

***Quis custodiet ipsos custodes* – Politics and the High Court’s constitutional review function**

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Abstract

While the High Court’s constitutional review function is well-accepted in modern legal discourse, there has been surprisingly little analysis of what Australia’s Constitutional framers intended for our Federal Supreme Court. First, this paper recognises that the High Court wields legal power that possesses significant *political* consequences for Australian society. It seeks to illustrate this proposition through a political and legal analysis of the *State Banking* and *Bank Nationalisation* cases. Secondly, it asks itself whether the High Court was meant to be the sole overseer of its constitutional review function, and answers that question affirmatively. In doing so, it discusses the American decision of *Marbury v Madison*, and its significance to the Convention delegates.

Keywords

High Court; Constitution; Banking; Chifley; Labor; Menzies; Convention Debates; Framers

Introduction

A.V. Dicey, in the Appendix to his *Law of the Constitution*, noted that 'the Law Courts, and especially the Australian "Federal Supreme Court", are...the guardians of the Constitution'. (1915: 531)¹ This idea was not unknown to Australia's constitutional framers. Sir Richard Baker introduced this concept in his *Manual of Reference* published in 1891;² Dr John Quick referred to it in his *Digest of Federal Constitutions* published in 1896;³ and Sir Robert Garran maintained its essentiality to federal governance in his book, *The Coming Commonwealth*, published in 1897.⁴ Indeed, a popular theme of the 1897-8 Convention debates was that 'the Constitution will be the guardian of the State rights, and the High Court...will be the guardian of the Constitution'.⁵ However, as one colonial commentator warned in 1898, '[w]ho shall watch the guardians?'⁶ Especially when one considers that the High Court 'may at any time be put in the position of having to decide a question...of burning political moment'.⁷

It is this paper's thesis that the High Court was constitutionally intended to be the sole overseer of its constitutional review function. Part A analyses the *State Banking*⁸ and

¹ A.V. Dicey, *Introduction to the Study of the Law of the Constitution* (Macmillan and Co, 8th ed, 1915) 531.

² Richard Baker, *A Manual of Reference to Authorities for the Use of the Members of The National Australasian Convention* (W. K. Thomas & Co, 1891) 128 ('guardians of the public').

³ John Quick, *A Digest of Federal Constitutions* (J. B. Young, 1896) 15, 30.

⁴ Sir Robert Garran, *The Coming Commonwealth, An Australian Handbook of Federal Government* (Angus & Robertson, 1897) 24, 28, 65-66, 152-4; see also Sir Robert Garran, *Commentaries on the Constitution of the Australian Commonwealth* (Angus & Robertson, 1901) 725.

⁵ *Official Record of the Debates of the Australasian Federal Convention*, Adelaide, 30 March 1897, 336 (Mr Trenwith) ('*Australian Constitutional Convention Debates*'); *Australian Constitutional Convention Debates*, Adelaide, 30 March 1897, 272 (George Reid); *Australian Constitutional Convention Debates*, Adelaide, 20 April 1897, 962 (Edmund Barton); *Australian Constitutional Convention Debates*, Adelaide, 8 September 1897, 212 (Edmund Barton); *Australian Constitutional Convention Debates*, Melbourne, 31 January 1898, 297 (Josiah Symon); *Australian Constitutional Convention Debates*, Melbourne, 21 February 1898, 1260 (William McMillan); *Australian Constitutional Convention Debates*, Melbourne, 2 March 1898, 1724 (Josiah Symon); *Australian Constitutional Convention Debates*, Melbourne, 17 March 1898, 2471 (Edmund Barton).

⁶ Anonymous, *Is Federation Our True Policy? The Politician Revealed to Himself* (George Robertson and Co, 1898) 137.

⁷ *Australian Constitutional Convention Debates*, Melbourne, 1 February 1898, 356 (Richard O'Connor).

⁸ *Melbourne Corporation v Commonwealth* (1947) 74 CLR 31.

Bank Nationalisation cases⁹ to illustrate the political significance of this function, while Part B examines the Convention Debates to consider whether Australia's constitutional framers intended it to shape the very course of Australia's political development.

As a preliminary matter, it is recognised that there is no agreed definition of 'political development' amongst its theorists. While the earliest works of political scientists such as Karl Deutsch,¹⁰ Gabriel Almond, and Sidney Verba¹¹ define political development as governmental policies trending towards a greater protection of civil liberties and limited economic intervention, others – like Samuel Huntington¹² and Aristide Zolberg¹³ – define political development as governmental policies trending towards political stability and order. By either measure, any examination of the High Court's impact on Australia's political development may be framed in terms of how the High Court has shaped Commonwealth legislative policy.

A. An illustration of the High Court's impact on Australia's political development

i) Bank nationalisation – the context.

