpretation as we apply to any ordinary law, these very principles of interpretation compel us to take into account the nature and scope of the Act that we are interpreting—to remember that it is a Constitution, a mechanism under which laws are to be made and not a mere Act which declares what the law is to be (the Union Label case, 6 CLR at 611-612).

While Griffith, Barton and O'Connor did not agree with Higgins' minority decision in that case, the point he made was one which was generally accepted then, as it is now.

With Isaacs and Higgins, the original members of the High Court accepted in principle not only that the grant of power to the Commonwealth should be interpreted broadly, but also that it is up to the Commonwealth Parliament to choose the appropriate means for executing its powers. In *Baxter's* case, Griffith, Barton and O'Connor, in a joint judgment, approved Story's description of the American Constitution:
The instrument was not intended to provide merely for the exigencies of a few years, but was to endure through a long lapse of ages, the events of which were locked up in the inscrutable purposes of Providence. It could not be foreseen what new changes and modifications of power might be indispensable to effectuate the general objects of the charter; and restrictions and specifications, which, at the present, might seem salutary, might, in the end, prove the overthrow of the system itself. Hence its powers are expressed in general terms, leaving to the legislature, from time to time, to adopt its own means to effectuate legitimate objects, and to mould and model the exercise of its powers, as its own wisdom, and the public interests, should require (4 CLR at 1105).

It was in the following year that O'Connor said, 'it must always be remembered that we are interpreting a Constitution broad and general in its terms, intended to apply to the varying conditions which the development of our community must involve' (Jumbunna, 6 CLR at 367-368).

Each side of the early Court claimed to be applying the same principles of interpretation, but the substantive outcome each delivered was the opposite of the other. So were the principles the same? The answer is yes and no. Yes, at the highest level of generality, because each approach, despite the claims to the contrary in Engineers, represented the application of a theory of the Constitution which not only gave substance to the Constitution's bare words, but which also tempered and controlled how the ordinary rules were deployed. But no, at the level of the particular theories applied, as each was diametrically opposed to the other.

The ordinary rules of statutory construction are unsatisfactory tools when it comes to interpreting a constitution, 'broad and general in its terms, intended to apply to the varying conditions which the development of our community must involve'. As Corry (1939: 511-512; cited and discussed in Cairns, 1971: 343) commented, in a reviewing a book of then recent Privy Council decisions on the Canadian Constitution:
The text writers and judges all insist that the basic rule is to find the "expressed intention" of the makers of the constitution and that, in the case of constitutions, this intention is to be liberally rather than narrowly construed. The trouble is that constitutions often do not have "expressed intentions" about many of the situations to which they must be applied. The Fathers of Confederation could not express any intention about aviation and radio. At best then, in such circumstances, the court can only argue by analogy, making inferences as to what the framers would have said if they had thought about the problem. Even then, there are numerous situations where no compelling inferences can be found by logical processes. Nor does it help to propose that the constitution should be liberally construed, for one must still ask for what purpose and to what end. Liberal construction of Dominion power is, at the same time, strict construction of provincial power and vice versa.

In many situations to which courts must apply the terms of the constitution, the expressed intention is clear and the court has no choice. In many other situations, this is not so and a court which did not have some predisposition about its problem, which lacked a general philosophy about what it ought to do, would be utterly at sea and unable to reach any decision.

What is necessarily required in constitutional interpretation is that the courts step outside of the 'settled rules' and look to the principles underlying the constitution so that sense can be made of its general provisions both in themselves and in terms of the changing circumstances to which they must apply. That is what the Griffith Court sought to do by beginning to develop an understanding of the Constitution's federal foundation as a means to interpreting and applying its provisions. Consistency with the ordinary rules could be claimed by the Court, because contained within them was an implicit recognition of their limitations in the invitation to ignore them and to look instead to the 'nature and scope' of an instrument like a constitution when interpreting it. The joint judgment itself referred to this aspect of construing constitutional meaning in approving the following comments made by Lord Loreburn LC for the Privy Council in Attorney-General for Ontario v Attorney-General for Canada (1912) AC 571:
In the interpretation of a completely self-governing Constitution founded upon a written organic instrument, such as the *British North America Act*, if the text is explicit the text is conclusive, alike in what it directs and what it forbids. When the text is ambiguous, as, for example, when the words establishing two mutually exclusive jurisdictions are wide enough to bring a particular power within either, recourse must be had to the context and scheme of the Act. ((1912) AC at 583; 28 CLR at 149-150).

For all the emphasis given in the *Engineers'* case to applying the rules of statutory construction and to allowing words of the Constitution by themselves to do all the work, the decision represents no simple application of the ordinary rules of statutory construction, but an application of principles of construction through which a desired political outcome was achieved.

Cowen (1967: 126-129) wrote of Isaacs that he had 'great technical mastery of the law', but that he also ‘insisted that technique must serve broader ends of principle and justice’. While Isaacs disliked technicality, he had no qualms about wielding technique and authority in support of his views of the nature of the Constitution. There is no more influential example than the joint majority judgment in the *Engineers'* case. As Zines (1997: 426) said:

> One cannot escape the view that in the *Engineers'* case, as elsewhere, reliance on 'express provisions' and the 'golden rule' of interpretation was emphasised because it suited his purpose and was a means of advancing the vision he had of Australia and its governmental institutions.

Sawer (1967: 200) similarly doubted that either Isaacs or Higgins, ‘would have favoured the conventional rules so strongly if their application had not also advantaged Commonwealth power’.

Isaacs was no literalist. He deployed the rhetoric of merely applying the ordinary rules of statutory construction to constitutional interpretation because it served his purpose in two ways: first, the strong appeal to conventional forms of legal interpretation within the English jurisprudential tradition allowed him to distinguish the majority's approach in the *Engineers'* case from the Griffith Court's approach and to characterise it as illegitimately outside of that tradition; and secondly, the technique resulted in an expansion of federal power.
The difference between the Griffith Court’s approach and Engineers lay not in their being essentially different, but, as Sawer (1967: 200) said, ‘in the political judgment about the nature of the Constitution’. But that does not go quite far enough because the two views are not equally valid when judged against what the nature of the Constitution actually is. The Griffith Court sought to give effect to an understanding of the actual grounds of the Constitution and began to do that at least with some success both in terms of method and outcome, whereas the Court under Isaacs’ lead in Engineers gave effect to an overwhelming national vision of the Constitution which lacks a secure constitutional foundation. The Griffith Court also foregrounded the substantive reasons for its decisions, whereas in Engineers those reasons were concealed in the Court’s tendentious reliance on legal form.

ISAACS AND MARSHALL

In tandem with the attack in the joint judgment on the Griffith Court’s federal jurisprudence and its emphasis on the Constitution as a British statute, the use of American authority as relevant to the interpretation of the Australian Constitution was dismissed: American decisions, ‘are not a secure basis on which to build fundamentally with respect to our own Constitution’ (28 CLR at 146).

One of the ironies of the rejection of American doctrines in the Engineers is how much the case represented an assertion of the jurisprudence of national supremacy developed by Marshall when he was Chief Justice of the United States Supreme Court. In that Isaacs thereby anticipated the American Supreme Court’s return to Marshall and its rejection of the federal jurisprudence which had first developed under Taney. Indeed, for all the rejection of American doctrine in the Engineers’ case, the joint judgment found support for a broad reading of the Commonwealth’s legislative powers in Marshall’s decisions:
Those who rely on American authorities for limiting pl. xxxv in the way suggested would find in the celebrated judgment of Marshall C.J. in Gibbons v Ogden [9 Wheat., 1], two passages militating strongly against their contention. One is at p. 189 in these words: "We know of no rule for construing the extent of such power's, other than is given by the language of the instrument which confers them, taken in connection with the purposes for which they were conferred." The other is at p. 196, where, speaking of the commerce power, the learned Chief Justice says: "This power, like all others vested in Congress, is complete in itself, may be exercised to its utmost extent, and acknowledges no limitations, other than are prescribed in the Constitution" (28 CLR at 145-146).

While Marshall's judgment in Marbury v Madison is seen as the font from which the modern idea of judicial review springs, Marshall's bold assertion in 1819 was for a substantial power of limited scope. Marshall used that power to contain State authority, whereas congressional power was broadly interpreted and great respect was paid to its legislative choices.

In this sense, Marshall and Isaacs were natural allies. The Supreme Court's later development of a more substantive federal jurisprudence would have had Marshall turning in his grave, much as it had Isaacs turning on the Court in its application under Griffith. They both shared a desire to strengthen the position of the national government in their federations and both federations share the crucial characteristic of dividing legislative power between the centre and the regions by setting out the national government's powers and leaving the residue to the States. That structure provided an opportunity to entrench and expand the power of the national government which was exploited by both. Through such a structure, in the absence of a federal jurisprudence which constrains a broad construction of national power, the residual powers of the States become less a bulwark against central power in a federation than a vacuum into which it can flow (note Crommelin, 1992).

In Engineers the Australian Constitution was read on the basis that it was informed not by any federal purpose, but by a national one—an identical purpose to that which informed Marshall's reading of the American Constitution. In terms of the means adopted to realise this purpose, the interpretive approach of Marshall and Isaacs was remarkably similar. Its primary outcome was the
almost complete marginalisation of federal principle as relevant to the task of constitutional interpretation.

In Marshall’s constitutional jurisprudence this marginalisation was justified on a reading of the American Constitution which began with ritual recognition of constitutional authority as emanating from the ‘people’ and the drawing of a strong link between the foundation of the Constitution’s authority and the representative nature of Congress. From there he emphasised the express nature of the national government’s powers and its constitutional supremacy in the exercise of those powers, while de-emphasising any federal considerations that might flow from the structure or text of the Constitution. This trajectory finds its analogue in the joint judgment in the Engineers’ case.

While in Engineers the status of the Constitution as an Act of the Imperial Parliament was emphasised, the Constitution was nonetheless variously described as ‘the political compact of the whole people of Australia’ and the ‘national compact of the Australian people’ (28 CLR at 142 and 160). Similarly, while the Court did not speak as inspiringly as Marshall of ‘those great powers on which the welfare of the nation essentially depends’ (McCulloch v Maryland (1819) 17 U.S. (4 Wheat.) at 415), it was highlighted in the joint judgment, by reference to the doctrine in Hodge v R, that the powers of the Commonwealth Parliament embraced an ‘authority as plenary and as ample ... as the Imperial Parliament in the plenitude of its power possessed and could bestow’ (28 CLR at 153). And just as Marshall had advocated deference to Congress in its determination of how its powers were to be exercised, so too did the majority in Engineers reproduce that same view:
But possible abuse of powers is no reason in British law for limiting the natural force of the language creating them. ... the extravagant use of the granted powers in the actual working of the Constitution is a matter to be guarded against by the constituencies and not by the Courts. When the people of Australia, to use the words of the Constitution itself, "united in a Federal Commonwealth", they took power to control by ordinary constitutional means any attempt on the part of the national Parliament to misuse its powers. If it be conceivable that the representatives of the people of Australia as a whole would ever proceed to use their national powers to injure the people of Australia considered sectionally, it is certainly within the power of the people themselves to resent and reverse what may be done. No protection of this Court in such a case is necessary or proper (28 CLR at 151-152).

Not only were those powers ample and their exercise, even if extravagant, a matter for the national Parliament to control, but the supremacy of laws made under them over inconsistent State law was also highlighted (28 CLR at 164-155).

As to the reserved powers of the States as a potential constraint on the scope of national power, just as Marshall saw the Tenth Amendment as merely declaratory (McCulloch v Maryland (1819) 4 Wheat (17 US) 316 at 406), so too was the attempt to read section 107 as other than declaratory described as 'a fundamental and fatal error' (28 CLR at 154).

It was later, in Gibbons v Ogden, that Marshall, consistent with his reading down of the Tenth Amendment, attacked strict construction of the terms of the American Constitution, seeing in that approach an attempt to 'explain away the constitution of our country' (22 U.S. (9 Wheat.) 1 at 222). Given that the States' powers were residual, strict construction of the national government's enumerated powers, in constraining the scope of those powers, necessarily increased the scope of State legislative power. Marshall sought to achieve the opposite outcome. In the joint judgment's emphasis on giving effect to the 'natural' meaning of the constitutional text and the related attack on the federal jurisprudence of the Griffith Court the same aim was apparent. The Griffith Court's constitutional jurisprudence provided federal reasons for narrowly construing the scope of Commonwealth power and so protecting the legislative powers of the States.
As we have seen in the discussion of the applicability of the ordinary rules of statutory interpretation to interpretation of the Constitution, there were nonetheless many specific aspects of the approach to interpretation advocated in *Engineers*, and also in Marshall’s constitutional jurisprudence, with which the Griffith Court agreed. Indeed, in *D’Emden v Pedder*, the Griffith Court quoted at length from Marshall’s judgment for the Court in *McCulloch v Maryland* and also highlighted the principle of plenary power expressed in *Hodge v R* in relation to the nature of the Commonwealth’s legislative powers (1 CLR 91 at 113-116 and 110). However, what distinguished the Griffith Court’s approach from that adopted in *Engineers*, and that which Marshall had applied, was a dramatic difference in emphasis. In *Engineers*, as had Marshall, but unlike the Court under Griffith, the High Court applied principles of interpretation that supported the development of the national government within the Australian federation without any countervailing recognition that that government existed within a federal constitutional framework.

The general approach to interpretation advocated in *Engineers*, and which reflects so much that advocated by Marshall on the Supreme Court a century before, was a highly effective one to adopt by a constitutional court wishing to promote the position of the national government within a federation structured as the Australian and American is. The stress on avoiding ‘strict construction’ and giving ‘natural’ effect to the express terms of a constitution in which the only express powers are those of the national government inevitably results in a broad reading of national power. Hand in hand with this went the disingenuous demurrer in relation to the performance by the constitutional court of a significant role in deciding federal issues. It at once absolves a federal constitutional court of its responsibility for resolving federal disputes by appealing to the traditional view of the courts as outside and above politics, while leaving federal issues to be decided in the cut and thrust of a federal political process in which the position of the national government relative to the States has been overwhelmingly enhanced in legal terms through it being freed by the Court of federal constraints on the scope of its powers.
Isaacs' promotion of the national cause on the High Court was not only apparent in the adoption of an approach to constitutional interpretation that resulted in an expansive reading of Commonwealth power. It is a general characteristic of his judgments, not only in terms of the relative position of the Commonwealth to the States, but also in terms of the position of the Commonwealth as the national government of an independent nation. Isaacs never missed an opportunity as a justice of the High Court to take forward the interests of the Commonwealth (note generally Cowen, 1967: 149-190). Among his many judgments, Isaacs interpreted Commonwealth executive power in Commonwealth v Colonial Combing, Spinning and Weaving Co Ltd (the Wooltops case) (1922) 31 CLR 421, the defence power in Farey v Burvett (1916) 21 CLR 433, the industrial relations power in Burwood Cinema Ltd v Australian Theatrical and Amusement Employees’ Association (1925) 35 CLR 528, section 92, with Knox and Starke, in W & A McArthur v Queensland (1920) 28 CLR 530 and section 109 in Clyde Engineering Co Ltd v Cowburn (1926) 37 CLR 466 in ways which greatly favoured the Commonwealth as a national government over any Imperial or federal considerations.

In Isaacs’ mind, the development of Australian nationhood and the expansion of Commonwealth power at the expense of State power were one and the same thing and the role of the High Court was to actively further that political goal, any contraindications in the Constitution notwithstanding. Nor, despite the attack in the joint judgment in Engineers on the ‘political’ nature of the Griffith Court’s decisions and the emphasis in it on the application of neutral legal principles in interpreting the Constitution, was Isaacs otherwise so cautious about expressing his own views on national development and the role of the Court. In the Wooltops case Isaacs said:

> It is the duty of the Judiciary to recognise the development of the nation and to apply established principles to the new positions which the nation in its progress from time to time assumes. The judicial organ would otherwise separate itself from the progressive life of the community, and act as a clog upon the legislative and executive departments rather than as an interpreter (31 CLR at 438-9).
Isaacs' judgment in *Burwood Cinema* provides another example:

It is the essence of a constitution that it is intended by its generality to adapt itself to the growth of the nation (35 CLR at 539).

Isaacs' advocacy of the national cause was a quality admired by some: 'certainly the flame of an aggressive nationalism burns in the many lengthy and inspiring judgments of Isaacs J' (Anderson, 1961: 97); whereas others, like Cowen (1967) have noted it simply as a fact: 'what Isaacs was concerned to assert, ..., was the widest ambit for federal power, without regard to the merits of the particular exercise of power' (Cowen, 1967: 171).

The values associated with Isaacs' nationalism provide the real ground for the decision in *Engineers*. However, because in the joint judgment the legitimacy of the decision was founded on form rather than substance, 'its real ground is nowhere stated in the majority judgment', as Latham (1937: 564) noted in his famous critique of the decision.

The gap between the expressed and real grounds for the outcome in *Engineers* has been more often than not explained away through an implicit acceptance of the link Isaacs drew between developing nationhood and the withering away of federalism. Hence, Latham (1937: 564), for all his criticism of *Engineers*, nonetheless suggests that the decision's 'real ground', the assertion of national imperatives over the federal assumptions of the Griffith Court, was historically and constitutionally justified:

This real ground was the view held by the majority that the Constitution had been intended to create a nation, and that it had succeeded; that in the Great War the nation had in fact advanced in status while the States stood still, and (as was a patent fact) that the peace had not brought a relapse into the *status quo ante bellum*; that a merely contractual view of the Constitution was therefore out of date, and its persistence in the law was stultifying the Commonwealth industrial power, which they believed to be a real and vital power; and finally, that the words of the Constitution permitted the view of the federal relationship which the times demanded.
Windeyer, in his judgment in *Victoria v Commonwealth* (the Payroll Tax case) (1971) 122 CLR 353, also considered that, in substantial part at least, the decision in *Engineers* was 'the consequence of developments that had occurred outside of the law courts' (122 CLR at 396). His is the classic exposition of this perspective:

... in 1920 the Constitution was read in a new light, a light reflected from events that had, over 20 years, led to a growing realisation that Australians were now one people and Australia one country and that national laws might meet national needs (122 CLR at 396).

As to the justification for the decision and its overruling of earlier precedent, Windeyer considered it required nothing more than recognition of the principle that 'interpretation of a written constitution may vary and develop in response to changing circumstances' (122 CLR at 396). On this reading, all that happened in the *Engineers*’ case was that the High Court interpreted the Constitution in the reflected light of Australia’s changing status as a nation and impartially gave effect to a national purpose immanent in the Constitution over a federal one assumed to be merely transitory.

This story obscures more than it explains and is not supported by what was happening when *Engineers* was decided in terms of Australia’s developing nationhood or Australian federalism. Australian political independence was a growing reality following the Great War, but its actual realisation and formal acceptance was a gradual process which would not be completed until much later. While Australia was slow to seek independence, it was nonetheless inevitable, but there was and is no inevitability about the demise of Australian federalism and nor has there has ever been an overwhelming desire for its demise manifested among the Australian people. Repeated attempts by the Commonwealth Government, both before and after *Engineers*, to expand the range of its legislative powers have for the most part failed at referendum. Given the choice, Australians have almost always chosen federalism over increased Commonwealth power. Since *Engineers* the opposite choice has been made by the High Court. Nationhood was a ground for the *Engineers*’ decision, but it was a model of nationhood preferred by Isaacs and those who followed him on the Court, not one immanent in the Constitution or sought by
the Australian people. It is certainly true that the Constitution provided for Australia’s evolution into an independent nation, but it provided for evolution into a federal nation, not evolution into an effectively unitary state, which is the outcome supported on the logic of the decision in *Engineers*.

In 1900, the colonies that became the Australian States had the status of self-governing colonies within the Empire. While the Commonwealth of Australia was created in 1901 following the passing by the Imperial Parliament of the Commonwealth of Australia Constitution Act in 1900, Australia’s status was no different to the Empire’s other self-governing colonies. The Imperial limitations on the Australian colonies that existed prior to federation did not change with federation and applied to the Commonwealth as a dominion within the Empire no less than to the States. This meant that, while Australia began its existence with control over matters of local concern, the British Government retained control over matters of Imperial concern, matters which primarily related to the international concerns of the Empire such as defence, foreign affairs and merchant shipping (Constitutional Commission, 1988: 72). It would not be until Australia became responsible itself for those matters as they affected its place in the world, that Australia could be called an independent nation (note Hudson and Sharp, 1988: 130-138).

Progress towards nationhood could be evolutionary as the Constitution’s provisions were sufficiently flexible to accommodate that development without formal amendment to its provisions. It is now generally recognised that the Commonwealth’s executive power under section 61 of the Constitution was framed in terms general enough to sustain an interpretation capable of incorporating all changes from the time of federation necessary to the development of nationhood, as were the Commonwealth’s legislative powers relevant to nationhood such as external affairs and defence (note Zines, 1991: 3-6).
Section 61 vests the executive power of the Commonwealth in the Queen and makes it exercisable by the Governor-General as the Queen’s representative. In so providing, the question arose as to which prerogatives of the Crown could be exercised by the Governor-General. Those prerogatives which related to the exclusive powers of the States were not considered to be included in section 61 (Zines, 1977: 25). Nor could the Governor-General exercise those prerogatives relevant to external affairs, such as the execution of international treaties or the declaration of war, as they remained matters of Imperial concern and within the power of the British government (note Zines, 1977: 25; Zines, 1997: 251; Winterton, 1983: 24).

It was accepted at the time of federation that the Governor-General would act in two capacities: one as an Imperial officer concerned with the interests of the Empire in matters of Imperial concern; and the other as a local officer who acted on the advice of the Australian government in matters of domestic concern. As Winterton (1983: 18) points out, as much was recognised in the Constitution under section 58, through which provision was made for the Governor-General to not only assent to a Commonwealth bill, but also to withhold assent or to reserve a bill for the Queen’s pleasure. However, as Winterton (1983: 18) also points out, by the end of the first decade of federation section 58 was a dead letter.

With respect to the prerogative powers, the position began to change as the dominions began to develop increasing diplomatic independence following the Great War, as was acknowledged at the Peace Conference of 1919. They were granted separate representation at the conference and accorded the status of non-major powers. The dominions not only signed the peace treaty, but were also admitted as members of the League of Nations, though neither can be read as indicating ‘sovereign independence’ (note Hudson and Sharp, 1988: 56-57). Executive independence began to be recognised with the Balfour Declaration at the Imperial Conference of 1926. The declaration recognised that, while united

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Section 61 provides:

The executive power of the Commonwealth is vested in the Queen and is exercisable by the Governor-General as the Queen’s representative, and extends to the execution and maintenance of this Constitution, and of the laws of the Commonwealth.
within the British Commonwealth of Nations, Britain and the dominions were ‘equal in status’ and ‘autonomous communities’ (Imperial Conference, 1926: 14). The conference also made clear that the Governor-General of a dominion was not ‘the representative or agent of His Majesty’s Government in Great Britain’, but was ‘the representative of the Crown’ within the dominion (Imperial Conference, 1926: 16).

While there was no doubt that the conventions governing who should advise the Governor-General as the representative of the Crown shifted with the resolutions made at the Imperial Conference in 1926, this did not mean that the prerogative power also shifted. All that was necessarily entailed by the change was that the King would in relevant matters now be advised by the Australian Government rather than the British. However, as Winterton (1983: 24) notes, once it was accepted that the executive power of the Commonwealth would be exercised on Australian advice the reason for reading section 61 narrowly ‘vanished’. Ultimately this is what happened, though it was sometime before this position was generally accepted and uncertainty remains as to when exactly Australian independence was achieved.

The Balfour Declaration represented a recognition of the political reality that Britain’s dominions were effectively independent states, but concerns over legal impediments to independence remained which could only be addressed through action by the British Parliament. Those impediments were removed by Britain through the Statute of Westminster 1931, though the most, and perhaps only, legally significant change represented by that Act was the removal of limits on the capacity of dominion governments to override Imperial statutes (note Zines, 1991: 5).

However, section 10(1) of the Statute of Westminster prevented key parts of the Act from extending to Australia until adopted by the Australian Parliament. This section was insisted upon by Australia in response to domestic, conservative opposition to cutting Imperial ties. As it was, the Act would not be adopted until well into the Second World War. The Australian Parliament passed the Statute of Westminster Adoption Act in 1942. By this Act adoption was made retrospective to 3 September 1939, the beginning of the Second World War.
However, between 1931 and 1942 conventions recognised at the earlier Imperial conferences, whereby the British Government agreed not to legislate for the dominions unless legislation was requested by and consented to by them, were followed with respect to Australia (Hudson and Sharp, 1988: 135).

Chief Justice Barwick, in referring to the acquisition of nationhood by Australia in the *New South Wales v Commonwealth* (the *Seas and Submerged Lands* case) (1975) 135 CLR 337, did not fix on any particular event as marking the transition from dominion to nation, but rather commented on the process, noting how nationhood was inherently accommodated within the Constitution's existing provisions:

> Whilst the new Commonwealth was upon its creation the Australian colony within the Empire, the grant of power with respect to external affairs was a clear recognition, not merely that, by uniting, the people of Australia were moving towards nationhood, but that it was the Commonwealth which would in due course become the nation state, internationally recognised as such and independent. The progression from colony to independent nation was an inevitable progression, clearly adumbrated by the grant of such powers as the power with respect to defence and external affairs. Section 61, in enabling the Governor-General as in truth a Viceroy to exercise the executive power of the Commonwealth, underlines the prospect of independent nationhood which the enactment of the Constitution provided (135 CLR at 373).

For Barwick, even if its exact date could not be fixed, the effect of Australian nationhood was to allow full effect to be given to the Commonwealth’s executive power and other relevant powers of the Commonwealth such as external affairs and defence.

Not surprisingly, given his ‘aggressive nationalism’, Isaacs’ understanding of this issue was the same as that stated by Barwick. In 1922, in the *Wooltops* case, Isaacs adopted the broad and then minority view that the Governor-General was ‘in truth a Viceroy’ in whom were embodied all the inherent powers of the Crown in relation to Australia’ (Hanks, 1996: 167). Barwick’s understanding in 1976 was by then the settled and accepted one, but Isaacs’ conclusion in *Wooltops* was reached more than half a century before, at a time when the question of the status of the Governor-General as ‘the representative...
of the Crown’ in Australia and Australia’s status more generally as an independent nation, remained politically and legally uncertain.

It is true that over the first two decades of its existence the Commonwealth had greatly increased its prestige and power in the eyes of Australians. ‘The subtle growth of federal authority’, as McMinn (1994: 220; note 196-233) terms it, was attributable to a number of factors that ranged from the uninspiring if nonetheless important expansion of Commonwealth taxation to Australia’s momentous involvement in the Great War. But, while Commonwealth prestige and influence had increased and was reflected in Australia’s evolving nationhood, independence from Britain was far from enthusiastically desired or pursued within Australia. It was for that reason that the Statute of Westminster Adoption Act was not passed for so long after the Statute of Westminster had been passed, as it was the reason why the Statute of Westminster in its entirety did not automatically apply to Australia in the first instance (note Hudson and Sharp, 1988: 125-129).

