Chapter One

The Idea of a Federal Commonwealth*

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Arguably the single most important provision in the entire body of Australian constitutional law is s. 3 of the *Commonwealth of Australia Constitution Act* 1900 (UK). This section authorised Queen Victoria to declare by proclamation that the people of the several Australian colonies should be united in a Federal Commonwealth under the name of the Commonwealth of Australia.

Several things are at once noticeable about this provision. Of primary importance for present purposes is that, while the formation of the Commonwealth depended upon an enactment by the Imperial Parliament at Westminster and a proclamation by the Queen, the Australian Commonwealth was itself premised upon the agreement of the people of the several colonies of Australia to be united into a federal commonwealth.

The framers of the Constitution could arguably have used any one of a number of terms to describe the nature of the political entity that they wished to see established. The federation was established subject to the Crown and under a Constitution, so they might have called it the *Dominion of Australia* and described it as a *constitutional monarchy*. The Constitution was arguably the most democratic and liberal that the world had yet seen, so perhaps they could have called it the *United States of Australia* and described it as a *liberal democracy*. But to conjecture in this way is to hazard anachronism. The framers of the Constitution chose to name it the *Commonwealth of Australia* and to describe it as a *federal commonwealth*. What did they mean by this, and how was the idea of a federal commonwealth embodied in the Constitution which they drafted?

The use of the word *commonwealth*, the origin of which is generally ascribed to Henry Parkes, appears to have generated a great deal of debate, both behind the scenes and in public.[1] The use of the expression *federal commonwealth*, however, appears to have received much less explicit attention. Samuel Griffith appears to have been the first to use it during the first Federal Convention held in Sydney in 1891.[2] The phrase did not appear in the draft constitutions prepared by Andrew Inglis Clark and Charles Kingston,[3] but did appear in the draft Constitution Bill prepared by Griffith, Inglis Clark and Edmund Barton, together with the designation *Commonwealth of Australia*.[4] Thereafter, and especially during the second Federal Convention held in 1897-98, the delegates used the expression *federal commonwealth* freely and frequently to designate the entity they wished to see created.[5] Although the meaning of the phrase itself was not analysed at length until John Quick and Robert Garran published their monumental commentary on the Constitution in 1901,[6] the ideas and values signified by the phrase were the subject of a great deal of discussion.

The inspiration for the expression *federal commonwealth* can almost certainly be traced to James Bryce's highly influential book, *The American Commonwealth*.[7] Bryce's influence upon the framers of the Australian Constitution is well known.[8] His basic idea was that the American political system is best understood as:

> "a Commonwealth of commonwealths, a Republic of republics, a State which, while one, is nevertheless composed of other States even more essential to its existence than it is to theirs".[9]

Bryce was here echoing a conception of the federal commonwealth which had been previously described by Montesquieu in his famous *L'esprit des Lois*, first published in 1748. Montesquieu had said that a *federal republic* arises when:

> ".....several smaller States agree to become members of a larger one, which they intend to form. It is a kind of assemblage of societies, that constitutes a new one, capable of increasing by means of new associations till they arrive at such a degree of power as to be able to provide for the security of the united body. … As this Government is composed of small Republics, it enjoys the

internal happiness of each, and with respect to its external situation, it is possessed, by means of the association, of all the advantages of large Monarchies".[10]

The influence of this idea of a Commonwealth of commonwealths can be traced in a direct line from Montesquieu, via the framers of the American Constitution, down to those who drafted the Australian Constitution in the late 19th Century. Alexander Hamilton, although the sincerity of his attachment to the idea may be doubted, adopted Montesquieu's definition of the federal republic in one of his letters to the *Independent Journal*, calculated to convince voters in the State of New York to ratify the proposed Constitution, and soon thereafter republished in a collection of 85 essays which we today know as *The Federalist Papers*.[11] In turn, Hamilton's essay (which we know as *Federalist No. 9*) was cited by Thomas Just in a little known, but highly significant, compendium which he prepared for the delegates to the Federal Convention of 1891 on the order of the government of Tasmania, and most probably on the instructions of Andrew Inglis Clark.[12]

Thomas Just's book contained a variety of extracts from various important writings on the idea of a federal commonwealth. Just's presentation of these extracts was done in a way that was apparently calculated to guide the reader in a certain direction. Most conspicuous among these were a number of extracts from *The Federalist Papers*, including Hamilton's *Federalist No. 9* and James Madison's *Federalist No. 39*. In Just's presentation, these extracts seemed to provide appropriate guidance on almost all important issues relating to Australian federation, apparently on the premise that "the Constitution of the United States was framed under similar circumstances to those which should mark the formation of the Constitution of United Australasia".[13] Just used Hamilton (and Montesquieu before him) to present the idea that a federation is essentially an "assembly of States" which is at the same time itself a "State", and in which the several States are constituent members, entitled to separate representation in the institutions of the federal government and an exclusive sphere of "sovereign" power over their own internal affairs.[14]

