



Australian Federalism: An Innovation in Constitutionalism

Author

Patapan, H

Published

2009

Book Title

The Ashgate Research Companion to Federalism

Downloaded from

<http://hdl.handle.net/10072/30766>

Link to published version

<http://www.ashgate.com>

Griffith Research Online

<https://research-repository.griffith.edu.au>

AUSTRALIAN FEDERALISM: AN INNOVATION IN CONSTITUTIONALISM

Haig Patapan

The Commonwealth of Australia came into being on 1 January 1901. On that day the former colonies of New South Wales, Victoria, South Australia, Queensland and Tasmania, 'agreed to unite in one indissoluble Federal Commonwealth'. The new Australian Constitution, drafted in the course of public conventions and finally adopted through referenda, transformed the former colonies into states, preserving as much as possible their constitutions. It also brought into being a new federal government made up of a new parliament and executive, as well as a new federal judiciary. From this perspective the rather spare and prosaic provisions of the Constitution confirm the Australian founding to be, in essence, a federation, where colonial concerns regarding defence and economic efficiency were accommodated while retaining as much as possible their Westminster inheritance. Accordingly much of the scholarship on Australian constitutionalism, and indeed the bulk of its constitutional litigation, has concerned aspects of Australian federalism; scholarly debate has been dominated by the problem of commonwealth-state relations, the judicial resolution of such disputes, and the far-reaching political and public policy consequences of these debates.

The founding as a federation – something obvious and undeniable – is also in one sense unhelpful for understanding Australian constitutionalism. The reason for this is that by concentrating on this aspect of the founding and therefore the Constitution, we are distracted from seeing something that is of equal consequence – the founding was a revolutionary moment in Australia. Of course the founding was not revolutionary in the sense that it was a radical break from Britain: it is enough to recall that Australia is still a monarchy, and that the Constitution, though autochthonous, was finally enacted as a British Act of Parliament. Rather, it was revolutionary in the subtle yet profound way it transformed orthodox Westminster constitutionalism.

It is generally accepted the Australian founding is an admixture of British and American influences. Yet the fundamental changes introduced by the adoption of federalism has been insufficiently appreciated. In this chapter we will explore the changes in constitutionalism introduced into Australia through the means of American

federalism, regarded by the American founders as an innovation in modern political science. To do so, we will first examine the complex nature of orthodox colonial constitutionalism, the tradition that shaped and informed the colonial founding and which continues to influence modern Australian constitutionalism. As we will see, this colonial constitutionalism is itself constituted by a number of traditions, the most significant of which include parliamentarianism and the common law. Having examined the dynamic tensions within colonial constitutionalism, we then examine the extent to which federalism was understood by the American founders as a modern innovation to secure republicanism. In the final section the chapter will look at three specific aspects of constitutionalism – the idea of constitutionalism itself; judicial review; and rights – to explore how the innovation of federalism has transformed Australia. Seeing Australian federalism as more than matter of federal-state relations, as an innovation in constitutionalism, I suggest, is important not simply for historical reasons, but because it provides important insights into an innovation that continues to shape and influence the contours of modern Australian politics.

Parliamentarianism, the Common Law and Colonial Constitutionalism

To understand the innovation that was federalism, it is necessary to appreciate the character of the constitutionalism that informed the Australian colonies. This task is made difficult, however, by the limited extent of the scholarship on the different traditions that influenced colonial rule before federation.¹ Certainly there is comparatively little research on the way indigenous traditions have shaped Australian constitutionalism.² Of the British inheritance, much more research is needed into the theoretical sources that influenced colonial, and subsequently Australian constitutionalism.³ What is clear, however, is that the colonial founding was shaped by many traditions, some of which were at considerable tension. In this context it is sufficient if we sketch two major – and contending – sources of these traditions to show the dynamic tensions within the orthodox constitutionalism.

¹ See generally Castles (1982); Hirst (1988); Irving (1997); Martin (1986); Irving and Macintyre (2001); Gascogne (2005).

² See in this context the High Court's decision in *Mabo (Mabo v Queensland (No 2))* (1992) 175 CLR 1) and Russell (2006).

³ Of the recent scholarship that attempts to examine these theoretical influences see, for example, Warden (1992; 1993); Meale (1992); Melleuish (1995); McMinn (1994); MacIntyre (1991); Aroney (2002); Brown (2004).

Captain Cook took possession of the eastern coast of Australia on behalf of the Crown in 1770. But the colony of New South Wales was secured only after its subsequent possession and settlement by Governor Philip at Sydney Cove on 26 January 1788. Though initially a penal colony, by 1828 Imperial Legislation defined New South Wales and Tasmania as settled colonies. Representative government was attained in the colonies in 1842, and in 1850 the *Australian Constitution Act (No 2)* (UK) introduced responsible government by giving authority to the Legislative Councils of New South Wales, Tasmania, South Australia and the Victoria to establish bicameral legislatures and to fashion their own constitutions (Castles 1963; Windeyer 1962; Lumb 1983).

This 'Westminster' inheritance of parliamentary and responsible government, the initial model for the colonies that was subsequently retained in the new state and Commonwealth governments, relied to a large extent on conventions. The monarchy was, in Bagehot's terms, the 'dignified' part of the constitution. The efficient consisted of the Cabinet, 'a hyphen that joins, a buckle that fastens', the legislative and the executive (Bagehot 1963, 68). Drawn from and enjoying majority support in the popularly elected house, ministers in Cabinet were individually and collectively responsible to that house of parliament for the administration under their control. Under ministerial control, these officials holding independent and permanent tenure were selected on grounds of ability and expertise to be loyal, confidential advisers and servants of the ministers of the day. The conventions of the British constitutionalism, especially of responsible government, thus animated the formal structures of the British parliamentary representative system made up of the Crown, the House of Commons and the House of Lords. Even at the time of Bagehot this account of the Westminster system was no more than an ideal – according to Crossman (in Bagehot 1963, 35), the extension of suffrage, party machines and a large independent Civil Service had transformed Bagehot's account of Cabinet government. Nevertheless it was this concept of parliamentary and responsible government that dominated many aspects of the Australian founders' understanding of the ideal form of political arrangements. Consequently, it was these ideas that shaped the way they anticipated and responded to changes and innovations in constitutionalism (see generally, Parker 1982).