Nor, as has been at least sometimes recognised if far from lamented, did ‘the subtle growth of federal authority’ mean Australia needed or desired the radical departure from the more robust federalism supported by the Griffith Court brought about by *Engineers*. In terms of the substantive outcome in *Engineers*, Sawer (1967: 200-201) concluded:

> If the federal implications doctrines of the first justice had remained in force, and been developed rather than restricted, the result would have been a coherent constitutional jurisprudence tending to restrict Commonwealth more than State authority. This would have caused some tensions, since the scope of Commonwealth action and responsibility inevitably increased after 1914, but the extent of the possible tension can be exaggerated; the political pressures and social demands of the time were much more equivocal in their character than is sometimes assumed. It is by no means certain that after 1918 constitutional referenda designed to extend Commonwealth powers would have been carried. The drive for extensive amendment from 1910 to 1914 was very much a Labor Party enthusiasm, and lost much of its force when Labor disintegrated over the conscription issue in 1916-17.
On the question of constitutional interpretation, Zines (1997: 425) also does not see that there was any pressing need to depart from the federal doctrines developed by the Griffith Court:

Had the doctrine of the immunity of instrumentalities and reserved powers survived, there is no reason to believe that there would have been a greater degree of uncertainty in our constitutional law than there is today or that it would have been more difficult to predict in any case what the court would decide.

At the time of the Engineers’ decision the States were vibrant political communities which retained control over most aspects of the day-to-day lives of Australians. The politics was also relatively conservative and operated within existing constitutional limits (note Sawer, 1967: 201-202). Australians did not indicate any dissatisfaction with the continuing political relevance of the States, just as they did not manifest any great desire for formal independence from Britain. But, more importantly, there is no reason to think that they would have conflated the acquisition of independence with a diminishing role for the States in the Commonwealth as Isaacs did and as did in effect the majority that supported him in Engineers.

One of the ironies of the decision in the Engineers’ case, is that, on the one hand, it represents an apparent assertion of Australia’s development as a nation independent of Britain, while, on the other, it imposes on the Constitution the conventions of the British form of government as opposed to giving effect to the indigenous form of government and law which actually informs the Constitution.

The decision in Engineers’ case was neither an impartial application of the settled rules of statutory construction nor a constitutionally justified reflection of Australia’s evolution as a nation. What the decision reflected was a particular view on the shape the Australian political system should take.

THE KEYSSTONE OF THE FEDERAL ARCH – RESPONSIBLE GOVERNMENT!

The Engineers’ case has often taken as authority for the proposition that interpretation of the Constitution should not proceed on the basis of any general
assumptions about the Constitution’s meaning or purpose. However, the reliance on such assumptions by the Court could not be avoided in the Engineers’ case. It is those assumptions which provide the ‘real ground’ for the decision in Engineers and not any easy explanation from evolving nationhood.

As to what those assumptions are, the answer is found in the reasons for the rejection of American authority in the joint judgment:

For the proper construction of the Australian Constitution it is essential to bear in mind two cardinal features of our political system which are interwoven in its texture and, notwithstanding considerable similarity of structural design, including the depositary of residual powers, radically distinguish it from the American Constitution. Pervading the instrument, they must be taken into account in determining the meaning of its language. One is the common sovereignty of all parts of the British Empire; the other is the principle of responsible government (28 CLR at 146).

However, not finding responsible government anywhere mentioned in the Constitution, Lord Haldane’s parliamentary assessment of the British Act in which the Constitution was contained was turned to for support:

The difference between the Constitution which this bill proposes to set up and the Constitution of the United States is enormous and fundamental. This bill is permeated through and through with the spirit of the greatest institution which exists in the Empire, and which pertains to every Constitution established within the Empire—I mean the institution of responsible government, a government under which the Executive is directly responsible to—nay, is almost the creature of—Legislature. This is not to say so in America, but it is so with all the Constitutions we have granted to our self-governing colonies. On this occasion we establish a Constitution modelled on our own model, pregnant with the same spirit, permeated with the principle of responsible government. Therefore, what you have here is nothing akin to the Constitution of the United States except in its most superficial features.

With these expressions we entirely agree (28 CLR at 147).

The selective rejection of American authority in Engineers was based on the differences between the Australian and American Constitutions, in which the division of powers between the States and the national governments in each
was dismissed as a merely 'structural' similarity and federalism as an only 'superficial' feature of the Australian Constitution. The implications drawn from the federal elements of the Constitution by the Griffith Court in its interpretation were rejected in *Engineers* not because it was wrong to draw implications, but because those implications came from what were seen as the least significant elements of the Constitution.

Through the joint judgment in *Engineers* the Court endorsed the belief that it is responsible government and not federalism that is the Constitution’s key element. This belief was one which Isaacs had held for a long time. As a delegate to the convention of 1897-1898 at which the Constitution was drafted Isaacs said:

> I take it as an incontrovertible axiom that responsible government is to be the keystone of this federal arch (Federation Debates, Adelaide, 1897: 169).

The references to responsible government in the joint judgment point to a theory of the Australian Constitution as the ground for the decision in the *Engineers’* case which emphasises, at the expense of federalism, the sovereignty and supremacy of the national Parliament. As was said in the joint majority judgment in *Engineers* from a passage already quoted:

> But possible abuse of powers is no reason in British law for limiting the natural force of the language creating them. ... the extravagant use of the granted powers in the actual working of the Constitution is a matter to be guarded against by the constituencies and not by the Courts (28 CLR at 151).

The assumptions on which this reasoning rely are not consistent with the active judicial role the High Court was created to fulfil under the Constitution in maintaining federalism, but rather the conventional role of the courts within the English constitutional tradition in which there is one sovereign parliament the laws of which the courts do not find invalid, but merely apply. Federalism is relegated to the ‘political’, but a political in which the Commonwealth reigns supreme because the institution established to ensure the integrity of the constitutional framework in which the ‘political’ is supposed to be contained has abrogated its duty.
The theory of the Constitution underlying the *Engineers’* decision only makes sense if the Constitution is informed by an immanent national purpose to be realised through Australia becoming an effectively unitary state on the Westminster model of government. That may have been the purpose which the majority of the Court in the *Engineers’* case thought the Australian Constitution should embody, but it is inconsistent with the federal purpose underlying the Constitution.

It is also far less consistent with the English tradition than the original federal jurisprudence of the Griffith Court. It may have been fair enough for the majority judges in *Engineers* to say that the Australian Constitution was contained in a statute of the British Parliament and should be interpreted as such, but if the point of statutory construction interpretation is to give effect to the intention underlying a statute, then the decision in the *Engineers’* case failed miserably. It gave effect to a national purpose in the Constitution that is not there, while denying a federal purpose that manifestly is. Unfortunately, it did so fairly successfully. The idea that the Constitution is informed by a dominant national purpose remains a key element in the interpretation of the Australian Constitution.

‘The settled rules of construction’ developed in the context of a governmental system completely different to the model of limited government that lies at the heart of the Australian Constitution. To simply adopt those rules as the ruling method of interpretation, rather than to transcend them as the Griffith Court sought to do, is to bring into the Constitution the assumptions of government which those rules reflect and reproduce, as the Griffith Court discovered. The effect of the simple application of those rules to interpretation of the Australian Constitution is a salutary reminder of the intrinsic relationship between form and substance in the task of constitutional interpretation. There is no such thing as a neutral method of constitutional interpretation, but only methods which can only be judged in terms of their substantive outcomes and how well those outcomes reflect and give effect to the substantive principles informing a constitution.
Constitutions are not only law, but also supreme law. They embody the principles and values which inform the political and legal institutions and practices of the community which they structure and maintain. So a constitution is at once law and the font from which a nation’s politics and law springs. That is why there can be no universal answer in specific terms to the question of what law is or how a constitution should be interpreted, but only answers which themselves are interpretive. In the particular Constitutional system which is the Australian, the High Court is not just an institution which defers to the legislative will, as the settled rules of statutory construction require, but an institution invited to develop a law of substantive principle.

The decision in the *Engineers’* case rejected federalism as a significant element of the Constitution and with it the federal jurisprudence of the Griffith Court. Taking those elements of the English jurisprudential tradition that had initially informed the constitutional practice of the Griffith Court to their logical conclusion, Isaacs found the foundation for excising the federal limitations on the scope of Commonwealth power from the Constitution, treating the Commonwealth Parliament instead as if it were a sovereign parliament on the Westminster model. This was no simple application of the settled rules of statutory construction. It was the imposition of a theory of government on the Constitution’s structure and words.

Earlier I argued that in many aspects the decision in the *Engineers’* case mirrored the approach to interpretation taken by the American Supreme Court under Marshall, but in one obvious respect, of course, it did not. In comprehensively overturning the Griffith Court’s implied immunities doctrine, Marshall’s doctrine of implied immunities was also apparently rejected. Dixon, on the other hand, in attempting in part to extricate the Court from the diminished constitutional role that is the logical outcome of *Engineers* and the constitutional theory on which it is based, would revive an implied doctrine of intergovernmental immunity. However, it was a doctrine of implied immunity which, like Marshall’s, would be developed not within the rubric of any

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26 Isaacs would later recoil from the straightforward approach to intergovernmental immunity taken in the *Engineers’* case and the room it in theory left for the States to bind the Commonwealth (note Isaacs’ judgment in *Pirrie v McFarlane* (1925) 36 CLR 170; Cowen, 1967: 164-165).
substantive federal jurisprudence, but rather as part of an overall jurisprudence of national supremacy, which effectively continued the anti-federalism given Australian form in *Engineers*. 
CHAPTER 6
DIXON’S ANTI-FEDERAL THEORY OF THE CONSTITUTION: CONSOLIDATING NATIONAL SUPREMACY AND ENHANCING JUDICIAL POWER

The *Engineers*’ case and the national vision it gave effect to is the starting point for the High Court’s expansive reading of Commonwealth power at the expense of State legislative and executive power, but it is not its end point. Sir Owen Dixon transformed and refined the approach in *Engineers* into a systematic method for broadly interpreting the scope of Commonwealth power and characterising the nature of Commonwealth law. It is Dixon’s method and the theory underlying it which remain the foundation of the High Court’s approach to interpreting the federal aspects of the Constitution.

As Sawer (1967: 133) noted, ‘Dixon disliked *Engineers*; its literary style set his teeth on edge, and he never mentioned it without a touch of asperity’ (note also Zines 1965). Against the raw literalism of the *Engineers*’ decision, Dixon (1965: 247) led the Court in developing ‘a strict and complete legalism’ through which a more robust and active constitutional role was asserted by the Court and Commonwealth laws struck down. This is reflected in decisions of the Court in the period immediately following the Second World War which saw the Court first overturn the Commonwealth Labor Government’s plans for centralising banking in *Melbourne Corporation v Commonwealth* (the *State Banking* case) (1947) 74 CLR 31, and later to nationalise them in *Bank of New South Wales v Commonwealth* (the *Bank Nationalisation* case) (1948) 76 CLR 1. However, the Court did not limit the exercise of its power to Labor’s post war legislative programme. In the following decade, the Court overturned the conservative government’s legislation outlawing the Communist Party in Australia (*Australian Communist Party v Commonwealth* (the *Communist Party* case) (1951) 83 CLR 1).

Like *Engineers*’ literalism, Dixon’s legalism, had a foundation in a substantive theory of the Constitution. This theory did not privilege the authority of the
Commonwealth Parliament in quite the same way as *Engineers* did, but it nonetheless privileged Commonwealth dominance over the States in much the same way. Dixon developed an ostensibly federal reading of the Constitution rather than the national one *Engineers* gave effect to, but, like Warden's more recent explanation of the federal foundation of the Constitution, it was a federal reading that saw the Constitution as incorporating a flawed federal theory which achieved the opposite of what was intended: the overwhelming legal supremacy of the Commonwealth over the States.

In the *State Banking* case a doctrine of intergovernmental immunity was reintroduced by the Court into the law of the Australian Constitution, but that doctrine, while providing some protection for the States, has had a limited application. Where the primary constitutional issue at stake has been the relative position of the Commonwealth and States, the Court, consistent with the outcome in *Engineers*, but reflecting more Dixon's theory of the Constitution and applying principles refined under his influence, has supported for the most part the legislative choices of the Commonwealth. However much Dixon disliked the *Engineers*’ decision, the legalism he advocated maintained and consolidated the anti-federal thrust of *Engineers*.

**DIXON’S METHOD OF CHARACTERISATION: A VEHICLE FOR VALIDITY**

What was at issue in the *Engineers*’ case was the question of intergovernmental immunities, but, as we have seen, the case stands as authority for not only the overthrow of the implied immunities doctrine, but also the reserved powers doctrine. It is the latter which has most profoundly affected the constitutional foundation of Australian federalism; a legacy marked in the method the Court subsequently adopted in determining whether a Commonwealth law is ‘with respect to’ a constitutional head of Commonwealth legislative power. The process is called characterisation.

Characterisation involves three, though not necessarily discrete, stages. First, the Constitution has to be interpreted and the meaning and scope of the power or powers upon which Commonwealth legislation relies determined. Secondly,
the law has to be characterised so that a decision can be made as to whether or not it comes within power. Finally, the Court has to determine whether any express or implied limitations on Commonwealth power apply. The first and second steps of characterisation are closely related analytically. The process of characterisation of Commonwealth law tends to be controlled by the Court's approach to interpretation. Since *Engineers*, the Court’s constitutional jurisprudence has been premised on a broad construction of Commonwealth legislative power effectively unmitigated by federal principle. How the Court has characterised Commonwealth laws has reflected that anti-federal premise. It leaves the Commonwealth a lot of room to draft valid legislation and the Court a lot of room to find legislation within power.

Before the decision in *Engineers*, the process of characterisation was undertaken by the Court within the context of its federal jurisprudence. The Griffith Court understood that, while each grant of legislative power to the Commonwealth under the Constitution is plenary within its scope and so should not be construed narrowly, it is also a grant of power which in its very form as a specific grant is limited for a federal purpose. The Commonwealth was not given a general grant of legislative power to make laws for the peace, order and good government of Australia, it was granted legislative power to make laws for the peace, order and good government of Australia with respect to a number of specific matters, with power over most of those matters being held concurrently with the States and residual power remaining with the States. The Griffith Court’s federal jurisprudence sought to give effect to the division of powers by applying the doctrine of reserved powers. In the *Engineers*’ case the distinction was rendered meaningless with the overthrow of the Griffith Court's federal jurisprudence. With that overthrow the heart of the Constitution, the division of powers, was cut out of it. The principles of characterisation the Court subsequently developed reflect the vacuum that the *Engineers*’ case left in place of the Constitution, giving rise to a process which gives the broadest possible scope to national power at the expense of State power. Far from providing a set of principles to constrain power (as it might be expected a constitutional court applying a constitution establishing a government of limited powers would develop), the principles appear to be designed to achieve the opposite end.
The broad approach to the construction of Commonwealth legislative power and the process of characterisation invited by the Engineers’ case was refined by Dixon into a set of principles that continue to guide the Court in determining the constitutionality of Commonwealth law where federal issues are to the fore. They have been summarised by Zines (1992: 33) in the following terms:

1. It is a logical fallacy to assume that s. 107 of the Constitution reserves any particular subjects to the States;

2. If a law directly operates on the subject matter of a power or, in some cases, “answers the description” of a law on that subject matter, legislative purpose is irrelevant;

3. There is implied in respect of each power an incidental area where legislative purpose is the key to the validity of a statutory provision;

4. It is irrelevant that a law otherwise answering the description of or with respect to a subject of federal power is also a law which can be described as being with respect to some other subject;

5. A broad interpretation of powers is necessary in a Constitution to provide the flexibility necessary in the case of an enduring document that is difficult to amend.

The High Court’s application of these principles has provided the basis for a consistently expansive interpretation of Commonwealth power.

Whatever disagreement Dixon may have had with the majority judgment in the Engineers’ case, he and Isaacs were likeminded on the subject of the States’ reserved powers, as the first principle of characterisation suggests. Just as Isaacs argued against the majority in Barger’s case that ‘[i]t is contrary to reason to shorten the expressly granted powers by the undefined residuum’ (6 CLR at 84), so too did Dixon put paid to any notion of resurrecting the doctrine:
The Commonwealth is a government to which enumerated powers have been affirmatively granted. The grant carries all that is proper for its full effectuation ... the attempt to read sec. 107 as the equivalent of a specific grant of power lacked a foundation in logic (the *State Banking* Case, 74 CLR at 83).

The rejection of the reserved powers doctrine has been an abiding piece of High Court dogma since it was first asserted by a majority in *Engineers* and authoritatively affirmed by Dixon (note Douglas, 1985: 114-115; Cowen, 1967: 156-158). Since *Engineers*, the Court has been vigilant in reminding itself of this orthodoxy and also any of its members who may have entertained reasoning which might revive the doctrine in some form (note Dixon in *Uther v Federal Commissioner for Taxation* (1947) 74 CLR 508 at 530; Menzies in *Airlines of New South Wales Pty Ltd v New South Wales* (No 2) (the *Second Airlines* case) (1965) 113 CLR 54 at 143; Windeyer in the *Payroll Tax* case, 122 CLR at 400; Barwick in *Strictland v Rocla Concrete Pipes Ltd* (the *Concrete Pipes* case) (1971) 124 CLR 468 at 485; Barwick in *R v Trade Practices Tribunal; Ex parte St George County Council* (1974) 130 CLR 533 at 540-541; Mason and Murphy in *Koowarta v Bjelke-Petersen* (1982) 153 CLR 168 at 227 and 241 respectively; Mason, Murphy, Brennan and Deane in *Commonwealth v Tasmania* (the *Tasmanian Dam* case) (1983) 153 CLR 1 at 127-128, 168, 220 and 254 respectively; Mason and Deane in *Phillip Morris Ltd v Commissioner for Business Franchises (Vic)* (1989) 167 CLR 399 at 427 and the joint judgment of Mason, Brennan, Dawson, Toohey, Gaudron and McHugh in *New South Wales v Commonwealth* (the *Incorporation* case) (1990) 169 CLR 482 at 499). The rejection of any reasoning which contains the actual scope of Commonwealth power, represents a consistent and successful attack on the only, though necessarily undeveloped, line of reasoning that appeared on the Court through which real effect could be given to that which is the key element of the Constitution and the federal system it establishes: the constitutional division of powers between the States and the Commonwealth.

A doctrine of reserved powers doctrine may take shape as a general principle which encourages a narrow construction of the enumerated powers of the Commonwealth Government consistent with the Constitution's underlying federal purpose. Such a principle is not logically inconsistent with a principle of broad construction of Commonwealth power as one side of the federal coin is
the creation of a national government with independent powers. However, unlike the principles of construction that the Court has adopted since *Engineers*, it requires that effect also be given to the other side of the federal coin, the maintenance of a degree of independent power for the constituent regions of the federation. The doctrine may also be applied to give substantive effect to express federal limitations contained within the powers granted the Commonwealth under the Constitution, such as exist within the Commonwealth’s trade and commerce and industrial relations powers. Those limitations can be given effect in interpretation of the specific power of which they form a part, but they can also be given effect in interpretation of the Commonwealth’s other powers, so preventing their otherwise being overridden though a broad interpretation of those powers. The Griffith Court applied the doctrine in both these senses.

These distinctions in the application of the doctrine have not been considered or addressed by the Court in its blanket rejection of reserved powers thinking and its uncritical acceptance of Dixon’s last and most general principle of interpretation, which requires a broad construction of Commonwealth power. This principle is the *Jumbunna* principle stripped of the context of the substantive federal jurisprudence in which it was articulated. As such, it carries within it the assumption that flexibility in interpreting the Constitution necessarily means discounting federalism and reading the Commonwealth’s powers more and more expansively as circumstances change. Claiming a logical foundation for the principle is to miss the point of constitutional interpretation. Law, whether it is the Dog Act or the Constitution, represents not logic but a practical choice intended for practical application in the real social and political world. Judicial discretion, if a law is to have any meaning at all other than what the judge says it means in any particular case, is limited to giving effect to the choice that law represents. At bottom, even in an apparently highly formal legal system such as the English in which judicial discretion is relatively constrained and rule bound, substantive principle governs that formal expression of law. Through that relatively formal legal system the substantive democratic principles of the system overall are realised. In Australia, the choice made was for a different form of democracy, a federal democracy in which the power of the national government was constitutionally limited and the courts given a much
more overtly substantive role in giving effect to the system. It is not logic that is at issue here, but the choice that was made. The overwhelming advantage a federal interpretation of the Australian Constitution has over a national one is that it has a foundation in history and the Constitution which the Commonwealth centric focus of an unconstrained, freestanding principle of broad construction does not.

The second principle of characterisation, through which legislative purpose is discounted where the law is characterised as coming within the core of a power, and the fourth, which discounts the effect of alternative possible characterisations of a law, both augment a broad construction of Commonwealth power. The language used in the cases relating to these aspects of the characterisation process speaks of discovering the ‘true nature of a law’ (Latham in the First Uniform Tax case, 65 CLR at 424) or ‘the true nature and character of the legislation’ and ‘its real substance’ (Kitto in Fairfax v Federal Commissioner of Taxation (1965) 114 CLR 1 at 7). However, it is important not to be misled here, for all the references to ‘true nature’ and ‘real substance’, this process is a formal legal process and substantive reasoning does not ostensibly come into it.

Establishing the nature and substance of a law means, according to the High Court, finding its ‘direct legal operation’, the purpose of which is to determine whether there is ‘sufficient connection’ between the law and the power upon which its validity relies (note Toohey in Re Dingjan: Ex parte Wagner (1995) 183 CLR 323 at 353). A law’s direct legal operation is discovered by taking the law at face value and identifying ‘the rights, duties, powers and privileges which it changes, regulates or abolishes’ (Kitto in Fairfax, 114 CLR 1 at 7; note also Latham in the First Uniform Tax case, 65 CLR at 424). If on the formal test the law is with respect to a head of power then legislative purpose plays no part in the Court’s considerations, even where that purpose is to achieve an end otherwise not within Commonwealth power. Similarly, where the law can be characterised as being with respect to more than one subject matter, it is sufficient if only one of those subject matters is within a head of Commonwealth power and irrelevant if the other or others are not (see Fairfax, 114 CLR 1; note also Herald and Weekly Times Ltd v Commonwealth (1966) 115 CLR 418).
As with so many of the principles which the Court has applied to remove federal constraints on Commonwealth power, they were on the books even before the Engineers’ decision. In the majority judgment of Griffith, Barton and O’Connor in Barger’s case, the Court made clear that the motive of the legislature or the indirect effect of the legislation was not relevant to the question of the law’s validity. There are two differences, however, in the judgment in Barger’s case with the modern approach of the Court. First, the Court in Barger’s case focused on the purpose of the legislation as manifested on its face (note Zines, 1997: 30). It was because the Commonwealth tax in question applied only to those manufacturers who did not comply with the prescribed labour conditions that the Court considered that the law establishing it was not in substance a law with respect to taxation, but a law with respect to the regulation of conditions of labour within the States. Secondly, the Court in Barger’s case considered the Constitution as a whole in constructing of the scope of Commonwealth power. That consideration included taking in account the express and necessarily implied prohibitions contained within the Constitution in the process of construction, prohibitions which at that time included those arising from the reserved powers doctrine. In Barger’s case it was assumed that the regulation of conditions of labour within a State was a matter within the reserved powers of the States.

The formal approach of the post-Engineers’ High Court invites the Commonwealth to use its powers creatively to achieve purposes which would not otherwise be in power—that is, on subjects which traditionally come within the legislative powers of the States. The Commonwealth famously used the trade and commerce power to this end to control sand mining on Fraser Island, a use of the power upheld in Murphyores Incorporated Pty Ltd v Commonwealth (1976) 136 CLR 1. Under the authority of a State Government mining lease, the plaintiff companies mined mineral sands on Fraser Island producing zircon and rutile concentrates for export. Regulations made under the Commonwealth Customs Act 1901 required written approval from the Commonwealth Minister for Minerals and Energy for the export of certain substances, which included those mined by the plaintiff companies on Fraser Island. Approval was sought, but it was refused pending an inquiry into the environmental impact of mining on
the island as required by a directive given under the Commonwealth Environment Protection (Impact of Proposals) Act 1974. The challenge to the Commonwealth’s legislation failed as the conditional prohibition on exports was seen to come directly within the Commonwealth’s control over overseas trade granted under the trade and commerce power. For that reason, the fact that the motive and purpose behind the law was to control mining and protect the environment, matters otherwise within State control, had no bearing on the Court’s decision.

In terms of directly characterising a law, the third principle of characterisation as refined by Dixon requires that legislative purpose only becomes important where the power relied on is purposive, such as the defence power or where the implied incidental power is relied upon. The implied incidental power is the power that attaches to each grant of power permitting what is appropriate or reasonably necessary to effectuate the purpose of the power (Dixon, McTiernan, Webb and Kitto in Grannall v Marrickville Margarine Pty Ltd (1955) 93 CLR 55 at 77). However, as the Court has recently affirmed, while purpose is important in such cases, the primary consideration remains the question of ‘sufficient connection’ between the law and core subject matter of the power (Leask v Commonwealth (1996) 187 CLR 579), a question which it appears the Court will answer with a relatively high degree of deference to the choices made by the legislature.

In general, the formality of the orthodox characterisation process after Engineers reproduces judicial deference to the legislative will of the Commonwealth Parliament, making it virtually impossible for the Court to apply substantive federal limitations on the scope of Commonwealth power and so give effect to the federal foundation of the Constitution.

A LIMITED LIMITATION: DIXON’S REVISED STATE IMMUNITY FROM COMMONWEALTH LAWS

Dixon, apart from refining the process of characterisation, was also the progenitor of a new principle intergovernmental immunity. The principle has afforded some protection to the structure of Australian federalism, but its effect
has been limited by the Court's overall approach to interpretation of the federal elements of the Constitution following *Engineers* and Dixon, which has tended to overwhelmingly promote Commonwealth supremacy over the States and the erosion of the constitutional division of powers.

The general rule prior to the decision in the *Engineers*’ case was that a strong doctrine of intergovernmental immunities applied: neither level of government could bind the other. In the *Engineers*’ case it was held by a majority that the States and their employees were subject to the process for conciliating and arbitrating interstate industrial disputes established by the Commonwealth under its Conciliation and Arbitration Act. In other words, Commonwealth laws could bind the States, but so too could the States bind the Commonwealth. In place of the reciprocal doctrine of implied immunities, the *Engineers*’ case introduced a reciprocal capacity to bind, although the Commonwealth held the upper hand under this new arrangement not only because of its supremacy where it enacted valid legislation inconsistent with State law, but also because the scope of its legislative powers were no longer constrained by federal principle.

Under the new immunities principle, while the Commonwealth can bind the States through its laws, the States are protected where such laws discriminate against them or, even if non-discriminatory and of general application, where they threaten their existence or capacity to function as States. The limitation on Commonwealth power has been recently expressed in the following terms:

> The limitation consists of two elements: (1) the prohibition against discrimination which involves the placing on the States of special burdens or disabilities (the prohibition against discrimination); and (2) the prohibition against laws of general application which operate to destroy or curtail the continued existence of the States or their capacity to function as governments (Mason, Brennan, Deane, Toohey, Gaudron and McHugh, *Re Australian Education Union: Ex parte Victoria* (1995) 184 CLR 188 at 231; following Mason in *Queensland Electricity Commission v Commonwealth* (1985) 159 CLR 192 at 217)

This was the working formulation on which the majority in *Australian Education Union* relied, though whether it is the final form the limitation will take remains to
be seen. The Court did not need to decide whether the implication was in fact ‘two implied limitations, two elements or branches of one limitation, or simply one limitation’ (184 CLR at 227).