While there were disputes over the details, as well as a small handful who dissented, it was this general conception of a *federal commonwealth* which animated the vast majority of the framers of the Australian Constitution and represented the general consensus of opinion among them. Time and again, the framers reasoned in terms of the idea of a federal commonwealth – the idea that the proposed Constitution must create a Commonwealth of commonwealths, a political community which is itself composed of constituent political communities more essential to its existence than it is to theirs. The Australian framers in particular learned from James Madison that this premise – of a federal state constructed out of constituent states – must have an influence upon institutions, decision-making processes, configuration of powers and amendment processes adopted under a federal constitution.[15]

Madison had pointed out in *Federalist No. 39* that a genuine federation is premised upon the consent of all of the constituent states – which is to say that it is founded upon a unanimous agreement among them.[16] However, the formation of a federal commonwealth means that those states have agreed to a joint political destiny, and so they consent to a political decision-making process in which decisions are taken by some form of majority rule. And yet, because the states come into the federation as equals, they are entitled to equal respect in that decision-making process. For Madison, the proposed US Constitution gave effect to both of these principles; first, in the form of the House of Representatives, representative of the people of the nation as a whole, second, in the form of the Senate, representative of the States on the basis of equality, and third, in the form of the President, chosen through an electoral college representative of both the nation as a whole and the separate States.[17]

The specific form in which these principles could be embodied could vary, however. The Australians followed the Americans in constructing a House of Representatives in which the people of the entire Commonwealth would be represented, but diverged from the American example in providing for the direct election of the Senate by the people of each State, and deviated even more extensively by making provision for a system of parliamentary government in which the Commonwealth executive would be responsible primarily to the House of Representatives. And yet, after prolonged debate, the Australians settled upon a formula which gave the Senate power to refuse to pass the annual supply bills, a power which could be used to bring down a government.[18]

Since in such a system the constituent States enter the federation as previously existent, mutually independent, self-governing political communities, it followed for the Australians that it was not the task of the federal Constitution to establish them as such, nor to invest them with powers.[19] The existence and self-governing capacities of the constituent States were indeed the presupposition of federation. The purpose of the

federal Constitution was to establish and empower a newly-formed federal political community which would be responsible to undertake those governing tasks that could be better addressed by a federal government. Moreover, the object of federation was to create a federal commonwealth in which the States would continue to exist and function as such. Thus, as Madison had pointed out, it was appropriate for the Constitution to confer only specific powers upon the Commonwealth, leaving the States to continue to exercise their original, "sovereign" powers, subject only to the competencies transferred to the Commonwealth.[20]

Finally, Madison in effect pointed out that federation involves not only a commitment to a joint political action, but also a joint constitutional destiny.[21] While the constituent States entered the federation by unanimous consent, they committed themselves to the amendment of the Constitution by a decision-making procedure over which they did not retain an individual veto. For the framers of the Australian Constitution, just as the representative principle appropriate to a federal commonwealth was one in which both the people of the Commonwealth and the peoples of the States were represented in the Parliament, so the amendment formula recognised a role for the people (and their representatives) at both a Commonwealth and a State level, in both cases voting by majority.[22] And yet the decision-making process was not simply one of majority rule in all respects. Unanimity was the basic decision-making rule underlying the formation of the federation in the first place, and it remained appropriate to continue that decision-making rule in respect of those matters the constituent States were not yet prepared to relinquish entirely. Thus, the general process for amending the Constitution was in most respects one in which the final decision would be referred to both the people of the Commonwealth as a whole and to the peoples of the States voting in a referendum. However, amendments to the representation of the people of a State within the Parliament, or alterations to the boundaries of a State, would require the consent of the people of the State concerned.[23] In other words, to alter matters as fundamental as this, there was a reversion to the underlying principle of unanimity – a principle which required the consent of each constituent State to a proposed constitutional alteration of this kind.

I have elsewhere argued that this very same principle ought to apply to any amendment to the so-called "covering clauses" of the *Commonwealth of Australia Constitution Act*, including the Preamble.[24] The amendment of the existing Preamble or the insertion of a new one to take its place should depend, I have argued, upon the agreement of the people of every single Australian State, and not just of a majority of the Australian States. While the matter is certainly not without doubt, this issue of how the existing Preamble might be altered or replaced shaped the specific proposal presented to the voters during the constitutional referendum on an Australian republic and a new Preamble in 1999.[25] It will also shape any future proposal either to amend the existing Preamble or insert a new one.

This idea of a federal commonwealth has implications for how the Australian Constitution ought to be interpreted. Stephen Gageler, the newly appointed Solicitor-General of the Commonwealth, wrote an article two decades ago in which he argued that because the Australian Constitution contains a complex system of "political" mechanisms through which Commonwealth decision-making is channelled and a certain "equilibrium" of the federal system maintained, it is not the task of the courts to impose an additional set of what might be called "judicial" safeguards.[26] This means that when asked to rule on questions of whether Commonwealth laws fall within one of the heads of power contained in s. 51 of the Constitution, the courts – and especially the High Court of Australia – should ordinarily adopt a deferential standard of review. The Parliament's judgment that its legislation is indeed constitutional should be given the benefit of the doubt,[27] and federal legislation should only be held unconstitutional if no rational connection with an affirmative grant of power can be demonstrated at all.[28]