The Westminster tradition we have outlined above co-existed – and at times was in tension with – another tradition that had its origins in Britain, namely that of

the English common law.⁴ The dominant understanding of the ‘common law’, influenced by legal realists, is that it is ‘judge-made law’, the exercise of personal discretion by judges and the judiciary.⁵ In contrast, the older ‘declaratory’ theory of the common law denied that judges made the law; rather, they applied precedents that were appropriate to the case at hand. Thus it was the judge’s duty to discover, not invent, what law governed the case at hand. The written evidence of the common law was to be found in the record of cases previously decided. Where a case was genuinely novel, the judge was to proceed by analogy to the appropriate precedent, on the basis of the common law maxim that a precedent that ran against reason was no law. According to Sir Edward Coke, renowned common-lawyer who had sat as chief justice of the Court of Common Pleas (from 1606) and as chief justice of the King’s Bench (from 1613), the common law was the ‘perfection of reason’. But this reason was not any one individual’s reason. As he writes in his famous and influential *Institutes*, ‘for reason is the life of the law, nay the common law itselfe is nothing else but reason; which is to be understood of an artificiall perfection of reason gotten by long study, observation, and experience, and not every man’s naturall reason’ (*I Inst.* 97b; Coke 1832; Stoner 1992, 23).⁶

According to this common law tradition, the common law as a body of law entered colonies with its first settlers as their ‘inheritance and birthright’.⁷ But this common law did not simply define the terms and concepts that would subsequently be used in federation.⁸ More radically, it was the source of all legal authority. To

⁴ For an earlier formulation of this discussion see Patapan (2005).

⁵ The American jurist and Supreme Court justice, Oliver Wendell Holmes, argued in his famous work *The Common Law*, that what was historically understood as the common law was no more than the incremental exercise of personal discretion by judges and the judiciary (Holmes 1881). Legal realism, in the form of Roscoe Pound’s sociological jurisprudence, was introduced into Australia by Julius Stone: see Mason 1996; Gleeson 1999; Fullagar 1993; Kirby 1983.

⁶ The realist attack on this tradition can be traced from Holmes’ realism, back to Bentham’s attack on the confederacy of ‘sinister interest’, to Blackstone’s attempt to reform the common law, finally to its origin in Hobbes’ critique of the common law.

⁷ In contrast, the ‘reception date’ for statutory law was established for New South Wales and Van Diemen’s Land by the *Australian Courts Act* 1828 (Imp) as those laws and statutes in force in England on 25 July 1828 (so far as they could be applied). This was also the reception date for Victoria and Queensland as a result of their separation from New South Wales. The reception date for South Australia is 28 December 1836, and for Western Australia, 1 July 1829 (Zines 1999, 3). For detailed accounts of the reception of the common law see Castles (1982) and Windeyer (1962). For the history of the reception of representative and responsible government in the colonies see Melbourne (1963) and McMinn (1979).

⁸ The Constitution is much indebted to the common law, using many of its terms and concepts, including the powers, privileges and immunities of the executive (s 61); the meaning of trial by jury (s 80); the office of the Speaker (ss 35-37, 40); and the legal remedies of prohibition, mandamus and injunction (s 75 v) (Saunders 2003, 230; Zines 1999, 15).

understand what this means, it may be useful to refer to the opinion of Sir Owen Dixon, Chief Justice of the Australian High Court and regarded as one of greatest common law jurists.⁹ Dixon claimed that the common law was an ‘ultimate constitutional foundation’ (Dixon 1957). Unlike the American model, according to Dixon, ‘In Australia we subscribe to a very different notion. We conceive a state as deriving from the law; not the law as deriving from a State’ .

We do not of course treat the common law as a transcendental body of legal doctrine, but we do treat it as antecedent in operation to the constitutional instruments which first divided Australia into separate colonies and then united her in a federal Commonwealth. ... The anterior operation of the common law in Australia is not just a dogma of our legal system, an abstraction of our constitutional reasoning. It is a fact of legal history (Dixon 1943, 199).

According to this view, parliamentary sovereignty itself revealed the primacy of the common law: ‘It is not the least of the achievements of the common law that it endowed the Parliament which was evolved under it with the unrestricted power of altering the law’ (Dixon 1935, 40). It is because the common law is the source of the authority of the Parliament at Westminster – the English constitution forms a part of the common law – that Australia had as its ultimate constitutional foundation the common law.

As the antecedent jurisprudential principle for the Australian founding, the common law shapes the nature of Australian institutions and how they are to be understood and interpreted by the judiciary.¹⁰ For example, the common law supported the view that the Australian Constitution was an act of Imperial Parliament.¹¹ It also accounted for the importance accorded to the *Australia Acts 1986* enacted simultaneously by the United Kingdom and the Commonwealth, in effect severing legislative authority of Westminster Parliament over Australia.¹² Importantly, the common law defined the nature of the judiciary: where the Constitution has as its foundation the common law, the High Court, in interpreting the

⁹ In the thirty five years he spent on the Court, first as justice in 1929, and subsequently as Chief Justice from 1952 until his retirement in 1964, he left an impressive and influential legacy in the interpretation of the Constitution and the common law in Australia. He was considered as ‘perhaps the most distinguished exponent in the world of the common law’ (Lord Diplock) and as ‘one of the greatest common lawyers of all time’ (Lord Pearce). For these and other assessments see Stephen (1986, 293).

¹⁰ On the importance of the common law for the institutions of government, ranging from the principle of parliamentary sovereignty to responsible government see Saunders (2003, 229-231).