Bank nationalisation had been a Labor party 'Objective' since 1921,¹⁴ but only in a climate of 'full-employment', 'pump-priming',¹⁵ and the nationalisation of key industries,¹⁶ did the Chifley Labor

⁹ *Bank of New South Wales v Commonwealth* (1948) 76 CLR 1; *Commonwealth v Bank of New South Wales (Banking Nationalisation Case)* (1949) 79 CLR 497 (PC).

¹⁰ Karl W. Deutsch, 'Social Mobilization and Political Development' (1961) 3 *American Political Science Review* 40.

¹¹ Gabriel Almond and Sidney Verba, *The Civic Culture: Political Attitudes and Democracy in Five Nations* (Princeton University Press, 1963).

¹² Samuel Huntington, *Political Order in Changing Societies* (Yale University Press, 1968).

¹³ Aristide Zolberg, *Creating Political Order: The Party-States of West Africa* (Rand McNally, 1966).

¹⁴ In 1905, the Labor party began to summarise its principles in an 'Objective' and, by the 1921 Brisbane Conference, it read: 'METHODS. Socialisation of Industry by:...(c) The nationalisation of banking and all principal industries': Lloyd Ross, 'Socialism and Australian Labour: Facts, Fiction and Future' (1950) 22(1) *The Australian Quarterly* 21, 23.

¹⁵ 'Pump-priming' refers to the policy of economic stimulation through, most typically, increased government spending: see Selwyn Cornish, *Full Employment in Australia: The Genesis of White Paper* (Research Paper on Economic History, No 1, Australian National University, 1981) 22 as cited in Donald Markwell, *Keynes and Australia* (A paper presented at a seminar at the Reserve Bank of Australia, 18 September 1985) 51.

¹⁶ Bruce O'Meagher (ed), *The Socialist Objective: Labor and Socialism* (Hale and Iremonger, 1983) 7; See generally L.F Crisp, *The Australian Federal Labour Party, 1905-51* (Longmans, 1955) 277.

government venture to pass an Act like the *Banking Act 1945* (Cth).¹⁷ Section 8 of that Act sought to secure: a) 'the stability of the currency of Australia'; b) 'the maintenance of full employment in Australia'; and c) 'the economic prosperity and welfare of the people of Australia', through monetary and banking policy. These goals were in keeping with recommendations made by the *Royal Commission on Monetary and Banking Systems* in 1937; it supported 'a system of central banking in which trading banks and other financial institutions are integral parts of the system, with a central bank which regulates the volume of credit and currency'.¹⁸

Further, the government recognised that since it was 'in the interest of any [private] bank, influenced by considerations of profit and liquidity, to expand or contract credit' at any time, the system required 'some limitation' on that activity.¹⁹ This limitation found its way into the Act as s 8: '[e]xcept with the consent in writing of the Treasurer, a bank shall not conduct any banking business for a State or for any authority of a State, including a local governing authority'.

ii) The State Banking case.

The validity of the *Banking Act 1945* (Cth) was challenged in the High Court by the Melbourne City Council.²⁰ Barwick KC, as he then was, argued during the course of the plaintiff's oral submissions that s 48 was either: i) not legislation with respect to banking; ii) invalid for being legislation with

¹⁷ The 'Bill for an Act to regulate Banking' itself appeared to have little issue getting through both Houses: Commonwealth, *Parliamentary Debates*, House of Representatives, 9 March 1945, 25 (First Reading); Commonwealth, *Parliamentary Debates*, House of Representatives, 21 June 1945, 151 (Second Reading); Commonwealth, *Parliamentary Debates*, House of Representatives, 22 June 1945, 151; Commonwealth, *Parliamentary Debates*, House of Representatives, 26 June 1945, 157; Commonwealth, *Parliamentary Debates*, House of Representatives, 27 June 1945, 159; Commonwealth, *Parliamentary Debates*, House of Representatives, 28 June 1945, 163; Commonwealth, *Parliamentary Debates*, House of Representatives, 29 June 1945, 167; Commonwealth, *Parliamentary Debates*, House of Representatives, 25 July 1945, 197.

¹⁸ Commonwealth, *Royal Commission Appointed to Inquire into the Monetary and Banking Systems at Present in Operation in Australia* (Government Printer, 1937) s. 166; see generally D.B. Copland, 'Some problems in Australian banking' (1937) 47(188) *The Economic Journal* 686.

¹⁹ Commonwealth, *Royal Commission Appointed to Inquire into the Monetary and Banking Systems at Present in Operation in Australia* (Government Printer, 1937) s. 532; see also *Melbourne Corporation v Commonwealth* (1947) 74 CLR 31, 77 (Dixon J).

