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POLITICS OF THE HIGH COURT

A STUDY OF THE JUDICIAL BRANCH OF GOVERNMENT IN AUSTRALIA

Brian Galligan

University of Queensland

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Brian Galligan was born and educated in Queensland, graduating in Commerce and Economics from the University of Queensland. He studied for his M.A. and Ph.D. at the University of Toronto from 1973 to 1978, and lectured at La Trobe University (1979–81) and at the University of Tasmania (1982–83). In 1984, Dr Galligan was a Visiting Fellow at the Australian National University, Department of Political Science, and is currently a Research Fellow at that university. He is the author of numerous articles, and the editor of *Australian State Politics* (Longman Cheshire, 1986). Dr Galligan's main research interests are the Australian Constitution and federalism, and Australian political economy.

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To the memory of my father Jack

Epigraph

The fundamental conceptions, which a legal system embodies or expresses, are seldom grasped or understood in their entirety at the time when their actual influence is greatest. They are abstract ideas usually arrived at by generalization and developed by analysis. But it is a mistake to regard such ideas as no more than philosophic theories supplied *ex post facto* to explain a legal structure which has already been brought into existence by causes of some other and more practical nature. On the contrary, sometimes the conceptions, even though never analysed and completely understood, obsess the minds of the men who act upon them. Sometimes indeed they are but instinctive assumptions of which at the time few or none were aware. But afterwards they may be seen as definite principles contained within the ideas which provided the ground of action. Further, when such conceptions have once taken root they seldom disappear. They persist long after the conditions in which they originated have gone. They enter into combinations with other conceptions and contribute to the construction of new systems of law and of government.

Owen Dixon, "The Law and the Constitution", 1935,
reprinted in *Jesting Pilate: And Other Papers and Addresses* (1965), 38.

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Preface

This book is a study by a political scientist of the politics of judicial review in Australia. Its purpose is to examine the High Court as a political institution and to assess the way it has exercised its power throughout Australia's political history. Since that is a dauntingly large topic for a single book, especially as there is a dearth of literature and research on the subject, the coverage is selective and in many instances only schematic and suggestive. While the book follows a broad historical framework, it is not a history of the Court but an analysis of the Court's political performance during successive historical periods. Nor is the book an attempt by a "bush lawyer" to write constitutional law, even though a good deal of time is taken up with examining legal opinions and trends in judicial doctrine. Legal reasoning merits close attention in a political study of judicial review because it provides the formal rationale for the Court's decisions.

Parts of the book are based on my original Ph.D. thesis completed at the University of Toronto in 1978. That thesis was the result of applying what I learned from my teachers at a fine university to my own reading and reflections on Australian politics. I am especially indebted to Peter Russell and Walter Berns for their scholarly example and guidance over several years, to Peter Hogg of Osgoode Law School for his advice and encouragement, and to that grand old scholar Albert Abel with whom I had the privilege of working before his death. Since returning to Australia in 1979 I have completed the research for the book. As well I have drawn on the work of many Australian scholars in the fields of history, law and politics and am indebted to the work of three in particular, John La Nauze, Geoffrey Sawer and Fin Crisp. Numerous others are acknowledged in references throughout the book.

Some of the material of the book and parts of the argument have been previously published as journal articles. An earlier version of chapter 2 was published as "Judicial Review in the Australian Federal System: Its Origin and Function", *Federal Law Review* 10 (1979): 367. Parts of the argument about the Court's political strategy, the nature of the constitution and the reason for Labor's opposition to its federal structure have been published in two articles: "Legitimating Judicial Review: The Politics of Legalism", *Journal of Australian Studies* 8 (1981): 33; and "Federalism's Ideological Dimension and the Australian Labor Party",

Australian Quarterly 53 (1981): 128. The last section of chapter 5 on the Tasmanian *Dam* case draws on a longer article, "The Dams Case: A Political Analysis", in M. Sornarajah, ed., *The South West Dam Dispute: The Legal and Political Issues* (1983), 102.

I am grateful to the Australian Research Grants Scheme for supporting further research under a 1980 grant and to Gaynor MacDonald for her work; to the School of Social Sciences at La Trobe University for assisting with additional research; to the Flinders University of South Australia for allowing me access to the Evatt papers; and to Don Aitkin and the Research School of Social Sciences at the Australian National University for inviting me to spend a year as a visiting fellow in the Political Science Department, where I was finally able to finish the book. I should like to thank all those who have assisted with suggestions, critical comment and typing, particularly James Thomson who read the entire manuscript and offered innumerable helpful suggestions, Don Aitkin who read parts of it, Carol Beames, Janet Grubb and Brigitte Coles who typed the final manuscript, and Gillian O'Loghlin for proof reading and Suzanne Ridley who prepared the index. Thanks also to Clare Hoey of University of Queensland Press for editorial suggestions.

Finally I owe a special debt of gratitude to my wife and colleague, Roslyn, who has generously supported this work and allowed it to take precedence over her own.

Introduction

Politics is concerned with power: how it is exercised by individuals; how its exercise is structured in institutional arrangements and practices; and how the various sets of individuals and institutions exercising power interrelate with one another and with the larger subject society over which they rule. Politics is not concerned with all aspects of power and power relations, but with the more formal ones that entail an essential element of public authority and legitimacy. Quite clearly, judges, courts and judicial decisions all come within the broad definition of politics. Put another way, the political system includes the legal world as a specialized subsystem.

In past times and in less complex polities the standard legal functions of adjudicating conflicts and interpreting laws, now performed by our specialized court system, were carried out either directly by ruling assemblies and executive heads or by their committees and agents. In fact that is how courts originated. Even today in many countries where the "rule of law" is not as highly developed as in Australia, leading individuals and groups or local communities still perform such functions. In highly complex liberal democracies like ours, however, where the processes of political evolution and technical specialization have produced an independent judiciary and court system staffed by specialist lawyers, there is a formal separation of law from politics narrowly defined as government.

Unfortunately for the proper understanding of both law and politics in our society, the respective academic disciplines have largely accepted this formal line of demarcation, and "law" and "politics" are narrowly defined as separate and distinct subjects. What was only a conventional distinction, based on constitutional separation and professional specialization, became de facto generic because the separate disciplines of politics and law each used different methodologies and studied their subjects for very different purposes. Law studied judicial decisions and was concerned primarily with technical and professional issues, while politics studied the more obvious governmental institutions and processes such as parliament and the executive to see how governments ruled and public affairs were administered. The power and social control that courts exercised were ignored—by lawyers because that was not their concern, and by those who studied politics because

that was outside their domain. Recently sociologists have stepped into this breach and have begun studying law as part of the system of social control.[1]

More surprising was the extension of this artificial segregation of the disciplines of law and politics to judicial review by the High Court. The High Court is the third branch of government and as such is an integral part of the institutional machinery of government. This is obvious from the constitution itself which, in its basic institutional arrangements, formally enshrines the principle of separation of political power into legislative, executive and judicial branches. Chapter 3 describes the judicature, following chapter 1 on parliament and chapter 2 on the executive. Chapter 3 deals with "judicial power" and specifies the structure of the High Court. Not only does the High Court receive major emphasis in the constitution, but its primary function of judicial review is also an important part of the ongoing political process.

Through exercising judicial review, the High Court plays an important role in Australian politics that is both adjudicative and constitutional. In its adjudicative role, the Court arbitrates the kinds of jurisdictional disputes that invariably arise when legislative, executive and judicial powers are divided between two levels of government, as in our federal system. Through its adjudicative role, the Court is involved in the political process. Controversial cases that involve disputed jurisdictional claims either between federal and state governments or between private interests and one or another level of government come to the Court for decision. The Court's decisions then feed back into the political process, producing winners and losers and affecting the balance of power between federal and state governments and private interest groups.

From a lawyer's perspective, such political disputes might be seen as "legal" cases when they come to the Court for resolution and are decided on strictly "legal" grounds. But that does not mean that they are in fact apolitical; rather the Court and its legal method are being used for a political purpose. Perhaps the point is clearer if one adopts a political-systems point of view. Consider the High Court as that part of the larger political system through which certain kinds of high-level political issues, disputes involving governments, are routed and resolved. From the viewpoint of the individual institution, the Court receives inputs from the political process (disputes concerning jurisdictional powers) and initiates outputs (decisions) that form part of the political process. If the political system is a process of authoritative decision making in which politics takes place as a systemic flow, as modern political science tells us,[2] then clearly the High Court in its constitutional work is an important part of the political system and performs a key function within the political process.

In its adjudicative role, the Court is involved in resolving high-level disputes that are thrown up by the ongoing business of federal government. In so doing, the Court also exercises its complementary, but more important, constitutional role of authoritatively interpreting the constitution. In this sense, the Court stands

above the political system and the political process of which it is also part. By interpreting the constitution which sets up the machinery of government and controls the political process, the Court is itself, to a significant extent, shaping the political system and process. Since the constitution is the basic instrument of government, the High Court's role of authoritative interpreter is a primary political function.

The High Court's political role in exercising judicial review has been neglected by the disciplines of both law and of politics. James Thomson has recently pointed out the shortcomings of the lawyer's approach:

> Exposition and analysis of Australian constitutional law continues to be predominantly an exegesis of particular results and reasons contained in judgments rendered by courts. Australian case and text books designed for constitutional law courses perpetuate this approach. Extracts from High Court decisions are reproduced and synthesized, more often than not, in a vacuum. Placement of this traditional approach within a wider spectrum, encompassing, for example, the historical, political, economic and comparative milieu, is overdue. That in turn should generate discussions and issues whose focus will draw and gather from the particular instance the more universal theme or general premise.[3]

For their part political scientists have left the study of the High Court and judicial review to constitutional lawyers. Emerging as a separate discipline only in the postwar period in Australia, political science has been mainly concerned with political parties, elections, bureaucracy, interest groups and voting. As Don Aitkin notes in his recent report on political science in Australia: "there has not been much interest in fundamental constitution-making: parliament, the federal system, legal institutions and the like; these are assumed to be given, or taken to be the province of lawyers".[4] As a result the political role of the High Court has been ignored by both lawyers and politicians. The notable exception is Geoffrey Sawer, one of Australia's most renowned constitutional lawyers, who has written extensively about the political aspects of the Court's work.

This book is a further attempt to fill that gap from a political science perspective. It discusses the politics of judicial review at three levels: first, it locates the Court and its functioning within the larger political system; second, it focuses on the Court as a political institution in its own right, giving particular attention to its composition and decision making over time; and third, it looks in detail at particular leading cases that have had major constitutional or political impact. Each of these three levels of analysis is necessary for a proper understanding of the political work of the Court.

The first and most general level of analysis is necessary because the Court functions as an interdependent part of a larger and more complex political system. The political system is itself embedded in a broader environment made up of an evolving political culture and a dynamic political history. All these broader factors and interdependent relations determine the sorts of constitutional cases that come

to the Court for decision. As well they affect the strategy that the Court adopts to facilitate its work and legitimate its decisions. Chapter 1 on the political environment of judicial review is concerned specifically with these larger issues. But throughout the book an attempt is made to locate the Court's work in the larger political and historical contexts. The Court's adjudication of periodic challenges made to the constitution by federal Labor governments is a major theme of the book.

The second level of focus is on the Court as a political institution in its own right. Such a focus is necessary if we are to understand the Court's operation, even if this too is alien to the standard approach of constitutional lawyers who focus narrowly on the Court's outputs or cases. Here the emphasis is on questions about the Court's function, its staffing and internal dynamics. Chapter 2 sets out the founders' design of the High Court and the political function of judicial review which they envisaged. Successive chapters examine how the Court has carried out that function. Because the staffing of the Court is crucial, close attention is given to the impact of judicial appointments, dominant individual judges and changing factional groupings on the Court. Major decisions and doctrinal developments are shown to be influenced by the composition of the Court at any particular time. For the most part, doctrinal changes occur not spontaneously but when new judges with different views are appointed to the bench.

The third, micro level of focus is that of individual cases and lines of doctrinal development that link cases. Although this is the familiar domain of constitutional law, the emphasis given here is rather different from that of lawyers. There is less attention paid to forensic dissection of judicial opinions and more to the political aspects and context of the cases. Judges' opinions are examined not for their own sake or because of their contribution to the law but as official reasons that purport to justify particular political decisions. As well the cases that are examined in detail have been selected as much for their political as for their legal significance. Hence one cannot piece together a potted version of constitutional law from these pages; a constitutional law textbook, and Australia has many high quality ones, is necessary for a thorough account of constitutional law.[5]

If the book stimulates constitutional lawyers to broaden the scope of their study of constitutional cases and leads political scientists to include the High Court and judicial review within mainstream political analysis, it will have achieved its purpose. It is not intended to be the final word in this fascinating and interdisciplinary area, but to be a provocative beginning.

1

Stability and Conflict in Australian Politics: The Political Environment of Judicial Review

The political history of the Australian nation from its federation in 1901 to the present day has seen the working out of two separate and opposing sets of forces which have tended to produce stability on the one hand and conflict on the other. The stabilizing forces have been dominant. Despite periods of polarization and confrontation associated for the most part with challenges to the established order by federal Labor governments, conflict has been peacefully resolved within existing political institutions. For more than three-quarters of a century Australia has enjoyed periods of steady growth and prosperity interspersed with periods of national crisis caused by war and depression. Nevertheless the Australian federal system has coped and retains the basic framework set out by its founders. The federal government comprises the institutions designed in the 1890s, and embodies in somewhat bloated form the original powers that were shorn from the colonies in 1901. The states are the same family of colonies that welded their peoples into "one indissoluble Federal Commonwealth" for specific national purposes. During a history of national growth that has included periods of crisis and acute conflict, political stability has triumphed.

What are the underlying causes of stability and of conflict in the Australian political system? And why has stability been dominant? These are among the most important questions of Australian politics. It is contended here that stability is due primarily to three factors: a social and political culture that is relatively homogeneous, a political tradition that is essentially liberal democratic, and a federal constitution that embodies and reinforces the principles and practices of a liberal political economy. Conflict in Australian politics has been due to real differences in party, class and ideology. True, the similarities among Australian political parties, classes and ideologies are greater than their differences, but that is only another way of affirming the dominance of the stabilizing factors already mentioned. The major conflict present in Australian politics has been rooted in real differences in social class and political ideology that are represented by the division between the Liberal and Labor parties. Romantic Labor historians have characterized the Labor party as the standard bearer of Australia's radical national ethos. It would have been more accurate to describe Australia as predominantly a liberal polity whose natural governors were the Liberal parties, with Labor being

the reformist challenger to the dominant liberal ethos. It is argued in this book that the federal constitution has been the structural anchor, bringing stability to Australian politics while the Labor party in the past, but less so in the last couple of decades, has been the main institutional agent for change.

The High Court, as guardian of the constitution, has played an important stabilizing role. Since its creation in 1903 it has been remarkably active in deciding constitutional issues and in forcing governments, particularly federal Labor governments, to abandon legislative initiatives or to modify their policies to fit the constitutional mould. At various times in Australian history, but especially during the 1940s, the Court has made important constitutional decisions affirming the liberal character of the Australian polity. The Court overruled the major socialist initiatives of the Chifley Labor government and effectively put Labor's socialization objective beyond the pale of the Australian constitution. What is more surprising, the Court did that without jeopardizing its neutral image with the public or sacrificing its formal legitimacy with the Labor party. There was no direct challenge to the Australian High Court comparable to Roosevelt's threat to pack the United States Supreme Court in 1937; nor did the Australian Court, unlike the American Court, back down.

The Court's political achievement has been substantial and is the subject of this study. Because it is only a part of the political system, however, and not the most important part at that, the Court as political actor has to be viewed within the larger political context. That the Court has been able to adjudicate great political disputes, upholding the constitution and legitimating its decisions, has been as much due to factors beyond its control as to its own considerable political skills. To appreciate the political work of the High Court, one has to locate its functioning within the larger context of Australian politics. That is the purpose of this chapter, most of which is concerned with the character and institutions of the Australian political system, of which the judicial branch of government is an integral part.

Party, class and ideology

The two great institutional structures that have shaped Australian politics are the constitution and the political party system. Each of these two structures encompasses both stability and conflict but in rather different ways. Moreover, the combination of the two systems produces a unique balance between tendencies towards stability and conflict. Considering the constitutional system first, conflict is deliberately built into key institutions and arrangements. For instance the division of the federal legislature into two houses of roughly equal powers but quite different electoral bases allows, and even fosters, conflict within the legislature. More importantly, the federal system ensures intergovernmental conflict by splitting powers between competing levels of government. At the same time the overriding purpose of

institutionalizing conflict in these ways is to produce political moderation and the stability of the overall system. The fragmentation of power and internal checking of institutions is designed to ensure that tyranny and political excesses are unlikely. To sum up, the constitutional system seeks stability through introducing conflict into key parts of the system; power is deliberately diffused and institutions fragmented in order to stabilize the system as a whole.

The political party system has quite a different mix of elements of stabilization and conflict. Even allowing for the complications of a Liberal coalition rather than a single party, and the periodic existence of minor parties such as the Democratic Labor party between 1955 and 1974 and the Australian Democrats in recent years, Australia has basically a two-party system. Each party is an instrument for aggregating support in order to form a winning electoral majority. As such it is a stabilizing force, since a successful party needs to ameliorate conflict within its own ranks and as well to build majority support in the wider community. Conflict of a limited sort is institutionalized between the two parties, however, as they compete against each other to win the majority support necessary to gain office.

Australia's disciplined two-party system is clearly compatible with a unitary Westminster arrangement where government and opposition confront each other in a dominant legislative chamber. The Westminster part of the Australian constitution, particularly responsible government, is entirely consistent with, and both reinforces and promotes, the system of disciplined parties. When disciplined parties work the federal parts of the constitution, however, additional conflict is generated. For example, when opposing parties control the two houses of the federal legislature, as they sometimes do, or when opposing parties control different governments at the federal and state levels as they almost invariably do, extra conflict is generated because of the constitutional mismatch brought about by combining Westminster and federal systems.

A more important source of conflict in Australian politics has been the class base of the political parties and the ideological differences between them. When political parties were formed in Australia around the turn of the century they institutionalized aspects of class division within the Australian polity between the working class and the middle class. These class differences were articulated in conflicting party ideologies: liberalism and labourism, or liberal democracy and democratic socialism of the British Labour variety. Parties were the bearers of conflict since they represented in the political arena the class and ideological cleavages of the Australian polity. The class dimension of Australian political parties is obvious if a comparison is made with the United States, a similar but much larger and more complex liberal democracy. Although a nation of greater regional diversity and more extreme social conflict, the United States is not polarized by disciplined political parties articulating class differences and espousing conflicting ideologies. Rather, American parties have been loose-knit institutions for building a national

consensus across class lines. Both the Republican and Democratic parties are essentially liberal parties, even though the Democrats have traditionally had more support from labour unions and disadvantaged groups.

Two immediate qualifications need to be made regarding the Australian cleavages. The first concerns their relatively minor extent. In the spectrum of political possibilities, Australian classes, ideologies and parties are quite close together. In fact there is far more common ground than there are differences. The Australian working class has always enjoyed one of the highest standards of living in the world and the disparities of wealth in Australian were never as great as in most other countries. Although there have been significant income differentials, class distinctions have been more apparent in the subtler terms of quality and dignity of work, and in the web of social relations that flow from, and are broadly determined by, one's position in the productive process. Class differences in Australia have been considerably smaller than they might otherwise have been because of the political and industrial strength of the working class and its political achievements through the Labor party. Indeed Labor's successes in reforming Australian capitalism and setting in place the modern welfare state have contributed towards the lessening of differences in party, class and ideology.

In the realm of ideology, differences between liberalism and labourism are not excessive. Australian liberalism was an offshoot of nineteenth-century English liberalism and has always had an important radical component. This liberalism benefited from the progressive and compassionate reformulations of Mill and Green in the second half of the nineteenth century. A self-professed but somewhat confused Australian liberal could say in all earnestness in 1953 that he was "against self-interest, economic or class interest" and was really "a *very* Fabian socialist".[1] It is hardly surprising that the Labor party took over many strands of radical liberalism when it was formed in the 1890s, and that ever since then its outlook and policies have had much in common with those of progressive liberals. Similarly the Liberal party has both tolerated and retained democratic socialist policies and practices. As Robert Menzies, the father of modern Australian liberalism, acknowledged in 1964, "Where government action or control has seemed to us to be the best answer to a practical problem, we have adopted that answer at the risk of being called Socialists."[2] Moreover, in competing for a majority of popular votes, both political parties have been forced to modify their policy platforms in the direction of a compromise middle ground.

The second important qualification that needs to be made in any plausible class view of Australian political parties is that the relationship between party and class has changed substantially over time. Put briefly, there has been a reduction in class differences and a scrambling of the class basis of political partisanship. Australia was never the battleground where Marx's epic forces of capital and labour were locked in mortal combat. Classes were never rigidly distinct nor was there a simple one-to-one relationship between class and party. Hence the common concept of

the Australian party "as based upon a class division, with trade unionists forming the stable core of one such class" was probably always a somewhat romanticized simplification of the real situation. Certainly since World War II, as Don Rawson's careful study of recent trade union trends establishes, "the gap between this model of the party system and the beliefs and actions of real people has widened rapidly".[3] With Australian society becoming more affluent and complex, manufacturing and blue-collar trade unions declining relative to service industries and white-collar unions, and large segments of "unwilling conscripts" and non-Labor voters being conscripted into unions, class divisions have become blurred. As a result the reasons why people support the parties they do have become more inscrutable. Common sense observation attests to this fact, and those who have carried out empirical research claim to have demonstrated it scientifically.

In his study of *Society and Electoral Behaviour in Australia* (1978), David Kemp concludes that there has been a "convergence in electoral behaviour among individuals on different sides of the old cleavage systems" in the period from 1945 to 1975, and in particular "a substantial decline in the importance of class as a structural basis for voting behaviour".[4] Kemp's findings are based on extensive attitudinal research which is linked to generally recognized changes in Australia's postwar social environment such as increased affluence, rising levels of education, growth in the service sector, greater urbanization combined with the diffusion of the working class into suburbia, and a "middle-classing" of attitudes among blue-collar workers. The result has been the increased homogenization of the electorate and the erosion of Labor's traditional solid constituency within the blue-collar workforce. The convergence part of Kemp's analysis broadly supports the complementary argument that will be developed subsequently in this study: that there has been a transformation of Labor policy in postwar decades from traditional concern for working-class gains to concern with overall economic management and quality of life considerations. The important consequences for this study are a marked decrease in tensions between Labor and the constitution and a consequent decline in the political significance of the Court's pivotal role of judicial review.

Whether the process of integration and homogenization has gone as far as Kemp claims—to the extent that "it becomes difficult to identify the grounds on which an appeal could be made to distinctive class interests"[5]—is more dubious. The evaluation of this rather extreme claim is beyond the scope of the present work and would require a methodological evaluation of the adequacy of attitudinal survey data alone for investigating aggregate social relations. The argument being advanced here is that historically the federal Labor party has been a major institutional agent of conflict in Australian politics, but that it has become increasingly less so in recent decades; and that a large part of the reason for the heightened conflict earlier on and the reduced conflict in recent decades has been the changing class base of the Labor party. When the class component of party politics was stronger there was greater conflict in the system, but as it has been reduced there has been less.

While Kemp's evidence might corroborate parts of that argument, one has to rely mainly on an analysis of the historical developments within the political economy of Australian capitalism.

That entails briefly reviewing an old and favoured topic in Australian historiography—the origins of the Labor party. Labor's entry into politics as an independent working-class party in the 1890s ended the golden age of the Australian bourgeoisie when the liberal ethos reigned supreme and politics was limited to factional squabbles between competing middle-class elites.[6] By rejecting liberal and radical middle-class leadership in favour of direct parliamentary intervention in its own right, the working class shattered the prior consensus that liberalism was a universal creed taking care of all classes and interests. The rise of the Labor party pointed to the growing awareness of conflicting class interests. Labor introduced the principle of party based upon different class interests into Australian politics, and forced a realignment of political forces along the familiar Liberal versus Labor lines.[7] Much of the tension in Australian politics resulted from the class-related conflict that the Labor party both reflected and produced.

In a theoretical book on liberal democracy, C. B. Macpherson has argued generally "that the chief function the party system has actually performed in Western democracies since the inception of a democratic franchise has been to blunt the edge of apprehended or probable class conflict, or . . . to moderate and smooth over a conflict of class interests so as to save the existing property institutions and the market system from effective attack".[8] This blurring of class lines by the party system is supposed to explain why mass enfranchisement of the working class did not lead to the overthrow of the capitalist system. In fact, in Australia the opposite has occurred, with the party system that developed at the turn of the century articulating and representing the class divisions in Australian society. Previously these divisions had been blurred by a universalist liberal ethos and factional politics. The mass franchise did not bring dramatic changes to the basic capitalist order because of the overall prosperity that capitalism produced and the generous share of its benefits that the working class was able to secure through political organization.

The institutional check to working-class pressures in Australia was not so much the party system as the federal constitution and the High Court, the former through determining the basic organizational shape of political parties and specifying limits to their practical policies, the latter by policing those limits. The constitution's shaping and moderating of the party system needs to be taken into account in rounding out Don Aitkin's study of *Stability and Change in Australian Politics* in which he also selects "the massive stability" of the system as its outstanding feature. Aitkin finds the explanation of this stability in party solidarity and continuity. Aitkin's thesis is "that the shape of Australian politics has been largely unchanged since 1910, and that the causes of this stability are to be found in the adoption, by millions of Australians then and since, of relatively unchanging feelings of loyalty

to one or other of the Australian parties".[9] The freezing of politics into the Labor-Liberal party mould is said to explain the dominant stability of the system, while conflict is present in a secondary, regulated fashion because the parties represent different ideologies and classes. According to Aitkin, ideology that contains some account of the good society and how to achieve it is an essential element of modern parties; it provides "a thick ideological coating to the bases of economic self-interest on which the party system rests".[10] The class element is also present in Aitkin's account because the party system embodies "a simple social cleavage—that between the haves and the have-nots, both very broadly defined".[11]

Aitkin quite properly emphasizes the crucial role of party solidarity in stabilizing Australian politics, but his account does not give sufficient weight to the moulding and moderating effect of the constitution. He gives parties full credit for the massive stability of the system and dismisses the federal structure as "a skeleton that represents the anxieties of colonial days better than it does the realities or needs of industrial Australia in the late twentieth century".[12] Although commonly used by others as well as Aitkin, this "horse-and-buggy" characterization of the constitution fails to recognize that it is a living skeleton that provides the shape and form of the Australian body politic. Pre-dating the federal parties on which Aitkin's study focuses, the federal system has helped mould those parties into their present form. Aitkin examines only one level of the party system and explains the stability of the total system in terms of it without acknowledging that parties at the national level are already severely checked by their own state machines, by the limited powers that the constitution allows to the federal government and by the division of powers among the branches of the federal government.

Like Rawson and Kemp, Aitkin also argues that there has been a convergence in Australian politics in recent decades and a scrambling of the social and economic factors affecting partisanship. He too is sceptical about class having any explanatory value in modern Australian politics and dismisses class conflict as "one of the myths of Australian politics". Aitkin denies there is any significant class consciousness in Australia, despite the finding of his 1967 survey that "the great majority not only accepted that there were classes, they seemed equally clear about which class they themselves belonged to".[13] Further testing in 1979 suggested that some "middle-classing" had occurred, but that most Australians had a sufficient sense of class to slot themselves into either the middle class or the working class. In addition there was a doubling of those who saw class conflict as inevitable, up from 25 per cent to 50 per cent in 1979.[14] This increased polarization reflected the onset of economic recession in 1974.

Aitkin originally sought to explain away this popular perception of class with the thesis of Giovanni Sartori that parties produce class consciousness.[15] This explanation was not altogether convincing. While political parties, and particularly the Labor party, do identify and articulate class conditions for the ordinary voters

so that their class perceptions are often summed up in their party allegiance, it seems equally obvious that there is some element of real class condition underlying such appeals. Otherwise one is left with a curious version of "false consciousness".

Aitkin, in the second edition of his book, returned to this troublesome part of his argument that party identification could not be explained by social structure or class. Aitkin offered two further explanatory reasons. The first was that the political world had a richness and life of its own that could be understood wholly in terms of political processes so that more fundamental social and economic substructures were not needed. The second was that the structure of modern societies is so complex that any individual's partisan choice is "the relatively unpredictable result of a unique interaction" of diverse factors.[16] Certainly political parties, like constitutional systems, tend to have an institutional life of their own once they have been established. While Aitkin's analysis builds in a certain amount of social cleavage which he locates earlier in Australian political history, he argues that subsequently parties have had an independent political life of their own and society has become too complex for any link to remain between an individual's partisanship and class position. Because of increased social complexity, Aitkin considers class is no longer a meaningful category.

As with Kemp, one suspects Aitkin has gone too far in drawing extreme conclusions about aggregate social relations from individualistic survey data. A very different, and to some extent corrective, analysis of stability and conflict in Australian politics is given in Bob Connell's *Ruling Class Ruling Culture* (1977) and Connell and Irving's *Class Structure in Australian History* (1980). Although poles apart from Kemp and Aitkin in methodology and causal explanations, these authors agree that stability is the major outcome in Australian politics and that conflict is in fact, although not in principle, the minor phenomenon. Connell and Irving rely on party, class and ideology as explanatory variables, but use each in an entirely different manner to Aitkin. Equally important for the purposes of this study, neither author refers to the stabilizing role of the constitution. Connell and Irving rely on a basic Marxist perspective that puts class conflict that is inherent in the capitalist mode of production at the heart of Australian politics. Connell's book focuses on ideology and contemporary affairs while Connell and Irving's more recent book examines class in Australian history.

In his 1977 book, which is subtitled "Studies of Conflict, Power and Hegemony in Australian Life", Connell argues that there is a ruling class that maintains its privileged position by fostering a middle-class culture and mobilizing its superior political resources whenever it is threatened. The class conflict that is endemic to capitalism is effectively shrouded and depoliticized by an all-pervasive bourgeois culture and an elaborate process of personal socialization. Consequently, stability of the middle-class variety is the normal state of affairs. Conflict periodically surfaces when this false bourgeois tranquillity is disturbed by industrial strife and politicial challenges from the Labor party. In such instances the true nature of the system

stands revealed and real power relations become apparent. Stability is restored because invariably the rulers win: the angry strikers at the Ford assembly plant in Melbourne in 1973 were enticed back to work with extra pay incentives; the Chifley Labor government in 1949 and the Whitlam Labor government in 1975 were bundled out of office when the aroused capitalist beast mobilized its forces.[17]

Connell's account focuses on class and ideology that is extended to the broader notion of culture. The concepts of hegemony, mobilization and political socialization are used to explain how the ruling class stays on top and why the ruled class is satisfied with its lot. Party has a minor role, though Connell does identify political leadership in the Liberal and Country parties as an entrepreneurial specialization within the ruling class. The Labor party has a more ambivalent role. It represents the working class and at times threatens ruling-class hegemony. Although Connell describes the Whitlam brand of reform as "committed to making capitalism a little more just and a good deal more efficient", he opens his book with the claim that Whitlam's dismissal in 1975 proved beyond doubt the class nature of Australian politics.

Connell's account supplements that of Kemp and Aitkin by emphasizing class differences and the potency of conflict in Australian political life, but Connell's Marxist paradigm takes him much too far. He first posits a model of conflict that is too extreme for Australia and then has to call upon the vague and somewhat mystifying notions of political socialization to explain its non-existence in practice. There is insufficient distinction between those who benefit and those who rule, and inadequate weight is given to the autonomy of the state and the strength and moderation of the working class. Lingering in the background of Connell's analysis is the Marxist model of a more extreme alternative to bourgeois capitalism than labourism, and in comparison most of Australian politics appears to be bourgeois.

Connell and Irving's analysis of class structure in Australian history is the most systematic and careful study of Australian politics yet produced by Marxist-orientated scholars. The authors combine an essentially Marxist view of capitalist production with an acute historical examination of the process of class formation throughout Australian history. They set out by rejecting *a priori* structural analysis which was previously the favoured method of the New Left and advocate instead a sympathetic historical analysis of the particularities of Australian developments that is modelled on E.P. Thompson's classic, *The Making of the English Working Class.* And yet the study never subsumes its underlying Marxist paradigm which determines its findings and dictates both its logic of analysis and its language of presentation. Whereas the book begins by eschewing a definition of class—"the whole book is a contribution to the definition of class"[18]—it soon settles into the routine Marxist ruling-class/working-class paradigm. By the time the fifth and final chapter is reached, the whole period 1930 to 1975 can be summed up as the reign of "The Industrial Ruling Class".

Where Connell's earlier book did not take proper account of the Labor party and its broad constituency, the 1980 book is equally deficient in its treatment of the middle class. It focuses on workers as the ruled class and capital owners whom it calls the ruling class. The larger middle class that is the broad constituency of the Liberal party is virtually ignored.[19] The massive ambivalence between owning and benefiting on the one hand and ruling on the other, and between the owning capitalist bourgeoisie and the more extensive and tamer middle class is never sorted out. The paler realities of Australian politics never quite match the requirements of Marxist theory, and yet are sufficiently suggestive to give it a certain plausibility.

The truth about the Australian condition, it is contended here, falls somewhere between the Kemp-Aitkin position and the Connell-Irving one. There is a more substantial economic and class basis to conflict than Kemp and Aitkin do uncover, or could possibly uncover, in their study of individualistic survey data and voting trends. But that conflict is not the titanic struggle between capital and labour that Marxist analysis presupposes. The stability and conflict that is present in Australia is translated into the real institutional conflicts of Australian politics as Kemp and Aitkin assume, but the constitutional system, which they ignore, does play a significant stabilizing and moderating function. Because Connell and Irving set their perspective from a more extreme model of conflict than is reflected in the real world of Australian politics, they want to explain away what actually happens as if it were a puppet show being staged and manipulated by darker, more potent forces to distract attention from the real issues.

Conflict in Australia is by and large as great or as little as is institutionally manifest in party conflict, subject to the limiting and moderating constraints of the constitution. The Labor party represents Australian social democracy that has grown out of liberal democracy and its complementary capitalist system as a reforming movement. Oligarchic and inflexible capitalism may throw up a proletarian class of exploited wage labourers who will overthrow it in a bloody revolution, but liberal-democratic capitalism spawns a milder alternative because it is itself more flexible and humane. Therefore the full-blown Marxist theoretical analysis is as irrelevant to an understanding of Australian politics as the Communist party is to real politics. Australia's predominant liberal-democratic political culture supports neither except in very attenuated forms.

Political culture: radical or liberal?

Supporting the constitution and the political work of the High Court, and underlying the important commonalities shared by opposing political parties, is Australia's political culture. Some diagnosis of its essential character is necessary for a proper appreciation of Australian politics generally, and the political role

of the Court in particular. It is generally recognized that Australia's political culture, unlike Canada's, is nationally homogeneous, but there has been considerable dispute over what it actually is.

The traditional literature on Australian politics exaggerated the radical character of the national ethos[20] and cast the Labor party as the dominant force. Labor was depicted as the standard bearer of radical nationalism and the party of initiative and action; the Liberals were the party of resistance and reaction, the "anti-Labor" party.[21] The most ambitious account of the dominance of radicalism and Labor has been advanced by the American historian Louis Hartz and documented in some detail by another American historian, Richard Rosecrance.[22] The Hartzean thesis as such has never had much currency in Australia and has not sparked the ongoing debate among indigenous historians and political scientists that still rages in Canada.[23] This was mainly because it was out of date by the time it was published. Rosecrance overlooked the "middle class" revolution in Australian historiography that occurred in the 1950s and 1960s.[24] Nevertheless the Hartzean interpretation of Australian politics is still widely accepted outside Australia and is a powerful, if somewhat exaggerated, statement of a more traditional view. It is worth considering, albeit briefly, in order to place Australian political culture and the Australian Labor party in ideological perspective.

According to the Hartzean thesis, Australia is the radical fragment thrown off by Britain in the nineteenth century. Radicalism secured an early victory over Whiggery and was enthroned as the national ethos. It spawned the Labor party which in turn "seized the nationalism of the fragment and . . . even in defeat, determined the context of Australian politics".[25] The radical myth "captured capitalism and never let it go . . . Australian capitalism was 'kept' by the radical ethos"; Australian financiers and industrialists became its domestics.[26] In short, the Labor party was the dominant force in Australian politics because it embodied the ruling ideology which was radicalism.

The Hartzean thesis depicts Australia as a radical fragment whose national ethos congealed in the mid-nineteenth century. In fact, the Australian colonies were neither radical nor fragments. Rather they were loyal British colonies which grew to nationhood under the benevolent umbrella of the British Empire. Australia retained close ties with Britain until well into the twentieth century, and as a result, its developing indigenous culture was fed by waves of British immigrants bringing the latest British ideas. This ensured that the class nature and ideological configuration of Britain, minus those aspects of the class system that did not travel well, like the upper class itself and truly conservative beliefs, were faithfully reproduced in Australia. Australian advances in union organization and political representation of the working class paralleled those in Britain. If Australia appeared more radical it was because progressive British ideas and practices could be more easily implemented in a new country. But the developments from specialized craft unions to mass industrial unions and from "Lib-Lab" political associations to an

independent Labor party were essentially the same in both countries and occurred in the same time frame.[27]

Tom Mann, the notable British socialist and trade union leader, spent several years in Australia organizing unions and socialist cells at the turn of the nineteenth century. Mann found Australia little different from Britain and other capitalist countries in its economic system, and wrote from Melbourne in 1904: "The conditions in all countries under a capitalist *regime* are so unsatisfactory that the Australasian States are compelled to look forward to a Collectivist *regime;* this the workers believe to be inevitable, and this they are sensibly preparing for by peaceful and constitutional methods."[28] Mann's optimism was for a future alternative to the then reigning capitalism. The Webbs who toured the Australian colonies on the eve of federation and after the formation of the Labor party recorded that Australia was "just a slice of Great Britain and differs only slightly from Glasgow, Manchester, Liverpool and the *suburbs* of London. Bad manners, ugly clothes, vigour and shrewdness characterise the settlements of Sydney, Melbourne and of bush stations, exactly as they characterise the lower and upper middle class folk of the old country".[29]

Recent historical work has completed the process of discrediting the radical interpretation of Australian history by exposing the origins of the Australian legend. The Schedvins have traced the typical Australian values of the early bushmen—egalitarianism, mateship, rugged masculinity and indifference to regular work—back to the London underworld where Australia's first unwilling settlers were socialized. They argue that these characteristics were expressions "not so much of innovative social codes of behaviour in response to an alien and seemingly hostile environment", but rather the social defences and manifestations of an insecure criminal class developed to protect the fragile and immature personalities of its members who lived in degrading conditions.[30] Graeme Davison shows that most of the Australian legend did not come from the bush but was invented by disaffected city intellectuals. For the most part the famous *Bulletin* journalists of the 1890s, including that great bush writer Henry Lawson, knew virtually nothing about the real outback. They invented a rural ideal as an alternative to the sordid and cramped conditions of the inner city where they lived and worked.[31]

Besides historical inaccuracy, the root of the problem with the Hartzean thesis, and to a lesser extent with the Australian literature it built upon, is the mistaken diagnosis of ideologies. Liberalism and labourism are lumped together as radicalism and contrasted with Whiggery or conservatism as it is sometimes called. Hartz and Rosecrance divide Australian history into two ideological periods; radicalism versus Whiggery before 1860, and the ascendency of radicalism after 1860. It is more appropriate to use three periods and to characterize them roughly as the struggle for liberal democracy (1840-60), the triumph of liberalism (1860-90), and liberalism versus labourism (after 1900).

Radicalism is a misleading term since it emphasizes what is common to both

Australian liberalism and labourism. Radicalism during the nineteenth century was the left wing of liberalism. It was important because its constituency was the working class before the formation of the Labor party. After the formation of the Labor party in the 1890s, radicalism remained an important part of Australian liberalism but became as well a major ingredient of Labor ideology. Thus Dr Evatt was a spiritual heir of Higinbotham and Higgins, who were middle-class radicals,[32] but he was something more. Whereas they were neither labourites nor socialists, Evatt led a mature Labor party that had become social democratic rather than simply radical. To blur liberalism and labourism together on the basis of the common strands of radicalism and leave out the significant points of difference is to distort the pattern of Australian politics.

The second and related problem of ideological diagnosis is identifying the upstart oligarchy of merchants and squatters—the aspiring "bunyip aristocracy"—that tried to corner political power in the first half of the nineteenth century. They have been called Whigs by some and conservatives by others and provided the countervailing force against which the radical legend was developed. Though its leaders did invoke the rhetoric of Britain's established upper class to support its claims, this group was neither truly Whig nor conservative. It was a clique of self-made men who reaped the easy benefits of being first in a new country. The Macarthurs and the Wentworths were shrewd businessmen who amassed quick fortunes by exploiting government patronage.[33] They were rather crude capitalists who substituted convict labour and patronage for wage labour and a developed market that were absent in the early colonial era. In their motivation and pursuits, however, they were mature capitalists who amassed huge tracts of land through influence or squatting in order to produce wool for the export market. Generally they dabbled in every trading venture that promised a quick profit. Their only conservatism was in attempting to secure the excessive property and privileges acquired under early colonial governors. If they must be given a title they were "patronage capitalists", and as such they were staunch opponents of the rising claims of liberal democracy.[34]

Squatterdom secured some initial privileges in the nominated councils of colonial government in the early 1850s. But within a decade liberal democracy had triumphed; manhood suffrage, responsible government and land reforms were all achieved by 1861.[35] Large property interests fought a limited independent rearguard action in the upper houses of colonial parliaments. Nevertheless, that was incidental to the main political battle which had been lost to principles of democratic equality and the economic battle won by the advocates of a free market. In effect, it was hardly a defeat at all for the large property interests. The victory of liberal democracy secured equality of political rights in the formal sense, but in practice political power passed from the squatters and large traders to middle-class professionals and urban traders and manufacturers.[36]

Typical of this new urban power elite that dominated colonial politics for several

decades before the formation of the Labor party were Henry Parkes and Samuel Griffith.[37] Parkes, a Sydney shopkeeper and trader, then political activist and newspaper proprietor, was premier of New South Wales three times between 1872 and 1891. Samuel Griffith, a leading Brisbane barrister, was a dominant figure in Queensland politics during the same period, and was premier twice between 1883 and 1893. Both Parkes and Griffith were premiers of their respective states during the turbulent period of the maritime and shearers' strikes in the early 1890s, and both used the force of the state on the side of capitalists and against striking workers to protect established property rights. According to his biographer, Parkes viewed strikes as conspiracy, and was dedicated to preserving law and order in a way that "ineluctably assisted strike-breaking employers".[38] Griffith was more enlightened, but his government and some hot-headed ministers were implicated in supplying firearms to pastoralists and assisting strike-breakers to reach country areas.[39] Thus radical liberalism as practised by two of its most eminent colonial representatives aligned itself with the pastoralists and financiers and against the working class when the crunch came over industrial relations in 1890-91. In effect the advent of liberal democracy in colonial Australia had opened the way for a purer form of capitalism free from blemishes of convict labour and oligarchic interference. Market freedom was universally extended while property rights were secured.

Liberalism that secured both equal rights and the right to unequal property carried within itself the seeds of its own fragmentation. The powerful motor of capitalist production, fuelled by market freedom and property security that liberalism guaranteed, combined with the limited frontier of this harsh new continent to produce the Australian working class. The development of large scale industrial capitalism in mining and manufacturing and the expansion of large scale pastoralism based on the wool industry converted aspiring independent settlers and immigrants into wage labourers. The severe 1890s depression that ended several decades of easy prosperity and expansion[40] triggered the clash between trade unionism and large capitalism that gave an enormous impetus to the politicization of the labour movement. The story of the formation and rapid success of the Labor party has been told and retold with ever greater precision by contemporary historians and is not our concern here.[41] Our concern is rather with putting that key event which determined the subsequent shape of Australian politics into its proper ideological perspective.

The traditional view of Australian politics was a somewhat romanticized version of the struggle between labour and capital. There was a tendency in the Australian epic, however, to stand Marx on his head and make labour rather than capital the stronger party. This view was rooted in the obvious fact that labour won substantial industrial and political gains with relative ease in Australia. Yet labour was never the dominant partner and capital was not the gadfly of Australian politics

as Rosecrance claims.[42] Rather, in Bede Nairn's terms, the achievement of Labor can best be described as that of "civilizing capitalism".[43]

The Hartzean radical interpretation cannot explain the Labor party which it acknowledges as the primary agent in Australian politics. If a radical working class ideology had prevailed before 1890, the Labor party would never have emerged as an independent political party—an event that Nairn has correctly described as "the most decisive . . . in the history of the Australian working classes".[44] Similarly, if a radical Labor ideology had prevailed after 1890, there would be no explanation of Labor's continual struggle for reform nor for its regular defeats and only modest successes. In fact, the Labor party was created to reform the liberal capitalist regime and the pattern of its progress ever since indicates that it has usually been the outsider in Australian federal politics.

The traditional historians of the Labor movement dwelt on the extremes and the peculiarities of the Australian story, emphasizing what they preferred, and were sympathetic to, rather than the harsher bourgeois reality that was dominant. They over-generalized the polarization of industrial forces produced by the great strikes of the 1890s and used this as a framework for linking subsequent Labor party history with the major struggles of the nineteenth century between convicts and gaolers, squatters and land reformers, and rebellious Eureka miners and reactionary colonial governments. This story of extremes tended to lose sight of the most obvious and pedestrian fact of all, the middle class. As A. W. Martin has pointed out, much of Australian political history can be more accurately explained by reference to "that diverse middle class which has shaded off into the working class, and which has always been a dominant element in the community, or at the very least a powerful mediator between labor on the one hand and big capital on the other".[45]

If the radical interpretation cannot explain the pattern of Australian politics and the Labor party in particular, nor can the liberal-bourgeois thesis that goes to the other extreme. Writing in *Pravda* in 1913, Lenin gave the classic statement of this view.[46] He contemptuously dismissed the Australian Labor party as "a liberal-bourgeois party". To preserve the obvious differences between Labor and its opponents, Lenin had to add a second implausibility, that "the so-called Australian Liberals are really conservatives". This judgment reflected Lenin's own crude "insurrectionary" brand of socialism,[47] and violated his sound maxim that "In order to understand the real significance of the parties it is necessary to examine not their labels but their class character and the historical conditions of each separate country".

The Leninist thesis has been kept alive on the fringes of Australian politics by the Communist party, which alienated itself from the working class by slavishly following the Moscow line even when Stalin's power was at its peak.[48] More recently in the 1970s the Leninist thesis came into vogue with the New Left and was the basic paradigm underlying much of their reinterpretation of Labor history

before the more substantial work of Connell and Irving. The giants of traditional Labor history in the past were often people of the Old Left such as Brian Fitzpatrick and more recently Robin Gollan. These scholars had a profound respect for the populist, working-class and mildly socialistic character of the Labor party and an optimism in its ability to reform Australian society eventually. Their story of Labor was one of a progressive struggle towards the fairer and more just society in which they believed. It was essentially an unfinished tale since it narrated the past in the light of a nobler future. The New Left repudiated the Old Left for idealizing the old Labor order of Australian politics rather than demolishing it.

Heirs to the failure of the Curtin and Chifley governments to achieve any breakthroughs towards socialism in the 1940s and the ensuing twenty-three years of Liberal government, many New Left academics in the 1970s were intent upon recasting Labor as a bourgeois party. They married Lenin's thesis with that of the "middle-class" reinterpretations of historians and concluded that Australia remained liberal because it had always been so and because the Labor party had never provided any real alternative.

According to Catley and McFarlane, Labor was "a party serving the needs of a modern capitalist economy with the techniques of liberal capitalism"; it differed from the Liberals only as Tweedledee did from Tweedledum.[49] For Humphrey McQueen, the rise of Labor in the 1890s was "by no means a break with the past. In every respect it was a fulfilment of it". The Labor party was cast as an active protagonist in integrating the workforce into the consensus of capitalism.[50] Or as John Playford summed it up, in typical doctrinaire fashion:

> The ALP has never understood the nature of economic and political power in Australia. Marxists, on the other hand, realize that the principal objective of revolutionary action is state power and the necessary precondition of any socialist revolution is the destruction of the bourgeois state apparatus. The conclusion is obvious: the ALP is not and never has been a socialist party. As Lenin pointed out as long ago as 1913, it is a "liberal-bourgeois party".[51]

Like the Hartzean radical interpretation, the Leninist liberal-bourgeois thesis fails to explain the Australian phenomena because its categories are generalizations from an alien political environment. Instead of examining the local political phenomena, these grand theories are highly selective in choosing data that tend to fit their preconceived paradigms. In the Leninist case, the real differences between Liberal and Labor in Australian politics pale into insignificance when judged against Marxist categories and Soviet experience.

The federal constitution

Party in Australia is potentially more divisive and destabilizing than it has been in practice. Aristotle pointed out long ago that the basic issue in politics was the

struggle between the few and the many who were the rich and the poor. Aristotle's best practical regime was one where the virtue of moderation curbed the extreme passions of the rich and the poor, and a middle class held the balance of power. When the ideal of the perfect man of antiquity and the virtue of the mean were replaced by modernity's view of man as naturally a selfish seeker of power and property, a new mechanism had to be found to ensure political stability. Machiavelli found this in the cunning rule of a prince when the people were corrupt, or in the creative tension between rich and poor that was institutionalized in the ancient Roman republic when the people were virtuous. Hobbes found it in an absolute sovereign. Neither solution was appropriate for the capitalist system of production that was emerging in Western Europe, nor for the rising forces of democracy.

The Americans, who established popular government in a modern form that was both liberal democratic and positively compatible with capitalism, had to face the age-old problem of politics. In Madison's famous formulation of *Federalist* no. 10, a stable system of popular government had to "break and control the violence of faction", the source of which was usually the "various and unequal distribution of property".[52] A ruling majority animated by a single class passion confronting a powerful minority of entrenched property owners, all unrestricted by traditional moral and religious motives, were the typical ingredients for turbulence and political violence. Add the inherent tendency of the capitalist mode of production to produce large property accumulation on the one hand and a class of wage labourers on the other, and the problem of producing a stable political system was heightened. Despite all the ameliorating qualifications that must be made for Australia, that is potentially the case here.

Why then has the Australian political system been so stable in practice? Undoubtedly Connell's cultural explanation is part of the answer, even though one may prefer to use the terms of a dominant consensus upon, and a political socialization in, liberal democratic values, rather than use "ruling class" terms. The strong British traditions of political moderation and dedication to the rule of law are also significant factors. In this respect Australia is similar to Britain itself or New Zealand. In Australia's case, however, the main cultural attributes producing stability are embodied in and supported by our constitution. The institutional explanation of political stability in Australia is to be found in the working of the federal system.

Federalism breaks up the popular majority by dividing the Australian people's allegiance between the commonwealth government and the state governments. It creates a multitude of politically distinct majorities and checks the most powerful of these, the national majority, by restricting the jurisdiction of the commonwealth government. Besides being confronted by strong and jealous state governments from without, the commonwealth government is weakened by institutional checks and balances from within. The commonwealth's legislative power is divided between two houses of parliament organized according to different principles of

representation. If the Australian Senate does not represent state interests as it was designed to do and as its American model does to a much greater extent,[53] its structure does allow opposition parties to control half the legislative machinery. Thus both the Scullin Labor government during the Great Depression and the recent Whitlam government were effectively hamstrung by hostile Senates that were controlled by the opposition.

The constitution divides the powers of the central government among the legislative, executive and judicial branches. The separate judicial power provides a constitutional base from which tenured judges can overrule legislative and executive acts that they judge to exceed constitutional limits. By this means the most radical initiatives of the Fisher-Hughes Labor government from 1910-13 and the Chifley Labor government in the late 1940s were defeated. Finally, the reactivation of the obsolete prerogative power that was embodied in the executive part of the constitution was used by the governor-general to dismiss the Whitlam government in 1975. That accounts for all the federal Labor governments that existed up to 1983 and were not totally absorbed in fighting the two world wars as were the Hughes government from 1914-16 and the Curtin governments from 1941-45. The Australian political system has been stable because it has tamed or terminated the main disruptive and reforming attempts of federal Labor governments.

In Australia's strong and culturally homogeneous federation, challenges from the states to the established political and constitutional order have been less significant. Australia lacks the powerful regionalism of Canada and is spared the special problems associated with a distinct francophone culture in Quebec.[54] The secessionist movement in Western Australia during the 1930s was an isolated phenomenon. The most serious state challenge to the established order came, typically, from the Labor side. It was mounted by the greatest populist demagogue Australia has produced, Premier Jack Lang of New South Wales. After the Scullin government capitulated to the hostile Senate and conservative financial interests in 1931, Lang broke with the federal Labor party and made an independent stand. He ordered a moratorium on New South Wales' overseas debt payments so that financial capital as well as labour would bear the brunt of the depression. Lang was quickly brought to heel by the superior authority and financial power of the federal government. The Lyons United Australia party government paid the New South Wales debt and impounded New South Wales monies. The strong action was upheld by the High Court in the *Garnishee* cases (1932), and Lang was dismissed from office by the state governor.

That the Labor party has consistently been the agent of challenge in Australian politics supports the previous argument that the established order has been predominantly liberal. Labor's reforming initiatives and challenges have been effectively absorbed or cut off by the system, suggesting that the system itself

is inherently a liberal structure. The American theory of federalism supports in principle what the Australian experience has indicated in practice.