¹¹ See, for example, Windeyer (1962); Latham (1961); Mason (2000) and generally Winterton (1998).

¹² In arguing that parliamentary sovereignty is a child of the common law, these decisions reveal popular sovereignty as founded upon the common law.

Constitution, is in effect a common law court; the court interprets the Constitution primarily to dispose a dispute; it will not give advisory opinions;¹³ its decisions are never prospective.¹⁴

This necessarily brief account of only two, albeit major, strands of colonial constitutionalism – parliamentary responsible government and the common law – reveals the complexity, and the dynamic tensions, within the orthodox constitutionalism that could trace its origins to the early British history. It was this rich tradition that was soon to be transformed by the innovation that was federalism.

Australian Federalism

The comprehensively popular or democratic character of the Australian founding becomes evident when we examine the drafting of the Australian Constitution, and especially the role of the major conventions – the National Australasian Convention of 1891 and the Australasian Federal Convention of 1897-8.¹⁵

After Henry Parkes' famous Tenterfield Oration favouring a national government, the National Australasian Convention was held in Sydney from 2 March to 9 April 1891. Forty five delegates from seven colonies, including New Zealand, attended the Convention, drafting the first, and influential, version of the Constitution.¹⁶ For various reasons, however, the federation cause was not resumed until the Australasian Federal Convention, which met in three sessions, in Adelaide and Sydney (1897) and finally in Melbourne (1898).¹⁷ The significant feature of this Convention, which drafted the final version of the Constitution, was that its delegates were elected by the people.¹⁸ Importantly, after the Convention adopted the draft of

¹³ Unlike the Canadian Supreme Court, the High Court has held that it will not provide advisory opinions; the Court will not hear a matter unless there is a dispute or controversy where some immediate right, duty or liability needs to be established by the determination of the Court: *Crouch v Commissioner for Railways (Qld)* (1985) 159 CLR 22.

¹⁴ In striking down a provision as unconstitutional, the Court has held that such invalidity exists from the beginning or is *void ab initio*: see *South Australia v Commonwealth* (1942) 65 CLR 373; *Victoria v Commonwealth* (1975) 134 CLR 338; Mason (1989). In rejecting prospective invalidity, the Court adopts the common law view that it interprets and declares the law, rather than making it.

¹⁵ For first hand accounts of the Australian founding see, for example, Deakin (1944); Moore (1902); Wise (1913). For more contemporary accounts see La Nauze (1972); Crisp (1990); Irving (1999); Williams (2004).

¹⁶ The reasons for federating (principally economic, military and immigration) can be discerned from the resolutions proposed by Parkes at the Sydney Convention in 1891.

¹⁷ The official record of the Convention Debates are in Craven (1986) and electronically at <http://www.aph.gov.au/Senate/pubs/records.htm> and <http://setis.library.usyd.edu.au/oztexts/index.html>.

¹⁸ A conference at Corowa in 1893 had devised the 'Corowa Plan' for a new popular constitutional process. In 1897 popular elections returning ten delegates from each state were held in New South

the Constitution of the Australian Commonwealth, it was put to the people in the form of a referendum on the Constitution Bill.¹⁹ When the bill was amended to take into account certain concerns of New South Wales, it was again put to the people in 1899, where it was endorsed by all the states except Western Australia.²⁰ As this brief account of the making of the Constitution indicates, in the popular election of delegates for drafting the Constitution and in its final endorsement by the people through referenda, the Australian founding revealed and confirmed its democratic credentials.²¹

The Convention debates reveal the profound difficulties of federation, especially of fashioning new institutions and allocating powers and responsibilities while retaining as much authority in the states as possible. Where the orthodox constitutionalism confronted the new demands of federalism, the founders did not attempt to resolve these problems in abstract, theoretically, in the way, for example, *The Federalist Papers* (Hamilton et al 1982) sought to argue for federation in America.²² Rather, the Australian debates reveal attempts to reconcile different theoretical positions in the specific context of practical and institutional arrangements. For example, the major issue that divided the 1891 Convention, jeopardising federation itself, concerned the Senate's powers regarding amendment and rejection of money Bills, which appeared to be inconsistent with the convention of responsible government where the lower house was to predominate. After intense negotiations in Adelaide in 1897, the 'compromise of 1891' was adopted, restricting initiation of money bills to the House of Representatives and forbidding the Senate from amending taxation bills. Similarly, it was not clear whether federalism would, in the words of Hackett, 'kill responsible government' (Convention Debates, Sydney, 1891, 280). Sir Samuel Griffith in the 1891 Convention had proposed to leave the question open by providing that the executive *may* sit in Parliament. By the time of the 1897-8

Wales, South Australia, Victoria and Tasmania. The Western Australian parliament appointed its delegates and Queensland did not send any representatives.

¹⁹ The referendum took place in all states but Western Australia and Queensland. It was unsuccessful in New South Wales.

²⁰ Western Australia held its referendum on 31 July 1900.

²¹ Even when the bill was taken to the United Kingdom for its passage as an Act of Parliament, the delegates strongly resisted changes to its terms. On the nature of the compromise regarding the High Court provisions see Deakin (1944, 155-6). For a discussion of the limited conception of 'the people' see, for example, Irving (1996).

²² For an exception see, for example, Cockburn's defence of the English constitution as natural, as opposed to manufactured, 'rigid and written' American Constitution (Australasian Federation Conference, Debates, 1890, 135)

Convention there was strong support for retaining responsible government, described by Sir Isaac Isaacs as the ‘keystone of this federal arch’. Accordingly the requirement that the executive sit in Parliament was retained (Convention Debates, Adelaide, 1897, 169).

American Innovation

The discussion above shows how the founders suspected that federalism was innovative, yet attempted to resolve any possible tensions pragmatically, by modifying institutions or devising new ones. But what was innovative about federalism? If one were to understand federalism simply in terms of the allocations of powers between the states and the new commonwealth it may be possible to separate the innovations of federalism into changes that were due to federalism itself, for example, the introduction of another parliamentary body in the commonwealth, and in those innovations incidental to federalism, for example, that a new constitution was needed to implement federalism. Such an approach, though tempting, tends to deny something fundamental to the American federalism that the Australian framers used as their model, namely, the view that federalism itself was part of a larger experiment in democratic government.