²⁰ C.B. Schedvin notes that the members of the Council and the banks were intimately associated: C.B. Schedvin, *In Reserve: Central Banking in Australia* (Allen & Unwin, 1992) 75.

respect to State Banking;²¹ or iii) discriminated against an essential State Government activity' – the 'custody, control and disposition of government funds'.²²

When the Court finally handed down its decision, a 5:1 majority ruled that s 48 was invalid on the basis that the Commonwealth's legislative power may not be used to discriminate against State governments by placing special 'burdens' or 'disabilities' upon them.²³ This decision also had a significant political impact, not just because the High Court invalidated s 48, but because its justification was framed in the language of 'disabilities', 'burdens', 'hindrances' and 'the efficient working of the business of government'.²⁴

The politics of the decision seemed clear. Every member of the majority spoke critically of the measures. Latham CJ, for instance, said that it is 'essential that a Government should have the power of borrowing money and of providing for the custody and expenditure of loan moneys'.²⁵ Similarly, Rich J argued for a protection of the 'the power freely to use the facilities provided by banks, under modern conditions'.²⁶ Dixon²⁷ and Williams JJ,²⁸ in separate judgments, invalidated s 48 for effectively locking the States out of the private credit market, and Starke J went so far as to say that *any attempt* 'to curtail or interfere with the management of [state revenues and funds] interferes with their constitutional power'.²⁹

²¹ *Commonwealth Constitution* s 51(xiii).

²² *Melbourne Corporation v Commonwealth* (1947) 74 CLR 31, 34-5.

²³ *Ibid* 62 (Latham CJ), 67 (Rich J), 76 (Starke J), 85 (Dixon J).

²⁴ *Ibid* 67 (Rich J) ('the power freely to use the facilities provided by banks, under modern conditions, must be regarded as essential to the efficient working of the business of government, and that power ...cannot be impaired').

²⁵ *Ibid* 53 (Latham CJ).

²⁶ *Ibid* 67 (Rich J) ('the power freely to use the facilities provided by banks, under modern conditions, must be regarded as essential to the efficient working of the business of government, and that power ...cannot be impaired').

²⁷ *Ibid* 64 (Dixon J) ('[s 48 is a] law directly operating to deny to the States banking facilities open to others').

²⁸ *Ibid* 100 (Williams J) ('the effect of s 48 is to deprive the States and their authorities of the use of banking facilities available to the general public').

²⁹ *Ibid* 75 (Starke J); cf 91-2 (McTiernan J).

This dictum, couched in the language of State economic sovereignty and the free-market, sent a message to the Chifley Labor government that a declaration of constitutional invalidity had a political, as well as legal, meaning.³⁰

iii) The political response to the State Banking case.

The High Court's decision was handed down on Wednesday 13 August 1947 and, 'when most of the unsuspecting bankers were playing bowls or working in their gardens',³¹ the Labor Caucus agreed to nationalise the banks the following Saturday. For the Chifley Labor government, the High Court's decision was 'the thin end of the wedge',³² or as C.B. Schedvin described, 'the first step in a legal onslaught'³³ against government policy that demanded immediate action. On 27 November 1947, the decision to nationalise Australia's banks became law.

The *Banking Act 1947* (Cth) gave the Commonwealth sweeping powers. It provided for the Commonwealth's compulsory acquisition³⁴ of Australian shares in any of the private banks.³⁵ Upon the acquisition of those shares, the directors of that bank would cease to hold office,³⁶ and new directors would be appointed by the Governor of the Commonwealth Bank.³⁷ Those directors were vested with full power 'to manage, direct and control the business and affairs' of that bank,

³⁰ See, eg, Anonymous, 'Memorandum: Upon the Decision of the Privy Council in the Case of *Webb v Outtrim*', in *Papers of Alfred Deakin* (1804-1973) 13 <<http://www.nla.gov.au/apps/cdview?pi=nla.ms-ms1540-15-3456>>. Alfred Deakin, as then Attorney-General, recognised this political element during the passage of the *Judiciary Act 1903* (Cth): Sally Warhaft, *Well May We Say: The Speeches That Made Australia* (Black Inc, 2004) 142 ('although [the High Court] relates to legal machinery, the purposes to be served by that machinery are but in a fractional sense legal, are in the main general, and in a very particular sense, political').

³¹ Margaret Myers, 'The Attempted Nationalization of Banks in Australia, 1947' (1959) 35(71) *Economic Record* 170, 176.

³² Robert Crawford, 'Supporting Banks, Liberals and the Australian Way: The Freelands and the 1949 Election' (2003) 2(3) *History Australia* 84.1, 84.3; one of the strongest advocates was the Fabian Society of New South Wales: see NSW Fabian Society, *The Case for Bank Nationalisation, Pamphlet No. 1. (Worker Trustees, 1947)*.

³³ Carl Boris Schedvin, above n 25, 75.