The American designers of the modern federal system deliberately fragmented power and broke up the ruling majority will by dispersing it into diverse and conflicting channels.[55] At the highest political level, ambition was to be pitted against ambition and institution against institution. The tyranny of rulers was to be controlled, not by restricting passions and inculcating virtue, but by designing a system of competing and offsetting power clusters: the president against the Congress; the Court over the Congress; the Senate vying with the House of Representatives; the power of the federal government offset by the combined strength of the states. There would be no single strong figure or dominant institution. The will of the people would be sovereign but their rule would be filtered and refined through a system of institutional checks and balances. Indirectness and dispersion of the popular will combined with the sheer size and diversity of the new country would ensure there was no dreaded tryanny of the majority. At the popular level, the people themselves would be citizens of both the union and the states. The American founding fathers claimed that they had invented a new system of popular government that stabilized majority rule. The great French political philosopher Alexis de Tocqueville recognized their claim and credited them with "a wholly novel theory, which may be considered as a great discovery in modern political science".[56]

The mechanisms of American government were negative, but their overall purpose was positive. That purpose was to secure the basic rights and property acquisitions of individuals who were considered naturally independent and acquisitive and responsible for defining and pursuing their own happiness—in other words, individuals who were Lockean liberals. The positive side of American government was the protection of commerce. Madison, who has rightly been honoured with the title of "Father of the American Constitution", could confidently predict in *Federalist* no. 10 that "A rage for paper money, for an abolition of debts, for an equal division of property, or for any other improper or wicked project" would be unlikely to pervade the whole body of the union. By securing property rights without limiting or damping down acquisitive passions, the Americans laid the foundation for a great commercial republic.[57]

The spirit and character of the federal system of government that the tough-minded Americans invented in 1787 inspired the Australian founders in the 1890s, as we shall see in detail in chapter 2. By 1890 America was a thriving nation, and the Australians rightly perceived that America's enviable prosperity and stability were rooted in its basic laws. The Australian colonies were ripe for the American system of government; with established colonial governments, strong British traditions of political moderation and respect for the rule of law, and about three million people scattered over a huge undeveloped territory, Australia in 1890 closely resembled the American colonies at the time of their federation. Australia's

burgeoning capitalist economy and bourgeois aspirations disposed it naturally towards the American example.

Federating the Australian colonies was like negotiating the inevitable; the problems were associated with timing, detail and striking an acceptable compromise. The motives behind federation were convenience, self-interest and, in Inglis Clark's words, "the low and selfish ground" of commercial free trade.[58] The Australian founders may not have fully appreciated the powerful liberal logic with which the Americans had forged and defended their system, but they were practical people who appreciated its suitability and proven strength. Liberals to a man with the sole exception of William Trenwith, a Victorian Labor delegate and trade union leader, the Australian constitution makers found little that was alien in the spirit of the American model. Except for retaining responsible government and the weakening imperial tie with Britain and not adopting a bill of rights, the Australians implemented the essential features of the American federal constitution. In view of this, it is hardly surprising that the constitution has proved such an effective barrier to Labor's more extreme policies.

It is the supreme irony of Australian politics that the federal constitution and the Labor party were formed in the same decade, but that the constitution was put in place just before Labor became a major political force. The constitution was the mature achievement of the older order of nineteenth-century colonial politics, and the institutional embodiment of its liberal capitalist spirit.[59] The rise of the Labor party marked the beginning of the new era of Labor-versus-Liberal politics. The initial successes of Labor in New South Wales in 1891 directed attention away from the first draft of the constitution. When Federation was reactivated half a decade later in a second round of constitution making, Labor was barely involved; the constitution was completed without Labor input and implemented despite its opposition. Labor entered the race too late to affect the basic design of the constitution. Instead, the constitution forced the young party to develop within the federal mould. The separate colonial Labor parties were just establishing themselves when they had to add a common federal tier. Thus the Labor party embodied the essential federal structure within its own organization. The ingenious American device of fragmenting power and breaking up majorities was built into the Labor party.

The federal system divided Labor against itself. The initiative for reform legislation soon passed to the federal party because of the superior resources of the federal government and the national sweep of its legislation. Party power, however, remained decentralized at the state level. As L.F. Crisp has pointed out: "The maintenance of the strictly federal basis of the Labour Party . . . has cut clean across the Party's principle of majority rule. For the ALP has clung stoutly to equality of State Branch representation irrespective of divergent population and Party membership levels in the several States".[60]

When Labor first won office both federally and in New South Wales in 1910,

Hughes's drive to expand central powers was offset by Holman's championing of state rights in New South Wales.[61] In the Great Depression crisis of the 1930s, the federal structure of the Labor party and the constitutional system allowed Premier Lang of New South Wales to take an opposite stand to the Scullin-Theodore federal Labor government, which led to a disastrous split in the party. At one point before the split, Theodore and Lang, the "two Caesars" of New South Wales Labor politics, addressed a mass rally from the same platform and advocated a "Yes" vote and a "No" vote respectively in a forthcoming federal referendum to expand commonwealth legislative powers.[62]

Ever since Harold Laski pronounced "The Obsolescence of Federalism" in 1939,[63] his followers have tended to dismiss federalism as an archaic form and an obstacle to national development. Its potent influence in moulding national life and political parties has been played down or overlooked. The demise of federalism was widely predicted or at least desired in the 1940s and 1950s. Federalism was considered obsolete because it fragmented political power, whereas the national economy was becoming an integrated unit composed of giant corporations. But federalism is arguably stronger today than ever before precisely because it has withstood the centralizing pressures of war and postwar periods. The critics often did not appreciate the powerful liberal rationale that underpinned this ingenious system of government, nor did they recognize federalism's propensity for perpetuating itself and adjusting to new conditions.

Once set in place, a federal system has a life of its own. By moulding the dynamic political forces of a nation along federal lines, the basic division of powers tends to ensure its own survival. Once political parties, bureaucracies and interest groups have been shaped into a federal framework, they in turn reinforce and promote the federal system. The federal structure is like the bed of a turbulent river; it directs the flow of the waters and is at the same time broadened and deepened by their flow.

The Canadian political scientist Alan Cairns has recently given a powerful statement of the primacy of a federal constitution in determining the subsequent shape of a nation's political life.[64] Cairns stressed that a system of government tends to reinforce itself and shape the other vital forces of a country acording to its own form. Although Cairns was discussing Canadian federalism, his observations are equally applicable to Australia. Cairns said that the federal system

> has become a system of powerful governments, sustained by interest groups and parties which, with imperfections, mirror the governmental structure in which they exist. The chain of federal influence, commencing with the elemental fact of a federal constitutional system, has successfully exerted strong pressures to align parties, interest groups, and individual voters behind the distinct governments which are the essence of federalism. Federal and provincial governments, federal and provincial parties, and federal and provincial pressure groups reinforce each other and they reinforce federalism.[65]

In Australia, federal and state governments that reinforce federalism have divided the Labor party within itself. While professing the abolition of federalism in principle for most of its history, the Labor party has been locked into the federal system in practice by its powerful state machines and the substantial prizes of state governments. Labor's appeal to a national working-class constituency has been broken up by state governments that represent local majorities and fragment political life. As a result Labor's challenge to the federal constitution has been limited. Nevertheless that challenge has been at the centre of Australian politics when Labor has been in federal office.

The constitution versus Labor

Two of the major structural determinants of Australian politics are the federal constitution and the Labor party. These institutions shape the forces of Australian politics and give the Australian polity its uniquely Australian form. Neither institution is unique in itself, but the combination is. The Australian Labor party is comparable to the British and New Zealand labour parties, whereas the Australian constitution implements an American federal system and combines federalism with responsible government as does the Canadian constitution. In having both a federal constitution and a Labor party, Australia does not have the best of both worlds. In fact, Labor and the constitution are incompatible in important respects, and much of Australian politics has involved the working out of the conflict inherent in the juxtaposition of these two political institutions.

For much of its history, as the Canadian-Australian political scientist David Corbett observed in 1962, the Labor party has appeared more interested in constitutional than social reform.[66] The reason is that the constitution has restrained federal Labor policy and at times been an effective obstacle to its implementation. As Gough Whitlam fairly summed up Labor's experience of the first half century of federalism in his 1957 Chifley Memorial Lecture, appropriately titled "The Constitution versus Labor",

> the Australian Labor Party, unlike the British and New Zealand Parties, is unable to perform, and therefore finds it useless to promise, its basic policies. It has been handicapped, as they were not, by a Constitution framed in such a way as to make it difficult to carry out Labor objectives and interpreted in such a way as to make it impossible to carry them out.[67]

The Labor party was opposed to the federal constitution from the beginning. The fledgling colonial parties fought against the adoption of the constitution in 1898 and 1899 although they supported federation, or more accurately speaking, the national unification of the Australian colonies. As early as 1891 the New South Wales party had adopted the plank of "Federation of the Australasian Colonies upon a national, as opposed to an imperialistic, basis". In 1897 the New South

Wales party ran a slate of ten candidates for that colony's ten delegates to the convention that drafted the constitution. They advocated such direct democratic measures as initiative and referendum, and unicameralism or, failing that, a senate elected in proportion to population. None of the candidates was successful and the New South Wales Labor party's proposals were not adopted by the conventions.[68]

After the draft constitution had been adopted by the constitutional convention in 1898, it was put to referendum in all the colonies. The New South Wales Labor party was the strongest and best organized of the colonial parties and launched an extensive campaign against its adoption. The radical Labor view that federation was "a fatman's trick to dam back the ocean of Democratic state legislation" and "delude" the masses was persistently put by the Victorian weekly newspaper *Tocsin*.[69] Labor spokesmen shared platforms with such notable radical critics as Piddington and Higgins. They achieved some success when, in the 1898 referendum, sixty-one per cent of the total "No" vote was registered in New South Wales. Despite a slight majority in favour, the set quota of 80,000 affirmative votes in New South Wales was not reached. In Victoria, South Australia and Tasmania, majorities of electors favoured the bill and set quotas were reached, while Queensland and Western Australia did not vote.

The New South Wales rejection enabled Premier Reid to press the other premiers for concessions that appealed to New South Wales interests and went part of the way towards satisfying Labor demands for a more democratic constitution. The national capital was given to New South Wales, provided it was not located within one hundred miles of Sydney. The other changes allowed for a simple majority to pass bills in joint sittings of both houses rather than a three-fifths majority, referenda proposals to be submitted to the people if twice passed by one house rather than by both houses, and the termination of the Braddon financial clause after ten years.[70] These changes neither altered the substance of the document nor induced the New South Wales Labor party to moderate its opposition to the second referendum in 1899 that approved the amended constitution.[71]

Other colonial Labor parties were less mature than the New South Wales party, and their campaign against the constitution was less significant and often coloured by local politics. The Queensland party had no specific policy on federation, some Labor party members supported it while others opposed it as a middle-class device for diverting attention from Labor demands for reform. Federation was not high on the political agenda in Queensland and no delegates were sent to the 1897-98 convention. Nevertheless Queensland ratified the constitution. In South Australia and Tasmania, the Labor parties campaigned for a unitary state and the abolition of the Senate. The Victorian party was opposed to the draft constitution but did not carry many voters with it. In Western Australia, however, the small Labor party strongly supported federation in order to capitalize on a strong popular

movement against the Forrest government that was inclined to stay out of federation.[72]

Thus Labor was generally opposed to federation with the exceptions reflecting local political conditions. Considering that none of the parties was even a decade old, the extent of their opposition was significant. The fledgling Labor parties sensed that their trade-union brand of populist, socialist reformism would be curtailed by the proposed constitution. Hence they sought to ameliorate its impact by singling out its indirect and "undemocratic" features for special criticism. Where the constitution's amending formula called for a double majority of the people voting as a nation and in their states (that required majorities in four of the six states), the Labor parties proposed amendment by simple majority irrespective of state boundaries. Reid had just introduced direct income tax in New South Wales with strong Labor support, but the new commonwealth was expected to rely on indirect taxes from tariffs which was fiscally less progressive. Had federation been delayed one or two decades, the constitution would probably have been substantially different.

The early New South Wales Labor party's instincts and suspicions of the constitution were more firmly based than its chronicler, Bede Nairn, acknowledges. Nairn admits that "the making of the federal constitution was a task for the educated middle class" and was subject to "the inbuilt conservatism of both the legal profession and the mass of the middle class". But then he asserts that "the constitution was above and beyond politics" and blames the New South Wales party for failing to comprehend "that Federation was not a political issue and that their decision to fight on a specific policy had placed them outside the arena" of constitution making.[73] Nairn does not appreciate that a constitution is political in the most fundamental sense. It will only appear as a neutral instrument where there is a national consensus on the basic principles that underlie it and are implied by it. In Australia that was not the case since the Labor parties were challenging the established liberal order and in the process of formulating a collectivist and mildly socialist alternative.

The colonial Labor parties, however, were too new and immature to make an impact on the great national issue of federation, which was the last and greatest achievement of the established forces of nineteenth-century liberal politics. The constitution was set in place before Labor could influence national policy, and as a result Labor was shaped as a national party by the federal constitution. Only the bitter lessons of subsequent experience would spell out for Labor the full extent of its incompatibility with the federal constitution that it had originally sensed.

While the Labor party was becoming federalized in practice, its adoption of a collectivist objective in 1905 and a socialist objective in 1921 ensured that it would remain firmly opposed to the principle of federalism. The 1905 Federal Labor Conference adopted as its objective "The securing of the full results of their industry to all producers by the collective ownership of monopolies and the

extension of the industrial and economic functions of the State and the Municipality". This was essentially state socialism on a limited scale. Andrew Fisher, the future Labor prime minister, was reported as saying at the time that no Labor party worthy of the name "can deny that its objective is socialism, but no socialist with any parliamentary experience can hope to get anything for years to come other than practical legislation of a socialist nature".[74] In moving the adoption of the 1905 objective, Labor leader Watson directly linked the need for an objective with the federal constitution's propensity to subvert Labor policy and goals. Watson said:

> It is a wise thing to direct the attention of the people to what we are really aiming at as a party. The great thing is to let the people know the good we are working for. The manner in which the Constitution circumvents the Federal Party in politics is an additional reason why we should have an Objective on the programme.[75]

In 1921 during a period of left-wing ascendency in the party, the stark British Labour slogan of "The socialisation of industry, production, distribution and exchange" was adopted as the party's objective. It is significant that the federal party was then in opposition and had lost many of its influential moderates in the exodus of members following Hughes out of the party in the 1916 conscription split. Theodore, who was premier of Queensland at the time, opposed adopting such an objective because he saw it as an electoral liability that was devoid of substantive meaning in the context of Australian politics. The Blackburn Declaration, sponsored by the moderates, was also carried and severely restricted the socialist objective to bring it into line with more traditional Australian Labor goals. The declaration specified that collective ownership would be pursued only "for the purpose of preventing exploitation", and affirmed the party's respect for private ownership wherever property was "utilised by its owner in a socially useful manner and without exploitation".[76] The Blackburn rider in effect modified the socialist objective to a democratic socialist objective that was in keeping with Labor party traditions and aspirations. In one form of words or another, this has been Labor's objective ever since and was reaffirmed as recently as the 1981 Federal Labor Conference.[77]

Although often controversial and at times an electoral albatross, Labor's objective has given an important orientation to the party. As Lloyd Ross has pointed out, "The Objective was never at any stage anything other than a vague generalisation of Labor ideals and Labor methods".[78] Yet it has been important for directing the vision of leading Labor people and anchoring the intention of the party. While its practical fruits have been exceedingly modest, its inspirational value has been significant. As Geoffrey Sawer has affirmed, "The ALP will tend to choose a 'socialist' solution to a specific problem, where the other parties will seek a private-enterprise one."[79] Menzies put it more strongly:

> [Our] first impulse is always to seek the private enterprise answer, to help the individual

> to help himself, to create a climate, economic, social, industrial, favourable to his activity and growth.
>
> Our opponents have an exactly opposite point of approach. Their first instinct is the Socialist one: "The right way to deal with this matter is for the Government to run it!" Private enterprise and effort are the alternatives to which they reluctantly turn only when the Socialist plan proves to be constitutionally incompetent or in practice unworkable.[80]

Implementation of Labor's objective has been severely restricted in Australia for a variety of reasons. The people have not generally been amenable to socialism because the capitalist system has been sufficiently prosperous and flexible to satisfy ordinary demands. The state at both federal and state levels has always played a major role in managing capitalism in Australia. The proven relationship between modified free enterprise and basic democratic liberties has been preferred to the unproven promises of complete democratic liberty in a collectivized economy. Yet at specific times in Australian history, the Labor party has attempted the partial implementation of socialist policy. In such instances, as the following chapters will show, Whitlam's claim has been vindicated; the constitution is framed in such a way as to make it difficult to carry out Labor's objective and it has been interpreted by the courts, both the High Court and the Privy Council, in such a way as to make it impossible for Labor to implement its more socialist policies. In the confrontation between Labor and the constitution, Labor has had to change, modifying or abandoning its more extreme policies and moderating its objective. In determining the outcome of that confrontation the High Court has played a crucial role. In fact the key events in the politics of judicial review in Australia have been the Court's decisions upholding our liberal constitution against Labor's centralist and socialist challenges.

The political role of the Court

Immediately one speaks of the Australian High Court as a political institution exercising a prime political function, one confronts the most solemn public denials of the fact by the Court's own leading spokesmen. The High Court's persistence in claiming that its work is strictly legal has been widely recognized as a distinguishing characteristic. Therefore, at the very beginning, a study of the politics of judicial review has to deal with the Court's avowal of apolitical legalism. Since legalism has come under increasing attack by Australian legal scholars in the last couple of decades, that means taking up and evaluating the counterclaims of the critics.

The classic statement of legalism was given by its leading practitioner and reputedly Australia's greatest judge, Sir Owen Dixon. At his swearing in as chief justice in 1952 Dixon claimed that the Court's sole function in constitutional adjudication was a strictly legal one; as he put it, to "say whether a given measure

falls on one side of a line consequently drawn or on the other, and that it has nothing whatever to do with the merits or demerits of the measure". Dixon complained of a widespread misunderstanding of the Court's role and a popular misuse of terms in describing its decisions. He endorsed legalism in these often-quoted terms: "It may be that the Court is thought to be excessively legalistic. I should be sorry to think that it is anything else. There is no other safe guide to judicial decisions in great conflicts than a strict and complete legalism."[81]

At the time Dixon was an experienced judge, having already served on the High Court for twenty-three years and having been its most influential and learned member throughout the 1940s. He was chief justice for the next twelve years, from 1952-64, and his opinions and spirit still influence the Court today. Sir Robert Menzies, an admirer of Dixon and an eminent constitutional lawyer in his own right, has said:

> Owen Dixon . . . has left an ineradicable mark upon the constitutional history of Australia. He established the interpretation of our constitution as a pure matter of law and of legal concepts. He had never been engaged in politics, and always seemed to me to have little interest in them; certainly no partisanship; no sociological objectives to achieve . . . He rejected the notion that the Constitution, being in its origin and effect a political document, should be interpreted in the light of current political views by judges of a political frame of mind.[82]

Legalism was reaffirmed as the official stance of the High Court by Sir Garfield Barwick, Australia's most controversial chief justice, in June 1976. In a National Press Club address, Barwick distinguished the Australian High Court from the American Supreme Court on the grounds that the High Court did not make bill-of-rights decisions. He acknowledged that such decisions were clearly political and questioned whether an unelected body such as the Court could continue for long to exercise such a function. Barwick argued that the Australian Court's work was "strictly legal" because it had no bill of rights to interpret. He justified the Court's "legalistic attitude to the Constitution and to other matters" on the grounds that it was the "right thing and the only stable thing to do". Barwick's position was summed up in the following claim: "We have no general Bill of Rights situation in which we can go beyond the law, and as in the case of decisions about the Bill of Rights make what really are political decisions."[83]

Barwick's reasoning may be simplistic, but his message as official spokesman of the High Court was quite clear; legalism remained the Court's official doctrine on constitutional adjudication. In the Court's most significant and controversial decision in recent years, the Tasmanian *Dam* case in 1983, a majority of judges insisted that their decision making was essentially legalistic.[84]

Legalism is the view of constitutional adjudication which holds that judges interpret the constitution by reading the natural sense or plain meaning of its provisions. Judges are then supposed to characterize the subject matter of the impugned statute and determine its constitutionality by a legal decision. Advocates

of legalism contend that contextual and consequential factors of a political, economic and social nature are not taken into account in this decision-making process. The High Court claims that its reasoning is legalistic and this view is generally accepted without critical analysis.[85] For example Professor Lane, a prominent constitutional scholar, has characterized the mental attitudes of the judges that inform the High Court's work as "literalism" and "legalism". By literalism, Lane means the Court's propensity to take at face value both the statute under review and the constitution. He claims that the Court is "more impressed by the form of a statute than by its substance", and that it looks only at the narrow legal aspects of a case while completely ignoring the broader communal considerations. Legalism refers to the Court's preference for abstract categories and technical distinctions. The High Court, says Lane, holds fast to the belief that constitutional terms are "absolutes deemed to be fixed by the Constitution for all eternity".[86] This is something of a caricature drawn from the literal acceptance of the Court's own formal rhetoric, as we shall see subsequently when particular Court decisions and judicial opinions are examined, but it does sum up the Court's professed method.

The Australian judiciary has tended to be impeccably nineteenth century and British in the manner in which it has conceptualized and discussed its role. Its inspiration has been drawn from the "classical epoch" of English law, the second half of the nineteenth century when, according to Dixon, "Among legal historians, jurists, and judges . . . the qualities of scholarship, penetration, clearness of exposition and felicity of expression appeared to an extent and in a degree that had not before been equalled."[87] The High Court has cultivated a strict legal positivism that assumes that the law is an imperative prescription, clear in itself or logically deducible from legal principles that are clear, and simply to be expounded and declared.[88] Only in recent years has this orthodoxy begun to crumble.

The persistence of Australian judges with very traditional and positivistic modes of legal thinking, writing and speaking has come under increasing critical comment from academic lawyers during the last couple of decades. Legalism is under threat as waves of modern realist criticism spread from North America and break over the Australian judicial citadel. The work of Professors Sawer, McWhinney, Lane and Blackshield, four of the High Court's most eminent critics, has been informed by the latest academic trends of value relativism, realism and behaviourism. Judges are creative policy makers, says McWhinney;[89] they actively govern as a "judicial oligarchy" in Australia, says Lane.[90] Constitutional decisions are ultimately determined by the personal preferences or "general set of values" which judges internalize and then smuggle into their legal reasoning, says Sawer;[91] or by the "deep bias" of judges, says Blackshield.[92] By adopting alternative models of judging drawn from modern social science, these critics have highlighted aspects of judicial decision making that legalism has disguised or denied.[93]

McWhinney has pointed out that the account of judging given by Dixonian legalism does not square with the actual phenomena, and to prove his point cites

the obvious example of the judicial interpretation of section 92 of the constitution. McWhinny criticizes legalism as a constitutional method on the grounds that it ignores political, social and economic elements that are integral parts of a constitutional decision. He makes the strong point that judges do not operate in a political and social vacuum simply by professing to do so; judicial prejudices and presuppositions invariably flood in to fill the void and supply the hidden premises of the "legal" argument. McWhinney concludes by advocating that the High Court abandon altogether "the purely mechanical conception of the judicial office, the fiction that judges never make the law but simply apply it, and [recognize] frankly the essentially creative role of a supreme court exercising judicial review".[94] He advocates that judges should be given a good social science education so that they might, as master policy makers, be acquainted with all the relevant evidence.

Lane acknowledges that constitutional adjudication necessarily has important political, social and economic consequences, but assumes that these follow as unintended consequences of the Court's legalistic approach. He marvels that such random consequences of the Court's literalism and legalism do not always have "the—quite unintended—effect of obstructing Commonwealth and State government".[95] Lane goes out of his way to emphasize that when the Court's decisions are beneficial to government and serve the public interest, such consequences are largely accidental byproducts of legal considerations.[96] At the same time Lane maintains that the court is "*a co-ordinate legislator and our polity is a judicial-legislative government*"[97] because of the active and creative law-making role of judges.

If the realist criticisms of Lane and McWhinney reveal obvious aspects of judicial decision making that legalism obscures, the paradigms of judging that inform their criticisms—"government" for Lane and "policy-making" for McWhinney—are themselves simplistic and partial. It is because Australian courts do not govern in the active manner of Lane's model that they are able to govern in the passive way that is peculiar to them. Lane tends to maintain the artificial distinction between legal and political decision making that legalism itself presupposes; he differs from the legalists by putting judicial review back into the political realm through calling it government. Moreover, Lane's claim that there has been in fact a complete severance of the judges' legal act and intentions from the practical policy outcomes of their decisions is quite implausible, as we shall see.

McWhinney's preferred alternative to legalism is equally flawed. The active, policy-making role he advocates seems singularly unsuited to the non-elected and tradition-bound institution that a court typically is. His model of judging as policy-making is fraught with as many theoretical difficulties as legalism itself. It relies on the optimistic assumption that rational policy making is possible, and reflects a naive belief in the truth and practicability of modern social science. McWhinney's practical solution of "giving the legal decision-maker the broad training in the

social sciences that is so necessary in handling the complex public law issues of present-day society"[98] assumes that science can replace practical wisdom and that training in the social sciences can be a substitute for judicial technique in highly politicized constitutional conflicts. Both are problematical. McWhinney does not seem to appreciate that legalism has provided a powerful legitimating rhetoric for judicial review in Australia that is completely lacking in his activist policy-making model of judging.

What is especially noticeable about the critics of legalism is their own tendency towards legalism. While maintaining in principle that constitutional adjudication is a key socio-economic function, they persist in a literal analysis of the Court's opinions and public rhetoric. Such critics overlook the possibility that legalism might be the Court's method of executing judicial review and legitimating its decisions within the context of Australian politics. The reason for this oversight is that the Court's actual decision making and its professed legalism are not examined within the context of Australian politics and political culture. Despite general protestations against legalism, critics like McWhinney and Lane have tended to work within the cocoon of legal reasoning and rhetoric that the Court itself has spun.

A far more radical account of judging is inherent in the quantitative analysis of A. R. Blackshield that is based on the hard-core behaviourist approach of the American pioneer of jurimetrics, Glendon Schubert. Judicial decisions register judges' biases, it is claimed, while judicial opinions merely express judges' attempts at rationalizing their biases. In a judging situation, the judge's inherent attitudes are activated by specific input stimuli which in turn produce a decisional output registered by a vote. Judgments, Schubert says,

> are the products of sets of judicial attitudes that have been activated by particular stimuli; and from this perspective the attitudes of the justices are of much more fundamental importance than the decisions.[99]

> . . .[I]ssues can be perceived by a judge only through his own personal system of values . . . [T]he values of the judge are the latent parameters that determine how he will define and respond to the issues.[100]

Since a judicial decision is the product of a psychological rather than a rational process, it can be studied properly only by psychological methods. But not any psychological method, for Schubert is a "hard" empiricist, not a "soft" Freudian. His method is "based upon the S-R (stimulus-response) model of behaviourist psychology and learning theory".[101] Instead of probing judicial psyches for subconscious fears and complexes, he examines patterns of judical decision making on the assumption that these reflect an underlying "consistency in the structuring of attitudes in the minds of individual judges".[102] Schubert's method and the results it produces are only as sound as the ultra-behaviourist theory on which it is based. At the very least, such extreme behaviourism is fraught with theoretical

difficulties. It cannot give an adequate account of itself in its own terms. When arguing for his approach, Schubert claims that recourse is needed to psychological attitudes because logical reasoning is not sufficient to explain judicial decision making.[103] But that overlooks the third alternative of prudential or practical reasoning. Jurimetrics then is an approach one believes in or opts to follow. But because of its narrow philosophical assumptions about human behaviour and scientific method, it presents a crude and simplistic view that ignores reason and speech, the defining attributes of human beings and, in particular, judges.

How much of Schubert's theoretical baggage Blackshield accepts is not clear, as jurimetrics is only one of Blackshield's several approaches to studying the work of the High Court.[104] In a major article on quantitative analysis Blackshield does modestly call his work "little more than a footnote" to Schubert.[105] He is more careful, however, in specifying that his purpose is "to uncover precisely those elements in judicial decision-making which are subjective, non-rational, and stubbornly value-charged".[106] This does not say that judging can be reduced solely to non-rational psychological components, but that Blackshield is trying to isolate *precisely those elements* in judging that can be so reduced. In other words, it may be his view that judging is a combination of rational and non-rational components, and that the non-rational component can be isolated by jurimetrics. While such a position has a certain superficial plausibility, it is basically flawed. The patterns in decision-making that are documented by jurimetrics may be either entirely, or at least partly, explained by rational factors. How could one tell? Certainly not by plotting the pattern of outcomes that are the product of both causes, and perhaps primarily of rational, rather than irrational, psychological factors. In any case there is a speculative leap from these patterns of decisional outcomes to the identification of underlying psychological causes or "deep bias".

It is hardly surprising, given the theoretical bankruptcy of Schubert's extreme behaviourism and the methodological flaws of Blackshield's modified jurimetric approach, that jurimetric analysis of judging has produced no significant insights into the judicial decision-making processes. Jurimetrics only provides, with any certainty, a useful diagram of the relative trends in judicial decisions. To label the two ends of the judicial spectrum that one plots as "liberal" and "conservative" explains very little. If judicial attitudes and personnel change over time, such labels become positively misleading. Blackshield concludes his article after comparing his findings with those of others, as follows:

> At the very least . . . in reaching decisions based upon their divergent degrees of "conservatism" and "authoritarianism" Australian High Court judges were showing themselves to have much the same psychological structure as American or Japanese judges. At its widest, it means that in thus deciding, they were falling into a pattern of universal human response.[107]

That is to say, judges are human. Such a banal conclusion was never in dispute.

The promise of jurimetrics to uncover the psychological basis of judging has not been fulfilled, and in principle cannot be.

The study of judicial review in Australia has generally been the preserve of constitutional lawyers and law teachers who, until recently, were prepared to serve as the academic wing of the tightly knit legal profession, accepting the leadership of the judiciary and disseminating professional and doctrinal orthodoxies to neophyte lawyers. Constitutional lawyers worked within the law; evaluating, reconciling and criticizing judicial decisions, and consolidating them into comprehensive texts. Their work was essentially "the ordinary business of lawyers, courts and law teachers", as Sawer has described it; it was "the criticism of legal doctrine by reference to the law's internal standard—the established techniques and the authoritative sources".[108] All non-lawyers, including political and social scientists, were lay people and for the most part respected the strict delineations of an entrenched legal apartheid.[109] Given this tradition, it was perhaps not surprising that when constitutional lawyers like Lane, McWhinney and Blackshield took over models of decision making from modern social science, they did so quite uncritically and with little appreciation of the political consequences.

It is more surprising that a scholar like Sawer, who has worked with such distinction in the overlapping fields of Australian constitutional law and politics, should also fall back upon an impoverished model of judging and a crude distinction between the legal and the political. Sawer's otherwise rich treatment of judicial review has been handicapped by this basic theoretical flaw. In this final analysis of judging, Sawer has two separate categories, one for the legal and the other for the political. Concerning the legal, he posits only two attributes and corresponding criteria for evaluation: the logical and the aesthetic. But that does not take one very far in evaluating legal decisions since, as Sawer himself notes, "in a majority of the cases where the High Court has divided, or where the High Court or the Privy Council has overruled or departed from a previous doctrine, all the divergent views so exposed were logically possible and none was logically necessary". He argues consequently that criticisms must be based on the "aesthetic rather than the logical". Preference is given to one decision rather than another, not because it is wiser or more prudent or more in keeping with the character of the constitution, but because it is "more elegant" or, more importantly, because it agrees with one's own "general set of values". Sawer points out that judges smuggle in their personal preferences and social biases which are then internalized in legal reasoning. "Since a critic, like a constitutional judge, must have some general set of values", says Sawer, he should divulge them. Sawer does this and states that it is his point of view "that the courts should handle constitutional doctrine so as to minimize the impact of judicial decision on parliamentary activity, and so as to facilitate the expansion of Commonwealth competence to keep pace with the integration of the Australian nation".[110] This is a modified version of the Laski-Greenwood thesis that prefers the abolition of federalism in the name

of national integration. But it is hardly fair to fault the Court because it does not phase out federalism, when that is the essence of the constitution it is supposed to uphold.

That neither High Court judges nor constitutional lawyers have given an adequate account of judging is not so remarkable. Their primary concern is with the ongoing application and development of the law rather than with speculation about the nature of the judging. Judges make decisions and write supporting arguments, while lawyers study judicial opinions in order to know what the law is. For the internal purposes of the legal system, it does not matter whether or not judges or lawyers can give a theoretically sound account of what is entailed in judicial decision-making. This lack of self-explanation is not unique to law. Most complex human activities are more easily performed than explained—for example the creative arts such as painting or writing, statesmanship and leadership, and even knowing itself. Nevertheless, regardless of its validity, theory affects practice. This is particularly the case in the social and political fields. If judges think they are doing one thing rather than another, their performance is likely to change. Since what judges do and what they say they do have enormous political consequences, the matter is of prime political significance.

Most Australian judges still rely on the public rhetoric and rationalizations of a neutral legalism, but their credibility is becoming increasingly questionable. The onslaught of modern realist criticisms must soon undermine the credibility of the Court's legalism.[111] Australian judges of the future will be increasingly exposed to the new social science models of judging. The legal fraternity of today is at least schizophrenic: according to Mr Justice Kirby, it "asserts most vehemently, the absolute removal of judges from political issues, [but] nevertheless spends so much time and mental energy examining the prejudices and attitudes of judges".[112] Such an attitude will appear quaintly archaic to the next generation of lawyers who will probably take for granted Senator Gareth Evans's view that the court be "pragmatic, purposive and openly policy-oriented in its decision-making style".[113]

Australia's isolation and its legal conservatism can provide only temporary barriers against the forces and ideas that have changed both the substance and the public perception of the judicial function in America. We can take advantage of the breathing space to take stock of the High Court's political role and to assess the likely impact of activist models of judging before they penetrate the court system. Before legalism is abandoned, the political function it has served needs to be understood. A major purpose of this study is to explore the political role of legalism in facilitating and legitimating judicial review in Australia after the rise to national prominence of the Labor party. An overall interpretation of the political significance of legalism is sketched in the next section and elaborated in subsequent chapters.

Legalism as a political strategy

Legalism disguises, and the realist critics tend to overlook, those aspects of judging that are not reducible either to formal logical inference or the personal bias of judges. For a proper appreciation of judicial reasoning and decision-making in the area of constitutional adjudication, one has to return to an older and richer notion of judging and political speech than those used by Sawer, Lane, McWhinney or Blackshield. Judging is neither a process of strict logical deduction and formal inference, nor simply an assertion of preconceived biases. If it were the former, logicians rather than experienced practical lawyers would be the leading candidates for judicial office. If it were the latter, then the spectrum of community biases should be represented in the Court as critics have suggested. While common sense acknowledges that technical reasoning skills and personal values are significant in the process of selecting judges, it also insists that they are not sufficient qualifications for a judge. Judging relies on logical inference as does all practical reasoning, but is not reducible to logical inference.[114] Judicial opinions might often reflect the personal views of judges but that does not mean they are reducible to the "deep bias" of judges.

Judging and judicial opinion writing belong to the realm of practical reason rather than theoretical reason, to use Aristotle's distinction. Judicial reasoning is closer to moral reasoning, another area of practical reason, than to logic or pure theory. Judging entails reconciling, weighing and choosing between principles and precedents that often are in conflict or overlap; then applying them to particular factual disputes. At best a judicial decision gives only practical certainty and a net balance of reasonableness in favour of one side.

Constitutional adjudication is not simply a matter of legal interpretation, as the critics of legalism point out; it is also political decision-making of a high-profile and contentious character, a crucial fact that the critics tend to overlook. Constitutional decisions have attributes of important decisions of state, and judicial opinions share qualities of political speech. Judges, like statesmen, cannot afford to be entirely open and irresponsibly oblivious to their political environment. Political circumstances combined with a prudent concern for maintaining their legitimacy may constrain judges to use arguments and even make decisions that they would not otherwise countenance. And whatever their decisions, judges can be expected to support them by the most convincing arguments that they can muster. Law itself is based on the art of persuasion and reasonable inference, so it is hardly surprising that constitutional law with its extra political dimension includes a good deal of public rhetoric.

What then of the High Court's "strict and complete legalism"? The first point to note is the obvious one that this is the Court's public statement about itself. It is often a ritual invocation that judges make before tackling contentious constitutional questions. Despite the High Court's formal protestations about strict

legalism, the pattern of its decision making and the substance of individual judges' opinions are not especially legalistic, as our subsequent detailed analysis of constitutional developments and individual opinions will show. Australian High Court judges select precedents that support their position; they qualify others that do not; and they generally write as judges do. Even the arch-legalist Dixon wove an elaborate and reasonable theory of federalism into his constitutional opinions, as Leslie Zines has shown.[115] One has only to read Dixon's opinions to see that he was not in fact a strict and complete legalist. Thus strict legalism is more a quality of the High Court's rhetoric than of its actual decision making.

The second and more substantive point is that judicial review is a vulnerable political procedure since it entails a court, traditionally a non-political body, making important decisions of state. The Australian political environment is particularly inhospitable towards judicial review for two reasons: first, because popular sentiment favours parliamentary supremacy of the Westminster kind; and second, because the Liberal-Labor party division has tended to polarize Australian politics over substantive issues of political economy. Australia did not have the same "higher law" background that was significant in legitimating judicial review in America.[116] Moreover, it has lacked the dominant liberal consensus that anchors the American constitution in the political culture of the nation and enables the American Supreme Court to appeal to substantive principles in adjudicating constitutional disputes. In the more difficult environment of Australian politics, legalism has been championed by the Court because it is an effective political strategy for exercising judicial review. By actively cultivating an impartial image and professing an apolitical method, the High Court has been able to carry out its delicate political function with ease.

Legalism as a political strategy is not something new. Its origins lie in centuries of English common law practice. A typical example is the famous 1770 judgment in the *Case of John Wilkes*[117] in which Lord Mansfield made a highly political decision on the narrowest technical grounds. He reversed a declaration of outlawry against the popular hero John Wilkes on the grounds that the original warrant of arrest omitted the location "of Middlesex" from the description of the county court. In a ringing declaration that must gladden the heart of every advocate of legalism Mansfield asserted: "The Constitution does not allow reasons of State to influence our judgments: God forbid it should! We must not regard political consequences, how formidable so ever they may be: if rebellion was the certain consequence, we are bound to say, '*Fiat justitia, ruat coelum*'."[118] Since rebellion was a likely consequence if Wilkes were not released, Mansfield had made an expedient decision. At one and the same time he satisfied three zealous masters: he upheld the dignity of the law; he satisfied the popular clamour for Wilkes's release; and he avoided directly confronting the government that had imprisoned Wilkes. The comment of another famous English judge, Lord Denning, to an Australian audience in 1975 appropriately summed up the outcome: "the crowd

did not know what to admire the most, the eloquence by which he silenced the people or the subtlety by which he let their hero free".[119] The case of John Wilkes was a renowned instance in which legalism was used to defuse an explosive political situation while maintaining the dignity of the law. In Australia, legalism has become the accepted judicial method of constitutional adjudication for similar reasons.

Legalism has enabled the dignity and independence of the law to be maintained while allowing the Australian High Court to perform a delicate political function in a society that has been divided over important aspects of political ideology and political economy. In Australia, in contrast to America, the constitution did not preside over political conflicts; rather it was itself one of the points of conflict. Labor has opposed the constitution because it hindered the implementation of its policies. Whereas in America the two major political parties have generally supported the constitution, in Australia they have not. The basic commonality in Australia has not been one of substantive political principles as in America, but one of forms and institutions. Australians were united by a common allegiance to parliamentary institutions and to the rule of law. Each political party might strive for a different societal and economic order, but both were committed to using the same institutional means for pursuing their different goals. In view of this, it is not surprising that the High Court had based its constitutional jurisprudence on forms and technique rather than on substantive principles. Legalism has built on what is held in common, and it has avoided what is contentious.

Legalism has developed over time as the product of two converging sets of factors. From a micro point of view, the most significant ingredients of legalism are the traditions of the Australian legal profession, the strong influence of English jurisprudence, the custom since 1913 of appointing leading barristers rather than public figures to the court, the predominance of private appeal cases in the Court's work, and the character of Australian constitutional cases that involve questions of the division of powers rather than civil rights. All of these factors are important and have been stressed by the various commentators, but they provide only a partial explanation of the phenomenon of legalism. The other part of the explanation must be found in the character of the political environment within which the Court has had to operate. From this larger macro point of view, legalism has thrived in Australia because it was appropriate for the political environment and provided the Court with an effective strategy for exercising judicial review. Legalism has developed and been consolidated because it suited the political circumstances.

Many of the judges, formed and practised in the traditional mould of their profession, may have been unaware or only partly aware of the political implications of legalism, yet by adopting it so wholeheartedly they have affirmed its suitability. Some of the leading judges, notably Dixon and Barwick, have undoubtedly appreciated its strategic implications. In his 1976 National Press Club address referred to earlier, Barwick emphasized the vulnerability of the American Supreme Court that had become openly politicized. "The right thing and the only stable

thing" for the High Court to do, claimed Barwick, was to maintain "a legalistic attitude to the Constitution". In view of Barwick's own career and opinions as a champion of free enterprise both on and off the Court, as a leading Liberal minister for six years under Menzies, and as an active ally of Governor-General Kerr in 1975, it is hardly surprising that he appreciated the apolitical image of the Court and insisted on maintaining its legalistic rhetoric.[120] And yet, as we shall see, Barwick in his later years as a member of the Court did much to expose and discredit legalism.

In his public defence of legalism in 1952, just after the Court had struck down the Liberal government's bill banning the Communist party and following the court battles of the 1950s, Dixon argued that close adherence to legal reasoning was the only way to maintain the confidence of all parties during federal conflicts. He insisted that there was no other safe guide to judicial decisions in great conflicts than "a strict and complete legalism". Dixon placed the Court's adjudicative role in political context; it had to "maintain the confidence of all parties" while settling "great disputes". In a subsequent passage of his address that is generally overlooked, Dixon pointed out to both Liberals and Laborites that the Court stood apart from their basic political differences, on the neutral ground of law:

> Those who believe in a planned society should perceive that the rule of law administered by the courts offers a reconciliation of ordered liberty with planned control. Those who, on the contrary, believe that society is best served by giving reign to the competitive exertion of the energies of everyone in his calling or pursuit must also see that the courts must preserve the rights of each from the encroachment of the others.[121]

According to Dixon, the law provided the foundation and framework for the edifice of society which could wear either a liberal or a democratic socialist face.

A "strict and complete legalism" has been the High Court's solution to the problem of adjudicating great political disputes where there was no consensus on substantive principles. In this respect legalism is the "noble lie" of Australian politics; it has allowed the Court to carry out its function of upholding the basic constitutional order with ease and success, and has helped ensure a constitutional stability that might not otherwise have been achieved. The development and use of legalism in leading High Court cases are examined in the following chapters, while the political implications of its demise and likely replacement by realist views of judging are taken up in the final chapter.

2

The Origin and Function of Judicial Review 1890 to 1900

The High Court is a powerful branch of the Australian government. In a parliamentary system such as Australia's where, by the conventions of responsible government, the executive is in effect the leader of the legislature, the judiciary provides the basic institutional check on majority rule. The Court can disallow executive and legislative initiatives that go beyond the limited constitutional powers of these two branches of government. More importantly, the Court defines the limits of federal and state powers and acts as an arbiter in jurisdictional disputes. By making key decisions at important moments of history, the Australian High Court has kept the nation's dynamic political and economic forces within constitutional limits. Sometimes the Court has made incremental adjustments to the constitution. At other times, as during the two world wars and in allowing uniform taxation, the Court has sanctioned more sweeping changes to the constitutional system. Quite often, especially against federal Labor governments, the Court has overruled legislation, forcing governments to moderate their objective and modify their policies. The constitution forms and moulds the political forces of the nation, so that by interpreting and applying the constitution the High Court has been an active agent in the ongoing process of constitution making. Judicial review is therefore a crucial part of the Australian federal system.

This chapter examines the origin and function of judicial review in the Australian federal system. An examination of the federation debates makes it clear that the Australian founders intended judicial review as an essential part of the Australian constitution. Futhermore it is argued that judicial review is an integral part of the structural logic of a federal system. While not absolutely essential to federalism, judicial review does provide a most efficient operational solution to the key issues of authoritative interpretation of the constitution and adjudication of jurisdictional disputes.

Disputed origin and basis

Although judicial review is an established part of the Australian constitution, there is some dispute over its origin.[1] The Australian-Canadian constitutional scholar,

Edward McWhinney, has claimed that judicial review in the various Commonwealth countries is "a vestigial survival of the Privy Council's old judicial hegemony in relation to the Overseas Empire, rather than a direct derivation or borrowing from American constitutional experience".[2] This may be a correct generalization of Canadian experience but it does not hold for Australia where the direct borrowing from American experience with judicial review by those who drafted the constitution was much more significant than colonial law vestiges. An article on the 1975 constitutional crisis claimed more generally that "While the influence of American federal theories is obvious in the provisions for sharing power between the national and state governments, the document is above all a summary of British experience."[3] Australia's greatest judge, Sir Owen Dixon, rejected the view that the predominant influence on the Australian constitution was British. Dixon claimed to belong to a court "fashioned upon the model of the Supreme Court of the United States", and described the Australian constitution as "framed after the pattern of that of the United States".[4] Dixon was right, as we shall see presently.

There is also dispute over the basis of judicial review in the Australian constitution. Despite the fact that the High Court has been prominent and active in deciding major political issues, it has rarely had to justify its enormous power.[5] While judicial review is a fundamental part of the Australian political system, judges have usually taken their role for granted or appealed to the justificatory reasoning of the leading American decision, *Marbury v. Madison*,[6] as self-evident and sufficient. According to Chief Justice Marshall's reasoning in the *Marbury* case, judges are required to apply higher over lower laws in the ordinary course of deciding cases, and hence to interpret and apply the constitution as the highest law. For instance, Mr Justice Fullagar asserted in 1951 that "in our system the principle of *Marbury v. Madison* is accepted as axiomatic".[7] These were not empty words, as Fullagar was then a member of the Court that struck down commonwealth legislation banning the Communist party even though this anti-Communist legislation implemented a key plank of the Menzies government's successful election platform. Likewise, Dixon maintained: "To the framers of the Commonwealth Constitution the thesis of *Marbury v. Madison* was obvious. It did not need the reasoned eloquence of Marshall's utterance to convince them that simply because there were to be legislatures of limited powers, there must be a question of ultra vires for the courts."[8] Australian legal commentators, for the most part, have followed the judiciary in taking for granted the Court's most important political function. Recently, Geoffrey Lindell pointed out that "many of the text books and articles which deal with judicial review of legislation seem to assume, rather than discuss in any great detail, the proper basis for the doctrine of judicial review".[9]

This ready acceptance of judicial review in Australia is in marked contrast with the ongoing controversy over its constitutional legitimacy, historical origins and

proper exercise in the United States. In America, as Alexander Bickel has put it, judicial review is seen "as a present instrument of government. It represents a choice that men have made, and ultimately we must justify it as a choice in our own time."[10] In Australia judicial review has not been seen as an instrument of government and no doubt partly because of this its exercise by the High Court has been unquestioningly accepted by generations of judges and academic lawyers. Moreover, despite Australia's strong tradition of parliamentary sovereignty and popular majoritarian democracy, which is antithetical to judicial review, the Court's legitimacy has not been seriously questioned. Why has this been so? One part of the explanation is a major thesis of this book; because the Court has been so effective in exercising its political function while at the same time portraying itself as a strictly legal and non-political actor, its political function has never been seriously challenged. One might have expected that Australian academic lawyers would have followed their American counterparts in probing the foundations of judicial review, but a narrow positivistic orientation to "black-letter" law has kept them at the surface of this important issue. In any case, it would have been impossible for the Australian High Court and legal establishment to give a credible justification of judicial review in terms of their dominant legalistic paradigm of law and judging. To have attempted the former would have entailed calling in question much of the latter.

Another probable reason why judicial review has not been so problematical in Australia has been the influence of James Bryce. Bryce's classic *The American Commonwealth* (1888) was the standard work on the American system of government for generations of leading Australians for half a century. Bryce had a surprisingly uncomplicated view of judicial review. Arguing against the contrary European impression, Bryce asserted that there was "really no mystery about the matter"; it was not a novel or complicated device, he claimed, but "the simplest thing in the world if approached from the right side".[11] Bryce, an Englishman, then set about explaining this novel American institution to other Englishmen (and Australians) in typical English legal terms that have been seized upon by the Australian High Court.[12] A "stream cannot rise above its source", Byrce argued, and in the same way a subordinate body cannot go beyond its enabling legislation. In this respect the American Congress was in exactly the same position as "an English municipal corporation or railway company"; it could not validly exercise powers beyond its appointed limits. The crucial questions of "how and by whom" the precise limits of powers were to be judged were posed by Bryce, but not properly answered. To the "how" question, Bryce gave a mechanical, legalistic explanation of what was entailed in exercising judicial review—"setting the statute side by side with the Constitution, and considering whether there is a discrepancy between them". Such an answer implied that the "by whom" question would be answered in the court's favour, and so it was. Bryce concluded that since the interpretation of laws properly belonged to courts, judicial review of

congressional legislation was part of the normal function of a court. Bryce did give other prudential reasons why the judiciary, rather than the executive or legislature, should make such decisions, because he admitted that judicial review was not absolutely necessary for a federal constitutional system. His main explanation as outlined, however, gave a constitution exactly the same status as an ordinary statute and assumed that its interpretation came within the ordinary legal function of courts. Bryce's simplistic view became the orthodox one in Australia.

P. H. Lane is one leading constitutional scholar who has probed the basis of judicial review in the constitution and found it insufficient. Lane says: "I can find no express constitutional basis for such a doctrine."[13] He rejects the reasoning in *Marbury v. Madison* on the grounds that it slides over from the ordinary role of courts to an unproved federal role. Lane concludes: "Thus, the best that I can offer as a basis for judicial review by the High Court is the historic practice of the United States Supreme Court, the Privy Council and pre-Federation Colonial courts."[14] This is a rather vague foundation for such a potent and crucial political procedure. Lane does acknowledge that "what was introduced by history has now been sanctified by prescription. Parliament and people throughout this century have tacitly acquiesced in the role assumed by the High Court in the government of the Commonwealth."[15] Lane's position on judicial review in the Australian constitution can be summarized in three propositions: (1) judicial review has no express constitutional basis; (2) it was introduced by history and is now sanctioned by the tacit acquiescence of the people and parliament; and (3) it is a role assumed by the High Court in the government of the Commonwealth. If Lane is correct, the important function of judicial review has been built on insufficient constitutional foundations.

In response to Lane, Geoffrey Lindell has argued that judicial review, and moreover the duty of courts to exercise judicial review, is properly based in law. Lindell's position relies on the common law role of judges and "the general duty of a court to apply and interpret all laws",[16] including the constitution. The extensive evidence that Lindell gleans from English and Australian case law establishes that judicial review has deeper roots in law than Lane acknowledges. Whether this argument meets the main thrust of Lane's objection that judicial review is, in the last analysis, a function that judges have usurped for themselves depends on the view one takes of the basic character of the Australian constitution. If the constitution is essentially just another statute passed by Westminster and deriving its authority from that source, then Lindell's analysis that relies on common law principles of interpretation would seem to be conclusive.[17] If this is a legal "fantasy" and there is an essential difference between the constitution and an ordinary statute, as Lane in my view correctly claims,[18] then the gap that Marshall sought to bridge in *Marbury v. Madison* remains. Only a systematic study of the structural logic and original design of the constitution can properly

substantiate judicial review and get round the problem posed by Lane.