It was in the State Banking case that Dixon led the Court in providing the foundation for this federal implication, the groundwork for which had been laid by Dixon over many years (see West v Commissioner of Taxation (NSW) (1937) 56 CLR 657 at 683; and Australian Railways Union v Victorian Railways Commissioners (1930) 44 CLR 319 at 390). The various judgments in favour of a federal limitation on Commonwealth power in the State Banking case were brought together by Mason in Queensland Electricity Commission as the two limbs of the principle, one prohibiting discrimination and the other prohibiting laws which prevent the States from existing or their capacity to function as governments, which was provisionally approved in Australian Education Union.

The limitation in one form or another has often been raised by the States in argument before the Court, but, it has been rarely applied. The cases where it was not applied include the Payroll Tax case in 1971, in which it was accepted the Commonwealth could tax State government payrolls; the Tasmanian Dam case in 1983, in which the exercise of Commonwealth control over a significant, if not large, area of Tasmania was not considered an impairment of Tasmania’s capacity to function; State Chamber of Commerce and Industry v Commonwealth (the Second Fringe Benefits case) (1987) 163 CLR 329, in which the Court concluded that the application of Commonwealth fringe benefits tax to State ministers, members of Parliament and judges was neither discriminatory nor impaired the States’ capacity to function; and Richardson v Forestry Commission (1988) 164 CLR 261, in which neither limb of the limitation was held to apply, despite the fact that the case concerned Commonwealth legislation affecting a much larger area of Tasmania than was at issue in the Tasmanian Dam case.

The High Court or its members from time to time in other cases have also referred to the limitation without it having been central to the Court’s decision. In the Social Welfare Union case, the Court overturned long-standing precedent and expanded the Court’s narrow definition of ‘industrial’ so as to encompass all
work characterised by the relationship of employer to employee for the purpose of the Commonwealth's limited power over industrial relations under section 51(xxxv) of the Constitution. The narrower definition, which had confined 'industrial disputes' to those within productive industry, had largely prevented State public servants coming within the Commonwealth industrial relations regime, or at least those providing administrative services to the States. Mindful of the affect on the States that this expansion of the concept of industry might have, the Court acknowledged that 'a Commonwealth law which permitted an instrumentality of the Commonwealth to control pay, hours of work and conditions of employment of all State public servants' would not be valid (153 CLR at 313).

*Australian Education Union* was only the third time the Court had applied the prohibition to strike down a Commonwealth law and only the first time that the second limb of the prohibition, concerning Commonwealth laws which threaten a State's existence or its capacity to function, had been applied. A decade earlier in *Queensland Electricity Commission* the discrimination limb was applied for the second time. The first application, almost forty years before that, was in the *State Banking* case.

The judgments in the *State Banking* case left unclear the exact nature of this new federal limitation on Commonwealth power and how in practice it might be applied. While it is now clear that the limitation exists and that either limb may be relied on by the Court, the fact remains that some fifty years after the decision in the *State Banking* case the High Court's application of the limitation remains infrequent and uncertain.

The high point for the narrow application of the implied federal limitations on Commonwealth power was in *Re Lee; Ex parte Harper* (1986) 160 CLR 430, which dealt with the question of whether Commonwealth law could extend to industrial disputes between States and organisations representative of State school teachers. In a joint judgment, Mason, Brennan and Deane said that the limitations must be read in the light of the Commonwealth's express powers and seemed to suggest that where a law is characterised as directly within power, that itself is the end of the matter, leaving no room for any implied federal
limitations to come into play as a constraint on the exercise of power by the Commonwealth (160 CLR at 453).

One of the narrowing elements of the second limb of the implied federal limitation on Commonwealth power, which protects the Governments of the States from Commonwealth laws that threaten their existence or capacity to function as such, is a distinction the Court has made between a State's capacity to function as a government and its functions as it were, the limitation only applying to the former. In the *Tasmanian Dam* case Mason referred to Tasmania's argument that the second limb of the implied federal limitation can be relied upon to strike down Commonwealth legislation which 'inhibits, impairs or curtails any [State] governmental function in a material way' (158 CLR at 139). Mason would have none of this, limiting its application to 'a substantial interference with the State's capacity to govern' (158 CLR at 139). In *Australian Education Union* the majority gave more life to the second limb of the implication. It was accepted in that case that the Commonwealth industrial relations system applied to the States and their employees, but the Court now recognised that in certain policy areas relating to employees at 'the higher levels of government' its application was modified or excluded because it would interfere with a State's 'integrity' or 'autonomy' (184 CLR at 232). In particular, a federal award could not bind the States to the extent that it controlled decisions regarding dismissal of some of its employees on the grounds of redundancy.

While application of the principle on these grounds in *Australian Education Union* represents an advance on the past in terms of the constitutional efficacy of federal principle, the distinctions relied on by the Court remain highly artificial as Dawson pointed out in his minority judgment (184 CLR at 249-250). Where the Court took a more substantive turn was in a partial return to the pre-*Engineers*’ approach of treating issues of characterisation and the application of limitations on Commonwealth power as part of a single whole. The approach in *Australian Education Union* can be contrasted with that taken by Mason, Brennan and Deane in *Re Lee; Ex parte Harper*, in which the process of characterisation was treated as a discrete exercise to be undertaken in the first instance independently and possibly to the exclusion of consideration of the
The effect of any federal limitations (note Blackshield, 1997: 97-98; Blackshield and Williams, 2002: 972-973; Zines, 1997: 335-336). The apparent shift in Australian Education Union has not resulted in the implied federal limitations receiving a substantially wider application. Despite the more holistic approach taken by the Court in Australian Education Union in applying federal limitations on Commonwealth power, their scope remains narrow. As Wheeler (1997: 129) has said, the decision in Australian Education Union overall remains ‘remarkably faithful to Engineers’.

However the presently recognised limited State immunity from Commonwealth law is applied, it represents no more than tinkering around the edges of the federal system established under the Constitution. The key difference between the parsimonious federal jurisprudence of the modern Court brought about by Dixon and the more substantive federal jurisprudence of the Griffith Court remains: the Court under Griffith focused on power as well as structure, whereas the later Court has focused almost exclusively on the latter, leaving Commonwealth power otherwise free from limits on its expansion (note Australian Education Union, 184 CLR at 229-230). If the Court is to take federalism seriously it must reclaim for itself the constitutional role it gave up with the decision in Engineers and develop a jurisprudence through which substantive effect can be given to the federal division of powers under the Constitution.

**REMOVING STATE POWER TO BIND THE COMMONWEALTH**

Just as the Court in Engineers found that Commonwealth law could bind the States, so too did it find that State laws could bind the Commonwealth, subject to the paramountcy of Commonwealth laws (28 CLR at 155). As we have seen, Dixon later led the Court in modifying the capacity to which the Commonwealth could bind the States through the reintroduction of a limited immunities doctrine. As to the capacity of the States to bind the Commonwealth, modification of Engineers did not go far enough for Dixon. In a dissenting judgment in Uther’s case, Dixon rejected the possibility that the States even had power to bind the Commonwealth, asserting that the Constitution does not provide this power and
it 'formed no part of the old colonial power' before federation (74 CLR at 530-531).

The assumption made in *Engineers* that the States, whose constitutions are preserved by the Australian Constitution and whose powers under those Constitutions are plenary, should be able to bind the Commonwealth in law is hardly displaced by Dixon's 'logico-historical impossibility' argument, as Evans (1972: 524) describes it. The Court nonetheless came to be persuaded by Dixon's views on this matter, as with so many others. In *Commonwealth v Cigamatic* (1962) 108 CLR 372, the Court held that the States had no power to alter Commonwealth priority in debt repayment upon a company winding up.

To overcome the practical difficulties of leaving the Commonwealth unregulated by State law, a complicated and vague exception referred to as the 'affected by' doctrine, was proposed by Dixon. Despite the assumption of Commonwealth immunity from State law, it was suggested that the Commonwealth could, in effect, choose to be 'affected by' State laws of general application, such as when the Commonwealth entered a contract within a State (note Dixon in *Cigamatic*, 108 CLR at 378; Fullagar in *Commonwealth v Bogle* (1953) 89 CLR 229 at 260; Donaldson, 1985). Subsequently the Court would find that section 64 of the Commonwealth's *Judiciary Act 1903* provided the foundation for the application of State law in suits to which the Commonwealth was a party (*Maguire v Simpson* (1978) 139 CLR 362).27

The belief in Commonwealth immunity from State law as reflected in the decision in *Cigamatic* has been often and fairly criticised, not just because of the weakness of Dixon's logico-historical argument, but also because there is no practical reason for a blanket rule preventing the States from binding the Commonwealth (note Latham in *Uther's* case, 74 CLR at 521; and see generally Evans, 1972; Meagher and Gummow, 1980; Doyle, 1994; Hanks, 1996: 251; Zines, 1997: 361-366; and Mescher, 1998). While the Constitution does not expressly deal with how the question of immunity should be resolved, Section 64 of the Act provides:

> In any suit to which the Commonwealth or a State is a party, the rights of the parties shall, as nearly as possible, be the same, and judgment may be given and costs awarded on either side, as in a suit between subject and subject.
the resolution proposed in *Engineers* with respect to the effect of State laws on the Commonwealth in general terms is a simple and practical one. Commonwealth supremacy is necessarily retained as it can rely on section 109 to free itself of State laws by which it does not wish to be bound, leaving the Australian legal system to operate otherwise unaffected by abstract, complicated and unnecessary considerations of Commonwealth immunity. Nonetheless, despite a recent challenge, *Cigamatic* remains on the books, albeit in a diluted form (see *Re Residential Tenancies Tribunal (NSW); Ex parte Defence Housing Authority (Henderson’s case)* (1997) 190 CLR 410).

**WAS SIR OWEN AN ENGINEER?**

The formal approach of the Court to interpretation after *Engineers* has spoken the language of English jurisprudence and has drawn on the myth which is so much a part of that jurisprudence that law is a closed system logically distinct from substantive political values. However, law is necessarily informed by such values, values given primary effect through the constitutional arrangements of particular polity and the forms of legal reasoning which arise therefrom. In law, and particularly constitutional law, form and substance are inextricably linked together. How the Court interprets the Constitution, even were the approach is highly formal, represents a value choice. The question is: does the choice give effect to the principles which inform the Constitution or to principles derived from elsewhere? The later can be justified, but only on non-interpretivist and realist grounds, and either way the fact that substantive choices are being made cannot be avoided.

Many discussions of the High Court’s formalism refer to a dual and often undifferentiated genesis for the approach first in the *Engineers’* case and later in Dixon’s constitutional jurisprudence. The genesis is seen first in the *Engineers’* emphasis on giving effect to the text and structure of Constitution, as opposed to broad constitutional implications, and secondly in Dixon’s explicit espousal of legalism, ‘*[t]here is no other safe guide to judicial decisions in great conflicts than a strict and complete legalism*’ (1965: 247). There are indeed strong connections between the two, but also significant differences.
Both these approaches emphasised form over substance and both were presented as neutral approaches to interpretation which merely gave effect to the law of the Constitution and not any extrinsic values. However, in their application the opposite was true. Through *Engineers* and the later influence of Dixon, technique was used in the service of giving effect to a substantive vision of the form the Australian polity should take, not that which it was given through the Constitution. In each, so far as federalism was concerned, that vision was substantially the same, the deliverance of almost complete legal dominance to the Commonwealth over the States, and in each the method was virtually identical, a literal method of interpreting Commonwealth powers and characterising Commonwealth statutes. Given that only the Commonwealth’s powers are expressly set out in the Constitution and that the major constraints on those powers therefore must be derived from federal constitutional implications given substantive effect, a literal method of interpretation is guaranteed to deliver power to the Commonwealth at the expense of the States. Consistent deployment of that method since *Engineers* has transformed residual State power from being a real constraint on the scope of Commonwealth power into a vacuum into which Commonwealth power can flow.

The differences are more nuanced, but nonetheless highly revealing.

The *Engineers’* approach was the more obviously literal. Emphasising that the Constitution should be interpreted in the same manner as an ordinary statute, the Court was told to give full effect to its express terms without reference to any underlying implications. It was a bold approach which swept away the complications of the Griffith Court’s federal jurisprudence adopting in its place a simple and brutal interpretive method which delivered the preferred anti-federal outcome without the Court having to accept much responsibility for it. Dixon preferred a more subtle approach which he called legalism.

Dixon’s legalism was a strange hybrid of English form and American principle seen through English eyes. The formalism of legalism was foregrounded by Dixon in the techniques of interpretation he developed and advocated. Constitutional law was not ostensibly an exercise in applying substantive
constitutional principle, but a formal exercise in syllogistic logic. Unlike the American Constitution, whose force is derived from the ‘people’s inherent authority’, the Australian Constitution was seen by Dixon (1965: 44) as simply ‘a statute of the British Parliament’, its organs of government ‘simply institutions established by law’ and the powers of those organs no more than ‘authorities belonging to them by law’. The Constitution was just another law applied by the courts. The traditional job of the courts within the English system is to find the facts in any particular case and then to apply the law to them. It is legal reasoning on this model that Dixon (1965: 247) advocated for the Court in its constitutional work: ‘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 the other, and that it has nothing whatever to do with the merits or demerits of the measure’. To do that, Dixon, and the Court he carried with him for so long, sought to give effect to the Constitution through the development of artificial legal principles which were of sufficient abstraction for it to appear that the Court had assessed ‘a given measure’ by purely legal standards and not its ‘merits or demerits’.

But Dixon also appeared to go beyond formalism in recognising that the special status of the Constitution required a fuller and more substantive interpretive approach, one which allowed for principles to be implied from the Constitution:

Since the *Engineers’ Case* [(1920) 28 CLR 129] a notion seems to have gained currency that in interpreting the Constitution no implications can be made. Such a method of construction would defeat the intention of any instrument, but of all instruments a written constitution seems the last to which it should be applied. I do not think that the judgment of the majority of the court in the *Engineers’ Case* meant to propound such a doctrine (*West v Commissioner of Taxation*, 56 CLR at 681-682).

Through articulating the foundation of the federal implications which he was to find in the Constitution, Dixon gave expression to the substantive principles which are the foundation of legalism and which legalism’s formal aspects tend to obscure. Moreover, it is in the substantive foundation for legalism that the real similarities and differences between legalism and the purer literalism of the
Engineers' approach are revealed. Both start with Dicey, but whereas the decision in Engineers starts with Dicey's theory of law and government under the Westminster system, Dixon starts with Dicey's theory of federalism.

In his writing of American federation, Dicey, like Bryce, understood American constitutionalism through his inherent experience of English law and politics. Dicey's English background is reflected not only in his well known criticisms of federalism, but also in his explanation of what federalism is and its three leading characteristics, 'the supremacy of the constitution—the distribution among bodies of limited and co-ordinate authority of the different powers of government—the authority of the courts to act as interpreters of the constitution' (Dicey, 1959: 144), characteristics echoed by Deakin when introducing the Judiciary Bill into the Commonwealth Parliament in 1903. The inevitable consequence of those characteristics was a system of government in which law and the courts are supreme, not the people and politics: 'federalism ... means legalism—the predominance of the judiciary in the constitution' (Dicey, 1959: 175).

The decision in Engineers was based on a Diceyean understanding of law and politics, but an understanding associated with constitutional practice under the Westminster system. The values which inform it are ones consistent with English constitutionalism and parliamentary sovereignty, not the form of limited federal government provided for under the Australian Constitution. The practical effect of the decision was to treat the Commonwealth Parliament as if it were the Australian equivalent of the Parliament at Westminster and the High Court as if it were no more than a conventional court on the English model, albeit a superior one, whose role was to ultimately defer to legislative judgment.

Dixon's theory of the Constitution is also based on a Diceyean understanding of law and politics, but it is the law and politics of a federal system as Dicey saw it that provides the starting point for Dixon, the touchstone of which is judicial sovereignty rather than parliamentary sovereignty. Dixon's substantial disagreement extended not to the fact that Engineers imposed a national purpose on the Constitution, but the method by which it did that, which left not only federalism diminished under the Constitution, but the Court as well.
Legalism was Dixon's answer to those aspects of *Engineers* he found unsatisfactory and particularly the eclipse of the Court's constitutional role that case invited. Sawer (1967: 133) thought that Dixon restated *Engineers* 'in a manner calculated to emasculate the decision', but Dixon did not so much emasculate *Engineers* as refine it. While it is true that Dixon drew from the Constitution certain federal implications which provide some protection from discriminatory federal laws and some kind of guarantee for the States' continued existence, the principles were grounded on an austere and abstract theory of federalism which was grafted on to the core rejection by the High Court of the federal jurisprudence of the Griffith Court, and in particular, the rejection of the reserved powers doctrine. This approach reflected a particular belief in Commonwealth supremacy in the Australian federal system, which left federalism as a concept relevant to the interpretation of the Australian Constitution hardly less emasculated than it was following the decision in the *Engineers* case, except insofar as it could be relied upon to entrench judicial supremacy.

Before being appointed to the High Court in 1929 Dixon, on behalf of the Committee of Counsel for Victoria, gave evidence to the Royal Commission on the Constitution, which had been appointed by the Bruce administration in 1927, in the form of a memorandum read to the Commission by Dixon, on which his had probably been the major influence (Saunders, 1986a: 553). The memorandum, as reported by Saunders (1986a: 557), takes up themes later to be well rehearsed by those associated with the unitary preference tradition in Australia. Apart from referring to weakness in government arising inherently from a federal division of powers, the apparently transitory nature of federalism was also commented on. However, insofar as federalism was to continue, the memorandum identified principles on which a federal distribution of powers should be based. In broad terms, those principles suggested a model in which responsibility for the general law should fall to the central government and its administration to the regions, a model which Saunders (1986a: 559) described as 'a remarkably centralised one'. Later, when on the High Court, Dixon found a 'remarkably centralised' model of federalism immanent in the Constitution, one which protected the States as administrative structures, but provided no defence for the States' substantive powers.
Legalism combined in Dicey’s eyes with Federalism’s inherent weakness, conservatism and rigidity to produce a system of government inferior to a unitary system (Dicey, 1959: 171-180). In Australia, Dixon nurtured ‘legalism’, but he otherwise sought to interpret out of the Constitution federalism’s shortcomings as Dicey perceived them. Dixon managed to establish as a foundation of the High Court’s constitutional jurisprudence a theory of the Constitution that centralised the Court, while continuing to promote national supremacy. Flexibility was given to Australia’s ‘rigid’ Constitution through a ‘flexible’ interpretation of the Commonwealth’s powers: ‘it is a constitution we are interpreting, an instrument of government meant to endure and conferring powers expressed in general propositions wide enough to be capable of flexible application in changing circumstances’ (Australian National Airlines Pty Ltd v Commonwealth (1945) 71 CLR 29 at 81); an interpretation which supported the development of a national government sufficiently powerful to overcome the apparently inherent weakness and conservatism of federalism. As to a justification for that interpretation, it is the same as Warden’s thesis about the origins of Australian federalism: the framers got it wrong. Copying the American federal model of dividing power, they introduced a federal theory of divided sovereignty into the Australian Constitution that, far from achieving the result intended, would see what in fact has happened, an at times gradual and uneven, but nonetheless inevitable and overwhelming increase in Commonwealth power at the expense of the States.

Like the Griffith Court, Dixon understood federalism to be ‘necessarily a dual system’, but he qualified its duality in the Australian context with the statement in Uther’s case that ‘supremacy where it exists belongs to the Commonwealth’ (74 CLR at 529). Dixon understood the Commonwealth’s general supremacy to arise from a combination of provisions in the Constitution, particularly the express grants of power to the Commonwealth, both exclusive and concurrent, the lack of any express grant of power to the States, and the supremacy of Commonwealth laws under section 109 (the State Banking case, 74 CLR at 82-83). The direct playing out of Commonwealth supremacy as so perceived would not be complete until Cigamatic was decided, but well before then the
main outline of Dixon’s vision for Australian federalism would be worked into the Constitution.

One of the most important and enduring distinctions Dixon made was between structure and power under the Australian Constitution. The immunity against Commonwealth law which the States enjoy according to Dixon, protects the structure of government at State level, and therefore the institutional structure of federation, but it does not protect the powers of the States. In the *State Banking* case, Dixon again derogated from the conception of federalism as a dual system, noting that, while ‘[t]he foundation of the Constitution is the conception of a central government and a number of State governments separately organised’, all that foundation in fact provides for is a skeleton of federalism, through which the institutions of State government are continued, but not their powers:

> The framers of the Constitution do not appear to have considered that power itself forms part of the convention of government. They appear rather to have conceived of the States as bodies politic whose existence and nature are independent of the powers allocated to them (74 CLR at 82).

Dixon may have said that without recourse to implications the intention of any instrument would be defeated (*West v Commissioner of Taxation*, 56 CLR at 681), but the federal theory he imposed on the Constitution is so abstract and the limitations he drew from it so limited themselves as to effectively have varied little the negative effect of the *Engineers*’ decision on Australian federalism and by definition the Constitution. Dixon, no less than had the Court in *Engineers*, relied on form to deliver a substantive outcome in constitutional adjudication which enhanced the position of the Commonwealth in the federation and diminished that of the States. His reading of the Constitution as separating structure from power was as brutally literal as that adopted in *Engineers* and as powerfully corrosive of the federal purpose which is the foundation of the Constitution. Dixon may have claimed to give effect to a federal theory of the Constitution, but, as Zines (1997: 362) noted in commenting on the development of Dixon’s principles of intergovernmental immunity, ‘fundamentally it appears the present situation has been arrived at by using a model that emphasises nationhood rather than dual federalism’.
At the same time as exorcising from the Constitution those characteristics of federalism which he found inefficient, Dixon also led the Court as Chief Justice in consolidating a limited separation of powers doctrine with respect to the judiciary in the *Boilermakers'* case. In a majority joint judgment on which Dixon is generally considered to have been the main influence, it was decided that the constitutional separation of powers with respect to the judiciary required that judicial and non-judicial functions strictly defined not be in anyway mixed in a single body, as they then were in the Commonwealth Court of Conciliation and Arbitration.  

It is a decision which in its rigidity has often been criticised as representing a triumph of form over substance and as impractical in its application as unnecessary in protecting what was presumably the substantive principle at stake: the integrity and independence of the judicial function (see Galligan, 1987: 207-209; Zines, 1997: 212-218; Sawer, 1961; and note Barwick in *R v Joske: Ex parte Australian Building Construction Employees and Builders' Labourers' Federation* (1974) 130 CLR 87 at 90). Despite the criticism, the *Boilermakers'* principle remains substantially intact.

While the protection afforded judicial independence through the *Boilermakers'* principle has been regarded as unnecessarily strict by many informed commentators, the Court itself in *Boilermakers* believed that such a principle was a necessary consequence of the Constitution's federal structure. It was said in the joint judgment that 'the position and constitution of the judicature could not be considered accidental to the institution of federalism: for upon the judicature rested the ultimate responsibility for the maintenance and enforcement of the boundaries within which governmental power might be exercised and upon that the whole system was constructed' (94 CLR at 276); a structural fact seen as in itself sufficient to support the strict separation of the judiciary from the other branches of government claimed in the joint judgment. It had been pointed out earlier in the judgment that the position of the judiciary

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28 The decision was affirmed on appeal to the Privy Council (*Attorney General (Cth) v R; Ex parte Boilermakers' Society of Australia* (1957) 95 CLR 529).
under a federal constitution is one ‘unknown in a unitary system or under a flexible constitution where Parliament is supreme’ (94 CLR at 267).

Why the federal structure of the Constitution is sufficiently robust to secure the position of the Court as the majority saw it in Boilermakers, while otherwise so flawed that it leaves the States potentially completely devoid of power as Dixon otherwise contended, is not explained in the reasons for the decision. You would think that the opposite conclusion would be justified on Dixon’s theory of the Constitution. If, as he suggested, the framers failed to adequately provide for State power in the Constitution, leaving the constitutional division of power with a national purchase, but no federal purchase, then federalism in this context provides little support for the application of any strict separation of powers doctrine with respect to the judiciary. There is in effect no federal division of power for the Court to interpret. On Dixon’s reading of the Constitution, the Court’s federal role is, at best, one of legitimising the exercise of Commonwealth power. In this, Dixon was an Engineer through and through.

LEGALISM’S REALISM

Legalism in the history of interpretation of the Australian Constitution is claimed by its judicial champions to be the antithesis of realism. It was the legal integrity that legalism supposedly promised which provided the reason why legalism could ‘maintain the confidence of all parties in federal conflicts’. While the subject matter of constitutional disputes was necessarily political, ‘close adherence’ to legalism was intended to ensure that the only ‘compelling’ outcomes would be first and foremost legal outcomes. Ironically, legalism, in the context of interpreting the Australian Constitution, manifests itself as the very realism it supposed to protect against. Legalism shades into realism in this context for a number of reasons.

The most general reason is that the logic of legalism tends towards judicial deference to the Commonwealth Parliament. As legalism draws on formal standards of interpretation more consistent with the principles of majoritarian democracy and parliamentary sovereignty than limited government under a written Constitution, its underlying logic supports judicial deference to the
sovereignty of the Commonwealth Parliament. This logic manifests itself in promoting the non-interpretation of the constitutional division of powers instead of effect being given to principles through which the scope of Commonwealth power can be contained in a way consistent with the federal foundation of the Constitution.

The second is closely related to the first and is a dynamic that arises from the application of formal standards of interpretation to the general language of a constitution like the Australian. Positivist theories of law are premised on law being a system of relatively determinative rules. Sophisticated legal positivists accept there are gaps in the system; but only at the margins—gaps that manifest themselves in hard cases in which the rules run out or in which more than one reasonable legal answer presents itself to a court. What happens then? Hart suggests that at the end of the day all the judge can do under those circumstances is act as ‘a conscientious legislator’, balance the competing interests and make law (Hart, 1994: 273). At this point, law on the positivist model becomes a variety of realism. The positivist answer, of course, is that, while that may be the case, it happens rarely and in most cases the system delivers a clear legal answer.

However, written constitutions designed to limit government are not like ordinary laws. Not only does the constitutional decision of a court override the legislature in a way not susceptible to legislative amendment, but the language of such constitutions tends to be so broad and so reflective of general principle that the law they generate throws up lots more hard cases, cases for which there is no authoritative legal answer in the way that positivism suggests there usually is. Methods of interpretation like legalism, which rely on positivist assumptions about what law is and which look for formal standards through which to apply the law of a constitution, deny resort to the very thing required to make sense of it, the underlying substantive principles which are the only source through which meaning and effect can be given to its general provisions. Without these principles, all you are left with is politics and the judges exercising a discretion, no matter how it may be dressed up, analogous to that of a legislator.
Of course, Dixon was alive to the special status of the Constitution and the need to look beyond purely formal standards to find its meaning, but only up to a point. He did claim a principled basis for his constitutional jurisprudence which amounted to a substantive theory of the Constitution, but it tended to resolve itself into secondary and artificial legal principles. In their abstraction, those principles became divorced from whatever substantive foundation they originally had and, far from providing the answers in difficult cases, acquired something of a free wheeling quality. This is one of the main reasons why legalism provides so much grist to the mill of realist critics, who can point to the gap between legalism’s ostensibly pure legal standards and the politics which necessarily fills the gap where sight is lost of the substantive foundation underlying those standards.