The grounds of Gageler's argument are diverse. He recites the views expressed by several framers of the Constitution, but does not seem to consider these views to be in any sense binding or authoritative. He also relies very heavily upon a particular interpretation of certain *dicta* in the judgment of Isaacs J in the *Engineers Case*, but does not in any place state clearly that he would rely on those *dicta* as a matter of authoritative precedent. Gageler alludes to the practical functioning of the political process in Australia, suggesting that the Commonwealth Parliament can be trusted to represent the considered views of the entire Australian people, but the claim remains very abstract, and is not subjected to the critical attention that would be necessary in order to establish it as a well-founded, empirical fact.[29] Gageler likewise finally concludes by pointing to "the centrality of the political process *in the Australian Constitution*",[30] suggesting, perhaps, that it is the text and structure of the Constitution itself that is ultimately determinative on this point; but nowhere in the article

is there a close examination of the relevant provisions and the institutions to which they give rise in order to make good this argument.

It lies beyond the scope of this paper to scrutinise each of these points. What I propose to do in the remainder of this paper is to focus on the way in which the framers conceived of the task to be undertaken by the High Court of Australia, with its implications for the way in which the High Court ought to go about its task of constitutional interpretation in federalism disputes.[31]

It is possible both to underestimate and to overestimate the significance of the High Court's role as the framers largely conceived it.[32] A clear majority of the framers believed that the structure of the Commonwealth Parliament and, in particular, the Senate would be an important mechanism by which the peoples of the States would be represented and the interests of the States taken into consideration. They therefore insisted that each of the constituent States should be equally represented in the Senate, and that the Senate should be just about as powerful as the House of Representatives. Those, like Isaac Isaacs and Henry Bournes Higgins, who did not wish a Senate of this kind to be established, argued that federalism is exhausted by the idea of a division of powers between the federation and the States, enforced by the courts. In this specific context, their argument *overestimated* the importance of the High Court and the division of powers, making this *the* centrepiece of the federal system. Against this, the vast majority of the framers of the Constitution considered that federalism implies, as well, a mechanism by which the States are represented in the decision-making institutions of the federation as a whole, that is, through their equal representation in a powerful Senate.

But it is also possible to *underestimate* the significance of the High Court's role as the framers conceived it. While the vast majority did not regard the High Court as the only means by which the interests of the States might be protected, they certainly thought it should have a very important role in resolving disputes between the Commonwealth and the States concerning the scope of their respective powers and responsibilities. Indeed, it was precisely as the specific design and composition of the Senate evolved during the course of the debates that the role of the High Court was itself clarified and emphasised.

The equal representation of the States in the Senate was never doubted. Throughout the Federal Convention of 1891, it was proposed and generally agreed that Senators would be nominated by the respective State Parliaments on the model of the US Constitution as it then provided.[33] Given that under the practices of responsible parliamentary government, the executive governments of each State enjoyed the confidence of at least the lower houses of their respective Parliaments, this would have meant that the Senators nominated by the State Parliaments would have been representative, not only of the State Parliaments but also of the views and interests of the State governments. At this early stage in the debate the need to provide for a federal Supreme or High Court was also recognised, especially as a general (and possibly final) court of appeal for the entire federation,[34] and as the means by which federal law would be applied directly to the citizen,[35] but its role as an arbiter of federal disputes and as an enforcer of the Constitution, while certainly recognised, was much less prominent.[36] Accordingly, in the draft Constitution Bill that emerged from the Federal Convention of 1891, provision was made to give the Commonwealth power to establish a Supreme Court of Australia; the existence of the Court was not established by the Constitution itself, but made contingent upon the Commonwealth taking steps to create it.[37]

Following the Convention of 1891 and leading up to the Convention of 1897-98, several important changes occurred. One was that the process by which the Constitution was to come into being was made by the Enabling Acts passed in each colony to depend upon the agreement of the people of each colony voting in a referendum.[38] Associated with this move to direct, popular ratification of the Constitution was the view that the Senate ought similarly to be directly elected by the people of each State, rather than nominated by the State Parliaments.[39] As such, the Senate would be representative of the people and give effect to the federal principle in that respect, but the degree to which the Senate would be representative of the views and interests of the governments of the States was to that extent significantly reduced, if not eliminated. Notably, at around this time as well, the framers began to take much more interest in the High Court and its role in interpreting the Constitution and resolving federal disputes. John Quick and Robert Garran, in two works prepared for the Convention of 1897-98, both argued that judicial review under a written constitution was an essential element of a federal system.[40] As Garran put it, the "essential characteristics" of federal government are:

"(1) The supremacy of the Federal Constitution.
(2) The distribution, by the Constitution, of the powers of the Nation and the States respectively.
(3) The existence of some judicial or other body empowered to act as 'guardian' or 'interpreter' of the Constitution".[41]

Consistent with this perspective, from the very beginning of the debate within the second Federal Convention of 1897-98, the High Court's role as constitutional adjudicator between the Commonwealth and the States was very clearly in view.[42] In addition to a general appellate jurisdiction from the decisions of the Supreme Courts of the States, specific provision was made for jurisdiction to be conferred upon the High Court by the federal Parliament to hear matters "arising under the Constitution, or involving its interpretation".[43] According to Josiah Symon, the High Court was going to be the "keystone of the federal arch" and essential to the very "fabric" of the Constitution.[44] According to William Trenwith, it would be the "custodian of the Constitution".[45] According to Edmund Barton, the Court would be "the bulwark of the Constitution" and its "supreme interpreter".[46]