As Lane points out, Marshall's reasoning in *Marbury v. Madison* does slide over from the ordinary role of judges to an unproved federal role. Where the constitution is silent, judicial proofs must beg the question.[19] Arguments can be advanced on behalf of the federal executive, or the legislature, or all three branches of government having the constitutional right of interpreting the constitution in matters that concern them.[20] The Court's assumption that it can authoritatively determine whether judicial review is constitutionally mandated presupposes that the Court has the power of interpreting the constitution definitively. And that is precisely what has to be established. As Alexander Bickel has pointed out, Marshall's proofs of judicial review are "too strong; they prove too much. *Marbury v. Madison* in essence begs the question. What is more, it begs the wrong question."[21]

That Marshall's insufficient argument formally established judicial review in the American federal system is proof of his political finesse and masterly rhetoric. In the words of the American constitutional historian, Robert McCloskey, "The decision is a masterwork of indirection, a brilliant example of Marshall's capacity to . . . advance in one direction while his opponents are looking in another."[22] In turn, Australian judges for the most part have been shrewdly discreet in relying on Marshall's authority or have simply taken for granted that their primary function is to exercise judicial review. Few Australian judges have attempted to establish judicial review by their own arguments and reasoning.[23]

The reasons why judicial review was not spelt out in the various constitutions are less clear. In the Australian case, as we shall see, and probably also in the American, judicial review was implied by judicial decisions and the paramountcy principle. We can speculate that there were perhaps other reasons of political expediency and prudence for not making such an important power explicit. To spell out judicial review would violate that discreet reticence which tends to disguise the court's delicate political function and to enhance its ability to exercise such a function. Judicial review is a political function, albeit of a peculiar kind, and it is exercised by a legal body. That implies a certain tension or contradiction. The court performs the key function of ensuring federal paramountcy in enumerated areas while at the same time confining it to those constitutionally defined areas. That is a crucial function in a federal system. The power to declare legislative and executive acts unconstitutional cannot properly be given to either level of government, national or state, because to do so would tend to make that level of government superior to the other and thereby destroy the federal balance. Moreover, the adjudication of federal disputes is not left immediately to the people, save in the exceptional instances of constitutional amendments, or under the Swiss constitution (which is an exception in this regard), because the people are generally considered to lack the qualities necessary for its proper exercise.[24]

Thus the court is given the important function of federal adjudication for two reasons: negatively, because it cannot prudently be given to any other body and

so the court assumes it by default; and positively, because the court possesses institutionalized attributes derived from its legal character which fit it for such a role. Those attributes include independence, learning, experience and reflection. The court's arbitral role is a delicate political power that has to be exercised in a judicious manner. The court's legal characteristics tend to disguise the political nature of the role and thereby remove it from a disputatious and charged political atmosphere. The formal procedure of the court tends to narrow the focus of the issue to a manageable form. The full ritual, sober dignity and calm deliberation of the court lend an air of finality and objectivity that plays an important part in legitimating the resolution. Judicial review removes a political dispute to a traditionally non-political arena for resolution. Partisans are forced to transpose their positions from the passionate rhetoric of political dispute to the more neutral rationalizations of the law. In this indirect transposition and calm resolution the exhilaration of the victor tends to be damped down and the disappointment of the loser to be lessened.

The court then is a major arbiter in federal disputes. That clearly is a political function, so in this respect Lane is correct in describing the court's role as government.[25] But the court's role in constitutional adjudication is not simply government, but governmental or political only in a special sense. A court cannot normally govern in the sense of legislating about a general class of things, nor can it govern with the flexibility of the executive in directing specific actions. Generally speaking a court decides disputes between parties that are brought to it and that involve conflicting laws. At least that is the classic view of a court's role that inspired Alexander Hamilton's famous words that the judiciary has "neither *force* nor *will* but merely judgment", and is therefore the "least dangerous" branch of government.[26]

Superior courts exercising judicial review have become more powerful, more activist and more controversial since Hamilton's time. The American Supreme Court in particular has taken on an aggressive policy-making role in public litigation of bill-of-rights issues in recent decades. Because of its sweeping affirmative action decisions and deeply controversial moral rulings made in civil and personal rights areas, the American Supreme Court would not now be regarded by many as the least powerful branch of government, nor by some as the least dangerous branch. Even in Australia where the High Court has a much lower public profile and a more legalistic public image, there are signs that the Court is becoming more controversial, and its major decisions, like the Tasmanian *Dam* case (1983), more politically contentious. These developments, which will be taken up in the final chapter of the book, make imperative the task of properly establishing the constitutional basis of judicial review.

That is the purpose of this chapter. The critical argument of Lane and others is that since judicial review has no express textual basis its constitutional legitimacy cannot be established directly from the words of the constitutional text or from

judicial decisions. But fortunately for judicial review, those are not the only sources of constitutional authority. It does not matter whether or not judges have given an adequate account of judicial review, provided that the function can be shown to be an integral part of the system's design and its structural logic. There is ample evidence in the federation debates to establish that judicial review was not introduced by history, as Lane claims, but by the framers of the Australian constitution who deliberately followed the American model. Likewise judicial review was not simply assumed by the High Court, but was fully intended and clearly specified in the federation debates as an integral part of the Australian federal system. That judicial review was not spelt out explicitly in the constitution is not evidence to the contrary.

The founders' design and intention

The Australian constitution was the product of a protracted series of constitutional conventions that spanned the last decade of the nineteenth century. The Australian founders grafted the American federal system on to the traditional British executive of responsible government. Though federalism was by then a mature and well-tried system of government in North America, it was quite novel to the Australians. As Dixon has pointed out: "In many respects the plan or scheme of government, which we took from the United States and adapted to our British system of ministerial responsibility, involved, not a development of conceptions then current among us and familiar to us, but a departure from them."[27] The fundamental principle of dividing powers between two autonomous levels of government and the corollary of a powerful court to police that division were strange and novel doctrines for Australians who were nurtured and practised in the traditions of parliamentary supremacy.[28] The federation debates combined political negotiation with an intensive learning process. The Australian founders adopted the American model of a powerful federal court as part of their new constitution at the beginning, but only gradually did they work out the full political implications of such an institution.

Presentiments, Melbourne 1890

From the very beginning of the federation discussion it was asserted that the court would play a vital role in the federal system. At the preliminary Melbourne conference in 1890, when delegates made only broad and tentative suggestions about the future federation, it was becoming evident that the American constitution would serve as the model for the Australian, and that the proposed federal court, like the American Supreme Court, would have a larger-than-legal role. Alfred Deakin, the youngest delegate but one of the ablest and best read, who was to

be responsible for the Judiciary Act thirteen years later, recommended the adoption of an American-style federal judiciary. Drawing upon Bryce's recently published *American Commonwealth* which he described as a first class "text-book for the philosophic study of constitutional questions" and a "magnificent work", Deakin explained the essential characteristic of the American federal system. The central government, he pointed out, acted "directly and immediately on every citizen of the entire country" in certain specified powers. The judiciary was an important organ of such direct central action. Deakin expressed himself as "glad to think that we shall see a Sovereign State in Australasia which will be able to act directly through its judiciary, and in other ways, on every citizen within its borders".[29] Future conventions were to adopt Deakin's recommendation for an American-style federal system and supreme court, and to accept Bryce as an authoritative reference.[30]

Andrew Inglis Clark, attorney-general for Tasmania, spoke immediately after Deakin. He endorsed Deakin's recommendation for an American-style court and spoke more generally about the character of a federal union for the Australian colonies. Clark preferred "the lines of the American Union to those of the Dominion of Canada.".[31] He cited the Dominion veto power in the Canadian constitution as a method of amalgamation antithetical to the federal structure. Clark predicted that the Canadian provinces would be reduced to the status of municipalities, a view that did not take sufficient account of the strength of regionalism in Canada and the remarkable juridical feat of the Judicial Committee of the Privy Council in legitimating the turnaround of the constitutional division of powers. Clark's evaluation of the American system was more accurate. He attributed the cause of the Civil War to slavery and not to any deficiency in the American federal system. This analysis undercut the Canadian founders' reasons for departing from the allocation of legislative powers in the American model. According to Clark, the enviable success and prosperity of the American nation were due to its federal system. Local public life and regional differences of custom and industry were preserved within a strong national grouping. Since the Australian colonies had the territory and potential for such national growth and at the same time the regional differences and established governments to preclude a unitary system, Clark argued that they should adopt the American federal system. He proposed American bicameralism as the only way round the question of federal finances that Samuel Griffith had raised as the principal difficulty in the way of federation. All in all, in 1890 the American system appeared tailor-made for the Australian colonies.

Clark's influence and the first draft, Sydney 1891

Inglis Clark's influence on the formation of the Australian constitution was profound. "[M]ore American than the Americans in his admiration of American

institutions", as Bernhard Wise described him,[32] Clark was instrumental in moulding the broad lines, and especially the judiciary sections, of the Australian constitution to the American federal model. Clark's role in the founding of the Australian constitution has not always been properly appreciated, nor have the extent and implications of the American political principles in the Australian founding been fully realized.[33] No doubt the former partly explains the latter. We can identify several reasons for this dual neglect.

First, Clark's influence on the federal constitution occurred at the beginning. He did not attend the second round of conferences in 1897-98 that finally produced the constitution. Clark tended to lose touch with the federal movement as federation approached. He actually opposed federation in the 1898 referendum because he thought the financial security of the smaller states was not sufficiently protected. He held no public office in the new commonwealth government and narrowly missed out on being appointed to the original High Court bench. A shy person who avoided the public limelight, Clark was a man of ideas rather than a leader.

Second, the High Court's break with the constitutional jurisprudence of the earlier Griffith Court in the famous *Engineers* case[34] in 1920 was a departure from the Court's close identification with the American Supreme Court and its leading constitutional doctrines. At that point the Court broke with its own origins and adopted a rhetoric that has tended to obscure them.

Clark's role was better appreciated by his peers. Bernhard Wise, a distinguished delegate to the 1897-98 convention where he was a member of the judiciary committee, gave the following glowing account of Clark's influence:

> No one in Australia, not even excepting Sir Samuel Griffith, had Mr Clark's knowledge of the constitutional history of the United States; and, when knowledge of detail is combined with zeal, its influence on a deliberative body becomes irresistible. That our Constitution so closely resembles that of the United States is due in a very large degree to the influence of Mr A. I. Clark. His speech at this Conference [1890] . . . is interesting as containing the germ of the ideas which dominated the Convention of 1891.[35]

Clark's was the predominant influence on the overall design of the Australian constitution, and particularly its judiciary sections. Other men such as the convention leaders Griffith (1891) and Barton (1897-98) made greater practical contributions towards shaping the instrument and having it adopted, but Clark's influence on its general principles and structure was pre-eminent. Of course, in Samuel Griffith's words, the 1891 bill "was not the work of any one man. It was the work of many men in consultation with one another."[36] And the 1891 bill was itself only the blueprint for the new beginning that was made in 1897. Moreover, as La Nauze points out, Griffith was technically capable of doing what Clark did. But the honour of drafting the first constitution to federate the Australian colonies belongs to Inglis Clark.[37]

Clark had long been an admirer of American constitutional principles. As early as 4 July 1876, when he gave the presidential address to a small group of devotees

gathered at Hobart's Beaurepair's Hotel to celebrate the centenary of American independence, Clark had advocated American principles of constitutional and federal government. Those principles he declared to be "permanently applicable to the politics of the world and the practical application of them in the creation and modification of the institutions which constitute the organs of our social life to be our only safeguard against political retrogression".[38] By the 1870s Clark had become a champion of Australian federation and had turned to American principles as a basis for federating the Australian colonies. Clark continued his advocacy of the American model at the preliminary Melbourne conference in 1890. Later that year he made the first of three extended trips to the United States, "a country to which in spirit he belonged, whose Constitution he revered and whose great men he idolized."[39] There Clark supplemented his extensive reading in American history and politics with discussions and observations.

Returning to Australia, Clark prepared a draft constitution that embodied his beloved American constitutional principles. He circulated this draft to leading delegates before the 1891 Sydney convention called to frame an Australian constitution. Clark's draft closely followed the American model in its overall federal arrangement, in the division of powers between federal and state governments, in its bicameral legislature with a Senate constituted by equal state representation and a House elected on the basis of single constituencies of roughly equal size, and finally in its strong and independent federal judiciary. Clark retained the traditional formulation of executive rule by the monarch through the governor-general, but left open the option of having the Executive Council or efficient executive constituted either in the traditional form of responsible cabinet government or in the American cabinet form. Clark's personal preferences were republican and American, but the British tradition was too deeply engrained to be directly challenged on this point.

Clark's draft constitution, however, was not the only one prepared before the 1891 Sydney convention. A second draft constitution was circulated by Charles Kingston, a leading South Australian political figure who was one of the more significant contributors throughout the federation debates. Kingston's alternative was produced after he had studied Clark's draft. As Crisp explains, Kingston "was moved to produce and circulate—as a preferred alternative—a significantly modified draft", but he had "had much learning and thinking to do about both the essentials and details of the American system" and its applicability to Australia.[40] Kingston suggested a constitutional scheme that was similar to the one suggested by Clark.[41] It was Clark's draft rather than Kingston's that provided the convention with a concrete plan that was significant in focusing thinking and general discussion. Clark's draft bill also provided the original text for Samuel Griffith's drafting committee.[42] Clark's draft constitution played a similar role in the framing of the Australian constitution to that of the Randolph Plan in the 1787 American Convention, although it was not directly debated on the convention floor. Despite

a new beginning to the task of drafting in 1897 and innumerable amendments, the final Australian constitution embodies the substance of Clark's first draft and his beloved American principles.

Clark was active in the 1891 convention as chairman of the judiciary committee, as a member of the constitutional committee and of the select three-member drafting committee. The real work of the 1891 convention was done in special committees—constitutional, finance and judiciary—after a general discussion of broad principles had indicated a general consensus sufficient for such detailed work. "In those few days", report Quick and Garran, "federation came down from the clouds to the earth; it changed from a dream to a tangible reality. The idea was once for all crystallized into a practical scheme, complete in all its details."[43] This statement overlooks the role of Clark's first draft, but it does capture something of the importance of the first official drafting of a constitutional bill. Clark was chairman of the judiciary committee and dominated its work. He was deputed to draw up a set of resolutions which he did by simply polishing up the judiciary sections from his draft bill. These were then submitted to the committee and all accepted, but three of them only with the aid of Clark's casting vote.[44]

The constitutional committee reconsidered Clark's judiciary committee proposals and the drafting committee rewrote them. Though a member of both committees, Clark was absent with an attack of influenza when the judiciary sections were recast.[45] He was unhappy with the changes but was unable to do anything about them. As he acidly commented, "they altered all the clauses relating to the judicature . . ." and "messed it".[46] Most of the changes, however, were stylistic ones. The important exception was to substitute a Canadian-style formulation that parliament "shall have power to establish a Court" for the stronger American expression, reverted to in 1897, that "The judicial power of the Commonwealth shall be vested in a Federal Supreme Court".[47]

Despite a second reformulation in 1897, the judiciary sections of the constitution that were embodied in the 1891 bill contain the substance of the American clauses and reflect Clark's original draft. There were of course significant differences between the Australian and American clauses: section 71 allowed the parliament to invest state courts with federal jurisdiction; section 71(ii) adopted the more traditional Canadian method of dismissing a judge after an address from both houses of parliament;[48] section 73 gave the court a more extensive appellate jurisdiction, including appeals from state Supreme Courts in matters of non-federal law; and parts of sections 73 and 74 dealt with Privy Council appeals. Otherwise Article III, sections 1 and 2 of the American constitution which are the charter of the American Supreme Court were reproduced in slightly different form.[49]

La Nauze points out that "The draft of 1891 is the Constitution of 1900, not its father or grandfather."[50] Despite fairly extensive modifications in the several sessions of the 1897-98 convention, the form of the 1891 bill is apparent. As we have seen, the main lines of that 1891 bill were sketched by Clark in his original

draft proposal. As author of the first draft constitution and as chairman of the judiciary committee in the 1891 convention, Clark played the leading role in having an American-style federal court written into the Australian constitution.

There was little time for detailed discussion of the judiciary clauses in the 1891 convention debates. Nevertheless we can surmise from the extensive discussion concerning the court in the 1897-98 convention debates that they were not fully understood or appreciated. The Australian constitution makers adopted the stark formulations of an American court because of the persuasive oratory and drafting of Inglis Clark and other leading delegates such as Griffith, Barton and Deakin who were familiar with, and who admired, the American Supreme Court. But only gradually did most other delegates come to appreciate the full meaning of judicial review. The next section traces the evolution of that understanding.

Judicial review intended, Adelaide 1897

The 1891 draft constitution "had been constructed in six weeks. It was to be 'put by' for six years."[51] One cause was the dramatic entry of the recently formed Labor party into New South Wales politics in the June election of 1891. Labor won 36 of the 141 seats and held the balance of power. It traded support for concessions. Labor's single-minded concern with social legislation at the colonial level was combined with an ignorance and suspicion of federation. It seemed to the fledgling Labor party that a new level of federal government that was perceived to be undemocratic in its bicameralism and proposed amendment procedures was being added just as Labor was beginning to make inroads into the first level of state government. As a result of Labor's entry into politics, the attention and political skills of New South Wales politicians were focused internally on colonial matters. The other colonies were not prepared to proceed with federation while New South Wales, the key to any federal union, was absorbed in accommodating this new political force.

There was some rather half-hearted discussion of the 1891 draft constitution in the colonial legislatures.[52] Parkes gave notice of a resolution to approve the constitution bill in the New South Wales Legislative Assembly in May, shortly after the 1891 convention ended. However, an election in June left him in office, but dependent upon the support of the new Labor members. Parkes was forced to resign the premiership in October 1891 and his resolution to approve the 1891 constitution bill was not moved until later the next year.[53] Detailed discussion in committee had barely got underway when the New South Wales parliament was prorogued in December 1893. Barton and O'Connor, the two leading proponents of federation, resigned their ministerial portfolios soon afterwards because of a parliamentary censure against their acceptance of briefs in litigation against the Railway Commission. Thus, after intermittent consideration the 1891 constitution bill lapsed in New South Wales. Neither Queensland nor Western

Australia considered the bill; Queensland because Griffith rightly held that there was no point in moving ahead without New South Wales, and Western Australia because the government was engrossed in operating the newly established system of responsible government. After some debate Tasmania adopted the Queensland stance of waiting to see what happened in New South Wales. In Victoria and South Australia there was more serious discussion and the issue of judicial review was touched on. Both the Legislative Assembly and Council in Victoria wanted an express provision in the constitution spelling out that the court had the power of judicial review; the Assembly, to decide the validity of federal legislation; the Council, to judge both federal and state legislation. In South Australia, John Gordon opposed the constitution bill because it made a bench of judges "not only the guardian but also the master of the Constitution".[54] The desultory nature of discussion of the 1891 bill in the colonial legislatures showed that the Australian people and their colonial governments were not yet prepared for federation.

The federal cause was rejuvenated in 1897 and the first of three long convention sessions began at Adelaide in late summer. The 1897-98 convention was attended by delegates elected by the people of the colonies rather than appointed by colonial legislatures as in 1891. Many new delegates were present and several of the previous convention leaders did not attend. The 1891 convention leader, Samuel Griffith, had been made chief justice of Queensland in 1893, and Inglis Clark was absent because of illness and a second recuperative trip to the United States. Armed with a new mandate, the convention made a fresh start, while using the 1891 draft bill as an unofficial blueprint. Edmund Barton, who had substituted for Inglis Clark on the 1891 drafting committee, was elected convention leader and chairman of the constitutional drafting committee. Barton was responsible for overseeing the debate on the convention floor and preparing successive drafts of the bill, an immense task that called forth all of Barton's great abilities.

As in the earlier Sydney convention of 1891, the Adelaide convention began with a general discussion of broad principles, mainly to hear the views of the new delegates, who included three future justices of the High Court in O'Connor, Isaacs and Higgins. To focus discussion, Barton presented a set of resolutions specifying the basic federal principles that he considered should be embodied in the new constitution. These resolutions stipulated that the colonies and colonial legislative powers would remain intact, except that powers over defence, customs and trade would be given to the federal government. The federal government was to consist of a bicameral parliament, responsible government executive and a federal judiciary.[55] This of course was the essence of the 1891 draft bill. What concerns us here is the federal court, detailed discussions of which are largely absent from the 1891 record of the debates. Perhaps because of this, Barton saw a need to explain the character and functions of the federal court at the very beginning of this convention.

Barton's resolution regarding the federal judiciary read: "There shall be a Supreme

Federal Court, which shall also be the High Court of Appeal for each colony in the Federation." Like the formulation of the judiciary sections in the constitution, these brief words were deceptively simple. What they implied was forcefully stated by Barton in his explanatory speech. Barton thought the need for a federal court was so obvious that he doubted whether more than one or two delegates would oppose it. More to the point was the role of such a court. In this respect Barton noted that most of those who discussed the matter saw the court principally as a court of appeal. But for him the court's appellate role was secondary to its role of arbiter in federal disputes. Barton claimed that the "peaceful arbitrament of a Federal Court" was the best means of holding the federation together and preserving the honour of the constitution. In Barton's powerful rhetoric, judicial arbitration was the alternative to negotiation and the final "arbitrament of blood".[56]

Barton predicted that disputes between the states and between the federal government and the states would invariably arise under a federal constitution. He saw the federal court as providing "a continuous tribunal of arbitration" where states could bring their differences. "The peaceful and calm atmosphere of a court" would replace the "perturbed imagination" and "infuriated party politics" of the political arena. Barton claimed: "One of the strongest guarantees for the continuance and indestructibility of the Federation is that there should be some body of this kind constituted which, instead of allowing the States to fly to secession because they cannot get justice in any other way, will enable them to settle their differences in a calm judicial atmosphere."[57] Barton pointed out that giving the arbitral role to the court would prevent the federal government's being a judge in its own case. Both state and federal parliaments and governments would be bound by the constitutional division of powers which would be policed by the court. This was something quite novel to the traditional parliamentary system.[58] It proved a hard lesson for the Australians to learn and was to be stressed over and over again in the debates.

With the exception of Privy Council appeals, the judiciary sections of the constitution aroused little substantial controversy compared with such contentious matters as finance and equal state representation in the Senate. The judiciary committee of the 1897 convention was the smallest of the three committees and carried out its work with the least trouble. Its resolutions were well drafted and went straight into the draft bill. This was in marked contrast to the controversial and vague recommendations of the finance committee which were repudiated by leading committee members on the convention floor.[59] From its earliest conception the federal judiciary enjoyed a certain apolitical status.

The judiciary sections were essentially a rewrite of the 1891 bill, with a few important exceptions. At the instigation of a delegate from impecunious Western Australia, the novel expedient of investing state courts with federal jurisdiction as an alternative to creating subsidiary federal courts was added. This change was

first cleared by wiring Samuel Griffith[60] who, along with Inglis Clark, was now a respected authority on federal matters and continued to exert a powerful influence on the convention *in absentia.* A far more significant change was to reinstate Inglis Clark's original intention of entrenching the establishment of the court in the constitution rather than leaving its creation to parliament's discretion. Clark was reported to be "flattered" by this change.[61]

The most blatant disagreement regarding the judiciary was over retaining the Privy Council as an appeal court. The majority of delegates, including all eminent lawyers in the convention, felt adamantly committed to establishing a powerful Australian court as the final court of appeal. A vocal minority supported retention of the Privy Council, however, making appeals to monarchic and imperial sentiment. They were strongly supported outside the convention by a mixed alliance of powerful interests that included the British Colonial Office, a group of colonial chief justices and retired judges, and wealthy English corporate investors who distrusted the impartiality of an Australian court as a safeguard for their colonial investments.[62] The debate was often quite heated with the convention leaders giving short shrift to the arguments of the pro-Privy Council faction and making disparaging remarks about the quality of the Judicial Committee of the Privy Council.[63] One of the best arguments used against retention of the Privy Council was that it would have no competence in Australian constitutional cases since it would lack an intimate knowledge of Australian history and local conditions.[64] The force of this argument depended on the fact that constitutional questions were not abstract legal matters that could be decided by a foreign legal body. The attempt to reinstate Privy Council appeals at this stage failed by a majority of two to one.

Our main concern, however, is not with the formulation of the judiciary sections which, with the few exceptions noted earlier, remained virtually the same as in 1891. It is with the convention's understanding of judicial review. Judicial review was not expressly enunciated in the constitutional text, but nevertheless it was a dominant theme that constantly recurred throughout the debate on the judiciary clauses. The bald formulations of the text need to be fleshed out with the substance of the debates for an appreciation of the design and intention of the founders in this matter.

It is quite clear from the debates that the founders intended to create a strong, American-style court that would be an independent branch of government and exercise judicial review over both state and federal legislation. Convention leaders Barton, Downer, O'Connor and Kingston, with judiciary committee members Symon, Wise and Glynn, dominated the debate and all supported vesting the court with the power to declare legislative and executive acts unconstitutional. Trenwith, the sole Labor delegate, was no exception and gave one of the best accounts of the court's role of exercising judicial review in the proposed federal system:

> We are creating a Constitution in connection with which we are fixing all kinds of matters for protecting State rights; but, whatever we do, 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. We want to create unification in a central body for specific purposes, but we are extremely anxious that the central body shall deal with nothing else but what we submit to it. Therefore, we shall have a strong and dignified custodian of the Constitution.[65]

The founders were quite clear that they were establishing the court as an independent branch of government. In heading off a proposal to delete the requirement setting the minimum number of judges at five, Bernhard Wise stressed that the whole object of the judiciary committee had been to "make the High Court in all essential parts independent of Parliament".[66] He warned that in future controversies between parliament and the court it was imperative that parliament not have the power of dismissing judges. Wise advocated an independent court with a sufficient number of judges to command the respect both of the legislature and the state Supreme Courts. The judiciary committee chairman, Symon, went further and claimed that the federal principle was to "make the judges of the High Court once appointed, irremovable. The High Court in its position should be equal to, if not above, the Parliament and Executive."[67]

The draft bill that emerged from the special committee had entrenched the High Court in the constitution as Clark had originally recommended. Now the convention sitting as a committee of the whole adopted Kingston's amendment for strengthening judicial tenure. Where previously judges could be removed by the governor-general after an address from both Houses of parliament, the conditions of "proved misbehaviour or incapacity" were added. Kingston's purpose was to "preserve intact the absolute independence of the judges, both in relation to the Federal Executive and the Federal Parliament".[68] Glynn, who firmly supported him, had drawn attention to the probable lag in political complexion of the court which would make it especially vulnerable to political disfavour from the legislature. He cited early American experience and the attempted impeachment of Justice Chase in 1803 to demonstrate the kind of political pressures a federal court might have to withstand.[69]

The most significant difference of opinion regarding the court was a division within the majority who favoured a final court of appeal in Australia. The difference was over the character of such a court and throws light on subsequent jurisprudential changes by the court. Isaacs and Higgins preferred to stay close to English legal tradition, with the court restricted to a somewhat narrow scope in its legal interpretation. Their view is important because it was the seed of the more legalistic view of the High Court's role that became dominant on the Court after 1920. It was also significant in the convention because it called forth strong statements from other leading delegates regarding the intended character of the Court and of judicial review.

Higgins spoke and voted against the majority over retaining a specified minimum size for the court. He admitted there were very strong reasons for having a court of five justices but held that it was properly a matter for the future legislature to decide.[70] Isaacs tried unsuccessfully to have the British law regarding removal of judges retained. He ably explained that under such a law a judge could be removed for two reasons: first, if he were guilty of misbehaviour; and second, if the parliament wanted him removed for its own good reasons. Isaacs stressed that in the latter case it was parliament's opinion of the matter which was to be paramount. Since this procedure had worked well in the British constitution for two centuries without abuse, he advocated its retention.[71] Higgins supported him. "I hope we shall adhere to the British Constitution so far as we can", he said, "because we are more used to it."[72]

The stance taken by Isaacs and Higgins stirred the others to strong statements in support of their preferred American-style court. Symon was quick to take issue with Isaacs. The position of judges under the British constitution was well known to the convention, he said, but they were creating a federal system that was closely modelled on the American constitution. Symon claimed that Isaacs did not distinguish sufficiently between a unified state and a federation; what applied to one did not apply to the other. In support of his case, Symon approvingly quoted Hamilton's strong argument from *Federalist* no. 78. In the passage he quoted, Hamilton argued for permanent tenure for judges because the courts were the "bulwarks of a limited Constitution against legislative encroachments". Symon called the court "the keystone to the federal arch".[73]

Backing up Symon, Barton claimed that the Canadian model of a supreme court should not be followed. Canada, he said, had neither a true federation nor a true union: it was "a mongrel between both". Barton had in mind the centralizing mechanism of dominion veto over provincial legislation which was an alternative to judicial review by an independently entrenched court. In the proper federation that they were creating, argued Barton, a strong and independent court was needed to exercise the power of judicial review. Barton's account of what judicial review would be like in the Australian constitution drew directly from the great American tradition:

> The Federal Judiciary must be the bulwark of the Constitution. It must be the supreme interpreter of the Constitution, and it is not true that in the United States the Supreme Court is above the Constitution, and the Parliament below it. That is the way in which the matter has been stated by Englishmen who have not thoroughly studied the question. The truth of the matter is this, as laid down in the American Constitution in few and stately words: This Constitution is the supreme law of the land . . . When the Federal Judiciary of the Supreme Court of the United States has confided to it the maintenance of the Constitution, which is confided to it by that very phrase, the settlement of any question in which Parliament makes an attempt to transgress the law of the land comes within their jurisdiction. Acrimony may arise between the Parliament and the Supreme Court, and we have to ensure that the judges shall not be removed upon the occurrence of that acrimony.[74]

Quoting his colleague O'Connor, Barton stated in a follow-up speech that the most important questions the court would have to decide would be "between the States and the Commonwealth, the validity of State laws, and the validity of Commonwealth laws which may overlap or override them".[75]

Downer, the third member of the constitution's drafting committee with Barton and O'Connor, was equally determined that the American model of judicial review should be followed in Australia. "We should make our Supreme Court so strong and powerful", he said, "that no Government will be able to set the Constitution at defiance owing to the presence of a majority in either House, whereby an authority would be obtained that was never intended by the founders of the Constitution."[76]

We must be careful, however, not to exaggerate the difference between the majority opinion as formulated by the drafting committee members Barton, O'Connor and Downer, with judiciary committee members Symon, Wise and Glynn on the one hand, and the view of Isaacs and Higgins on the other. While the majority were persuaded by the dominating influence of the American Supreme Court, Isaacs and Higgins preferred to adhere more closely to traditional English practice. This was a difference in the preferred style, exercise and scope of judicial review, not in the intended function of judicial review. For example, Higgins emphasized the need for a strong and independent court, "especially as it has to decide between the States and the Federation and upon encroachments by the Federation upon the States".[77]

Despite these differences over judicial style and the degree of independence of the court from the legislative branch, all the convention leaders came out strongly in favour of judicial review. In order that this function could be properly performed, and they saw it as necessary to the federal system, they structured their court accordingly. The Court was entrenched in the constitution and the tenure of its judges was guaranteed. Constituting such a powerful court, and investing it with the key role of arbitration of federal disputes and keeping each branch of government within its appointed powers, was, for the most part, an adoption of the American model.

Judicial review reaffirmed, Melbourne 1898

The Adelaide session had produced a draft bill but had left many matters unsettled. There had been serious divisions within the convention, but now the bill would be thoroughly vetted by both Houses of parliament in each of the colonies. This was the occasion for every would-be constitutional draftsman and a chance for such anti-federalist chambers as the New South Wales Legislative Council to indulge in a spoiling campaign. The colonial premiers hurried off to England to attend the diamond jubilee celebrations of Queen Victoria and a Colonial Conference called by the secretary of state for the colonies, Joseph Chamberlain. Hence they

were absent during much of the public debate on the constitutional bill for which they were jointly responsible. In this period the British Colonial Office was also busy. Chamberlain lectured the premiers on the importance of retaining Privy Council appeals in private law cases while his office prepared schedules of detailed criticisms and suggested improvements to the draft bill. These were discreetly passed on via Reid to Barton and a few others in the convention.[78]

After a short Sydney session in September of 1897, the convention adjourned to Melbourne for the longest and final session in January 1898. The Sydney and Melbourne sessions were occupied with settling all outstanding matters and disposing of the various suggested amendments from the colonial parliaments. There was necessarily much attention to fine detail.

The sections on the judiciary were considered at Melbourne. There was no change in the basic view of a powerful and independent court that would exercise judicial review over state and federal legislation. The debate on the court was reopened, however, to consider diverse sets of suggested amendments from colonial legislatures. In the event, the minimum size of the court was reduced, after a close vote, to a chief justice and two justices. A penny-pinching scheme from South Australia to staff the court with state chief justices on a part-time basis, now supported by Glynn and Kingston who had championed the court's independence at Adelaide, was defeated. The question of allowing appeals to the Privy Council in private law cases was reopened. Despite the beefing up of the minority position by Chamberlain's considerable political weight—all premiers except the radical Kingston spoke and voted for allowing such appeals—the Adelaide clauses that ruled out such appeals were upheld by a substantial majority.

Again, as in Adelaide, the debates are more significant for revealing the thinking of convention leaders on the general role of the court rather than for the substance of the disputed details. In the context of finalizing the judiciary clauses, the convention reaffirmed its commitment to judicial review by a strong and independent court. This was eloquently formulated by such leading delegates as Barton, O'Connor, Symon, Downer, Isaacs and Higgins, a group that included four of the five original justices of the future High Court.

The debate over the Glynn-Kingston amendment to staff the High Court with state Supreme Court chief justices on a part-time basis was interesting because it raised the issue of political bias in the court. The delegates seemed rather coy about broaching this delicate issue because a court of law was supposed to be above such suspicions. With masterly circumlocution, Barton raised the issue. Such an expedient would, he said, "lead to the suspicion that the Chief Justices chosen from the various states were intended to be in some sort of way the representatives of provincial interests, and that it was not intended that the court in its impartiality should be representative of the Commonwealth as distinct from the provinces".[79] Symon, an outspoken and forthright man, put the matter more bluntly and claimed that state-appointed judges would act as state partisans.[80]

Such charges of state partisanship could be easily turned around, as they were by Kingston immediately afterwards. In this instance the roles were reversed with the federalists now playing coy about the possibility of federally-appointed judges having a bias—or as one delegate suggested, an "unconscious bias"—in favour of the federal government.[81]

The Australian founders were generally reluctant to dwell on the political character of judicial review, but it was sporadically raised. The matter was taken up by O'Connor who sharply distinguished between the accustomed legal role of judges and the novel political role that was to be given to the federal court. O'Connor stressed that state judges were not concerned with political questions whereas federal judges might at any time have to decide "a question which may become a matter of burning political moment—a question of the validity of a law which may affect very largely the interests of a state and the Commonwealth, and may at any time become a matter of heated controversy between a state and the commonwealth".[82]

The general political character of the court's role was very much to the fore when the amendment reducing the minimum size of the court from five to three was debated. The danger of manipulating the court through controlling appointments was discussed. O'Connor stated that the main danger would come not from outright packing which could attract popular disapproval, but from the less blatant strategy of letting numbers dwindle. Therefore, he insisted on specifying a reasonable minimum size for the court.[83] Isaacs claimed that appointments to the American Supreme Court had been used as a means of amending the constitution. He asserted that in America the great judges of the Supreme Court had been as influential in shaping the constitution as the founding convention and predicted the same would be the case in Australia:

> We are taking infinite trouble to express what we mean in this Constitution; but as in America so it will be here, that the makers of the Constitution were not merely the Conventions who sat, and the states who ratified their conclusions, but the Judges of the Supreme Court. Marshall, Jay, Storey [sic], and all the rest of the renowned judges who have pronounced on the Constitution, have had just as much to do in shaping it as the men who sat in the original Conventions.[84]

Isaacs predicted that the court would have to decide "vast issues" involving the very existence of states, their taxing powers and their rights over rivers and territories.

Higgins took a different tack that stressed the particular vulnerability of a federal court in the Australian context of responsible cabinet government. In such a system, he claimed, the executive was "the creature of the Legislature" and together they would have "every temptation to so mould the character of the High Court as to get it to adopt their views".[85] Consequently, he argued, it was even more important here than in America to constitute a strong and permanent court. On

this occasion differences between Isaacs and Higgins and the other convention leaders were not apparent.

Symon's criticism of the interpretive style of the Judicial Committee of the Privy Council was also to the point. The Privy Council's narrow legalistic approach was unsuitable for a constitutional court, claimed Symon. "[T]hey are guided by a more rigid adherence to what is literal, as though they were interpreting simply an Act of Parliament, rather than by a regard for those great constitutional principles which throw light upon and assist in the efficient interpretation of a Constitution."[86] Symon approvingly quoted Bryce's eulogy of Marshall and his praise for Marshall's broad constitutional jurisprudence which had given the American constitution an admirable flexibility and capacity for growth from the beginning. Bryce had contrasted with this the Privy Council's unsatisfactory "spirit of strictness and literality" in interpreting the Canadian British North America Act. It was well understood by the leading Australian constitution makers that judicial review was not simply a legal function.

Judicial review was so fundamental a part of the founders' intention and design that the judiciary sections of the constitution cannot be fully understood without acknowledging that fact. Furthermore, the founders considered that a strong court exercising judicial review of legislative acts was an integral and necessary part of the federal system that they were instituting. The federal system entailed allocating specific national powers to the federal government and making it paramount in those areas, while at the same time restricting it to those areas. Therefore, some independent arbitrator was required. That arbitrator was to be the federal court which was constituted in such a way as to enable it to undertake this function. In carrying out such a role, the High Court was expected to apply and develop the constitution in an innovative and creative fashion. Despite the lack of an express provision mandating judicial review, the evidence from the federation debates makes it quite clear that the founders intended judicial review to be the Court's primary function. That expectation was summed up in the eloquent formulation of the distinguished constitutional draftsman, John Downer:

> [Federal judges] will have the greatest part in forming this Commonwealth; because honorable members must not forget that, although we form it in form, they form it, to a large extent, in substance. With them rest the vast powers of judicial decision, in saying what are the relative functions of the Commonwealth and of the states. With them rests the interpretation of intentions which we may have in our minds, but which have not occurred to us at the present time. With them rests 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 one 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. As was felt in America, and in every Federation which has had any permanence, there comes the necessity of a tribunal to stand between the states and the Commonwealth, of such dignity and held in such esteem, so free from all possibilities of influence or corruption that the general people of the Commonwealth will recognise that the jurisdiction has been well placed, and must be properly exercised.[87]

The rivers question: a test case for judicial review

The Australian founders considered judicial review in two main parts of the federation debates: generally in the discussion of the judiciary clauses, and as a specific solution to the contentious rivers question. The rivers question was immensely important in the founding conventions—at the Melbourne session alone it occupied two weeks of prime convention time and took up over 400 double column pages of the official record. The matter is of no consequence today since railways replaced river steamers within a decade, an outcome predicted by Barton in convention and urged as a reason for omitting mention of river navigation from the constitution and cutting short the debate.[88] A River Murray Waters Agreement regarding water usage was in fact signed by the commonwealth government and the three interested states in 1914. In this respect La Nauze's representation of the protracted debate as "much ado about nothing" is quite valid.[89] This dead issue is resurrected here because it provides an excellent case study on the intended role of judicial review in the federal system.

In dispute was control of dry Australia's single great river system, the Murray-Darling, with catchments spreading from monsoonal Queensland through western New South Wales to the snow covered Australian Alps in the south. New South Wales and, to a lesser extent, Victoria were beginning to undertake extensive irrigation schemes and were concerned to maintain state water rights. South Australia, through which all these waters flowed via the Murray to the Southern Ocean, was the centre of the river steamer trade which tapped the rich rural markets of New South Wales and Victoria. The South Australian delegates were concerned with guaranteeing this trade by ensuring the continuing navigability of the Murray and, if possible, the Darling. All the elements of a classic federal dispute were present. Under the proposed federal system interstate trade and commerce were to be federal matters that extended to river navigation. Water conservation and irrigation, however, came under state property and riparian rights. While navigation required maintenance of water levels and waterways, irrigation implied using water and constructing conservation and flood control works across rivers. South Australia pushed for a specific federal power over rivers to protect its interstate navigation; New South Wales was equally stubborn in insisting on entrenching state water rights in the constitution.

The Sydney convention of 1891 raised the matter but left it unresolved: as Quick and Garran aptly put it, "discussion showed that the question was too difficult to be dealt with off-hand".[90] The lines of battle were more firmly drawn at the

1897 Adelaide session of the second convention when various formulations were tried, but none accepted as satisfactory. The third and final Melbourne session of the 1897-98 convention had to resolve all outstanding points, not least among which was the rivers question.

At the very beginning O'Connor, who was supported by Barton, set out what was to be finally accepted; that federal control over river navigation was sufficiently protected in the trade and commerce clause.[91] O'Connor explained the American law at length and predicted that it was "only reasonable to suppose that our Judges in interpreting our Constitution will be guided very much by the same principles".[92] In other words, the court would resolve particular disputes between navigation rights that were incidental to trade and commerce and water rights that remained under state jurisdiction. This American solution of judicial review was not acceptable to either the South Australian or the New South Wales partisans at this point. The New South Wales premier, George Reid, accused the South Australians of "trying to federalize us" for their own benefit.[93]

After the first week of thrashing about over "amendments innumerable", convention leader Barton secured a short respite while the delegates from the interested colonies discussed the matter privately.[94] Since they could not agree, the rivers question came back for a second full week of debate. In the meantime the judiciary clauses of the constitution had been finalized and delegates were in a better position to appreciate the O'Connor-Barton proposal for leaving the whole matter to the federal court to sort out. O'Connor restated the court solution as the "simplest and most statesmanlike way" of solving the problem. But O'Connor alarmed many delegates when he spelt out the broad political role of the court: it would decide both the merits of a particular case and "absolutely and definitely the rights and the principles upon which the decision should proceed".[95]

Many delegates were opposed to such an extensive scope for judicial review. They had agreed to a powerful American-style court in theory, but baulked at leaving it with such wide powers of decision when it came down to a practical issue. Downer had recommended that in "making a new Constitution, we should place our meaning in plain and unmistakable words".[96] Reid said he was prepared to "risk legal decisions in regard to what I am giving, . . . [but] always so long as the absolute possession of these waters by New South Wales is made clear"—at which point honourable members laughed, to Reid's consternation.[97] Glynn from South Australia wanted to define navigability so as to put the matter beyond doubt; he was "not going to let the Federal Judiciary be the legislators".[98] Similarly, Isaacs wanted to spell out the meaning of navigability and have it entrenched in the constitution lest an Australian court follow English rather than American precedents and define navigability in terms of tidal flow.[99] This was rather a laboured and pedantic view, but it does show the extent to which even leading delegates were chary of judicial review.

Higgins took a different tack and insisted that the navigation-irrigation

controversy be left with the federal parliament. It was a political rather than a legal question and would necessitate new policies as knowledge and conditions changed. Therefore it ought to be left with parliament and not the federal court.[100] Finally, when all attempts to spell out a specific federal power over navigation had failed, Higgins sided with Barton and O'Connor. His summing up of the outcome of the debate and the judicial review solution caught the spirit of many delegates: "As we cannot agree upon an amendment that will secure to South Australia, and I may say to Australia, the federal control of this river system we ought to stop . . . and . . . allow the glorious uncertainty of the construction of the law to operate on the [trade and commerce clause]."[101]

The final outcome, and for our purposes here the significance of this large section of the federation debates, was that judicial review was accepted as a means of resolving, or at least bypassing, an otherwise intractable problem. River navigation was not specified as a separate federal head of power because it was considereed to be incidental to, and implied by, the federal commerce power. Just to be sure, however, it was spelt out in section 98 that the commerce power did extend to navigation and shipping. New South Wales carried its insistence into a special clause, section 100, specifying that the federal commerce power did not abridge the right of a state to use its rivers for irrigation, but only after the qualifying word "reasonable" had been added.

In effect the matter was left to the court to resolve in the future as specific disputes arose. Although this potentially rich field for litigation was neutered almost immediately when railways replaced river steamers, the difficult question had already been resolved in principle by the convention. The solution was judicial review.

The Australian founders were forced to realize that they could not resolve the rivers question in advance through specific formulations. In the first place they could not agree. Second, the subject was too extensive and abstract, and they lacked adequate information. Third, they were forced by the strong claims of the senior state of New South Wales to respect state rights that were not essential to a federal union. That ruled out the possibility of an overarching federal power to formulate river policy and balance navigation against irrigation rights. The federal solution of national sovereignty over navigation and state sovereignty over irrigation at first appeared to most delegates to be no solution at all since navigation and irrigation were but two conflicting aspects of the one issue. Leaving the matter for a federal court to sort out under a broad commerce clause jurisdiction was enthusiastically promoted by a few, but only reluctantly accepted by the convention as a whole after exhaustive debate proved no other solution was forthcoming. The rivers debate shows the Australian founders finally and, for the most part, only grudgingly adopted judicial review as a practical, federal solution to the rivers question. But when they did so it was with full knowledge of what it entailed. This test case shows that judicial review was intended to work as an essential part of the constitution.

An integral part of the federal structure

The Australian founders laboriously thrashed out the issue of judicial review in the federation conventions and accepted it as the primary function of their federal court. Those who designed Australia's federal constitution copied the great American model and continuously drew upon America's long federal experience. In Sir Owen Dixon's words, "The framers of our own federal Commonwealth Constitution . . . found the American instrument of government an incomparable model. They could not escape from its fascination. Its contemplation damped the smouldering fires of their originality."[102]

To appreciate fully the theory of federalism and the function of judicial review in such a system, we have to go back to the American constitution makers since federalism in its modern form is an American invention. The American founders were acutely aware of the fragility of the old federal form because that was the basis of the Articles of Confederation under which they had fought the War of Independence. In such a system central authority tended to be ineffectual. As Martin Diamond has carefully documented, a federation in the old sense was a confederation or league of societies in which the central government acted not on the individual citizens but on the constituent social units.[103] By way of contrast a national government acted directly on the citizens. The American constitution was, in Madison's summing up in *Federalist* no. 39, "in strictness, neither a national nor a federal Constitution, but a composition of both". This fundamental innovation of grafting national powers on to the old form of federal alliance and thus making the individual a citizen of the union as well as a citizen of his own state was well appreciated by the American founding generation. It was praised by its supporters as overcoming the basic weakness of ineffectual central control and a tendency to disintegration that characterized the traditional federal form.[104] It was likewise blamed by critics of the constitution such as Luther Martin, the Maryland attorney-general and champion of a loose confederation of autonomous states, as "a system neither wholly federal, nor wholly national—but a strange hotch-potch of both".[105]

The Americans created a new form of government by dividing powers between two levels of government and making each sovereign within its appointed sphere. Judicial review was part of the elaborate system of checks and balances built into the federal government and provided a practical means of keeping each level of government to its constitutionally defined limits. Influential Americans such as James Madison had originally favoured a central government power of veto over state legislation to ensure it did not infringe upon the federal domain. This was rejected by Jefferson and others as a proposal "to mend a small hole by covering the whole garment". Jefferson proposed instead the alternative of judicial review: "Would not an appeal from the state judicatures to a federal court, in all cases where the act of Confederation controuled [sic] the question, be as effectual a

remedy, and exactly commensurate to the defect."[106] Jefferson was writing to Madison from Paris in 1787. The same solution emerged at the Philadelphia convention which was drafting the American constitution at the same time.

The Randolph Resolutions, which were probably drafted by Madison and which provided the focus for discussion in the 1787 American constitutional convention, specified the paramountcy of national legislation in areas of national jurisdiction. According to these resolutions the national legislature was empowered to "negative all laws passed by the several States, contravening in the opinion of the National Legislature the articles of Union".[107] After considerable debate this was rejected as too serious a threat to the independence of the states, and the supremacy clause, Article VI section ii, was adopted. This clause stated that the constitution was the supreme law of the land and would take precedence over state laws. It was not stated in the text of this clause that the court would give practical substance to this clause by exercising judicial review, but that was suggested by some delegates during the debate. As one delegate pointed out, "A law that ought to be negatived will be set aside in the Judiciary department."[108]

Although the American founders were rather tentative about defining judicial review, it seems that many intended it to be the mechanism for resolving jurisdictional disputes between two levels of government each of which was sovereign in its own powers.[109] It took the consummate political and legal skills of John Marshall to establish judicial review as a practical part of American constitutional law and practice. Once he had done so, however, there could be little dispute over its aptness. There is an obvious link between governments of limited powers and judicial review by the court, at least in countries where the rule of law is given pre-eminence.[110] In fact classic writers on federalism, like K. C. Wheare, assume that this link is natural and inevitable. Wheare says: "The substance of the matter is that while it is the duty of every institution established under the authority of a Constitution and exercising powers granted by a Constitution, to keep within the limits of those powers, it is the duty of the Courts, from the nature of their function, to say what these limits are."[111]

If the American founders were somewhat tentative about the court's key function of judicial review in 1787, the Australian founders in the 1890s certainly were not. By that time judicial review was well established in North America and the Australian founders took it over as an integral part of their federal system. Many Australians had considerable difficulty reconciling themselves to such a broad political role for a court, but Inglis Clark, Barton and O'Connor gradually led them to accept American-style judicial review as an important part of federalism. 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 as absolutely crucial for keeping both levels of government within their constitutional boundaries.

The Canadian founders in 1867 did not consider judicial review such an essential part of the system they were devising, but as Edmund Barton inelegantly put it, theirs was a "mongrel" brand of federalism. The Canadian British North America Act was heavily weighted in favour of the centre, and included explicit powers of reservation and disallowance—of federal legislation by the governor-general and of provincial legislation by the lieutenant-governor. These were practical alternatives to judicial review adopted as means of keeping each level of government within its proper limits.[112] Also, as Jennifer Smith has pointed out in explaining the origins of judicial review in Canada, disallowance was considered to be more in keeping with traditional parliamentary supremacy than was American-style judicial review. Smith explains that "Disallowance not only undermined the need for judicial arbitration, whether by the Judicial Committee or a national court, it also suited partisans of parliamentary supremacy . . .who clearly understood the threat to this supremacy posed by a tribunal patterned after the American Supreme Court."[113] Despite the ambivalence of the Canadian founders towards judicial review, the Canadian Supreme Court and the Privy Council soon made judicial review an integral part of the Canadian federal system.[114] As the forces of regionalism redressed the balance of power in favour of the provinces, and reservation and disallowance fell into disuse, the courts exercising judicial review became the authoritative interpreters of the British North America Act. Thus the Privy Council and the Canadian Supreme Court became indispensable parts of Canadian federalism. Mallory has described the process as follows:

> [The Canadian Constitution] began as—at best—quasi-federal and became more and more truly federal by a process of constitutional evolution . . . While it was the forces of economic, political and ideological change which turned the Canadian States into a "classical" federal system on the American model, it was the courts which confirmed this change by giving it authoritative sanction.[115]

Judicial review has become an integral part of the Canadian federation as well as of the American and the Australian.

Those who would abolish the judiciary's role in constitutional adjudication have to propose some alternative mechanism for settling jurisdictional disputes between the two levels of government. The Canadian constitutional scholar, Paul Weiler, has recently advocated the abolition of judicial review. Weiler claims that there is no necessity for judicial review "even though federalism by its very nature involves the creation of *limited* legislative powers".[116] He claims that "a federal system is precisely the kind of relationship for which an external umpire may not be necessary and in which the better technique for managing conflict is continual negotiation and political compromise".[117] Weiler is concerned that judicial review is essentially unprincipled—he charges the Canadian Supreme Court with deciding constitutional questions on the basis of doctrines that it makes up as it goes along—and that a court is singularly unsuitable for resolving the "very complicated political and economic conflicts which are the 'stuff' of constitutional adjudication".[118]

Weiler's critique of judicial review highlights many of the problems associated with this somewhat incongruous institution whereby a court of law settles great questions of state; but he goes too far. Judicial review need not be as unprincipled as he claims since the constitution provides a basic order against which conflicting claims can be weighed and to which new developments can be fitted. Admittedly the Canadian Supreme Court's task is made more difficult because the British North America Act's original centralist division of powers does not fit the strongly regionalized and decentralized nation that Canada has become.

Weiler proposed political negotiation and compromise as an alternative to judicial review by the court, but what about those hard cases where neither government will compromise sufficiently to allow a negotiated settlement? Weiler acknowledges the problem and would solve it by giving paramountcy to the national government in all disputed cases:

> There should be one easily applicable rule, singling out one jurisdiction's legislation as dominant. There seems also no doubt that, if such is the character of the rule, the dominant jurisdication must be the Dominion Parliament which is responsive to the whole electorate, including voters in the province whose legislation is being overriden.[119]

That is a rather simple and straightforward alternative to judicial review, but unlike judicial review it is not a federal solution. Weiler would give the decision of paramountcy to the federal legislature, thus making it a judge in its own case. Presumably courts would still have the subsidiary function of deciding when laws were inconsistent, but that would be a considerably reduced role. Such an alternative was rejected by the American founders in 1787 as a dangerous threat to the states—as Jefferson said, it was a patch that covered the whole garment. Neither was it countenanced by the Australian founders a century later for the same reason.

Rather, the Australian founders deliberately created a powerful court whose prime function was to interpret the constitution and apply it in settling federal disputes. In so doing they were consciously adopting an integral part of the classic American federal system. They intended the federal court to exercise judicial review over both state and federal legislation and constituted it accordingly. The federal court was made strong and independent; its structure was set out in the constitution; its minimum size was stipulated and the tenure of judges elaborately safeguarded. Moreover, the intended exercise of judicial review by the new court explains why other parts of the constitution appear as they do. The commerce clause was left in very broad terms on the assumption that the judiciary would interpret and apply it in the future. The contentious question of reconciling conflicting river navigation and irrigation claims was left essentially unresolved by the founding conventions precisely because the court was to handle the matter. Since the federal court was to make such important political and economic decisions, the Australian founders were intent upon making it, rather than the Privy Council, the final arbiter in constitutional matters concerning the division of powers. In

adopting American judicial review by a strong court, the Australians were implementing what has now become generally recognized as a necessary operational part of federalism in Canada as well as in the United States and Australia.