We can see this more clearly when we examine the American founders’ conceptions of federalism. According to Publius in *The Federalist Papers* the founding represented a political experiment, not only for the benefit of Americans, but for all of humanity (*Federalist 1*) (Hamilton et al 1982).²³ The question to be tested was the very possibility of republicanism itself; whether it was possible to have a politics founded on ‘reflection and choice’ instead of ‘accident and force’. In testing the possibility of free government, Americans had before them the grand history and ancient models of republicanism. Yet the founders did not simply take their bearings from the past; the founding was not only politically, but also theoretically revolutionary: modern republicanism was founded upon natural rights.²⁴ Natural rights, informed by the modern political thought of Locke, Montesquieu and Hume,

²³ These were 85 letters by ‘Publius’ (Alexander Hamilton, James Madison and John Jay) published in New York newspapers in December 1787 urging the voters of the state of New York to ratify the proposed Constitution of the United States. On the status of the *Federalist Papers* as a rhetorical and philosophical work see generally Epstein (1984).

²⁴ The revolutionary nature of the American founding can be seen in the introductory words of the *Declaration of Independence*, which inaugurated a *novus ordo seclorum*, or a ‘new order of the ages’. The motto on the obverse of the Great Seal was suggested by Charles Thomson in June 1782.

and not divine, ancestral and traditional authority, was the foundation of modern republicanism. These rights, discerned by unassisted human reason ('self-evident' truths) and 'inalienable', included the individual liberty to pursue happiness. Accordingly, they determined the character, extent and end of government. Thus government was founded on a social contract or 'instituted' by the consent of equal, rights-bearing individuals, to secure these rights, and no more. Where governments exceeded this authority, natural rights also guaranteed a right of revolution.²⁵

Because 'advocates of despotism' relied on historical accounts of republican disorders to question not only republican government but all free government, another starting point was needed to found modern republics, one that had been developed in modern political thought. Modern political thought questioned the ability of individuals to dedicate themselves to the common good. Much safer, it was argued, to rely on a Machiavellian 'realism' – that 'it is necessary to whoever disposes a republic and orders laws in it to presuppose that all men are bad'.²⁶ In Hume's much admired reformulation, it was 'a just *political maxim, that every man must be supposed a knave*'. For Publius this was the realistic and therefore safe political maxim that men are not angels (*Federalist 51*). Human knavishness, apparently fatal to liberty, was to be transformed by the 'Inventions of prudence' to counter the 'defect of better motives' and establish modern republicanism. These inventions drew upon improvements in the science of politics that yielded new discoveries and perfected principles 'imperfectly known by the ancients':

The regular distribution of power into distinct departments – the introduction of legislative ballances [sic] and checks – the institution of courts composed of judges, holding their offices during good behaviour – the representation of the people in the legislature by deputies of their own election – these are either wholly new discoveries or have made their principal progress towards perfection in modern times (*Federalist 9*; Hamilton et al. 1982, 38).

To this list Publius added the enlargement of the republic into a 'one great confederacy', that is, federalism. Unlike ancient republics, the modern federal republic of the United States would have extensive territory, a consequence of the principle of passion countering passion, applied in terms of ambition countering ambition in government, to overcome the perennial problem of 'faction' in the governed. Faction, though traditionally based on the divisions between rich and poor,

²⁵ On the Lockean influence on the founding see generally Zuckert (1994; 1996); Pangle (1988).

²⁶ 'Men never work any good unless through necessity': Machiavelli, *Discourses on Livy*, Book I, Chapter 3.

also included the modern problem of religious ‘enthusiasm’. A commercial republic with an extensive territory would, in addition to the benefits of greater security without, multiply faction and thereby ameliorate both forms of potential divisiveness. Thus the American founding, an innovation in politics and an experiment in free government, was a modern founding; the modern diagnosis of the deficiencies of ancient thought and classical republicanism, and the new means of improving on their deficiencies, captured the founders’ imagination and instructed their actions.

Federalism itself, in this account, was one part of a much more ambitious experiment in republicanism, an innovation to test the possibility of people ruling over themselves by election and choice, without descending to constant dissolution and war. Each aspect of American founding, brought together, established a comprehensive political device to solve the political problem of securing republicanism. It was this innovation in modern politics that was introduced into Australia by American federal constitutionalism. Did the Australian founders appreciate the extent of this innovation? Some, for example Inglis Clarke, the Tasmanian Attorney-General who was one of the major contributors to the 1891 draft and a great admirer of America, certainly did. Others no doubt saw the innovations in the context of specific institutional tensions, as we have noted above. Perhaps for most, however, what was foremost was not the theoretical issues at stake, but of exploiting the advantages of federation to solve immediate and pressing economic and security problems.

Transforming Colonial Constitutionalism

To appreciate the extent to which federalism was innovative it is useful to examine in greater detail specific theoretical changes that were introduced at the founding. Clearly a comprehensive enumeration is not possible in this context. In what follows we will briefly review the core concept of constitutionalism, and its related ideas of republicanism, judicial review, and natural rights, to examine the nature of the innovations that federalism introduced to colonial constitutionalism. As we will see, these innovations were adopted extensively or in part, depending on the extent to which they challenged the orthodoxy. Moreover, the continuing tensions between traditions often became a matter for resolution by the judiciary, which until recently tended to favour the orthodox colonial constitutionalism and its presuppositions.