³⁴ Section 15 provided for the payment of fair compensation: *Commonwealth v Bank of New South Wales (Banking Nationalisation Case)* (1949) 79 CLR 497, 620 (Lord Porter).

³⁵ *Banking Act 1947* (Cth) s 13.

³⁶ *Banking Act 1947* (Cth) s 17.

³⁷ *Banking Act 1947* (Cth) s 18.

including its disposal.³⁸ While the Act allowed private banks to enter into agreements with the Commonwealth Bank to facilitate the transition,³⁹ a bank's business and assets were to be compulsorily transferred to the Commonwealth Bank if any agreement fell through.⁴⁰ Finally, the Treasurer could, 'by notice published in the Gazette and given in writing to a private bank, require that private bank to cease, upon a date specified in the notice, carrying on banking business in Australia'.⁴¹ The Act, in short, gave the Commonwealth, through its agent, the Commonwealth Bank, a virtual monopoly over Australian banking business.⁴²

The banks rallied in response to this legislation and, for two years, Australians 'were subjected to the most intense, highly organised, highly financed, and unscrupulous propaganda campaign they had ever experienced'.⁴³ When three of the private banks, led by the Bank of New South Wales, sought an injunction to restrain the Commonwealth, the conflict crystallised into, what then Associate-Professor Geoffrey Sawer described as, 'one of the greatest political and legal battles in Australia's history'.⁴⁴

iv) The Bank Nationalisation case and the November election.

The banks were successful; mostly on the basis that the Act infringed ss 92 and 51(xxxi) of the *Constitution*.⁴⁵ Four Justices held that ss 13 and 14 – the powers to acquire Australian shares in the private banks – were invalid for constituting a scheme of compulsory

³⁸ *Banking Act 1947* (Cth) s 19.

³⁹ *Banking Act 1947* (Cth) s 22.

⁴⁰ *Banking Act 1947* (Cth) s 24.

⁴¹ *Banking Act 1947* (Cth) s 46; see *Commonwealth v Bank of New South Wales (Banking Nationalisation Case)* (1949) 79 CLR 497, 621 (Lord Porter).

⁴² See generally Robert Menzies, 'Socialised banking: Instrument of tyranny' in Graeme Starr (ed) *The Liberal Party of Australia: A Documentary History* (Heinemann, 1980) 137.

⁴³ Robin Gollan, *Revolutionaries and Reformists* (Allen and Unwin: Sydney, 1975) 222. For a detailed discussion of these marketing practices see Crawford, above n 35.

⁴⁴ A. L. May, *The Battle for the Banks* (Sydney University Press, 1968) 16.

⁴⁵ Section 92 of the *Constitution* provides: 'On the imposition of uniform duties of customs, trade, commerce, and intercourse among the States, whether by means of internal carriage or ocean navigation, shall be absolutely free'. Section 51(xxxi) provides: 'The acquisition of property on just terms from any State or person for any purpose in respect of which the Parliament has power to make laws'.

acquisition without compensation on just terms.⁴⁶ A similar conclusion was reached in relation to s 24⁴⁷ as well as those provisions concerning business acquisition and board management.⁴⁸ Further, the prohibition on private banking business in s 46 of the Act was struck down by four Justices as an infringement of s 92 of the *Constitution*.⁴⁹

Not unlike the ideology of the *State Banking* judgments, their Honours adopted an 'individual rights' approach – described by Blackshield and Williams as 'a high point' in the jurisprudence of s 92⁵⁰ – that was sympathetic to private enterprise and an inter-state market 'free of governmental prohibitions, restrictions and burdens whether they be legislative or executive in character'.⁵¹

Dixon J, for example, noted that 'a large part of the business of banking' depended on 'trade, commerce and intercourse among the States'.⁵² That business included:

- (a) the constant inter-State transmission of funds and transfer of credit;
- (b) the constant business communication and intercourse among the States;
- (c) the regular use of instruments of credit in inter-State transactions;
- (d) the integration of inter-State banking transactions with banking business to form a system spreading over the Commonwealth without regard to State lines; and
- (e) commercial dealings between inter-State traders in goods.⁵³

⁴⁶ *Bank of New South Wales v Commonwealth* (1948) 76 CLR 1, 254, 259, 264, 267 (Rich and Williams JJ) 317 (Starke J) 329-30, 344, 352 (Dixon J).

⁴⁷ *Ibid* 219 (Latham CJ) 259 (Rich and Williams JJ) 320 (Starke J) 329, 375 (Dixon J).

⁴⁸ *Ibid* 216-18 (Latham CJ) 319 (Starke J) 394-5 (McTiernan J) 353 (Dixon J).

⁴⁹ *Ibid* 291 (Rich and Williams JJ), 324-5 (Starke J); 329-30, 380-4 (Dixon J); *Commonwealth v Bank of New South Wales (Banking Nationalisation Case)* (1949) 79 CLR 497 (PC).