The Australian federal system was completed when the High Court was set up by the first Commonwealth parliament in 1903, as will be discussed in the following chapter. Introducing the Judiciary Bill in 1902, Alfred Deakin, by then attorney-general and soon to replace Barton as prime minister, reiterated the central role of the High Court in the Australian federal system in terms that re-stated the thinking of the constitutional conventions:

> The Constitution is to be the supreme law, but it is the High Court which is to determine how far and between what boundaries it is supreme. The federation is constituted by distribution of powers, and it is this court which decides the orbit and boundary of every power. Consequently, when we say that there are three fundamental conditions involved in federation, we really mean that there is one which is more essential than the others—the competent tribunal which is able to protect the Constitution, and to oversee its agencies. That body is the High Court. It is properly termed the "keystone of the federal arch". . . . [T]he High Court exists to protect the Constitution against assaults.[120]

3

The Establishment and Consolidation of Judicial Review 1900 to 1940

Controversy over the High Court, and particularly over its key political function of interpreting the constitution and arbitrating federal disputes, did not end with the final favourable divisions in convention, nor even after popular approval of the constitution by all the eastern states in the 1899 referenda (Western Australia held out until late 1900 for special terms). Before the United Kingdom parliament at Westminster would formally enact the constitution in 1900, secretary of state for the colonies Chamberlain forced a modification of clause 74 that restricted appeals to the Privy Council. Again in 1903 when legislation for its establishment was before the first commonwealth parliament, the High Court was severely criticized both inside and outside parliament, and the debate over its character and function was re-opened. Although its staunchest defenders were now members of the government—Barton was prime minister, Deakin attorney-general and O'Connor government leader in the Senate—the new High Court narrowly escaped legislative emasculation or indefinite postponement at the hands of its opponents.

Even after being set up in late 1903, the High Court's future was not assured. Despite the strength of its constitutional credentials and the pre-eminence of its American parent, the Australian High Court had to contend with a political culture that was markedly different from that of America, where judicial review thrived. As a colonial offshoot of Britain, Australia had strong populist tendencies that favoured direct majoritarianism, parliamentary supremacy and a restricted role for courts. Armed only with the power of its own judgment, the early Court had to establish in practice its right to decide great issues of state, and build up sufficient public prestige to ensure that its decisions were respected and obeyed. Moreover, the Court had to accomplish these things in the face of a growing challenge from the Labor party that called in question the constitutional order that the Court was established to uphold. The High Court therefore needed to develop a political strategy suitable to the conditions of Australian politics. It was to do so by adopting the techniques and public rhetoric of a "strict and complete legalism" for constitutional cases.

The development and use of legalism by the High Court over the next half century roughly paralleled Labor's rise to power in federal politics. The political conditions produced by Labor's rapid emergence as a dominant federal political

party, commanding the popular support of half the Australian electorate, affected the character of constitutional jurisprudence developed by the Court in two ways. First, the divisiveness of Australian politics fostered the appointment of "apolitical" legal specialists who, not surprisingly, crafted a legalistic jurisprudence. Even Labor governments often appointed such specialists in order to avoid political controversy and accusations of court packing. Second, legalism was an appropriate strategy for deciding constitutional issues between liberal democrats and social democrats divided over basic issues of political economy. The rise of the Labor party in federal politics was accompanied by an intensification of legalistic technique used by the Court. By the 1940s, when Labor's federal power had peaked and its threat to Australia's liberal constitution was greatest, Dixonian legalism had triumphed in the Court. The technique of the Court, the thrust of federal Labor party policy and the collision course between Labor and the constitution had been set in the previous decades. This chapter examines the developments in federal politics and constitutional interpretation from federation until the second world war.

The High Court in dispute

It may come as something of a surprise that setting up the High Court should generate so much controversy when, only a few years previously in the federal conventions, that same institution had been lauded as "the keystone of the federal arch".[1] Although the Judiciary Bill and the High Court Procedures Bill were put high on the agenda of the first commonwealth parliament that opened in Melbourne on 9 May 1901, more than two years elapsed between the formal introduction of these bills and their final passage in August 1903. During that time, the legislation had been postponed through lack of support, scarified by opponents in debate, and placed in jeopardy because of fickle political allegiances and unpredictable cross-voting that characterized the early federal parliament. It was an open secret, reported the *Age,* that the government was saved from absolute defeat on the second reading of its High Court legislation primarily because of personal consideration for the attorney-general rather than any other cause.[2] Deakin, who as attorney-general was responsible for securing passage of the bills through parliament, gave a dramatic account of the ordeal in his anonymous weekly report on Australian politics in the London *Morning Post:*

> . . . [P]rovincialists fought the Attorney-General inch by inch at every stage of his cherished measure. Its second reading is publicly alleged to have been secured only by the threat of his resignation with which he steadied wavering Ministerialists, who were unaware of the significance of the Bill and to whom its import could not be disclosed without arousing fresh antagonists. In the Senate the measure was much more sympathetically handled, because its value to the less populous States was to a certain extent appreciated. But it was fiercely assailed to the last by the economists, the States' rights militants, and the Opposition guerillas. Twice its fate in the House depended

> in critical divisions on a single vote, while defeat was evaded again and again by postponements or recommittals. No measure yet launched in the Federal Parliament was so often imperilled, skirted so many quicksands, or scraped so many rocks on its very uncertain passage.[3]

Even allowing for Deakin's propensity to overdramatize events for the sake of journalistic colour, this High Court legislation had had a rough passage through parliament. Timing was one of the immediate issues in dispute; economy was the other. Those who opposed the legislation, and this group included such eminent founding fathers as Glynn, Higgins and Quick, argued that there was no urgency for the new federal court and that economy precluded its immediate establishment. The hostile Melbourne press dismissed the measure as a "splendid luxury". The *Age* asked: "Why establish a piece of magnificent machinery a long time before the need for it has become manifest?" While paying tribute to Deakin's "high thoughts", the paper claimed that "not one proof was offered that this proposed establishment of a Federal Judiciary would not be so much surplusage, so many sinecures".[4] The *Argus* looked forward to a prestigious High Court in the future when the time was ripe, but insisted that the existing judicial machinery of the various states combined with facilities for appeal to the Privy Council was quite sufficient for initial federal needs.[5] Glynn, the most implacable parliamentary opponent of the new court, took a similar position. He mocked Deakin's proposed third tier of federal government as "a glorious tribunal to which we can address apostrophes as exhibiting the splendours of federation, while it is sitting in solitary grandeur and waiting for business to come to it".[6]

The debates over establishing the High Court in the first parliament, and previously at Westminster in 1900 over the extent of appeals to the Privy Council were intensely political ones that concerned elite, rather than popular, interests. The general public had little appreciation of the significance of a federal court in constitutional government, nor much concern about the niceties of jurisdictional questions in a federal system. If anything, there were suspicions of the new court as "a device of the lawyers placed upon the Statute book in the interests of their profession".[7] If the matter came into the arena of popular opinion at all, it was in the crude terms of nationalism versus imperialism, and luxury versus economy. The radical newspaper *Tocsin* was complimentary towards Deakin's presentation of the bills, but cynical about their practical purpose which it reported as follows:

> Of course, the first reason of the Judicature Bill is to provide a Federal High Court; its second, is to provide a billet for Toby Barton. And it is because of this that the Bill will be rushed for all the Ministry is worth. The number who want a judgeship is amazing. Barton, O'Connor, Griffiths [sic] (of Queensland), Quick, Wise (NSW), Symons [sic], Reid, and Isaacs are after billets. They feel the mantle of the Court already on them; and some of them are so completely in the backwash of politics, and overwhelmed at the apparent permanence of the Ministry that they will squelch any criticism, in order to grasp the certainty of a Federal judgeship and a fat salary.[8]

The govenment's predicament was that with little popular support for the legislation

in any part of the country, it faced tough opposition from elite groups intent upon retaining Privy Council appeals and the prestige of the state courts.

The parliamentary coalition against the federal court included a multiplicity of diverse positions. Glynn proposed an alternative "scratch court" of state Supreme Court justices serving on a part-time basis, a suggestion that had been roundly defeated at the Adelaide convention. A tireless advocate of South Australian interests, Glynn made no bones about defying the will of the convention which, he claimed, had been "too pedantic" and had followed too closely the example of the United States.[9] Glynn's home state boasted in its chief justice, Sir Samuel Way, the leading lobbyist for maintaining Privy Council appeals and a champion of the local pre-eminence of state Supreme Courts. The proposed High Court infringed upon both areas. As Deakin explained: "A large proportion of its authority will be carved out of the jurisdiction of the State Courts on the one side, and to a smaller extent, from the Privy Council on the other."[10]

Quick spoke for many others when he strongly opposed the establishment of the High Court on the grounds of economy. The earlier euphoria for federation had now been replaced by a niggardly concern for its costs. Although the new court would require an annual vote of less than £30,000, that was considered excessive, at least until the need for such a court was more apparent. The short-term concerns of the politician were inclined to cloud the nobler vision of the statesman and scholar. In making the opposite case, that parliament had a solemn obligation under the constitution to establish the High Court, Isaacs could quote Quick's earlier authoritative interpretation that the opening words of the judiciary sections: "The judicial power of the Commonwealth shall be vested in a Federal Supreme Court" (section 71), were "imperative . . . and mandatory on the Parliament to carry the vesting into effect".[11]

The case against the new court was greatly strengthened by the support of such an ardent federalist as Higgins. He opposed the government's legislation for the same sorts of reasons promoting his opposition to ratifying the constitution: that it did not go far enough. From Higgins's radical point of view, no court was better than a weak court. "If we create a High Court under the Constitution as it stands", he claimed, "we shall erect a body which will be docked of power and shorn of dignity—which will be in the leading strings of some higher power elsewhere." Higgins looked forward to a constitutional amendment that would overturn the 1900 Westminster compromise and allow "an ideal court such as Sir Henry Parkes had in mind"; that is, one that was final and from which there could be no appeal whatsoever to the Privy Council. There were only two respectable positions available, argued Higgins; either "to keep the sap running from the root of British jurisprudence everywhere throughout the Empire", or to be "self-contained and self-sufficing . . . [taking] the responsibility of interpreting our laws as well as of making them".[12] After passage of the legislation was

assured, Higgins actively supported the government's unsuccessful attempt to have five rather than three judges constitute the first High Court.

The scope for, and probable frequency of, Privy Council appeals were key issues in the 1903 debate. Deakin's famous second reading speech in June 1902 had been a grand affair that reformulated, as he put it, "many of the truisms of our federal debates".[13] Subsequently, government spokesmen were forced to show that the changes made to clause 74 of the constitution at Westminster in 1900 had not jeopardized the position of an Australian federal court. Opponents argued that because of those changes which expanded the scope for appeals to the Privy Council, an Australian court could be neither independent nor autonomous, and hence would have little to do. Higgins argued that since nearly all the large corporate and financial institutions had lobbied for retention of Privy Council appeals during the 1890s conventions and at Wesminster, this major class of potential litigants would now choose to bypass the High Court by appealing direct from the state courts to the Privy Council.[14]

In responding to such critics, Barton had to explain precisely what had been changed in 1900 and why such changes did not vitiate the position of the proposed federal court. As Barton, one of the five Australian delegates sent to London in 1900, admitted, that delegation was charged with securing passage "word by word, and letter by letter, of the Constitution which the people of this country had claimed for themselves".[15] The original clause 74 of the constitution bill that was sent over to Westminster for formal enactment had specified that no appeal to the Privy Council would be allowed 'in any matter involving the interpretation of this Constitution or of the Constitution of a State, unless the public interests of some part of Her Majesty's Dominions, other than the Commonwealth or a State, are involved".[16] In other words, all local constitutional issues were to be reserved exclusively for the High Court.

In the name of imperial interests which he understood primarily as commercial interests, and in response to the powerful lobby of English corporate investors and colonial chief justices, who included not only the obstreperous Way of South Australia, but also, surprisingly, Griffith of Queensland,[17] Chamberlain refused to accept such a severe limitation on appeals as of right to the Privy Council.[18] But an unrestricted right of appeal was totally unacceptable to the Australian delegates. After months of haggling, a compromise was agreed to that broadened the scope somewhat for Privy Council appeals, but at the same time restricted the bulk of constitutional cases to a decision by the High Court. No appeal was to be allowed to the Privy Council from a decision of the High Court in any case involving the limits of constitutional powers of the commonwealth and the states, or of any two or more states, unless the High Court itself agreed by issuing a certificate to allow such an appeal. Curiously these were called *inter se* questions. Appeals as of grace, those which "the Queen may be pleased to exercise by virtue of Her Royal Prerogative" as the constitution formulated it, had been allowed

by the original constitution bill, but subject to the provision that "Parliament may make laws limiting the matters in which leave may be asked". This was not touched except for adding the rider that proposed laws containing any such limitation were to be reserved by the governor-general for "Her Majesty's pleasure". This was not a major change, and in any case the government was not proposing to exercise parliament's power for limiting appeals as of grace at this early stage.

How significant were the changes made in 1900? As Barton put it, the High Cout had been "maimed to a certain extent", but that extent was less than Glynn or Higgins made out. The restriction on allowing Privy Council appeals in constitutional matters had been narrowed to High Court decisions involving mainly the federal division of powers. Appeals direct to the Privy Council from the state courts in constitutional cases were formally permitted, although this avenue could be cut off by the commonwealth parliament, as it was in 1907, by restricting the exercise of federal jurisdiction vested in state courts.[19] The High Court could grant certificates allowing appeals from its own decisions in *inter se* questions, but it would be unlikely to do so. Thus the constitution still provided for a powerful federal court that was, or by commonwealth legislation could be made to be, autonomous in all key areas of constitutional adjudication. The High Court would be responsible for defining what Deakin termed that "large area of disputed territory" between the commonwealth and the states which, because of the general language employed in the constitution, was "unmarked, and upon many points . . . difficult to determine".[20] As final arbiter of the boundaries of political power, the Court would be powerful in its own right.

Although much of the debate over setting up the Court was coloured by considerations of political expediency, it did raise some fundamental issues of government. Was the Court a necessary part of the machinery of federal government or "an institution which might be blown up or down at the mere caprice of any Parliament"?[21] Was it simply an appellate court that could be dispensed with by channelling legal work to existing courts, or did it have an essential political function under the constitution? The opponents of the Court took the narrow legal view; its defenders the broad political one that was consistent with the founding conventions.

The debate reflected basic disagreements on the central issues of constitutionalism versus parliamentary sovereignty. The government argued that the constitution, rather than parliament, embodied the higher will of the people because the people had approved the constitution and elected parliament according to its provisions. Barton insisted that the people were the real founders of the constitution since they had elected the delegates who drafted it, and had subsequently approved it in referenda.[22] Deakin pointed out that the people had done so with "the provisions for the High Court writ large across its face".[23] O'Connor claimed it would be "treachery of the most unparalleled description" towards the people not to set up the Court because the constitution had been approved on the

understanding that the High Court would maintain the respective rights of individuals, states and the commonwealth.[24]

The method of interpreting the constitution was also at the heart of the dispute. Glynn's case relied on a narrow legal view both of the Court's role and of the constitution's mandate for its establishment. Glynn argued that there was no strict requirement to establish the Court since it could not be enforced by a court injunction. Such legalism was dismissed by Barton: "we must take not only the lawyer's view, to be arrived at by the construction which is to be extracted from the meaning of the words used, but a broader view", that of the statesman. To consider the Court in such a narrow legal way was, according to Barton, "one of the worst sins" because the Court was the "third arm of the Constitution". If the High Court was an integral part of the machinery of federal government, its function could not be performed by other appeal courts. Neither would appeal judges from other courts be equipped for the High Court's work which Barton saw as primarily political:

> It is in controlling transgressions beyond the Constitution, either by this Parliament or by the Parliaments of the States, that the work of the High Court will in a large measure lie. Clashes between the authorities that are created will arise as often as weak humanity overrides its powers, either in the Federal or in the States' Parliaments. In the heat of debate, and in the turmoil of party, excesses of power will inevitably be committed, as they have been committed in the United States. We want a tribunal composed of men who understand the people, who live amongst them, who understand the history of and the reasons for our Constitution, and who are not dependent for their knowledge upon casual reading.[25]

A strong start

Barton's government prevailed and the High Court was set up as Deakin had originally proposed. During the protracted second reading debate, the *Age* had claimed that the prime minister and attorney-general had "made the mistake of following their mere sentimental Federal ideals rather than the practical requirements of the time".[26] If that were so, the outcome was a triumph of federal ideals over practical requirements.

Although stiff opposition had forced a reduction in the required minimum number of judges from five to three, the Court's prestige and importance in the political system were enhanced by the appointment of three of the most prominent founding fathers to its bench. The original judicial triumvirate of Griffith, Barton and O'Connor was indeed impressive. Griffith and Barton had been the leaders and chief draftsmen of the two constitution conventions; Barton had been the first Australian prime minister; while O'Connor had been a distinguished member of the 1897-98 constitution drafting committee and leader of the Senate. Since

these men had led the colonies into federation and presided over the drafting of the constitution, they could claim a special position as its authoritative interpreters. Such initial appointments established the public status of the Court and ensured the immediate acceptance of judicial review by the High Court in Australia. That had not been the case in the United States or Canada, where state governorships and state judicial offices were initially more highly prized than appointments to the Supreme Court.[27]

Selection of the first three High Court judges and the allocation of the chief justiceship were delicate political matters. This was especially so because Prime Minister Barton was one of the leading contenders for appointment, while Attorney-General Deakin was heir apparent to the prime ministership. Some, including the Labor leader Fisher and old colleagues like Kingston, thought Barton was entitled to the position of chief justice.[28] Others, particularly his old New South Wales political rival George Reid, had railed against such a possibility.[29] Despite his great achievements in the Federation Conventions, it was widely held that "As a politician, Sir Edmund Barton did not shine, because his heart was not in the work."[30] With speculation about his intentions rife for months before the appointments were made, Barton had categorically denied in the House that he had any thought of appointing himself to be chief justice.[31] In any case Deakin strongly supported Griffith for the position, and it was offered to him.[32]

O'Connor's appointment was championed by Barton and widely supported. The *Argus* praised him as "one of the most astute leaders any Chamber has ever seen" for his work in the Senate.[33] Earlier in the convention he had demonstrated one of the most learned and acute minds, and had worked closely with Barton in defending the principles of the constitution and in drafting its provisions. The *Argus* paid tribute to O'Connor as "a remarkable man": "As great a lawyer as Sir J. W. Symon, as great a constitutionalist as Sir Edmund Barton, and as great a tactician as Sir William Lyne and Mr Austin Chapman put together. Some great abilities will rust unused in him when he ascends to the bench, yet there he will hold his own easily with the other two judges."[34]

Barton wavered about accepting the remaining seat on the Court. On the one hand he was stung by accusations that he was engineering a "fat billet, and a safe harbour for a troublous old age".[35] Yet, on the other hand, he was strongly attracted by the judicial position as "both a haven and a reward . . . for which he [was] eminently fitted".[36] "Oriel" in the *Argus* mocked Barton's genuine agonizing over the decision by publishing a "secret dossier" of official letters between Barton the prime minister and Barton the prospective appointee. One letter read as follows:

> From the Prime Minister to Sir Edmund Barton, K.C., LL.D.
> Dear Sir,—It is the unanimous wish of my colleagues—and if I do not cordially join in it I at least do not dissent from it—that you should take a position upon the High Court Bench about to be created. Your eminent services to the Australian Commonwealth

> and your great abilities as a constitutional lawyer fully entitle you, my colleagues hold, to the distinction they desire to confer upon you.—I am, etc.,
>
> EDMUND BARTON
>
> Prime Minister.
>
> P.S.—We must make Griffith Chief to draw the teeth of criticism. Waver a bit before accepting, in order that we may get the capital site settled, and that Deakin may feel his way.[37]

All had been finalized by the afternoon of 24 September 1903 when Deakin, the new prime minister, made the announcements in the House of Representatives. That morning Barton had received a telegram from Griffith accepting the chief justiceship. Barton then tendered his resignation to the governor-general; Deakin was commissioned to form a new ministry; and Barton and O'Connor were appointed to the Court.[38] These events were the climax of the last days of the first federal parliament, and they provided the occasion for a good deal of complimentary rhetoric. The overall atmosphere of "friendliness and unanimity" was spoiled, however, by the sour reactions of Kingston and the Labor party to Griffith's appointment. There was no comment or congratulation from any Labor member, while several Queensland Labor senators joined Kingston in a bitter attack on Griffith. They charged that Griffith had "intrigued to get the High Court stripped of some of its plenary powers" in 1900; and that he had been devious in appointing himself to the chief justiceship in Queensland.[39] This, however, was a minority view.

The calibre and status of the first appointees ensured that the High Court would become the institution that Deakin had envisaged. Just as the Court was a political institution, these first judicial appointments were political ones intended to achieve a certain kind of result. The *Argus* had previously reported Deakin's intentions:

> He desires a Court which shall work in a federal atmosphere, and shall to that end be composed of lawyers with a federal training. Their decisions should be all of a piece—all framed with the purpose of filling the federal outline with a clear, consistent, uniform purpose. He distrusts the state courts, not because they are not impartial and able, but because they are not surrounded with a special federal atmosphere and imbued with a distinctive federal spirit. The meaning of all this—if it does have a meaning—is that the Federal Court must be composed of lawyers who have been active in the federal movement; who have, in fact, been partisans on the great issues which divided the Convention, and which were settled by compromises. These are to be chosen by the Ministry, which will, as Mr Deakin indicates, make a selection of eminent men of the one way of thinking, whose decisions will be consistent and homogeneous, and who will mould the constitution on the preconceived plan and with a definite purpose.[40]

In the same article the *Argus* had warned that judges should come to their task of constitutional adjudication "without any preconceived ideas, or any bias gained during their personal experience in the federal fray". They ought to be guided "by the strict letter of the bond, and by no notions of their own as to the intentions of the framers". For that reason people who had not participated in the federal

debates were to be preferred. That was the legalist's view, but it was not followed when the High Court was first constituted.

Because its purpose had been so thoroughly worked out beforehand, the Australian High Court began deciding constitutional cases as a matter of course. Consequently the Australian Court did not require the consummate judicial statecraft of a John Marshall to establish in practice its prime function, nor did it serve a long apprenticeship to the more august imperial tribunal of the Privy Council as the Canadian Supreme Court had done. Established later in time, the Australian High Court came fully formed from its makers' hands with its intended role of exercising judicial review more clearly worked out. Such origins were significant for legitimating judicial review in Australia from the very beginning.

The method of constitutional adjudication adopted by the founders' Court reflected the character of its personnel. As senior statesmen, the original justices adopted a broad discretionary approach to constitutional adjudication rather than a narrow legal approach. The Court tried to maintain an even-handed balance between commonwealth and state powers, and for this purpose borrowed the doctrines of implied immunities and implied prohibitions that had been developed by the American Supreme Court.[41] According to these doctrines, commonwealth and state agents and instrumentalities were held to be reciprocally immune from each other's regulation and taxation. Conversely, commonwealth grants of legislative power in section 51 were considered to be restricted by an implied prohibition against interfering with residual state powers, and so were interpreted more narrowly than a literal reading might have allowed. The approach of the early High Court relied more heavily on the sagacity and authority of the justices than on logical consistency or a literal construing of the constitution's text. The doctrines of implied immunities and implied prohibitions provided the first justices with a convenient legal rationale for the exercise of broad discretionary powers of judicial statesmanship.

The constitutional work of the early Court was dominated by questions of the reach of commonwealth and state legislative powers. The flavour of the Court's approach is evident from a sampling of its leading constitutional decisions. The first constitutional case, *D'Emden v. Pedder* (1904),[42] set out the basic immunities doctrine and exempted a federal officer from a Tasmanian receipts tax on his salary. In its decision the High Court adopted the dissenting opinion of fellow founder, Inglis Clark, then a justice of the Tasmanian Supreme Court. In a further set of decisions in *Deakin v. Webb* and *Lyne v. Webb* (1904),[43] the Court exempted federal employees, in this case cabinet ministers, from paying Victorian state income tax on their federal salaries. In this instance the Court overruled the Victorian Supreme Court which had preferred to follow principles laid down by the Privy Council in its interpretation of the Canadian constitution,[44] rather than the American doctrine of implied immunities required by the High Court.

The Court demonstrated its even-handedness, and placated critics from the states

who were dissatisfied with the above decisions, by exempting the states from commonwealth regulation. For instance, in *Peterswald v. Bartley* (1904),[45] the scope of the federal excise power was limited to allow for state licensing of brewing. In the important *Railway Servants* case (1906),[46] important because railways were the leading item in state budgets, the Court ruled that the federal arbitration power in section 51(xxv) of the constitution did not extend to state railway employees.

The High Court asserted its independence early on by refusing to grant a certificate to allow an appeal from its decision in *Deakin* and *Lyne v. Webb* to the Privy Council, despite the support of five state premiers for such an appeal.[47] Subsequently, the Victorian Supreme Court allowed an appeal on a similar case to go direct to the Privy Council which, in its decision in *Webb v. Outtrim* (1907),[48] rejected outright the immunities doctrine. The radical paper *Tocsin,* which had criticized the High Court's earlier decisions for violating common sense and elevating commonwealth employees above the common bulk of citizens, reported the Privy Council decision with glee: "The Federal High Court has hitherto taken a delight in kicking the State Full Courts. Now the Privy Council has given the High Court a clip in the ear, and as the Privy Council is daddy, the High Court cannot even talk back . . . Alf Deakin and Bill Lyne will have to pay up, so will Sammy Griffiths [sic], Toby Barton, and Dick O'Connor."[49] But the High Court struck back and repudiated the Privy Council's authority by its decision in *Baxter v. Commissioner of Taxation (New South Wales)* (1907).[50] The Australian Court's insistence upon its prime responsibility for interpreting the constitution was supported by the commonwealth government which amended the Judiciary Act in 1907 to ensure that all matters of consitutional interpretation would henceforward be removed directly into the High Court when they arose in a state court.

The early Court was highly successful, and the rapid growth of its business required the addition of two judges by 1906. Speaking to the 1906 Judiciary Amendment Bill, Attorney-General Isaacs boasted that

> the High Court of Australia has gained the complete confidence of the public. Inherently it is in a position of enormous power and influence, and I think it is not too much to say that its decisions have justified the highest anticipations of its best friends. Apart from the Supreme Court of the United States, I do not think there is any legal tribunal in the world which has so much power.[51]

Even allowing for an element of hyperbole from a man who was to be appointed to one of the new positions, the substance of Isaacs's claims was not seriously questioned. The High Court had earned the hearty approval of federal parliament and the respect of the public.

Papers tabled in the parliament with the Judiciary Amendment Bill (1906) demonstrated the need for expanding the Court's personnel. The Court's registrar certified that the business of the Court had been growing rapidly and would

continue to grow. In 1906 it was overburdened with work,[52] and as well there was incessant travel between capital cities. The record for the first six months of 1906 revealed the Court's extraordinary pace:

> In 1906, the High Court commenced its sittings by sitting at Hobart on the 19th of February. The sitting there occupied 5 days. From Hobart the Court came to Melbourne, and commenced a sitting on the 27th February, which occupied 25 days. The Court then proceeded to Sydney, and commenced a sitting there on the 2nd April, and after sitting some days proceeded to Brisbane, and held a sitting there on the 17th April, and after finishing its sitting, returned to Sydney, and resumed the sitting there. This sitting the Court was unable to complete before it had to leave for Melbourne, to commence a sitting on the 28th May, where a long list was awaiting it. The Court continued sitting until the 29th June, when it adjourned for the winter vacation, leaving several cases undisposed of. Up to the 30th June, the Full Court had, in 1906, sat in Melbourne for 50 days, Sydney 31 days, Brisbane 4 days, and Hobart 3 days, making in all 90 days, and heard 42 appeals, and a large number of motions.[53]

O'Connor, who also served as president of the Arbitration Court, had complained to the government that due to the increasing appellate work of the High Court it was impossible for him to hear an important industrial dispute between the steamship owners and maritime unions. The delay entailed "practically a denial of justice" to the parties involved.[54]

The chief justice confirmed that the Court's appellate work was likely to keep it continuously engaged throughout the year, leaving no time for O'Connor's arbitration work or for the hearing of original cases by single judges. Griffith pointed out that the Court's tight schedule would collapse if any judge fell sick even for a few days. He complained that the continuous pressure of work left very little time for research, or for preparation of written or even oral judgments.[55]

There was widespread support for increasing the number of justices on the Court. The only controversy was whether one or two justices were required. The legal profession in the larger states had long been of the opinion that there should be no fewer than five judges on such a senior court.[56] Many of those who had opposed the establishment of the Court earlier on had now become its staunch supporters. For example Joseph Cook, who voted against the establishment of the Court in 1903, supported the expansion in 1906. In view of "the growing friction between the States and the Commonwealth", he argued that the High Court was "the only body to safeguard both Federal and State rights, and whatever objection there might have been to the constitution of the High Court had now vanished".[57] Some politicians gave only grudging support for increasing the number of justices, but they were persuaded by the sheer amount of litigation. Several blamed parliament for overburdening the Court by passing a good deal of experimental and ill-considered legislation, but argued that since parliament had brought about the necessity for more judges, it should appoint them. Another speaker suggested that the Court's growing reputation as "a Court of reversal

as well as a court of appeal" accounted for its overwork by attracting unsuccessful litigants from the state courts.[58]

Public discussion at the time over the type of judicial appointee was interesting because it indicated the perception of the Court's role. Cook, who emphasized that the Court was the only body to safeguard both federal and state rights in conditions of growing friction, identified three groups whose claims for judicial appointment should be considered: members of state courts, those engaged in purely legal pursuits and lawyer-politicians. He emphasized that lawyer-politicians were not the only contenders.[59] The *Argus* called for the appointment of people of the "very highest attainable standard" because, it claimed, "[t]he High Court holds an eminent position, for its work affects not only individuals, but also interests of the state and of the Commonwealth, and the privileges of each when they come in conflict".[60]

Prime Minister Deakin offered the new positions to Chief Justice Way of South Australia and to Isaacs, his attorney-general. Way refused because of his age, so Isaacs was given the first position and Higgins the second.[61] O'Connor was keen to relinquish his duties as president of the Arbitration and Conciliation Court, so Higgins took over that office. The appointments of Isaacs and Higgins met with almost complete acceptance. "It is a matter of not inconsiderable boast", commented the *Age,* "that in such examples of Ministerial patronage a choice has been made which is so completely ratified by the public judgment."[62] Even *Tocsin* admitted that the appointments of Isaacs and Higgins "would be unobjectionable were not the trail of political influence over it all". Nevertheless, it concluded, "both may be regarded as fairly safe democrats".[63] There was some quibble that the two men were both Victorians. The only other possible contender of comparable rank was Sir Josiah Symon, a founding father and a leader of the Adelaide bar. He belonged to Reid's opposition faction, however, and had had stormy relations with the older High Court judges while serving as Reid's attorney-general.[64]

The expansion of the Court in 1906 was not only a response to its increased workload, but was also a deliberate attempt by Deakin's government to consolidate the Court's dominant position and redirect the thrust of its constitutional adjudication. Commenting anonymously in his regular English newspaper column, Deakin affirmed that his purpose then, as in 1903, was to establish a "commanding Federal Court". His aim was to make the Court "thoroughly efficient for purely legal work, but above all things to add to its dominance in constitutional questions and all interpretations of the Constitution". This was of crucial importance for the commonwealth parliament because the definition of its powers depended directly on the Court's judgment. Deakin admitted that his prime motive in expanding the Court was to enhance the constitutional power of the commonwealth:

> The ardent and aspiring Federalists who look forward to the time when every truly national function shall be in the hands of the Federal Government while the States and their Courts shall be restricted to subsidiary local affairs have no more zealous and

> consistent ally than the present Prime Minister. The mere circumstance that this amendment of the Judiciary Act of 1903 comes from him is sufficient indication of the true motive for enlarging the Bench of the High Court.[65]

The new appointees, Isaacs and Higgins, brought to the Court "a pronounced political radicalism".[66] Like Deakin, they were both ardent federalists intent upon expanding commonwealth powers. Since that meant rejecting the doctrines of implied prohibitions and immunities that had been championed by the original three justices, the harmony and consensus of the original Court was shattered. These doctrines were not anchored in specific clauses of the constitutional text, but depended on a prior understanding of the nature of the federal compact that the constitution implemented. In the Court's early opinions, Griffith rejected strictly literal construction of the text in favour of an approach that relied on an overall appreciation of the federal character of the constitution that respected the integrity of the states. As he put it, the constitution was not "to be construed merely by the aid of a dictionary, as by an astral intelligence, and as a mere decree of the Imperial Parliament without reference to history".[67] The two new justices, however, looked forward to a more integrated nation with a dominant national government, rather than backwards to a historical compact between jealous states. The radical and progressive liberalism of the new justices who favoured national integration was at variance with the conservative liberalism of the senior justices who were more in favour of states' rights and the status quo. As a result the Court was consistently split three votes to two in its leading constitutional decisions, with Isaacs and Higgins being consistent and highly critical dissenters. This division plagued the Court for the next seven years, until the appointment of three new justices in 1913. It was not resolved until the *Engineers* decision of 1920, and in recent years has re-emerged in the *Koowarta* and Tasmanian *Dam* cases that will be discussed in chapter 5.

The method of constitutional interpretation followed by the original High Court had suited the delicate balance of political forces in the first years of federation. Used to virtual autonomy before federation, the states would hardly have tolerated a centralizing court immediately afterwards. Moreover, the consistent unanimity of the original Court in constitutional cases until 1906 was a significant factor in establishing its credibility. As Griffith said in paying tribute to O'Connor in November 1912: "Our minds ran to a great extent in similar grooves."[68] After 1906, the basic division within the Court over interpreting the constitution reflected the beginnings of a new stage in Australian development. The factions on the High Court represented two conflicting views of Australia: one as a nation of states which had formed a limited federal compact; the other as an integrated nation. Because most of the senior justices who made up the majority viewed the constitution as a limited federal compact, the High Court had become, even at this early stage, an impediment to national development and change.

If the balancing, discretionary approach of the original High Court was necessary

to accommodate state sensitivities in the first years of federation, such an approach was possible because of the political environment in which the Court was operating. This was not antithetical to such a jurisprudence since the Labor party was as yet an immature third party in federal politics. Nineteenth-century parliamentary practices, associated with loose-knit political alliances and fairly autonomous members, still held sway. Most important of all, the general consensus that supported the constitutional order was largely intact and the spirit of compromise that had characterized the founding conventions had not been destroyed. By the end of the first decade of federation, the political environment had been transformed by the Labor party. Because of this change, the divisions on the Court became highly significant. Since the complicated interaction between Labor politics and the High Court is a central theme of our study, its origins need to be set out in some detail.

The Labor party and the beginnings of confrontation

The Australian constitution and the High Court were both set in place before the Labor party became a major force in national politics. Had federation occurred a decade later, it is probable that the constitution would have been quite different. As it was, the most vigorous opposition to the constitution and to judicial review came from the fledgling Labor party. As the champion of populist reformism and egalitarianism, Labor was a strong advocate of parliamentary supremacy against the indirect and anti-democratic aspects of the constitution. But the colonial Labor parties were only being formed in the last decade of the nineteenth century when the constitution was being drafted. Consequently they had virtually no say in drafting the constitution and their campaign against its adoption was largely ineffective.[69]

Not surprisingly W. M. Hughes, Labor's spokesman on judicial affairs, spoke out in 1903 against the Judiciary Bill that established the High Court. It was the people's prerogative to amend the constitution, he said, and the judges' function simply to say what the law was. Hughes rejected the view, put forward by attorney-general Deakin, that the Court's main function would be to amend the constitution to keep pace with national development, and to adjust it to release excessive political pressures. Piecemeal fiddling by the judiciary would be ineffective and would only blunt popular pressures for more sweeping reforms. Rather than "going round or over or under stone walls", Hughes advocated popular plebiscites, "that straightforward way of knocking the walls down and have done with it".[70] He blamed those who drafted the constitution for making the amendment procedure too difficult, and thereby unduly restricting the popular will.

Consequently, it was hardly surprising that the federal Labor party soon came into conflict with the High Court. As a junior coalition partner to Deakin's

governing Liberals from 1905-8, Labor had seen some of its favourite policies and most carefully laid legislative strategies rejected by the Griffith Court. Deakin and his Labor allies had put together an elaborate "New Protection" deal that tied the benefits of tariff protection to industrial relations. Australian manufacturers would be protected only if they shared the benefits with labour by providing fair and reasonable working conditions. In his famous *Harvester* arbitration decision (1906),[71] Higgins applied the high excise duty and severe penalties of the Excise Tariff Act against H. V. McKay, Australia's largest manufacturer of farm implements, because the defendant failed to provide the conditions of employment that would have entitled the firm to an exemption. Higgins objected to "the shunting of legislative responsibility" for such grave economic and social questions to a court, but nevertheless seemed to relish the opportunity for transforming industrial arbitration in Australia. In defining a "fair and reasonable wage", Higgins rejected the free-enterprise method of determining wages according to business interests and considerations of profit. Instead, he defined it in terms of "the normal needs of the average employee, regarded as a human being living in a civilized community".[72]

This key arbitration decision reinforced Labor's transition from an anti-federalist to a centralist-orientated party. Labor was in the process of allaying its initial suspicions of the new system of national government. Party leaders were beginning to appreciate the efficiency and sweep of national legislation that could instigate social reform through a single Act rather than by a patchwork of state legislative initiatives. Winning federal office was now a possibility, and perhaps an easier route to legislative reform than bringing to heel reactionary state upper Houses which had been appointed by previous conservative governments or which were elected on a limited property franchise.[73] Higgins' judgment swept the Labor Leagues into the army of "New Protectionists", as Deakin had predicted,[74] but the legislation it implemented did not stand up to the scrutiny of the Griffith Court. The manufacturers of agricultural implements refused to obey the controversial Excise Tariff Act, and the High Court upheld them by ruling it unconstitutional in *The King v. Barger* and *The Commonwealth v. McKay* (1908).[75] The Court decided that the Excise Tariff Act was an attempt to regulate the conditions of manufacture which were state matters, and therefore it was not a valid exercise of the federal taxing power. Moreover, the Court majority held that even if the taxation power could be stretched to include such indirect regulation of a state's domestic affairs, there was an implied prohibition against such federal interference.

Isaacs and Higgins presented typical strong dissenting opinions. In their view, federal powers were plenary and could be restricted only by express limitations found in the text of the constitution. The commonwealth Act was to be construed according to "the natural meaning of the language used", and according to this test Isaacs and Higgins maintained that the legislation was a valid exercise of excise

taxation. Griffith claimed that "[t]he question for decision is entirely one of construction". And so it was. The implications of the decision were enormous because new protection was a key policy of the government and one of the strongest links in the fragile alliance between Deakin's Liberals and the Labor party. As well, Labor's attitude both to the Court and to the constitution, and its future strategies for industrial reform were strongly influenced by the outcome of the case.[76]

Despite such unfavourable Court decisions, and no doubt partly because they were carried by the narrow three-to-two majority, Labor was attracted to federal rather than state initiatives for implementing its industrial reforms. At its 1908 Brisbane Convention the Labor party pledged itself to constitutional amendments that would enable the commonwealth parliament to implement the "new protection", to nationalize monopolies and to expand the powers of the commonwealth Arbitration Court. That this slate of proposals was so limited was due in large part to opposition from the NSW branch of the Labor party. Holman, the rising star of the New South Wales party who was to become deputy premier in 1910 and premier in 1913, was an eloquent champion of state rights because he expected a Labor victory in New South Wales well in advance of a federal Labor victory.[77]

The Griffith Court had already rejected "new protection", and in 1908 it was probable that it would also restrict the federal government's legislative power to regulate trusts and monopolies. It soon did so in the leading case of *Huddart Parker v. Moorehead* (1909) which emasculated the commonwealth's corporation power, thus making it virtually impossible for the commonwealth parliament to outlaw restrictive trade practices.[78] The Court ruled, with Isaacs dissenting, that the sections of the Industries Preservation Act prohibiting monopolies were invalid because they purported to regulate commercial trading, which was a state matter. Basing its decision squarely on the immunities doctrine, the Court insisted that corporate trading activities were a matter for state regulation. Hence the commonwealth's section 51(xx) power with respect to "trading or financial corporations formed within the limits of the Commonwealth" was to be limited accordingly. The majority decision led Isaacs to exclaim: "The distinct unambiguous words of the power, couched in language quite unequivocal, do not—so it is argued—mean what they say."[79] In reporting the decision, *Labor Call* asked whether "it was not time we resolved to wipe out all restrictions on Commonwealth power".[80]

Thus, as early as 1908, Labor began its standard practice of prefacing policy planks with a commitment to appropriate constitutional amendments, and it did so partly in response to adverse judicial decisions by the High Court. The federal party campaigned in the 1910 election on national arbitration and regulation of monopolies. Labor capped its extraordinary rise to power by winning both the Senate and House of Representatives. Immediately upon taking office, the new

Labor government plunged into the business of constitutional reform. When the strong New South Wales party also won that key state a few months later, severe tensions developed within the Labor movement over amending the constitution. The McGowen-Holman state Labor government was as zealous in defending states' rights as the Fisher-Hughes federal Labor government was in undermining them.

At Hughes's insistence the federal Labor party adopted in 1910 a slate of constitutional amendments that were much more centralist than the proposals that had been approved in 1908. The new proposals were designed to give the federal government plenary legislative powers over trade and commerce, corporate and monopoly affairs, and industrial relations. These proposals were put to referenda as a slate in 1911 and separately again in 1913, but on both occasions were easily rejected.[81] The federal Labor party's campaign was effectively nullified by Holman and the New South Wales parliamentary party. For example in the 1913 state election campaign, Holman countered the federal push for increased industrial powers with concrete proposals for strengthening his state's industrial laws and revamping the state Court of Industrial Arbitration. The respective electorates preferred Holman's federalism to Hughes's centralism; the federal Labor government was narrowly defeated, with all its proposed constitutional amendments, in 1913, while Holman's state government was re-elected with a greatly increased majority.

Labor's campaign to amend the constitution was defeated by federal-state antagonisms within the party itself. The dilemma that Labor faced was an impossible one; the party was inclined to reject federalism in favour of unitary government and parliamentary sovereignty, but had to work within the existing federal system. As a consequence Labor's own party structure was essentially federal. The national Labor party had been formed by the state parties just after federation, and the state parties continued as powerful, semi-autonomous branches. By participating in the federal system of goverment Labor reinforced in practice what it tended to reject in principle. The success of the state branches, especially in New South Wales, undermined the party's case against federalism and gave the powerful state parties a vested interest in its retention. Thus Labor's opposition to, and persistent attempts to amend, the constitution were severely compromised by the party's internal federal structure.

While carrying on its sustained campaign for constitutional reform between 1910 and 1913, the Fisher-Hughes Labor government was also brawling intermittently with the Griffith Court over attempts to deal with monopolies and trade combinations within the ambit of existing law. Australian industry was dominated by a few large corporations and riddled with restrictive trade practices. There were thirty-three trusts and trade combinations operating in the country, according to Hughes, and between them they controlled the prices of important commodities such as coal, oil, freights, sugar, confectionery, tobacco, wheat, flour, bricks, timber and meats.[82] Labor's attitude to trusts and monopolies was very different from the prevalent Liberal view. Liberals in America and in Australia

opposed trade restrictions in the name of free market competition which they wanted to restore. To the Labor party, according to Billy Hughes, trusts and monopolies were "an inevitable stage in the evolution of production as a social function", but they needed to be regulated or owned by the government rather than private individuals. The Labor government wanted power over trusts and monopolies not to restore competition, but "to nationalize them if necessary, to control and regulate them, and to make what laws are essential from time to time, both for the benefit of the producer of the article and the community generally".[83] Labor wanted national rather than state power over corporations because trusts and combinations were essentially national in scope. Without a generous expansion of legislative power through constitutional amendment, however, the federal Labor government's arsenal for regulation or nationalization was inadequate. This was demonstrated by the failure of its attempts to regulate two of the most powerful sectors, sugar and coal.

The federal Labor government appointed a Royal Commission to inquire into all aspects of the sugar industry in 1911. That industry was dominated by the Colonial Sugar Refining Company (CSR) which enjoyed a virtual monopoly over refining and marketing. When CSR officials refused to co-operate either by answering questions or producing documents, the government strengthened the Royal Commission Act to force their compliance. This amendment was held by the High Court to be unconstitutional, Isaacs and Higgins dissenting, on the ground that the federal government was exceeding its legislative powers by attempting to authorize investigation of the internal affairs of trading corporations. As O'Connor had recently died, the Court's decision relied on the casting vote of the Chief Justice.[84] The High Court granted a certificate for appeal to the Privy Council, the only time it has ever done so, but the Privy Council upheld the Griffith-Barton decision.[85] Without CSR's testimony, the Royal Commission was ineffective.

Labor's attempt to break up the Coal Vend, a combination of the largest coal producers from the rich northern coalfields of New South Wales and major interstate steamship companies that fixed the production and price of coal, was just as ineffective. The Coal Vend had been formed in 1906, and action against it under the Industries Preservation Act had been in progress intermittently since 1907. The *Huddart Parker* case had removed the principal powers from the Act, but left the Comptroller of Customs with some powers of investigation. Proceedings against the Coal Vend were being prepared when Labor swept into federal office in 1910. These were initiated on Hughes's instructions immediately he took over as attorney-general. After a monumental trial, Isaacs ruled in favour of the Crown and ordered the combination to break up.[86] Isaacs's elaborate opinion was overturned, however, when the case was appealed to a full bench of the High Court. According to the full Court, the actual intent of the parties to the combination, upon which the case turned, was not to cause detriment to the public

which was outlawed by the Act, but only "to put the Newcastle coal trade on a satisfactory basis, which would enable them to pay adequate wages to their men and to sell their coal at a price remunerative to themselves, having regard to the capital and risk involved in the enterprise".[87]

For Hughes, in his battle to control trusts and monopolies, the Industries Preservation Act was a two-edged sword. A right-wing paper had called the Act "an excess of doctrinaire principles"[88] even though it had been introduced by the earlier Deakin Liberals and was the favoured trust-busting instrument of Labor's parliamentary opponents. Hughes took the Act and demonstrated by its spectacular failures against the sugar and coal combines that it was impotent; as he vividly expressed it, "a barren fig tree" that produced "Dead Sea fruit, which has left the companies no worse off than they were before, and benefited the public not at all".[89] Hughes was attacked in parliament for deliberately dragging out court proceedings against the Coal Vend while at the same time using the delays and setbacks to support his campaign for increased federal powers. In the *Vend* judgment in 1912, Griffith complained that the government had abandoned fair play for technicalities and quibbles. Hughes responded angrily by accusing the chief justice of "a gratuitous and deliberate insult".[90] Relations between the Griffith Court and the Labor government had reached a dangerous low.

For Labor, these adverse court decisions confirmed the need for constitutional reform. Before the first referenda were put in 1911, Hughes had argued that the wealth and influence of giant corporations and trusts threatened the well-being of the nation. Yet he claimed that the High Court had "shorn" the federal government's power to deal with corporations and left the citizens exposed to corporate ravages.

If commerce was one pillar of national prosperity, industrial relations was the other. In this area Hughes charged that the Griffith Court, by "narrow and technical" renderings of the commonwealth parliament's industrial power in section 51(xxv), had produced "the apotheosis of absurdity" by limiting that power so as to give immunity from commonwealth legislation to the states.[91] Similarly in 1913 Hughes claimed that the adverse decision of the Privy Council in upholding the High Court's decision concerning the legality of the Coal Vend demonstrated the need for holding the forthcoming referenda. Without carrying the referenda proposals there could be no effective legal restriction on combines, claimed Hughes: "We have done all possible under existing law."[92] The Labor press agreed. "The powers of the Federation have been cut down by successive decisions of the High Court", concluded the *Labor Call* in a critical review of the Court's decisions, "until at present they are admittedly futile."[93]

If Hughes was unscrupulous in exploiting the Court's adverse decisions as part of his government's broader strategy for constitutional change, the Court had left itself open to such treatment. It had consistently sided with monopolists and cartels against the Labor government's attempts to force their investigation and

regulation. In the polarization of Australian politics that occurred during the first decade of federation, the Court tended to favour the anti-Labor side: corporate rather than government control; restricted rather than expansive interpretation of federal constitutional powers; and the claims of employers over those of workers. "Wherever possible", the *Australian Worker* complained in 1910, "the High Court will limit and curtail the powers given by the Constitution."[94] After a typical decision that overturned an award judgment by Higgins in favour of BHP company workers, the same paper published a cartoon of Darling, chairman of BHP, telling a servant: "I have ordered the High Court to attend on me. When they arrive, show them into the waiting room until I am ready! And, by-the-way, show that judge chap Higgins the door!"[95]

In the growing confrontation between the High Court and the Labor government, the Court was vulnerable because its method of interpreting the constitution, a mixture of judicial discretion and gruff paternalism only thinly disguised by the immunities doctrines, was palpably insufficient for striking down important government legislation. The credibility of the Court was further damaged by the persistent strong dissents of Isaacs and Higgins who favoured an expansion of central constitutional power. Moreover, in juggling state immunities and federal powers, the majority justices, Griffith, Barton and O'Connor, were not always logical or consistent, especially in the troubled area of industrial relations. In 1910 Higgins drew public attention to the "blind alley" into which the Arbitration Court was being driven by the decisions of the High Court. Higgins blamed the High Court for burdening the Arbitration Court with a "veritable Serbonian bog of technicalities" that jeopardized its practical functioning.[96] Hughes publicized Higgins's strong criticisms of the High Court while the Labor press launched its own attack. After a series of adverse decisions on arbitration cases in 1911, the *Australian Worker* concluded: "Arbitration is a great experiment, spoilt by the High Court, where 'certain elderly gentlemen in wigs' will not allow the common rule, so that individual employers can continue sweating . . . Arbitration is being discredited, and it seems almost a conspiracy to drive the workers back to strike action."[97]

When O'Connor died in November 1912, in the closing days of the fourth parliament, Hughes seized the opportunity for dealing with the Court. With the Court now evenly split between Griffith and Barton on the one hand and Isaacs and Higgins on the other, the power of appointing new justices was the key to the Court's future. Instead of one appointment to replace O'Connor, Hughes proposed three. The additional two positions were created by rushing a Judiciary Amendment Bill through Parliament in the last two weeks of the sitting in December 1912. The three appointments were put forward by Hughes in the months prior to the defeat of the Labor government at the May 1913 elections. Hughes's bold initiatives have been described by many as a blatant attempt at "packing" the High Court.[98] For the Labor attorney-general, it was one more

bold attempt at removing constitutional restraints on popular government.

Through this daring plan Hughes provided the Labor government with the opportunity of appointing a block of three justices who could influence the direction of the Court for the next couple of decades. Australian High Court justices have been characterized by longevity. Their average term of office has been eighteen years, almost a third longer than the average term of a United States Supreme Court justice for the same period which is about thirteen years.[99] The three Labor appointments proved no exception to the rule: Gavan Duffy served for twenty-two years, Powers for sixteen and Rich for an astonishing term of thirty-seven years that, to Labor's subsequent regret, spanned the terms of office of the Curtin and Chifley Labor governments in the 1940s. Hence this block of three new appointments was crucial for the future direction of the Court.

To his credit, Hughes made a reasonably strong case for expanding the size of the Court.[100] Higgins was virtually full-time president of the Arbitration and Conciliation Court; the number of High Court cases that came within its original jurisdiction had grown significantly with the proliferation of federal legislation; and the Court travelled extensively—during 1912 it sat in every capital city, and in Melbourne and Sydney on three and four different occasions respectively. These reasons were similar to the ones used by Deakin in 1906. Hughes also relied heavily on two additional reasons that linked the authority of the High Court to the number of its justices. As an appellate court, the High Court should not be less numerous than the state Supreme Courts appealed from. And in future, according to a complementary amendment to the Judiciary Act that Hughes brought forward, constitutional decisions would require a majority decision rather than the chief justice's casting vote.

Deakin, now leader of the opposition, complimented Hughes on having adopted "something approaching an adequate view of the status, importance and influence of the High Court". But he warned that the new Judiciary Amendment Bill marked

> not only a stage in the growth of this Commonwealth, and of its responsibilities, but a critical event. Having regard to the present division of opinion amongst members of the existing Bench, even one appointment may possibly give a very decisive turn to the interpretation of constitutional law affecting Parliament and the whole Commonwealth.[101]

Prime Minister Fisher was less discreet than his clever attorney-general in revealing the thinking of the Labor government. Neither courts nor the legal profession had a monopoly on constitutional knowledge, he claimed, and therefore they should not be treated with awe. Fisher reminded parliament that High Court judges came from political backgrounds and retained biases and prejudices on the bench:

> The High Court is constituted of eminent gentlemen, each of whom has had experience in the field of politics. In addition to being members of the legal profession, they have been politicians fighting on the floor of Parliament with as much vim and, shall we

> say, party prejudice, as does any member of this House. We regard them as distinguished jurists, free from party political bias in the discharge of their duties, and we must assume that they do their best according to their high intellectuality, in spite of the unconscious bias and prejudice which, as human beings, they must carry with them.[102]

As early as 1908, Holman had charged that the High Court's decision in the *New Protection* case depended not on constitutional necessity, but on "the temperament, the idiosyncracies and the intellectual standpoint of the majority of the Court".[103] Now Labor was in a position to do something about that.

In its first appointment the Labor government was a model of discretion. It appointed Frank Gavan Duffy, a renowned advocate and a leader of the Melbourne Bar.[104] Gavan Duffy's father was a prominent Irish nationalist who had made a second political career in Victorian politics, but Gavan Duffy himself had remained aloof from politics. Though sixty at the time, he lived to become the Labor-appointed chief justice from 1931-35. The choice of Duffy was universally acclaimed, but the subsequent appointments of Powers and Piddington created a furore. Charles Powers was the commonwealth solicitor-general and had worked for the Labor government in that capacity. He had a background in Queensland politics where he had been a senior non-Labor leader. Most of the public criticism was directed at the fact that he was a solicitor and not a barrister, regardless of his being one of Australia's leading lawyers.