Constitutionalism

The very concept of constitutionalism – of a constitutive legal enactment, derived from the people, that places limits on government – was a federal innovation. Strictly speaking Britain did not have such a foundational enactment – its constitution was an amalgam of conventions and a number of significant historical agreements and Acts, such as the Magna Charta, the Bill of Rights, and the Act of Settlement. Colonial constitutionalism was of course familiar with constitutions, but only as enactments by Imperial Parliament founding the colonies and allowing them increasing independence and authority. Thus in this context the Australian Constitution was simultaneously, section 9 of the British *Commonwealth of Australia Constitution Act 1900*, and an enactment by the people of the colonies to establish a new nation. This tension and ambiguity between a British parliamentary conferral of authority, and a popular ‘Australian’ limitation on governmental authority, can be seen most clearly in the political problem of who was sovereign in Australia. The formal authority of the United Kingdom Parliament was evident in the Constitution itself, as well as the subsequent enactments such as the *Statute of Westminster 1931* (UK) and the *Australia Acts 1986* (UK and Cth), which confirmed the gradual evolution of Australia into an independent nation.²⁷ After all, the Constitution did speak of a ‘subject of the Queen’ (section 117). Yet it could not be denied that the means by which the Constitution was drafted and accepted, as well as its provisions, also recognized and established popular sovereignty in Australia. ‘Whereas the People’, its very first words, signalled the decisive importance of the people. Consistent with the intention of the preamble, the people are essential for the parliamentary democracy secured by the Constitution: it is the people who choose members of the House of Representatives and Senators (sections 7; 24). Importantly, it is only the people (as ‘electors’) who can alter the Constitution (section 128). The scholarly debate as to whether Australia was a federal republic from its inception indicates the tension between this colonial understanding of constitutionalism, where parliament is

²⁷ The *Australia Acts 1986*, were identical provisions enacted by the United Kingdom Parliament, and the Commonwealth, declaring that United Kingdom Parliament could no longer legislate for Australia.

sovereign, and the sovereignty of the people, an innovation introduced by federal constitutionalism.²⁸

Judicial Review

These different conceptions of constitutionalism were also evident in the founders' understanding of judicial review. As we have seen the founders sought to secure what Publius called one of the new discoveries of political science – separation of powers – into the Constitution. Though its adoption was resisted and limited by the principle of responsible government, so that the executive and the legislative were not strictly separated in Australia, in one respect separation was wholly successful: the 'Judicature' was entrenched in the Constitution (chapter 3). Along with the establishment of a new High Court of Australia, the Constitution secured the appointment, tenure and remuneration of the judiciary. Importantly, one of the most significant roles assigned to the new Court was that of determining constitutional disputes.

For the founders judicial review was a natural and necessary consequence of federalism. How would the inevitable problems, doubts and disputes regarding the federal demarcation of powers be resolved? The answer appeared simple once the Constitution was seen as a legal enactment: the judiciary, and specifically the new High Court, was best placed to determine the meaning of the Constitution. It was qualified to undertake such a legal task, and it was sufficiently independent to assure a fair outcome. Judicial review was indistinguishable from the way common law adjudication proceeded, and was identical to the role of the Judicial Committee of the Privy Council, the ultimate source of appeal for constitutional and general legal disputes.²⁹ This view and understanding of judicial review was incapable of seeing the democratic problem of judicial review as articulated in the American Supreme Court decision of *Marbury v Madison*. In terms of federal constitutionalism, judicial

²⁸ See generally Winterton 1992; Warden 1993; Galligan 1995; Williams 1995; McKenna 1996; Wright 2000 and 2001; Meale 1992; McKenna and Hudson 2003.

²⁹ One of the important changes made in London in the course of enacting the Constitution bill was to retain appeals to the Privy Council. This was supported by the British Colonial Office, a group of colonial Chief Justices and retired judges, as well as English investors: see generally La Nauze (1972, 173, 220-2, 248-9). Appeals to the Privy Council were gradually limited: *Privy Council (Limitation of Appeals) Act 1968* (Cth), the *Privy Council (Appeals from the High Court) Act 1975* (Cth). The *Australia Acts 1986* abolished the remaining avenues of appeal to the Privy Council so that by 1986 the High Court was effectively the final court of appeal in Australia. In theory a right of appeal to the Privy Council remains under s 74 of the Constitution but because it requires a certificate from the High Court it is effectively obsolete.

review meant the striking down (for being inconsistent with the constitution) of a democratic enactment by an unelected judiciary. As such it represented a profound challenge to the principle of popular sovereignty. In Australia this understanding of judicial review assumed greater prominence as the High Court's federal jurisprudence increasingly challenged the Labor government's post-war social policy (see generally Galligan 1987). But the full extent of the tensions between the two approaches to judicial review would not become marked until the 1990s, where the Mason High Court became increasingly concerned with rights and freedoms, augmenting its federal judicial review with a jurisprudence that placed greater emphasis on the rights and freedoms secured in the Constitution (see generally Patapan 2000).

Rights

Of course rights as such were also an innovation introduced into the Constitution. The Australian founders did not adopt comprehensive bill of rights in the Constitution; certainly there is no mention of 'nature's rights' or 'inalienable rights'. Colonial constitutionalism could not comprehend the idea of limiting parliamentary sovereignty in such a way. Liberty was secured by allocating the greatest authority to parliament and reviewing it through responsible government; certainly not by limiting or restraining such authority by appealing to 'nature' or some other higher principle. Such 'distrust' of parliament was considered an American innovation (see, for example, Moore 1902; Galligan et al 1990). Yet primarily due to the influence of Andrew Inglis Clark, whose republican sympathies meant that he followed the American model as closely as possible, a number of individual rights were enacted in the Constitution.³⁰ The requirement of acquisition of property on just terms (s 51 xxxi); the requirement of trial by jury for indictable offences (s 80); freedom of religion (s 116), and limits on state discrimination based on residence (s 117) are some of the provisions in the Constitution that seek to secure individual rights. The tensions between these different conceptions of rights can be most clearly seen in the High Court's jurisprudence. These rights were initially given limited scope by the High Court, which tended to interpret them in the spirit of colonial constitutionalism, especially the concepts of parliamentary sovereignty, responsible government and the common law. In its more recent rights-based jurisprudence, the Court expanded its