⁵⁰ Anthony Blackshield and George Williams, *Australian Constitutional Law and Theory: Commentary and Materials* (Federation Press, 4th ed, 2006) 1242; see also *Bank of New South Wales v Commonwealth* (1948) 76 CLR 1, 282 (Rich and Williams J); *James v Cowan* (1930) 43 CLR 386, 418 (Isaacs J).

⁵¹ *Ibid* 383 (Dixon J).

⁵² *Ibid* .

⁵³ *Ibid* 380.

All of this, his Honour argued, was protected by s 92. Dixon J could not see how closing up every bank but a government bank left inter-State banking free.⁵⁴ The decision was appealed to the Privy Council in London, but their Lordships found themselves adopting the 'language and reasoning of Dixon J', to which they could add nothing.⁵⁵

The *State Banking* and *Bank Nationalisation* cases are often cited as illustrations of the politically devastating impact of the High Court's constitutional review for good reason.⁵⁶ First, the 'contemporary enthusiasms' of the Chifley Labor government were frustrated by judicial majorities guaranteeing 'continued private enterprise' at the expense of 'monopoly enterprise'.⁵⁷ To adopt the phraseology of Deane J in *Miller v TCN Channel Nine*, s 92 was transformed into a 'constitutional guarantee' of laissez-faire economics and 'small government' politics.⁵⁸ Secondly, the decisions 'struck at the Labor Party's roots'.⁵⁹ Bank nationalisation, a 'dead issue'⁶⁰ in the 1946 election, became *the* issue in the 1949 election. Not only did the Chifley Labor government lose office in that election, it lost its majority in the Senate and held only 47 out of 120 seats in the Lower House.⁶¹ This loss fuelled Labor's grievances with the High Court and a *Constitution* they had no hand in drafting.⁶²

⁵⁴ Ibid 388.

⁵⁵ *Commonwealth v Bank of New South Wales (Banking Nationalisation Case)* (1949) 79 CLR 497, 633 (PC).

⁵⁶ See Geoff Lindell, 'The Australian Constitution: Growth, Adaptation and Conflict - Reflections About Some Major Cases and Events' (1999) 25(2) *Monash University Law Review* 257.

⁵⁷ Geoffrey Sawer, *Australian Federal Politics and Law 1929-1949* (Melbourne University Press, 1963) 23; see also Peter Hanks, 'The Political Dimension of Constitutional Adjudication' (1987) 10 *University of New South Wales Law Journal* 141, 143-5.

⁵⁸ *Miller v TCN Channel Nine* (1986) 161 CLR 556, 618 (Deane J).

⁵⁹ Brian Galligan, *Politics of the High Court* (UQ Press, 1987) 118; see also Frank Farrell, 'Internationalism, and the Australian Labour Movement' (1985) 15 *Labour/Le Travail* 125, 138.

⁶⁰ May, above n 50, 8; Crawford, above n 38, 84.2; cf to Myers who stated that '[m]any of the points raised by the Members [in Parliament] were depressingly similar to those of all the banking debates which had gone before: Myers, above n 37, 178.

⁶¹ Ibid 184.

⁶² Ibid; see also David Solomon, *The Political Impact of the High Court* (Allen & Unwin, 1992) 13; Justice Ronald Sackville, 'Law and Social Change' (a paper presented at 6th Annual Members' Conference of the Administrative Decisions Tribunal, 27 October 2006) <<http://www.austlii.edu.au/au/journals/FedJSchol/2006/28.html>>.

This chapter in Australian constitutional history ultimately begs one to ask whether Australia's constitutional framers intended for the High Court to occupy such a politically significant role.

B. Justifying the High Court's impact on Australia's political development

One need not look far to see that the High Court wields significant legal power through its constitutional mandate. As the 'Federal Supreme Court of Australia',⁶³ the High Court has an extensive appellate jurisdiction that allows it to hear and determine appeals from judgments, decrees, orders and sentences of: any Justice or Justices exercising the original jurisdiction of the High Court;⁶⁴ any other federal court, or court exercising federal jurisdiction;⁶⁵ the Supreme Court of any State;⁶⁶ any other court of any State from which, at the establishment of the Commonwealth, an appeal lies to the Queen in Council;⁶⁷ and the (now defunct) Inter-State Commission, but as to questions of law only.⁶⁸

The High Court also has an extensive original jurisdiction in matters: arising under any treaty;⁶⁹ affecting consuls or other representatives of other countries;⁷⁰ in which the Commonwealth, or a person suing or being sued on behalf of the Commonwealth, is a party;⁷¹ between States, or between residents of different States, or between a State and the resident of another State;⁷² in which a writ of *mandamus* or prohibition or an injunction

⁶³ *Commonwealth Constitution* s 71.