Given the critical role that the High Court would play, much closer attention was now given to such matters as the number of Justices to be appointed to the High Court, the mode of appointment, the grounds of removal from office and the extent of the Court's jurisdiction. In particular, there was concern to ensure that members of the Court could only be removed upon an address of both houses of Parliament upon proved "misconduct, unfitness, or incapacity", as Kingston proposed in 1897.[47] Kingston's argument was that it was necessary to "preserve intact the absolute independence of the judges, both in relation to the Federal Executive and the Federal Parliament".[48]

Isaacs and Higgins thought the amendment unnecessary.[49] Responding in support of Kingston, however, Symon pointed out that because the High Court would be called upon to "safeguard the liberties of the subject and the rights of the individual States against the encroachment of the [Commonwealth] Legislature", it was vital that its independence be "absolutely assured".[50] For Barton, it was precisely because the Court would be called upon to scrutinise federal legislation to determine whether it was consistent with the Constitution that it was necessary for the Court to be protected from attack by the Commonwealth Parliament, and it was in disputes between the States and the Commonwealth that the most serious of such cases would arise.[51] For Downer, what was particularly important was that the Commonwealth be prevented by the Court from pursuing powers and enacting legislation on topics "never intended by the founders of the Constitution".[52]

What is especially clear, then, is that it was because the framers wished to ensure that the allocation of only limited powers upon the Commonwealth would be maintained that they provided for the creation of an independent High Court with the power of judicial review. They recognised the immensity of the power involved – that the High Court, as Symon put it, would be "equal to, if not above, the Parliament and Executive" in this respect.[53] Indeed, such was the power that the High Court would now exercise, there were even attempts to ensure that its composition would be reflective, if not even representative, of the several States. At Melbourne in 1898, Patrick Glynn (unsuccessfully) proposed that the High Court should consist of a Chief Justice and, until Parliament otherwise provided, the Chief Justices of the several States.[54] Glynn's stated reasons were financial: in its early years, the High Court would not have much work to do, and so it would be expedient to make use of the Chief Justices of the States as an interim measure.

Barton's chief objection to this was that the proposal placed the composition and indeed even the existence of the High Court ultimately under the control of the Commonwealth, enabling the Commonwealth to "alter the arrangements upon the faith of which" the various States would agree to federate – a "structural change", he said, "in the whole fabric of the Constitution" which would undermine and perhaps even eliminate the role of the Court as arbiter between the Commonwealth and the States *at the behest of the Commonwealth*.[55] Barton also argued that the appointment of the Chief Justices of the States would lead to the suspicion that they were intended to be representative of provincial interests rather than impartial between the interests of both the Commonwealth and the States.[56] As Symon put it, they would "owe their judicial allegiance and their emoluments to the separate States".[57] But to this Kingston retorted that if the High Court was to be appointed solely by the Commonwealth there would likewise be an apprehension of bias – *unconscious bias*, as James Walker explained – in favour of the Commonwealth, and that the best solution was to make the Court representative of both the Commonwealth and the States.[58]

On both sides of this debate, it was expected that the High Court would have to resolve disputes between the Commonwealth and the States and that it ought to do so in terms that were impartial between both parties.[59] The framers were conscious, as Richard O'Connor later put it, that the Court would have to decide questions which would become matters of "burning political moment" – questions which would affect the interests of the States and the Commonwealth and would likely give rise to "heated controversy" between the two.[60] After almost a century of High Court interpretations of the Constitution which have been friendly to the Commonwealth at the expense of the States, we may regret that something like Glynn's proposal was not accepted.

This closer attention given to the High Court at the Convention of 1897-98 could be explained simply on the ground that, after almost a decade of debate on the question of federation, the attention to detail had increased, the framers had become better informed and the arguments had become more sophisticated.[61] However, this greater emphasis upon the High Court can also be explained as a response to the fact that the Senate was now to be directly elected by the people of the States – properly representative of them, but to that degree less representative of the interests of the State governments, in which context some *additional* safeguard was doubly necessary, namely the High Court of Australia exercising judicial review. Certainly Edmund Barton thought that the most essential element of the federal project was the establishment of a relatively powerful Senate in which the constituent States were to be equally represented; but, at the same time, if the Senate should fail to protect the rights of the States, he said, the High Court should be called upon to adjudicate.[62]

The framers therefore expected the High Court to be the final bulwark of the Constitution – to resolve disputes between the Commonwealth and the States over its interpretation – and in so doing, to give effect to their general vision of a "federal commonwealth". This vision involved, as I have suggested, several basic ideas: first, that the Constitution would be founded upon the consent of the people and governments of each constituent State; second, that the Constitution would *establish* the Commonwealth and *continue* the existence of the States; third, that the Commonwealth Parliament would be representative of both the people of the Commonwealth as a whole and the peoples of the several States; fourth, that specific and limited powers would be conferred upon the Commonwealth, while the States would *continue* to exercise the legislative and other governmental powers which they had possessed prior to federation; fifth, that should the Commonwealth Parliament purport to enact legislation which, despite the existence of the Senate, exceeded its constitutional powers, the High Court would be called upon to enforce the Constitution against the Commonwealth (and likewise act against unconstitutional legislation by the States); and, sixth, that the entire Constitution should only be altered in ways that reflected its character as the Constitution of a federal commonwealth – a process in most cases requiring the consent of a majority of voters in Australia and a majority of voters in a majority of States, but in certain crucial cases, requiring the consent of a majority of voters in every State affected by the proposed alteration.