Most of the controversy concerned Piddington. He was a scholar, a practising barrister and something of a political gadfly. He had defeated Premier Dibbs in the 1895 New South Wales election and served a term as a supporter of Reid's Free Trade party. He was known for his radical views. Hughes was uncharacteristically inept in sounding out Piddington's views on federal powers before appointing him. While returning to Australia from England, Piddington had wired in reply to an inquiry from his brother-in-law who was in Hughes's service that he was in sympathy with the supremacy of commonwealth over state powers.[105] Hughes then announced Piddington's appointment and Piddington accepted the position on arrival in Australia, but only on the condition that his independence was recognized. The New South Wales and Victorian Bars formally resolved not to congratulate either Powers or Piddington on their appointments. The press was particularly vindictive against Piddington and accused Hughes of packing the Court. Despite assurances from Barton and the New South Wales chief justice, Piddington succumbed to the intense opposition and resigned. Hughes was furious and accused Piddington of cowardice, but Barton thought he had adhered to a standard of honour above the ordinary.

In Piddington's place Labor appointed George Rich, an eminent Sydney barrister who had recently been appointed to the New South Wales Supreme Court. Rich was the prototype of judges who came to dominate the High Court after the founding era; he was a distinguished legal expert without political experience or party affiliation.

Even before Piddington's unexpected withdrawal, Labor's policy on judicial appointments had been shaped by political considerations. The political environment was such that Labor's original decision was to appoint a spectrum of types to the court. Even Hughes's mistake in soliciting Piddington's views on federalism prior to his appointment derived from Labor's position as a new reform party in Australian politics because Labor had no stable of proven candidates from which to make a choice. When Piddington withdrew in the face of virulent attack, Labor chose to appoint a neutral legalist. Ironically, the appointment of Rich, the least likely Labor preference, was politically motivated since Labor's hand was forced by the political fallout from the Piddington debacle.

Thus it was the Labor party that instituted the practice of appointing technical experts who were allegedly apolitical to the High Court. These judges were instrumental in channelling the High Court's constitutional jurisprudence towards a neutral legalism. And Labor did this for political reasons.

World War I interlude

During the term of the first majority Labor government, 1910-13, the federal constitution had been subjected to increasing centralist pressures while the High Court, in defending the original compact of Australian federalism, had become politicized. These growing confrontations, however, were defused in 1914 because grave matters of national and international politics intervened and forced constitutional issues into the background. Labor was briefly out of office in 1913-14 after the Liberal party scraped in with a majority of one at the 1913 election. Cook's Liberal government was largely ineffectual because Labor retained a strong Senate majority. Most of the Cook government's energies were dissipated in trying to obtain the necessary conditions for a double dissolution by manoeuvring a reluctant Senate into rejecting proposed government legislation. When that dissolution finally occurred, it was granted by the governor-general on the basis of contrived and flimsy grounds and over the Senate's protestations.[106] All Cook's careful scheming came to nothing because Labor was returned to government in the 1914 elections with a sizeable majority in both Houses of parliament.

Labor's second term in office as a majority government was markedly different from the first. Absent were the constitutional turmoil, the great legal battles and the continuous agitation for sweeping constitutional changes. The reason for this was the Great War which was declared on 4 August 1914 during the election campaign. Labor won the battle of words with a pledge to support Britain "to our last man and our last shilling". Its energies while in office were totally absorbed in honouring that pledge and organizing Australia's massive war effort. More than three hundred thousand Australian volunteers fought in France, the Middle East and at the disastrous Gallipoli landing, their contribution to the fighting attested

by their 64 per cent casualty rates which were higher than those of any other Empire country including Britain.[107] Despite this extraordinary volunteer response, Prime Minister Hughes accepted the advice of Westminster politicians and the insatiable generals and tried to introduce conscription to feed still further the bloody trench warfare in France. In the face of bitter opposition from within the Labor movement, Hughes twice forced the issue of conscription to a popular plebiscite but was defeated on both occasions. After the first plebiscite in 1916, he was forced out of the Labor party and led a large block of senior Labor parliamentarians into a new Nationalist party that absorbed the old Liberal party. The federal parliamentary Labor party was shattered.[108] It managed to hold on to only twenty-two out of the seventy-five seats in the House of Representatives in the 1917 elections and languished in opposition until 1929.

The constitutional implications of these events were enormous. Labor's passion for social reform and its solid majorities in both Houses of parliament in 1914 spelt constitutional confrontation. As it turned out, Labor's energies were channelled into the war or dissipated as the party was torn apart in the bitter conscription debate. For its part, the High Court co-operated in the national cause by liberally construing the commonwealth's defence power to permit near-dictatorial federal action in executing the war effort. The constitutionality of the War Precautions Act 1914-16, which allowed the executive government to make virtually any regulations it thought desirable "for the more effectual prosecution of the war", including regulation of "the disposal or use of any property, goods, articles or things of any kind", was upheld by the Court. The leading case, *Farey v. Burvett* (1916), that upheld the validity of commonwealth laws that authorized the fixing of bread prices in Victoria, provided the judges with a forum for expressing their patriotic support for the war effort. War, said Isaacs, was the "*ultima ratio* of the nation".[109] Consequently in time of war, the defence power became "the pivot of the Constitution" with limits "bounded only by the power of self-preservation". During war the Court would co-operate by giving the broadest possible interpretation to the defence power, and otherwise staying its hand. Isaacs's opinion has the ring of grand rhetoric:

> When we see before us a mighty and unexampled struggle in which we as a people, as an indivisible people, are not spectators but actors, when we, as a judicial tribunal, can see beyond controversy that coordinated effort in every department of our life may be needed to ensure success and maintain our freedom, the Court has then reached the limit of its jurisdiction. If the measure questioned may conceivably in such circumstances even incidentally aid the effectuation of the power of defence, the Court must hold its hand and leave the rest to the judgment and wisdom and discretion of the Parliament and the Executive it controls—for they alone have the information, the knowledge and the experience and also, by the Constitution, the authority to judge of the situation and lead the nation to the desired end.[110]

After *Farey v. Burvett,* the Court upheld all the government's defence regulations that were challenged. These included regulations for the detention of suspects,

deportation of aliens, property protection, confiscation and disposition of enemy subjects' property, and prevention of propaganda prejudicial to recruitment.[111] Judicial patriotism allowed the reconciliation of section 92 and the war effort. In the *Wheat* case (1915),[112] the Court held that section 92 did not forbid compulsory acquisition of wheat under a state marketing scheme. Nor did section 92 prevent the compulsory holding of cattle for purchase by imperial authorities, according to the Court in *Duncan v. Queensland* (1916).[113]

Prime Minister Hughes's relentless pursuit of the imperial war received no check from the High Court, but it destroyed the Labor party. After the 1916 split, Labor was relegated to a secondary role in federal politics for the next thirteen years. From the opposition benches it could neither instigate constitutional reform, nor force the pace of change with progressive legislation, nor influence the composition of the Court through judicial appointments. In Dr Evatt's words, Labor had entered "a long era of powerlessness and futile opposition".[114]

The *Engineers* decision: realignment

The constitutional revolution effected by the *Engineers* case occurred independently of direct pressures from Labor, but it was not independent of the overall political environment that Labor's entry into Australian politics produced. The *Engineers* case greatly expanded the federal parliament's arbitration power by interpreting it to cover state-run enterprises involved in industrial disputes that spread beyond the limits of any one state. Since the national structure of key unions enabled industrial disputes to be easily spread interstate, the commonwealth government gained effective arbitral control over national wages.[115] This indirectly satisfied a key plank in the Labor party's platform and a growing demand of the working population. As early as 1910 when it criticized the High Court for taking a "narrow legal view of powers under the Constitution", the *Bulletin* had proclaimed:

> It is evident that before the Federal Court can be of any real consequence, industrial regulation must be taken from the squabbling States. If the Constitution means anything it is that Australia is an industrial unity. It is absurd that the States may set up laws to advantage themselves, and the High Court may not vary these anti-federal conditions.[116]

The impact of the *Engineers* decision extended far beyond the area of industrial relations. Because it discredited the doctrine of the immunity of instrumentalities and substituted a more literal method of interpretation, the decision foreshadowed a considerably broader scope for all federal legislative powers. This loosened the severe constitutional restraints that had weighted the federal system so heavily against the implementation of Labor policies. The Labor party had shifted the focus of Australian politics away from the balanced federalism of the founders and their zealous concern for state rights towards a more nationalist, centralized

constitutional order. Though the federal Labor party was decimated and in opposition, its presence ensured that Australian politics would remain considerably left of the founders' centre. Since the dimensions of Australian politics had been changed irrevocably by Labor, some constitutional realignment in favour of its preference for stronger central powers was necessary. Moreover if the High Court was to continue to function as an independent institution there had to be some neutral ground on which constitutional adjudication could be based, other than the personal prestige of the judges and respect for an original compact that had been framed without Labor's participation. The *Engineers* decision provided both.

The *Engineers* decision was possible because of personnel changes on the Court. Griffith resigned in October 1919 and Barton died in January 1920. In their places were appointed Adrian Knox as chief justice and H. E. Starke, both leading barristers. Starke, like Rich, was without political experience. Knox had at one time served a term in the New South Wales Legislative Assembly, apparently because of a fleeting interest in politics, but he was first and foremost a legal man of conservative instincts.[117] Because of these changes, legalists predominated on the Court that decided the *Engineers* case. Though Isaacs and Higgins, who were reformist centralists, led the reversal and Isaacs wrote the majority opinion, the numbers were made up by legalists Knox, Rich and Starke. This coalition of reformist centralists and legalists was possible because Isaacs and Higgins in their own judicial approaches had already integrated the method of more literal construction of the constitution with a strong preference for expansion of federal powers. Commitment to a literal method rather than the substantive effect of expanding federal powers may have been the legalists' motive in joining the judicial coup, but whatever the motive, this coalition of new judges abruptly ended the era of the founding Court and overruled its key constitutional doctrines.

Thus, in broad terms, the *Engineers* decision was both a response to, and a consequence of, Labor-related politics. It was a response because it realigned the constitutional balance to accommodate an expansion of federal powers. In addition it substituted a literal technique of constitutional interpretation for the early Court's balancing of commonwealth and state powers that was becoming virtually unworkable. Pure legal technique could appeal to all parties in Australian politics whereas commitment to a particular political order meant taking political sides. In this dual respect the *Engineers* decision was the Court's belated response to the changed political environment. The decision was the work of a Court that was beginning to be dominated by professional lawyers. The divisiveness produced by Labor's entry into politics had virtually ensured that legalists rather than senior statesmen would henceforth be appointed to the High Court bench. Such judges would better maintain the integrity and independence of the Court in the atmosphere of extreme partisanship that had resulted from the rise of the Labor party in Australian politics.

The *Engineers* case remains the leading Australian decision because it laid down

the broad principles of constitutional interpretation that the Court follows to this day. A leading newspaper of the time reported:

> This is a judgment of momentous importance, providing new principles of interpretation . . . The judgment of *D'Emden v. Pedder* is overthrown, and all the decisions based on it. People must wonder how long this new interpretation will last. The question is: Are there any such things as State rights? The people have lived for a number of years under the impression the State instrumentalities are immune from Commonwealth interference, and they have refused in referendums to extend Commonwealth powers. Now the High Court has done what the people would not do.[118]

This new interpretation has lasted. In 1967 Menzies described the *Engineers* decision as "a great landmark in the history of interpretation" because "the method of interpreting Commonwealth powers there approved was revolutionary, and has had and will continue to have a great influence upon the scope and weight of Commonwealth powers".[119] Despite his lack of impartiality—Menzies was the young counsel whose arguments the Court accepted in this case—this was a fair assessment, except that the revolution was in fact a reversion to classic legal doctrine. Geoffrey Sawer has expressed a similar view: "So far as a single case provides general premises for Australian constitutional reasoning, it is still *Engineers*."[120] In the *Concrete Pipes* case (1971),[121] the High Court itself forcefully reaffirmed the principles of *Engineers*.

The particular question the Court had to answer in the *Engineers* case was whether the commonwealth's arbitration power in section 51(xxxv) of the constitution extended to state-owned business. This question arose in a hearing before Mr Justice Higgins in the commonwealth Court of Conciliation and Arbitration and was stated for the High Court as follows: "Has the Parliament of the Commonwealth power to make laws binding on the States with respect to conciliation and arbitration for the prevention and settlement of industrial disputes extending beyond the limits of one State?" In particular, asked Higgins, was the dispute between the Amalgamated Society of Engineers, a national union, and the Western Australian government's engineering and sawmilling works an industrial dispute that came within the commonwealth Parliament's arbitration power? The case re-opened the basic constitutional issue of whether states and state enterprises were constitutionally immune from federal laws.

The constitution was silent on the point at issue. The commonwealth arbitration power, section 51(xxxv), covered "industrial disputes extending beyond the limits of any one State", but all section 51 powers are granted "subject to this Constitution". The question was whether there was anything in the constitution to exempt state enterprises from the general wording of section 51(xxxv). The obvious answer was the doctrine of implied immunity of instrumentalities that would have protected the state's businesses from the reach of the commonwealth's arbitration power. Had the doctrines and precedents of the Griffith Court been followed, probably it would have been a foregone conclusion that state enterprises

were exempt. The Court had held precisely that with respect to state railways in the *Railway Servants* case (1906).[122] The hopelessness of the case was indicated by the fact that Robert Menzies, a twenty-five-year-old junior with no previous appearances before the High Court, was briefed for the union at the last minute. Due, in his words, to the "discouraging state of the decisions", he tried to argue that the particular Western Australian state enterprises were involved in functions of trading and not of government. When provoked by Justice Starke that his argument was a lot of nonsense, Menzies brashly agreed, but claimed that he was forced to it by earlier decisions. If he were permitted to challenge those decisions, he said he could undertake to advance a sensible argument.[123]The time was ripe for such sweeping challenge because the High Court was now staffed by new men with different views. Menzies's arguments were subsequently heard and accepted. The central doctrines of the founders' Court were, in Barwick's colourful 1971 language, "exploded and unambiguously rejected"[124] and their leading decisions reinterpreted or overruled.

The majority opinion is a powerful polemic but a logical muddle; it says one thing but does another. It enthrones pure legal technique as the sole method of constitutional interpretation, but at the same time adjusts the constitutional mould to fit a changed political reality. Sawer claims that "The joint judgment is one of the worst written and organized in Australian judicial history."[125] While this may be a fair evalution of the internal logic of the opinion, Sawer's opinion does not do justice to the complex interplay of judicial preferences and political factors that went into the making of the decision. Taken by itself the majority opinion is a muddle, but taken in its total context it is a fascinating piece of judicial craftsmanship. The key to the decision is the alliance between the new legalists Knox, Rich and Starke, and the older centralists Isaacs and Higgins. Isaacs and Higgins had already integrated a legalist technique with centralist goals in their judicial approach. In this instance Isaacs was writing the majority opinion for himself, Knox, Rich and Starke, so he relied heavily upon legalistic rhetoric. Isaacs was supplanting the more balanced federalism of the founders' Court that had previously been dominant. To do that he had to shift the grounds on which the constitution was to be interpreted and the original federal balance understood. Rather than contradict blatantly the old Court on the grounds it had established, Isaacs and the new legalists redefined the rules of the game and so took the Court off in a new direction. The new legalistic technique was a means of achieving a majority; it provided a plausible ground for overthrowing the old Court's restrictive doctrines; and it permitted the expansion of federal powers that Isaacs and Higgins had championed for decades. All in all, it was a brilliant piece of judicial strategy and rhetoric.

The *Engineers* decision officially changed the High Court's approach to interpreting constitutional powers. According to the majority opinion, the Court's duty was to interpret the constitution precisely as framed, to read the natural

meaning of the text, and to proceed according to the general principles of statutory interpretation. Isaacs sought formulations of a neutral, legal method from copious English cases. He quoted Lord Macnaghten that "a judicial tribunal has nothing to do with the policy of any Act which it may be called upon to interpret . . . The duty of the Court, and its only duty, is to expound the language of the Act in accordance with the settled rules of construction."[126] Isaacs quoted Lord Haldane's warning that when courts "endeavour to interpret the desire of the country, they are in danger of going astray in a labyrinth to the character of which they have no sufficient guide". He endorsed Haldane's formulation of judicial interpretation: that a court should "exclude consideration of everything excepting the state of the law as it was when the statute was passed, and the light to be got by reading it as a whole, before attempting to construe any particular section. Subject to this consideration . . . the only safe course [was] to read the language of the statute in what seems to be its natural sense."[127]

American judicial authorities were out; English authorities were in. "No more profound error could be made", said Isaacs, "than to endeavour to find our way through our own Constitution by the borrowed light of [American] decisions." The settled rules of construction had been "very distinctly enunciated by the highest tribunals of the Empire" which, according to Isaacs, the High Court was bound to follow. Isaacs set the example by referring twenty-nine times to the opinions of the "august tribunals of the Empire" as opposed to only four references to American cases. Isaacs's invoking of the Privy Council's authority was not for its own sake; the switch from American precedents meant a rejection of the key doctrines of the founders' Court because the Privy Council had already rejected the implied prohibition doctrine in *Webb v. Outtrim* (1907).[128] This adoption of English authorities in Australian constitutional cases was a fundamental option the Court exercised in 1920. Since it was a fundamental option, it is not surprising that Isaacs's reasons for the switch were not compelling.

Isaacs claimed there were two cardinal features of the Australian constitution which radically distinguished it from the American: common sovereignty of all parts of the British Empire, and responsible government. These two features had little to do with the issue in this case, which was drawing the line between state and commonwealth power in a federal jurisdictional dispute. The sovereignty of the Crown and responsible government were features of both the states and the commonwealth and had little relevance for jurisdictional disputes between the two. Since the division of legislative powers was explicitly modelled on the American constitution, American decisions were clearly to the point. Moreover, the formal monarchy and responsible government were matters of constitutional convention, not constitutional law. Therefore they did not bear on the issue of whether a strict statutory method of interpretation was appropriate for construing the constitution.

Political considerations were to be replaced by pure legal technique. Isaacs claimed

that the method of interpretation used by the founders' Court relied on "a vague, individual conception of the spirit of the compact, which is not the result of interpreting any specific language to be quoted". Rather, that Court had relied "on the opinions of Judges as to hopes and expectations respecting vague external conditions".[129] The early Court's implied constitutional doctrines were incapable of consistent application, concluded Isaacs, because they were based on political considerations that varied according to time and circumstances and the nature of the power under consideration. Isaacs began by describing the constitution as a "political compact" of the Australian people and defining the Court's role as "the chief and special duty . . . faithfully to expound and give effect to it according to its own terms, finding the intention from the words of the compact, and upholding it throughout precisely as framed".[130] But in the body of the opinion he emphasized the statutory character of the constitution and stipulated that it was to be read according to the ordinary rules for statutory interpretation. The meaning of constitutional sections was to be garnered from their words; the method of interpretation, not substantive considerations, was all that was relevant.

Despite all the formal rhetoric about literal interpretation and neutral technique, the *Engineers* decision changed the federal balance of power in favour of the commonwealth. *Engineers* introduced into Australian judicial review a curious duality between the professed technique and the substantive content of judicial decision making. In future, to understand the substantive aspects of decisions it would be necessary to read between the lines of opinions; to search out unstated premises, assumptions and contradictions in the stated "legal" reasons; to examine the pattern of outcomes; and to distil the frame of mind and the personal biases of judges.

In the *Engineers* case itself a proclaimed neutral technique produced an expansion of national powers at the expense of the states. This was hardly surprising since Isaacs and Higgins who now led the Court majority were both ardent nationalists. They had supported stronger central powers since the 1897-98 Constitutional Convention. To take an example, it was Higgins's dogged persistence that got the federal industrial power into the constitution in the first place. Higgins proposed the matter at Adelaide in 1897 but was soundly defeated. He raised it again at Melbourne in 1898 when the Western Australian delegates were present and with the surprising support of John Forrest, a reputed arch-conservative who prefaced his endorsement with the boast that he did have "some liberal instincts", had it carried by a slight majority.[131] Isaacs had supported the federal industrial power while Barton and O'Connor both vigorously opposed it as a dangerous and unwarranted instrusion into what were properly state matters. Needless to say, the power was rather tentatively defined and there was no inkling from its supporters, though there was from its opponents, that it might turn out to be of major federal significance.[132]

Isaacs and Higgins were both radical liberals with reformist and progressive

views.[133] Isaacs had served as Deakin's attorney-general, and Higgins as attorney-general for the first minority Labor government that held office briefly in 1904. On the Court these two men had persistently attacked the prohibitions and restrictions that the three more senior judges had read into federal powers. The judicial method they advocated tended towards legalism, at least from a surface view, but their social philosophy was clearly progressive. This was baldly stated by Isaacs in a 1922 opinion:

> It is the duty of the Judiciary to recognize the development of the Nation and to apply established principles to the new positions which the Nation in its progress from time to time assumes. The judicial organ would otherwise separate itself from the progressive life of the community, and act as a clog upon the legislative and executive departments rather than as an interpreter.[134]

Similarly, in his famous *Harvester* decision, Higgins warned against the Court's making controversial political decisions, but then proceeded to revolutionize the understanding of the basic wage.

For Isaacs and Higgins the more literal method of construction established by *Engineers* served as a carefully chosen means to a preferred political end. For the majority of judges, however, the method may well have been chosen for its own sake since it fitted with their legal experience and the orthodoxy of their profession. As Justice Windeyer has explained this aspect of the *Engineers* decision: "For lawyers the abandonment of old interpretations of the limits of constitutional powers was readily acceptable. It meant only insistence on rules of statutory interpretation to which they were well accustomed."[135] Hence for some of the judges who participated in the decision the resultant expansion of federal powers may have been more of an accidental by-product or an unintended consequence. Thus, among the judicial majority, some used legalism as a means to a political end while others probably subscribed to the method for its own sake. *Engineers* established this ambiguous, dual character of legalism. Henceforward it would be used by some judges, probably the majority, as an apolitical technique that produced, willynilly, a certain outcome; but a discerning few would manipulate it to achieve a preferred political order. In *Engineers,* legalism produced expansion of federal powers, but it could be used with equal facility to do the reverse, as would be the case in the 1940s.

Interim years: unrealized capacity

After *Engineers,* the federal Labor party was continually in opposition for the next two decades, except for a brief term of office during the Great Depression in 1929-31 when it did not control the Senate. Consequently there were no confrontations between Labor and the Court comparable to the earlier period of Labor government,

although the appointments of Evatt and McTiernan in 1930 stirred up a political storm and created sharp divisions within the Court. Labor's frustrating experience in trying to govern during the Depression highlighted the special problems of working the Australian constitutional system after the advent of disciplined party politics. On the Court's side, due to changes in its personnel and in response to new issues thrown up by developments in Australia's political economy, there were significant constitutional variations in technique and interpretation of key provisions such as section 92. The important political and constitutional developments of the period are discussed in this section.

The decade of the 1920s was a period of stability and consolidation in Australian political history. Peace abroad was complemented by continuing prosperity at home. Australia was ruled by the Bruce-Page government, a conservative coalition of the Nationalists and the newly-founded Country party that favoured private enterprise and a contraction of state intervention in the economy and industrial relations. Indicative of the Bruce-Page government's attitude were the following: reconstruction of the Commonwealth Bank, set up by the Fisher Labor government in 1911 as a competitor to the private banks, under a separate board that ensured its independence from ministerial control, and an attempt to vacate entirely the field of labour arbitration and conciliation in favour of the states.[136] This last attack on the dual arbitration system proved fatal. The Bruce-Page government was brought down by defectors from its own ranks, appropriately led by the veteran Labor renegade, Billy Hughes.[137] During the election Labor campaigned successfully on the platform that an attack on the arbitration system was an attack on the standard of living and regained federal office in October 1929.

With a relatively passive government in office throughout the 1920s, there was excessive slack in the constitutional system. The Court had laid the foundation for a considerable expansion of federal powers in the *Engineers* decision of 1920. That same year it followed through with *McArthur v. Queensland* (1920),[138] a radical reinterpretation of section 92 that went far beyond the case in point. In *McArthur v. Queensland* the Court was asked to rule on the constitutionality of a Queensland wheat marketing scheme that interfered with the interstate flow of wheat from New South Wales. The Court held that the interstate trade which was guaranteed "absolute freedom" by section 92 was co-extensive with the interstate trade over which the commonwealth parliament had jurisdication under its interstate trade and commerce power, section 51(i). Consequently to reconcile the two sections, the Court held that section 92 bound only the states and not the commonwealth. The decision, again written by Isaacs, was logically tidy but had little basis either in the federation conventions or in the first twenty years of judicial interpretation. The founders' Court had given section 92 a narrow interpretation, although not always a plausible or consistent one.[139] All the earlier decisions, like *McArthur* itself, had involved state infringements against section 92. The Court prior to *McArthur* had prudently restricted its ruling of principle

to the specific issues raised in the cases it had to decide, although Griffith did pair a narrow anti-state reading of section 92 with *dicta* that the section was "equally binding upon the Commonwealth and the States".[140] The *McArthur* decision, which gave section 92 an expansive meaning but restricted its application to the states, suggested the enormous scope for judicial discretion that was allowed by the new techniques of constitutional construction followed by the Court after *Engineers*.

But the Court was out of step with the political trends of the time. Under the leadership of Isaacs and Higgins, it was consolidating federal supremacy and expanding commonwealth powers at the expense of the states at a time when such powers were unlikely to be utilized by the Bruce-Page government. By leaving the commonwealth's section 51(i) trade and commerce power completely untrammelled by restrictions from section 92, the *McArthur* decision effectively staked out for the Australian commonwealth a commerce power that was potentially as broad as the American. This was never actualized at the time, however, and was later eroded by changes in judicial views. As Sawer has pointed out, there was "a curious dissociation between politics and constitutional law" in this period.[141] As a result, much of the capacity for expanding commonwealth powers for which the Knox-Isaacs Court had allowed was never utilized by the commonwealth parliament at the time. Government initiative in addition to Court compliance was necessary if commonwealth powers were to be expanded.

The most significant constitutional measure of the Bruce-Page government was the appointment of Owen Dixon to the High Court in 1929 to replace Higgins who died in office.

Labor returned to federal office in October 1929 with a landslide victory that gave it forty-six seats in the seventy-five-seat House. There was no Senate election, however, since the Bruce-Page government had fallen in the first year of its current term. Scullin, the Labor prime minister, failed to obtain an early double dissolution and, as Labor's electoral chances rapidly deteriorated, it was soon too late.[142] The Scullin government inherited a hostile Senate that crippled its legislative programme and frustrated its every move. All of Labor's controversial legislation was either thrown out by the Sentate or abandoned in advance in the House of Representatives. The Senate provided a complete buffer for the Court. When the government adopted controversial monetary and fiscal policies to alleviate the severity of the depression, the Senate blocked them all. As a result, the High Court escaped entirely the responsibility of ruling on the constitutional validity of Labor's anti-depression legislation. Labor's programme was far more radical than Roosevelt's New Deal, but there was nothing in Australia equivalent to the United States court crisis of 1937 because Labor did not control the Senate and so was prevented from implementing its programme.

The Scullin Labor government had the misfortune to take office just as the Great Depression was beginning in Australia — it was sworn in during the week

in which the New York Stock Exchange crashed. The Australian economy was particularly vulnerable to world depression since it depended on exports of primary industries and high inflows of overseas capital investment. The nation had participated fully in the world boom of the late 1920s, magnifying its record prosperity by accumulating huge national debts. Suddenly export earnings tumbled, London loan capital dried up and national income shrank.[143] To service the huge national debt that required an increasing slice of the reduced national income, the government was forced to adopt drastic austerity measures. The Scullin government first hosted a team of financial experts headed by Sir Otto Niemeyer that had been despatched by the Bank of England and concerned English financial interests. It then capitulated to pressure from Niemeyer, conservative economists, the banks and the opposition-controlled Senate and adopted the austère "Premiers Plan" in 1931.[144] By acquiescing in that plan, the federal Labor government allied itself with the financial sector and the opposition against the interests of its own supporters. Its action alienated many rank and file Labor members and cemented the rift with the belligerent Lang Labor government in New South Wales. The Scullin government was defeated in October 1931 when the Lang faction of federal Labor parliamentarians voted against it in the House of Representatives. The Lang supporters claimed that it was immaterial whether a Labor government that was as compromised as the Scullin government had become, ruled or not.

Had Labor controlled the Senate in 1930 and 1931, Australia's constitutional and economic history would probably have been significantly different. Of the fourteen major bills that the Senate caused to be defeated, withdrawn or lapse, several would have provided important developments in the federal system.[145] On four successive occasions the Scullin government tried to establish a marketing pool and support price system to aid wheat farmers, the sector hardest hit by the collapse of export markets. Each time the scheme was blocked by the Senate. In 1931 the Senate defeated the Theodore Plan by rejecting a whole spate of legislation that would have established central reserve banking under ministerial control, authorized fiduciary note issues to finance public works projects for the unemployed, and regulated interest rates. The Theodore Plan was the Labor government's considered response to the Great Depression and the brainchild of its brilliant treasurer, E. G. Theodore.[146] It was a plan to reorganize and control Australia's monetary system in order to implement the now familiar, but at that time radical, counter-cyclical policies of monetary expansion and deficit budgeting. Labor's bold attempts to alleviate human misery and stimulate the economy were frustrated by the Senate and a hostile banking system that clung tenaciously to the flawed economic orthodoxy of balanced budgets and monetary retraction. Even the publicly-owned Commonwealth Bank could consistently oppose the government's monetary policy since it was governed by an independent board.[147]

The Theodore Plan was politically necessary for Labor. Without it, electoral defeat and a permanent rift in the key New South Wales branch were virtually assured. The economic effectiveness of the plan was never demonstrated, but many critics have been generous with their praise. A later Liberal prime minister of Australia, Malcolm Fraser, wrote in 1975: "If Theodore had been allowed to practise the substance of Keynes before Keynes was written, Australia's own hurt would

have been much reduced."[148] The constitutionality of the plan was never tested before the High Court. Had it been, there was a good chance that it would have been found constitutional since Labor had already appointed two of its own men, Evatt and McTiernan, to the Court. With Gavan Duffy and perhaps Rich, they might have formed a majority. But controlling only half the legislative machinery, the Scullin government was prevented from testing the commonwealth's legislative powers through pushing the existing constitutional order to its limits.

There are three means of changing the constitutional balance: first, by implementing bold legislative measures which, provided they are upheld by the Court or go unchallenged, extend existing constitutional capacity; second, and as a complementary measure to the first, by appointing judges sympathetic to such legislation; and third, by amending the constitution. The Fisher-Hughes Labor government had tried all three during its earlier term of office, but without any significant success. The Scullin government was prevented from even attempting the first method because of the hostile Senate. It could not take advantage of the legislative capacity opened up by the *Engineers* and *McArthur* decisions.

The Scullin government did make a rather grandiose but half-baked attempt at major constitutional change. Early in the first parliamentary session, Scullin introduced three constitutional amendment bills.[149] The Constitution Alteration (Power of Amendment) proposal was the most radical. It would have abolished the federal compact and judicial review with it. The proposal was to delete the existing amending formula of section 128 and confer upon the federal parliament itself full power for amending the constitution. According to Scullin that would free parliament from the uncertainty and vagaries of High Court decisions:

> A change in the personnel of the High Court may mean a different interpretation of the Constitution, and an alteration of the powers of this Parliament. It may affect the validity of acts of this Parliamentary that have been in operation for years. A mere change in the personnel of the judiciary may alter the practice of years. Thus, what ought to be a political matter becomes a judicial one. That is surely not in the interests of democratic government. Important issues like this should be decided, not by courts, but by the Parliament that represents the people.[150]

Scullin wanted parliamentary supremacy of the Westminster kind for the national parliament. Federation or unification would then have become policy options of the national parliament which in turn would have depended solely on the popular electoral vote. The other two constitutional amendment proposals were more specific and would have extended the commonwealth's conciliation and arbitration power to cover all industrial disputes, and its trade and commerce power to include all matters of trade and commerce with the single exception of state railways. All three proposals duly passed the House of Representatives in April 1930, but were defeated in the Senate in May. Although it was constitutionally possible for the government to hold a referendum after passing the proposals a second time if the Senate persisted in its rejection, the proposals were allowed to lapse because they had little chance of success, and also because the state Labor parties were generally hostile to such sweeping changes.[151]

The Scullin government's only real impact on the constitutional order was via the indirect method of judicial appointments. Justice Powers resigned from the Court in July 1929 and Chief Justice Knox followed him in March 1930. Isaacs was appointed chief justice, but the two vacant positions on the Court were not immediately filled for reasons of economy. While Prime Minister Scullin and Attorney-General Brennan were in London attending an Empire Conference and securing the appointment of Isaacs as the first Australian-born governor-general, the Labor caucus decided to initiate action. Caucus instructed cabinet to make two appointments to the High Court.[152] Amidst press rumours that the appointments were imminent, the deputy leader of the opposition asked in parliament on 12 December 1930 whether the report that the vacancies on the High Court were to be filled by caucus was true. Fenton, the acting prime minister, feigned to be "very surprised that such a question should be asked".[153] Parliament adjourned for the summer vacation on 18 December, and Evatt and McTiernan were appointed on 19 and 20 December. The appointments were bitterly attacked in the press and in parliament when sittings resumed in the new year. One opposition speaker claimed that the history of the country contained "no more disgraceful chapter than that relating to the recent appointments to the High Court".[154] The government countered by expressing shock that the impartiality of the judiciary should be impugned, or alternatively that the Labor government was following practices pioneered by its opponents. Curtin asked why it was thought that appointments to the High Court by a Labor government savoured of "political partisanship", while similar appointments made by non-Labor governments did not.[155]

On the basis of "extraordinary disclosures" made in leaked confidential cables between Scullin and his cabinet, Latham moved a motion of no confidence in the government on 17 March 1931. The government was severely embarrassed because the cables revealed that the prime minister and his attorney-general, then in transit by ship to Australia, had strongly opposed the appointments. According to Latham's charge there had been "acceptance by the Government of political directions for appointments to the High Court, notwithstanding the declaration of the Prime Minister and the Attorney-General that such appointments would strike fatally at the authority of the Court".[156] The evidence was damning. A cable dated 19 December 1930 from Prime Minister Scullin to acting Prime Minister Fenton, which Scullin admitted was substantially accurate, had read:

> Telegram from Vice-president Executive Council to Attorney-General stating that steps being taken to appoint judges astounds us. It is a reversal of Cabinet decision, and means that Cabinet accepts political direction on appointments to the High Court judiciary. Political interference removing this matter from Cabinet responsibility strikes fatally at authority of Court. Attorney-General and I will be no party to that. Number of judges adequate; moreover, long vacation begins. Why rush appointments, and deny Prime Minister and Attorney-General opportunity to express strongly held view? We

> have the right to take part in the discussion on this most vital question. We ask party to reconsider appointments before it is too late.[157]

In another cable to Lyons who was acting treasurer, Scullin had threatened that he and Brennan would "go out of office if in the circumstances appointments were rushed through during our absence". But Lyons was in Tasmania and not apparently privy to caucus's moves, and Scullin's cables were delayed several days. The government closed ranks, except for Lyons who was in the process of changing his party allegiance, and stuck by its appointments.

Both appointees had excellent Labor credentials. McTiernan was a member of the federal parliamentary caucus and had previously served as Labor attorney-general in New South Wales. Evatt at thirty-six was the youngest man ever appointed to the High Court. A distinguished scholar and first-class lawyer, he also had been a Labor member of the New South Wales Legislative Assembly and was a popular advocate for the unions. Scullin strongly opposed the appointments on the basis that they would weaken the High Court's authority and bring it into disrepute. The appointments created a political furore and provided the opposition with ammunition for a censure motion on the government. The appointees were deliberately snubbed by the Bar Associations. McTiernan's appointment drew special criticism because he was considered not to have sufficient standing at the bar to qualify for a seat on the bench. Menzies, who was Victorian attorney-general at the time, personally congratulated Evatt while deploring McTiernan's lack of qualifications. There was great indignation in Melbourne, Menzies wrote, at what was taken to be "packing" of the bench.[158] Evatt and McTiernan weathered the storm, but no additional appointment was made to replace Isaacs when he became governor-general. Gavan Duffy, now an old man, was elevated to chief justice and the seventh seat on the Court was sacrificed to public austerity. The High Court bench remained at six justices until 1946.

The federal Labor party disintegrated in attempting the hopeless task of governing during the Great Depression without controlling the Senate. Its second echelon of senior parliamentary leaders, Lyons and Fenton, defected to the Nationalist opposition which then became the United Australia party. Their ostensible reason was the reinstatement of Theodore as treasurer and deputy leader before he had completely cleared his name in the Mungana affair,[159] but the deeper reason was their fundamental disagreement with Theodore's monetary and fiscal policies combined with hard-headed political opportunism. Fenton and Lyons had headed the Labor government during Theodore's protracted sidelining by the Queensland Nationalist government and Scullin's long absence in Britain. The return of the more senior leaders meant they were relegated to second place.

More serious was the split between the federal Labor party and the Lang state Labor party in New South Wales. Again Theodore was in the thick of the fight as he and Lang, "the two Caesars", fought for control of the key New South Wales party machine, with the likely spoils being succession to Scullin as prime

minister. This factional fighting was allied with opposing economic strategies for dealing with the depression and aggravated by the federal government's inability to implement its relatively moderate Theodore Plan. All these factors converged to produce a disastrous split in the party. The federal Labor government was devastated at the December 1931 polls: the official Labor party held only thirteen seats, while the Lang faction won five others. At the national level Labor remained in opposition for the next nine years while it slowly mended its party structure.

Labor had been doubly defeated by the federal system. The bicameral structure of the legislature allowed the opposition to leave the Scullin government with the responsibility for governing while denying it the power. Consequently Labor could not take the bold initiatives required for countering the depression, nor could it placate its more radical wing by implementing Labor policies instead of conservative ones that were dictated by the opposition Senate and the banks. In the second place the federal division between state and commonwealth governments allowed party infighting to be expanded and institutionalized into a federal battle.

The Scullin Labor government was defeated in 1931. Lang, the rebel premier of New South Wales who had wrecked the Labor party and defaulted on payment of his state's public debt, was brought to heel in 1932 by tough commonwealth legislation. The new Lyons government paid the New South Wales debt interest and impounded New South Wales public monies. The overriding force of the Financial Agreement of 1928 and the constitutional validity of the federal Financial Agreements Enforcement Act 1932 were sustained by a majority of the Court in the *Garnishee* cases (1932). Gavan Duffy and Evatt dissented. The decision was wildly attacked by the Sydney *Labor Daily,* the mouthpiece for Lang's faction, as "a judgment reeking of suspicions of political bias". It suggested that the Court was in collusion with Lang's enemies:

> The New South Wales Government will fight against Federal brigandage, and will win. The justices took no thought for the welfare of the people of the State. The judgement has cleared the way for the Bruce Government, the Chamber of Manufacturers, the Boo Guard, and other Tory auxiliaries to level down New South Wales conditions to the coolie conditions of South Australia. The State Government will resist. The workers of New South Wales will support their Government.[160]

McTiernan, who made up the Court's four-two majority, was singled out for special criticism because of his previous links with the Labor party in New South Wales.[161] Lang was eventually dismissed by Governor Game in a controversial exercise of the prerogative power.[162]

With Lang out of the way and the Labor party shattered, Australian politics settled back into a quiet routine for the remainder of the 1930s. The depression bottomed out in 1932-33. Then followed a long and painful period of "natural recovery" that was only fully completed by the onset of World War II. Lyons led a sequence of United Australia party and UAP-Country party coalition governments until his death in 1939 when he was briefly succeeded by Robert

Menzies. Again as with the Bruce-Page governments of the 1920s, there was little expansionary pressure on the federal system during the 1930s.

The labyrinth of section 92

The most significant constitutional developments of the 1930s were the reinterpretation of section 92[163] and the brief ascendancy of a style of constitutional jurisprudence that was more sympathetic towards the requirements of public policy. This was made possible by the new Labor appointees on the Court and was chiefly the handiwork of Evatt.

The *McArthur* decision (1920) had left the states in an impossible position because it interpreted the "absolute" freedom of interstate trade and commerce guaranteed by section 92 in a literal and expansive manner, but applied the section solely against state interference with interstate trade and commerce. The states had undertaken vast expenditures on railway systems which they had to safeguard in order to protect their financial liquidity. This meant integrating rail and road transport, and in practical terms licensing road hauliers and charging a fair tax on road usage. With the growth of the national economy and improvements in transport technology, Australia was rapidly becoming an integrated market rather than a federation of state economic units. Consequently, licensing and taxing road transport entailed interfering with interstate commerce which, according to *McArthur,* was absolutely forbidden to the states by section 92.

The second area where the states were severely curtailed by the *McArthur* interpretation of section 92 was state marketing boards for primary production. The state was the natural political unit for organizing agricultural policy and support pricing systems since it was closer to the growers, and because different states had different primary industries. But a marketing system affected interstate trade, either by preventing interstate producers underselling the pool price in the original state or by denying interstate buyers a free market. *McArthur* severely limited the ability of the states to regulate their primary industries, unless the regulation scheme entailed the extreme measure of state acquisition and thereby satisfied the anomalous exception of the *Wheat* case (1915). The *Wheat* case was a wartime decision which allowed a state to acquire ownership of a product before it passed into interstate trade. The constitutional situation was that the federal government had the legislative power necessary for regulating interstate trade but was not disposed to exercise that power and legislate for the welfare of particular regional sectors. In any case the Lyons government of the day was not inclined politically to government action.

It was in this context that Evatt led a majority of the Court that included McTiernan, Gavan Duffy and Rich to a practical and judicious reappraisal of section 92. In a series of decisions known as the *Transport* cases,[164] the Court returned

to an earlier and more balanced interpretation of section 92. Eventually, that section was held to bind both the commonwealth and the states but in a limited way. Regulation of interstate trade by either level of government was permissible if its real intention was to implement some valid purpose and not to interfere with interstate trade as such. For example, the efficient regulation of road transport by a state was not an infringement of section 92. The appropriate test, according to Evatt's formulation in the leading *Vizzard* case (1933), was not whether individual traders might have been burdened in their interstate transactions, but whether a more orderly system of interstate transportation resulted. The overall flow of interstate commerce, not an individual trader's right to participate freely in it, was what section 92 protected.[165] Evatt even went so far as to say that a state monoply was not precluded in certain circumstances.[166]

But in the area of state marketing pools, the Court was not prepared to follow Evatt's bold lead. In the *Peanut Board* case (1933) the Court held, with Evatt dissenting, that the state Act and regulations supporting a Queensland peanut marketing board were unconstitutional. The board had compulsorily acquired peanuts and thereby prevented growers from disposing of their crop interstate. Had Evatt's interpretation of section 92 prevailed, that troublesome section would have been made ineffectual. Evatt claimed:

> That the State lends its powerful aid, commands pooling, and goes so far as to make the producers' body the owner of the crops grown during the long period of years, is not, in my opinion, sufficient to prove any forbidden hindrance to inter-State commerce . . .
>
> No one doubts that the State may "socialize" an industry to the extent of controlling those engaged in it, by requisitioning their products, and by rewarding them in any way thought just and fitting, whether under the name of wages, compensation or price.[167]

Evatt would have allowed virtually any restictive state marketing organization designed to stabilize and preserve an industry.

Evatt's was a progressive jurisprudence that could allow bold legislative initiatives if they seemed to be required by the economic and administrative needs of the community. Such a jurisprudence weighted the balance in favour of upholding government initiative since the elected government was presumably in a better position than the judiciary to assess the needs of the community. Evatt's approach to the federal system was more practical and even-handed than Isaacs's extreme nationalism. In the *Transport* cases where he was joined by a majority of justices, Evatt was instrumental in temporarily improving the position of the states vis-à-vis section 92, not because he was a states' righter, but because the important constitutional challenges of the day came from the states that had been put into a constitutional straitjacket by the *McArthur* decision. Evatt's jurisprudence was equally appropriate for allowing commonwealth initiatives, but with the federal

Labor party in opposition during his period on the Court, there were few such initiatives.

Had Evatt's views continued to attract the support of a majority of justices, the socialization legislation of the Chifley Labor government in the late 1940s might have been upheld. In those 1940s cases McTiernan, who shared similar views to Evatt, was a constant dissenter in Labor's favour, but by then Evatt had resigned from the Court and was a senior Labor minister. Evatt's approach to interpreting section 92 was appropriate for upholding Labor initiatives, but whether it was feasible for maintaining judicial review and the relative independence of the judiciary in the Australia federal system, given the extreme partisanship of Australian politics, is more doubtful.

The fundamental issue lurking in the cases concerning state marketing boards and transport regulation was the controversial one of state ownership and control versus private enterprise and a free market. If a government could acquire goods for the sake of orderly marketing, was there any defensible barrier to state acquisition for other more ideological purposes? Compulsory pools for primary produce were perhaps the thin edge of the socialization wedge to which the Labor party was officially committed. The implications of the High Court's decisions concerning section 92 were not lost on the business community or the conservative press. The *Argus* welcomed the *Peanut Board* decision because it struck down "one of the numerous attempts to benefit groups by juggling with economic laws".[168] The president of the Sydney Chamber of Commerce said: "The decision is welcomed by the business community. If it counteracts quackery about orderly marketing, and the claims that Government boards can do better than trained commercial men, then it will help economic reliability."[169]

Evatt's star was in the ascendent during the *Transport* cases of the early 1930s, but it was to wane in favour of that other forceful and brilliant jurist, Owen Dixon. The ground on which Evatt and Dixon joined battle was the interpretation of section 92. At stake was the basic issue of whether governments, either state or federal, could regulate interstate trade and commerce, and if so to what extent. The issue was of central importance because, with the increasing integration of the Australian economy into a national market, virtually all major trade and commerce included an interstate component. The constitutionality of Labor's socialization objective which entailed government monopolies and nationalization of key industries was in the balance. In more general terms, the method of intrepreting the constitution was at issue: Dixon's supposedly neutral legalism was pitted against Evatt's more progressive, policy-orientated approach. Dixon was to triumph and the walls of legalism were to be restored and raised even higher around the citadel of judicial power in the 1940s and 1950s. In the meantime Dixon staked out his position.

Dixon was a consistent and powerful dissenter in the *Transport* cases. There he developed an alternative and equally novel interpretation of section 92 that

was to dominate the High Court in the 1940s. Dixon claimed that the only relevant matters for judicial consideration were the bare juristic and legal aspects of the constitution and the impugned statute. Dixon's technique was a subtle refinement of the legalistic technique that *Engineers* had established, but the substance of his reasoning was as creative as Isaacs's had been twenty years earlier. The difference was that it led in the opposite direction, towards a restriction of both commonwealth and state legislative powers. Dixon formulated a private enterprise interpretation of section 92 as protective of an individual's interstate transactions against government regulation from either level of government. "The object of section 92", wrote Dixon in his dissenting opinion in the *Gilpin* case (1935), "is to enable individuals to conduct their commercial dealings and their personal intercourse with one another independently of State boundaries." According to Dixon, the purpose of section 92 was to preclude legislative interference with events or aspects of interstate trade and commerce. Moreover, Dixon held that section 92 applied distributively to each and every transaction in interstate trade and not just to interstate trade as a whole.[170] Dixon was at one with Evatt only in holding that section 92 bound both the commonwealth and the states. Geoffrey Sawer has characterized Dixon's reading of section 92 as "a guarantee of individual liberty appropriate to the circumstance of a private enterprise or capitalist society, 'liberty' in a sense determined by Herbert Spencer's sociology".[171]

The fact that Dixon was deliberately fashioning a new meaning for section 92 has often been downplayed by those who, for one reason or another, have wanted to perpetuate the myth of legalism. Some might prefer to believe that Dixon finally discovered the real meaning of "absolutely free" that had lain undiscovered in the constitution, rather than that he read in his own novel view. While Dixon himself was meticulous about using the rhetoric of legalism in public, privately he was more honest. Writing to Latham in 1937, he admitted

> In cases relating to transport and other "means" "implements" and "agencies" of commerce, if not in all cases, I think it is almost clear that we must proceed by arbitrary methods. No doubt there will be limits but political and economic considerations will guide the instinct of the court chiefly. In time the thing will work back to some principle or doctrine but what it will be I am unable to foretell.[172]

Even in this private account of the judicial art, Dixon maintained the formalities of legal professionalism. In the last sentence he professes ignorance of the underlying principle that will finally emerge as having guided the decisions of the judges.

Dixon's free enterprise interpretation of section 92 was to emerge triumphant only in the 1940s when Gavan Duffy and Evatt had left the Court and Rich accepted the Dixon view. But the groundwork for the 1940 decisions was laid in the interminable litigation and judicial confusion of the 1930 *James* cases. James was a litigious South Australian dried fruit dealer who, after four High Court and two Privy Council appeals, successfully challenged both state and federal attempts to set up a marketing scheme. The purpose of the scheme was to ration the small

but lucrative home market equitably among growers and force the bulk of the crop on to the world market. James first challenged a South Australian version of the scheme—Victoria had identical legislation—that rested on the twin pillars of state acquisition of fruit and restrictive quotas on the marketing of the balance of the crop anywhere in the commonwealth. The Court narrowly upheld state acquisition on the *Wheat* case precedent, Isaacs and Powers dissenting, but unanimously overruled state-imposed quotas using the *McArthur* rule.[173] The commonwealth Dried Fruits Act 1928 plugged the gap by providing complementary licensing and quotas for the interstate trade in dried fruit. James challenged the federal legislation in 1928 but was unsuccessful.[174] A further appeal by James against the expanded acquisition strategy of the South Australian government was summarily rejected by the majority of the Court in *James v. Cowan,*[175] but again Isaacs wrote a long dissent.

Persistence paid off. Both James and Isaacs were vindicated in 1932 when the Privy Council reversed *James v. Cowan.*[176] The case got to the Privy Council without a High Court certificate since it did not technically involve a section 74 *inter se* question; that is, a dispute over commonwealth-state jurisdiction. The Privy Council overruled the *Wheat* case with its implausible severance of acquisition of title from interference with interstate trade. In so doing it adopted Isaacs's rather extreme reasoning that prevented the states from regulating interstate trade. The corollary of Isaacs's position was that section 92 did not bind the commonwealth. But since that was not relevant to the case, it was never endorsed by the Privy Council. Thus the Privy Council used Isaacs's reasoning to establish only half Isaacs's position, and the less significant half at that.

In the meantime the personnel on the High Court had changed. All the new justices, Dixon, Evatt and McTiernan, thought that section 92 bound both the commonwealth and the states and had said so on many occasions, particularly in the *Transport* cases. On that basis James again challenged the commonwealth Dried Fruits Act that was now the only barrier to his free trade bonanza. In this instance the High Court adhered to its earlier *McArthur* and *James* (1928) precedents even though these were not reconcilable with the *Transport* cases, knowing full well that the matter would be settled by the Privy Council.[177] And so it was. The Privy Council reversed the High Court's decision and finally overruled the *McArthur* case that had bedevilled section 92 interpretation for sixteen years.[178]

The 1936 *James* decision of the Privy Council became the leading case on section 92, but it had in fact resolved very little. The Privy Council restricted its holding of principle to what the majority of Australian judges agreed on, that section 92 bound the commonwealth as well as the states. In that respect it served the useful function of clearing away weighty precedents with which all the Australian judges privately disagreed.

The problem was that the Privy Council put no coherent alternative in place of the decisions it overturned. On the key dispute between Evatt and Dixon as

to whether section 92 was to be construed as applying to the flow of interstate trade as a whole or to an individual's interstate transactions distributively, the Privy Council was silent. Evatt's leading *Vizzard* opinion was described as "an elaborate judgment of great importance",[179] but in the context of determining that section 92 bound the commonwealth. It was not at all evident how much of Evatt's reasoning the Privy Council accepted. The test it proposed, that section 92 protected freedom "at the state barrier" or "at the border", was more in line with Evatt's restrictive reading of section 92. On the other hand the legalistic style of the decision and the substance of the holding that James's right to interstate trade had been infringed by the federal legislation favoured the Dixonian view, though Dixon's formulation was not invoked. A further complication was that the commonwealth legislation at issue had been framed when it was still considered that the commonwealth was not bound by section 92. The Privy Council never discussed whether James had an individual right to free trade under section 92, although he was vindicated in this instance. Thus in many important respects the Privy Council did not clarify the interpretation of section 92; rather, it further confused things by adding the vagaries of a third party not familiar with the implications of such a decision.

More importantly, the decision was an endorsement of legalism, and a model of its irresponsible use. The opinion attempted to determine the "true construction" of the constitution from its "actual language", irrespective of consequences.[180] Counsel made powerful appeals to reasonableness, administrative necessity and consistency. For example, Robert Menzies, attorney-general for the commonwealth and counsel for the state of Victoria intervening, argued that if neither the states nor the commonwealth could control interstate trade, "the control of marketing in Australia is impossible" [181] The attorney-general for New South Wales, intervening also on behalf of Queensland, supported the commonwealth's existing power over interstate trade as vital for all the states' collective marketing schemes involving dried fruit, dairy products, wheat, etc.[182] Nevertheless, their lordships paid no attention to such non-legal considerations. They admitted that outlawing such a marketing scheme was not in the best interests of the people of Australia. "Such a result cannot fail to cause regrets", they said, "but these inconveniences are liable to flow from a written Constitution."[183] Judges only construed the constitution, they claimed; the people must change it.