³⁰ On Inglis Clark generally see Howard and Warden (1995); Reynolds (1958); Williams (1995) and Patapan (1997).

understanding of such rights, but in doing so insisted on their procedural rather than natural rights or human rights based provenance.³¹

Federalism as Innovative Constitutionalism

Australian federalism is generally understood in terms of state-commonwealth relations. As a consequence scholars have defined federalism in terms of a struggle between centripetal and centrifugal forces that result in ‘co-ordinate’; ‘cooperative’ or ‘coercive’ federalism. Mathews (1980), for example, divides Australian federalism into distinct periods, characterized by co-ordinate federalism (1900 to 1920); co-operative federalism (1920-1940); coercive federalism (1940-1945); co-ordinate federalism (1950-1975); and new federalism (from 1975) (see also Mathews 1977; Starr 1977; Parker 1977). More recently, the Hawke and Keating period has been described as ‘collaborative federalism’ (Painter 1998), and the Howard period as ‘regulatory federalism (Parkin and Anderson 2007). These accounts of federalism are undeniably useful, especially in understanding public policy initiatives. In neglecting the larger theoretical framework of Australian federalism, however, they have in effect entrenched a limited and limiting pragmatic approach to questions concerning federalism (Hollander and Patapan 2007).

In this chapter we have explored the innovation that is federalism in the light of the American founding, and within a larger context of the dynamic tensions within colonial constitutionalism between parliamentary and common law traditions. As our examination of constitutionalism, judicial review and rights indicates, understanding federalism as an innovation provides profound insights not only into the theoretical provenance of the founding, but in important practical aspects of governance. The innovative nature of federalism is not merely a matter of historical curiosity, of concern for historians of constitutionalism or of ideas; it has immediate and practical consequences for Australian political life. The tensions we have noted between various streams of constitutionalism continue to animate, and in important respects shape and influence Australian politics and public policy. One need only consider the nature of the continuing debates regarding, for example, republicanism, indigenous and individual rights and freedoms, judicial politics, to see how the formulation of contending arguments reveal the persistence and power of these fundamental tensions.

³¹ For a general discussion of rights and the constitution see Patapan (1997; 2000); Williams (2002).

A more subtle awareness of the innovation that was and is Australian federalism therefore provides an essential starting point for a more comprehensive, theoretically informed, appreciation of modern Australian politics.

REFERENCES

- Bagehot, W. [1867] (1963), *The English Constitution*. (Ithaca, New York: Cornell University Press).
- Castles, A. (1982), *An Australian Legal History* (Sydney: Law Book Co.).
- Coke, E. [1628] (1832), *The First Part of the Institutes of the Laws of England.; or, a Commentary Upon Littleton*. Charles Butler Ed. Volume 1, 19th ed. corrected (London: Clarke).
- Craven, G. (ed.) (1986), *Official Record of the Debates of the Australasian Federal Convention* (Sydney: Legal Books).
- Crisp, L. F. (1990), *Federation Fathers* (Carlton: Melbourne University Press).
- Deakin, A. (1944), *The Federal Story: the Inner History of the Federal Cause* (Melbourne: Robertson & Mullens).
- Dixon, O. (1997), *Jesting Pilate And Other Papers and Addresses*. Collected by Judge Woinarski. 2nd ed. (Buffalo, New York: William S. Hein & Co., Inc.).
- _____. (1957), 'The Common Law as the Ultimate Constitutional Foundation'. In Dixon (1997), 203-218.
- _____. (1943), 'Sources of Legal Authority'. In Dixon (1997), 198-202.
- _____. (1935), 'The Law and the Constitution'. In Dixon (1997), 38-60.
- Epstein, D. (1984), *The Political Theory of the Federalist* (Chicago: Chicago University Press).
- Fullagar, I. (1993), 'The Role of the High Court: Law or Politics?', *Law Institute Journal* 67:72-73
- Galligan, B. (1987), *Politics of the High Court: A Study of the Judicial Branch of Government in Australia* (St Lucia: University of Queensland Press).
- _____. (1995), *A Federal Republic: Australia's Constitutional System of Government* (Cambridge: Cambridge University Press).
- Galligan, B. et al. (1990), 'Australian Federalism and the Debate Over a Bill of Rights', *Publius: The Journal of Federalism*. 20:4, 53.
- Gascoigne, J. (2002), *The Enlightenment and the Origins of European Australia* (Cambridge: Cambridge University Press).
- Gleeson, A.M. (1999), 'Legal Oil and Political Vinegar', Address to the Sydney Institute, Sydney, 16 March.
- Hamilton, A. et al. [1788] (1982), *The Federalist Papers* (New York: Bantam).
- Hirst, J.B. (1988), *The Strange Birth of a Colonial Democracy: New South Wales 1848-1884* (Sydney: Allen & Unwin).
- Hollander, Robyn and Haig Patapan. (2007). 'Pragmatic Federalism: Australian Federalism from Hawke to Howard'. *Australian Journal of Public Administration* (forthcoming).