⁶⁴ *Commonwealth Constitution* s 73(i); (Cth) *Judiciary Act 1903* (Cth) s 34.

⁶⁵ *Commonwealth Constitution* s 73(ii); (Cth) *Judiciary Act 1903* (Cth) s 35(1)(b).

⁶⁶ *Commonwealth Constitution* s 73(ii); *Judiciary Act 1903* (Cth) s 35(1)(a). This has also been extended to any Supreme Court of a Territory: *Judiciary Act 1903* (Cth) s 35AA.

⁶⁷ *Commonwealth Constitution* s 73(ii).

⁶⁸ *Commonwealth Constitution* s 73(iii). The Inter-State Commission was repealed by the *Industry Commission Act 1989* (Cth) (repealed) s 48(2).

⁶⁹ *Commonwealth Constitution* s 75(i).

⁷⁰ *Commonwealth Constitution* s 75(ii).

⁷¹ *Commonwealth Constitution* s 75(iii).

⁷² *Commonwealth Constitution* s 75(iv).

is sought against an officer of the Commonwealth or Federal Court;⁷³ and; arising under the *Constitution* or involving its interpretation.⁷⁴

However, nowhere in the *Constitution* does it expressly state that the High Court has the power to invalidate a Commonwealth Act of Parliament.⁷⁵ One must consider the decision in *Marbury v Madison*⁷⁶ to appreciate how it nonetheless does so.

i) Whether Marbury v Madison is axiomatic.

Like the *State Banking* and *Bank Nationalisation* cases, *Marbury* was born of political fire and brimstone.⁷⁷ That case arose out of the failure of President John Adams and John Marshall, then Secretary of State, to deliver commissions of appointment to four Federalist Justices of the Peace before Thomas Jefferson's presidential inauguration. The new President refused to recognise the outstanding commissions, and the appointees sought writs of *mandamus* from the United States Supreme Court to compel him to recognise their appointments. Marshall CJ, as he went on to become, refused to grant the appointees the relief they sought. His Honour noted that the Court's jurisdiction to grant prerogative writs was original, not appellate; so the *Judiciary Act of 1789*, which purported to confer the Court with power to grant such writs, was unconstitutional for attempting to confer upon it original jurisdiction.⁷⁸ Under the American Constitution, Congress could only confer the Court with appellate jurisdiction.

⁷³ *Commonwealth Constitution* s 75(v).

⁷⁴ *Judiciary Act 1903* (Cth) s 30(a); enacted pursuant to *Commonwealth Constitution* s 76(i).

⁷⁵ For an extensive discussion of the constitutional implications see P.H. Lane, 'Judicial Review by the High Court' (1966) 5(2) *Sydney Law Review* 203.

⁷⁶ (1803) 1 Cranch 137.

⁷⁷ For a detailed discussion of the case and its surrounding political consequences see Margaret Kelly, 'Marbury v Madison: An Analysis' (2005) 1(2) *High Court Quarterly Review* 58.

⁷⁸ *Marbury v Madison* (1803) 1 Cranch 137.

In coming to these conclusions, Marshall CJ said that 'it is a proposition too plain to be contested, that the constitution control any legislative act repugnant to it',⁷⁹ and described this right as 'so established', 'original' and 'fundamental'. His Honour held that America's founding fathers explicitly chose a *written* constitution as their 'superior paramount law',⁸⁰ which 'defined' and 'limited' the Legislature's powers. Further, legislation that was constitutionally 'repugnant' would not bind the courts. Most importantly, however, Marshall CJ reserved the 'duty' of determining constitutional repugnancy to the Supreme Court.⁸¹

A popular theme in Australia's constitutional jurisprudence is that the principle of *Marbury v Madison* is axiomatic.⁸² Brian Galligan has recognised that judges have usually taken constitutional review for granted⁸³ or appealed to the justificatory reasoning of *Marbury* as 'self-evident and sufficient'.⁸⁴ However, while Australia's constitutional framers were aware of the idea that a Federal Supreme Court could determine an Act of Parliament *ultra vires* of the *Constitution*, *Marbury* was hardly known to them.⁸⁵ This is borne out in a letter from Edmund Barton to Andrew Inglis Clark in 1898:

I have to thank you further for your telegram as to the striking out of the power given to the High Court to deal with cases of mandamus and prohibition against Officers of the Commonwealth. None of us here had read the case mentioned by you of *Marbury v Madison*,

⁷⁹ Ibid 176.

⁸⁰ Ibid 177.

⁸¹ Ibid 177-8.

⁸² *Australian Communist Party v Commonwealth* (1951) 83 CLR 1, 262 (Fullagar J); see also Sir Owen Dixon, *Jesting Pilate* (Law Book co, 1965) 166, 174.