In the event a referendum was held, but the people proved a poor alternative to the Court and voted down the proposal that the commonwealth parliament be given the power that the Privy Court had taken away in the *James* case. Their lordships' rationale for evading responsibility for their decision was doubly fallacious. In fact, they had effectively changed the constitution by denying the commonwealth power to regulate interstate trade since it had that power before their decision. In the second place the people were not a homogeneous body that could dispassionately deliberate upon a constitutional point and second-guess the Court.

The issue inevitably became politicized. The people were not asked to approve a power the federal government had, but to add one it did not have, at least according to the highest court of law. The issue was exploited by political leaders. Though the bulk of the federal Labor party supported the measure, the left wing of the party opposed it simply because it was sponsored by the Lyons government, while several state parties took an intransigent states' rights line.

Thus the judicial muddle that had reduced section 92 to a totally unsatisfactory state was passed back to the judicial branch to sort out. The *James* decision had not resolved the meaning of section 92, but nor had legislative and judicial ingenuity been exhausted. In two subsequent decisions the High Court upheld Victorian regulations forbidding the buying or selling of dried fruit that had not been packed in licensed packing sheds,[184] and as well a New South Wales statute declaring that Victorian milk that had been shipped to Sydney must be sold at a fixed price through a Milk Board.[185] Dixon could dissent on the ground that section 92 protected individual parties to an interstate sale,[186] and Evatt could assert:

> The fact that a legislative scheme of a State will have a direct and even disastrous effect upon the inter-State marketing business of certain individuals does not invalidate the scheme, provided its main objects and purposes are disparate from trade, commerce and intercourse and the scheme is not administered for the purpose of restricting inter-State marketing . . . Section 92 lays down the rule of inter-State free trade, not the rule of *laissez-faire*.[187]

It all depended on judicial numbers, and when Labor returned to federal office at the end of 1941, McTiernan was the only justice on the Court who was genuinely sympathetic to Labor policy. Gavan Duffy and Evatt had both departed and in their places sat Latham and Williams. Latham succeeded Gavan Duffy as chief justice in 1935 after yielding leadership of the Nationalist core of the United Australia party to Menzies. Though he had been a senior Liberal politician, Latham as a judge was the epitome of *Engineers* principles, first and foremost a legalist but also a federalist.[188] Latham's "coldly logical personality"[189] was naturally attuned to the Court's orthodoxy of legalism. Evatt resigned from the High Court in 1940 to enter federal Parliament as the Labor member for Balmain. His place was taken by Dudley Williams, "a lawyers' lawyer, with conservative instincts but no party political ties and no parliamentary experience" [190] The only other Labor appointee on the bench when Labor came to office in 1941 was Rich whose appointment story has already been told. Rich was now an old man, and after the passing of his colleague, Gavan Duffy, was content to hitch his fortunes to Dixon's bright star.

The meaning of section 92, and by direct implication the constitutionality of Labor's socialization objective, had not been finally determined by the courts at the end of the 1930s. Nevertheless, after Evatt had abandoned the Court in 1940, judicial opinion was running strongly in favour of Dixon's free enterprise

interpretation of section 92. After the *Peanut Board* case (1933), the *Bulletin* had commented:

> The High Court chewed peanuts last week, but didn't settle the matter, which isn't its job anyway. It decided that a State may not set up compulsory marketing schemes, since they interfere with free trade. The big question is whether any Government, State or federal, should have the right to seize a man's work and sell it where, when and at whatever price some official may decide.[191]

This "big question" was to be settled by the Court in the next decade, in favour of private enterprise and against Labor's attempts at implementing nationalization policies.

4

Time of Testing: Labor Versus the Constitution in the 1940s

The Labor party returned to federal office in October 1941 just as Australia was entering its greatest national crisis. The swearing in of the Curtin government on 7 October 1941 ended a period of chronic instability in Australian politics and initiated the federal Labor party's longest and greatest term of office. That term lasted for eight unbroken years until the defeat of the Chifley government in December 1949. It spanned four years of war and four years of peace.

During the years of war when Australia was fighting for its life as well as making a considerable military contribution to the allied cause, the Labor government exercised unprecedented controls over the workforce and industry. National survival and total war necessitated such controls, while the defence power that virtually suspended the rest of the constitution in such circumstances allowed them. The Curtin government enjoyed almost complete power to mould national life and production to the goals of survival and defence. It was able to indulge fully Labor's traditional preference for strong, centralized government and to exercise the rigid control over the economy that Labor aspired to in times of peace. The Labor government took advantage of this unique opportunity to implement its key policies of bank regulation in 1941 and uniform taxation in 1942. For its part, the High Court acquiesced by generously construing the defence power and upholding uniform taxation.

The return to peace at the end of 1945 entailed a withering of the defence power but not, in the Labor government's view, of the necessity for continued goverment planning and control. For Labor's purpose in postwar reconstruction was not to restore the old prewar system of capitalist enterprise that had so clearly failed in the Great Depression, but to reconstruct a new social order based on "sensible selective socialism".[1] Labor leaders and their senior economic advisors were fired by a modest utopian vision of a society that would combine state management of the economy with limited private enterprise so as to ensure full employment and the welfare of all. After the Keynesian revolution in theoretical economics and the positive wartime experience with tight government regulation, a centrally managed and mildly socialist economy seemed both desirable and practically possible. Constitutional obstacles, however, obstructed the road to Labor's modest utopia. The Labor government first tried to amend the constitution, but failed. It then

had to fall back upon existing powers in its endeavour to provide a secure legislative base for its extensive welfare projects, banking controls, nationalization of interstate airlines, and finally bank nationalization. It was this legislation that dominated political and constitutional attention throughout the four years of the Chifley administration and was the subject of the great court battles.

Although Labor controlled the Senate, the federal system provided hostile state governments and powerful private interest groups with the means of challenging the Labor government's legislation and subjecting it to the scrutiny of the High Court. In effect, the Court became the superior house of review in the political system with the success of Labor's controversial legislation depending on favourable judicial review. The judicial branch presided over the direction of the nation's government at this crucial period of change when upheavals in the old order had allowed some scope for transition to the new. By successfully upholding its conservative, free enterprise view of the constitution, however, the judiciary was instrumental in restricting the Labor government's initiatives to state welfarism and overruling its attempts to implement selective socialism.

The Chifley era is emphasized in this study because it was the period in Australia's constitutional history when the High Court was most severely tested. At that time the case of "Labor versus the constitution" was forced to a decision, and the constitution won. From a political point of view the High Court was completely successful. It adjudicted in a routine manner the divisive issues that polarized the community, and legitimated its decisions in such a way that neither the Court itself nor the constitution it upheld were placed in jeopardy. Nor was the Court seriously challenged by the government. Due to Evatt's commanding influence in cabinet, the Labor government resisted strong moves from within its own ranks to pack the Court. The government, not the Court, was forced to back down. Subsequently the Labor party modified its objectives and policies to fit the constitutional mould that the Court had insisted upon.

War powers and an expansive Court

Labor's wartime model of vigorous, interventionist government was the product of its traditional preferences for state action and control coupled with the daunting task of redirecting the Australian war effort to meet the Japanese threat in the Pacific. That required a basic re-orientation in national outlook and a massive mobilization and relocation of resources.

Under previous conservative governments, Australia's outlook, its institutions and its defence arrangements had been geared for war in Europe that directly threatened Britain. Australia entered the war as the loyal colony and ally of a threatened mother country. Its subservient international status was summed up in the official statement of Prime Minister Menzies on 3 September 1939 bringing

Australia into the war: "It is my melancholy duty to inform you officially that Great Britain has declared war upon [Germany], and that, as a result Australia is also at war."[2] When Menzies went to London in 1940 to urge the strengthening of commonwealth forces in the Pacific, he was told that no British or commonwealth forces could be spared while Britain herself was under attack, and no stand could be taken against Japan unless American intervention was first assured. Menzies noted in his London diary at the time that "Drift seems to be the policy of the Foreign Office",[3] so by the logic of loyalty and empire drift also became Australia's foreign policy.

As the Japanese threat grew daily more ominous, Australia's internal politics drifted dangerously in the shallows of petty bickering and personal feuding. Menzies was unable to maintain the confidence or solidarity of his own coalition. His repeated invitations to the Labor party to join a government of national unity were turned down since Labor sensed the imminent disintegration of the coalition government and the chance to govern in its own right. Labor played a skilful game of waiting that combined caution and cunning. The Labor caucus set down the substantial aims of Labor's electoral policy as "an essential part of the war effort" and a condition of Labor's entering a government of national unity.[4] Menzies was forced to resign in August 1941 and was briefly succeeded by Arthur Fadden. On the evidence of Percy Spender, one of the coalition's highest ranking ministers, that government was "indecisive, without direction, and riddled with the malady of dissension".[5] Spender's own United Australia party "had become more of a rabble than a political unit. It was riddled with disaffection, place-seeking, and trouble-making. It had become a party of expediency."[6]

Labor came into office in October 1941 because the two independents who held the balance of power in the house, Coles and Wilson, lost confidence in the ability of the UAP—Country party coalition to govern. As Wilson put it, "the present Gilbertian House" might not work in a serious national crisis.[7]

Japan's entry into the war, although not unexpected, was dramatic and its advances were astonishing. Pearl Harbour was attacked on 7 December 1941, Singapore fell on 15 February 1942, Darwin was bombed on 19 February 1942 and the American forces in the Philippines surrendered on 6 May 1942. The shock of Pearl Harbour was in many respects an immense relief for Australia since it brought the United States directly into the war with Japan. The fall of Singapore was a more traumatic experience because it exploded the popular myth that Australia was secure behind the protective umbrella of British naval power. As Curtin predicted: "The fall of Singapore opens the Battle of Australia."[8] Soon Australian troops were fighting grimly in Southern Papua, part of Australia's trust territories, and a Japanese landing on Australia's own shores seemed imminent.

Labor's war administration, and the High Court's accommodating attitude, must be understood in the circumstances of dire national peril and lack of preparation in which Australia found herself at the end of 1941. The Curtin government had

to achieve a massive mobilization of the country's resources while at the same time totally re-orientating national outlook and defence arrangements. In foreign affairs that meant turning from Britain to America for help. The AIF divisions were recalled from the Middle East and North Africa and, despite Churchill's strong pressures, the seventh AIF division was not diverted to Burma. Australian forces were placed under the American commander, General Douglas MacArthur. In domestic affairs Curtin called for "the reshaping, in fact the revolutionising, of the Australian way of life until a war footing is attained quickly, efficiently and without question" By July 1943 Curtin claimed credit for doubling defence personnel to 820,000 in the fighting forces and a further 350,000 in war production.[9]

Labor's approach to war administration was most distinctive in the field of economic management. There Labor's techniques were deeply coloured by its traditional commitment to centralized planning and control combined with a distrust for private enterprise and a preference for extensive government action. When Labor was still in opposition and before Japan entered the war, Curtin had declared: "Capitalism as an economic system is too loose to deal with the problems of modern war. More public control of war undertaking is essential."[10] The previous Menzies government had been soft on business interests and was reluctant to adopt unpopular but necessary measures. According to its own army minister, Percy Spender: "Where the Menzies Government's performance fell particularly short, was in the field of internal organization of the domestic economy for war purposes."[11]

Under Labor administration, however, there was ruthless direction of industry and considerable expansion of government works by the Allied Works Council. A myriad of national security regulations controlled virtually every aspect of Australian life; there were labour controls, price controls, profit controls and rationing. In his pleas to the American people for increased help in March 1942, Curtin could vouch for the maximum commitment of his own country's resources. Australia was "a nation stripped for war", he said; business interests were subject to "iron control and drastic elimination of profits"; and the sacred rights and privileges of trade unions had been suspended.[12] This was possible only because the High Court allowed enormous expansion of the section 51(vi) defence power during this period of grave national emergency.

Bank regulation

The swift implementation of tough banking controls by Chifley, the treasurer, provides one of the best illustrations of how effectively the Curtin Labor government combined wartime regulation under the defence power with the implementation of major Labor policy. Since control of banking was later to erupt as the greatest political and constitutional issue of the postwar period, the

circumstances of Chifley's first easy victory over the private banks need to be examined in some detail.

Because of the failure of the Theodore Plan and the Scullin government in the early 1930s depression years, the banks had come through the depression with their independence intact but their public reputations tarnished. Reform of the banking and monetary systems had become topical in the 1930s within the Labor party and the working class and in rural communities where Douglas Credit enthusiasts were active. The Lyons government had vaunted the integrity of the banking system and the virtues of orthodox finance with such success against the radical Lang Laborites that it only reluctantly set up the important Royal Commission on the Monetary and Banking Systems in 1935. Ben Chifley, out of parliament due to the Lang split in the New South Wales branch of the Labor party, was one of the six commissioners appointed.

The Royal Commission held extensive public hearings through 1936 and reported in 1937. Its findings and recommendations were an embarrassment to the Lyons government because they were an indictment of the existing system. The commission blamed the private banks for pursuing policies of self-interest that had fed the boom of the 1920s and exaggerated the depression of the 1930s.[13] It recommended the adoption of a proper central banking system through expanding the powers of the Commonwealth Bank under a central banking division that was to be separate from its traditional trading activities. The commonwealth government was to control the private trading banks and co-ordinate overall monetary policy through this central bank. The basic presupposition underlying the commission's recommendations was the central Keynesian principle that the national management of monetary policy could contribute significantly to the prevention of excessive fluctuations in productive activity. The coincidence of this important Royal Commission with the publication of Keynes's *General Theory* in 1936 meant that the Keynesian revolution came promptly to Australian public life.

The commission report called for the licensing of private banks, mandatory provision of detailed banking statistics and the control mechanism of special deposits lodged with the Commonwealth Bank and fixed in amount by the treasurer from time to time.[14] Along with the old economic orthodoxy, the commission threw out the bankers' sacred canon of independence from political direction and interference: "The Federal Parliament is ultimately responsible for monetary policy and the Government of the day is the executive of the Parliament", the commission stated.[15] Chifley had agreed with the central banking objectives of the commission majority, but differed fundamentally on the means that would ensure a sound banking system. In a minority opinion, he insisted that only bank nationalization and the total elimination of the powerful motive of private profit would ensure a system of public banking appropriate for a well ordered community.[16] Later as treasurer, Chifley in fact implemented the central control

measures of the majority report and only finally fell back on bank nationalization in 1947 when he thought that less drastic means would prove inadequate for controlling the banks.

The Labor party's policy on banking, formulated at about the same time, was equivalent to a mixture of the commission's majority recommendations and Chifley's dissent. Labor's purpose, according to the policy statement,[17] was the utilization of Australia's real wealth to ensure a maximum standard of living consistent with its productive capacity "through national control of its credit resources" The "Principles" section laid down that "the direction and control of nationalized banking" was to be vested in the Commonwealth Bank under parliamentary control. In the concrete "Plan of Action", however, nationalization of banking was not advocated, but only the strengthening and expansion of the Commonwealth Bank to provide "vigorous competition with the private banking establishments" The plan did call for a statutory provision reserving the banking business of all public bodies for the Commonwealth Bank, a measure that Chifley was to include in his 1945 banking legislation and the High Court was to declare unconstitutional in the *State Banking* case. Thus Labor's banking policy, like its socialization objective, was ambivalent; while the ultimate goal of nationalized banking was suggested in principle, Labor's practical policy closely resembled the Keynesian recommendations of the Banking Royal Commission.[18] In fact the two were so close that Curtin adopted the commission proposals as Labor's banking policy.

In response to Fadden's November 1940 budget, Curtin proposed a Labor amendment stipulating, among other things, that "the private trading banks be regulated on the basis of the report of the Royal Commission on Banking in order to prevent them building up a superstructure of bank credit on the monetary expansion arising from war conditions".[19] Soon after becoming prime minister, Curtin stated that "in banking policy we shall be guided by the recommendations of the Royal Commission . We shall interpret Labour's currency and banking policy in the light of the recommendations of that Commission."[20]

The recommendations of the Royal Commission were not implemented before the war because they were well in advance of bank tolerance, and the banks were a favoured constituency of the governing United Australia party. Proposed legislative reforms were drafted but fierce bank lobbying ensured that they never got beyond the first reading stage. L. F. Giblin has described the attitude of the private banks in the late 1930s as being one of "fight to the death" against any effective control of their operations by a central bank.[21] Nevertheless the necessities of war finance made the control of banking imperative even for a conservative government. By September 1941 Fadden, then prime minister as well as treasurer, had decided to introduce by means of national security regulation a system of special deposits with limits on profits. The banks objected so strongly that Fadden settled for a "firm undertaking" for bank co-operation rather than

compulsion.[22] Before this "gentlemen's agreement" could be implemented, however, the Fadden government was defeated.

On taking office as treasurer, Chifley quickly brought the private banks to heel through a comprehensive set of national security regulations.[23] Private banks were licensed; their advance policy was subjected to central bank control; their investment portfolios were brought under Commonwealth Bank supervision; and they were required to provide all the information needed by the treasurer and the Commonwealth Bank for monitoring their activities. The control mechanism consisted of "special accounts" at the Commonwealth Bank in which the trading banks were required to deposit their surplus funds. The Commonwealth Bank controlled the level of funds held in special accounts and the interest paid on them, thereby effectively controlling the extent of bank advances and loans to the public as well as bank profits. Chifley laid down two austere guiding principles: the funds to be lodged in special accounts were equivalent to all funds available for investment in excess of prewar levels; and the rate of interest paid on such funds was to be adjusted to ensure that bank profits did not exceed average profits for the three prewar years. The twin dangers of bank-induced inflation and excessive profits from war expenditure were eliminated.

Thus an effective central banking system was instituted by the Labor administration using national security regulations under the defence power. The conditions of total war provided the necessary political atmosphere and the section 51(vi) defence power the constitutional means for controlling private banks. The banks attempted no legal challenge at the time and submitted without public fuss during this period of national crisis, but they had not surrendered.

Uniform taxation

The early Labor administration also seized the opportunity provided by war to establish an effective commonwealth monopoly over income tax. Labor's uniform taxation coup formed an important part in its overall centralizing drive. The Labor government's success in implementing the policy and defending its constitutional validity before the High Court demonstrates the importance of political circumstances for legitimating a major constitutional innovation.

The commonwealth had initially entered the field of income tax to finance war expenditure in 1914, and until 1942 both the commonwealth and the states raised revenue by income tax. Rates were rather modest and differed among various states. There was never any question that both levels of government had a constitutional right (based on section 51(ii) for the commonwealth, and sections 106 and 107 for the states) to levy income taxes.

The uniform taxation scheme that established the commonwealth's monopoly was a clever one that consisted of four separate bills, only one of which relied on the defence power. The scheme made it politically, though not constitutionally,

impossible for the states to impose income tax over and above the high federal rate. Moreover, the federal legislation made this alternative doubly repugnant by stipulating that any state that collected its own income tax would forfeit an equivalent sum in its share of reimbursement grants paid by the commonwealth. Thus, once initiated, the federal monopoly could be perpetuated by a judicious use of ordinary federal powers.

The scheme was introduced and justified by Labor leaders as a war measure to facilitate war financing. In March 1942 while details were still being worked out, Chifley obtained general cabinet approval for the scheme. A conference of state premiers was to be held so that the states' views on details of the proposed scheme could be heard. Cabinet noted, however, that "In the event of the States' expressing unwillingness to relinquish their powers, the point might be reached where the Commonwealth would be obliged to levy taxation and return to the States amounts calculated on the average income tax collected over the past two years."[24] The states did not co-operate, so cabinet approved the uniform taxation measures three weeks later. Commonwealth legislation was drawn up and was ready by May and, although widely supported by segments of the opposition, was hotly debated in Parliament.

Prime Minister Curtin defended uniform taxation as "a war measure arising from the necessities of war" He argued that total war required the total mobilization of national resources and justified the rearrangement of commonwealth-state powers in the same way that it justified the curtailment of citizens' rights.[25] Chifley explained that there had been an alarming increase in war expenditure from £515m in the previous three years to an estimated £350m in the coming year. Two attempts to win the voluntary co-operation of the states in the previous year had been summarily rejected as invasions of states' rights. Chifley accused the states of ignoring national objectives in time of war and of proposing no serious alternative to the imposition of uniform taxation by the commonwealth. He relied on the criteria of efficiency, equality and national emergency to justify this unprecedented invasion of the states' domain. The legislation would allow the federal government to exploit the whole of the nation's taxable field "on the basis of equality of sacrifice and equality of citizenship" [26]

What the Labor government leaders Curtin and Chifley claimed was true, but it was not the full story. That was given by Arthur Calwell who was rebellious and angry because he claimed that the taxation bills were not shown to the Labor caucus before they were presented in the House, a claim that was rejected by Chifley. At any rate Calwell proceeded to disclose and emphasize the Labor qualities of the legislation that the Labor leaders had been careful to downplay in favour of national security ones. Calwell pointed out that Labor members were bound by their party constitution to "invest the Commonwealth Parliament with unlimited legislative powers and authority to create (or re-order) States or Provinces with delegated powers" He claimed that the government's real intention was

to implement Labor policy by establishing a permanent unified system of income taxation, and that unification of other revenue sources would likely follow. As a self-professed socialist, Calwell was trumpeting the other side of Labor's intention which was to centralize financial control over the national economy. Calwell happily predicted "the slow strangulation of the States" He said that they might "linger superfluous a little longer, but if they lose their right to impose income tax, they will become mendicants existing upon the bounty of the Commonwealth. They will, in effect, be on the dole, and for practical purposes they will cease to exist as States."[27]

Opposition members attacked the legislation for precisely those reasons. Harold Holt branded it "a scheme for the introduction of unification by stealth and by the back-door method".[28] Dr Price was more florid in his rhetoric: "Once again this Government of centralizers and socialists is using the war as an excuse to force on the country the policy which they want." Where the government preached patriotism, simplicity and economy, Price saw only "a clever device, unconstitutional, unnecessary, unjust, and designed to further the policy of centralization by destroying those guarantees which made this Commonwealth a federation rather than a unified state" [29]

Although Menzies was generally in favour of uniform taxation, he argued that Labor's scheme was unconstitutional because it was in substance a scheme to deprive the states of their taxing power, rather than a bona fide exercise of the federal taxing power. Broad as the defence power might be, argued Menzies, it could not be stretched to "alter the Constitution by destroying the States as polities". Menzies said he favoured a more centralized constitution along South African lines, but during the present emergency he was committed to upholding the existing constitution until it could be changed by popular referendum.[30] Parliament passed the uniform tax legislation, but the High Court had the final say on its validity, as it also did on the validity of the Labor administration's draconian wartime regulations.

Cases concerning the defence power

It has long been recognized that a federal system is predisposed towards weak national government.[31] Whereas strong government requires a concentration of political power and the ability to act forcefully and quickly, the Australian federal system, following the American model, divides basic government powers between two levels of government, each sovereign in its own sphere. It further weakens the national level of government by fragmenting power among its three branches, legislative, executive and judicial, and by dividing the legislature into two separate houses, each constituted on a different principle of representation. During the national crisis of World War II this complicated system of fragmented powers was effectively suspended. Under the defence power, Australia had, for all practical

purposes, a unitary government. The national legislature was unified: in the first instance because the opposition-controlled Senate dared not oppose the Curtin government, as it had the Scullin government in the 1930s, because of far greater pressures for national solidarity in time of war; and after 1943 because the Senate was also controlled by Labor. Futhermore, parliament delegated virtually the whole area of defence to the executive. Under the National Security Act of 1939 the executive was given sweeping powers "for securing the public safety and the defence of the Commonwealth . . . and for prescribing all matters which . . are necessary or convenient for the more effectual prosecution of the present war" [32]

Presiding over and sanctioning this transformation of the Australian constitution was the High Court. Rich said in one of the defence cases that a country with a federal form of government that becomes involved in a war which necessitated the direction of its whole resources to defence, "cannot hope to survive unless it submits itself for the time being to what is in effect a dictatorship with power to do anything which can contribute to its defence".[33] Comprehensive legal accounts of the Court's definition and application of the defence power in its forty-odd decisions of the period have been given by others.[34] My concern here is with the political aspects and implications of the Court's expansive interpretation of the defence power, particulary in the *Uniform Tax* case (1942). In the defence cases the Court's "strict and complete legalism" barely disguised its broad discretion in allowing the Labor government virtual free rein in directing and forcing national resources into a total war effort. The *Uniform Tax* case indicates the extremes to which judges were prepared to go in a time of national crisis and demonstrated the absurdities to which a legalistic jurisprudence can lead if it is not tempered with prudence and common sense.

In the spirit of *Farey v. Burvett* (1916) the Court first upheld the National Security Act that allowed the executive to govern by national security regulation.[35] It subsequently allowed regulations controlling prices, the workforce and the production and distribution of goods.[36] These regulations were typically drawn in the broadest terms and gave the appropriate minister absolute discretion. For example, regulation 59 of the National Security (General) Regulations allowed a minister to make orders providing for "regulating, restricting or prohibiting the production, movement, distribution, sale, purchase . of essential articles", while "essential articles" were defined as articles "appearing to a Minister to be essential for the defence of the Commonwealth or the efficient prosecution of the war, or to be essential to the life of the community".[37] The constitutional validity of this open-ended regulation was upheld by the Court. More specifically, in the commercial field the Court allowed regulations controlling landlord and tenant relations and rents, fixing maximum and minimum prices of shares, prohibiting advertising for special occasions such as Christmas, and adjusting contracts to take account of war conditions.[38]

Many of the regulations that the Court allowed as valid exercises of the defence

power were only very indirectly linked to defence. For instance, the Court upheld a national marketing scheme for apples and pears on the basis that the export part of the crop was now subject to war restraint on shipping. Starke, a fairly regular and quite sarcastic dissenter in many of the defence cases concerning economic regulation, claimed that the apple and pear marketing regulations had no relation whatever to the "economic front", but merely propped up one sector of the economy that had been affected by war. Starke accused the Court of accepting arguments that led to the conclusion that "in time of war the Commonwealth had complete power to legislate in respect of the social and economic conditions of Australia". He reminded his fellow judges that "after all, the government of Australia is a dual system based upon a separation of powers".[39] The Court even went as far as declaring constitutional the restriction of drinking hours in the name of national defence. Starke again disagreed and called this regulation "one of those irritating orders and restrictions upon freedom of action which is arbitrary and capricious, serves no useful purpose, and has no connection whatever with defence".[40]

As with banking and uniform taxation, the Labor government married national security with traditional Labor policy in the field of industrial relations. The national regulation of industrial matters, one of Labor's prime objectives, was implemented by national security regulation and upheld as constitutional by the Court in *Pidoto v. Victoria*.[41] The Court ruled that the defence power allowed the commonwealth to regulate all industrial disputes and industrial unrest during wartime and in particular to limit the holidays of state employees engaged in industry. In effect the expanded scope that the defence power allowed over industrial matters during wartime was held to supersede the restrictions on the commonwealth's normal power over industrial relations that was limited by section 51(xxxv) to disputes extending beyond state boundaries.

An important part of the Labor government's industrial strategy was to secure decent wages and conditions for women who were joining the workforce in unprecedented numbers, often to replace men who went into military service. The Court upheld the constitutional validity of the Women's Employment Regulations[42] and also the Female Minimum Rates Regulations.[43] The latter regulations allowed the commonwealth government to declare any industry a vital industry and, if female rates of pay were unreasonably low in that industry, to refer the matter to the commonwealth Court of Conciliation and Arbitration for adjustment. Initiating the challenges in both cases was the clothing and textile manufacturing industry that employed large numbers of women and paid low wages. The constitutionality of such invasions of the states' domain by the federal government was upheld on the very general grounds that a contented and efficient workforce enhanced economic productivity which in turn was related to overall defence capacity. For example, in the *Female Minimum Rates* case Latham said:

> I find it difficult even to think of a modern State conducting a large-scale war without the power of controlling the industry of the country. In the organization of the working capacity of the people and the provision of conditions which will make that working capacity available with a minimum of friction and of economic and industrial disturbance the Commonwealth Parliament is, in my opinion, exercising a power in relation to a subject which is most directly connected with defence.[44]

Starke dissented in both cases. He claimed, with some justification, that the defence power, extensive though it was, did not allow the commonwealth "to seize control of the whole social, industrial and economic conditions of Australia and legislate for them as it thinks proper".[45] Starke was prepared to draw the limit of the defence power short of Labor's industrial policy with respect to the employment of women, but the majority of the Court were not.

The defence power, however, was not completely without limits. The Court disallowed the federal government's attempt to regulate the working conditions of state public servants engaged in routine administrative work that had nothing to do with the war effort.[46] It also overruled a mixed bag of federal attempts to regulate admissions to universities, to control the making of insect sprays, and to set general standards for artificial lighting in factories.[47]

The defence cases demonstrate the broad discretion that judges have for greatly expanding one part of the constitution when they are convinced that circumstances warrant such expansion. If the judges had been concerned only with technical evaluation of the cases before them, they might have sided with Starke in disallowing many of the Labor administration's industrial and economic regulations that were only indirectly related to defence. But the judges themselves were acutely aware of the seriousness of the national crisis. Latham and Dixon had been directly involved in diplomatic work in Tokyo and Washington in the early years of the war and were privy to the great efforts that the Australian nation had to make in order to survive until the tide of battle turned in the Allies' favour. In such a crisis the Court was prepared to allow virtually every regulation of individual and economic freedom. Approving the overall thrust of the Labor administration's war effort, the Court rarely quibbled over detailed regulations.

In short, the enormous expansion of the commonwealth's defence power that the High Court sanctioned during World War II is evidence of the judges' broad discretion in interpreting the constitution to suit the needs of the times. To accommodate this expansive interpretation of the defence power, the Court restricted the scope of other sections of the constitution. For example the Court gave precedence to the operation of the defence power over claims of religious freedom made under section 116 of the constitution.[48] It also held that sections 98 to 102 of the constitution barring preferences for particular states did not apply to commonwealth legislation based on the defence power.[49]

Furthermore, the Court allowed a gradual winding down of the defence regulations after hostilities had finished. Dixon said that the defence power did

not "suffer an immediate constitutional collapse" as soon as fighting ceased, but allowed "some reasonable interval of time" during which national security regulations could remain in force.[50] This interim period was to allow the government time to arrange an orderly transition to peace and to implement alternative legislation. The Court upheld virtually all the national security regulations that were challenged until the end of 1948.[51] In December the Court ruled that the control of new car sales under the defence power had not been valid in April 1947.[52] Then in a series of cases that were decided in June 1949 the Court terminated the transition period by ruling that the defence power could not support in time of peace the regulation under national security legislation of what were normally state matters in 1948, or petrol rationing in 1949.[53] All in all, the Court was quite reasonable in allowing a gradual phasing out of the defence power after the war.

Through all of this enormous expansion of the defence power to meet the requirements of modern warfare and its subsequent gradual contraction to allow an orderly transition to peace, the Court kept up its legalistic facade. For example, Dixon formulated a highly artificial distinction between meaning and application: the meaning of the defence power remained constant, he claimed; only its application changed. Dixon said: "In dealing with that constitutional power, it must be remembered that, though its meaning does not change, yet unlike some other powers its application depends upon facts, and as those facts change so may its actual operation as a power enabling the legislature to make a particular law."[54] We find Dixon's distinction erected into a general principle of constitutional interpretation by such treatise writers as W. Anstey Wynes who says, regarding interpretation of the constitution: "In truth the meaning of the terms of the Constitution does not undergo any change, for the nature of a grant of power remains always the same While the power remains the same, its extent and ambit may grow with the progress of history."[55] This is a convenient legal fiction for disguising the broad discretion and progressive role of judges in developing the law. The claim that judges simply apply the law but do not make or develop it is especially implausible with regard to the defence power, yet it remains the official orthodoxy of the court and of legal authorities such as Wynes.

The Uniform Tax *case*

The *Uniform Tax* case (1942)[56] was the most significant of the Court's wartime decisions because, being decided mainly on grounds other than the defence power, it changed permanently the fiscal balance of the Australian federal system. The decision which allowed the commonwealth to establish a virtual monopoly over revenue marked the high point of judicial compliance with a centralizing Labor government. Although only a minor part of the tax scheme and the judicial opinions in its favour relied on the defence power, the Court's decision is inexplicable outside

the war setting. The legislation had received royal assent the day before the Battle of Midway, and the case was argued before the Court during that time of grave national crisis. As Calwell had predicted, the case was "prejudiced before the High Court in favour of the Commonwealth by the existing situation".[57]

The four commonwealth Acts that constituted the uniform tax scheme were the States Grants (Income Tax Reimbursement) Act, the Income Tax (War-Time Arrangements) Act, the Income Tax Assessment Act and the Income Tax Act. The first Act provided for the reimbursement of states, by section 96 grants from the commonwealth, to replace the income tax revenue that they would otherwise have collected. The amounts to be paid to individual states were almost exactly equivalent to their average income tax receipts in previous budgets, and were inequitable in so far as different states had levied income tax at different rates.[58] These grants were conditional upon the states not levying taxes of their own. If a state persisted in levying its own tax, its grant was to be reduced by the amount of the tax it collected. The second Act, which relied on the defence power and was to apply for the duration of the war, allowed the federal government to take over the personnel, offices and equipment of the states' taxation offices. It stipulated that if the states set up replacement offices, the federal government could also take them over at any time. The third Act forbade a taxpayer to pay state taxes until he had first paid his federal income tax. This key stipulation was introduced by the words, "For the better securing to the Commonwealth of the revenue required for the efficient prosecution of the present war" [59] The last Act imposed a uniform tax at extremely high rates in order to cover reimbursement grants to the states and finance the war. Taken separately each Act had a powerful mechanism for keeping the states out of the income tax, and taken together they constituted a scheme that made the commonwealth government sole master of the field.

Four states, including Queensland, which was the only state Labor government to break ranks, challenged the four Acts as a legislative scheme whose purpose and effect was to strip the states of their concurrent constitutional rights to raise revenue. Taking the interpretive principles of *Engineers* to absurd lengths, the Court insisted on considering the Acts separately. Ruling that evidence from the treasurer's parliamentary speeches indicting that the Acts were in fact integral parts of a total scheme was "irrelevant and inadmissible", Chief Justice Latham insisted that "The words of a statute speak for themselves" [60] This legalistic ruling crippled the states' case from the beginning. All the judges, with the partial exception of Starke, refused to accept the states' strong argument that in a federal system neither level of government should direct its legislative powers towards destroying or weakening the other. Five years later in the *State Banking* case the Court would revive the state immunities doctrine to restrict the commonwealth's banking power in order to protect the states' right to bank with private banks, on the ground that such a restriction discriminated against the states. In this instance, however,

the Court refused to allow state immunities as a means of safeguarding the far more important function of states' levying their own taxation.

All the Acts were held by the Court to be within the constitutional power of the commonwealth, although there were some dissenting opinions on particular issues. Latham and Starke did not agree that the commonwealth's takeover of state taxation offices was a valid exercise of the defence power. Starke further considered that the State Grants Act was really an Act to make the commonwealth the sole effective taxing power, rather than a valid exercise of the section 96 granting power. The majority, however, held that the federal taxing power, section 51(ii), was plenary in extent and therefore permitted the federal government to occupy the income tax field. The majority held that the federal government could claim precedence for payment of its own taxes over those of the states under the section 109 paramountcy clause. They also interpreted section 96 broadly to uphold the federal government's right to make grants to the states conditional on the states not imposing their own tax. The federal takeover of state taxation offices was allowed under the defence power. As Rich said: "If the Commonwealth is to wage war effectively, it must control the sinews of war."[61]

The decision was a triumph for legalism and centralism, Latham's opinion being the most extreme in this regard. He began with the ritualistic assertion of a neutral legal method:

> The controversy before the Court is a legal controversy, not a political controversy. It is not for this or any other court to prescribe policy or to seek to give effect to any views or opinions upon policy. We have nothing to do with wisdom or expediency of legislation. Such questions are for Parliaments and the people.[62]

Latham recognized that the strategy of the uniform tax scheme could be applied to other taxes so as to make the states completely dependent upon the commonwealth in financial terms. By tying policy conditions to section 106 state grants the commonwealth could subject the states completely to its will. Latham concluded:

> Thus, if the Commonwealth Parliament were prepared to pass such legislation, all State powers would be controlled by the Commonwealth—a result which would mean the end of the political independence of the States. Such a result cannot be prevented by any legal decision.[63]

The Court could have upheld the substance of the scheme on the basis of the defence power. McTiernan, whose opinion was the most consistent and plausible, went further than the other judges in this direction. As well as the takeover of state offices, he also upheld the main Income Tax Assessment Act requiring payment of the commonwealth taxes before state income taxes as an exercise of the defence power. In so doing he took his cue from the Act which introduced the key section with the recital: "For the better securing to the Commonwealth of the revenue required for the efficient prosecution of the present war"

The Court's decision was eagerly awaited by the Curtin cabinet. At an earlier meeting in April 1942 when it had approved the uniform taxation scheme, cabinet also decided to appoint Dixon as ambassador at Washington to replace Casey.[64] Perhaps the two issues were not unrelated. At any rate Dixon did not sit on the case. Several weeks before the decision was handed down in July, the prime minister told cabinet that he had asked the attorney-general to consider the Court's decision on uniform taxation immediately it was given. Thereafter full cabinet would be summoned to consider the matter.[65]

Because of the Court's favourable decision, that was not necessary. When the decision was handed down, Chifley said he was "gratified" with the Court's "go-ahead", while Evatt said it was "a far-reaching result obtained by a liberal and common-sense application of legal principles". Hughes, now deputy leader of the opposition, was more forthright: "The judgement will please everyone except the group of State leaders who have tried to hamstring the Commonwealth. It marks an epoch in Commonwealth history. The States are now relegated to being subordinate legislators as most people want them to be."[66] On the other side, the Victorian premier was highly critical. "It is doubtful", he claimed, "if a more vicious and discriminating act has ever been conceived, let alone put into operation against the people of our State."[67] Victorians had a special grievance because, as the *Age* put it, they were put "under compulsion to pay tribute to States that [had] for years been glaringly spendthrift" The *Age* warned the federal government that its tax plan was an emergency measure and that there was no surrender of the right to challenge the constitutionality of uniform taxation after the war.[68] Most commentators, however, were more realistic about the permanency of the measure, although they exaggerated its impact. The *Bulletin* pronounced that State sovereignty was dead.[69] The Adelaide *Advertiser* agreed that the judgment, which it abhorred, spelt "the end of the federal era" Nevertheless, it continued with perverse logic, "we must show the enemy that Australia is not weakened by this virtual collapse of the federal system".[70] The *Sydney Morning Herald* concluded rather more soberly that there would be no return to the old system, even though the government had legislated only for the duration of the war.[71]

The scheme was easily continued at the end of the war. In November 1945 cabinet approved the treasurer's recommendation that he be given authority to seek the concurrence of the state premiers in the continuance of uniform taxation, and that if they did not agree the commonwealth parliament would legislate for its continuance anyway.[72] Chifley subsequently reported:

> At the Premiers' Conference held on 22nd-25th January, 1946, the Premiers unanimously opposed, in principle, the continuation of uniform taxation. After it had been made clear, however, that the Commonwealth was determined to continue uniform tax legislation, the Premiers, whilst still maintaining their opposition to the principle of uniform taxation, agreed to discuss the principles on which future tax reimbursement grants to the States should be based.[73]

Cabinet then approved legislation to continue the scheme during peacetime.[74]

Because the Court upheld uniform taxation on a piecemeal basis and mainly on non-defence grounds, this wartime centralization of Australia's fiscal federal system was easily continued during peacetime. In view of the Court's determined and consistent blocking of the subsequent Labor government's attempt to expand federal powers after the war, such an expansive and favourable decision cannot be adequately explained outside its war emergency context. But the rationale for the decision owed more to an extreme application of the Court's legalistic technique of considering separately the legislative Acts that comprised the uniform tax scheme, and the expansive centralism of *Engineers* doctrines that dominated the view of the judges, than to the defence power. The Court made the right decision for the immedate circumstances of grave national security, but its fragmentary approach and technical reasoning helped transform a temporary war measure into a major lasting change in the structure and balance of Australian federalism.

The reasoning of the Court made it extremely difficult to reopen the question of a federal monopoly on income tax. Nevertheless in 1957 Victoria and New South Wales challenged essential parts of the uniform tax scheme, specifically those parts tying state grants to federal conditions and giving precedence to payment of federal tax over state tax. The states' argument was presented by Garfield Barwick who relied heavily on the *State Banking* precedent and claimed that the commonwealth's income tax legislation was also an unwarranted interference with the integrity of the states.[75] By then there were four new judges on the Court, and of the other three, Dixon had not sat on the *First Uniform Tax* case and McTiernan had relied on the defence power to uphold the key clause that forced payment of federal taxes prior to payment of state taxes. In his opinion Chief Justice Dixon emphasized that "The whole plan of uniform taxation [had] become very much a recognized part of the Australian fiscal system."[76] No state had challenged it within fifteen years, so consequently overruling or distinguishing the decision must involve "grave judicial responsibility" Several of the judges including Williams were not prepared to reopen the issues at all, but a majority made up of Dixon, McTiernan, Kitto and Taylor disallowed the section of the Act that forbade a taxpayer to pay state tax before he had paid the full federal tax. The original introduction to the section, "For the better security to the Commonwealth of the revenue required for the efficient prosecution of the present war", had been changed to, "For the better securing to the Commonwealth of the revenue required for the purposes of the Commonwealth" [77] But since the Court on this second occasion upheld the validity of state grants that had as a condition that states not collect their own income tax, the uniform tax scheme was not disturbed.[78] Thus time, politics and judicial review sanctioned what war had originally occasioned.

Postwar reconstruction, or reconstitution

The tide of battle turned when the American fleet held the Japanese at the battle of the Coral Sea in May 1942 and then won a decisive victory at Midway in June 1942. As the immediate threat to Australia was passing, the Labor government began considering postwar reconstruction policies. In Percy Spender's unsympathetic account, the Labor government had been intoxicated by the "strong wine" of executive rule during wartime, and as the danger to Australia passed, sought to impose "its socialist platform upon the economic and industrial life of the Australian people."[79] There is a kernel of truth in this despite Spender's partisan exaggeration. He does, however, omit the crucial fact that in the August 1943 general elections the Curtin Labor government won a landslide victory in both Houses of parliament. Labor campaigned on its war administration and the promise of a comprehensive programme of postwar reconstruction that included expansion of social services, active pursuit of full employment as a guiding principle in economic management, and the integration and retraining of ex-servicemen. Labor won forty-nine of the seventy-five seats in the House and all eighteen of the Senate vacancies to give it control of the Senate for the first time since 1914. Spender's United Australia party was reduced to a dispirited shell with only fourteen members in the House. Thus when Labor began to assert its "doctrinal party views" and impose its "socialist platform", it was not upon an unwilling people.

Labor's purpose: "sensible selective socialism"

Labor's declared purpose in postwar policy was not to reconstruct the old prewar economic order but, as Curtin put it as early as his policy speech for the 1940 general elections, to reconstitute "a new social order based upon democracy and the rights of all men and women to enjoy the fruits of honest toil" The many promises made to compensate for the heavy toll exacted from workers in World War I had only been partially kept. As Curtin pointed out, "Expected social advancement was limited by the fetters of a society that remained acquisitive and unequal." Therefore the Labor party insisted from the very beginning that serious attention had to be given to planning the future so that those who bore the brunt of the fighting would not be betrayed. Curtin boasted in 1940 that his was the only political party with a programme containing "a working plan for a new economic order" [80] That was an exaggeration, but it did indicate something of the intention behind Labor's thinking on postwar reconstruction.

Labor's credibility had been generally boosted by the Keynesian revolution. This had been a key factor in bringing Labor thinking back into the mainstream of Australian political life and giving its policies a consistency and force that commanded respect. The party had failed dismally in the early thirties when confronted by the Great Depression because it could not achieve a consensus on

principles of economic management even among its own members. Moreover, it could make little headway against the financial orthodoxy of the time and was easily cast as a radical and irresponsible party by its critics. Keynes and the whole generation of economists, planners and bureaucratic manipulators that he spawned transformed the concepts and practices of economic management. This new elite shifted public tolerance away from the old orthodoxies of non-interference and balanced budgets towards Labor's traditional position of strong central government direction and control. Keynes concluded *The General Theory of Employment, Interest and Money* in 1936 with these prophetic words: "It is certain that the world will not much longer tolerate the unemployment which, apart from brief intervals of excitement, is associated—and, in my opinion, inevitably associated—with present-day capitalistic individualism."[81] Keynes was sure, as only a master can be, that his reformulation of economic theory would transform public life by curing the excesses of unemployment and depression. Following Keynes, the Labor government adopted economic stability and full employment as the overriding principles of its postwar economic policy.[82]

After Keynes came the war. The Great Depression that had called forth Keynes's response had shaken the old economic order to its foundations. The extraordinary wartime productivity demonstrated the effectiveness of government regulation of the economy. In the opinion of D. V. Copland, a leading Australian economist and senior advisor to the Labor government, the war had demonstrated "what can be done through government control of private enterprise in guiding the direction and development of production and enterprise".[83] After the depression, after Keynes and after the war, there could be no return to the discredited prewar economic system. Copland characterized that system in the bleakest terms:

> If we look at the facts prewar, we see a depressing picture of mass unemployment and depressed primary producers; monopoly and imperfect competition leading to an excessive inequality of wealth and incomes, and to a severe distortion of production from that most needed by society; unequal opportunities for health, education and occupation.[84]

Labor's traditional commitment to centralized control of the economy was now compatible with the new economic orthodoxy that required overall management of the economy.

The marriage of Keynesian economic technique with traditional Labor policy was embodied in the Department of Post-War Reconstruction established in November 1942. Chifley, who also retained treasury, became the first minister while the young Keynesian economist, Dr H. C. Coombs, was appointed to head the new department. In his first budget speech in 1941 treasurer Chifley contrasted the treatment of the working class in prewar decades with the role they were expected to take in the war:

> For years the working class, which is now expected to assist in the conduct of the war, either on the battle field or in the munitions factories, was treated worse than

> farm horses or pit ponies in the mines. They were thrown into the streets, where they were left to starve. Despite that treatment they are now expected suddenly to develop extreme feelings of patriotism. To their eternal credit they have done so.[85]

Half the working population had been mobilized for war service or war production. Chifley was determined that they could not be turned out on to an unregulated market as used pit ponies, nor allowed to form a reserve army of unemployed to provide a buffer for cyclical fluctuations in an erratic market. The public expected a better world after the war, and the government's prosecution of the war had demonstrated that such was now feasible. "There can be no doubt", said Coombs in 1944, "that at the end of the war men will believe that, if for purposes of war we can be masters of our economic destiny, then so, too, can we be for the purpose of peace."[86]

Underlying Labor's postwar reconstruction policies was the vision of a new social order that was Fabian in orientation but Keynesian in technique. This envisioned new world was a solid, pragmatic and rather modest utopia that combined elements of welfarism, mild socialism and regulated capitalism held together by strong central government. Lloyd Ross, director of public relations for the Ministry of Post-War Reconstruction, sketched Labor's ideal as

> a Fabian world in which large inequalities of wealth have been removed by redistributive taxation, no tribute is exacted by "unproductive" capital, employment is maintained at its maximum by public investment and monetary measures, social security is granted to all, exploitation of consumer and worker by monopolies is made impossible by social controls and by "sensible selective socialism" but a large field is left for independent firms and businesses.[87]

Ross admitted that this was neither original nor profound but a hotch-potch of bits and pieces of British, American and Australian progressive thought. Nevertheless Ross claimed somewhat euphorically that "it's certainly nearest to that new order ever yet reached by industrial man—its symbol is the community centre" [88]

Labor statements on postwar reconstruction ranged from wild prophecies of an economic millennium, to restatements of basic public policy goals in terms of Keynesian principles, to concrete bread-and-butter promises of jobs, houses and free medicine. For instance, Lloyd Ross assured members of the Rotary Club in March 1944 that "by democratic planning of our national resources we can move to a period of boundless expansion of wealth and of liberty" [89] Coombs preached a similar message to a national seminar on postwar reconstruction:

> There is no sound economic reason why we cannot achieve an economy in which there will be a high and stable level of employment, progressively improving standards of living, the spectacular development of national resources, and substantial security for the individual . . . we can devote our resources to [these objectives] in exactly the same way as we have devoted our resources to the purpose of war.[90]

The 1945 White Paper, *Full Employment in Australia,* restated the overriding

principles of economic policy as full employment and economic stability. The product of Coombs's department and the Labor cabinet, this paper was a milestone in the development of Australian public policy. In a public broadcast in 1943, Chifley reformulated all this in plain terms: "The Government's reconstruction policy will aim to make Australia a land of happy homes with a job for every man and woman who wants one."[91]

Despite some exaggerated rhetoric on both sides regarding socialism and comprehensive plans, Labor's vision of postwar Australia was, as Chifley put it, "very much the Australia we have always known" [92] Labor did have a fairly complete agenda of social welfare measures to implement, and it had adopted the new Keynesian strategies of economic management. But by and large this was the old Labor man dressed up in new clothes. Even as a social democratic party, however, Labor would have to do battle with powerful vested interests in order to implement its fairly moderate reforms.

Although not a doctrinaire or radical socialist party, Labor did have a socialization objective. If nothing else, that objective formally declared that the party was unsympathetic to capitalist free enterprise, even if it tolerated it in practice and had no real intention, let alone a comprehensive plan, for replacing it. Having such an objective gave the Labor government a powerful weapon of last resort. But is also generated excessive fear and suspicion among Labor's opponents and stirred them to intransigent opposition. This in turn made more likely the use of Labor's ultimate weapon of socialization. During the war some Labor radicals like Eddie Ward, minister for labour and national service, called for the nationalization of basic industries.[93] This was repudiated by Curtin who pledged that his government would not socialize Australia during the war.[94] For the postwar period, however, selective socialism was both a real option for the Labor government and a dreaded threat for its opponents. This became clear in 1945.

In 1945, as the world moved from war to peace after the German surrender in May and the Japanese surrender in September, the Labor administration began putting in place its postwar reconstruction policies. The transition was marked by a change in Labor leadership. John Curtin died in July 1945, worn out by the burdens of office during a period when, as he put it, "the demands on us to survive were colossal and, at times, looked beyond our capability" [95] Fate had conspired to replace the great wartime leader with the steady financial planner, Ben Chifley, at the appropriate time. Chifley retained the treasury portfolio throughout his prime ministership, symbolizing in his own administration that centralized and pervasive control that his government sought to impose on the national economy. The year 1945 was the mid-point in Labor's eight-year term of office; it was also the high point of Labor's power in federal politics, being halfway between its overwhelming electoral endorsement in 1943 and its comfortable victory in 1946.

In the throne speech opening parliament in February 1945, the Labor government

gave formal notice of its postwar reconstruction and reform programme. It was at this point that the controversial issues of the public control by the commonwealth government of banking and interstate airlines were placed on the public agenda. These two issues were to dominate political and constitutional debate for the rest of the decade. In rather muted terms the Labor government proposed a statutory authority to control interstate airlines and announced that the wartime banking controls would be translated into permanent legislation.[96] Labor spokesmen were more effusive in proclaiming a new economic era in which "direct government intervention and positive government action " would replace the worn out shibboleths of private enterprise and individual freedom. Labor's model of interventionist government was paraded in its full war colours: its results were "tremendous, and demonstrable to all" [97] This was to be a session of planning for peace; of initiating new social security benefits as integral parts of "the new order" [98]

The opposition was immediately alarmed. Menzies, now leader of the opposition and founder of the reconstituted Liberal party, singled out the key proposals on banking and civil aviation for special criticism. He accused the government of using the circumstances of war to set in place major postwar social policies.[99] The rising Country party leader, John McEwen, correctly anticipated that Labor intended nationalizing interstate airlines.[100] Others branded Labor's reconstruction programme "totalitarianism with a humanitarian face", and warned the government "not to be rash in pushing its socialistic ideals".[101] Public debate was already raging outside parliament. Labor spokesmen complained of a stream of "insidious propaganda" against the government's proposed banking legislation.[102] The professional association of doctors, the British Medical Association, was already fighting the government's proposed national health policy which it branded as a "nationalized" health policy.

This exaggerated rhetoric reflected the growing polarization of Australian politics. There was real potential for substantial change to Australia's political economy because of Labor's dominant political position and the ripeness of the country for change. By 1943-44 the Curtin government was better placed than any Labor government before or since in terms of power, experience and technical resources at its disposal to create the social and economic order that had been Labor's stated objective for decades. It had won an impressive popular mandate in 1943 and enjoyed enormous prestige because of its successful war administration. The opposition parties had been reduced to a dispirited and factious rump. For the first, and indeed the only, time since federation, a mature and united Labor party could look forward to governing Australia with majorities in both Houses of parliament and without having to devote the bulk of its energies to a national crisis.

It was not simply that the Labor party appeared as the natural party of government during this period; the times were ripe for far-reaching change. The Australian nation had been forged from six separate colonies and consolidated into

an integrated country during the previous four decades. It had matured through withstanding the stresses of war, the ravages of depression and the slackening of imperial ties with a tired and rapidly declining mother country. By the end of the war Australia was a young nation that had not yet become rigidly set in its present mould. National transformations are normally associated with great crises; after the Great Depression and World War II Australia was as susceptible to basic change as it is ever likely to be.