Most importantly, however, it is through the substantive foundation for legalism as represented by Dixon’s theory of federalism under the Australian Constitution that legalism shades most dramatically into realism. Dixon’s constitutional theory is less a federal theory than a theory promoting the supremacy of the national government over the States. As such, it a theory not derived from the Constitution, but is imposed on it as a means to giving effect to a preferred national purpose over the federal purpose which provides the Constitution’s animating principle. The result is a necessarily realist and non-interpretivist reading of the Constitution.
CHAPTER 7
CENTRALISED FEDERATION – APPLYING A JURISPRUDENCE OF NATIONAL SUPREMACY

In the immediate aftermath of *Engineers*, the Commonwealth did not take up the opportunity for a significant expansion of Commonwealth power over the States. During the 1920s decisions were brought down which would later become significant in providing a foundation for the Commonwealth's capacity to coerce the States. They include *Cowburn’s* case, important in terms of the development of the ‘cover the field’ test of inconsistency, and *Victoria v Commonwealth* (the *Federal Roads* case) (1926) 38 CLR 399, in which section 96 was given a broad and unrestricted interpretation. However, despite the importance of those decisions, the political climate had changed. As the High Court overturned early orthodoxy in a way which would favour the legislative ambitions of federal Labor, Labor lost power. In the conservative political climate that came to prevail the boundaries of Commonwealth legislative power were not extensively tested (note Sawer, 1967: 89; Galligan, 1987: 102-104). Labor did not take national office again until Curtin took power in 1941 during the Second World War.

The war saw the Commonwealth again seek to expand its reach. One of the most enduring and significant decisions taken at that time was the introduction of the uniform tax scheme in 1942. The implementation of the scheme and its sanction by the High Court in the *First Uniform Tax* case has had far reaching consequences for Australian federalism. Through it the Commonwealth gained a monopoly over the collection of income tax, the main source of government revenue in Australia. The decision also confirmed that the conditions which could be attached to section 96 financial transfers from the Commonwealth to the States were virtually unlimited.

However, as to Labor's post-war reconstruction plans, they were largely undone by the Court (see Galligan, 1987: 148-183), though the period following this saw relative stability return to Commonwealth-State relations and matters
constitutional. In fact, they were so stable that in 1967 Sawer (1967: 208) could describe Australia constitutionally as ‘the frozen continent’. This period of stability was characterised by conservative dominance of national politics and Menzies’ record term in office as prime minister.

The character of Australian constitutional politics began to change in the late sixties and early seventies as the Commonwealth showed greater preparedness to use its powers to coerce the States (note Sharman, 1989: 100-101), a shift which was to be dramatically accentuated once Labor took office under Whitlam in 1972 after more than 20 years in the wilderness. While the changes were occurring even before Whitlam took office, the extent of Whitlam’s preparedness to use Commonwealth powers and financial dominance creatively to direct policy outcomes at State level and his subsequent dismissal by the Governor-General shifted fundamentally the political and legal landscape in Australia. As we have seen, federalism itself took on a significance politically during and after Whitlam’s terms in office which most thought was past. The optimism of those who subscribed to the inexorable march of Australia to unitary government was at best diminished with Whitlam’s departure.

Not so on the High Court, however. By the time Labor was again in national office in 1983, the logic of the Court’s jurisprudence of national supremacy was being given full effect. A continuing broad interpretation of Commonwealth legislative and financial power and a liberal approach to the characterisation of Commonwealth laws and the supremacy of Commonwealth law under section 109 has given the Commonwealth the legal choice to implement its policy preferences in most areas of governmental activity in Australia.

PUSHING THE ENVELOPE – THE EXTERNAL AFFAIRS, CORPORATIONS AND INDUSTRIAL RELATIONS POWERS

The High Court’s literal method of interpreting Commonwealth power and characterising Commonwealth law and its narrow application of federal principle has played itself out across the board of the Commonwealth’s powers and continues to do so, but some powers have been more significant than others.
The two which stand out are the external affairs (section 51(xxix)) and corporations (section 51(xx)) powers. Both have been interpreted broadly and both are important direct sources of Commonwealth legislative power. As Commonwealth powers are interpreted in isolation from each other by the High Court, and unrestrained therefore by federal limitations which may exist in other powers, the width of the external affairs and corporations powers have also been relied upon by the Commonwealth to overcome perceived weaknesses in its other powers. The Commonwealth has recently relied on these powers to overcome constraints contained in its industrial relations power, section 51(xxxv), illustrating the degree to which use of its broad powers in combination can further enhance Commonwealth power. The industrial relations power itself has represented one of the great constitutional battlegrounds. Industrial relations is a subject over which the Commonwealth from the very first sought ascendancy over the States.

The trade and commerce power, the Commonwealth’s first power under section 51, has also been important, but it has not taken on the significance of its equivalent in the American Constitution, the commerce power (Article I, section 8 (3)) from which it is derived. The United States Supreme Court has been no less committed to supporting national supremacy than the Australian High Court, but it had a narrower range of powers to work with. For that reason, the commerce power under the American Constitution has had to carry a much greater burden in that process than the trade and commerce power under the Australian Constitution. In Australia, that burden has been carried by the Commonwealth’s corporations and external affairs powers.

There are thirty-nine heads of power granted the Commonwealth under section 51, but the external affairs, corporations and industrial relations powers stand out for the reasons outlined above. Examined together, they provide a sufficient range to illustrate what is meant in practice by a broad interpretation of Commonwealth legislature power by the High Court and its impact on the federal system contained in the Australian Constitution.
THE EXTERNAL AFFAIRS POWER – A POWER TO LEGISLATE ON ANY SUBJECT?

The scope of the Commonwealth Parliament’s power to make laws for the peace, order and good government of the Commonwealth with respect to ‘External Affairs’, section 51(xxix), was uncertain at the time of federation. Quick and Garran (1901: 631) observed that ‘[c]onsiderable speculation has been already been indulged in by constitutional writers as to the meaning and possible consequences of this grant of power’. In a speculative vein themselves they went on to say that the external affairs power ‘may hereafter prove to be a great constitutional battle-ground’, and so it did, though not for sometime.

The history of the provision at the constitutional conventions of the 1890s belies its present significance. Included in the 1891 draft constitution, it was part of a small number of provisions relating to the Commonwealth’s power with respect to treaty making and external affairs more generally. The precursor of Covering Clause 5 provided not only for the supremacy of the Constitution and all laws made by the Parliament of the Commonwealth under the Constitution, but also ‘all Treaties made by the Commonwealth’ (Commonwealth of Australia Bill, Covering Clause 7, Federation Debates, Sydney, 1891: 944). As such, treaties ratified by the Commonwealth would have been self-executing and would have had an immediate and direct legal effect on Australia’s domestic law. Correspondingly, the High Court was given a treaty jurisdiction under what is now section 75(i) of the Constitution. Those provisions were derived from the Constitution of the United States (Article VI; Article III, section 2). What had not been taken from the American Constitution was the democratic and federal check on executive power in this regard through the requirement of Senate concurrence with an Executive decision to enter into a treaty (Article II, section 2). The Commonwealth Parliament’s legislative powers under the 1891 draft included a power with respect to external affairs as they do now, but it extended also to treaties. Of that original framework only the High Court’s jurisdiction over treaties remains in the Constitution, however redundantly. What became Covering Clause 5 was altered to remove the reference to treaties during the
later convention of 1897-1898, as was the reference to treaties under the Commonwealth’s legislative powers. The reason for those changes was simple enough: it was, ‘to make clear that there was no suggestion that the [Constitution] Act would confer power on Australia to enter into treaties in its own right’ (Saunders, 1995: 154). What the constitutional changes did also prevent, even though that was not their direct object, was the self-execution of ratified treaties into the domestic law. In effect if not by design, British practice ended up replacing the partial inclusion of American precedent in the first draft constitution of 1891.29

Within the Westminster tradition, entering treaties is a matter for the executive, as is the conduct of external relations more generally, but their domestic legal application requires parliamentary implementation. In Australia’s case, negotiating and entering into treaties developed with the gradual acquisition of international personality and evolving nationhood, falling naturally to the Commonwealth Executive (see generally Saunders, 1995: 155-157; Twomey, 2000: 10-22). It is now accepted as a political and legal fact that the power to enter treaties forms part of the executive power vested in the Commonwealth under section 61 of the Constitution (Victoria v Commonwealth (the Industrial Relations Act case) (1996) 187 CLR 416 at 476). Historically that conclusion is less certain given the genesis of the treaty making provisions of the Constitution in an attempt to limit such a role (Saunders, 1995: 157).

As to implementation, the power to implement treaties has come to the Commonwealth through the vehicle of the external affairs power. Under that power, the Commonwealth Parliament can legislate to give effect to obligations assumed under treaties the Commonwealth Executive has entered into on Australia’s behalf. Consistent with its general approach to constitutional interpretation, the High Court has ignored the federal nature of the Constitution in interpreting the external affairs power and effectively endorsed a constitutional framework for the conduct of international relations by Australia in

29 Saunders (1995: 155) notes that the original departure from British practice was probably not intended or well understood. Note also Twomey (2000: 5-8) for an historical overview of the drafting of the Constitution and the treaty-making power.
which the position of the Commonwealth Government is equivalent to that of a unitary government.

For all nation-states the accelerating internationalisation of law following the Second World War, which has manifested itself most obviously in the number and scope of treaties and other international agreements between and among nations, raises issues of national sovereignty. Concern has also been raised over the lack of transparency in the acceptance of international obligations by governments and opportunities for democratic scrutiny of those agreements. For a federation, like the Australian, these issues are compounded (note generally Stephen, 1994, Burmester, 1995; Opeskin and Rothwell, 1995; Saunders, 1995; Crawford, 1997).

In spite of comments to the contrary by the majority judges in the Industrial Relations Act case (187 CLR at 478-479), it is difficult to believe that the framers contemplated the broad range of treaties that Australia would enter or the open-ended scope of the power that flows from that as a result of the Court’s broad interpretation of the external affairs power. It seems likely that they contemplated that obligations arising under treaties to which Australia was a party would be primarily implemented by the Commonwealth Government; but then the framers probably also assumed that most treaties would relate to subjects which would come within the legislative powers of the Commonwealth other than the external affairs power, as was largely the case until after the Second World War (Twomey, 2000: 23-24).

Given the relatively narrow scope of treaties and their effect on domestic law during the first decades of Australian federation, it is not surprising that the scope of the external affairs power was not then a significant issue between the Commonwealth and the States. However, the question did come before the High Court in one important case: R v Burgess; Ex parte Henry (1936) 55 CLR 608. This case concerned regulations made by the Commonwealth controlling domestic air transport under an Act which sought to implement the Paris Convention for the Regulation of Aerial Navigation, a convention signed by Australia in 1919 and ratified for the Empire by the King. While the regulations were held invalid for various reasons, the external affairs power itself was given
a broad construction by Latham, the Chief Justice, and Evatt and McTiernan, a majority of the Court. For the majority the power clearly provided the foundation for legislative action by the Commonwealth to implement a treaty, though Evatt and McTiernan went further: ‘matters of concern to Australia as a member of the family of nations’, which might include international recommendations and requests, were seen as also possibly providing a basis to enliven the power (55 CLR at 687). Dixon and Starke took a narrower approach (55 CLR at 669 and 658 respectively). In Dixon’s words, the power was limited to giving effect to matters ‘indisputably international in character’.

The real watershed for the external affairs power was not to come until 1984 in the High Court’s decision in the Tasmanian Dam case, decided over 40 years after Burgess. That decision followed hot on the heals of Koowarta, which just barely gave life to a requirement that, following the minority in Burgess, would limit the external affairs power to only allowing Commonwealth legislative implementation of matters which were of ‘international concern’. The concept of ‘international concern’ as a limitation did not survive the Tasmanian Dam case. It was brushed aside in favour of a broad interpretation of the power consistent with the decision in the Engineers’ case and the logic of the process of interpreting Commonwealth power and characterising Commonwealth law as refined through Dixon’s influence, if not his qualification in Burgess. Consequently, even where the subject matter of the treaty relates to an area which would otherwise come within the legislative competence of the States, the Commonwealth can legislate on that subject. Section 109 ensures that where there is inconsistency between a valid Commonwealth law made under the external affairs power it overrides State law on that subject.

In general terms, the phrase ‘external affairs’ in section 51(xxix) is unrestricted and has been taken by the Court as referring to all ‘relationships’ and ‘matters’ or ‘things’ external to Australia (the Seas and Submerged Lands case; Polyukhovich v Commonwealth (the War Crimes case) (1991) 172 CLR 501). The power is not limited to implementing only obligations assumed under international treaties or conventions, though that is its most significant and obvious use.
While the matter remains undecided (note the *Industrial Relations Act* case), the concept of ‘international concern’, was transformed in the *Tasmanian Dam* case from a possible limitation on the power to one which may enliven it. Drawing on the judgments of Evatt and McTiernan in *Burgess*, rather than those of the minority, a majority of justices in the *Tasmanian Dam* case suggested that the power may also extend to cover matters which are simply of international concern (*Mason; Murphy; Deane; and, more equivocally, Brennan in 158 CLR at 131-132; 171-172; 258-9; and 222 respectively*). Such matters may be reflected in the non-binding resolutions of international bodies, international negotiations and also international customary law (note Saunders, 1995: 160).

There are limitations on the power. A treaty must be *bona fide*: the Commonwealth cannot enter a treaty simply for the purpose of acquiring a power to legislate domestically on that subject. But as Gibbs said in *Koowarta*, this requirement is ‘a frail shield’ (153 CLR at 200; note also Saunders, 1995: 159-160). A Commonwealth law implementing a whole or part of a treaty must be also ‘reasonably capable of being considered to be appropriate or adapted’ to achieving that end (the *Industrial Relations Act* case, 187 CLR at 487). As was shown in the *Industrial Relations Act* case this is a constraint on the power: part of the Commonwealth Act implementing the Termination of Employment Convention was held not to be valid for this reason, but it is not a federal limitation and does not limit the scope of the power in its application to subjects which may otherwise be within the legislative power of the States. Nor can the external affairs power be used in such a way that it infringes or avoids express or implied constitutional restrictions or guarantees. Here there is scope for implied federal implications to be given effect, but the limitations first recognised by the Court in the *State Banking* case, as we have seen, have been applied only narrowly to contain Commonwealth legislative power.

What happened in the *Tasmanian Dam* case was that Commonwealth legislation, which relied in part on the external affairs power in seeking to give effect to international obligations assumed by the Commonwealth under the Convention for the Protection of the World Cultural and Natural Heritage (1972), was upheld in its application preventing the Tasmanian Hydro-Electric Commission from constructing a dam. The proposed dam was to be built on
the Gordon-below-Franklin River in an area on the World Heritage List as provided for under the convention, preventing the Tasmanian Government from implementing its preferred policy in an area traditionally within State control: management of its lands and waters.

The outcome in the *Tasmanian Dam* case raises the key issue under the external affairs power and more generally the Court’s interpretation of the Constitution: the lack of any jurisprudence which effectively constrains the scope of Commonwealth power vis-à-vis State legislative power. Another example is the *Industrial Relations Act* case, which in part concerned reliance by the Commonwealth on the external affairs power to give effect to certain conventions and recommendations of the International Labour Organisation. In relying on those, the Commonwealth was able to legislate on matters from which it would otherwise have been excluded even on the broad interpretation by the High Court of the Commonwealth’s industrial relations power under section 51(xxxv), a point Dawson made in his separate judgment in the *Industrial Relations Act* case even as he reluctantly gave effect to the anti-federal logic of the decision in the *Tasmanian Dam* case (187 CLR at 564-566). Consistent majorities on the Court dealing with the scope of the external affairs power have had no such qualms, a fact manifest in the decision in the *Tasmanian Dam* case and affirmed in the majority judgment in the *Industrial Relations Act* case:

... the intrusion of Commonwealth law into a field that has hitherto been the preserve of State law is not a reason to deny validity to the Commonwealth law provided it is, in truth, a law with respect to external affairs (187 CLR at 485).

The main problem with the external affairs power from a federal perspective is its potential scope given the broad and ever expanding range of international agreements involving Australia. Even now there are few subjects upon which the Commonwealth cannot legislate in reliance on the external affairs power, and, on a theoretical level, in fact, there are none (note Dawson, 1984: 358-359; Stephen, 1994: 18; Opeskin and Rothwell, 1995: 55). As Mason said in the *Tasmanian Dam* case, ‘there are virtually no limits to the topics which may hereafter become the subject of international co-operation and international treaties or conventions’ (158 CLR at 124). It may be a trite point, but the power
provides a legal foundation for the Commonwealth to cut a complete swathe through the constitutional division of powers. What is less trite to note is that, while this outcome is consistent with the decision in the Engineers’ case, its source lies more directly in Dixon’s theory of the Constitution, which did not deny the federal foundation of the Constitution, but only that it worked. The decisions on the external affairs power give dramatic effect to the literal logic of Dixon’s theory and its core idea that, as the States lack an affirmative grant of legislative power, there is no constraint on the potential breath of the Commonwealth’s powers arising from any concept of State legislative competence.

THE CORPORATIONS POWER – THE REAL AUSTRALIAN COMMERCE CLAUSE

The trade and commerce power is the first of the Commonwealth’s enumerated powers. It was recently described by the High Court as ‘a plenary power on a topic of fundamental importance’ (Cole v Whitfield (1988) 165 CLR 360 at 398). However important, as Zines (2000a: 98) recently noted, ‘there has been little in the way of novel or adventurous use of s. 51(i)’. There are two reasons for this. The first is that the trade and commerce power has been interpreted to restrict Commonwealth control over intrastate trade and commerce. The second is that the corporations power has been there to fill the breach. As Hanks (1987: 148) noted a few years ago, ‘the disappearance of the trade and commerce power from the High Court’s agenda is largely due to the revival of s. 51(xx)’. The modern interpretation of the corporations power has been uninhibited by the restrictions in section 51(i). This is reflected in the Commonwealth’s largely successful reliance on the corporations power in making wide-ranging laws to regulate the national economy, the Trade Practices Act 1974 and the Workplace Relations Act 1996 being good examples.

The Commonwealth’s power under section 51(i) over commerce trade and commerce is expressed in the following terms: ‘trade and commerce with other countries and among the States’. The equivalent provision in the Constitution of the United States grants power to Congress to ‘regulate Commerce with foreign Nations among the several states and with the Indian Tribes’ (Article I, section 8
(3)). They are very similar, but have been interpreted very differently. Whereas the American clause has been interpreted broadly, so allowing a significant degree of national regulation of intrastate commerce, the Australian provision has been interpreted more narrowly. The narrowness is not the result of any technical or artificial interpretation of ‘trade and commerce’. Those terms have been given their full and natural meaning by the High Court, most often in cases dealing with section 92, such as the Bank Nationalisation case. It is the expression ‘among the States’ that has prevented the power being used to substantially regulate trade and commerce within the States. Just after federation Quick and Garran (1901: 516) said of the trade and commerce power, it is a power ‘unbounded as regards the subject matter’, but it is ‘limited as regards its area and operation’ and it cannot be used ‘to invade the domain occupied by the internal trade and commerce of a State’, a position which the High Court reluctantly maintained. In Wragg v New South Wales (1953) 88 CLR 353 at 385-386, Dixon, made reference to the apparent distinction between interstate and overseas trade and commerce on the one hand and intrastate trade and commerce on the other within section 51(i) as ‘artificial and unsuitable to modern times’. But he, while indicating his preference for national economic regulation, accepted that ‘it is a distinction adopted by the Constitution and it must be observed however much inter-dependence may now exist between the two divisions of trade and commerce’. In the Second Airlines case, the Court relied on a further distinction between the ‘physical’ effects of intrastate trade on interstate and overseas trade, which the Commonwealth could regulate, and the ‘economic or commercial’ effects which it could not, thereby continuing to substantially uphold the main distinction. Kitto, while commenting, as had Dixon, on the impracticality of separating out intrastate from interstate and overseas trade, famously spoke of Australia’s ‘dual federalism’ as the reason for the distinction and one which the Court was duty bound to uphold:

The Australian Union is one of dual federalism, and until the Parliament and the people see fit to change it, a true federation it must remain. This Court is entrusted with the preservation of constitutional distinctions, and it both fails in its task and exceeds its authority if it discards them, however out of touch with practical conceptions or modern conditions they may appear to be in some or all their applications (113 CLR at 115).
More recently, the extent of the power in this regard has simply not been tested. It remains, as Zines (1997: viii) has said, 'the least explored in modern times'.

Not that the trade and commerce power is without its charms for the Commonwealth. Given the Court's approach to characterising Commonwealth laws, such that where a law deals with a matter at the core of a power its conditional regulation of a matter outside of it is irrelevant, control over overseas and interstate trade and commerce has allowed the Commonwealth to indirectly regulate a wide range of matters, as reflected in the decision in the *Murphyores* case.\(^{30}\) In this case 'dual federalism' did not restrain the Court from approving Commonwealth reliance on control over exports under the trade and commerce power to achieve an environmental policy goal within an area normally within State control.

The charms of the corporations power under section 51(xx) have been more far-reaching and may now have made redundant even the kind of use of the trade and commerce dealt with in *Murphyores* case (note Zines, 1997: 95). Under the corporations power the Commonwealth may make laws with respect to, '[f]oreign corporations, and trading or financial corporations formed within the limits of the Commonwealth'. It is a general power over particular kinds of corporate entities, rather than activities defined and confined geographically. Unlike the trade and commerce power, its scope has been pushed to the limit and, for the most part, has not been found wanting. Here again, 'dual federalism' has not saved intrastate trade and commerce from Commonwealth regulation. A few years after the decision in the *Second Airlines* case, the Court, in the *Concrete Pipes* case, overturned early authority restricting the scope of the corporations power, opening it up to an expansive interpretation. The case concerned aspects of the then Commonwealth *Trade Practices Act 1965* which did not survive the case, but the decision clearly invited Commonwealth regulation of trade practices in reliance on the corporations power. It is the judicial foundation for the Commonwealth's Trade Practices Act of 1974.

\(^{30}\) The *Murphyores* case was discussed in more detail in the previous chapter.
The early authority overturned in the Concrete Pipes case was Huddart Parker, decided by the Griffith Court in 1909. In Huddart Parker the Court held invalid those aspects of the Commonwealth’s first ‘trust-busting’ legislation, as Sawer (1967: 82) referred to it, which sought to regulate generally the activities of section 51(xx) corporations for the purpose of preventing monopolies and other practices which restrained trade. Isaacs was the only dissenter. Higgins’ conclusion was based on characterisation of the law as not being one with respect to corporations. However, the three original members of the Court, Griffith, Barton and O’Connor, were influenced in their judgments by the reserved powers doctrine, particularly the ‘reservation’ of intrastate trade and commerce to the States within the trade and commerce power. As Griffith said, apart from that federal context, the words of the corporations power ‘might be capable of bearing the wide construction claimed by the respondent’ (8 CLR at 350).

The Concrete Pipes case was decided not in the context of any federal jurisprudence, but in the context of the post-Engineers’ jurisprudence of national supremacy refined by Dixon. Consequently, the unanimous decision in Concrete Pipes that the Commonwealth could pass laws ‘regulating and controlling the trading activities of trading corporations’ formed within the limits of the Commonwealth, whether or not their operations reached outside of any single State, was unsurprising (note Barwick, 124 CLR at 490). As to remaining limits on the power, they were left to be worked out another day.

The limits on the power relate primarily to the breadth of the ‘trading’ and ‘financial’ classes of corporation within the power and the nature of the control the Commonwealth may exercise over such corporations. The greater the breadth of those classes and the wider the range of activities of the corporations which come within them which the Commonwealth may regulate, the greater potential Commonwealth control over those entities that in the modern world constitute the main focus of private and public economic activity.

As to how those limits were to be construed, federal and national readings of the power played themselves out on the Court for a time. In Actors &
Announcers Equity Association v Fontana Films Pty Ltd (the Actors Equity case) (1982) 150 CLR 169, Gibbs, then Chief Justice, and alive to the potential for the broad construction of the power to invade areas of State control, cautioned regard to the ‘federal nature of the Constitution’ (150 CLR at 181) in interpreting its scope. He would have limited the power to allowing only those laws which dealt with the trading aspects of Australian trading corporations and the financial aspects of Australian financial corporations (150 CLR at 182). Mason, on the other hand, encouraged a wide interpretation of the power on the grounds of the national purpose he ascribed to it:

... it was intended to confer comprehensive power with respect to the subject matter so as to ensure that all conceivable matters of national concern would be comprehended (150 CLR at 207-208).

Gibbs was concerned to interpret the power subject to limits that maintained as far as possible federal distinctions and State power by limiting the scope of potential Commonwealth regulation, whereas Mason took the opposite view and one much more consistent with the trajectory and logic of the Court’s post-Engineers’ constitutional jurisprudence. As he said, in reaching his conclusion on the nature of the power in the Actors Equity case, it ‘conforms to the accepted approach to the construction of a legislative power in the Constitution’ (150 CLR at 207). As to whether it conforms to the Constitution, that is another matter. Nonetheless, it was the broad view that was to become ascendant.

The Tasmanian Dam case concerned not only the external affairs power, but other Commonwealth powers as well, which together were relied on to ground the legislative measures used to prevent the Franklin dam being built. The corporations power was significant among them. In many ways the issues surrounding the use of this power crystallised in the Tasmanian Dam case.

The proposed dam was to be built by the Tasmanian Hydro-Electric Commission, a State statutory authority which conducted a wide range of activities. Its primary role was to generate and distribute electricity within Tasmania and to advise government in that regard. Its work was undertaken largely in the public interest. Nonetheless, among its activities were ones which could be classed as trading: ‘it sold electricity in bulk and by retail on a very
large scale’ (Mason in the *Tasmanian Dam* case, 158 CLR at 156). In determining whether the Hydro-Electric Commission was a trading corporation the nature of its activities was considered. A majority of the Court concluded that because the ‘trade’ the Commission engaged in was a not insubstantial part of its operations, even if not the most substantial or important part, it was a trading corporation. This decision followed earlier decisions of the Court in *R v Federal Court of Australia: Ex parte WA National Football League* (1979) 143 CLR 190 and *State Superannuation Board v Trade Practices Commission* (1982) 150 CLR 282, in which an activities test generously applied gained ground. However, the purpose for which a corporation was created may also be relevant. In *Fencott v Muller* (1983) 152 CLR 570, a majority of the Court found that a shelf company, which had not yet engaged in any activity, but which was incorporated for purposes which included a trading object, was a corporation within the terms of section 51(xx). In this case the reason for the corporation’s existence were indicative of its intended activities. This decision suggests that the overall test is a practical one with a corporation’s activities being primarily important in determining its character. If those activities, either actual or intended, are at all significant then the corporation is likely to be subject to Commonwealth regulation under section 51(xx). This approach appears to be designed to give as much breadth as possible to the classes of domestic constitutional corporations subject to Commonwealth control without losing sight entirely of the distinction their constitutional description entails. It is an approach consistent with a plenary construction of Commonwealth power generally and the national purpose perceived to underlie the corporations power in particular as identified by Mason in the *Actors Equity* case.