⁸³ See, eg, *Federated Amalgamated Government Railway and Tramway Service Association v New South Wales Railway Traffic Employees Association* (1906) 4 CLR 488, 490-1, 509; *Baxter v Commissioners of Taxation (NSW)* (1907) 4 CLR 1087, 1125.

⁸⁴ Galligan, above n 67, 43.

⁸⁵ Chief Justice Robert French, 'Constitutional Review of Executive Decisions – Australia's US Legacy' (A paper presented at the John Marshall Law School, 25 and 28 January 2010) 4; and, if so, apparently after Clark's telegram: *Convention debates: Australian Constitutional Convention Debates*, Melbourne, 4 March 1898, 1875-1884.

or if seen it had been forgotten – it seems however to be a leading case. I have given notice to restore the words on the reconsideration of the clause.⁸⁶

Clark's clause ultimately found its way back into the *Constitution*,⁸⁷ but no express constitutional review function was afforded to the High Court. Nevertheless, the convention delegates seemed to think that a Federal Supreme Court, as the sole interpreter and 'bulwark'⁸⁸ of the *Constitution*, simply possessed this power. This sentiment was perhaps best captured by Isaac Isaacs, who noted at the Third Session of the 1898 debates that 'the power is not expressly given in the United States Constitution but undoubtedly the [United States Supreme Court] exercises it'.⁸⁹

ii) The High Court – 'keystone to the federal arch'.⁹⁰

Two discussions bear out the proposition that the framers intended for the High Court to declare Acts of Parliament constitutionally invalid, and to oversee that power independently of other governmental organs.

On Tuesday 1 March, Mr Gordon, of South Australia, put the following motion to the floor:

74A. The plea that any law either of the Parliament of the Commonwealth or of any state Parliament is *ultra vires* of the Constitution shall not be raised in any court except as follows:-

1. As to a law of the Parliament of the Commonwealth by or on behalf of a, state.
2. As to a law of any state by or on behalf of the Commonwealth.⁹¹

⁸⁶ See JA La Nauze, *The Making of the Australian Constitution* (Melbourne University Press, 1972) 234.

⁸⁷ *Commonwealth Constitution* s 75(v); see *Australian Constitutional Convention Debates*, Melbourne, 4 March 1898, 1885 (Barton).

⁸⁸ *Australian Constitutional Convention Debates*, Adelaide, 20 April 1897, 952 (Edmund Barton).

⁸⁹ *Australian Constitutional Convention Debates*, Melbourne, 31 January 1898, 21 (Isaacs).

⁹⁰ *Australian Constitutional Convention Debates*, Adelaide, 20 April 1897, 950 (Mr Symon).

⁹¹ *Australian Constitutional Convention Debates*, Melbourne, 1 March 1898, 1679 (Mr Gordon).

This motion sought to deny private litigants a right to seek constitutional review of Acts of Parliament. Gordon held faith in the belief that Parliament 'will not pass laws which are ethically indefensible'.⁹² After strong criticism of this motion,⁹³ Gordon reacted by stating, 'I am not declaring that any law which is *ultra vires* is not *ultra vires*. I am simply limiting the area of attack'.⁹⁴ Andrew Wise was one of Gordon's more vocal critics. In his opinion, it was not up to the Executive or Legislature to determine whether an Act was *ultra vires* or not.⁹⁵ Wise stated: '[w]e have been striving all through to erect an independent Commonwealth with certain clearly-defined subjects of legislation'.⁹⁶ The rationale behind this, he revealed, was nothing that had not already been stated by the other delegates: that the exercise of the powers of the Federal Parliament had to be kept in check so as not to encroach upon the rights of a State.⁹⁷ Gordon then went on to say that he thought that 'the duties and function of the Supreme Court' had been widely misapprehended:

It very often seems hard to a layman that that which has been enacted by Parliament should be declared to be illegal by a Supreme Court when the statute is called into question during litigation between two citizens. It is hard, but like everything else in politics, it is a choice of evils.⁹⁸

As a result of this debate, Mr Gordon's motion was not carried.

The second motion in relation to the *ultra vires* question was put by Mr Holder, also of South Australia. In substance, his motion sought to enshrine a mechanism, '[i]n the event

⁹² *Australian Constitutional Convention Debates*, Melbourne, 1 March 1898, 1681(Mr Gordon).

⁹³ *Australian Constitutional Convention Debates*, Melbourne, 1 March 1898, 1682 (Edmund Barton); *Australian Constitutional Convention Debates*, Melbourne, 1 March 1898, 1682 (Mr Symon); *Australian Constitutional Convention Debates*, Melbourne, 1 March 1898, 1683 (Mr Higgins); *Australian Constitutional Convention Debates*, Melbourne, 1 March 1898, 1686 (Mr Wise).