Labor's quest for constitutional powers

As soon as the Labor government turned its attention to postwar reconstruction, it began agitating for constitutional reform. That was necessary to provide a secure constitutional basis for proposed legislation that would ensure survival of the banking, marketing and industrial reforms that the Labor administration had already achieved under the defence power during wartime, and to provide for the extensive array of economic and social welfare policies that the government intended to implement. In October 1942 Attorney-General Evatt introduced a constitutional alteration bill into parliament and had it read a first time in order to initiate discussion. In late November 1942 Curtin and Evatt presented a new draft bill, revised after public discussion, to a special constitutional convention representing the governments and oppositions of the commonwealth and the six states. There was strong opposition to proposing constitutional alterations at such a critical point. Therefore the Curtin goverment agreed not to hold referenda during the war in exchange for an undertaking from all the state premiers that certain powers would be "referred" to the commonwealth for a period of five years under section 51(xxxvii). The state legislatures were not so accommodating. The Tasmanian Legislative Council rejected the referral proposal outright, South Australia and Western Australia made substantial amendments to the particular powers that were proposed, while Victoria's assent was made conditional on all the other states passing identical measures. Only New South Wales and Queensland, where strong Labor governments were entrenched, honoured their premiers' undertakings. Consequently, in Evatt's view, there was "no practical method left for laying a sound constitutional basis for Australian postwar reconstruction, to which this Government has pledged itself to the people, except by an appeal to the people".[103]

Accordingly, in February 1944, Evatt introduced the Constitution Alteration (Post-War Reconstruction) Bill into parliament. The bill proposed a referendum to vest in the commonwealth for a limited period of five years from the end of hostilities powers to make laws with respect to the fourteen matters that the state premiers had agreed to refer to the commonwealth. Evatt so restricted the referendum proposals to enhance their chances of being carried by the Senate, still controlled by the opposition, and by the people, who were generally wary of

constitutional change. As Evatt pointed out in his submission to cabinet, "The desire for almost unrestricted power is understandable but getting the people to consent is a very different thing."[104] In any case, he reported that members of the special cabinet committee that had worked on the proposals were "very impressed by the almost unlimited potentialities of several of the powers" already included in the list. In the House, Evatt's arguments in support of the bill were more restrained; he claimed that the present constitutional division of powers did not permit "national action to meet the urgent practical needs of the postwar period". Evatt singled out the important areas of employment and unemployment, prices and profiteering, and the production and distribution of goods as areas in which the defence power in time of peace provided no sure foundation for commonwealth laws.

It is clear from Evatt's arguments, and from the extent of the additional legislative powers that Labor wanted to add to commonwealth jurisdiction, that postwar reconstruction had an extraordinarily broad meaning. The changeover from war to peace was in itself a massive task since it involved the re-location of about half the entire workforce. But as Menzies pointed out in his response, "Whatever the defence power enables you to do in time of war it enables you to undo in time of peace."[105] The uncertainty inherent in judicial discretion may have been unsatisfactory, but the past pattern of broad judicial interpretation of the defence power made Menzies's 1944 proposition a reasonable expectation. In the event, it was realized. But as we have seen, Labor's purpose was not simply to wind down the war effort but to build a new social order, albeit a rather pedestrian one that wedded Keynesianism to traditional Laborism.

For example, Evatt argued that the proposed power to make laws with respect to employment and unemployment was necessary so that the Commonwealth could "establish better standards of employment throughout Australia" That had been a primary concern of the earlier Labor governments of Fisher and Hughes. In fact, with the exception of provisions dealing with the demobilization and reinstatement of armed service personnel, the list of additional legislative powers Evatt sought for the federal parliament included virtually all the areas that a Labor government would have needed to secure in order to implement its policies independently of postwar reconstruction. The list included powers to legislate with respect to employment and unemployment, organized marketing of commodities, companies, trusts, combines and monopolies, profiteering and prices, production and distribution of goods, overseas exchange rate and overseas investment, air transport, uniformity of railway gauges, national works, national health, family allowances and people of the Aboriginal race. Though certain provisions specified state co-operation or approval of some form, the list of amendments entailed an enormous expansion of constitutional powers available to the commonwealth parliament. While all these various heads of proposed legislative power could be related to some aspect of postwar reconstruction, they

were more directly relevant to the implementation of Labor policies and reforms.

The main thrust of Evatt's argument was not so much that an orderly transition to peace was impossible under the existing defence power but that the implementation of Labor policies in times of peace was difficult, or perhaps even impossible, under the existing constitution. Labor's postwar programme had been endorsed by the people in 1943 but the government could not be sure of carrying out its mandate without substantial constitutional change. Evatt therefore laid down the axiom that "Parliament should, as a general rule, be given authority to pass legislation on a topic to which electors have given their approval." Evatt claimed that the constitution should be indifferent between "a policy of nationalization or of greater government control" and "the opposite policy of *laissez-faire* or complete legislative inaction" [106]In effect Evatt was asking for a neutral constitution that allowed implementation of Labor or Liberal policy indiscriminately, depending only on the voters' choice. He wanted the equivalent of parliamentary sovereignty in a unitary state where the government in national office would represent a single majority. That was not possible in a federal state where powers were divided between federal and state parliaments and their respective governments.

There was in fact a basic tension between Australia's federal constitution and Labor's purpose. The former was heavily weighted against implementation of the latter. Whereas the Labor government was intent upon centralizing power to enable national planning and control for the purpose of implementing economic and welfare programmes, Australia's constitutional system presupposed and favoured a liberal order in which individuals were left at liberty to define and pursue their own interests and to make their own economic and welfare arrangments. For that purpose the constitution, which was modelled on that of the United States, had divided and checked government powers. There had been a revolution in social welfare thinking since the Americans had designed their constitution and the Australians had copied it in the 1890s, but the division of powers had left social and economic jurisdiction mainly with the states.

Menzies, who fully appreciated the liberal character of the constitution, opposed the amendments on the grounds of basic liberal principles. He invoked Thomas Jefferson's strictures against the centralizers of his day:

> the way to have good and safe government is not to trust it all to one, but to divide it among the many, distributing to every one exactly the functions he is competent to fulfil.
>
> . What has destroyed liberty and the rights of men in every government which has ever existed under the sun? The generalizing and concentrating all cares and powers into one body [107]

In any case the commonwealth had become the dominant level of government in the federation. Anticipating the constitutional strategy that the Labor party was to adopt under Whitlam, Menzies stressed the commonwealth's extensive

scope for initiating and directing state works under section 96 that allowed the parliament to tie financial grants to the states with any terms it saw fit. Hence the commonwealth already had sufficient power to direct much of the states' spending, and it had also recently acquired a monopoly over income tax. Menzies pointed out that the commonwealth already possessed the power of the purse, and he emphasized the specificially Labor intention behind the reconstruction proposals. Menzies claimed it was the first time in the history of Australia that an obvious political manifesto was being made the subject of an amendment to the constitution.[108] Other Labor opponents were more extreme. Describing the initial 1942 Constitutional Convention in the *Herald,* Keith Murdoch branded Labor's attempts to build up the powers of the central government as "a revolutionary procedure disguised as a war reform a cyclone masquerading as a zephyr".[109]

Labor easily passed its referendum bill in parliament and submitted the proposals to the people in 1944. By then, however, Australians were weary of war regulations and government directives. Menzies, who had conspicuously absented himself from the conferences that drafted the original proposal for referral of legislative powers, spearheaded the Liberal campaign against the referendum proposals by cleverly identifying increased central powers with socialism, regimentation and industrial conscription. Evatt wore himself out in an extensive national campaign. He "did a giant's work, with a courage and distinction that ought to have challenged others to greater efforts",[110] but to no avail. Many Labor supporters were lukewarm and some were even opposed to the amendments. State Labor parties had vested interests in maintaining state powers, and many Labor supporters made up the large majorities that voted down the proposals. The "No" vote carried 56 per cent of the popular vote and all states except South Australia and Western Australia.

As had been the case in previous attempts, Labor's elaborate scheme for transforming the constitution had failed. It was left with the old constraints of a federal system and the existing range of legislative powers. The Labor government's attempt to amend the constitution in 1944 brought out the restrictive character of that instrument and the true colour of the federal Labor government's postwar intentions. The failure to expand central powers helps to explain the extreme pressures that were subsequently put upon the constitution when the Labor government tried to implement its programme using existing constitutional powers.

High Court reconstruction overruled

The alternative avenue for expanding commonwealth powers that previous federal Labor governments had exploited was that of judicial appointment. During its eight years of office in the 1940s, the Curtin and Chifley administrations made

only one appointment to the High Court, William Webb in 1946, and he was unsympathetic to the Labor cause. Part of the reason for Labor's extremely conservative record in appointing new judges to the High Court during this crucial period was chance combined with the dogged determination of Rich and Starke to sit out Labor's term of office. Both judges retired in early 1950 after the new Menzies Liberal government was sworn in. By then Rich was eighty-seven and Starke seventy-eight. The other part of the reason was Evatt. He squashed a bold "High Court Reconstruction" plan that would have given the Labor government three new appointments by increasing the Court from six to nine members.

When Labor came to office in 1941 it faced a very experienced but at the same time a hale and hearty Court. Although Rich and Starke were quite old men, the average age of the judges was only about fifty-eight which is relatively young for Australian High Court judges. All six judges, Latham CJ, Rich, Starke, Dixon, McTiernan and Williams JJ, survived Labor's eight-year rule. The Court that began assessing the Chifley government's social and economic reforms in 1945 was a very experienced one. Four of the judges had been on the High Court bench for fifteen years or more; in addition Latham had been chief justice for ten years; while Williams, the least experienced judge, had served only five years on the High Court.

The High Court of the 1940s was comprised of judges who were predominantly from narrow professional backgrounds and without political or public experience. Of the six judges, only McTiernan and Latham had been involved in politics and public life, McTiernan as a New South Wales Labor attorney-general in the early 1920s and a federal Labor member at the time of his appointment, and Latham as leader of the old Nationalist party. Latham had resigned from the leadership in favour of the Labor renegade Lyons, and to make way for Menzies. Menzies got Latham's safe Kooyong seat and the attorney-generalship while in return Latham was appointed chief justice. The other four judges were all legal specialists who were appointed to the Court after distinguished careers as barristers and judges. It was hardly surprising that the High Court of the 1940s was extremely legalistic in view of the strictly professional background of the majority of its members and the fact that Latham had also adopted an ultra-legalistic approach. Moreover, by the 1940s Dixon's influence over the Court had become dominant.

More importantly, despite its favourable wartime decisions, the Court was generally unsympathetic to Labor. All the judges except McTiernan and Rich had been appointed by non-Labor governments, but only McTiernan was favourably disposed to Labor policy and consistent in upholding all the federal Labor government's legislation that was challenged during the postwar period. The attitude of the Court was becoming clear to the Labor side well before the adverse decisions in the *Airline Nationalization* and *Pharmaceutical Benefits* cases in 1945. In 1943 a Perth barrister who had been appearing before the High Court in Melbourne reported to Evatt "some very interesting conversations with some of

the Members of the Bench". He warned Evatt that some of the Labor administration's National Security Regulations might be mauled, and went on:

> I gathered from more or less direct statements some of the judges do not think much of Socialism and their decisions might be affected by the fact that they consider your Government is trying to attain Socialism under the guise of National Security.
>
> My general impression is that the High Court has given you Uniform Taxation but you won't get very much besides that unless you keep on the very straight and narrow paths specifically defined by the Constitution.[111]

Such suspicions were also held by Calwell and Ward, two of the most radical and outspoken of the Labor ministers, who began pushing a "High Court Bench Reconstruction" plan as the war was drawing to a close. The plan was first raised in cabinet as an agenda item under that title in June 1945. Since Curtin was absent because of ill health (in fact he was dying) and Evatt was overseas, this politically explosive item was deferred. It was agreed that the acting prime minister and the acting attorney-general would discuss the matter with the solicitor-general and submit a response after Evatt's return.[112] Calwell persisted in pushing the issue at the next cabinet meeting in July while Evatt was still overseas. This time cabinet decide that the acting attorney-general should submit to cabinet "a proposal to increase the membership of the High Court Bench and matters related thereto" [113]

Evatt had returned to Australia in time for the cabinet meeting in August 1945. The court reconstruction proposal was again raised, and the attorney-general asked to consider the matter and submit an agendum to cabinet. At the September meeting of cabinet, however, Evatt was again absent and no agendum on reconstructing the Court was brought forward. Calwell persisted in raising the issue, this time in the more concrete terms of a proposed amendment to the Judiciary Act. Cabinet then asked the acting attorney-general to bring before cabinet the next day "notes regarding the appointment of further judges".[114] The next day cabinet decided to defer the question of an amendment to the Judiciary Act until the next meeting of full cabinet.

The time for procrastinating had been exhausted. Full cabinet met a week later on 2 October 1945. Despite the fact that Evatt was still absent, the issue was put to the vote. The outcome of this contentious cabinet decision was recorded in full:

> The following questions were put to Cabinet and the decisions of Cabinet are recorded hereunder:—
>
> (1) Whether the question of increases in the number of Judges of the High Court should be deferred for decision until the first Cabinet meeting after the return to Australia of the Attorney-General?
>
> *No decision.*
>
> (2) Whether the number of High Court Judges should be increased?
>
> *Approved*

(3) Whether the increase should be one in number?
Not approved.
(4) Whether the increase should be three in number?
Approved.
(5) Whether the necessary legislation should be deferred until after the return of the Attorney-General?
Approved.[115]

Calwell's persistence had paid off; a majority of the cabinet were prepared to approve his bold plan to reconstruct the Court. The moderates, who wanted only one new position to restore the Court to its strength of seven before the depression, were defeated, but the record of the cabinet decision suggests that they were able to force the final compromise of deferring the enabling legislation until Evatt's return. That was crucial. There was to be no repeat of the 1930 episode of cabinet hastily appointing new judges behind the attorney-general's back.

Despite the circumstances of his own appointment, Evatt was, as his biographer notes, "proud of the dignity of the High Court and jealous of its reputation" [116] At the next meeting of cabinet which he attended there was a terrific row. Calwell records that Evatt resented the interference of laymen in the highest of legal matters and that he stressed that Labor would be accused of packing the Court. Calwell relates that he responded in typical fashion: "if our proposal could be described as one of packing the bench, then the successful plot that put Evatt and McTiernan on the bench at the same time was certainly an instance of packing" Calwell recalls that he and Ward attacked Evatt so vehemently on that occasion that, despite Evatt's "thick hide", he was reduced to tears.[117] Nevertheless, despite his reported breakdown, Evatt carried the day and the cabinet decision of 2 October 1945 was amended as follows: "that it be a recommendation to the Parliamentary Labour Party that the Attorney-General prepare and introduce legislation to amend the Judiciary Act by the creation of one additional Judgeship of the High Court of Australia".[118]

The High Court was narrowly saved, but only because of the dominant influence of Evatt in the Labor government. Without Evatt's stand at this point, the constitutional history of Australia might have been quite different. The political storm that would have broken had the Labor government persisted with Calwell's High Court reconstruction plan can be gauged from the controversy that was stirred up by its decision to restore the size of the Court to seven. After Isaac's appointment as governor-general in 1930, the size of the Court had been reduced to six. The reasons for this reduction in the number of judges from seven to six were the financial stringency required by the depression and also the acute embarrassment suffered by the Scullin government over the appointments of Evatt and McTiernan. In 1946 Evatt argued that in view of the increased workload of the Court, the possibility of split decisions and the advanced age of several of the justices, it was time to restore the number of seats on the Court to seven. Even this modest amendment provoked accusations of unprincipled court-packing from

the opposition. For example H. L. Anthony claimed that "the decisions of judges are largely influenced by their previous history and prejudices over many years", and cited Evatt as an example. Anthony invoked memories of Roosevelt's famous court-packing plan that would have allowed the president to increase the size of the United States Supreme Court from nine to fifteen. He said that Evatt would use the amendment to appoint somebody aligned with the Labor party and suggested that Barry was the likely choice.[119]

Evatt was even more cautious in filling the single position he had created. An obvious choice whom Evatt passed over was in fact J. V. Barry, a prominent Melbourne KC and an active member of the Labor party. Barry's candidacy had earlier been advanced in the House by a Labor partisan[120] and tipped by Anthony in his inflammatory speech cited above. Barry had suitable credentials for a Labor appointee, and had been engaged by the Labor administration to assist with various high level commissions of inquiry. In July 1943 he staged a brilliant defence of Ward that promptly ended the bizarre "Brisbane Line" Royal Commission that had been forced on the government by the opposition and the independents who at the time held the balance of power in the House.[121] In the 1943 elections Barry stood as the Labor candidate for Balaclava, a stronghold of the United Australia Party. As an unfriendly newpaper bluntly put it, "With no chance of winning Mr Barry is apparently less concerned with impressing unattached voters than attracting the favourable notice of his ALP masters by playing up to their favourite prejudices."[122] Barry also campaigned strenuously for the Labor side in the 1944 referendum.

A number of factors went against Barry's selection. The first was his age—he was forty-two—but given Evatt's own appointment to the High Court at only thirty-six years of age Barry's relative youth could not have been too significant. More important were the bitter divisions within cabinet and the fact that Evatt had bested Calwell and Ward who were Barry's strongest supporters.[123] Other senior ministers like Frank Forde supported William Webb because he was a Queenslander. Furthermore Barry may have become too much of an outspoken Labor partisan for Labor leaders Chifley and Evatt who, unlike Calwell and Ward, scrupulously avoided politicizing the Court or publicly criticizing its decisions. In fact, as his subsequent career demonstrated, Barry would have been a suitable choice. He was appointed to the Victorian Supreme Court in 1947, became chairman of Melbourne University's Department of Criminology in 1951, and chairman of the Parole Board of Victoria in 1957. Barry won an international reputation as a jurist and scholar in penology and criminology.[124]

Instead of Barry, the Labor government chose Webb who had been chief justice of Queensland since 1940 and was at the time the Australian judge on the International War Crimes Tribunal in Tokyo. Even Webb was accused by some of having pro-Labor sympathies because of his appointments to the War Crimes Tribunal and to a federal Industrial Relations Council by the Labor government

in 1942. These accusations were unfounded, however, as Webb had no real sympathies for Labor. In any case Webb did not take up his position on the High Court until 1948 and in the only important case concerning the validity of Labor legislation in which he participated, the *Second Pharmaceutical Benefits* case (1949), he was part of the majority that invalidated the Labor scheme. Since he was an experienced judge without political affiliations, Webb was an extremely safe choice, as Rich had been for an earlier Labor government in 1913.

The defeat of Calwell's High Court reconstruction plan in 1946 meant that, on balance, the Labor government remained publicly committed to the orthodoxy of an apolitical and neutral Court. Evatt, who was deeply committed to the whole professional ethos of lawyers, narrowly saved that view of the Court. Had Evatt been less of a lawyer, and less convinced of his ability to change the direction that the Court was likely to take through the sheer persuasiveness of his own arguments, he may not have taken such a conservative stand. Thus, ironically, it was largely because of Evatt that legalism survived and the High Court was able to consolidate its own position of political supremacy while cutting down the key legislative initiatives of the Chifley government. In the final analysis, it seems that there was a sense among the Labor leaders that the conventions of legal neutrality and judicial independence had to be preserved regardless of the cost in terms of Labor policy. The Labor cabinet's final decision to reverse its earlier endorsement of Calwell's scheme to reconstruct the High Court and its conservative choice of Webb to fill the single position that it created on the High Court show that the Chifley Labor government was committed primarily to traditional parliamentary and consensus politics, and to radical reform only in so far as that was permissible within such limited bounds.

An obstructive court

There were two complementary parts to Labor's postwar reconstruction programme: one was central control of the national economy including, if necessary, public ownership of vital services such as airlines and banking; the other was provision of a comprehensive system of social services. In a spectacular series of constitutional cases between 1945 and 1949 the High Court obstructed both. In the two *Pharmaceutical Benefits* cases (1945 and 1949) the Court twice invalidated legislation providing for free medicine which was to be the first stage of Labor's national health scheme.

During the early war years, the Labor administration began planning its postwar social welfare programmes. By the end of 1942 Chifley had prepared a preliminary estimate of the costs involved in developing a comprehensive system of social services in Australia. The list of services to be provided included "Free Health, Medical,

Hospital, Dental and Pharmacy Services" [125] The scheme that was envisaged for providing free health and medical benefits was broadly set out as including:

(1) a salaried medical service
and
(2) Commonwealth Government assuming direction, in collaboration with the States, of all public hospitals, asylums and public health services.[126]

This ambitious proposal was considered at length by cabinet in early 1943. There was some attention given to the financial constraints imposed by war, the need to work with the states in such areas as hospitals, and the existence of powerful interest groups that would be affected by the changes. For instance Evatt thought that "there should be at present no nationalisation of doctors, but that hospitalisation and other such benefits should be conducted through the existing channels as far as possible".[127] Others were more optimistic. The minister for social services suggested that much of the programme, including the items of free medicines and free hospitalization, "could be put into being without any great disruption of existing rights and interests" Prime Minister Curtin said, in a similar vein, that the biggest hurdle was getting the services started. Although many of these services were at the time quite novel to Australia, Curtin claimed that once they were started "any Government would shrink from discontinuing them. On the contrary the natural action would be a progressive amplification of the services." At this point the Labor government was severely underestimating both the length and cost of the war effort and its own ability to bring into line strong interest groups such as doctors. What the early cabinet documents do make clear is that the Labor government's original goal was a nationalized health service run by a salaried medical profession.

As it turned out little could be spared from the war effort for social security by the Curtin administration. Nevertheless, the government committed itself to substantial social security spending, which it deferred for the duration of the war, through the National Welfare Fund. By this means one quarter of personal income tax receipts were earmarked for social security expenditure and credited to the fund for spending after the war. In the meantime the government sought legislative power over national health in the 1944 referendum, but failed to secure it. For this reason, and also because of the continuing drain that the war made on personnel and resources, the Curtin wartime government had to proceed with its national health scheme on a very limited and piecemeal basis.

The Pharmaceutical Benefits Act 1944 was the first modest instalment of Labor's national health scheme. It was to provide free medicine at an annual cost of two million pounds to be appropriated from the National Welfare Fund. The scheme was quite simple and efficient in its administrative details. All proven drugs were to be listed in a comprehensive, standardized formulary. Doctors would prescribe drugs from this formulary using a standard prescription form. The patient would present this prescription at a pharmacy to obtain the drugs, while pharmacies were

to be reimbursed directly by the federal government. There were sound public health and administrative reasons for using a standardized listing of drugs that would be eligible under the scheme, and for insisting on standard prescription forms. All free drugs could be first vetted by a panel of experts; unnecessary prescribing could be monitored; and costing and administration would be facilitated. The practical disadvantage of such a scheme was the hostility of the medical profession to a government-controlled pharmaceutical scheme that standardized the process of doctors' prescribing drugs to their patients.

The scheme was attacked from the very beginning by the combined forces of the opposition parties and the medical profession with Sir Earle Page, the "truant surgeon" and ex-leader of the Country party, spearheading the attack in parliament.[128] When the Pharmaceutical Benefits Bill was first introduced, its opponents branded it "another instalment of the dole" and "the thin edge of the nationalization wedge".[129] The professional association of medical practitioners, the Australian division of the British Medical Association (BMA), had already come out against the scheme. In December 1943 the BMA told the commonwealth minister of health that the medical profession must be "entirely untrammelled" and that the welfare of the sick would be "seriously jeopardised by the adoption of any scheme which would limit the freedom of a doctor in prescribing".[130] Underlying their purported concern for the sick was the doctors' real concern for their complete professional autonomy. The profession was haunted by the spectre of socialized medicine. Commenting on the Pharmaceutical Benefits legislation, the Victoria president of the BMA warned "that the profession has to face what is, without beating about the bush, the threat of nationalization, the loss of its ancient freedom and independence and the prospect of regimentation into a civil service".[131] Therefore the doctors were intent on holding the line against any encroachment by the federal Labor government on their traditional domain of free enterprise medicine. The BMA explained to the minister of health in 1947 that its members opposed the pharmaceutical benefits scheme because of "the opportunity provided for the introduction of a nationalized medical service by means of an act not drawn up for that purpose" [132] The BMA directed extensive propaganda against the nationalization of medicine and any system "designed as a stepping-stone to the nationalization of medicine" [133]

First Pharmaceutical Benefits *case (1945)*

The Pharmaceutical Benefits Act became law in 1944 and its constitutionality was challenged in 1945 by the anti-Labor attorney-general of Victoria who brought an action on behalf of three Victorian doctors, the president, vice-president and secretary of the Medical Society of Victoria. The plaintiff claimed that the Act was invalid since it was not referable to any commonwealth legislative powers. The commonwealth in turn contested the plaintiff's standing to bring such a

challenge. The Court decided both the question of standing and the substantive constitutional issue against the commonwealth.

The Court's decision on the question of standing was the culmination of its previous generous practice of allowing a state attorney-general to challenge the validity of commonwealth legislation that affected the interests of his state. In his opinion Dixon reformulated the Court's generous policy of giving standing to state attorneys-general:

> It is the traditional duty of the Attorney-General to protect public rights and to complain of excesses of a power bestowed by law and in our Federal system the result has been to give the Attorney-General of a State *locus standi* to sue for a declaration wherever his public is or may be affected by what he says is an *ultra vires* act on the part of the Commonwealth or of another State.[134]

In this way, by using the friendly offices of a sympathetic state attorney-general, the doctors were able to take their contest with the federal Labor government before the High Court. The case is a typical example of how a small but politically astute elite group can exploit the legalities of a federal system to check threatening government legislation.

The substantive issue in the case turned on the characterization of the Act and the scope of the section 81 appropriation power in the constitution. According to section 81 all commonwealth revenues can be "appropriated for purposes of the Commonwealth in the manner and subject to the charges and liabilities imposed by this Constitution". The question was whether the phrase "for the purposes of the Commonwealth" had a broad, open-ended meaning that allowed the commonwealth parliament to determine for itself the purposes for which it could appropriate money, or whether the phrase had a narrow meaning restricting appropriations to purposes that were specified within the legislative powers of the commonwealth parliament as set out in the constitution. The Pharmaceutical Benefits Act relied on the broad interpretation of the appropriation power which, as Menzies pointed out, had excellent credentials: "For 40 years the Commonwealth Parliament acted on the wide view."[135] But no previous federal government had pushed this power to such an extent. The plaintiff's case depended on characterizing the Act as primarily legislation regulating medical matters that were properly in the states' domain.

Although the point on which the case turned was the technical one of whether the section 81 phrase, "for the purposes of the Commonwealth", had an open-ended or a restrictive meaning, the implications of the decision were enormous because the constitution expressly enumerated only one commonwealth social security power, section 51 (xxiii), covering old age and invalid pensions. The case was billed as "the most momentous since uniform taxation" because, if it succeeded, the commonwealth government's whole social service structure would collapse.[136] The *Age* lamented the partisanship that was crippling the government's legitimate

endeavours: "The Commonwealth cannot act with any sense of security, or of constitutional propriety, in fields of national concern."[137]

The Court was hopelessly divided on the meaning and scope of the appropriation power, although only McTiernan was prepared to uphold the Act. McTiernan's dissenting opinion was the most straightforward, and was at one extreme of the judicial spectrum. He held that "the purposes of the Commonwealth" were "such purposes as the Parliament determines" That made the appropriations power as broad as the elected representatives of the people chose to make it. McTiernan coupled this broad interpretation of section 81 with a progressive view of the development of the constitution and a restricted scope for judicial review. He said: "The Constitution puts the power of the purse in the hands of Parliament, not in the hands of the courts."[138] Latham agreed with McTiernan that the appropriation power was constitutionally unlimited and that in practice it was for Parliament to determine its scope, but he invalidated the Act on a legalistic dilemma of characterization. Latham posed that dilemma as follows: either the Act was for the appropriation of money, or it was really for the control of doctors, chemists and the sale of drugs, and only incidentally for the appropriation of money. Latham held that it was the latter. Therefore by a blatant use of the legalistic technique of characterization, Latham effectively undercut his broad interpretation of the appropriation power.

At the opposite end of the spectrum of views on the scope of the appropriations power were Starke and Williams. Starke simply rejected the claim that the commonwealth had unlimited power to appropriate its revenues for any purpose that it thought proper. Williams based his argument for a strictly limited appropriations power on a static characterization of the original federal system. Expenditure had to be supported by the "particular purposes and those alone" for which the states had created the commonwealth in the original compact.[139]

Between Williams's rigidly static view of interpreting the constitution and McTiernan's loosely progressive and centralist view, there was obvious room for a more balanced developmental approach that preserved the essential federal character of the instrument while allowing for national growth and changed socio-economic conditions. In a series of 1947 opinions culminating in the *State Banking* case Dixon attempted to outline such a position. But in the *First Pharmaceutical Benefits* case he merely suggested the lines such reasoning might take: "In deciding what appropriation laws may validly be enacted it would be necessary to remember what position a national government occupies and to take no narrow view, but the basal consideration would be found in the distribution of powers and functions between the Commonwealth and the States."[140] Dixon did not develop such reasoning in this case because, like Latham, he also chose to decide the case on the narrower technical grounds of characterization. Dixon, with Rich concurring, characterized the Act as being primarily for legislating a detailed and coherent plan for the dispensing of free medicines, and only incidentally for appropriating

money. Dixon claimed to be reserving his opinion on the substantive issue of the scope of the appropriations power. While that may have been formally the case, his reasoning implicitly assumed a narrow interpretation of the section 81 "purposes of the Commonwealth". If the appropriations power was as broad as McTiernan maintained, it would clearly allow an appropriation for any purpose chosen by the federal government, including the funding of a free pharmaceutical benefits scheme that was at issue here.

The individual opinions of the judges who made up the majority are not persuasive. Among the majority there was no consensus of reasoning on the key issue of the scope of the purposes for which the federal government could make appropriations under section 81. Latham held that "the purposes of the Commonwealth" were unlimited, Starke and Williams that they were limited to purposes that were specified in the commonwealth's grants of power as set out elsewhere in the constitution, while Dixon and Rich said the question was irrelevant for the case. These five judges were united only in their view that the Pharmaceutical Benefits Act was invalid, and by their characterizing it in a way that implied its invalidity. The holdings of the majority judges are more illuminating than the reasons that support them: all five judges held the legislation invalid but relied on three quite different sets of reasons to do so. Only McTiernan was prepared to validate the Act. Had Latham been consistent in his reasoning, he might have joined McTiernan. The configuration of the High Court with respect to Labor legislation for the rest of the decade had already emerged. The warning that had been passed on to Evatt in 1943 "that the High Court has given you Uniform Taxation but you won't get very much besides that unless you keep on the very straight and narrow paths specifically defined by the Constitution" was proving correct. Yet only Ward publicly queried the Court's decision and even he was atypically circumspect and moderate in his response: "I have never attacked the personnel of the High Court but I do not think its powers should be greater than those of Parliament."[141]

Cabinet was stunned by the Court's decision which was handed down in November 1945 while Evatt was overseas. After Sir George Knowles had attended the cabinet meeting and explained the judgment, cabinet approved the resolution that "The Government is so concerned with the decisions of the Court that it will ask the opinion of eminent constitutional lawyers as to the constitutionality of similar social legislation."[142] Five eminent lawyers, ranging from Robert Garran to Garfield Barwick, were consulted. They confirmed the government's fears that the constitutionality of much of its social welfare programme was now in jeopardy because of the implications of the High Court's adverse decision on the Pharmaceutical Benefits Act. Legislation providing for maternity allowances, child endowment, widows' pensions, and unemployment and sickness benefits that had already been enacted was said by all counsel to be either doubtful or invalid.[143]

The *Pharmaceutical Benefits* decision had dealt a severe blow to the Labor government's whole social security programme. The Court had directly overruled the free medicine scheme, but more importantly it made the rest of Labor's existing and projected social security legislation constitutionally suspect. Having sanctioned the federal government's usurpation of the revenue field in the *Uniform Tax* case, the Court had now restricted the scope of its power to appropriate money for spending. The only social security matters that the constitution specifically provided for were invalid and old age pensions in section 51 (xxiii).

The Labor government's response to this judicial straitjacket was the Constitutional Alteration (Social Services) Bill to allow the federal government to legislate for: "the provision of maternity allowances, widows' pensions, child endowment, unemployment, pharmaceutical, sickness and hospital benefits, medical and dental services (but not so as to authorize any form of civil conscription), benefits to students and family allowances." This carried by a majority in all the states at the 1946 referendum and became section 51 (xxiiiA) of the constitution. Its purpose was to secure the Labor government's social security legislation against the ravages of the High Court. When Evatt introduced the bill in parliament, the opposition readily supported all the heads of power except that concerning "medical and dental services". Evatt's explanation, that the function of this clause was "to enable the Commonwealth to make use of the services of doctors and dentists to provide national medical and dental services",[144] did nothing to allay the opposition's fears. Opposition spokesmen immediately raised the prospect of the nationalization of health and dental services. Menzies sketched the constitutional possibility of the government's setting up its own services as it had done in the Airline Act, but then, without the restriction of section 92 that applied only to interstate trade and commerce, proceeding to nationalize the whole field.[145] To win opposition backing for the amendment, Evatt accepted Menzies's "civil conscription" qualification that made the commonwealth's power to provide medical and dental services subject to the restriction "but not so as to authorize any form of civil conscription" This qualification was to prove fatal to the government's new legislation in the *Second Pharmaceutical Benefits* case.

The social services amendment proposal was one of three submitted to the people in 1946 in a referendum that coincided with general elections. The other two amendment proposals, which failed to carry, concerned powers to allow national organization for the marketing of primary products regardless of section 92, and national regulation of industrial matters throughout Australia. For the election, Labor campaigned on its record and the implementation of its social security programme. Chifley placed special emphasis on the significance of the three referenda proposals for implementing Labor policies. If the social security amendment were carried, he promised that the scheme for free medicines that had been invalidated by the Court would be re-enacted. The social security amendment was carried, and the Chifley Labor government was returned with

handsome majorities in both Houses of parliament. With an impressive popular mandate and a constitutional amendment in hand, the Chifley administration was now confident of implementing its pharmaceutical benefits scheme.

Second Pharmaceutical Benefits *case (1949)*

The pharmaceutical benefits scheme was re-enacted in virtually the same form as the 1944 Act. Senator McKenna, a lawyer and accountant and one of Labor's most competent ministers, was now in charge of the difficult health and social services portfolio. Labor's pharmaceutical benefits scheme was reintroduced and passed as the Pharmaceutical Benefits Act of 1947. Since this Act placed no compulsion on medical practitioners or pharmaceutical chemists to take part in the scheme, and since it lessened the economic barriers to the patients' treatment and was covered by the new constitutional amendment, the government believed that both professions would co-operate.[146] That hope proved to be ill-founded.

The doctors were intransigent because they feared that free medicine was the first step towards a nationalized medical scheme. Most of the negotiation between McKenna and the federal council of the BMA was over administrative details. In these negotiations the BMA claimed "the right to judge" whether the form of administration chosen by the government was "likely to advance the efficiency of a pharmaceutical benefit scheme, or any other essentially medical scheme".[147] The doctors' fears of socialized medicine were fuelled by provocative statements from both the government and opposition. In pointing out that "times change", Arthur Calwell claimed that "the great days of the private practice of medicine are over here and in every other part of the world".[148] Menzies exploited the situation with his considerable rhetorical skills: "The ultimate objective of the Government is the abolition of private practice . The bill is just one step towards the achievement of that objective."[149]

When the scheme came into effect in June 1948 it was boycotted by the great majority of doctors. The federal council of the British Medical Association advised its members to stay outside the scheme and to refuse to accept delivery of the commonwealth formulary and prescription forms. An estimated 3,200 doctors, comprising over half the BMA membership, returned their formulary and prescription forms unopened to the ministry while most of the doctors remained outside the scheme. By early 1949, with only 117 doctors participating, Labor's free medicine scheme was an embarrassing failure. There was no possibility of co-operation from the medical profession whose attitude was, in Chifley's words, one of "conservatism and downright pigheadedness".[150] Consequently the government made the scheme compulsory by simply legislating that all prescriptions for items listed by the commonwealth formulary of drugs had to be made on commonwealth prescription forms. Since the formulary contained all the usual drugs that would be routinely prescribed, doctors were in effect forced to participate

in the scheme. The penalty for non-compliance was fifty pounds. In introducing this tough legislation Senator McKenna promised that regulations would be published to ensure the patients' right to reject formulary prescriptions and free benefits. In June 1949 this option was written into the Act, probably for the purpose of enhancing its validity in the ensuing High Court challenge.[151]

The federal council of the BMA challenged the constitutionality of the amended 1947 Act on the ground that having to write prescriptions on standard forms using standardized drug names imposed a form of civil conscription on the medical profession. Counsel for the plaintiff argued that doctors were forced to make their services available "under practical compulsion" or cease to practise their profession.[152] Attorney-General Evatt, appearing for the commonwealth, argued that the constitution had been amended for the very purpose of providing exactly the type of scheme being challenged. The constitutional amendment had approved "a great new power of social service" which Evatt said was entitled to be given a broad and liberal interpretation.

For the second time the Court overruled the Labor government's welfare scheme. Latham, Rich, Williams and Webb made up a majority which ruled that the compulsory prescription requirement of the legislation was a form of civil conscription and hence unconstitutional. Dixon, this time dissenting along with McTiernan, described the requirements regarding prescription writing as matters of "incidental character" and merely "the observance of formalities" Only Dixon and McTiernan gave careful consideration to the meaning of civil conscription, a term that was drawn from the wartime practice of conscripting civilians to work in war production and services. Dixon, whose dissenting opinion was a model of careful reasoning, rejected the majority's identification of civil conscription with compulsion of a trivial kind. He distinguished between regulation in which an incident of medical practice was stipulated on the one hand, and the compulsion to serve medically or to render medical service on the other. Only the latter could be called civil conscription in the sense proscribed by the constitution. Dixon said: "There is no compulsion to render this service. But there is a compulsion as to the formalities to be observed when the prescription is set down as a direction for the chemist. In strict accuracy I think it is not a medical service that is made compulsory."[153]

But the majority of the judges ruled unconstitutional the government's pharmaceutical benefits scheme, and in so doing registered a basic preference for private enterprise medicine and untrammelled professional autonomy. Latham relied upon a domino-style argument: if the government could regulate the writing of prescriptions, it could equally regulate a doctor's time and place of practice, class of patient and routine for dealing with patients—"the whole practice of a doctor could be completely controlled" [154] The reasoning of all four of the majority judges presupposed that doctors had an absolute right of free choice in their professional practice that could not be touched, even in incidental ways, by

government. The legislation was unconstitutional because it impinged upon some primordial right of contract between doctor and patient that was presumed to be protected by the constitution. As Williams put it, the legislation was unconstitutional because it required "a compulsory service to the Commonwealth for the purpose of the Act which is super-imposed upon the contract of the parties".[155]

The *Second Pharmaceutical Benefits* case was a triumph of positive individualism and professional autonomy over government regulation of the incidentals of medical health care delivery and its provision of a rather modest welfare scheme. In effect a majority of the Court were putting the professional freedom of doctors beyond even incidental regulation by the federal government. The right of doctors to prescribe in whatever form they chose was made constitutionally sacrosanct, whilst the Labor government's second attempt to introduce its pharmaceutical benefits scheme that had been popularly endorsed by the electorate and specifically provided for by a constitutional amendment was overruled by the Court.

The *Second Pharmaceutical Benefits* decision was handed down in November 1949 just before the Chifley government was voted out of office. By this time there were two significant changes in attitudes: of the press towards the Labor government and of Labor members towards the Court. Both had soured since the *First Pharmaceutical Benefits* case in 1945. Leading metropolitan dailies applauded the decision, blaming the government for attempting to socialize medicine, for authoritarianism, for being a bully and for attempting to evade the constitution.[156] It was reported that the Chifley government might make an issue of the High Court's obstruction of its policies at the coming election: "They could stress that they have been hamstrung by the High Court, and could introduce reform of the Court as an issue. A section of the Labor Party has been urging the appointment of lawyers with Labor leanings—after all Roosevelt packed the Supreme Court."[157] This did not occur. Chifley denied that Labor would pack the Court, and the Court's cloak of legal impartiality was publicly adhered to.

The Court as defender of private enterprise

The Australian Labor party had been formally committed to the nationalization of industry in one form or another from the very beginning. The 1890 platform of the Australian Labor Federation, the precursor of the Labor party, had as its first general objective "the Nationalisation of all sources of wealth and all means of producing and exchanging wealth" In 1921, after experimenting for several decades with less doctrinaire formulations of purpose, the party reverted to a full-blooded socialist statement of its objective as "the socialisation of industry, production, distribution and exchange" This was considerably muted by the Blackburn Declaration, an explanatory rider adopted at the same time reassuring

the party itself and the public that it did not seek to abolish private ownership of any property that was used by its owner "in a socially useful manner and without exploitation" [158] This remained the Labor party's stated objective in the 1940s. It had not previously been implemented nor had its constitutionality been tested before the High Court.

At the sixteenth Federal Conference of the Labor party in December 1943, when the tide of war was turning and after Labor's landslide victory at the 1943 federal polls, it was resolved "that a nation wide campaign for socialism be started immediately" This resolution was referred back to the federal executive for action, and in turn passed on to the state executives of the party.[159] Although little was done, the motion shows that large sections of the party favoured action on the party objective. The federal government's decision to nationalize interstate airlines was in part a response to this demand from within Labor party ranks.

While recognizing that the constitutional position was "most insecure" after the failure of the 1944 referendum,[160] cabinet nevertheless decided in 1944 to proceed with the nationalization of interstate airlines.[161] The decision was cleared with Drakeford, the minister for civil aviation, who was in America at the time. In reply to a wire from cabinet, Drakeford drew attention to the precarious constitutional position, but nevertheless supported a tougher line than cabinet had taken. Drakeford said "if air line services are to be nationalized, we should nationalize the lot", including intrastate as well as interstate services. Drakeford's reply also indicated that the party caucus as well as its federal conference had been pushing for implementation of the party objective: "A firm declaration of policy and intention on these lines ought, I feel, to satisfy Caucus that Cabinet has every intention of giving effect to party policy when conditions are favourable and will make success certain."[162]

The Airline *case and section 92*

The bill to nationalize interstate airlines was debated in parliament in the second half of 1945. With Australia on "the threshold of the Air Age", the Labor government wanted to secure this key growth industry as a public utility.[163] The practical alternatives for Australia, Drakeford claimed, were either a private monopoly or a government monopoly. Already one large company, Australian National Airways (ANA), dominated the industry. ANA was in turn owned by a consortium of shipping interests which in its own right was one of the most powerful transport combines in the country. Drakeford claimed that the shipping lines were killing two birds with one stone; they were extending their profit-making activities while at the same time ensuring that the new transport medium did not endanger their existing business. The Australian National Airlines Commission was to be set up with powers to acquire, establish and maintain air services subject to ministerial control. No new licences would be issued to private

operators, and the commission was empowered to take over existing interstate airlines.

Drakeford put up a bold front on the constitutional question. He said that the government presumed it had the necessary constitutional power over interstate air traffic to support its legislation despite charges in the press that, having lost the referendum which included a specific power over civil aviation, the government had neither the constitutional power nor a mandate to interfere with air traffic. Drakeford denied both claims and asserted that the federal government had always had legislative power over interstate air traffic. "Had the referendum been successful", he added, "this legislation would in all probability have covered intrastate as well as interstate airlines."

Menzies cleverly cut much of the ground from under Drakeford's reasoning and reduced the issue to the fundamental choice of state ownership versus private enterprise.[164] He explained that ANA had been formed by amalgamating smaller airlines at the suggestion and with the blessing of the UAP-Country party government in 1936. The then postmaster-general wanted a national airline to which he could award a national contract for carriage of mails. Menzies pointed out that the federal government already controlled "all existing airline operations, air routes and stopping places, fares and freights, time-tables and frequency of services, the rates paid for the carriage of mails, the safety of aircraft, the training of crews, methods of flying operations, air navigation, discipline and control" Why then did Labor want to nationalize ownership when it could control everything else? The Labor defenders argued that in either case there was a natural monopoly that would be run by professional managers and technicians. In such a monopoly situation the motive of private profit could not be expected to ensure the most economic service, or best serve the public good. The Liberals replied that the profit motive was the best incentive to efficiency and development and that the government could ensure that public ends were served by instituting appropriate regulations. The Liberals fondly referred to airline advances in private enterprise America, but failed to note that America was far more populous than Australia and supported a number of competitive airlines. The opposing positions of the Labor government and the Liberal opposition reflected different basic commitments; the opposition advocated the marriage of private enterprise and government regulation whereas the Labor government stood firm on public ownership and control.[165]

The constitutional validity of the Australian Airline Act was immediately challenged in the High Court by ANA, the emerging giant of the airline industry that, in Labor's estimation, was well on its way to monopolizing the field. Appearing for ANA, Garfield Barwick argued that the federal trade and commerce power, section 51 (i), was a power to regulate and not a power to prohibit or restrict. He argued that section 92 was imported into section 51 by the words "subject to this Constitution", and that it was a general qualification to all section

51 powers. Consequently, according to Barwick's interpretation, section 51 (i) should be read as a power "to make laws with respect to trade and commerce among the States but so that trade, commerce and intercourse among the States shall be absolutely free".[166]

The case turned on two major constitutional questions: (i) did the section 51 (i) commonwealth power over interstate trade and commerce allow the government to establish a monopoly over interstate air transport; and if so (ii) did section 92 prohibit such a monopoly? The five judges—McTiernan did not sit on the case because his father died on the eve of the hearing—answered both questions in the affirmative. Though they were unanimous in their holdings, each judge wrote a separate opinion.

None of the judges had any reservations about the plenary nature of the trade and commerce power or its sufficiency to support the creation of a government monopoly over airlines. Dixon's dismissal of the narrow interpretation of section 51 (i) is most interesting and seldom referred to by those critics who take his "strict and complete legalism" at face value. He rejected the narrow view of the trade and commerce power, that it was a power to regulate but not a power to prohibit or restrict, because such a view was grounded on a nineteenth-century, naturalist concept of trade. Paraphrasing Marshall's famous comments on the American constitution, Dixon said:

> It plainly ignores the fact that it is a Constitution we are interpreting, an instrument of government meant to endure and conferring powers expressed in general propositions wide enough to be capable of flexible application to changing circumstances. It confuses the unexpressed assumptions upon which the framers of the instrument supposedly proceeded with the expressed meaning of the power.[167]

Fresh from his sojourn in the United States as a wartime ambassador, Dixon was intent upon avoiding the pitfalls of the American Supreme Court in the 1930s when it interpreted the "due process" clause of the American constitution to safeguard the sanctity of contract and private enterprise. Because of the explicit words of section 92 in the Australian constitution, the Australian judges could uphold private enterprise by a more literal reading of the constitutional text.

The commonwealth's argument was based squarely on the *Transport* precedents, especially *Vizzard's* case that had allowed a New South Wales system of restrictive licensing of motor vehicles involved in carrying goods in interstate trade. The restrictive licensing was allowed in that case on the grounds that it facilitated and co-ordinated interstate transport. In this instance involving interstate airlines, the commonwealth's defence was stated as follows:

> So far as section 92 is concerned a monopoly could be granted, in the interest of efficiency, to one of the existing companies, to a Government, to anyone; therefore the Act is not obnoxious to section 92 merely because it is designed to give a monopoly to the Commission which it constitutes so long as the Commission provides adequate services.

> The only question is whether to do so may properly and reasonably be regarded as facilitating air transport.[168]

Latham was the only judge who considered this argument in his written opinion and he rejected it. He denied that the airline Act was for purposes of safety or efficiency, which might have been grounds for upholding the statute, on the basis that it introduced regular and orderly control into what otherwise might have been unregulated, disorderly and possibly foolish competition.

All the judges including Latham read private competition into section 92 and held that such private competition was to extend to the provision of airline services. In so doing they accepted the arguments of Sir Garfield Barwick who had made his reputation as an advocate in opposing the constitutional validity of national security regulations before the High Court, and had a keen sense of judicial attitudes that were then current on the High Court bench.[169] The Act contravened section 92, Latham said, because it was "directed against all competition with the inter-State services of the Commission" The most extreme identification of section 92 with free competition was made by Starke who said:

> The object of section 92 is to maintain freedom of inter-State competition—the open and not the closed door—absolute freedom of inter-State trade and commerce. An act which is entirely restrictive of any freedom of action on the part of traders and which operates to prevent them engaging their commodities in any trade, inter- or intra-State, is in my opinion, necessarily obnoxious to section 92.[170]

The Act effectively precluded everyone but the commission from engaging in interstate trade. Therefore the majority held that it contravened section 92 of the constitution.

Dixon and Williams distinguished this case from the *Transport* precedents which were the foundation of the commonwealth's defence. Dixon acknowledged that there was ample authority in the *Transport* cases for the proposition that the absolute freedom of section 92 was compatible with the regulation of individuals. He distinguished those cases from the *Airline* case, however, on the grounds that they dealt with means or implements of trade while the *Airline* case dealt with actual trade. In Dixon's view there was a "sharp differentiation between commercial dealings, or perhaps commercial and other intercourse, on the one hand, and, on the other hand, motor vehicles as means or implements used for that purpose and no more" [171] Dixon concluded that the Act concerned the carrying of people and goods interstate, and that such commerical carrying was intrinsically as much interstate commerce as the sale and delivery of goods from one state to another. That may well be, but so is the carriage of people and goods interstate by means of motor transport. In short, Dixon's distinction was not adequate to differentiate interstate road transport that the Court (with Dixon dissenting) had allowed governments to regulate restrictively, despite section 92, from interstate air transport that Dixon was here stipulating governments could not regulate. Having distinguished this case from the *Transport* precedents in this way, Dixon applied

the *dictum* of the Judicial Committee of the Privy Council that section 92 guaranteed "freedom at the frontier", and ruled that the airline Act violated such freedom.

If Dixon's distinguishing of the *Transport* cases was inadequate, that of Williams was highly contrived. He claimed that the *Transport* cases were distinct because they concerned state-owned roads. According to Williams, if interstate road carriers persuaded owners of private land on each side of the border to build a road on which to carry on their business, states could not interfere with such carriage without violating section 92. In the airline business the commonwealth could monopolize only aerodromes and navigation aids, said Williams, but not apparently air routes.[172] On that implausible basis the current airline case could be distinguished from the earlier road transport cases.

Rich's holding was the most straightforward and the least reasoned. He simply stated that the question of a statute's validity with respect to section 92 was a question of fact and in this case he was "unable to feel any doubt" that the airline Act violated section 92.[173]

The *Airline* decision reflected the dominance on the High Court of Dixon's private enterprise view of section 92, and the demise of Evatt's alternative view that would allow government regulation and control provided the flow of trade was maintained. This was the second great revolution in the judicial interpretation of this enigmatic section. The first had occurred twenty-five years earlier when Isaacs dogmatically asserted on behalf of a new bench of judges that section 92 bound only the states but not the commonwealth, and later that it protected "a personal right attaching to the individual and not attaching to the goods".[174] Dixon had taken over this notion that section 92 guaranteed an individual's personal right to free trade and applied it against the commonwealth as well as the states. Thus in Dixon's creative hands section 92 became a bulwark to protect private enterprise against the government's monopolizing the field. It could be used by the Court to block a federal Labor government's attempt to establish a public monopoly over any sector of the national economy that involved interstate trade.

In the *Airline* case the High Court overruled Labor's attempt to nationalize interstate airlines. The Court decided that the section 51 (i) trade and commerce power allowed the commonwealth parliament to set up a publicly-owned interstate airline but that section 92 prevented it from monopolizing the field. The result was the creation of the public airline, Trans Australia Airlines (TAA), and the continuation of the private airline, Australian National Airways (subsequently Ansett-ANA). The significance of the *Airline* decision extended far beyond the nationalization of interstate airlines, however, since it sanctioned an interpretation of section 92, that, if adhered to, precluded the nationalization of interstate industries per se. The Court had interpreted section 92 as a guarantee of free enterprise competition and individual trading and transport rights. It had read individual liberty and private enterprise into this section of the constitution and had thereby put Labor's socialization objective beyond the pale of the Australian

constitution. The subsequent *Bank Nationalization* decision of the High Court was a logical extension of the reasoning of the *Airline* case.

Most surprising of all, the Court made this highly political decision without disturbing its neutral, legal image. In reporting the decision, the *Sydney Morning Herald* said: "The Court has not passed judgment on economic and social policies, but on the legal aspects of the Constitution."[175] The Brisbane *Courier* agreed, insisting that "the Court's judgment had nothing to do with the case for or against nationalization of airlines. It was interpreting the Constitution."[176]

The State Banking *case (1947)*

Money, said Thomas Hobbes, one of the precursors of modern capitalism, is the lifeblood of a political commonwealth since it "goes round about, nourishing, as it passeth, every party thereof" [177] In early 1945 Chifley legislated to convert the national security regulations that had imposed central banking controls on the private banks during wartime using the defence power, into peacetime legislation. The Commonwealth Bank Act 1945 set up a central banking division within the Commonwealth Bank with powers to control the policies and activities of the whole banking system. The prewar independent bank board was replaced by a single governor directly responsible to the commonwealth government. The broad mandate of the central bank was set out in the Act in grand Keynesian terms: to pursue monetary and banking policies that would best contribute to

(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.[178]

At this point Chifley was prepared to settle for the full paraphernalia of central banking that had worked so well during the war, rather than impose nationalization that he had advocated in his 1937 Royal Commission dissent. He had avoided inserting provisions in the bill which were not essential for effective control, and which might have given rise to adverse propaganda and injured Australia's credit standing overseas.[179]

The banking legislation included two additional policies that were to prove especially contentious. The trading division of the Commonwealth Bank was to compete actively with the private banks for ordinary business; and public bodies could be required to bank with public institutions, either the commonwealth or state banks, at the treasurer's discretion. The former measure provided the ground for outraged cries of unfair competition from the banks. The latter measure triggered the challenge in the *State Banking* case (1947) and proved to be the Achilles' heel of the 1945 banking legislation.