As to the scope of the corporations power itself, a majority of the Court in the *Tasmanian Dam* case found it could be used to regulate activities carried out for the purposes of trade by Australian trading corporations. However, Mason, Murphy and Deane, who each in separate judgments formed part of that majority, went further, treating section 51(xx) as a power over certain kinds of corporate entities such that, so long as the law was with respect to a constitutional corporation it could control any of its acts or activities. With respect to the particular circumstances of the *Tasmanian Dam* case, Deane
described section 51(xx) as 'a general power to make laws with respect to trading corporations' (158 CLR at 270).

Even on the narrower view on the scope of the power given effect in the *Tasmanian Dam* case, it was an important decision in terms of Australian federalism. As Zines (1989: 122) said, 'it gives to the Commonwealth power to control all productive processes performed by those corporations, even though the legislative purposes or objects have nothing to do with the control of trade'. It is just such processes which are most significant from a regulatory point of view. The decision represented a considerable victory for the Commonwealth.

The wide view of the scope of the power taken by the minority in the *Tasmanian Dam* case seems now to represent the present view of the Court, but not the direction in which the Court is going. Even though the decision went against the Commonwealth, in *Re Dingjan; Ex parte Wagner* a majority of the Court appeared to support the wide view of the corporations power. A number of the members of the Court referred to the plenary nature of the power and the fact that its subject matter is not a particular kind of activity, but specific kinds of corporate entity (note Mason; Toohey; Gaudron, with whom Deane agreed; and McHugh, 183 CLR at 333-334; 352-353; 364; and 368 respectively). Such a view of the scope of the power is certainly consistent with the broad approach taken by the Court in determining what constitutes a corporation for the purposes of section 51(xx). It is also consistent with the logic of national supremacy which has generally informed the decisions of the Court on the scope of Commonwealth power vis-à-vis the States since *Engineers*. Within that context it is hard to see how narrow constructions of power can survive. From this point of view, it is not only limits on the corporations power which are likely to be reduced in significance, but also those applying to the trade and commerce power should that power again come to be tested in the High Court. However, in *Dingjan* the main differences on the Court related less to the interpretation of the power than how the law in question was to be characterised. The Court required some kind of connection between the law and the corporations which are the subject matter of section 51(xx) for that law to be valid under the power, but the level of the required connection was expressed in terms which varied between sufficient and substantial. The
degree of connection required leaves scope for differences of opinion, as reflected in the decision in Dingjan, though, overall, the Court's generally broad interpretation of the power ensures that the Commonwealth retains significant room to enact wide-ranging legislation implementing its policy choices in relation to corporations.

One thing the Commonwealth cannot do, however, is control the incorporation of companies within Australia in general. This remains a State responsibility. The Concrete Pipes case overturned the Griffith Court's early interpretation of the scope of section 51(xx) in Huddart Parker, but not its conclusion that the Commonwealth could not regulate incorporation itself. The Court's conclusion in Huddart Parker turned on the word 'formed'. The Griffith Court took the view that 'formed' meant already created. Whether that need be the case was taken up by Sawer (1964: 445), who argued that the word 'formed' may have been used to distinguish domestic corporations from foreign ones (note also Zines, 1997: 101). However, history, as Sawer (1964: 445) appeared to acknowledge, points in the other direction. Quick and Garran (1901: 607 and 604), who express a different view to Sawer on the semantic issue, note also that in 1891 Griffith rejected suggestions that the Commonwealth have power 'to prescribe a uniform law for the incorporation of all trading corporations'. Subsequent changes to the relevant clause did not suggest any departure from this view.

The opportunity to overturn Huddart Parker on the issue of incorporation arose in the Incorporation case, but it was not taken up. Relying on a combination of history, authority and language, the majority judgment, a joint judgment from which only Deane dissented, confirmed Huddart Parker on this point and so put paid to Commonwealth ambitions to establish directly itself a national law regulating corporations and securities. A uniform scheme in cooperation with the States was subsequently established in 1991 (Mathews and Grewal, 1997: 723-724).

As to the importance of the decision from a federal perspective, it did not detract from the otherwise broad interpretation of the power. As Hanks (1996: 367) concluded in his assessment of the case, '[t]he decision did not cast any doubt on the consistently expansive approach adopted by the High Court to
interpreting the scope of the corporations power in such decisions as the *Concrete Pipes* case, the *Actors Equity* case and the *Tasmanian Dam* case'.

THE INDUSTRIAL RELATIONS POWER – FROM PAPER DISPUTES TO FEDERAL DOMINANCE

The Commonwealth's industrial relations power under section 51( xxxv) of the Constitution is not a general legislative power over industrial relations, but one limited to making laws with respect to:

Conciliation and arbitration for the prevention and settlement of industrial disputes extending beyond the limits of any one State.

The limiting requirements of the power appear on its face: first, there must be an 'industrial dispute'; secondly, that dispute must be one 'extending beyond the limits of any one State'; and thirdly, the mechanism for prevention or settlement must be 'conciliation' or 'arbitration'.

The provision was included in the Constitution in response to the enormously disruptive and bitter intercolonial disputes in the shearing and maritime industries during the 1890s to provide a national means for dealing with similarly disruptive interstate disputes should they arise after federation. However, whatever its genesis, section 51( xxxv) became increasingly significant as a source of Commonwealth legislative power. While available measures are not comprehensive, it appears that of those workers covered by awards in Australia (up to 80%), something close to half are currently covered by federal awards (Stewart, 2001: 17). This coverage itself, while significant, does not indicate the degree of importance of the federal system within the Australian system of industrial relations overall, in which the federal component remains dominant (Creighton and Stewart, 2000: 40-41). The High Court has tended to apply narrowly where it can the qualifications within the power, thereby providing the foundation for Commonwealth dominance and resulting in a system both complicated and less responsive to local conditions than federal imperatives. Be that as it may, the question of whether industrial relations should be a subject of power over which the Commonwealth has direct and
general authority, as many believe it should (note the Constitutional Commission, 1988: 798-802), is not at issue here. What is at issue is that the industrial relations power is an expressly limited power, the limits on which have been progressively diminished through decisions of the High Court favouring national regulation of industrial relations in Australia.

The first Act in reliance on the industrial relations power was the Commonwealth’s Conciliation and Arbitration Act, an Act which, in its proposed application to State employees, was described as the ‘wrecker of governments’ by Cowan (1967: 172), having resulted in the defeat of the first Deakin government (note Sawer, 1956: 44-45), and otherwise to be much litigated in subsequent years (Creighton and Stewart, 2000: 40). The Act provided the basis for the making of industrial awards for the purpose of settling interstate industrial disputes through the mechanism of compulsory conciliation and arbitration by a specialist tribunal, now called the Australian Industrial Relations Commission (‘AIRC’). The award making process, as Creighton and Stewart (2000: 39) note, came to supersede State based collective bargaining as the primary mechanism of determining industrial relations in Australia, an outcome which reflects not a preferred policy choice so much as the requirement within the Commonwealth’s industrial relations power that interstate industrial disputes be prevented or settled through conciliation and arbitration. The Commonwealth had no other obvious avenue to exploit so as to generally enter the field of industrial relations. The dominance which the Commonwealth system and method assumed within Australian industrial relations overall indicates how successful the Commonwealth’s exploitation of the power has been, despite the federal limitations contained in it.

However, the scope for Commonwealth exploitation, consistent with the broader federal system provided for under the Constitution and the limitations inherent in section 51(xxxv), was in the first instance itself contained by the Griffith Court’s interpretation of the power. This was to change under the influence of Isaacs and Higgins following their appointments in 1906. As Sawer (1956: 108) commented, ‘[t]he senior Justices expected federal arbitration to be exceptional and confined to the settlement of matters in dispute left as a residue by the operation of State authorities and of collective bargaining, while Isaacs and
Higgins JJ. expected the federal authority to play a more dynamic part in the establishing of Australia-wide industrial norms. The latter view has prevailed.

The key to the Griffith Court’s interpretation of the industrial relations power lay in its understanding of what an ‘industrial dispute’ was. Taking as a starting point the reason for the power being conferred on the Commonwealth, the expression was interpreted broadly so as to extend beyond disputes relating to the production and manufacture of goods. As O’Connor put it in the seminal decision in Jumbunna:

It was to remedy the evil of industrial disturbances extending beyond the territorial limits of any one State that the power in question was conferred. It must have been well known to the framers of the Constitution that such disturbances are not confined to industries connected with manufacture or production (6 CLR at 367).

What constituted a ‘dispute’ was also interpreted in the light of the purpose underlying the power. However, in this case ‘purpose’ indicated that the expression ‘industrial disputes’ be limited to applying to ‘real and genuine’ disputes and not those manufactured by ‘a mere formal demand and formal refusal without more’ (Griffith in Federated Saw Mill etc Employees’ Association v James Moore & Son Pty Ltd (the Woodworkers’ case) (1909) 8 CLR 465 at 488). As Barton was to presciently observe, to hold that a paper demand and its refusal constituted a dispute, ‘would mean the speedy handing over of all industrial concerns of each State to be regulated by the Commonwealth Arbitration Court’ (R v Commonwealth Court of Conciliation and Arbitration and Merchant Service Guild (Allen Taylor’s case) (1912) 15 CLR 586 at 604).

The general reasoning of the Griffith Court in regard to this matter was explained by Barton in Australian Boot Traders Employees’ Federation v Whybrow & Co (No 1) (Whybrow (No 1)) (1910) 10 CLR 266 at 291, in terms which made express its foundation in the developing federal jurisprudence of the Court and the reserved powers doctrine in particular:
The very method and form of the constitutional delimitation involves this consequence, that, before the grant of power to the Commonwealth can be held to cut down any power included in the general reservation in favour of the States, it must be clear, either from the words of the grant itself, or by necessary implication form those words, that such an effect is intended.

Relying on such reasoning, Barton stated in Allen Taylor's case that '[t]o hold a mere claim unsatisfied is in fact and in law an industrial dispute, is to cut down the industrial relations powers of the States in violation of the federal principles on which the Constitution is built' (15 CLR at 605). Earlier, in 1906, the immunities side of those principles, as the Griffith Court understood them, had been applied in the Railway Servants case to protect State agencies from the operation of the Commonwealth Act.

Another important decision constraining the scope of the power, in particular its preventative aspect, was made in Australian Boot Traders Employees' Federation v Whybrow & Co (No 2) (Whybrow (No 2)) (1910) 11 CLR 311. It was found in this case that the industrial relations power did not permit the making of a common rule binding a whole industry. Whybrow (No 2) turned on the idea that 'arbitration' necessarily concerned 'settlement' of a dispute between parties, precluding a common rule being made through that process, as such a rule would of its nature apply to parties not in dispute (note Ford, 1984: 66-67). The decision was made in the face of arguments that the making of a common rule through the Commonwealth system of arbitration was justified if it was for the purpose of 'preventing' industrial disputes (note Barton's comments, 11 CLR at 323). Whybrow (No 2) has not been overruled and the concept of arbitration under the industrial relations power remains a narrow one.31 However, the practical import of the decision was subsequently diminished as a jurisprudence of national supremacy became ascendant and the views of the first members of the Court were displaced.

The key to this displacement is the Court's interpretation of the meaning of 'disputes' and its acceptance in effect that a paper dispute in the form of a written log of claims delivered and not complied with was prima facie sufficient to invoke federal jurisdiction. Having formed a majority over Isaacs' dissent in

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31 The decision was approved in R v Kelly; Ex parte Victoria (1950) 81 CLR 64.
Allen Taylor's case, Griffith and Barton were to find themselves in the minority subsequently on this crucial point in *Federated Felt Hatting Employees Union of Australia v Denton Hat Mills Ltd* (the Felt Hatters’ case) (1914) 18 CLR 880. More importantly, the effect of the decision in the Felt Hatters’ case was to be taken forward in *R v Commonwealth Court of Conciliation and Arbitration; Ex parte Jones; Ex parte W Cooper & Sons* (the Builders’ Labourers’ case) (1914) 18 CLR 224 in a finding, again over Griffith and Barton’s dissents, that builders’ labourers, seen by the minority as working within an industry ‘essentially local in character’, could join together across States to make common demands upon their employers which, if refused, would give rise to an ‘industrial dispute’ within the scope of section 51(xxxv). With this decision, the outcome Barton anticipated in Allen Taylor’s case began to be realised, as Griffith was to lament in the Builders’ Labourers’ case:

> If such a joint demand is sufficient, it is plain that the whole subject matter of the regulation of any kind and any branch of industry can be taken out of the hands of the State and transferred to the Commonwealth Arbitration Court (18 CLR at 234).

As the paper process of commencing an interstate dispute became accepted, the interstate requirement of the industrial relations power became a mere formality. In terms of limitations on that process, the Court has retained a requirement that the dispute has to be ‘real and genuine’. However, despite isolated preparedness to give this requirement substantive effect (*Re State Public Services Federation; Ex parte Attorney-General (WA)* (1993) 178 CLR 249), satisfying it remains essentially a formality and it represents no threat to the authority of paper disputes (*Attorney-General (Qld) v Riordan* (1997) 192 CLR 1). The extraordinary shift brought about by the acceptance of such ‘machine-made disputes’, as Griffith described paper disputes in the Builders’ Labourers’ case (18 CLR at 231), is highlighted when it is borne in mind that the purpose for which the industrial relations power was included in the Constitution was to provide a mechanism for the Commonwealth to deal with the kinds of massively disruptive disputes of the 1890s that occurred across the colonies.

Isaacs was instrumental in expansion of the industrial relations power and the decisions on the status of ‘paper disputes’ were only the first step in that expansion. As Cowen (1967: 175) so aptly expressed it, ‘with sledgehammer
blows, Isaacs led the Court to ever wider definitions of the jurisdiction’. Isaacs saw the Commonwealth’s industrial relations power and the Act through which it was given effect as highly significant: the power allowed the Commonwealth to deal with Australia’s ‘most momentous social problems ... unimpeded by the sectional policies of particular States’ (Cowburn’s case, 37 CLR at 479) and the Act embodied ‘a great public policy’ (George Hudson Ltd v Australian Timber Workers’ Union (1923) 32 CLR 413 at 434).

The decision in the Engineers’ case was, of course, part of that process, even though its importance has been so much more far reaching. In terms of direct effect on the scope of the power, however, one of the most substantial blows came in Burwood Cinema Ltd v Australian Theatrical and Amusement Employees Association (1925) 35 CLR 528, in which it was found that an employer could be made party to a dispute even if its employees were satisfied with their conditions of employment. The effect of the decision was, as Sawer (1956: 254) noted, to ‘enable unions by suitable organisation to secure the same practical effect as a “common rule” provision in an award’. The flipside of that coin was to be given effect in Metal Trades Employers’ Association v Amalgamated Engineering Union (1935) 54 CLR 387. In this decision, the Court held, over Dixon’s dissent, that an award could be made binding upon employers even in respect of employees who were not members of a union. With the decisions in Burwood Cinema and Metal Trades the ascendancy of the federal system was largely assured.

But in the topsy-turvy Engineers’ world in which Australia’s federal constitution could be turned into a charter for unitary government, there was to be one ironic reversal concerning the scope of section 51(35) which left the promise of the power’s expansion partly unfulfilled. As we have seen, the Griffith Court had read the industrial relations power narrowly in the light of a federal jurisprudence, but in Jumbunna the ‘industrial’ side of “industrial disputes” was given a broad interpretation. As the other limitations on the power were progressively diluted and the idea of a ‘dispute’ broadened, the concept of ‘industrial’ itself was to be narrowed in ways which limited its scope. This narrowing began, somewhat unwittingly, with a broad but nonetheless qualified formulation of the expression ‘industrial disputes’ given in the joint judgment of
Isaacs and Rich in *Federated Municipal and Shire Council Employees’ Union of Australia v Melbourne Corporation* (the Municipalities case) (1919) 26 CLR 508 (as noted in the *Social Welfare Union* case, 153 CLR at 306-308). The view was taken in Rich’s and Isaacs’ judgment that an industrial dispute could only occur in an industry defined as an operation ‘in which capital and labour are contributed in co-operation for the satisfaction of human wants or desires’ (26 CLR at 554). With this definition the question of what constituted an ‘industry’ was brought to the fore in the Court’s deliberations over the scope of section 51(xxxv).

The question of what constituted an industry for the purposes of section 51(xxxv) was to be used subsequently in a way which contained the expansive thrust of *Engineers* with respect to industrial relations through providing a reason for limiting the reach of the Commonwealth system in its application to State government employees (Rothnie, 1985; note also the *Social Welfare Union* case, 153 CLR at 311). A decade after the Municipalities case was decided the Court found that State school teachers were not engaged in ‘an industry’ and so could not be engaged in an ‘industrial dispute’ (*Federated State School Teachers’ Association of Australia v Victoria* (the School Teachers’ case) (1929) 41 CLR 569). This piece of waywardness from Engineers’ orthodoxy was to survive and reproduce for many decades, but in 1983, in the *Social Welfare Union* case, the broad, unqualified Jumbunna view of what constituted an ‘industrial dispute’ was resurrected, albeit expressly severed from the Griffith Court’s federal jurisprudence (note 153 CLR at 312). But for some uncertainty concerning the present application by the Court of the limited, implied State immunity from Commonwealth law (note *Australian Education Union*) and the scope of the preventative aspect of the power, the industrial relations power of the Commonwealth is now subject only to limits which cannot be overcome even on the broadest interpretation of its terms.

The High Court’s interpretation of the industrial relations power from the very beginning has seen the focus of the federal system fall almost entirely on the ‘settlement’ of interstate industrial disputes. This is reflected not only in the Court’s early sanction of paper disputes and their evolution as the primary means of engaging the federal system, but also in its finding that the power
does not support the making of a common rule in *Whybrow No 2* (note generally Ford, 1984: 65-78). The latter is the main reason why the scope of the ‘prevention’ limb of section 51(xxxv) has been so little explored. Recently, however, development of the preventative side of the power has been enhanced through the Commonwealth’s successful reliance on it in its *Industrial Relations Reform Act 1993* and as the Court’s requirement for the existence of an actual dispute to trigger the power has been relaxed. In the words of the joint judgment in the *Industrial Relations Act* case:

The power conferred by section 51(xxxv) of the Constitution is a power to legislate with respect to conciliation and arbitration for the prevention, as well as for the settlement of interstate industrial disputes. This, as is well settled, extends to a situation that is likely to give rise to an interstate industrial dispute (187 CLR at 497).

How significant these developments are depends in part on how the Commonwealth continues to explore the scope of its other powers to ground legislation dealing with industrial relations, powers which have been themselves broadly interpreted.

The potential, and at that time relatively limited, reliance by the Commonwealth on other powers in matters relating to industrial relations to overcome the deficiencies in its eyes of section 51(xxxv) was recognised by the Constitutional Commission (1988: 796). This potential arises because of the Court’s discrete approach to the interpretation of the Commonwealth’s legislative powers. As confirmed in the *Industrial Relations Act* case, if a Commonwealth law is otherwise valid under a head of power, then restrictions which apply in other heads of power are immaterial. Relying on this approach, the Commonwealth commenced a process in the 1990s of shifting the focus away from conciliation and arbitration of interstate disputes to agreements made within individual enterprises. While the Commonwealth turned in part to the conciliation and prevention elements of the industrial relations power for the legislative changes made (note Creighton and Stewart, 2000: 45; Ford, 1994: 107-111), other powers were also relied upon. Primarily and unsurprisingly they were the corporations and external affairs powers (note generally Creighton and Stewart, 2000: 44-48; 82-89).
Marking the first step in the shift away from conciliation and arbitration was a change of name to the Commonwealth’s Conciliation and Arbitration Act. In 1988 the Act was repealed and replaced by the *Industrial Relations Act 1988*, though the primary constitutional foundation of the legislation remained the industrial relations power. The new Act was effectively an exercise in consolidation (Creighton and Stewart, 2000: 45). Five years later the Commonwealth passed the Industrial Relations Reform Act. Unlike the 1988 Act, it relied more substantially on powers other than the industrial relations power, most notably the corporations power, in providing a framework for enterprise bargaining, and the external affairs power, to ground certain minimum standards relating to working conditions and termination of employment (see further Ford, 1994). The High Court generally approved those provisions in the *Industrial Relations Act* case. Under the Commonwealth’s *Workplace Relations and Other Legislation Amendment Act 1996*, the Act’s name was changed again, this time to the Workplace Relations Act, representing a further shift away from conciliation and arbitration and further indicative of the Commonwealth’s reliance on powers other than section 51(xxxv) to regulate industrial relations, particularly the corporations power (Ford, 1997). As to how far that process may go it is difficult to say, but it has been suggested that the corporations power, with support from other powers such as external affairs, is sufficiently broad to found a relatively comprehensive system of federal regulation of Australian industrial relations (Stewart, 2001; Williams and Gotting, 2001).

**COERCING THE STATES – SECTION 109 AND FEDERAL FINANCE**

Because most of the powers of the Commonwealth are held concurrently with the States there is obvious potential for conflict between State laws and Commonwealth laws. Constitutional provision for its resolution is provided through section 109:

> When a law of a State is inconsistent with a law of the Commonwealth, the latter shall prevail, and the former shall, to the extent of the inconsistency, be invalid.\(^{32}\)

\(^{32}\) In providing that an inconsistent State law is invalid, the Constitution is not saying that the State law is made completely void. Supremacy brings about only invalidity while the inconsistency exists. If the Commonwealth law is amended in such a way so as to
The federal financial provisions represent another key element of Australia's constitutional settlement. Those provisions in many ways begin with what was one of the main reasons for federation, intercolonial free trade, the necessary concomitant of which was a uniform tariff. However, with the imposition of a uniform tariff the States would lose their main source of revenue and the Commonwealth would control, at least for a time, a significant proportion of all government revenue raised in Australia. Consequently, it was known and expected that over the early years of federation there would have to be a transfer of funds from the Commonwealth to the States. This early period is dealt with through a series of transitional constitutional provisions. As to what happened after that, as the framers were uncertain of how to shape federal financial arrangements in the long term, the provisions of the Constitution are much more open-ended.

In very different ways section 109 and the provisions for federal finance under the Constitution as interpreted by the High Court provide a comprehensive foundation for the Commonwealth to assert supremacy and achieve its policy preferences against the will of the States. Neither was intended to be an instrument of coercion in this way, but each has become so through the consistent application of the principles of interpretation and the theory of Constitution through which the High Court has given effect to national purposes over federal ones in its broad interpretation of Commonwealth legislative power. Key sections of the financial provisions have been interpreted so as entrench substantial Commonwealth control over government revenue collection, while sanctioning conditional redistribution to the States in a way which allows the Commonwealth to powerfully influence government policy at State level. Section 109 has been liberally interpreted so that the Commonwealth can, with relatively little difficulty, legislate to 'cover the field' and completely exclude State law on subjects within the range of its concurrent powers. This interpretation of section 109 is the logical corollary of a broad interpretation of Commonwealth legislative power (note Gilbert, 1986: 125), in combination with which it is doubly corrosive of the federal purpose underlying the Constitution.
THE ROLE OF SECTION 109 IN DISPLACING STATE POWER AND ENTRENCHING COMMONWEALTH SUPREMACY

The inconsistency clause did not occasion much debate at the constitutional conventions of the 1890s, nor did it receive much consideration in contemporary texts related to the new Constitution. Initially clause 3 in the draft constitution of 1891, it was not amended during the later convention process and emerged ultimately as section 109 of the Constitution. In Melbourne in 1898 it received some attention, but it was not substantial (note Quick and Garran, 1901: 938-939). George Reid raised a concern about the scope of the provision, then Clause 101, and wished to make it clear that it would only apply to, ‘subjects within the legislative powers of the Commonwealth’ (Federation Debates, Melbourne, 1898: 643). In response, Symon explained:

Clause 101 is merely declaratory. If there is any inconsistency between a law of the state and a law of the Commonwealth it is for the High Court to determine which shall prevail, and the court will, of course, be bound to consider whether the law of the Commonwealth is, or is not, within the legislative power of the Commonwealth. If it is not, it will be null and void. The clause is necessary to establish in the Constitution the principle that where the Commonwealth legislates within its legislative power its laws must prevail (Federation Debates, Melbourne, 1898: 643).

Despite the discussion being briefly revisited later by the convention, the clause remained unchanged (Federation Debates, Melbourne, 1898: 1911-1913). As the paucity of debate and Symon’s comments indicate, section 109 was thought of as a straightforward provision which set out plainly what would have been at any rate implied as it had been in the United States by virtue of the supremacy clause, and in Canada even in the absence of such a clause (note Quick and Garran, 1901: 353; Moore, 1902: 173-174).

As to how the provision would be given effect, the debates reveal little, but the contemporary literature suggests it was not expected that section 109 would be nearly as liberally applied to invalidate State legislation as it is today. Clark (1901: 91-92) distinguished only between those cases in which there was direct conflict and those in which State laws and Commonwealth laws in the same area of concurrent jurisdiction could be simultaneously observed, so permitting
the continuing ‘existence of two separate laws’. Quick and Garran (1901: 939) did not directly address the issue, though they did emphasise that section 109 only contemplates invalidity to the extent of inconsistency. While it is true that Moore (1902: 173) contemplated, even in the absence of direct inconsistency, that it was possible for the Commonwealth to regulate exclusively a subject within its power, those comments, which relied on American authority, reflected much more Marshall’s jurisprudence of national supremacy than the jurisprudence of dual federalism, whereas it was the latter which had the greater influence on both the making of the Australian Constitution and the constitutional jurisprudence of the first High Court. It would not be until Isaacs led the Court to the decision in the Engineers’ case that Marshall’s jurisprudence stripped of any federal embellishments would become significant in Australia. As to the overall effect of section 109, Clark (1901: 90-91) reassuringly noted:

[Section 109] does not confer upon the Parliament of the Commonwealth any authority to restrain the Parliaments of the States from exercising their legislative power in respect of any matter within their jurisdiction, and does not in any degree empower the Parliament of the Commonwealth to remove the residents of any States from the jurisdiction of the Parliament of the State in regard to any other matters than those in respect of which the Parliament of the Commonwealth has power to substitute its own legislation for the legislation of the State. The Constitution has placed a number of restrictions and prohibitions upon the Parliaments of the States, but it has not empowered the Parliament of the Commonwealth to add to them.

Consistent with the view that the constitutional division of legislative power was effective and the Commonwealth’s powers limited, the question of conflict was not seen to be a live issue by either the framers or contemporary commentators. Section 109 can do nothing on its own. It is only activated where a valid Commonwealth law comes into conflict with a valid State law. If the scope of Commonwealth power is narrow, as the framers expected, then the scope for conflict is also narrow.