- Holmes, O.W. (1881), *The Common Law* (Boston, Mass.: Little, Brown and Company).
- Howard, M. and Warden, J. (eds.) (1995), *An Australian Democrat: The Life, Work and Consequences of Andrew Inglis Clark* (Hobart: Centre for Tasmanian Historical Studies).
- Irving, H. (ed.) (1999), *The Centenary Companion to Australian Federation* (Cambridge: Cambridge University Press).
- _____. (1997), *To Constitute a Nation* (Cambridge: Cambridge University Press).
- _____. Ed. (1996), *A Woman's Constitution?: Gender & History in the Australian Commonwealth* (Sydney: Hale & Iremonger).
- Kirby, M. (1983), 'Law Reform as 'Ministering to Justice'', in Blackshield, A. R. (ed.) *Legal Change: Essays in Honour of Julius Stone* (Sydney: Butterworths).
- La Nauze, J.A. (1972), *The Making of the Australian Constitution* (Melbourne: Melbourne University Press).
- Latham, J. (1961), 'Interpretation of the Constitution', in Else-Mitchell, R. (ed.) *Essays on the Australian Constitution* (Sydney: Law Book Co. of Australasia Pty. Ltd.).
- Lumb R.D. (1983), *Australian Constitutionalism* (Sydney: Butterworths).
- Mason, A. (2000), 'Judicial Review: A view from Constitutional and Other Perspectives', *Federal Law Review* 28:2, 331-43.
- _____. (1996), 'The Judge as Law-Maker', *James Cook University Law Review*, 3:1-15
- Mason, K. (1989), 'Prospective Overruling' *Australian Law Journal* 63: 526-531.
- Mathews, R. (1980), *Federalism in Australia and the Federal Republic of Germany: A Comparative Study* (Canberra: Australian National University Press).
- McIlwain, C.H. (1947), *Constitutionalism: Ancient and Modern* (Ithaca, N.Y.: Cornell University Press).
- McKenna, M. (1996), *The Captive Republic: A History of Republicanism in Australia 1788-1996* (Cambridge: Cambridge University Press).
- McKenna, M and Hudson, W. (2003), *Australian Republicanism: A Reader* (Carlton, Vic.: Melbourne University Press).
- McMinn, W.G. (1979), *A Constitutional History of Australia* (Melbourne: Oxford University Press).
- Meale, D. (1992), 'The History of the Federal Idea in Australian Constitutional Jurisprudence: A Reappraisal', *Australian Journal of Law and Society* 8: 25-29.
- Melbourne, A.C.V. (1963), *Early Constitutional Development in Australia* 2nd Ed. (St. Lucia: University of Queensland Press).
- Moore, W.H. (1902), *The Constitution of the Commonwealth of Australia* (London: John Murray).
- Painter, M. (1998), *Collaborative Federalism: Economic Reform in Australia in the 1990s* (Cambridge: Cambridge University Press)
- Pangle, T.H. (1988), *The Spirit of Modern Constitutionalism: The Moral Vision of the American Founders and the Philosophy of Locke* (Chicago: Chicago University Press).
- Parkin, Andrew and Geoff Anderson. (2007). 'The Howard Government, Regulatory Federalism and the Transformation of Commonwealth-State Relations'. *Australian Journal of Political Science* 42: 2, 295-314.
- Parker, R. S. (1977). "Political and Administrative Trends in Australia Federalism". *Publius* 7:1 35-52.

- Parker, R.S. (1982). 'The Evolution of British Political Institutions in Australia', in Madden, A.F. and Morris-Jones, W.H. (eds.), *Australia and Britain: Studies in a Changing Relationship* (Sydney: Sydney University Press), 117-34.
- Patapan, H. (1997), 'The Dead Hand of the Founders? Original Intent and the Constitutional Protection of Rights and Freedoms in Australia', *Federal Law Review* 25:2, 211-36.
- _____. (2000), *Judging Democracy: The New Politics of the High Court of Australia* (Cambridge: Cambridge University Press).
- _____. (2005), 'The Forgotten Founding: Civics Education, the Common Law and Liberal Constitutionalism in Australia', *Griffith Law Review* 14:1, 91-107.
- Reynolds, J. (1958), 'A.I. Clark's American Sympathies and his Influence on Australian Federation', 32 *ALJ* 62.
- Saunders, C. (2003), 'Future Prospects for the Australian Constitution', in French, R. et al. (eds.), *Reflections on the Australian Constitution* (Sydney: The Federation Press), 212-35.
- Starr, Graeme. (1977). 'Federalism as a Political Issue: Australia's Two "New Federalisms"'. *Publius* 7:1 7-26.
- Stephen, N. (1986), 'Address by His Excellency the Right Honourable Sir Ninian Stephen Upon the Occasion of the Commemoration of the 100th Anniversary of the Birth of Owen Dixon'. University of Melbourne, 28 April, in Dixon (1997), 283-302.
- Stoner, J.R. (2003), *Common Law Liberty: Rethinking American Constitutionalism* (Lawrence, Kansas: University of Kansas Press)
- Warden, J. (1993), 'The Fettered Republic: The Anglo-American Commonwealth and the Traditions of Australian Political Thought' *Australian Journal of Political Science*, 28: 83-99.
- Williams, G. (1995), 'A republican tradition for Australia?', *Federal Law Review* 23: 1, 133-48.
- _____. (2002), *Human Rights Under the Australian Constitution* (South Melbourne: Oxford University Press).
- Williams, J. (1995), 'With Eyes Open: Andrew Inglis Clark and our Republican Tradition', *Federal Law Review* 23: 2, 149-179.
- _____. (2004), *The Australian Constitution: a Documentary History* (Carlton, Vic.: Melbourne University Press)
- Windeyer, I. (1962), 'A Birthright and Inheritance: The Establishment of the Rule of Law in Australia', *Tasmania Law Review* 1, 635-69.
- Winterton, G. (1998), 'Popular Sovereignty and Constitutional Continuity', *Federal Law Review* 26:1, 1-13.
- _____. (1992), 'Modern republicanism', *Legislative Studies* 6:2, 24-6.
- Wise, B. (1913), *The Making of the Australian Commonwealth* (New York: Longmans, Green and Co.).
- Wright, H. (1998), 'Sovereignty of the People – The New Constitutional Grundnorm?', *Federal Law Review* 26:1, 165- 194.
- Wright, J.S.F. (2000), 'The Nature of the Australian Constitution: The Limitations of the Institutional and Revisionist Approaches', *Federal Law Review* 28:3, 345-64.
- _____. (2001), 'Anglicizing the United States Constitution: James Bryce's Contribution to Australian Federalism', *Publius: The Journal of Federalism* 31:4, 107-29.