Contrary to the attitude adopted by Isaac Isaacs in the infamous *Engineers Case* of 1920, the Constitution is not to be reduced to a mere statute of the Imperial Parliament at Westminster.[63] Nor is it, as Isaacs J there suggested, a compact simply of "the people of Australia".[64] It is, rather, the result of a federating process in which the voters of each of the several Australian States participated; and the terms and structure of the Constitution reflected this fact.

With the greatest of respect to the many members of the High Court who have thought differently over the years, it is quite contrary to the text and structure of the Constitution to interpret each head of legislative power conferred upon the Commonwealth in the very widest terms which the language possibly allows.[65] Each head of power is capable of alternatively narrower or wider interpretations. The High Court ought rather to adopt an interpretation of each head of power which takes fully into consideration the underlying idea that the Commonwealth Parliament is designed to be a legislature of specific and limited powers, and that the Constitution preserves the existence and continuing capacities of the States as self-governing bodies politic.[66] This does not necessarily mean that the Court should adopt the very narrowest possible interpretation of each head of power conferred upon the Commonwealth, but it certainly means that neither should the Court necessarily adopt the very widest possible interpretation.

There is no pre-defined "federal balance" to which it is possible to point in this regard. There are interpretive choices to be made. But the federal scheme of the Constitution gives the Court good reason, when making

those choices, to take into consideration the fact that the framers of the Constitution intended to create a federal commonwealth in which the Commonwealth would certainly have significant powers, but also one in which the State governments would continue to be the means by which the peoples of each State would continue to exercise a substantial capacity to govern themselves.

The framers were strongly united on the importance of judicial independence as a means to this end of keeping both the Commonwealth and the States within their respective spheres. As Downer put it, the High Court would exercise "vast powers of judicial decision" in determining what would be "the relative functions of the Commonwealth and of the States". And he seemed to speak for many of the framers when he added that the Court would have:

> "…..the obligation of finding out principles which are in the minds of this Convention in framing this Bill and applying them to cases which have never occurred before, and which are very little thought of by any of us. With this Supreme Court, particularly in the earlier days of the Commonwealth, rests practically the establishment on a permanent basis of the Constitution, 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".[67]

Such was Downer's conception, at least, of the role to be played by the High Court. No-one ventured to contradict him at the time. To argue, as Stephen Gageler has done, that the Court should assume that the political process is generally sufficient to protect the integrity of the States as self-governing constituents of the federation, and that the High Court should therefore presume that Commonwealth laws are constitutional unless unconstitutionality can be clearly demonstrated, is to argue at variance with the design and function which the framers of the Constitution so clearly had in mind for this keystone of the federal arch.

Endnotes:

* The paper draws on the author's forthcoming *The Constitution of a Federal Commonwealth: The Making and Meaning of the Australian Constitution* (Cambridge University Press, Cambridge, 2008).

1. JA La Nauze, *The Name of the Commonwealth of Australia*, in Helen Irving and Stuart Macintyre, *No Ordinary Act: JA La Nauze on Federation and the Constitution* (Melbourne: Melbourne University Publishing, 2001), 158-72. La Nauze draws attention to Rev John Dunmore Lang's *Freedom and Independence for the Golden Lands of Australia* (London: Longman, 1852), 26, asserting that the "community of the Australian colonies" already formed a kind of "state or commonwealth" in the sense used by John Milton.
2. *Convention Debates* (Sydney, 1891), 523 (Samuel Griffith). See also Griffith's use of the term *commonwealth* to designate the proposed Australian federation of States: *Convention Debates* (Sydney, 1891), 490. Griffith later acknowledged that he had not liked the term *commonwealth* when he had first heard it, but now thought it to be a very appropriate word indeed: *Convention Debates* (Sydney, 1891), 553.
3. Andrew Inglis Clark, *Australian Federation: Confidential (Draft)* (1891); Charles Kingston, *A Bill for an Act for the Union of the Australian Colonies* (1891).
4. *Convention Debates* (Sydney, 1891), 521.
5. E.g., *Convention Debates* (Adelaide, 1897), 19 (Barton), 620 (Isaacs); *Convention Debates* (Sydney, 1897), 111 (Forrest), 337 (Deakin), 750-51 (Barton); *Convention Debates* (Melbourne, 1898), 21 (Deakin), 1105 (Wise).
6. *Annotated Constitution of the Australian Commonwealth* (Angus & Robertson, Sydney, 1901; reprinted by Legal Books, Sydney, 1976), 292-4, 332-42.
7. James Bryce, *The American Commonwealth*, 2 vols (2nd ed, Macmillan, London, 1889). Indeed the first instances of the word *commonwealth* in the Convention debates appear in connection with the United States: *Convention Debates* (Sydney, 1891), 148 (Rutledge), 315 (Henry Parkes), 402 (Thynne). See La Nauze, *The Name of the Commonwealth of Australia*, *loc. cit.*, 172. There is also a hint of the idea of a

federal commonwealth in Edward Freeman's influential essay, *Presidential Government*, in *Historical Essays*, First Series (4th ed, London: Macmillan, 1886), 392. On Bryce and Freeman and their influence in Australia, see Nicholas Aroney, *Imagining a Federal Commonwealth: Australian conceptions of federalism, 1890-1901*, (2002) 30(2) *Federal Law Review* 265.