The first High Court under Griffith approached section 109 in a way which did nothing to displace the framers’ expectations. In Whybrow (No 1), the issue arose hypothetically as to whether a Commonwealth industrial award, which
fixed a minimum rate of per hour wages to be paid to male employees in the
boot trade in certain States, would have been inconsistent with a State law,
which provided for a lower minimum wage for employees in the same industry.
Griffith, Barton, O'Connor and Higgins agreed that the provisions would only be
inconsistent if it were impossible for an employer to obey both the award and
the law. That test is now referred to as the 'impossibility of simultaneous
obedience' test. In this case, the laws would not have been found to be
inconsistent because, by paying the higher rate, an employer would be
complying with both the award and the State law. Isaacs did not agree. He
took the opportunity to express an alternative approach to questions of
inconsistency. Isaacs suggested that inconsistency under section 109 could be
found on the basis that the Commonwealth had occupied a field within an area
of its jurisdiction to the complete exclusion of State law.

The Griffith Court’s approach to interpretation of the Commonwealth’s
legislative powers was to interpret them in the light of the federal principle.
Consequently, while advocating prima facie a broad interpretation of those
powers, their scope was nonetheless contained where that broad interpretation
was seen to conflict with the primary federal purpose underlying the
Constitution. As a result, few section 109 cases came before the Court. That
was to change following the decision in the Engineers’ case.

Isaacs supported a broad reading of the Commonwealth’s conciliation and
arbitration power. Hand in hand with that went a broad interpretation of section
109 through which comprehensive Commonwealth supremacy could be
delivered in this area and others in which the Commonwealth shared power with
the States. Supremacy for the Commonwealth’s system of conciliation and
arbitration was delivered through the Court’s decision in Cowburn’s case. The
decision also set the foundations for future consideration by the Court of
inconsistency under section 109. Not one, but three tests of inconsistency were
applied by different members of the Court. Only Powers and Higgins applied
the impossibility of simultaneous obedience test. Knox, the Chief Justice, and
Gavan Duffy did not believe that test went far enough. Rich’s conclusions in a
separate judgment were similar. The approach they took is now referred to as
the ‘conferred rights’ or ‘denial of rights’ test, which is satisfied where a right or
privilege conferred by one law is removed by the other. Isaacs, as did Starke, took a much broader approach to the issue of inconsistency and one which would become increasingly important:

If ... a competent legislature expressly or impliedly evinces its intention to cover the whole field, that is a conclusive test of inconsistency where another legislature assumes to enter to any extent upon the same field (37 CLR at 489).

Where this test, the 'cover the field' test, is applied the question for the Court is whether the Commonwealth has legislated on a subject within the scope of its powers to the complete exclusion of all State law on that subject. Confirmation of its ascendancy was provided a few years later in *Ex parte McLean* (1930) 42 CLR 472, a confirmation with which Dixon concurred:

The inconsistency does not lie in the mere coexistence of two laws which are susceptible of simultaneous obedience. It depends upon the intention of the paramount Legislature to express by its enactment, completely, exhaustively, or exclusively, what will be the law governing the particular conduct or matter to which its attention is directed. When a Federal statute discloses such an intention, it is inconsistent with it for the law of a State to govern the same conduct or matter (42 CLR at 483).

Impossibility of simultaneous obedience arises where two contradictory duties are imposed by the relevant Acts. The classic example is *R v Brisbane Licensing Court* (1920) 28 CLR 23. In this case a Queensland law, which provided for a referendum to be held on the same day as an election for the Australian Senate, was found to be inconsistent with a Commonwealth law, which declared that on the day of any Senate election 'no referendum or vote of electors of any State or part of a State shall be taken under the law of a State' (section 14 of the Commonwealth's *Electoral (War-time) Act 1917*). The State law could not be obeyed without the Commonwealth law being disobeyed.

A denial of rights, however, occurs where rights provided in State legislation and Commonwealth legislation come into conflict, as in Cowburn's case. The duties, as it were, could both be complied with where the maximum 44 hours for a working week set by the State law for payment of the award wage was accepted, as the maximum 48 hours set under the federal award was greater
than that required by the State. The contest, however, could also be characterised as a clash between the respective rights of employees and employers: the employee's right under the State Act to a full wage for a 44 hour week; and the right of the employer provided through the federal award to pay that wage only upon 48 hours being worked. This second test requires a judgment to be made by the Court about the intention of the lawmaker regarding the status of the 'right' conferred by the paramount lawmaker. In this case, was the intention behind the relevant provision of the federal award to replace State law, or was it simply, in the absence of provision in a State law setting a lower maximum, to set the maximum hours an employer could require an employee to work to receive the award wage?

The cover the field test requires the Court to engage in a much more far-reaching judgment with respect to characterising relevant State law and Commonwealth law and determining whether the Commonwealth's intention was to cover the field. It also extends well beyond the other two tests as it can be satisfied even where neither the simultaneous obedience test nor denial of rights tests are applicable. Traditionally, following Isaacs' judgment in Cowburn's case, those considerations are represented by three questions:

1. What field does the Commonwealth law deal with or regulate?
2. Was the Commonwealth law intended to cover the field completely?
3. Does the State law attempt to regulate some part of that field?

Answering the first and the third requires the relevant laws of the Commonwealth and of the State to be characterised with respect to the fields they occupy. Only if the laws occupy the same field as construed by the Court can inconsistency arise. If State law and Commonwealth law are found to operate within the same field, the second question, as to whether the Commonwealth Parliament's intention was to cover the field, must have been answered in the affirmative for the test to be satisfied.
The application of the test requires that the Court must necessarily conduct an evaluation of material which is often open to conflicting interpretations (note Hanks, 1986a: 114). More than the denial of rights test, and much more than the impossibility of simultaneous obedience test, the cover the field test represents an exercise of judicial discretion. Evaluation is so marked in this area because, unlike where a question of direct inconsistency arises, the Commonwealth law will not have dealt specifically with the matters subject to State law, rather it is the general scope of the Commonwealth law that is significant.

Two considerations are often seen as being important to the Court in determining whether the Commonwealth intended to cover the field: the first is that certain subject matters such as weights and measures or copyright, among others, lend themselves to sole coverage by the Commonwealth; the second is the detail with which a Commonwealth law deals with a particular subject matter: where the matter is covered comprehensively by the Commonwealth that is more likely to indicate an intention to cover the field than where it does not. However, the second factor has been far from consistently present in relevant decisions of the Court. Comprehensiveness is not a necessary factor to a finding of inconsistency where the cover the field test is applied. The key to the test, as with the others, is the intention of the paramount lawmaker. An intention to cover the field has been found by the Court even in the absence of comprehensiveness (note Hanks, 1986a: 120-121; Hanks, 1996: 272-275).

Dixon's comments in *McLean* might suggest that the intention to exclude is inferred by the Court from the provisions of the Commonwealth Act in question. In theory that is the case: it is not the Commonwealth that brings about the operation of section 109, but the fact of inconsistency itself. Where the issue of direct inconsistency arises the theory is also largely the practice, but in relation to the cover the field test express legislative expression by the Commonwealth of an intention to exclude State law has been seen as significant and even necessary by the Court. This was in fact Dixon's view. He concluded that 'there may be no other way of expressing the intention and accomplishing the federal legislative purpose' in *Australian Coastal Shipping Commission v O'Reilly* (1962) 107 CLR 46 at 57.
These comments were recently cited with approval in *Botany Municipal Council v Federal Airports Corporation* (1992) 175 CLR 453. This case concerned purported inconsistency between Commonwealth regulations, which set up a licensing regime for work to be done in relation to a third runway at Mascot Airport in Sydney, and the *Environmental Planning and Assessment Act 1979* (NSW). The regulations expressly excluded the operation of State laws relating to environmental assessment. They were made after two Sydney Councils had relied on the State Act to seek an injunction requiring an environmental impact assessment over and above that provided under the Commonwealth regime, but before that injunction was heard. The Court unanimously found that the Commonwealth regulations covered the field.

The converse is that the Commonwealth can also declare its intention not to cover the field (*R v Credit Tribunal; Ex parte General Motors Acceptance Corporation* (1977) 137 CLR 545). What the Commonwealth cannot do, however, is revive a State law for a past period where inconsistency was found to exist by making such a declaration retrospective (*University of Wollongong v Metwally* (1984) 158 CLR 447).

Where an intention to cover the field is found by the Court there is no space left for State legislation to operate in that field at all, even where State law may complement or support the Commonwealth’s legislation. The Commonwealth’s law, to paraphrase Dixon, becomes the complete, exhaustive and exclusive law governing that field. Through appropriate drafting the Commonwealth can indicate an intention to exclusively occupy a field and so oust State legislation applying in the same area. This would not have such significant repercussions if the scope of Commonwealth legislative power was narrow. However, the Court’s broad and deferential recognition of the Commonwealth’s capacity to cover the field, combined with an expansive reading of the Commonwealth’s legislative powers under section 51, means that there are few areas of State regulation that cannot be displaced by a Commonwealth law.

Some, such as Morabito and Strain (1993), have argued that the test should be abandoned altogether, but that seems an unlikely prospect, if not also an illogical one. It is difficult to see why a paramount lawmaker should be
absolutely prevented from covering the field on a subject within one of its heads of power. Also, as Hanks (1986a: 133) notes, the test can be applied either narrowly to save State legislation or broadly to invalidate it. The problem is that the Court has almost invariably chosen the latter.

The law on section 109, especially as applied in cases like *Botany Municipal Council*, reflects the extent to which the Court privileges Commonwealth intention above all else in applying section 109. This is the case whichever test is applied, though it is most significant in application of the cover the field test. It is a privileging consistent with the general deference to the will of the Commonwealth Parliament that the Court has shown in the cases dealing with the Commonwealth's enumerated powers and the corresponding disengagement by the Court from containing Commonwealth power on the basis of federal principle. As we have seen, the origins of this disengagement lie in Marshall's jurisprudence of national supremacy as applied by the High Court led in this regard first by Isaacs and later Dixon, a genealogy which Dixon (1965: 177-178) acknowledged and celebrated in relation to section 109. For Dixon (1965: 177), 'Marshall's principles of national supremacy have had no application that has proved of more real importance in Australia than the invalidation of State laws where the ground is taken by federal legislation'.

The test is neither the problem, nor the solution, it is merely a means of directing an interpreter to the issues that must be addressed. That is why the manner in which the Court goes about applying that test is so important. Interpretation does not occur in a vacuum, but within some frame of reference. While principles of national supremacy provide that frame, the cover the field test will be applied in a way which serves national purposes, not federal ones. It is a constitutional jurisprudence in which federalism as a principle has virtually no purchase. If that were not the case, then the arguments about covering the field would be that much less significant, because the scope for the Commonwealth to displace State laws would be so much less significant.

One way in which a federal jurisprudence could operate in this area would be to start with the assumption that Commonwealth laws are intended to operate concurrently with State law unless that assumption could be displaced by
'necessary implication'. A suggestion along these lines was made many years ago by Bailey (1939-1941: 16). Since then it has resurfaced from time to time, including in the recommendations of the Constitutional Commission (1988: 649; note also Morabito and Strain, 1993: 204-205). More importantly, though, would be the operation of a federal jurisprudence which confined the scope of Commonwealth heads of power. One reason why section 109 was of relatively little significance over the life of the Griffith Court was because it took the constitutional division of powers seriously. This very fact alone acted as a gatekeeper with respect to section 109 issues, but that is not the case anymore.

THE HIGH COURT AND FEDERAL FINANCE

Upon federation it was expected that a degree of Vertical Fiscal Imbalance (VFI) would arise with the imposition of a uniform tariff, though it was not intended that it endure (Galligan 1995: 224). Nonetheless, VFI has become one of the defining characteristics of Australian federalism.

The term 'imbalance' in the phrase 'Vertical Fiscal Imbalance' refers to the lack of equivalence between the expenditure responsibilities of the State Governments and the Commonwealth Government and power to raise revenue. In Australia VFI exists because the Commonwealth's capacity to raise revenue is far greater than its expenditure requirements, whereas the States' capacity to raise revenue is far less than they require to satisfy their expenditure requirements. For this reason there is an annual transfer of funds from the Commonwealth to the States. The main sources of VFI today are the Commonwealth's effective monopolies over income tax collection and commodity taxes. VFI, combined with the Commonwealth's capacity to direct funds to the States on such terms and conditions as it thinks fit, has given the Commonwealth the opportunity to involve itself in developing and implementing public policy in virtually every area of government responsibility within Australia, an opportunity it has grasped. It is one of the reasons for the high degree of overlap and duplication in the Australian federal system.

Both the Commonwealth and the States have expressed concern, as have many others, over overlap and duplication, but their prescription for solving the
apparent problems arising from this are different. For the Commonwealth, the problems are caused by recalcitrant States who do not do as they are told. If the States behaved more like administrative units of the Commonwealth, rather than persisting in delusions of grandeur about their status as governments in their own right, many of the perceived inefficiencies in the system would be overcome. For the States, the problem is the Commonwealth illegitimately overreaching itself through the back door route of conditional grants and the bureaucratic apparatus that has been built up around that. Both attitudes were present in the new federalism of the 1990s through which the Commonwealth and States negotiated the shape and course of microeconomic reform in Australia (note Painter, 1998: chapter 2).

Overlap and duplication are inherent aspects of federalism and far from necessarily negative ones (note Sharman, 1991: 33-36; Galligan, 1995: 51-53; Painter, 1998: 153-180, 181-183), but the degree of overlap and duplication in Australia represents more than that which is inherent in federal systems, because of the extent to which the system of federal finance encourages both. Federalism is a messy form of government in which governments necessarily interact with each other, but what is important is how they do that. In Australia the Commonwealth's substantial control over federal finance has both allowed it to persist in seeking with considerable success a controlling interest in a number of policy agendas which stretch deep into areas primarily under State legislative control and to believe it is justified in doing so, a belief reflected in the new federalism process of the 1990s.

Characteristic of the new federalism of the 1990s, as with its predecessors, was the position adopted by the Commonwealth in negotiating with the States. The Commonwealth assumed that the primary federal relationship was between it and the States and in that relationship it was to be the dominant partner. While the 1990s version of the new federalism was less coercive than some of the earlier versions, it contained a strong strand of managerialism, which saw the Commonwealth's agenda for microeconomic reform and efficiency expressed through a significant degree of central policy coordination (note Fletcher and Walsh, 1992; Painter, 1998: 14).
Uncharacteristic of this new federalism, however, was the States’ organised resistance to Commonwealth control. As Fletcher and Walsh (1992: 611) argue, one of the outcomes of the new federalism in the 1990s was that the States began to recognise both their importance in the system overall and which parts of it undermined their position. This was evidenced by their effort to link agreement on microeconomic reform with reform of federal financial arrangements geared specifically at addressing VFI. This effort represented a major shift from relative acquiescence on the part of the States to the Commonwealth’s dominance in the area of revenue collection to a real desire for reform (note Walsh 1992: 26-30; Sharman, 1993: 231-232; Painter, 1998: 16-20). The States active attempts to reform the system of federal finance highlighted the degree to which they saw the existing system entrenching the dominant position of the Commonwealth within the federation at their expense, as did Commonwealth reluctance to alter the rules of the game.

The arrangements with respect to the Goods and Services Tax introduced in 1999 and given effect through the Commonwealth’s A New Tax System (Commonwealth-State Financial Arrangements) Act 1999, address some of the negative effects of the old system, but far from all of them (note Saunders, 2000). The changes in no way reduce the dominance of the Commonwealth in terms of revenue collection, in fact they do the opposite, and nor do they otherwise alter the dominant position the Commonwealth enjoys over Commonwealth-State financial arrangements. In particular, the agreement on reform is not intended to diminish the Commonwealth’s use of conditional grants to the States:

The Commonwealth will continue to provide Specific Purpose Grants (SPPs) to the States and Territories and has no intention of cutting aggregate SPPs as part of the reform process set out in this Agreement ... (Clause 5(v) of the ‘Intergovernmental Agreement on the Reform of Commonwealth-State Financial Relations’, schedule 2, A New Tax System (Commonwealth-State Financial Arrangements) Act 1999 (Cth)).

It should not be assumed that the financial settlement in the Constitution sanctioned the enormous influence the Commonwealth presently wields through its control over federal finance within the Australian federal system.
The structural basis for its influence lies not directly in the financial settlement, but rather in what those provisions have come to mean through the interpretation the High Court has made of them. It is this interpretation which has underwritten the Commonwealth's dominant position in terms of federal finance and enabled its substantial involvement in almost all areas of government activity in Australia, even where they would otherwise be within State control. The Court's initial sanction of the uniform tax scheme, the meaning it has attributed to duties of excise under section 90, and its virtually unrestricted and literal reading of section 96 have all been instrumental in this process.

The Constitutional Framework of Federal Finance

The main provision for revenue collection under the Constitution is a relatively straightforward one. Subject to certain limitations, the Commonwealth Parliament, under section 51(ii) of the Constitution, is given the power to make laws with respect to taxation, and, as with all section 51 powers, this power is held concurrently with the States. The only exception to this concurrent power of taxation is the exclusive power granted the Commonwealth under section 90 to levy duties of customs and of excise.

Provision for government borrowing was partial, allowing for the Commonwealth to take over only those debts which the States had accumulated at the time of federation, a limitation removed by referendum in 1910. A further referendum in 1928 inserted section 105A, which provided a constitutional foundation for a coordinated and centralised approach to government borrowing, as reflected in the Commonwealth-State Financial Agreement of 1927 (note generally, Saunders, 1990: 188-194, Saunders, 1992: 105 and 118-120; Hanks, 1996: 262-265).

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33 The Constitution prevents the Commonwealth from discriminating between States or parts of States in matters of taxation (section 51(ii)), or giving preference to any State or parts of States in matters of trade, commerce, or revenue (section 99), and neither level of government is permitted to tax the property of the other (section 114).
For the early years of federation it was expected that some revenue would be transferred from the Commonwealth to the States as a result of the eventual agreement between the Australian colonies on intercolonial free trade and the uniform tariff. The main constitutional provisions dealing with these aspects of the financial settlement are: section 88, which requires that a uniform tariff be established within two years of federation; section 92, which requires that 'trade, commerce and intercourse among the States ... be absolutely free'; and the exclusive power granted the Commonwealth under section 90 to levy duties of customs and of excise, and to grant bounties.

With respect to revenue redistribution, the Constitution deals with three separate periods following federation: the initial period extending only to the Commonwealth providing for a uniform tariff; a transitional period following the imposition of uniform customs duties; and an indefinite final period (Mathews and Jay 1972: 50-51, Quick and Garran 1901: 832). The framers produced a clearly structured framework for financial relations between the Commonwealth and the States for only the first few years of federation. Reflecting the framers' uncertainty about what would happen financially to the colonies following federation, the provisions for federal finance which came into effect upon the expiry of the transitional sections are much less specific.34

In this final period the framers expected section 94, described by Saunders (1993: 60) as 'the centrepiece of the fiscal constitution', to be the key provision through which the Commonwealth would redistribute any surplus revenue to the States. Section 94 provides for the monthly payment by the Commonwealth to the States of its surplus revenue 'on such basis as it deems fair'. As Saunders (1993: 60) notes, however, section 94 never came to fulfil the purpose for which it was designed. In New South Wales v Commonwealth (1908) 7 CLR 179 the High Court upheld legislation through which the Commonwealth directed its surplus revenue into trust funds to be used for its own purposes. Since then section 94 has not played a part in revenue transfers from the Commonwealth to the States. What took its place was section 96:

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34 For a detailed discussion of the financial provisions relevant to the first two periods, as well as the financial settlement more generally, see Mathews and Jay (1972) and Saunders (1986b).
During a period of ten years after the establishment of the Commonwealth and thereafter until the Parliament otherwise provides, the Parliament may grant financial assistance to any State on such terms and conditions as the Parliament thinks fit.

At the time of federation section 96 was not considered to be a crucial provision and was most probably included to assure the smaller States that they would be supported if they experienced financial difficulties (Saunders 1992: 107). Its significance, however, was greatly underrated. Section 96 has become the primary provision through which the Commonwealth redistributes revenue to the States. It was also largely through the combined use of section 96 and the taxation power, section 51(ii), that the Commonwealth came to monopolise the collection of income tax in 1942.

The Uniform Tax Scheme and Section 96

Under section 51(ii) of the Constitution, the States are able to impose all forms of taxation other than duties of customs and of excise, which are made exclusive to the Commonwealth under section 90. With the introduction of the uniform tax scheme in 1942, however, the States were effectively excluded from the income tax field. This scheme was instituted to deal with the demands placed on Australia during the Second World War. The idea was that it would be both more efficient and more equitable to have a uniform system of income taxation. Initially the Commonwealth requested that the States accede to this scheme with the Commonwealth compensating them through section 96, but the States would not agree (Mathews and Jay 1972: 171-174). In response to the States' recalcitrance, the Commonwealth Parliament passed a range of legislation designed to leave the States with no option but to accept the scheme. Four States challenged the legislation before the High Court: South Australia; Victoria; Queensland; and Western Australia. In the First Uniform Tax case, the High Court rejected the States' challenge and upheld all the Commonwealth legislation by reference to a combination of powers: the taxation power, section 51(ii), the grants power, section 96, and the defence
power, section 51(vi). Relying on this decision, the Commonwealth was able to legislate following the war for the continued operation of the scheme.

Two aspects of the amended scheme, the Commonwealth's continuing claim to priority in the collection of income tax and the section 96 requirement that, as a condition to reimbursement, the States not levy income tax, were challenged in *Victoria v Commonwealth* (the Second Uniform Tax case) (1957) 99 CLR 575. The section 96 condition survived the challenge, but the priority rule was held invalid. In 1959 the Commonwealth itself dropped the condition (Coper, 1987: 216). While both had been instrumental in establishing the scheme, neither was essential to the Commonwealth continuing to retain a monopoly over the collection of income tax.

In the *First Uniform Tax* case the States argued that the overall intention and effect of the legislation was to prevent them from exercising their power to levy income tax, a power that the Commonwealth holds concurrently with the States under section 51(ii) of the Constitution. The States' argument that the substantive effect and purpose of the scheme was to exclude them from the field of income tax was not, however, accepted by the High Court. The Court treated each Act separately and finding each valid saw no reason to look to the cumulative effect of the Acts or the overall purpose of the scheme. Moreover, while in practical terms the States had no choice but to be part of the scheme, the Court was only concerned with their legal obligation to join, and from a strictly legal point of view the uniform tax scheme was a voluntary arrangement.

In the uniform tax cases section 96 was applied very literally as it had been in the past (the *Federal Roads* case); an approach to the provision which ignored its substantive significance and delivered to the Commonwealth a substantial source of coercive power. As a result of the High Court's interpretation of section 96 the purposes for which the Commonwealth may grant financial assistance to the States are largely unlimited, as are the terms and conditions the Commonwealth may seek to attach to those grants. Section 96 also allows the Commonwealth not only to grant funds directly to the States, but also to pass funds to organisations and people through the States (Attorney-General (Vic); ex rel Black v Commonwealth (the DOGS case) (1981) 146 CLR 559).
Nor do the prohibitions against discrimination in section 51(ii) and preference in section 99 apply to section 96 (*Deputy Federal Commissioner of Taxation (NSW) v W R Moran Pty Ltd* (1939) 61 CLR 735). Section 96, however, is subject to section 116 of the Constitution, which prevents the Commonwealth from establishing any religion (the *DOGS* case).

The uniform tax cases and the High Court's interpretation of section 96 reflect the High Court's generally literal approach to the interpretation of Commonwealth legislative power and characterisation of Commonwealth law. But for the limited doctrine protecting the States from destruction or discrimination, federal considerations are irrelevant to determining the scope of Commonwealth power as is the substantive effect of Commonwealth legislation on the federal system. The substantive outcome of this formal approach is to provide the Commonwealth with a degree of control over government revenue and its redistribution more appropriate to the government of a unitary state than the national government in a federation.

In contrast, the Court has had to necessarily adopt a more substantive approach to determining the meaning of duties of excise under section 90 and the scope of exclusive power the Commonwealth may exercise as a result of that provision. A majority on the Court, however, has not read section 90 in the light of any federal purpose, but rather continues to accept the long held view that the purpose section 90 serves is a national one, resulting in decisions that, consistent with the outcome of the decisions on the uniform tax scheme and section 96 more generally, have enhanced Commonwealth financial dominance over the States.

**Excise Duties**

The granting of an exclusive power to the Commonwealth to levy duties of customs and of excise, and to grant bounties under section 90 was seen to be an inherent part of the federal union necessary to securing free trade between the States. Unlike duties of customs and bounties, however, what was meant by duties of excise has been less than clear. In part for this reason, a number of approaches to interpreting section 90 have been taken by the High Court and
various lines of conflicting authority can be found in the Court's decisions. There have been three main areas regarding the interpretation of section 90 over which the Court has divided. The first is the meaning of duties of excise under section 90. The second revolves around the question of whether formal or substantive criteria should be used to determine whether a State law is a duty of excise. The third concerns the reason for section 90's inclusion in the Constitution. The relationship between the first and third has become increasingly important.

The meaning of duties of excise

The Court originally limited duties of excise to taxes on the production or manufacture of goods. In the first case dealing with this question, *Peterswald v Bartley*, the Griffith Court concluded that an excise duty was, 'a duty analogous to a customs duty imposed on goods either in relation to quantity or value when produced or manufactured and not in the sense of a direct tax or personal tax' (1 CLR at 509).

That narrow interpretation left open to the States the possibility of levying non-discriminatory taxes on goods. It was eventually superseded by a wider view, which saw the concept of excise extended beyond taxes on the production or manufacture of goods to include taxes on goods during their distribution up to the point at which the consumer receives them. This broad understanding of the meaning of duties of excise under section 90 has been dominant on the Court since the decision in *Parton v Milk Board (Vic)* (1949) 80 CLR 229.

In the joint majority judgment in *Capital Duplicators Pty Ltd v Australian Capital Territory (No 2)* (1993) 178 CLR 561, Mason, the Chief Justice, and, Brennan, Deane and McHugh affirmed this wide view of excise, and noted that, since *Parton's* case, there had been little support on the Court for a return to a more narrow conception of excise. Toohey and Gaudron, in a joint judgment, and Dawson, in a separate judgment, however, were not prepared to accept the wide view of excise, in spite of the weight of authority behind it. Toohey and Gaudron restated the position they had adopted in *Phillip Morris*, that the exclusive power granted the Commonwealth to impose excise duties in section
90 only forbids State taxes ‘which discriminate against goods manufactured or produced in Australia’ (178 CLR at 631). Dawson adopted a slightly narrower conception of excise duties in endorsing the view expressed by Murphy in an earlier case, *Hematite Petroleum Pty Ltd v Victoria* (1983) 151 CLR 599, that ‘a State excise is a tax on production [or manufacture] within the State’ (178 CLR at 615).