⁹⁴ *Ibid* 1680(Mr Gordon).

⁹⁵ *Ibid* 1685-6(Mr Wise).

⁹⁶ *Ibid* 1686 (Mr Wise).

⁹⁷ *Ibid* 1685-6 (Mr Wise).

⁹⁸ *Ibid* 1686 (Mr Wise).

of any law passed by the Federal Parliament being declared by any decision of the High Court to be *ultra vires*, by which a referendum could be sought to deem the law *intra vires* and enlarge Parliament's powers.⁹⁹ Importantly, Holder did not deny that a Federal Supreme Court, as of right, already possessed such a power:

I admit freely that as the Constitution is a deed of partnership, it is absolutely necessary to have the High Court to interpret it, and to see that the various co-partners keep in all that they do within the four comers of the deed to which they have agreed.¹⁰⁰

Again, the motion was heavily criticised from the floor. One delegate, a Mr Symon, saw the proposal, not only as expensive, but as counter to the High Court's federal role as 'guardian' and 'protector of the freedom of citizens as well as of the rights of the states'.¹⁰¹ The proposed amendment was an anathema to Symon, who saw it as obliterating the entire rationale for having an independent constitutional interpreter.

If there is too wide a power in regard to disputes upon questions of encroachment under legislation, if it is considered that the High Court might frustrate the object of the Constitution, then the remedy is not to increase the expense in remedying the difficulty, *but to sweep away the High Court altogether, and to say that we will rest content with some other method of adjusting the differences between the constituent parts of the body politic of the Commonwealth.*¹⁰² (Emphasis added).

Holder withdrew clause 121A from deliberation shortly thereafter.

Upon the conclusion of the Convention debates, that the 'Federal Supreme Court' could declare an Act *ultra vires* was discussed in the context of: appropriation bills;¹⁰³ judicial

⁹⁹ Ibid 1717-8 (Mr Holder).

¹⁰⁰ Ibid 1717 (Mr Holder).

¹⁰¹ *Australian Constitutional Convention Debates*, Melbourne, 2 March 1898, 1724 (Mr Symon).

¹⁰² Ibid.

¹⁰³ *Australian Constitutional Convention Debates*, Adelaide, 8 March 1897, 1999 (George Turner); *Australian Constitutional Convention Debates*, Adelaide, 24 March 1897, 43 (George Turner); *Australian Constitutional*

tenure and independence;¹⁰⁴ claims by States against the Commonwealth;¹⁰⁵ claims between States;¹⁰⁶ and; claims between private litigants and the States and/or the Commonwealth.¹⁰⁷ In deciding these matters, there was no dispute among the constitutional framers that the 'Federal Supreme Court' would occupy a politically significant role in Australian governance. Importantly, one theme would dominate these discussions: that the High Court would be 'a tribunal constantly charged with the maintenance of the Constitution against the inroads which may be attempted to be made upon it by Parliament'.¹⁰⁸

Conclusion

This paper has argued that the framers intended for the High Court to be the sole overseer of its constitutional review function; despite the political significance that invalidating an Act of Parliament entailed. Part A discussed how significant legal decisions, such as the *State Banking* and *Bank Nationalisation* cases, have brought the High Court's power of constitutional review (and thus political role) into question. Part B then argued that while *Marbury v Madison* was not widely known by the framers, they intended for the High Court, as a Federal Supreme Court, to have an independent power of constitutional review. This independence was intended to be '[o]ne of the strongest guarantees for the continuance and indestructibility of the Federation'.¹⁰⁹

Convention Debates, Adelaide, 19 April 1897, 940 (Mr Peacock); *Australian Constitutional Convention Debates*, Melbourne, 1 February 1898, 366 (Mr Wise).

¹⁰⁴ *Australian Constitutional Convention Debates*, Adelaide, 19 April 1897, 940 (Mr Peacock); *Australian Constitutional Convention Debates*, Melbourne, 1 February 1898, 366 (Mr Wise).

¹⁰⁵ *Australian Constitutional Convention Debates*, Adelaide, 19 April 1897, 940 (Mr Trenwith) ('... unless we provide a competent tribunal to act as custodian of the Constitution, the people will have doubts as to whether the Parliament will exceed the powers that were intended by the Constitution, and thereby curtail the State rights about which we are all so anxious').

¹⁰⁶ *Australian Constitutional Convention Debates*, Melbourne, 8 February 1898, 670 (Mr Wise).

¹⁰⁷ *Australian Constitutional Convention Debates*, Melbourne, 1 March 1898, 1655 (Mr Glynn).

¹⁰⁸ *Australian Constitutional Convention Debates*, Adelaide, 20 April 1897, 962 (Edmund Barton).

¹⁰⁹ *Australian Constitutional Convention Debates*, Adelaide, 23 March 1897, 25 (Edmund Barton)