- Zines, L. (1999), 'The Common Law in Australia: Its Nature and Constitutional Significance', *Law and Policy Paper 13*, (Leichhardt, NSW: The Federation Press in association with the Centre for International and Public Law, ANU).
- Zuckert, M.P. (1994), *Natural Rights and the New Republicanism* (Princeton: Princeton University Press).
- Zuckert, M.P. (1996), *The Natural Rights Republic* (Notre Dame: University of Notre Dame Press).

FURTHER READINGS

- Aroney, N. (2002), 'Imagining a Federal Commonwealth: Australian Conceptions of Federalism, 1890-1901', *Federal Law Review* 30: 2, 265-94.
- Blackshield, T. and Williams, G. (2006), *Australian Constitutional Law and Theory: Commentary and Materials*. 4th ed. (Annandale, NSW: The Federation Press).
- Blackshield, T. et al. (2001), *The Oxford Companion to the High Court of Australia* (Oxford: Oxford University Press).
- Brown, A.J. (2004), 'One Continent, Two Federalisms: Rediscovering the Original Meanings of Australian Federal Ideas', *Australian Journal of Political Science* 39:3, 485-504.
- Collins, H. (1985), 'Political Ideology in Australia', *Daedalus* 114:1, 147-69.
- Craven G. (ed.) (1992), *Australian Federation: Towards the Second Century*, (Carlton, Vic: Melbourne University Press).
- _____. (ed.) (1992), *Australian Federation: Towards the Second Century* (Carlton, Vic: Melbourne University Press).
- _____. (2001), 'A Liberal Federation and a Liberal Constitution.', in Nethercote, J. R. (ed), *Liberalism and the Australian Federation* (Annandale: The Federation Press).
- Crisp, L.F. (1983), *Australia's National Government* (Melbourne: Longman Cheshire).
- Davis, S.R. (1995), *Theory and Reality: Federal Ideas in Australia, England and Europe* (St Lucia: Queensland University Press).
- Deakin, A. (1944), *The Federal Story: the Inner History of the Federal Cause*. (Melbourne: Robertson & Mullens).
- Detmold, M.J. (1985), *The Australian Commonwealth : A Fundamental Analysis of its Constitution* (Sydney: Law Book Co.)
- Galligan, B. (1993), 'Australian Federalism', in Marsh, I. (ed), *Governing in the 1990s: An Agenda for the Decade* (Melbourne: Longman Cheshire).
- Galligan, B. and Mardiste, D. (1992), 'Labor's Reconciliation with Federalism', *Australian Journal of Political Science* 27:1, 71-86.
- Galligan, B. and Walsh C. (1990), 'Australian Federalism: Developments and Prospects', *Publius: The Journal of Federalism* 20:4, 1-17.
- Galligan, B. and Wright, J.S.F. (2002), 'Australian Federalism: A Prospective Assessment', *Publius: The Journal of Federalism* 32:2, 147-166.
- Gillespie, J. (1994), 'New Federalisms', in Brett, J. et al (eds.), *Developments in Australian Politics* (South Melbourne: Macmillan Education Australia).

- Goldsworthy, J. (1992), 'The Constitutional Protection of Rights in Australia', in Craven (1992), 151-8.
- Holmes, J. and Sharman, C. (1977), *The Australian Federal System* (London: George Allen and Unwin).
- Jaensch, D. (ed.) (1977), *The Politics of 'New Federalism'* (Adelaide: Australasian Political Studies Association)
- Keating, M. and Wanna, J. (2000), 'Remaking Federalism?', in Keating, M. et al (eds.), *Institutions on the Edge? Capacity for Governance* (St Leonards: Allen & Unwin).
- La Nauze, J.A. (2001), *No Ordinary Act: Essays on Federation and the Constitution*. Irving, H. and Macintyre, S. (eds.) (Carlton: Melbourne University Press).
- Macintyre, S. (1991), *A Colonial Liberalism* (Melbourne: Oxford University Press).
- Maddox, G. (2005), *Australian Democracy in Theory and Practice*. 5th ed. (Frenchs Forest, N.S.W. : Pearson Education Australia).
- Martin, A.W. (ed.) (1969), *Essays in Australian Federation* (Melbourne: Melbourne University Press).
- Mason, A. (1986), 'The Role of Constitutional Court in a Federation: A Comparison of the Australian and the United States Experience.' *Federal Law Review*, 16:1-28.
- McMinn, W.G. (1994), *Nationalism and Federalism in Australia* (Melbourne: Oxford University Press).
- Melleuish, G. (1995), *Cultural Liberalism in Australia: A Study in Intellectual and Cultural History* (Cambridge: Cambridge University Press).
- Painter, M. (1998), 'Public Sector Reform, Intergovernmental Relations and the Future of Australian Federalism', *Australian Journal of Public Administration*. 57:3, 52-63.
- _____. (2001), 'Multi-level Governance and the Emergence of Collaborative Federal Institutions in Australia', *Policy and Politics* 29:2, 137-50.
- Parkin, A. and Anderson, G. (2007), 'The Howard Government, Regulatory Federalism and the Transformation of Commonwealth-State Relations', *Australian Journal of Political Science* 42:2 (forthcoming).
- Quick J. and Garran, R.R. (1901), *The Annotated Constitution of the Australian Commonwealth* (Sydney: Angus & Robertson).
- Sawer, G. (1969), *Modern Federalism* (London: Pitman Publishing).
- Stokes, G. (2004), 'The 'Australian Settlement' and Australian Political Thought', *Australian Journal of Political Science* 39:1, 5-22.
- Storing, H.J. (1981a), *What the Anti-Federalists Were For* (Chicago: University of Chicago Press).
- _____. (ed.) (1981), *The Complete Anti-Federalist* (Chicago: University of Chicago Press).
- Wheare, K.C. (1963), *Federal Government*. 4th ed. (Oxford: Oxford University Press).
- Winterton, G. et al. (1999), *Australian Federal Constitutional Law: Commentary and Materials* (Pyrmont NSW: LBC Information Services).