8. Alfred Deakin, an intellectual leader among the Australians, considered the debt they owed to Bryce to be "almost incalculable". The remarks of Charles Kingston, then Premier of South Australia, were not untypical; he referred to Bryce as "one of the highest constitutional authorities". See *Conference Debates* (Melbourne, 1890), 25-6; *Convention Debates* (Adelaide, 1897), 288; *Convention Debates* (Sydney, 1897), 287. La Nauze remarked that Bryce's *The American Commonwealth* was "the compulsory reading of the framers of the Constitution" and the "bible" of the 1891 Convention, and he observed that "[i]n the years ahead the cleverest and the dullest of the men of the Conventions would quote Bryce to add weight to their words": JA La Nauze, *The Making of the Australian Constitution* (Melbourne University Press, Carlton, 1974), 18-9. The importance of Bryce is undoubted, but it is possible to over-estimate his influence. Sir John Downer was perhaps more candid than most when he stated: "I humbly follow Mr Bryce when Mr Bryce happens to agree with my own views": *Convention Debates* (Adelaide, 1897), 209. None the less, the citations from Bryce within the Federal Conventions were extensive, unparalleled and usually deferential. See, e.g., *Convention Debates* (Adelaide, 1897), 30 (Baker), 98-102 (Higgins), 135 (Symon), 158 (Lyne), 209 (Downer), 243-4 (Fysh), 288-9, 293 (Deakin), 325 (Gordon), 536-8 (Glynn), 582 (Deakin), 646 (Higgins), 665 (Glynn), 704 (Deakin), 963 (Glynn), 965 (Symon), 1015 (Barton); *Convention Debates* (Sydney, 1897), 56 (Deakin), 287-8 (Kingston), 536 (Glynn), 584 (Deakin), 588 (O'Connor), 637 (Dobson), 663 (Isaacs).
9. Bryce, *American Commonwealth*, I, 12-15, 332. For a discussion of this idea, see Nicholas Aroney, *A Commonwealth of commonwealths: Late nineteenth century conceptions of federalism and their impact on Australian federation, 1890-1901*, (2002) 23(3) *The Journal of Legal History* 253.
10. Charles de Secondat, Baron de Montesquieu, *The Spirit of the Laws*, translated by T Nugent (Hafner, New York, 1949, I:IX:1).
11. Clinton Rossiter (ed), *The Federalist Papers* (New American Library of World Literature, New York, 1961).
12. Thomas C Just, *Leading Facts connected with Federation Compiled for the Information of the Tasmanian Delegates to the Australasian Federal Convention 1891, on the Order of the Government of Tasmania* (The Mercury Office, Hobart, 1891). See La Nauze, *Making of the Australian Constitution*, 23.
13. *Ibid*., 33. On Just's use of *The Federalist*, see 33-4, 37-8, 44, 49-7.
14. *Ibid*., 37. For a discussion, see Nicholas Aroney, *Imagining a Federal Commonwealth*, *loc. cit.*.
15. For a detailed discussion, see Nicholas Aroney, *The Constitution of a Federal Commonwealth*, chs 7-11 (*op. cit.*, forthcoming). See also Nicholas Aroney, *Formation, Representation and Amendment in Federal Constitutions*, (2006) 54(1) *American Journal of Comparative Law* 277.
16. Madison, *Federalist No. 39*, in Rossiter, *The Federalist Papers*, *loc. cit.*, 243-4.
17. *Ibid.*, 244.
18. Henry Bournes Higgins foresaw and lamented the significance of the Senate's power: it could delay supply bills, he said, it could reject supply bills, and it could thereby "keep Ministers on tenterhooks" and force them to "yield": Henry Bournes Higgins, *Essays and Addresses on the Australian Commonwealth Bill* (Melbourne: Atlas Press, 1900), 16-7.
19. See Nicholas Aroney, *The Constitution of a Federal Commonwealth*, ch 9 (*op. cit.*, forthcoming).
20. Madison, *Federalist No. 39*, 245.
21. *Ibid*., 246.
22. Australian Constitution, s. 128.
23. *Ibid.*, para 5. Compare, also, Australian Constitution, s. 51(xxxvii) and (xxxviii); *Australia Act* 1986 (Cth), s. 15.
24. Nicholas Aroney, *A Public Choice: Federalism and the Prospects of a Republican Preamble*, (1999) 21 *University of Queensland Law Journal* 205. Section 128 of the Constitution applies only to the amendment of the Constitution of the Commonwealth as contained in s. 9 of the *Commonwealth of Australia Constitution Act*. It does not extend to the amendment of the *Constitution Act* itself.
25. Rather than proposing the insertion of the new Preamble at the beginning of the *Constitution Act*, the referendum question asked Australian voters to approve the insertion of the new Preamble into the text

of the Commonwealth Constitution, contained in s. 9 of the *Constitution Act*. See *Constitution Alteration (Preamble) Act* 1999.