**Formal or substantive effect?**

In *Dennis Hotels Pty Ltd v Victoria* (1960) 104 CLR 529, Dixon and Kitto, while both accepting the broad definition of duties of excise, diverged greatly on how to determine whether a State law was such an excise. Dixon adopted an approach which looked to the substantive effect of the law, whereas Kitto identified the ‘criterion of liability’ as the crucial element in making this determination. For Kitto, if the fee in question applied to a licence and not to goods then it was not an excise. Dixon, however, concluded that if the fee was likely to be recovered by the licensee from the consumer through its inclusion in the price of the goods then it was an excise. In subsequent cases these two approaches contended for supremacy.

It was not until the decision in *Hematite Petroleum* in 1983 that the underlying policy arguments for both approaches began to surface. As Hanks (1986b: 377) argues, with the decision in *Hematite Petroleum* it became apparent that those judges who favoured a formal criterion of liability approach did so as a means to limiting the impact of a broad definition of excise duties on the States’ taxing capacities, whereas those who adopted a more substantive approach, in combination with a broad definition of excise, ‘were working towards the concentration, in the hands of the Commonwealth, of all commodity taxes’.

**The purpose behind section 90**

Dixon, consistent with his federal theory of the Constitution in which power and supremacy flow only to the Commonwealth, found a national purpose underlying section 90:
In making the power of the Parliament of the Commonwealth to impose duties of customs and excise exclusive it may be assumed that it was intended to give to the Parliament a real control of the taxation of commodities and to ensure that the execution of whatever policy is adopted should not be hampered or defeated by State action (Parton's case, 80 CLR at 260).

Mason, in *Hematite Petroleum*, enlarged on Dixon's understanding of the purpose behind section 90:

Excise duties, like customs duties, are significant instruments for raising revenue. What is more important is that Parliament, possessing exclusive power to impose both forms of duties, can protect and stimulate home production by fixing appropriate levels of customs and excise duties. And it can lower the level of domestic prices by lowering customs and excise duties. By lowering customs duties alone it can put pressure on Australian producers and manufacturers to become more competitive (151 CLR at 631).

As had Dixon, Mason used this understanding of the ‘the high constitutional purpose’ section 90 was to fulfil to support a broad interpretation of excise duties. Some members of the Court, however, have supported a narrower interpretation of excise duties on the ground that the more limited federal purpose of protecting the Commonwealth's tariff policy underlies the inclusion of section 90 in the Constitution.

In determining what the constitutional meaning of excise duties might be the convention debates are of little assistance as they do not clearly indicate what the framers meant by duties of excise (Saunders, 1986b: 15-19). However, section 90 itself and the context in which it appears in the Constitution can reasonably sustain a narrow interpretation of the meaning of such duties. Under section 90 the power granted the Commonwealth with respect to excise duties is clearly linked to the power to levy duties of customs and to grant bounties, all of which became exclusive upon the imposition of a uniform tariff as required under section 88 of the Constitution. At the same time, free trade within Australia was established under section 92. Moreover, in section 93 ‘duties of excise’ are referred to as those duties ‘paid on goods produced or manufactured in a State’. In this context it seems reasonable to assume that the purpose underlying section 90 and the inclusion of excise duties within it
was the limited one of protecting the Commonwealth’s tariff policy. If the States could impose taxes selectively on locally produced or manufactured goods then this would undermine that policy, but the levying by the States of non-discriminatory taxes on goods would not (Hanks, 1996: 297-298; Coper, 1987: 226-227).

In *Capital Duplicators*, Toohey and Gaudron looked to this purpose in reaching the conclusion that excise duties under section 90 refer only to discriminatory taxes on Australian produced goods, as did Dawson in reaching his slightly narrower conception of the constitutional meaning of excise duties. Mason, Brennan, Deane and McHugh, however, did not depart from the view, as proposed by Dixon in *Parton’s case*, that a wider national purpose underpinned section 90. On this basis they affirmed the broad conception of duties of excise under section 90, which prevents the States from levying taxes on goods during their production or manufacture or at any point in their distribution.

The majority in *Capital Duplicators*, while adopting a wide view of the meaning of duties of excise, did not take the opportunity to reconsider those cases which allow the States to impose business franchise fees on tobacco products (*Dickenson’s Arcade Pty Ltd v Tasmania* (1974) 130 CLR 177) and liquor (*Dennis Hotels*). On the majority’s reasoning, these fees survived in part because, given the nature of the products to which they related, each could be characterised as an element within a regulatory regime established in the public interest, but also because the decisions establishing these exceptions had been relied on by the States in imposing fees which had become significant sources of revenue. Therefore, the outcome in *Capital Duplicators* represented something of a tantalising opportunity for the States. On the one hand, if considerations of policy were not taken into account, and the existing exceptions reconsidered in the light of the broad interpretation of excise and the national purpose assumed to underpin section 90 on which that interpretation is based, then it was unlikely they would survive. On the other hand, the decision in *Capital Duplicators* was finely balanced as was only a 4:3 decision in favour

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35 In *H C Sleigh Ltd v South Australia* (1977) 136 CLR 475, the Court allowed that a similar fee on petroleum products was not an excise, but in *Capital Duplicators* only the limited authority of *Dennis Hotels* and *Dickenson’s Arcade* was recognised by the majority.
of the broad interpretation. If that weak majority could be overcome so that the more limited federal conception of the purpose behind section 90 was accepted by the Court then the tax base of the States would be considerably expanded.

That opportunity arose in *Ha v New South Wales* (1997) 189 CLR 465, and the States seized it. Two new justices, Kirby and Gummow, had been appointed to the Court, replacing Mason and Deane, who had both supported complete national government control over commodity taxes. The States lost. Kirby and Gummow joined with Brennan, now the Chief Justice, and McHugh to form a majority which found invalid the New South Wales tobacco licence fee which was the subject of the case. With that finding the broad interpretation of excise duties was affirmed and with it business franchise fees as a source of revenue for the States were effectively removed.

**MAKING THE CHOICE: FEDERALISM OR NATIONAL SUPREMACY?**

In spite of the Constitution being a federal one, federal considerations have played virtually no part in the High Court's interpretation of the financial settlement contained in the Constitution. Where the Court has been able to, as in the uniform tax cases and more generally with respect to section 96, it has adopted a formal and literal approach to interpretation that has left little or no room for substantive argument about the effect the legislation in question may have on the federal process, resulting in decisions that have enhanced the Commonwealth's capacity to dominate that process. To determine the meaning of excise duties under section 90, however, the Court's approach has, of necessity, been more substantive, as it has had to first determine the purpose for which section 90 was included in the Constitution. Forced to make a choice, the High Court, rather than being able to wash its hands of the outcome on the grounds that all it had done was impartially apply neutral legal standards of interpretation to the Constitution, chose to apply a national purpose over a federal one. That choice, in combination with its decisions on the other key aspects of the financial settlement in the Constitution, is the foundation of a process of intergovernmental relations in Australia in which the Commonwealth is centralised and holds the whip hand.
Similar choices have been made with respect to section 109. The effect of the impossibility of simultaneous obedience doctrine originally applied by the Court, was to leave as much room as possible for the operation of valid laws made both by the Commonwealth and the States. In that sense, the approach of the Griffith Court to section 109 issues deferred to the will not only of the Commonwealth Parliament and the national constituency it represented, but also the State Parliaments and the local constituencies they represented. That reflected not so much the operation of the test as the fact that the Griffith Court’s approach in this area, as in every other of constitutional interpretation, occurred within the paradigm of a developing federal jurisprudence. Since the decision in the Engineers’ case, the paradigm has been one of national supremacy. Consequently, the cover the field test has become ascendant and Commonwealth intention the determining factor in section 109 issues generally. Complementing and enlarging the national purposes served by this approach to section 109, has been the Court’s broad interpretation of the Commonwealth’s legislative powers granted under the Constitution.

The interpretive method which gave rise to the steady expansion of Commonwealth powers over the States began with the decision in the Engineers’ case, and was refined by Dixon into a systematic approach to broadly interpreting Commonwealth legislative power and assessing the validity of Commonwealth law. While Dixon was instrumental in resurrecting implied federal limitations on the exercise of power by the Commonwealth, the inherent logic of the legalism he introduced into the Court’s constitutional jurisprudence minimised the effect of those federal limitations and maximised the reach of Commonwealth power into areas traditionally within State power. The justification for the decision in the Engineers’ case and the legalism which came after was provided by the argument that all the Court did was make impartial and objective legal decisions, the political consequences of those decisions being matters not within the competence of the Court to consider, but to be resolved or otherwise through the political process. However, the Court’s approach to constitutional interpretation has privileged the will of the Commonwealth to such an extent that that process is substantially distorted in its favour. Neither was a neutral approach. Each was based on a particular and preferred conception of the form that Australian government should take.
The legal nature of Australian federation today is at best uncertain. The effect of the continuing, if at times uneven, construction of Commonwealth power unconstrained by federal principle, has been the creation in legal terms of a discretionary federal system in Australia; a system which, while distorted, survives politically and at times robustly without a firm legal foundation. There are hardly any substantial federal limitations on the Commonwealth arising from the Constitution which cannot be overcome by a determined national government. Where the Commonwealth has the will it can use its financial muscle underwritten by the High Court’s interpretation of the Constitution’s financial provisions and a phalanx of powers so broadly interpreted and applied by the High Court that few, if any, areas of governmental activity are excluded from its exclusive reach.
CONCLUSION

THE MASON COURT AND AFTER: FEDERALISM, RIGHTS AND THE DEAD HAND OF LEGALISM

Since the Engineers’ case was decided, there has been substantial change in the High Court’s approach to interpretation of the Constitution. Broadly speaking, the movement has seen the Court shift from the apparently formal and simple literalism of Engineers through the subtleties of Dixon’s legalism to an express focus on substantive reasoning in interpreting the Constitution when Sir Anthony Mason became Chief Justice. Most recently, a reactive return to orthodoxy in the form of what Patapan (2002: 243) has called a ‘new legalism’ is now becoming apparent on the Court. There has been, however, among the identifiable interpretive approaches the High Court has taken over the eighty years or so since Engineers was decided, one unifying theme: the deliberate or effective marginalisation of federal principle in the interpretation of the Australian Constitution. The Court’s ‘new legalism’ does not appear to represent any substantive departure from this theme.

The Engineers’ case, while eschewing reliance on principles not directly expressed through the words of the Constitution, is itself an expression of such principles: a view of the Constitution as somehow embodying the principles of the Westminster system of government and a particular reading of Australian history to that date. With the Great War and a developing international personality marking the beginning of the gradual move to Australia’s complete independence from Britain, history making seemed in the offing and the High Court led by Isaacs sought to make it. With the Court’s help it was time for Australia to free itself not only of its colonial shackles, but also its perceived federal ones. History was made and Engineers has endured one way or another.

Dixon’s legalism, a more complicated and sophisticated approach to interpretation than represented by Engineers’ literalism, was based not on a theory of the Constitution as a charter for national government on Westminster
principles, but rather on a federal theory of the Constitution. However, the federal theory underlying the Constitution on Dixon’s account was fundamentally flawed, delivering national supremacy to the Commonwealth with effectively as much abandon as the *Engineers’* approach.

While the theories underlying *Engineers* and legalism were each founded on interpretivist claims to legitimacy, neither does justice to the actual theory underlying the Constitution. This theory is neither a theory of government on Westminster principles nor a flawed federal theory of government that largely delivers the same, but rather it is a sophisticated theory of federal government grounded on a division of powers between the States and the Commonwealth and a High Court entrusted to give dynamic and enduring effect to that division on the basis of substantive federal principle. For this reason, the interpretivist justification claimed for *Engineers’* principles and those underlying Dixon’s later jurisprudence represent a false claim to legitimacy masking their essential non-interpretivism. Each imposes a national purpose on the Constitution in filling out the meaning of its general terms, thereby eclipsing the federal purpose which is the actual foundation of the Constitution and which, on the interpretivist principles that inform the Constitution, should provide the touchstone for the Court’s constitutional jurisprudence.

Until the 1980s, Dixon’s refinement of *Engineers* into legalism was the ruling approach to constitutional interpretation by the High Court and the foundation of its constitutional jurisprudence. However, legalism’s dominance was apparently exploded in the 1980s and early 1990s, if not quite as dramatically as the federal jurisprudence of the Griffith Court actually was sixty years before in *Engineers*. In 1987, Galligan (1987: 261) predicted ‘a brave new world’ for the High Court as legalism was discarded in favour of what he has described as realism (note also Galligan, 1995: 182-188). The year before, not long before becoming Chief Justice, Mason (1986: 28) had also anticipated legalism’s demise. Stating that ‘it is impossible to interpret any instrument, let alone a constitution, without recourse to values’, he identified both the ‘ever present danger’ of legalism as its capacity to be ‘a cloak for undisclosed and unidentified policy values’ and the Court’s movement away from it (Mason, 1986: 5 and 28). In contrast to legalism, Mason (1986: 28) advocated that the
Court's decisions be more transparent and accessible. He also advocated that the ‘values’ which necessarily inform constitutional interpretation ‘should be accepted community values’ (Mason, 1986: 5; note also Mason, 1987: 158-159).

While community values in Australia have consistently supported federalism (note Galligan, 1995: 36), it was not those community values which the Court gave effect to in interpreting the Constitution as the Court self-consciously sought to distance itself from legalism, but ‘community values’ as distilled by it into protection for implied political rights. As far as federalism was concerned, the anti-federal logic of legalism was applied with even more vigour than it had been in the past.

RIGHTING FEDERALISM

The movement away from legalism that Mason identified in 1986 was seemingly evident in a number of cases heard by the Court on the federal division of powers during the early 1980s. It surfaced in *Hematite Petroleum* in relation to the Court’s understanding of the meaning of excise duties under section 90 and was apparently realised in the *Social Welfare Union* case with respect to the meaning of ‘industrial disputes’ under section 51(xxxv) and the *Tasmanian Dam* case on the scope of the Commonwealth’s external affairs power, all decided in 1983. But the shift represented by these cases was in many respects less a departure from the logic of legalism, than a process of purifying it of those elements which deviated from legalism’s underlying rationale in favour of national supremacy.

While legalism has been generally associated with a broadening of Commonwealth power relative to the States, the course of legalism was not all one way and its spirit was not always applied consistently. In some areas of constitutional law some members of the Court artificially contained the scope of the Commonwealth’s powers in ways which sought to protect federal values. This was manifest in attempts to contain the effect on the States of a broad definition of excise duties by looking to the ‘criterion of liability’ as the basis for determining whether a tax was an excise or not (note *Dennis Hotels*, 104 CLR
Another example was the Court’s continuing interpretation of the phrase ‘industrial disputes’ in the Commonwealth’s industrial relations power (section 51(xxxv)) as being limited to the field of productive industry (see for instance *Pitfield v Franki* (1970) 123 CLR 448; note generally Rothnie, 1985).

It was this aspect of legalism which Mason focused on in anticipating legalism’s demise. For Mason (1986: 24) legalism was not characterised by its broadening of Commonwealth power, but by its opposite: ‘a tendency to interpret federal powers narrowly’. And it was this aspect of legalism which the Court began to self-consciously correct in the 1980s. Federalism was to be ‘righted’, as it were, through giving free rein to the logic of national supremacy that has been the foundation of the Court’s constitutional jurisprudence in one way or another since *Engineers* was decided.

In righting federalism the Court did not return, as might be expected, to *Engineers* directly or its denial that implications could be drawn from the Constitution. Rather it acknowledged the existence of the implied limitations from federalism on the exercise of Commonwealth power first identified by Dixon, while affirming that the words of the Constitution were to be given their ‘natural’ meaning—the Court’s euphemism from *Engineers* on for a literal and broad reading of Commonwealth power. As Mason said in the *Tasmanian Dam* case:

... a head of power under s. 51 should be given its natural meaning; the exercise of power is then subject to the express and implied prohibitions in the Constitution, including the implied prohibition enunciated in *Melbourne Corporation*’ (158 CLR at 129).

Consistent also with legalism, the implied limitations on Commonwealth power were themselves limited in their application, as was also recognised by Mason (1986: 18):

... so far the implied prohibitions in Australia, as in America, have proved a fragile safeguard for state interests.
The departure from legalism at this time was a newly found preparedness on the part of the Court to identify the values underlying the Court’s decisions, in line with Mason’s criticism that the ‘ever present danger’ in legalism was that ‘it will be a cloak for undisclosed and unidentified policy values’ (note Doyle, 1993: 17-18; Zines, 1997: 447-449). Just as a ‘naturally’ broad reading of Commonwealth power was to be no longer subject to formal and artificial restrictions, it was to be supported not simply by reference to the inexorable logic of law, but also by express assertions of national supremacy as the preferred value. In Hematite Petroleum, Mason argued, following Dixon in this regard, that a substantive national purpose animated the Commonwealth’s exclusive power over customs and excise duties and it was that purpose and not any artificial legal formula which should provide the foundation of its interpretation (151 CLR at 631). In the Social Welfare Union case, ‘the high object’, as the Court described it, that the Commonwealth’s industrial relations power was ‘unquestionably designed’ to achieve—that is, the prevention and settlement of industrial disputes by conciliation and arbitration, ‘which could not be remedied by any action taken by a single State or its tribunals’ (153 CLR at 314)—was an important factor in the Court’s overturning of the previously narrow interpretation of ‘industrial disputes’. Similarly, the reasoning of the majority in adopting a literal interpretation of the external affairs power unconstrained by federal considerations in the Tasmanian Dam case was shot through with substantive reasons based on ‘the role of the Commonwealth in international affairs and its contribution to an evolving world order’ (Zines, 1997: 461). Mason’s comments in this regard are generally representative:

... it conforms to established principle to say that s. 51(xxix) was framed as an enduring power in broad and general terms enabling the Parliament to legislate with respect to all aspects of Australia’s participation in international affairs and of its relationship with other countries in a changing and developing world and in circumstances and situations that could not be easily foreseen in 1900 (158 CLR at 127).

The departure from legalism was not a substantive one. All the Court was now prepared to do was to make express the dominant values underlying legalism in favour of national supremacy which had previously been concealed behind its attachment to legal form.
Another key continuity with legalism was in the area of characterisation. As far as the process of characterisation was concerned, the *Tasmanian Dam* case confirmed that legalism's formalism would continue, at least where the powers of the Commonwealth relative to the States was at issue: if a law could be characterised as within one of the Commonwealth's enumerated powers, it did not matter if it could also be characterised as dealing with a subject not within those powers. As Doyle (1993: 16) has pointed out, and as was discussed in chapters 6 and 7, such an approach to characterisation, 'which eschews questions of the real nature of the law', gives the Commonwealth considerable leeway in using its legislative powers so as to achieve ends not otherwise within power, thereby 'gradually eroding the legislative powers of the States in the process'. In this respect, the formal qualities of legalism could be relied upon to support the substantive purpose of enhancing Commonwealth supremacy over the States. Legalism in the service of a national purpose, as opposed to attempts relying on those qualities to advance a federal purpose, was apparently legitimate.

After Mason became Chief Justice in 1987, the Court took the opportunity to apply a substantive approach to interpretation in addressing problems which had plagued other key sections of the Constitution. Most notably, they were section 92, the guarantee of interstate free trade, and the meaning of excise duties under section 90. The first would be resolved in the ground-breaking decision of *Cole v Whitfield*.

Section 92, the core of which provides that 'trade, commerce, and intercourse among the States ... shall be absolutely free', was a rock on which successive High Courts and the Privy Council, when appeals still lay to it, have floundered one way or another. As the Court said in *Cole v Whitfield*:

> No provision of the Constitution has been the source of greater judicial concern or the subject of greater judicial effort than s. 92 (165 CLR at 383-384).

The clause appears in chapter IV of the Constitution: Finance and Trade. Apart from anything else, it expresses one of the central tenets of the federation.
movement in Australia in the nineteenth century: the creation of an Australian common market, free of the protectionist burdens which many of the States had established (note La Nauze, 1972: 21; 36-37).

At the conventions, the openness of the phrase ‘absolutely free’ prompted concern among some delegates, Isaacs most prominent among them. He complained of the clause which was to become section 92 that:

\[
\text{It is not only unnecessary, but it is very dangerous. It goes much further than it is intended, and there are some expressions which, taken in connection with other portions of the Bill, are extremely large and alarming (Federation Debates, Adelaide, 1897: 1141).}
\]

Isaacs’ opposition to the clause on these terms was raised a number of times (see La Nauze, 1969), but to no avail and in the end the convention was satisfied with this ‘little bit of laymen’s language’, as the phrase was described there by Reid (Federation Debates, Melbourne, 1898: 2367). La Nauze’s description of the phrase as ‘a little bit of lawyers’ language’ is, however, the more accurate one, not only in terms of its genesis, but also its subsequent application (La Nauze, 1969).

Surrounding section 92 in the Constitution are clauses dealing primarily with the transition to the uniform imposition of customs duties by the Commonwealth. They include the granting of exclusive power to levy duties of customs and excise and to grant bounties once uniform customs duties were imposed, and also provisions dealing with financial arrangements between the Commonwealth and the States during and following the period of transition. This context indicates that the purpose behind section 92 was at least to provide protection from discriminatory taxes and charges on interstate trade (note generally Sawer, 1967: 174-176). However, as to whether and how far the section went beyond that is a question which has exercised the minds of politicians, lawyers and judges alike since federation. It seems clear enough that it goes so far as to include discriminatory protectionist burdens generally on interstate trade and not just taxes and charges, but do the words of section 92 guarantee that interstate trade, commerce and intercourse will be absolutely free from any government regulation at all? At first it appeared that the more
limited federal perspective on the scope of section 92 would receive favour on the Court, but that view was to be subsequently transcended by variations on the theme that the section protected individuals from government regulation in their interstate trade, commerce and intercourse. It was the more limited view that the High Court was to unanimously endorse in *Cole v Whitfield*. Before *Cole v Whitfield*, the substantive reasons for the Court’s approach to its interpretation of section 92 had become increasingly hidden and confused behind formal, complex and narrow legal categories. In *Cole v Whitfield* the High Court swept those aside concluding:

In relation to both fiscal and non-fiscal measures, history and context alike favour the approach that the freedom guaranteed to interstate trade and commerce under s92 is freedom from discriminatory burdens in the protectionist sense ... (165 CLR at 395)

Settling the meaning of excise duties would take longer and involve much more controversy as a federal interpretation competed with one favouring national supremacy. In 1997, a narrow majority in *Ha*, following the earlier decision in *Capital Duplicators*, confirmed the ascendancy of the wide view of the meaning of excise duties, which excludes the States from levying taxes on goods during their production or manufacture, or during their distribution. This view of the meaning of the grant to the Commonwealth of exclusive power over excise duties had been originally justified on the argument that the purpose it served was the national one of allowing the Commonwealth effective control over Australia’s economy. On the approach set out in *Cole v Whitfield*, however, the more moderate federal reading adopted by the minority justices in *Capital Duplicators* and *Ha* was justified. As with section 92, while the relevant provisions were not unambiguous, ‘history and context’ supported the assumption that the purpose underlying section 90 and the inclusion of excise duties within it was the limited one of protecting the Commonwealth’s tariff policy. However, in this instance, where a moderate federal interpretation by the Court would not simply effect a largely neutral outcome with respect to the relative position of the States and the Commonwealth, but would rather substantially support State autonomy within the federation, the Court looked not to any federal purpose, but to a national one to guide its decision-making.
Cole v Whitfield was a remarkable decision because it demonstrated how successful a substantive approach to interpreting the Constitution's general provisions which took account of history and context could be in cutting through the dead wood of decades of tendentious technicality. The decision was the most significant example of the Mason Court's rejection of both 'technical and formalistic rules' and 'an increased emphasis on the purpose of the provision' (Zines, 1995: 18). However, the federal approach taken in Cole v Whitfield was the exception rather than the rule. It stands out as one of the few decisions of the High Court in which an impartial substantive federal interpretation was made of a constitutional provision.

The Court's reassessment of legalism as its ruling theory of interpretation did not generally represent either divergence from the substantive foundation of legalism—the promotion of national supremacy within the federation—or the formalism of the process of characterisation in federal cases involving the scope of Commonwealth powers, so much as a preparedness to express legalism's underlying rationale in favour of national supremacy and to purge from legalism those deviant manifestations which were inconsistent with that policy. Righting federalism in this context was not primarily a process which saw substantive effect given to the federal principles which inform the Constitution, but primarily one of making them increasingly irrelevant as the Court gave up on 'policing federalism', as Galligan (1987: 261) described it. However, righting federalism was not just an end in itself, but also the first step in the Court's attempt to follow the trajectory of its older cousin, the United States Supreme Court, which, after returning to Marshall's jurisprudence of national supremacy with the encouragement of the national government at the time of the New Deal, began later to develop a substantive jurisprudence of rights as its main constitutional role (note Mason, 1989: 89-90; Lindell, 1994: 38).

DISCOVERING RIGHTS

If in drawing out and making express the dominant policy preference underlying legalism in favour of national supremacy and giving it effect in righting federalism was a prelude to discovering rights, legalism provided the foundation for the Court's movement towards a substantive jurisprudence of rights in
another sense as well. In a fundamental way the possibility of realising a rights’ jurisprudence, for all the Court’s ostensible rejection of ‘legalism’, could not have come about without Dixon’s constitutional jurisprudence.

While Dixon may not have sought or brought about a radical departure from the jurisprudence of national supremacy which was inaugurated into the law of the Australian Constitution by *Engineers*, he did attempt to rescue the Court from the limited constitutional role which was the logical outcome of that decision. Discouraging reliance on constitutional implications and treating the Constitution as a mere statute empowering national government, *Engineers* encouraged general deference on the part of the Court to the Commonwealth’s assessment of the scope of its powers. Through legalism Dixon reclaimed for the Court an active role in constitutionally reviewing the actions of the Commonwealth Government, but at the same time he continued the development of a jurisprudence which actively promoted the position of the Commonwealth within the federation over that of the States.

It was a fine and difficult balancing act, with the constitutional role of the Court continually threatened with being overwhelmed by the degree to which legalism inherently incorporated the *Engineers*’ bias in favour of national supremacy. If the theory underlying legalism was correct and the federal division of power under the Constitution had so little purchase that it provided virtually no constraint on the potential scope of Commonwealth power, then what constitutional role was the Court actually left to perform? This was the dilemma which the Mason Court attempted to resolve and it did this with a bold gambit. At one and the same time as giving in to the logic of national supremacy which has been the undertow of the Court’s jurisprudence from *Engineers* on and giving up on ‘policing federalism’, it took from Dixon his reclamation of the constitutional role of the Court and sought to give it new life through reinventing itself as the protector of constitutional rights (note Mason, 1995a: 247-249).

When Galligan (1987: 261) spoke of the Court giving up on policing federalism as a preliminary to interpreting an Australian bill of rights, he was not anticipating a jurisprudence of implied constitutional rights; he was anticipating, at least in the first instance, the Court interpreting a statutory bill of rights, the
passing of which was part of the Federal Government’s agenda at the time. In fact, a Human Rights Bill had been introduced into the Commonwealth Parliament at Lionel Murphy’s instigation as Attorney-General in 1973, but it failed there. The flame was kept alive by Gareth Evans, who as Attorney-General a decade on, would take forward the cause through a new, though more limited, legislative Australian bill of rights. However, the proposal was not taken to the Commonwealth Parliament until Lionel Bowen, Attorney-General after Evans, introduced a revised version in 1985, at which point it floundered, as had the 1973 Bill (see generally Charlesworth, 1994: 28-33). A few years later, during the bicentenary in 1988, clarification and extension of the existing limited rights contained in the Constitution were included among a number of proposals to change the Constitution, all of which were defeated at referendum. However, the High Court was there to fill the breach.

DEVELOPING A JURISPRUDENCE OF RIGHTS

The development by the High Court of a rights’ jurisprudence in the absence of a bill of rights began with the Court indicating a preparedness to give the express rights in the Constitution substantive purchase through leaving behind the formalism that had characterised their interpretation in the past. The most notable example is Street v Queensland Bar Association (1989) 168 CLR 461. Street was a New South Wales barrister who sought to be admitted to the Queensland Supreme Court, but was restricted from doing so because of residency rules applying to barristers in Queensland. Dispensing with the then narrow interpretation of section 117, which protects subjects of the Queen from discrimination by a State based on their residence within another State, the Court found in Street’s favour. The freedom from discrimination contained in section 117 was not interpreted as unrestricted by the High Court, but it now gave the section some real breadth, indicating that both its interpretation and application was to be determined on the basis of the Court’s rejection of ‘mere form’ over substance (Deane, 168 CLR at 527). However, what was to prove more controversial, was the Court’s preparedness to go beyond giving substantive effect to the small collection of express rights in the Constitution by beginning to imply rights from the Constitution.
In 1992, the first of the ‘free speech’ cases, as they have been called, were decided: *Nationwide News Pty Ltd v Wills* (1992) 177 CLR 1 and *Australian Capital Television v Commonwealth* (the *ACTV* case) (1992) 177 CLR 106. In both of these decisions, which were brought down at the same time, a majority of the Court found Commonwealth legislation invalid because it violated an implied freedom of political communication, though it was in the *ACTV* case that the nature of the freedom was most extensively explored.

In 1991 the Commonwealth Parliament passed the *Political Broadcasts and Political Disclosures Act 1991* which amended the *Broadcasting Act 1942*. The amendments sought to prohibit, with some limited exceptions, political advertising on radio or television in the lead up to a federal election. In the *ACTV* case, the High Court found by a majority of five to two that the amendments were invalid. All five judges in the majority—Mason, Deane, Toohey, Gaudron and McHugh—applied the implied freedom of political communication recognised in *Nationwide* in making their decision. Of the two judges who found the legislation valid, Brennan, while accepting, as he had in *Nationwide*, that the freedom existed, did not think the legislation was an unreasonable limitation of it, whereas Dawson did not accept that a freedom of this nature could be implied. He did accept, however, that the Constitution required that electors have sufficient access to information so as to be able to make ‘a true choice’ (177 CLR at 187).

Two quite distinct foundations for an implied freedom can be seen in the judgments. McHugh and Dawson based their reasoning on those express provisions of the Constitution through which representative institutions are established at the federal level, albeit reaching different conclusions. The crucial words are those in sections 7 and 24 of the Constitution requiring that members of the Senate and the House of Representatives be ‘directly chosen by the people’. McHugh, therefore, while recognising the freedom, saw it as arising directly from these provisions, which were to be ‘construed by reference to the conceptions of representative government and responsible government as understood by informed people in Australia at the time of federation’ (177 CLR at 230). It appeared, however, that for the other judges, the system of representative government as provided for by sections 7 and 24 and related
sections, was an institution informing the very structure of the Constitution and the freedom of political communication arose as an essential element of that system. Discerning the freedom in a concept of representative government rather than directly in the words of the Constitution, suggested a broad constitutional foundation for the implication of other freedoms or rights.

The Court's new found jurisprudence of implied rights was extended two years later in another pair of cases handed down on the same day. One was *Theophanous* and the other *Stephens v West Australian Newspapers Ltd* (1994) 182 CLR 211. In *Theophanous*, a majority of the Court found that the implied freedom of political communication provided a constitutional defence for a newspaper publisher from defamation laws which could otherwise have limited the publisher's ability to make comments or criticism in the context of political discussion. In *Stephens*, which was also a defamation case, the freedom was also implied from the Western Australian Constitution.

In the free speech cases, the implied freedom was not framed in the form of a personal or general right to freedom of speech. In *ACTV*, Mason referred to the prevailing belief held at the time of federation that 'citizen's rights were best left to the protection of the common law in association with the doctrine of parliamentary supremacy', and the framers consequent 'disinclination' to include anything amounting to a bill of rights in the Constitution (177 CLR at 135-136). Given this background, he noted that 'it is difficult or impossible, to establish a foundation for the implication of general guarantees of fundamental rights and freedoms' (177 CLR at 136). Consistent with these comments, the freedom of political speech recognised by the Court in these cases attaches not to the individual, but was seen to arise by the Court as a necessary concomitant of the form of representative government provided for in the Constitution, protecting and enhancing that form of government. Nor is the freedom absolute. Where a law restricts the freedom that law may nonetheless survive if, to use Brennan's words in *ACTV*, there is 'proportionality between the restriction which a law imposes on the freedom of communication and the legitimate interest which the law is intended to serve' (177 CLR at 157).
As to how the question of proportionality might be resolved in such cases, significant differences appeared on the Court at the time of the free speech cases. On the one hand, consistent with the increasingly substantive and active constitutional role for the Court asserted by some of its members, including the Chief Justice, consideration of whether legislative restrictions of the freedom of political speech were justified could be undertaken in ways which effected considerable control by the Court over the decisions of the legislature. Hence, Mason, as part of the majority that found the impugned law invalid in the ACTV case, emphasised that ‘in the ultimate analysis, it is for the Court to determine whether the constitutional guarantee has been infringed in a given case’ (177 CLR at 144). In contrast, Brennan took a more conventional and deferential approach to this question. He emphasised not the extent to which the determination was one for the Court to make, but, ‘that the court must allow the Parliament … a ”margin of appreciation”‘ (177 CLR at 159). On this basis, he concluded that the Commonwealth’s amendments to the Broadcasting Act at issue in ACTV did not infringe the freedom.

The extent to which the concept of proportionality can be relied upon as a means of asserting judicial authority over the legislature in the context of protecting rights and freedoms was highlighted in another sense in Nationwide. At issue in Nationwide was the validity of a section of the Commonwealth’s Industrial Relations Act, which made it an offence for a person to use words calculated to bring a member of the Industrial Relations Commission or the Commission into disrepute. This law could not be sustained as an exercise of power at the core of the Commonwealth’s power over industrial relations, but only as an exercise of the incidental power which attaches to each grant of power. For a law to come within the scope of the incidental power, it is required that there be a sufficient connection between the law and the subject matter of the power, as Mason noted in Nationwide (177 CLR 27). While a majority in Nationwide had relied on the implied freedom in finding the legislation at issue invalid, the remaining justices found the legislation invalid on the basis that it lacked a sufficient connection with the Commonwealth’s industrial relations power. In reaching the latter conclusion, Mason applied a test requiring ‘reasonable proportionality … between the designated object or purpose and the means selected by the law for achieving that object or purpose’ (177 CLR
29). Mason found that the means chosen to achieve the object or purpose of the legislative provision—protecting the reputation of the Commission and its members and public confidence in its determinations (177 CLR 31)—was disproportionate. He emphasised in his judgment that, in considering the issue of proportionality, account must be taken of any adverse impact the law in question may have on 'fundamental values traditionally protected by the common law, such as freedom of expression' (177 CLR at 31). In this case, Mason found that the adverse impact of the impugned law on freedom of expression, and particularly 'freedom of expression in relation to public affairs and freedom to criticise public institutions' (177 CLR at 34), deprived it of validity. The importance which the Chief Justice accorded the value of freedom of expression in limiting Commonwealth power in the process of characterising a Commonwealth law is to be contrasted with the Court's consistent emphasis on minimising the importance of federal values or implications in that process.

During the 1990s, the Court began tentatively to also explore the extent to which the separation of judicial power under the Constitution may provide a foundation for rights implications (note Kennett, 1994: 589-596; Winterton, 1994). In Polyukhovich, for example, working from the principle that determining guilt is an inherent part of judicial power, the Court indicated that some retrospective criminal laws, such as bills of attainder, would be invalid, though only a minority rejected the general possibility of the Commonwealth Parliament passing retrospective criminal laws. Another example, is Leeth v Commonwealth (1992) 174 CLR 455, in which some life was given to a concept of substantive due process, though its scope, if any, remains undeveloped (note Winterton, 1994: 201-204; Blackshield and Williams, 2002: 1284).

JUSTIFYING A JURISPRUDENCE OF RIGHTS

While there are significant connections between legalism and the development of this rights jurisprudence, there is apparent discontinuity between that jurisprudence and the decision in Engineers, in which the legitimacy of the Court drawing implications from the Constitution was denied. However, there is nonetheless a major continuity in the rhetoric which has justified Engineers and
that which accompanied the Mason Court’s emphasis on substance and rights in interpreting and applying the Constitution.

*Engineers* has been seen as an evolutionary decision consistent with the dynamic development of the law of the Constitution and Australia’s place in the world as an independent nation. The rhetoric surrounding the Court’s development of a right’s jurisprudence has resonated with the same themes. If *Engineers* represented a constitutional decision reflecting and supporting Australia’s developing nationhood, with national supremacy going hand in hand with national independence, an evolution which the Constitution was apparently designed to accommodate, then the Mason Court’s substantive turn represented no more than another step along the way to the complete realisation of that vision. The 1980s saw the increased marginalisation of the already diminished significance of federalism as a source of constitutional principle and assertions of a new constitutional role for the Court as the protector of rights justified as part of Australia’s natural constitutional evolution. Just as the growth in Commonwealth power, Australia’s involvement in The Great War and its subsequent, albeit restrained, movement towards nationhood could be pointed to as a justificatory foundation for the decision in *Engineers* (note Mason, 1995a: 241-243), so too could contemporaneous external events be read as providing the foundation for the Court’s new orientation in method and content under Mason.

One of these events has been considered in the context of the Court’s interpretation of the external affairs power: the increasing economic and political interdependence among nations following the Second World War which has been most clearly marked in the exponential growth of international agreements among nations. This development, as we have seen, was pointed to in order to justify the Court’s denial of any substantive federal limits on Commonwealth power which might limit its capacity to engage internationally as Australia’s national government (the *Tasmanian Dam* case). It could also be relied upon by the Court in giving recognition in Australian law to the increased emphasis on human rights in international law (note Kirby, 1995; Mason, 1997; Patapan, 2000: 19-20).
Another was the evolution of the Court itself. While, through a combination of constitutional provision and legislative enactment, \textit{inter se} questions were determined almost exclusively by the High Court from its beginning, the right to appeal otherwise from the High Court to the Privy Council did not begin to be limited until the passing of the \textit{Privy Council (Limitation of Appeals) Act 1968} by the Commonwealth. It was not until the passing of the \textit{Privy Council (Appeals from the High Court) Act 1975} that such appeals were effectively completely abolished. However, the right to appeal from State Courts directly to the Privy Council was not effected until 1986 with the passing of the Australia Acts. The existence of a right of appeal to the Privy Council was seen as a constraint on the independence of the High Court and with it the development of Australian law (Mason, 2000: 100-102).

The elimination of appeals to the Privy Council from the High Court was followed in 1984 with amendments by the Commonwealth to the Judiciary Act and \textit{Federal Court of Australia Act 1976}, which further enhanced the independence and authority of the High Court. Until then appeal to the High Court lay of right, but following these amendments, appeal to the High Court could now only proceed upon the Court granting special leave. With these changes, the Court could control the number and type of cases that came before it, enabling it ‘to devote itself to its responsibilities as a constitutional court and as an ultimate court of appeal’ (Mason, 2000: 112). It is now more likely to be involved in developing the law rather than simply applying it, as the Court now deals primarily with cases in which existing precedent and principle do necessarily provide a clear answer (note Gleeson, 1997 and 2000a: 77-78; Mason, 2000: 112-117). With this development, the nature of the Court’s work, rather than reinforcing the positivist conception of law as a relatively seamless web of determinative rules, encourages a more sophisticated conception of law, including the law of the Constitution, as a practice of developing legal principle.

The complete cessation of Privy Council appeals from any Australian Court was part of a more generally significant change brought about by the Australia Acts. Australia had become an independent nation certainly by the time the Statute of Westminster Adoption Act was passed by the Commonwealth in 1942, but the States retained their colonial status and remained subject in part to the legal
sovereignty of the British Parliament. With the passing of the Australia Acts, the remaining significant legal vestiges of Australia's colonial past were removed. Not only did the Privy Council cease to be in anyway a court of appeal for Australia, but the formal capacity of the British Parliament to pass legislation applying to either the Commonwealth or the States was terminated (see generally, Lindell, 1986: 33-36).

The long drawn out process of Australia becoming not only an independent nation, but also one completely autonomous of the Imperial cause that was its genesis, was complete. Australian independence was wholly realised, as was the High Court's status as the final court of appeal in all matters of Australian law. In this transformation, a fundamental change in the status of the Constitution and the High Court could be perceived. No longer was the Constitution to be conceived of as a mere statute emanating from the ultimate legal authority of the British Parliament. The source of the Constitution's authority, and consequently the Court's, was now seen to be founded by some members of the Court solely on the sovereignty of the Australian people (Mason in ACTV, 177 CLR at 138; Deane and Toohey in Nationwide, 177 CLR at 72; McHugh in McGinty v Western Australia (1996) 186 CLR 140 at 230; note also Mason 1986: 24-25; Winterton, 1998; Patapan, 2000: 30-31). And so with Australia coming of age so too did the High Court and the Constitution:

The Court no longer simply ensures that the processes of parliamentary government are followed, it is now an institution that belongs to the people and exercises its powers for the people. This gives greater legitimacy to the judiciary and, as a superintendent of the sovereign will of the people, the Court may elevate its role above other institutions including Parliament (Patapan, 2000: 31).

Kennett (1994: 583-584) and Patapan (2000: 20) both consider that an important reason for the Court's reassessment of its function under Mason's leadership was the failure of parliamentary government on the Westminster model to adequately control executive power and so protect citizen's rights. Such concerns prompted a number of High Court justices to suggest that the judiciary can, through the application of rights, perform an important role in containing executive power and restraining the excesses of the majority will (note Mason, 1989 and 1996: 29-30; Brennan, 1991; Toohey, 1993). With this
next major evolutionary step in Australia’s constitutional development, the Court was now entrusted with giving effect to the sovereign will of the people as expressed through a Constitution founded on their authority and informed by higher order democratic rights designed to contain governmental power. This is in contrast to the Court in *Engineers*, which sought to support the sovereign will of the people as expressed through national institutions of government.

An important point which is too often overlooked in the developing discussion about the primacy of the people as the political and legal source of the Constitution’s authority is the essential federal component to the concept of ‘the people’ under the Australian Constitution. Informing the Constitution is a concept of ‘the people’, but it is a federalised one, which is not confined to the people of Australia as a single entity. The people of each of the colonies for the most part elected equal numbers of representatives to the 1897-1898 federal convention at which the Constitution was finally drafted; the referenda through which the draft constitution was approved were separate referenda held in each colony; and the reference to ‘the people’ in the preamble is a reference to the people of each of the original States separately recognised. Moreover, section 128 requires not only that a majority of Australians approve a proposed change to the Constitution for it to go ahead, but also majorities in a majority of States. The democratic foundation for judicial review is consequently intrinsically related to Australia being a federal democracy in which ‘the people’ of Australia are not simply a national entity, but also a federal one. The ultimate duty of the High Court may be to the people, but under the Constitution it is the people in this federal context that is important, a factor which highlights the inherently federal foundation of the form of limited government given effect through the Australian Constitution, if not by the High Court.

Another important point often overlooked in this discussion is that the Constitution has always been an organic instrument constitutive of the Australian polity, a foundation of which was popular sovereignty given constitutional recognition in the section 128 referendum requirement for its alteration. The rescission of Britain’s theoretical power to legislate for Australia did not radically add to or fundamentally alter its nature as such (note Lindell, 1986: 37 and 1992: 224; Winterton, 1998: 7-10). As to the legal foundation of
the Constitution, it was at the time of federation necessarily derived from its enactment at Westminster and it was one which lent considerable political authority to the new Australian Commonwealth (Winterton, 1998: 5-6).

The changes in 1986 did not radically alter the nature of the Constitution and nor did they radically alter the constitutional role of the High Court. The Constitution has always been an instrument of government limited on the basis of higher order democratic principles, and the High Court, from its inception, a constitutional court under a constitutional duty to give effect through judicial review to those principles. But the principles which trump the contingent political will of temporary majorities represented in the Australian Parliaments, and which the Court is supposed to apply, are overwhelmingly federal based, not rights-based.

The framers deliberately did not include many rights-based guarantees in the Constitution because they believed citizen's rights were adequately protected through the common law and parliamentary political processes founded on the principle of responsible government, as Mason noted in ACTV (177 CLR at 135-136; note also La Nauze, 1972: 227-232; Dixon, 1965: 102; Patapan, 1997: 231-232). As Patapan (1997: 232) has argued, the small collection of rights in the Constitution was included either because they were 'consistent with federalism' or merely declared what was accepted orthodoxy. The integrity of Australia's federal system, however, was not left to be maintained through the political process, but through the courts. The fact that the High Court could even begin to imply rights and strike down legislation on that basis is strong evidence of the structural logic of a system in which responsible government is a subsidiary principle. But how and why under the Australian Constitution is responsible government a subsidiary principle and how and why is the High Court able to assert its authority over Parliament? The reason is not the limited rights in the Constitution, but the federal limitations it imposes. Yet, it is the influence of federalism on constitutional interpretation that has been most persistently undermined since Engineers.
THE DEAD HAND OF LEGALISM

In the 1990s, it seemed that the predictions of legalism’s demise had come true. The Mason Court had begun to apply an overtly substantivic approach to constitutional interpretation, marked most dramatically by its beginning to develop a constitutional jurisprudence of implied rights. In 1995, Galligan (1995: 186), in confidently declaring that ‘[t]he court has not simply abandoned the rhetoric of legalism; it has also deliberately embarked on a more active role of developing the Constitution’, could rely, in reaching this conclusion, on the following comment by the Chief Justice of the High Court: ‘[i]n Australia we have moved away from the declaratory theory and the doctrine of legalism to a species of realism’ (Mason, 1994: 162). However, it seems that the promise of the ‘new realism’ on the High Court was to be short lived. At the turn of the new century, Mason (2000: 119), having retired as Chief Justice some years before, was to observe:

There are signs that this approach may be waning. The Court may be returning to a methodology that places great store by doctrinal discussion ostensibly little influenced by discussion of policy considerations.

More recently, Patapan (2002: 241) has noted the Court’s professed ‘return to legalism’ under the current Chief Justice, Murray Gleeson, who has endorsed ‘strict and complete legalism’ in interpreting the Constitution (Gleeson, 2000a: 85 and Gleeson, 2000b: 9). Patapan (2002: 243) is careful not to overplay the change, but the ‘realist’ nomenclature of the 80s and 90s has been replaced with a description of the Court’s approach as a ‘new legalism’. And while it can be said that Gleeson has not directly denied the decisions of the Mason Court or more generally ‘judicial law-making’, ‘Constitutional implications’ or ‘the need to accommodate social change’ (Patapan, 2002: 243), he has certainly shifted the focus fundamentally away from the realism inherent in allowing ‘community values’ to guide the Court in the task of constitutional interpretation. The present focus is not on what the Chief Justice has called ‘the prescriptions of a current generation of lawyers’, but rather one of the central tenets of legalistic orthodoxy: it is ‘through the political process, and the exercise by the people of their choice in the selection of parliamentary representatives, that responsiveness to the popular will exists’ (Gleeson, 2001b).
The return to legalism, however, began earlier than Gleeson’s appointment as Chief Justice. The development of a substantive jurisprudence of implied rights beyond its limited beginnings in the free speech cases was substantially contained only a few years after the first cases were decided. The basis for that containment was found in the judgments of McHugh, in particular, in the free speech cases and his narrow conception of the source for any implied freedom. His views relied expressly on orthodox approaches to interpretation and emphasised that the foundation for the implied freedom of political communication lay directly in and was conditioned by the express terms of the Constitution. The coming ascendancy of the narrow view could be observed in McGinty’s case in which it was adopted by a majority of the Court led by Brennan, who had replaced Mason as Chief Justice in 1995 (note Williams, 1996: 853-857). In taking the narrow approach, the scope for the Court to imply further rights or freedoms from the concept of representative government as provided for in the Constitution, or indeed for application of the implied freedom of political communication as it stood, was limited. In a unanimous decision, the ascendancy of the narrow view was confirmed in Lange v Australian Broadcasting Corporation (1997) 189 CLR 520.

The new cautiousness in the application and development of implied rights at this time was also reflected in how the Court approached questions of characterisation. Whereas in Nationwide, Mason sought to enhance the substantive role of the Court in determining the validity of legislation which relied on the incidental power through application of a test of reasonable proportionality, four years later, the Court in Leask appeared to place greater emphasis on the more conventional requirement of sufficient connection. As Brennan said in Leask:

... the basic test of validity remains one of sufficient connection between the operation and effect of the law on the one hand and the head of power on the other. If the head of power is purposive (eg, the defence power), the existence of a connection may be determined more easily by comparing the purpose of the law and the purpose of the power. But if the relevant head of power is non-purposive (as the taxation and currency powers are non-purposive) the validity of the law is more likely to be determined by reference to its operation and effect (187 CLR at 591).
This understanding of Leask is consistent with the Court’s general retreat from the implications of pursuing a robust jurisprudence of implied rights and reluctance to take forward methods of interpretation and characterisation which require the Court to make substantive evaluations of legislative purpose.

The present Chief Justice has acknowledged that ‘values’ underpin law and it is those values which should be given effect by the courts: ‘Judges are appointed to interpret and apply the values inherent in the law’ (Gleeson, 2000b: 9). However, despite this acknowledgement, the Gleeson Court has not indicated what ‘values’ it sees as inherent in the law of the Constitution as the Court tries to find a way forward through legalism after the heady days of the free speech cases. In an early review of the present Court’s decisions, Zines (2000b: 237-238) asks, ‘[w]hat trend do they show?’ His answer is ‘none’ and his assessment is hardly encouraging of any future vision emerging on the Court:

There is not, in my view, any general pattern or direction at this stage. The cases are a motley collection in which the Court and individual judges take varying approaches depending on the issue.

The present High Court will not develop any settled criteria of interpretation unless it relies on and applies a theory of the Constitution in its interpretation of the Constitution. Without such a theory through which to understand the Constitution’s general terms, the meaning of those terms will become merely contingent and the decisions of the Court taken as a whole will lack coherence, a possibility of which Dixon was all too aware. This is why ‘legalism’ as applied by Dixon was not simply a legal method, but an approach to interpreting the Constitution founded on a theory which he argued was immanent in the Constitution.

Shortly after having retired as Chief Justice, Mason, in reflecting on the development of the High Court, remembered appearing before Dixon. Mason (1995b: 275) noted Dixon did not say much, confining himself to ‘cryptic comments’ and manifesting ‘a sardonic expression’. Something of the latter quality appears in Dixon’s well-known and too often uncritically quoted comment on the framers’ lack of imagination:
The framers of our own federal Commonwealth Constitution ... found the American instrument of government an incomparable model. They could not escape from its fascination. Its contemplation damped the smouldering fires of their originality (Dixon 1965: 44).

This is a view of the Constitution which this thesis has sought to displace. Dixon was right that many of the central aspects of our constitutional structure reflect the pattern of the American instrument, but the decisions the framers made reflected not slavish copying of American precedent, as a visiting Fullbright Scholar, Robert Moffat (1965: 78) once pointed out, but a deliberate and carefully considered choice of a particular form of federalism as being well suited to the needs of the emerging Australian nation. There is nothing wrong with the model on the interpretivist assumptions about constitutional law that the framers carried with them and which inform the Constitution. An interpretivist model of constitutional law assumes only that certain principles can be given legal effect in a constitution and applied into the future to provide a framework for government and law. The principles can always be subverted, but when that happens let us not pretend the opposite is happening or that it is the fault of the instrument or its makers. The Australian Constitution is not a comprehensive code, there are gaps in it. It is also an instrument of relatively general provisions deliberately designed to be applied dynamically to the changing circumstances that the country and its institutions would necessarily face overtime. The meaning of its terms was never intended to be fixed in a rigid sense. But both of those characteristics necessarily give the High Court, which is entrusted to be the Constitution’s final interpreter, a choice: whether to apply the principles which inform the Constitution or not. For much of its history the Court has in fact made the latter choice, while purporting to have made the former.

The focus on form, as in the Engineers’ case and Dixon’s later reworking of it, muddied the waters, deflecting criticism away from the substantive reasons for the Court’s decisions and assessment of their consistency with the Constitution, and with good reason from that point of view. Those reasons were often not consistent with the Constitution. While the Mason Court’s preparedness to acknowledge the substantive reasons for its decisions was to be welcomed, it did not change the fact that in effectively continuing to support a jurisprudence
of national supremacy, its decisions reproduced the non-interpretivism of the legalism it claimed to transcend.

The Australian Constitution is overwhelmingly a federal Constitution which was made by mostly elected representatives of the people, approved by the people within each Australian colony, and passed largely unchanged by the Imperial Parliament aware that its legal supremacy could not substantially override the political supremacy of its Australian makers. The key element of that federal system is the division of powers between the Commonwealth and the States, a division effected by granting the Commonwealth through a written Constitution certain specific and limited powers and creating a constitutional court in the High Court to maintain it. However, since the Engineers’ case was decided, this is the one thing the High Court has not done. Time and again through its judgments and the statements of its leading members it has denied the significance or efficacy of the division of powers between the Commonwealth and the States, which was supposed to provide the foundation for Australia’s federal system of government and which provides the primary foundation for the Court’s existence as a constitutional court.

In Theophanous, Deane said, ‘to construe the Constitution on the basis that the dead hands of those who framed it reached from their graves to negate or constrict the natural implications of its express provisions or fundamental doctrines would deprive what was intended to be a living instrument of its vitality and its adaptability to serve succeeding generations’ (182 CLR at 171). But the dead hand which contained the Mason Court’s rights jurisprudence is legalism, a dead hand of the High Court’s own making. It is not the framers who lacked imagination, but the High Court itself. Rather than taking the invitation contained in the Constitution to act as a constitutional court and to give dynamic effect to the federal principles underlying it, the Court since Engineers has for the most part denied that role, existing instead to serve not the purposes of the Constitution, but the purposes of the Commonwealth.

In interpreting federalism out of the Constitution, the constitutional jurisprudence begun with Engineers and refined by Dixon into legalism, cut not only the words of the Constitution adrift from their federal foundation, but also the ground from
under the Court’s own function of judicial review. While the present Chief Justice has acknowledged and emphasised the federal foundation of the Constitution (Gleeson, 2000a, 10-12; 2001a), the expectation must be that, in the absence of a preparedness to take federalism seriously and apply the federal principles underlying the Constitution in its interpretation, the new legalism will be no different to the old. In legal terms, Australian federalism will remain diminished and with it the Constitution and the High Court.
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