26. Stephen Gageler, *Foundations of Australian Federalism and the Role of Judicial Review*, (1987) 17 *Federal Law Review* 162. Gageler revisited the argument in a paper recently delivered to *The Future of Federalism* conference, Brisbane, 10-12 July, 2008, provisionally entitled, *The Federal Balance: Cases and Judicial Attitudes in the High Court of Australia*.
27. Gageler, *Foundations of Australian Federalism and the Role of Judicial Review*, *loc. cit.*, 188.
28. *Ibid.*, 197.
29. Broadly the same idea was first proposed in the United States by Herbert Wechsler in *The Political Safeguards of Federalism: The Role of the States in the Composition and Selection of the National Government*, (1954) 54 *Columbia Law Review* 543. It has since been scrutinised, for example, in John Yoo, *The Judicial Safeguards of Federalism*, (1997) 70 *Southern California Law Review* 1311; Larry Kramer, *Putting the Politics back into the Political Safeguards of Federalism*, (2000) 100 *Columbia Law Review* 215; and Lynn Baker and Ernest Young, *Federalism and the Double Standard of Judicial Review*, (2001) 51 *Duke Law Journal* 75.
30. Gageler, *Foundations of Australian Federalism and the Role of Judicial Review*, *loc. cit.*, 197, emphasis added.
31. See, further, Nicholas Aroney, *Reasonable Disagreement, Democracy and the Judicial Safeguards of Federalism*, (2008) 27 *University of Queensland Law Journal* 129.
32. On the general topic of judicial review in Australia, see PH Lane, *Judicial Review or Government by the High Court*, (1966) 5 *Sydney Law Review* 203; Geoffrey Lindell, *Duty to Exercise Judicial Review*, in Leslie Zines (ed), *Commentaries on the Australian Constitution: A Tribute to Geoffrey Sawer* (Sydney: Butterworths, 1977); James Thomson, *Constitutional Authority for Judicial Review: A Contribution from the Founders of the Australian Constitution*, in Craven (ed), *The Convention Debates* (1986), Vol 6; Brian Galligan, *Politics of the High Court* (1987), ch 2.
33. In 1913, the US Constitution was amended to make Senators directly elected by the people of each State. Before then, Senators were nominated by the State legislatures. See US Constitution, Seventeenth Amendment.
34. *Federal Conference* (1890), 57, 72, 109, 148, 180, 197; *Federal Convention* (Sydney, 1891), 23, 26 (Parkes), 34 (Griffith), 45 (Fysh), 52 (Munro), 83 (Deakin), 96-7 (Barton), 103 (Downer), 126-7 (Jennings), 152 (Rutledge), 209 (Brown), 216-17 (Wrixon), 253-5 (Clark), 294-5 (Cuthbert), 306 (Suttor), 473-4 (Wrixon), 475 (Kingston), 527 (Griffith), 786-7 (Dibbs), 787 (Downer).
35. *Federal Conference* (1890), 89, 91; *Convention Debates* (Sydney, 1891), 95-6 (Barton). Note also Andrew Inglis Clark's calls for a distinct system of federal courts: *Federal Convention* (Sydney, 1891), 253-4, 474-5, 499.
36. Both James Bryce and AV Dicey had pointed out that judicial review was the means by which a federal constitution is enforced in the face of infractions by either the state or federal governments: Bryce, *American Commonwealth*, I, 225-8, 235-6, 237-43, 247; Dicey, *Law of the Constitution*, 130-55, 410-13. Cases in which the Supreme Court of the United States had interpreted and applied the Constitution in federalism disputes were cited and discussed by the Australians, but the general principle of judicial review presupposed in these cases was generally passed over. See, e.g., *Federal Conference* (1890), 45-6, 99. Perhaps the clearest statement of the court's judicial review role was by Edmund Barton: *Federal Convention* (Sydney, 1891), 96-8 (Barton); cf also 103 (Downer), 163-4 (Kingston), 294-5 (Cuthbert), 473-4 (Wrixon), 475-6 (Downer), 663-4 (Clark), 692-3 (Gordon), 696-7 (Kingston), 698 (Clark), 767 (Wrixon). Others recognised that judicial review would make the court even more powerful than the legislature (*Federal Convention* (Sydney, 1891), 198 (Moore)) and enable it to control the meaning to be given to the Constitution (*Federal Convention* (Sydney, 1891), 210-11 (Brown), 476 (Downer)). Apart from these references, however, there was generally only minimal recognition in 1891 of the role of the Court in interpreting the Constitution and resolving federal disputes.
37. *Commonwealth of Australia Bill* (1891), Ch 3, s 1. For the text, see *Federal Convention* (Sydney, 1891), 956.
38. E.g., *Australasian Federation Enabling Act* 1896 (Vic), ss 33-38.
39. See *Federal Convention* (Adelaide, 1897), 26-7 (Barton), 641 (Draft Bill, cl 9), 1223 (Draft Bill, cl 9).
40. Robert Garran, *The Coming Commonwealth: An Australian Handbook of Federal Government* (1897), 15-

16; John Quick, *A Digest of Federal Constitutions* (1896), 10-14.

41. Garran, *The Coming Commonwealth*, 23–4.
42. *Convention Debates* (Adelaide, 1897), 24-5 (Barton), 129 (Symon), 962 (Barton, referring to an observation of O'Connor's).
43. Australian Constitution, s. 76(i).
44. *Convention Debates* (Adelaide, 1897), 950 (Symon). Alfred Deakin said the same thing when introducing the *Judiciary Bill* into the Commonwealth Parliament in 1902: *Commonwealth Parliamentary Debates, House of Representatives*, 1902, p. 10967. Isaac Isaacs, less persuasively, had claimed that it would be parliamentary responsible government that would be the keystone of the federal arch: *Convention Debates* (Adelaide, 1897), 169.
45. *Convention Debates* (Adelaide, 1897), 940 (Trenwith).
46. *Convention Debates* (Adelaide, 1897), 952 (Barton).
47. *Convention Debates* (Adelaide, 1897), 947 (Kingston), cf 950-51 (Symon). Thus going further than the Canadian Constitution (*British North America Act* 1867 (UK), s. 99(1)), and before that the *Act of Settlement* 1701 (UK) (12 & 13 Wm 3 c.2), s. III.
48. *Convention Debates* (Adelaide, 1897), 946 (Kingston).
49. *Convention Debates* (Adelaide, 1897), 947-9 (Isaacs), 953 (Higgins). And yet, both Isaacs and Higgins thought that it was necessary to create a strong and independent Court. Higgins in particular saw a vital role for the Court in deciding "between the States and the Federation and upon encroachments by the Federation upon the States": *Convention Debates* (Adelaide, 1897), 953 (Higgins).
50. *Convention Debates* (Adelaide, 1897), 950 (Symon).
51. *Convention Debates* (Adelaide, 1897), 952-3, 962 (Barton).
52. *Convention Debates* (Adelaide, 1897), 557 (Downer).
53. *Convention Debates* (Adelaide, 1897), 942 (Symon).
54. *Convention Debates* (Melbourne, 1898), 265-8, cf 944. Samuel Griffith had previously suggested something along these lines: see *Convention Debates* (Melbourne, 1898), 270-71 (Symon, referring to Griffith). Glynn's proposal was supported by Kingston and Gordon, but opposed by Wise, Barton, Downer, Higgins, Isaacs and Symon. See *Convention Debates* (Adelaide, 1897), 115-6 (Wise), 117 (Gordon), 130-31 (Wise), 268 (Barton), 272-3 (Kingston), 274 (Downer), 279-81 (Higgins), 283 (Isaacs), cf 369 (Barton), 946 (Wise); *Convention Debates* (Melbourne, 1898), 269 (Barton), 269 (Symon). Note also the (unsuccessful) proposal of Frederick Holder that, in any case in which the High Court had declared a federal law to be *ultra vires*, there be a mechanism by which the matter could be referred to a popular referendum of the voters of the Commonwealth and of the States and that, should the referendum approve the federal law in question, the Constitution should be deemed to have been amended to the extent necessary and the law conclusively determined to be *intra vires* from the date of its enactment: *Convention Debates* (Melbourne, 1898), 1717-18.
55. *Convention Debates* (Melbourne, 1898), 268 (Barton).
56. *Convention Debates* (Melbourne, 1898), 269 (Barton), 270 (Symon).
57. *Convention Debates* (Melbourne, 1898), 269 (Symon).
58. *Convention Debates* (Melbourne, 1898), 272-4 (Kingston and Walker).
59. As Galligan, *Politics of the High Court*, 67, aptly summarised it:

    "The Australian founders had a more even-handed view of federalism than either the Americans or the Canadians, and thought that the federal government was as likely as the States to overstep its defined areas of jurisdiction. Consequently they considered judicial review by the court is absolutely crucial for keeping both levels of government within their constitutional boundaries".
60. *Convention Debates* (Melbourne, 1898), 357 (O'Connor).
61. Compare Galligan, *Politics of the High Court*, 53.
62. *Convention Debates* (Adelaide, 1897), 962.
63. *Amalgamated Society of Engineers v. Adelaide Steamship Co Ltd* (1920) 28 CLR 129, 148-154 (Knox CJ, Isaacs, Rich and Starke JJ); cf 161-2, 165 (Higgins J).
64. *Ibid.*, 153 (Knox CJ, Isaacs, Rich and Starke JJ).
65. See James Allan and Nicholas Aroney, *An Uncommon Court: How the High Court of Australia has Undermined Australian Federalism*, (2008) 30 *Sydney Law Review* 245.
66. For more detail, see Nicholas Aroney, *Constitutional Choices in the* Work Choices Case*, or What Exactly*

is Wrong with the Reserved Powers Doctrine?, (2008) 32(1) *Melbourne University Law Review* 1.

67. *Convention Debates* (Melbourne, 1898), 275.