Although the central control of the banking system that the Labor government was legislating was not so different from that being introduced in other countries

at about that time, there was a shrill response from the opposition and the private banks.[180] Menzies wanted a return to the old system of independent private banking. He relied on Keynes's earlier *Treatise on Money* that was now out of date—as one parliamentary interjector pointed out, Keynes had turned "a few economic somersaults" since that earlier publication.[181] Menzies called the banking bills a striking example of the government's desire to perpetuate "the servile state" in Australia long after the war emergency had passed. He predicted "slow strangulation of the private banking system in favour of a publicly owned and politically controlled banking system" Fadden claimed that the banking legislation was the first step to socialism.[182] He quoted Chifley's 1937 Royal Commission dissent that the best banking system for a community was one under national control, and that the Commonwealth Bank should be extended "with the ultimate aim of providing the whole of the services now rendered by private trading banks". Fadden also quoted the resolution of the 1943 Federal Labor Conference, the supreme policy-making body of the Labor party, directing the government to proceed with implementing the party's banking programme. That resolution had stipulated that the national security regulations regarding banking be translated into legislation so that the Commonwealth Bank be put "in complete control of the banking system" and that the Bank be made "subservient to the Government"

The private trading banks resented the Labor government's strict controls over their accustomed autonomy. They had submitted reluctantly to Chifley's wartime regulations and lobbied strongly against the 1945 banking legislation when it was before the House. This legislation required the private banks to transfer their wartime special deposits to new special accounts at the central banking division of the Commonwealth Bank. The seven major private banks advised the governor of the Commonwealth Bank at this point that their compliance with the banking law was not to be interpreted as acceptance or as establishing a contractual obligation to maintain such accounts in the future. As Chifley later stated in the House, "the private banks, obviously acting in concert and on legal advice, made it clear at that time that, while they were submitting to the legislation for the time being, they were reserving the right to challenge it at a suitable opportunity."[183]

There was no challenge to the constitutionality of the banking Act in the High Court until 1947 when Chifley moved to implement section 48, which empowered the treasurer to prevent private banks from conducting business for public authorities, including local governments that came within the legislative jurisdiction of the states. This contentious provision served two purposes; from a technical point of view it enhanced the capabilities of central monetary control, and as well it was a way of implementing Labor's preference for public rather than private enterprise. Section 48 was not implemented until 1947 because the Commonwealth Bank had inadequate facilities in Melbourne and Sydney where the bulk of such accounts were held.[184] When this was remedied, the governor of the

Commonwealth Bank approached the private banks in February 1947 and suggested that they should voluntarily transfer local government accounts to the Commonwealth Bank without requiring the treasurer to invoke section 48. The private banks refused with their spokesman, L. J. McConnan, pointing out that legal counsel had raised doubts as to the constitutional validity of section 48.[185] On 1 May 1947 Chifley informed some two hundred local government authorities, including the city of Melbourne, that an order would be issued under section 48 forbidding private banks from conducting their business as from 1 August 1947. This led the Melbourne city council to bring an action in the High Court to have the Banking Act 1945, or alternatively the controversial section 48, declared unconstitutional and the treasurer restrained from implementing it by an injunction.

The private banks were heavily implicated as "behind-the-scene" collaborators to the challenge. Melbourne was the acknowledged banking capital of Australia since it contained the head offices of five of the nine major trading banks.[186] The organization of associated banks at Melbourne was the key policy-making body for the private banking establishment and its "national mouthpiece" [187] The chairman of this body was L. J. McConnan, who was also the general manager of the National Bank. The Melbourne city council was a customer of the National Bank and was advised by the same firm of solicitors as the National Bank. As Arthur Calwell sarcastically pointed out, the solicitor for the Melbourne city council "happened, by the strangest coincidence in the world, also to be the secretary of the Victoria division of the Associated Banks of Australia" [188]

The hand of the private banks was also evident in the plaintiff's original statement of claim which challenged the whole of the 1945 Banking Act including the key sections 18 to 22, governing special accounts. These were the crux of the control mechanism, since they allowed the government through the central bank to control bank liquidity and advance policy. The plaintiff was going to argue that section 48 of the banking act was invalid on the ground that sections 18 to 22 constituted a law imposing taxation within the meaning of section 55 of the constitution, and consequently that any provision of the Act other than taxation was invalid.[189] This general attack was dropped, according to L. F. Crisp, because Chifley threatened that "if the private banks sought to emasculate essential provisions of the 1945 Acts, on whatever pretext or behind whatever 'front', he would go to the limit to sustain the basic purposes of that legislation".[190] The more general attack was dropped at the insistence of some influential private bank leaders, including McConnan, who were reluctant to challenge the determined treasurer head-on at this point, though the banks were apparently divided on the issue.[191]

Three states intervened in the case. Victoria, which at the time had one of its infrequent Labor governments, supported the commonwealth and the banking legislation, while the anti-Labor state governments of South Australia and Western Australia joined the private banks in supporting the challenge by the Melbourne city council. The intervention of Victoria against the Melbourne city council

indicates the extent of Labor solidarity, especially as Victoria had insufficient facilities of its own that might provide an alternative to the Commonwealth Bank for the city's large account. Thus the parties to the dispute were Labor and anti-Labor; the federal and Victorian Labor governments on the one hand, and the Melbourne city council backed by the private banks and two non-Labor state governments on the other. The real issue was public-versus-private enterprise, but the case was argued in standard commonwealth-versus-state categories of constitutional law. Again we see how a written constitution that is subject to judicial review can transfer an important political and public controversy from the realm of popular choice or political compromise to that of judicial decision making.

The High Court was unanimous in holding that the section 51 (xiii) federal banking power was a full-blooded power and that state banking meant the business of banking and not banking transactions to which the state was a party as customer. The banking power, section 51 (xiii), gives the Australian parliament power with respect to "banking, other than State banking; also State banking extending beyond the limits of the State concerned, the incorporation of banks, and the issue of paper money" Barwick argued on behalf of the Melbourne city council that the federal banking power allowed only the regulation of banking transactions and that state banking included, and therefore exempted from federal control, banking transactions in which a state or a state authority were customers. Either argument would, if accepted, have been sufficient to invalidate section 48 but neither was accepted by the High Court.

Instead, the Court, with McTiernan dissenting, brought back a modified version of the doctrine of implied immunities and held that section 48 was invalid because it discriminated against the states (Latham, Dixon and Williams), or that it violated an essential function of the states (Rich, Starke and Williams). Such state immunity from federal discrimination or violation of essential activities was implied by the basic nature of the federal system and operated to restrict commonwealth legislative powers including the banking power. Rich actually denied that there was any general implication in the framework of the constitution, probably for the sake of consistency with his 1920 *Engineers* opinion, but reached the same conclusion by simply stating that the constitution explicitly provided for the continued existence of the states.[192]

The majority holding was at odds with the spirit of the leading *Engineers* decision, as McTiernan emphasized in his dissenting opinion. Quoting extensively from the extreme reasoning of *Engineers*, McTiernan said:

> no implication of a restriction upon the exercise of Commonwealth legislative power is permissible if it is "formed on a vague, individual conception of the spirit of the compact" and is "not the result of interpreting any specific language to be quoted, nor referable to any recognized principle of the common law of the Constitution".[193]

Neither was the possible abuse of powers a valid reason for limiting the natural force of language. McTiernan could have emphasized the point, at the risk of

embarrassing the chief justice, by quoting Latham's *dictum* from the *Uniform Tax* case that even if the commonwealth destroyed the political independence of the states by using its taxing power to the limit, such a result could not be prevented by any legal decision since it was a political matter.

The Court's partial break with *Engineers* principles which had been applied in their full rigour only three years before in the *Uniform Tax* case reflected the dominant influence of Dixon. Dixon had not sat on the *Uniform Tax* case and had reservations about it.[194] The *Airline* decision was the culmination of a revival of a modified immunities doctrine begun by Dixon and Evatt in the 1930s. In *West's* case (1937) both judges had argued strongly that certain intergovernmental immunities were implied by the federal system. Dixon set out the principle that the constitution as an instrument of federal government implied that neither the commonwealth nor the states could use their powers to discriminate against the other, while Evatt said that neither the commonwealth nor the states could direct legislation towards the destruction of the normal activities of the other.[195]

The five judges who made up the majority in the *State Banking* case used both the Dixon and Evatt versions of the immunities doctrine: that a federal law could not discriminate against the states, and that a federal law could not violate an essential function of the states. Latham and Dixon relied upon the former principle of not discriminating against the states, while Rich and Starke relied upon the latter principle of not violating an essential function of the states, and Williams relied on both. The two versions of the principle are quite sound since the basic federal structure is the essence of the constitution. The problem is with applying these two variations of the federal principle to the legislation in question.

In this respect the Rich-Starke-Williams holding was implausible and illogical. These judges began with the sound federal principle that an essential function of a state, and a state instrumentality such as the Melbourne city council, was the right to manage its own funds, including a right of access to adequate banking facilities. But then these three judges assumed that a right of access to adequate banking facilities entailed, or was equivalent to, the right to use *private* banking facilities. In other words freedom of choice among private banks was assumed to be an essential part of the management of funds. Rich said this most explicitly: "the power freely to use the facilities provided by banks must be regarded as essential to the efficient working of government" [196] This assumption that the essential function of a state or a state instrumentality entailed free choice among pre-existing private banks lacked any constitutional foundation. The right to manage funds does include access to adequate banking facilities, but not necessarily to *private* banking facilities. If adequate services were available from a public institution, that would be sufficient. In the same way postal and telecommunication facilities are an integral part of modern administration, but that does not imply that for the essential functions of a state or state instrumentality to remain unimpaired by commonwealth legislation there must be freedom of choice among

competing private suppliers of such services. The adequacy of Commonwealth Bank facilities was never challenged in the course of argument before the Court or in the opinions of any of the judges. Chifley had given an assurance that adequate public facilities were available and that seems to have been universally acknowledged.

Dixon repudiated the absurd line of reasoning used by Rich, Starke and Williams: "The prima-facie rule is that a power to legislate with respect to a given subject enables the Parliament to make laws which, upon that subject, affect the operations of the States and their agencies." That was the essence of the *Engineers* case expressed as a legal proposition. In Dixon's view the *Engineers* rule was subject to reservations relating to the prerogative, to the taxing power and in this instance to discrimination against states. Dixon based this last reservation on an elaborate but moderate reformulation of federal implications and immunities.[197] He then held that section 48 of the banking Act discriminated against the states because they were "singled out and deprived of their freedom of choice which the existing system offered". Whereas ordinary citizens and corporations could use private banks, state authorities could not. Dixon did not assume that states had an absolute right to private banking; they had only a contingent right to use private banks if such existed. Dixon concluded:

> At bottom the principle upon which the States become subject to Commonwealth law is that when a State avails itself of any part of the established organization of the Australian community it must take it as it finds it. Except in so far as under its legislative power it may be able to alter the legal system, a State must accept the general legal system as it is established. If there be a monopoly in banking lawfully established by the Commonwealth, the State must put up with it.[198]

The *State Banking* case is far more significant for what it implied and what it provoked than for what it actually decided. The Court decided that the banking power was a broad and plenary power but that it was restricted by state immunities that invalidated section 48. There was no consensus on the extent of such state immunities and there were two different formulations of the immunities principle. But section 48 was not an essential part of Labor's banking controls. More significant was the Court's reliance upon a modified doctrine of federal implications and immunities. Though entirely valid and eminently sensible for interpreting a federal constitution, such a doctrine was at variance with the mainsteam of Australian constitutional jurisprudence since the 1920 *Engineers* case. It is significant that the majority of the Court, with the exception of the Labor judge McTiernan, chose in this case to revert to a doctrine of federal implications. This reaffirmation of a more balanced view of federalism was invoked to check a strong Labor government that was intent upon pushing federal legislative powers to the limits and utilizing the full scope that the *Engineers* decision had allowed. Why did it occur in this case? A plausible explanation is that the Court, unable in this instance to call upon section 92, needed a foundation for its decision that was not otherwise available in the explicit words of the constitution. This is but another instance

of the propensity of judges to create, adapt or revert to past interpretive theories in order to substantiate their decisions. The resurrection of the doctrine of federal immunities indicated the mood of the Court towards the Chifley Labor government; it was restricting the scope of the federal government's power and restocking its legal arsenal with an appropriate doctrine for such a purpose.

The key question of whether the federal government had power to nationalize banks was not at issue in the case and was not decided, at least not explicitly. The Rich-Starke-Williams position did preclude bank nationalization by implication because if the states had a sovereign right to use the facilities of private banks then quite clearly the commonwealth could not abolish them. Dixon and Latham deliberately left the question open while McTiernan's reasoning could easily be extended to permit bank nationalization. Dixon said a government monopoly in banking was not ruled out provided it were "lawfully established". This was still formally an open question.

The Bank Nationalization *case (1948)*

Chifley's immediate response to the *State Banking* decision was bank nationalization. Copies of the judgments in the *State Banking* case were immediately flown to Canberra where, after a couple of days of intense discussions, cabinet unanimously approved "that the Prime Minister and the Attorney-General prepare legislation for submission to the Parliamentary Labor Party for the nationalization of banking—with the exception of State Banks—making adequate provision for the protection of the shareholders and customers of the Banks and the staffs employed by the Banks."[199] Earlier in June before breaking up for the winter recess, the Labor caucus had authorized cabinet to take whatever steps were necessary as a result of the High Court's decision.[200] When Chifley subsequently presented the bank nationalization legislation, embodying "fundamentals of Labor policy to which every member here subscribes", to caucus, it was endorsed within twenty minutes.[201]

The Australian public was stunned. The *Age*, the least antagonistic of the major newspapers throughout this period, expressed "utmost astonishment" at Chifley's announcement of bank nationalization: "There was no need for it and no public demand."[202] Most of the other reaction from the anti-Labor side was far more extreme. Bank nationalization was branded a tactic of "Red totalitarianism" and "Socialist dictatorship".[203] Business leaders were outraged, pointing out that "a banking monopoly would give the power of life and death over businessmen", and claiming "control of banking will mean complete nationalization. Banking is the life blood of industry."[204] The polarization of Australian politics was complete with the Labor party and its union supporters closing ranks behind the Chifley government. The federal executive of the party congratulated the government on its decision.[205] The secretary of the Victorian branch of the Labor

party said that organized labour everywhere would enthusiastically support the decision: "The ALP's objective is socialism, and the decision is an important contribution to the objective."[206] Some hardline unionists went further, claiming that the banks should be nationalized without compensation.[207]

Why nationalization and why such a swift response? Crisp attributes the astonishing unanimity and despatch of the government to the ascendancy that Chifley had established over his colleagues by 1947 and the faith they had in his judgment.[208] Others have claimed that Chifley acted rashly and "out of pique" [209] Section 48 of the banking Act that was overruled in the *State Banking* case was not an essential part of the 1945 banking controls, and bank nationalization was not essential for controlling the private banks. Evatt had explained this to his colleagues: "The really important principle has not been challenged. We could do all we want without nationalization."[210] While Chifley's leadership, and perhaps his overreaction, provide part of the explanation for bank nationalization, the more important factor was Labor's purpose within the political circumstances of the time.

Chifley interpreted the successful challenge in the *State Banking* case as the first step in a piecemeal dismantling of the 1945 legislation at the instigation of the hostile private banking establishment. By nationalizing the private banks, the government sought to settle the issue once and for all by removing its potential challengers. The lesson that Chifley drew from the *State Banking* case was that a banking law that was within the federal Parliament's banking power could be invalidated by judicial interpretation of other sections of the constitution. The net effect, from Chifley's point of view, was as follows:

> The position which confronted the Government was that while doubts had arisen as to the constitutional validity of its banking legislation, there was evidence that the private banks were maintaining their hostility towards this legislation and were biding their time against a suitable opportunity to challenge it in the hope of throwing off the restraints they so strongly disliked.[211]
>
> The decision showed that full public control of banking as sought under the 1945 legislation could not be secured without public ownership of banking. The decision forced the Government to re-examine all the circumstances, constitutional and otherwise, surrounding the legislation of 1945.[212]

Whether rightly or wrongly, this was the way Chifley and his government understood the circumstances and consequences of the *State Banking* case. They could wait for a major challenge from the banks when it would be most opportune for the banks and most embarrassing for the government, or they could take the initiative and eliminate the potential challengers. They chose to do the latter. As Calwell bluntly put it, "the Government decided to finish the banks in their present form before the banks finished the people of Australia in another depression".[213]

More important than the circumstances that provoked the decision was Labor's socialist purpose. Unless one gives proper recognition to the Labor party's

socialization objective and Chifley's original preference for public ownership of banking, bank nationalization does not make sense. Labor was primarily a pragmatic, reformist party, but it did have a formal socialist objective which, for some Labor leaders like Chifley, provided "the light on the hill". Nationalization was the Labor government's ultimate weapon that it reverted to when less severe measures seemed ineffective. As Chifley explained,

> The Labor party has maintained for many years that, since the influence of money is so great, the entire monetary and banking system should be controlled by public authorities responsible through the Government and Parliament to the nation. On this principle the Labor party has held further that since private banks are conducted primarily for profit and therefore follow policies which in important respects run counter to the public interest, their business should be transferred to public ownership.[214]

Bank nationalization was completely in accord with Labor orthodoxy; Labor party members supported it immediately and unanimously because they did so instinctively.

Revisionist accounts, such as that by David Stephens, claim that Labor's bank nationalization decision was completely devoid of socialist intent.[215] For Stephens it was a pragmatic measure taken within a predominantly private enterprise economy for the purpose of making capitalism work more efficiently for welfare purposes: "There is a world of difference between nationalizing the banks as part of a collectivized economic system, as in Russia, and nationalizing them as a pragmatic measure within a predominantly private enterprise economy."[216] True, this was no Russian socialism but a socialist policy directed towards traditional Labor purposes. It is as silly to claim that Labor's bank nationalization was not socialist at all as it is to claim that it was doctrinaire socialism, as some critics of the right have done.[217] The truth is somewhere in between, as Evatt pointed out in a subsequent review of the issue:

> The major point is that Mr Chifley considered that his main aims in government, a full employment economy and a state providing social security in a free society, required full control over banking. Since, under the constitution as interpreted by the Court, the indirect method was of doubtful validity, he was prepared to stake all on the direct method. It would be as wrong to say he did this out of doctrinaire pedantry, as that he was opposed, as doctrinaires are, to socialization.[218]

Although directed only to Keynesian welfare ends, bank nationalization was one of the greatest challenges to capitalism that has ever occurred in Australia. It produced such a massive and concerted counteroffensive from the whole capitalist establishment that those who seek to impose the theory of hegemonic class rule on Australia take this as the prime example that supports their view.[219] The banks mobilized all their considerable resources of money and manpower to block nationalization and defeat the Labor government.[220] Menzies cleverly seized the opportunity to establish his own position and that of his newly reconstructed Liberal

party as the champions of establishment values and traditional Australian liberal democracy.

Bank nationalization was not only a lethal attack on a powerful sector of capital; it also threatened the sanctity of private property that is the economic foundation of liberal democracy. Menzies called bank nationalization "the most far-reaching, revolutionary, unwarranted and un-Australian measure introduced in the history of the Parliament". Menzies grasped the intimate relationship between individual liberty, business competition and the profit motive—in other words between liberalism and capitalism. An important part of liberty is liberty to seek profit and enjoy unequal property as the fruit of enterprise. Capitalism is an integral part of traditional liberalism and an important support for preservation of individual liberty. To attack capitalism is therefore to attack an integral part of traditional liberalism. Consequently in his defence of private banking, Menzies was not simply fighting for a privileged oligopoly but for the fundamental principle of political economy underlying liberal democracy. "Without the chance of profit and the search for profit", Menzies claimed, "the whole industrial expansion of the English-speaking world since the beginning of the nineteenth century would never have been accomplished." For Menzies and the Liberals, Labor socialism was a threat to the traditions and economic potency of the English-speaking civilization. This particular socialization measure was no example of "unpremeditated illegitimacy", but "the normal child of long-considered socialist policy".[221]

The first major victim of bank nationalization was the Cain Labor government of Victoria that fell in October 1947. The Legislative Council, described by the *Age* as "a conservative junta elevated to a position of trust by a restricted franchise", seized on the issue of bank nationalization and blocked supply.[222] The Cain government, which depended on the support of two independents, was forced to a general election. A leading role in the Legislation Council's tactic was taken by Sir Frank Clarke, a Liberal member of the council and also vice-chairman of the National Bank. He was dubbed by Labor Sir "Bank" Clarke.[223] The state Liberal party campaigned on the issue of bank nationalization while the state Labor party tried unsuccessfully to restrict the issues to state matters. Liberal leader Holloway declared in his policy speech: "there is one issue and one issue only—the nationalization of banking". He promised that "a Liberal Government will fight the Commonwealth at every turn. It will intervene in any litigation that may take place The banking legislation will be fought to the last ditch."[224] The Victorian Labor government of premier Cain was badly defeated by this close-knit alliance of the reactionary Victorian upper House, the private banks and the opposition Liberal party. Immediately after taking office Premier Holloway met with the premiers of the other non-Labor state governments of South Australia and Western Australia to draw up a concerted campaign against bank nationalization. These three states joined the private banks as co-plaintiffs in the *Bank Nationalization* case.

Immediately the cabinet decision to nationalize banks was announced, the banks retained Garfield Barwick who had successfully argued both the *State Banking* case and the *Airline Nationalization* case.[225] The banks also joined with the Liberal party in setting up a special private company which they liberally endowed with funds to cover the contingency of being taken over before they had a chance to initiate legal proceedings. Simultaneously the banks sought a restraining injunction from the High Court. Neither was necessary because the government agreed to allow time for a legal challenge before the legislation was invoked. Senator McKenna, the acting attorney-general in Evatt's absence, explained to caucus that a complete agreement had been reached by both sides for bringing the case to court "for a quick decision on the legal aspects of the Bill" as soon as the legislation received royal assent. McKenna "hoped that the whole case would be finalised both in the High Court and the Privy Council within a period of nine months".[226] As it turned out neither the courts nor the plaintiff would be hurried and the case dragged on for more than two years.

As soon as the banking Act received royal assent, the banks began legal proceedings, as had been agreed with the government. Dixon granted an interlocutory injunction preventing the Act being brought into operation until its constitutionality had been determined by the High Court. That was on 15 December 1947, but it was not until 9 February 1948 that the case was heard by the full bench of the High Court. The government's efforts to obtain a more timely hearing on the grounds that the legislation might be required for a possible economic emergency were turned down, and the judges took their summer vacation as usual.

Attorney-General Evatt argued the commonwealth's case before the High Court. His reply took up a record seventeen days of the thirty-nine-day hearing and stands as a monumental tribute to his faith in the power of his own reasoning and his conviction of the reasonableness of his interpretation of the limited scope of section 92. Regardless of its merits, Evatt's cause was quite clearly a lost one before the Court as it was then constituted, and none of the judges accepted Evatt's main arguments on section 92. Dixon rejected Evatt's proposed "volume of trade" test for section 92 as irrelevant and "a consideration of an economic and not a legal character" [227] During the hearing Starke and Barwick ridiculed an elaborate memorandum on banking that was submitted by Evatt as "more a lesson in banking and political economy than anything else" and "not a lawyer's statement but some sort of quasi-political document".[228] Even Latham and McTiernan who upheld the substance of the legislation did not rely on Evatt's interpretation of section 92, but on an artificial severance of banking from interstate trade and commerce.

The plaintiffs attacked the constitutionality of the banking Act on five grounds, listed on page 174. All the judges except Rich and Williams wrote separate opinions, but since they addressed themselves to the five grounds of attack, it is convenient to summarize their holdings in the following schematic form:

Judicial holdings: *Bank Nationalization* case

	Latham	McTiernan	Dixon	Starke	Rich and Williams
1. The Act falls under *no* head of *power*:					
(a) neither s.51 (xiii), a law with respect to banking;	X	X	X	X	✓ ✓
(b) nor s.51 (xxxi), acquisition for a lawful purpose.	X	X	X*	X**	✓ ✓
2. Acquisition, management and prohibition contrary to the *absolute freedom* of s.92.	X	X	✓***	✓	✓ ✓
3. Acquisition infringes *just terms* requirement of s.51 (xxxi)	partly		virtually all		✓ ✓
4. Infringes *constitutional integrity* of the states.	X	X	X	X	O O
5. Violates *Financial Agreement* between Commonwealth and states under s.105 A.	X	X	X	X	✓ ✓

X = rejected; ✓ = accepted; O = not decided.
* with reservations.
** s.51 (xxxix) needed as well to support takeover of bank liabilities.
*** prohibition only.

Rich and Williams held the banking Act unconstitutional on every count except the fourth, that it violated the constitutional integrity of the states. They did not find it was necessary to decide that question. Latham and McTiernan upheld the Act against every challenge except that it infringed "just terms" in some of its sections. Dixon and Starke agreed with Latham and McTiernan on all issues except the extent of infringement of just terms and the crucial question of section 92. Although Dixon and Starke both savaged large parts of the legislation with the flexible judicial weapon of "just terms", that damage was not irreparable, at least in principle. The crucial holding was the ruling on section 92 by the majority coalition of Dixon, Starke, Rich and Williams.

Despite the adverse views of the majority of the judges that had been clearly stated in the *Airline Nationalization* case, Evatt still persisted in urging his old interpretation of section 92, that it safeguarded "trade, commerce and intercourse among the States, not the trade exercised by an individual" [229] But the contrary interpretation of section 92 that Barwick put forward on behalf of the banks was now the favoured one. Barwick argued that section 92 guaranteed "the individual's freedom to move from place to place and to conduct his business across State lines" so that any direct prohibition or acquisition of such business by the state was prohibited.[230]

Starke, Rich and Williams all gave similar extreme interpretations of section 92 that blatantly presupposed a private enterprise economy. Starke was for restoring what he considered to be the literal meaning of "absolutely free"; that interstate trade "must be free from all restraints, hindrances, obstructions, interference and devices of every kind employed to interfere with that freedom".[231] Where Starke read private enterprise into section 92 by means of freedom of competition, Rich and Williams relied on a personal right of the individual freely to engage in interstate trade. They based this "individual right" interpretation on selective quotations from precedents, especially statements of Dixon such as the following: "The object of s. 92 is to enable individuals to conduct their commercial dealings and their personal intercourse with one another independently of State boundaries."[232] This earlier dissenting view from the *Gilpin* case was now the orthodoxy of the High Court majority. Rich and Williams even held the banking Act unconstitutional on the grounds that section 105A, the financial agreement with the states that left the states free to "borrow money for temporary purposes by way of overdraft", implied a right to obtain overdraft facilities from *private* banks.[233] Starke, however, dismissed this as "a hopeless construction".[234]

In his opinion Dixon went out of his way to distance himself somewhat from his enthusiastic disciples. He admitted that "juristically it is doubtless true that section 92 does not confer private rights upon individuals", and even allowed that "it may perhaps also be true that its purpose is not the protection of the individual trader" Nevertheless, Dixon's interpretation of section 92 remained essentially a free market one: "[I]t assumes that without governmental interference trade, commerce and intercourse would be carried on by the people of Australia across State lines, and its purpose is to disable the governments from preventing or hampering that activity."[235] Beneath his more sophisticated argument and more cautious formulation, Dixon's interpretation was basically the same as Starke's. Dixon dismissed previous sustained attempts at limiting the scope of section 92 as "expediency" in the face of "the apparently inflexible terms in which the framers of the Constitution chose to express a policy regarded as basal to the federation" [236]

The constitutional validity of the banking legislation that involved crucial issues of public policy and political economy was canvassed by all the judges in the language of strict legalism. On behalf of the Court, Chief Justice Latham first set out the customary judicial claim that the High Court was concerned only with legal questions and not with the merits of bank nationalization as public policy.[237] The judges used the techniques of legalism—conceptual definition, quasi-logical format, quotation of select precedents and formal dismissal of extra-legal considerations—to support their decisions. Yet in each case the operative premise of their opinions was a basic assumption about the meaning of section 92, or a personal preference in favour of private over public enterprise. The rhetoric of legalism also characterized the dissenting opinions of Latham and McTiernan, who

simply held that banking was not part of interstate trade, commerce and intercourse, and hence not caught by section 92. All the judges used the techniques of legalism to dress up basic judicial choices.

Latham was the least consistent. In the earlier *Airline* case he had ruled that nationalization of airlines was unconstitutional; in this case he held that nationalization of banking was constitutional. Latham surmounted this apparent inconsistency by means of his legalistic technique of characterization. Latham had ruled the airline Act invalid because it was a law directed against competing interstate services and hence contravened section 92. The bank nationalization legislation he found valid, however, because it was a banking law and therefore not part of the interstate trade and commerce that section 92 protected. These two holdings could just as easily be reversed without changing Latham's essential reasoning; it depended on how he chose to characterize the impugned legislation. Latham's judicial technique left him with the discretion to decide whether or not particular legislation was constitutional, more or less as he saw fit.[238]

The High Court's decision was announced on 11 August 1948, four months after hearings ended and a year after the Labor government's decision to nationalize banking. The response to the decision was predictable. Bankers, Liberals and newspaper editors were jubilant and the members of the Sydney Stock Exchange cheered the decision on the floor of the exchange. The Australian Council of Trade Unions deplored the fact that the constitution could so shackle a democratic parliament.[239] Putting on a brave public face, Chifley claimed a half victory; the legislation was a valid exercise of the banking power subject to some redrafting and except for the majority ruling on section 92.[240]

The truly astonishing political aspect of this great unconstitutional battle was that, despite the Court's earlier unfavourable decisions, the anti-Labor sympathies of the majority of the judges, and finally the adverse ruling in this key case, the Labor government kept up all the proper formalities of the respectful suitor at law. There were a few rumblings of deep discontent in the Labor camp, but these were the exception and were quickly scotched. One Labor backbencher caused an uproar in the House by suggesting that the High Court might delay its decision until the approach of a general election.[241] In fact that turned out to be the case with the Privy Council appeal, but it was the Labor government that insisted on taking the case to London. A second ugly incident was touched off by Speaker Rosevear when the legislation was before the House. Speaking in committee as the member for Dalley on the proposed court of claims that was to be set up to settle disputes over compensation, Rosevear attacked the requirement that he claimed had been imposed by an earlier High Court of appointing judges for life irrespective of their physical or mental capacity. Menzies righteously condemned this as "a wicked and monstrous attack on the High Court" and "a deliberate incitement of the foulest and most revolutionary element in the country". Spender accused the government of intending to pack the High Court by moving judges

to it from the court of claims which would have little work in the long term. McKenna then accused Spender of a "foul insult" to the government. Chifley, concerned that such outbursts might further antagonize the ill feeling towards his government, damped down the incident by insisting that his government's record in judicial appointments was impeccable.[242] This exceptional incident, and the Labor government's overall attitude, suggest how deeply entrenched were the public priorities for an apolitical legalism throughout the period.

Two days after the High Court decision came down, the government announced it would appeal to the Privy Council. As the government's critics pointed out, this was a last and desperate throw. A less conceited man than Evatt would have been deterred by numerous considerations against such an appeal. First, without a section 74 certificate from the High Court, the government's right to bring such an appeal was problematical. Although it agreed to hear the case in full, the Privy Council ended up ruling against the government on the grounds of lack of standing to bring such a case without a section 74 certificate from the High Court. Second, it was unlikely that the Judicial Committee of the Privy Council would overrule the Australian High Court. The Australian Court's tradition of sturdy independence was grounded in the constitution's severe restriction of appeals and had been established by the founder's Court at the very beginning. The Privy Council had learnt its lesson in 1907 when its contrary ruling on implied immunities was repudiated by the Griffith Court. Subsequently in the odd constitutional cases that came to it, the Privy Council usually adopted the reigning view on the High Court at the time. In this particular case it could hardly be expected not to endorse the dominant Dixonian view of section 92, especially as Dixon had a commanding reputation. Lord Denning would describe the next decade of Dixon's chief-justiceship as "the Golden Age" of the High Court in which "it established a reputation which overtopped even that of the House of Lords" [243]

From a political point of view, a Privy Council appeal meant considerable delay. Conditional leave to appeal was granted on 25 October 1948, but the hearing did not begin until 14 March 1949. Again the government's attempts to speed up the creeping pace of the legal process were unsuccessful. The hearings dragged on until June and judgment against the government was given on 26 July. The reasons were not released until 26 November 1949, the day before parliament rose for the general election in which the Labor government was defeated. Under a unitary system of government the banks would have been nationalized for two years; under the Australian federal system they had survived by winning a two-year court battle and were able to back a massive political effort to oust the Labor government at the next election. The Privy Council appeal ensured that this unpopular issue was kept at the forefront of public debate for the remainder of the Labor government's term of office.

In so prolonging the case by insisting on an appeal to the Privy Council, Evatt's

political judgment was shown to be poor. With only an outside chance of winning a spectacular victory, Evatt staked his own powers of advocacy. Although now president of the United Nations Assembly, he took twenty-two days out of an extraordinarily busy schedule to present exhaustive arguments for his government's position. The court Evatt addressed was a typical collection of venerable British law lords who had, on average, served twelve years as judges, including six years as lords of appeal. Porter, Simonds, Uthwatt, Du Parq and Normand were all aged sixty-five or more, while Morton and MacDermott were somewhat younger. All were Oxbridge educated except MacDermott who was a graduate and ex-faculty member of Queen's University, Belfast. All had straight professional law backgrounds except two. The Scotsman Normand had been an MP for West Edinburgh from 1931 to 1935 and solicitor-general and lord advocate for Scotland in that period. The Irishman MacDermott had been an MP in the Northern Ireland parliament from 1935 to 1944 and minister for public security and attorney-general during that period. Uthwatt had served on various public committees assessing war damages.[244] All in all, the composition and traditions of the Judicial Committee of the Privy Council ensured that the fate of bank nationalization would be decided in a technical and legalistic manner typical of such a body. Evatt's cause was not helped by the deaths of Uthwatt and Du Parq, the two lords said to be most favourably disposed to his position, during proceedings.[245] As one observer described it, "This quiet and dingy constitutional drama (so quiet that the lawyers' words can scarcely be heard: so dingy that the lights were necessary today at noon) [was] played out in the presence of a small but intense audience of banking and political interests."[246] Only the eminence of the actors and the spectators, who included Liberal premiers Holloway and Playford of Victoria and South Australia respectively, attested to the size of the stakes.

The case was decided on the question of whether an *inter se* question was involved. Evatt had argued that the question as to whether section 92 vitiated the banking power was not primarily an *inter se* dispute, that is one concerning the reach of a federal power, and hence that it did not require a High Court certificate to bring it before the Privy Council. The Privy Council rejected this argument, ruling that the case had originally raised a direct *inter se* question regarding the reach of the banking power. Such a ruling disposed of the case. But not content with such an easy and straightforward way out of an immensely difficult problem, the Judicial Committee went on to endorse much of the High Court's reasoning regarding section 92 and to add its own contradictory observations by way of *dicta*. It gave two reasons for taking up the substantive issue: first, the High Court might still grant a certificate (this was highly improbable) and the case had already been argued in full; and second, it wanted to correct some misapprehensions regarding its two previous *James* decisions that Evatt had drawn upon.

The Judicial Committee's argument, written by Lord Porter, closely followed Dixon's opinion in holding that banking came within section 92 because of the

controlling *James* precedents which, it said, established that section 92 protected individual freedom. Since the Act restricted individual bankers' interstate transactions, it violated section 92. Evatt's leading decision in the *Vizzard* case was praised, but this was small consolation for Evatt because it was not applied. In effect the Privy Council held that bankers were analogous to the fruit grower, James, who had been given protection under section 92 against government interference with private interstate trade, but were different from transport operators who had been denied such protection in the *Transport* cases.

In his famous dissents, the American Supreme Court judge Oliver Wendell Holmes Jr was wont to draw attention to the hidden major premise of his fellow judges who purported to overturn important social and economic legislation on the grounds that it violated the legal or natural meaning of the American constitution.[247] If one looks at the nub of the Privy Council's argument, one finds that the major premise is not too well hidden. The argument runs: "The test is clear: does the Act, not remotely or incidentally . but directly, restrict the inter-State business of banking? Beyond doubt it does, since it authorizes in terms the total prohibition of *private* banking."[248] Such reasoning is fallacious because "private" is slipped into the conclusion although it does not appear in the prior statement of rule. The question of whether bank nationalization restricts interstate banking cannot be answered in the negative from a process of logical deduction. The Privy Council succeeded in doing so only by smuggling private banking into one of its premises as the High Court had done before it. To find out whether the banking Act did or did not restrict interstate commerce, one would have to assess whether the service could be properly provided by a public corporation. Here some test such as Evatt's "volume of flow" would be relevant. But the Privy Council rejected the rationale of that test as "unreal and unpractical".[249]

The Privy Council attempted a general formulation of section 92 that bristled with vagaries and contradictions. "The problem", Porter wrote, "has been to define the qualification of that which the Constitution has left unqualified." So much for the orthodoxy of legalism and the interpretive doctrine of *Engineers*! Porter laid down two guiding principles to qualify "that which the constitution had left unqualified": that the regulation of interstate trade and commerce is compatible with its absolute freedom; and that section 92 is violated by direct and immediate restriction but not by indirect, consequential or remote impediments. But in subsequent comments Porter suggested problems with, and alternatives to, both the Privy Council's overall legalistic approach and its specific holding in this case. He admitted that "there cannot fail to be differences of opinion" because: "The problem to be solved will often be not so much legal as political, social or economic." Then he added this reservation:

> [T]heir Lordships do not intend to lay it down that in no circumstances could the exclusion of competition so as to create a monopoly either in a State or Commonwealth agency or in some body be justified. Every case must be judged on its own facts and

> in its own setting of time and circumstances, and it may be that in regard to some economic activities and at some stage of social development it might be maintained that prohibition with a view to State monopoly was the only practical and reasonable manner of regulation and that inter-State trade commerce and intercourse thus prohibited and thus monopolized remained absolutely free.[250]

"Absolutely free" may be compatible with indirect regulation, but it can hardly be consistent with prohibition and monopolization unless section 92 does not guarantee private freedom, as Evatt argued. Their lordships were having it both ways. In deciding the case they had rejected Evatt's position in favour of an extension of the *James* principle that section 92 guaranteed individual freedom; yet here they were allowing Evatt's principle if the circumstances were right. In effect, their lordships had asserted two incompatible principles. Further, they made no attempt to assess whether in this instance the "setting of time and circumstances" was or was not appropriate for a public monopoly. That would have entailed an examination of political, social and economic factors, as their lordships acknowledged. They would have had to take Evatt's arguments regarding the primacy of bank credit policy in the national economy and his proposed overall flow-of-commerce test more seriously. It seems that in order to avoid the difficulties involved in such an undertaking, the Privy Council, like the High Court, considered only "legal" matters.[251] The rhetoric and forms of legalism, however, barely cloaked a basic preference for liberal individualism. Judges cannot avoid making policy decisions simply by denying that they are doing so and using a language that tends to hide the fact.

Evatt's judgment as a strategist and advocate throughout the *Bank Nationalization* cases was poor. His assessment of what could be salvaged from his crushing defeat before the Privy Council was equally erratic. Writing to a New South Wales Labor colleague after the Privy Council's reasons had been published, Evatt claimed that the appeal, which had been supported by the state Labor governments of New South Wales and Queensland, had been "justified handsomely" He took the most favourable meaning that could be wrung from the Privy Council's contradictory statements about the meaning of section 92, so much so that Evatt thought he had turned the Dixonian tide: "I am of the view that these new principles will probably result in the Peanuts case being regarded as wrongly decided by the High Court so that the dissenting views expressed by Evatt, J., in the Peanuts case and Latham, C.J., in the Milk case would now be accepted."[252] Evatt's prediction could not have been wider of the mark. In the next decade the High Court completed the triumph of the Dixonian interpretation of section 92 by finally overruling the *Transport* cases. The Privy Council decision was a milestone on the way.

The Labor government accepted the High Court and Privy Council decisions because there was little else it could do. Time had run out and nationalization was an electoral liability. As the *Age* pointed out, the decisions upheld public

opinion.[253] The government therefore had to retreat to its more moderate 1945 central banking legislation and try to take nationalization off the immediate public agenda. That was not possible because the combined Liberal and capitalist forces had mobilized enormous resources behind the anti-socialist banner. Partly because they feared Chifley's dogged determination, and partly as an electoral ploy, Labor's opponents kept the issue boiling. A new Labor government would substitute "slow strangulation for the electric chair", warned Fadden; it would squeeze the private banks out of existence, predicted Menzies.[254] Anthony claimed that Chifley was determined to "break the banks" by any means he could find, even by packing the High Court.[255]

Although Chifley insisted again and again that a Labor government would never be party to any unconstitutional action,[256] there was enough vocal support for nationalization from the more radical members of the Labor camp to keep the spectre of socialism alive for years to come. The irrepressible Eddie Ward had boasted that "once the Labor movement has spoken, the fate of the banks is sealed" Even after the adverse court decisions, Ward insisted that bank nationalization could be brought about: "If the people continued to return Labor governments that are pledged to the nationalization of banking, why should not such a policy be put into effect"?[257] Ward was also the most outspoken public critic of the Court. A year later, from the opposition benches in the House, Calwell was still insisting that nationalization without compensation could still be achieved through the legal means of forcing the private banks out of existence through competition from the Commonwealth Bank.[258]

Ward may have been right about the politics of judicial review, that if the people continued to return governments that were pledged to the nationalization of banking such a policy would eventually be put in place despite the adverse decisions of the courts at this point of time. But he was wrong about the will of the people and the Labor party's persistence with an unpopular and increasingly irrelevant policy. As one Labor member put it, bank nationalization was "as dead as a dodo" after the court decisions.[259] A realistic view was given by McKenna on the last day of the parliamentary session when the Privy Council's reasons were published. McKenna said that the government "may not take any action that would have the effect of creating a monopoly for a government bank I may add that I find it difficult to conceive any activity that the Commonwealth could in fact nationalize, having regard to the decisions of the superior courts of this country."[260] Regardless of court decisions the federal Labor party has not since been in a position to test McKenna's judgment. After its crushing defeats in the 1940s and the successful implementation of central banking by the Menzies Liberal government, the Labor party has had neither the will, the opportunity nor the need to recontest the constitutionality of nationalizing the Australian banking system.

Labor's response to the concerted opposition against nationalization was

disappointing. Chifley had realized at the very beginning that bank nationalization would create an enormous storm and might well lead to his government's defeat. He warned the Labor caucus which endorsed the bank nationalization legislation in 1947: "It is beyond doubt that if this legislation is passed we may well pay a very high price and some members may be defeated, even myself."[261] On the other hand, Chifley was convinced that if Labor backed down on its basic policy to control banking the party was doomed.[262] This was for him the test of Labor purpose and principle, and the occasion for sharpening the focus of its direction. Addressing the Labor Federal Conference in 1951 as leader of the opposition, Chifley insisted that the Labor movement must have a clear understanding of its fundamental principles and a conviction to fight for them "whether they lead to defeat or victory".[263] Chifley was content to let the storm of opposition exhaust itself and use the ordinary forum of parliament to put the government's case. Perhaps he underestimated the effectiveness of the sustained media blitz that the banks and the opposition kept up. In any case Labor lacked the means and the media access to counter it. But as Lloyd Ross pointed out, the Labor party had done virtually nothing during the preceding decades to elaborate and defend its socialization policies.[264] For the most part, whenever Labor members had raised the socialization objective in public, it was to deny that it would be implemented. When the Labor government nationalized banking in 1947 the public and even many of its own members were totally unprepared. Consequently Labor spokesmen faced an unconvinced public and were virtually bankrupt of convincing reasons for justifying their action.

The Chifley government was defeated at the polls in December 1949. Its popular support fell almost five percent on 1947 figures and it won only forty-seven of the one hundred and twenty-one seats in the expanded House of Representatives. While bank nationalization was not the only issue in the election campaign, it was a major one and was blown into fearful proportions by the Liberals and their banking allies. Here is one Labor member's account:

> The Labor Party was on the defensive throughout the campaign. The money and propaganda against the Party was limitless. Bank officers in their hundreds organized and disrupted meetings and distributed anti-Labor propaganda. Parties and individual Liberal-Country candidates received financial support from the banks.[265]

Evatt said: "we lost the election on the Banking Bill. Chifley was right. If he had pulled it off we would have been out of our troubles. But the country was not ready."[266]

Because of the long-drawn-out court battles before the High Court in 1948 and the Privy Council in 1949, the Labor government was never able to implement its legislation and take banking off the national agenda. Had the Labor government been able to nationalize banks with the same despatch with which it took the decision in the first place, its fate in 1949 may have been different. But the Labor party was lethargic and fatalistic in the face of the immense forces it had stirred

to action. It could win only fourteen of the forty-seven new parliamentary seats it had created in the electoral redistribution. The Australian people were weary of wartime and postwar controls and susceptible to such opposition promises as the abolition of petrol rationing. Labor was swept from federal office and at the federal level spent the next twenty-three years in opposition.

5

Judicial Review as a Settled Routine 1950 to 1984

Introduction—Liberal ascendancy

For a third of a century, from 1950 until 1983, the Liberal party dominated Australian politics at the federal level. Menzies, who formed the modern Liberal party in 1944 from the remnants of the moribund United Australia party and the newly mobilizing anti-Labor groups, was prime minister for a record term of seventeen unbroken years.[1] Menzies originally consolidated his own leadership by welding the disparate but powerful anti-Labor groups into an effective political machine. In this he was given an immense fillip by the mobilization of business and conservative groups against Labor's attempt to nationalize the banks. Subsequently, Menzies shrewdly trimmed his government's policies to suit the long boom years of sustained economic growth. The string of electoral successes that kept Menzies's Liberal-Country party coalition government in office for so long was more or less guaranteed by steadily rising economic affluence and Menzies's clever exploitation of anti-Communist fears in the Australian electorate. Under Evatt's troubled leadership the Labor party split in Victoria in 1955 over Catholic "Groupers" versus Communists in the trade unions, and in 1957 in Queensland over the same issue combined with a bitter dispute between the Gair Labor government and the union movement.[2] Subsequent spoiling tactics by the splinter Democratic Labor party combined with Labor's own unimpressive and backward looking leadership to ensure that the Labor party remained on the federal opposition benches for more than two decades.

Unfortunately for the fortunes of the Labor party, by the time it had updated its leadership and its policies in the late 1960s and won office in 1972, the postwar decades of steady economic growth were coming to an end. The Whitlam Labor government that held office between 1972 and 1975, but did not control the Senate, was ill-prepared to deal with the severe economic recession that hit Australia in 1974. Consequently the Whitlam period of government proved not to be the beginning of a new era in "technocratic" and reformist Labor government, but only a brief interregnum of erratic administration and stormy politics.[3] Briefly in opposition, the Liberal coalition was able to shake off the lethargy of long and easy years in government, to find a tough new leader in Malcolm Fraser and to

adapt its policies and public rhetoric to suit the leaner economic conditions facing Australia in the late 1970s and early 1980s. By exploiting the sentiments of a cautious "new conservatism" in the electorate[4] and trading on memories of Labor's financial profligacy and inept management, the Fraser government won handsome electoral victories in three successive elections in 1975, 1977 and 1980.

The Liberal coalition only lost office in April 1983 when Prime Minister Fraser made several key strategy mistakes in calling an election almost a year before it was due.[5] The economy had declined alarmingly during 1982 but was expected to worsen by the end of 1983 when an election had to be held. Moreover, Labor's morale was low after the party failed to gain ground in the important Flinders by-election in Victoria. Despite bringing down an inflationary election budget in August 1982 and initiating an effective "wages pause" policy, the Fraser government dared not risk an election at that time because of damaging disclosures of the enormous scale of tax avoidance and evasion that had flourished during the recent years of Liberal government and with the connivance of some influential Liberal party backers, particularly in Western Australia. Ironically the disclosures came from the Costigan Royal Commission into the affairs of the notorious Painters and Dockers Union that Prime Minister Fraser had appointed to embarrass the Labor party with which the union was affiliated.[6] Early in the new year when this issue had been played out in the media, Fraser called a snap election to take advantage of renewed speculation that Bill Hayden's leadership of the Labor party was again under threat. Prime Minister Fraser's gamble backfired when the Labor party suddenly changed leaders at a special meeting of the shadow cabinet in Brisbane that coincided with Fraser's securing a double dissolution and general election in Canberra. Instead of Hayden, Fraser faced the popular new leader, Bob Hawke, whose media image and soothing message of consensus politics and national reconciliation captured the spirit of the electorate.[7] At the ensuing election the Labor party won a substantial majority in the House of Representatives, but failed to gain control of the Senate.

The Hawke Labor government was fortunate in coming to office just before Australia's economy began to improve quite remarkably. The rural sector recovered with the breaking of a crippling drought, while overall economic conditions improved in Australia due to the impact of an international economic recovery. To the chagrin of the Labor party's more radical left wing, the Hawke government has followed cautious and pragmatic policies. Through a "wages accord" with the trade union movement and tripartite consultative arrangements that involved big business as well as the unions in direct discussions with government, the Hawke government has established an impressive record of competent economic management.

Prime Minister Hawke called an early election in December 1984 to capitalize on his continuing high personal popularity and the good luck and proven competence of his government's administration of the affairs of the nation during

a period of economic recovery. The Hawke government was returned with a comfortable majority in the House of Representatives, but with a reduced popular vote and a proportionate decrease of seats in the enlarged House. Moreover, Labor again failed to win control of the Senate. Because of this setback, and also because within caucus the right and centre factions have the numbers to consistently outvote the left, the Hawke government's second term in office promises to be more cautious and unadventurous than the first.

Political leadership, party fortunes and electoral politics are the standard explanatory variables of pluralist political science and partly account for the Liberal coalition's ascendancy in postwar Australian politics. There are other deeper reasons, however, that are relevant to our present study of the politics of judicial review. Since Australia is a liberal democratic nation with a predominantly liberal political economy, as has been argued earlier, it is to be expected that a Liberal party can be the "natural" party of government provided it is astutely led and keeps itself attuned to both the moods of the electorate and the more substantial economic developments that occur in Australia as a consequence of its place in the larger capitalist world economy. A democratic socialist party, to the extent that it is truly socialist or even persistently reformist, will normally be at a disadvantage when peace, security and material prosperity abound. In such circumstances the tendency for an electorally successful modern Labor party is to become social democratic; to adopt progressive attitudes, small "l" liberal values and a firm commitment to technocratic management of an efficient public sector and the promotion of economic growth through a healthy private sector. The Hawke federal Labor government and the Wran, Cain, Burke and Bannon state Labor governments that have recently been elected or re-elected in New South Wales, Victoria, Western Australia and South Australia are all evidence of this phenomenon. In their essentials these modern Labor governments are little different from alternative Liberal coalition governments.

The consequences for judicial review of the dominance of Australian politics by the Liberal-Country (now National) party coalition are significant. Since the ruling political forces have been in character with the nation's institutional machinery of government, relative harmony has prevailed. Throughout the period, and with the partial exception of the Whitlam years, Australian politics have run smoothly within constitutionally appointed boundaries. The High Court made such incremental adjustments to the constitutional system as political need suggested and judicial discretion saw fit. This process of judicial review of the constitution occurred in an entirely routine fashion in response to the steady trickle of constitutional cases that came to the Court.[8] As a result judicial review functioned as a settled part of Australian politics for more than three decades and produced unexceptional overall results.

The broad lines of constitutional interpretation throughout the period reflected and continued the established trends of earlier years. Reviewing the quarter century

from 1951-76, Leslie Zines has rightly concluded that the High Court "viewed as a whole displayed no great changes of technique or shifts of approach" While noting that individual judges differed in emphasis and attitudes on a great number of points, Zines concludes that there has been "a general continuity of judicial method, of analysis, reasoning and argument".[9] Except for the traumatic dismissal of the Whitlam government which did not involve the Court, constitutional developments during the Whitlam years were also rather muted. There were some novel adventures with, and probings of, Commonwealth legislative powers, with the High Court's decisions being generally accommodating of the Labor government's initiatives and expansive in interpreting the Commonwealth's legislative powers. On the government's side, this was partly because the Whitlam government never controlled the Senate and was therefore severely constrained in its legislative programme, and partly because the Labor party had changed its economic policies and constitutional strategies since the Chifley days. On the Court's side, it was due to the composition of the Court which consisted of three Labor-appointed justices who generally upheld federal legislation and one or two of their "middle-of-the-road" colleagues who were often in agreement.

This chapter examines some of the more significant aspects and instances of judicial review during the long period of Liberal ascendancy and the brief interlude of Labor government under Whitlam. During most of this time there was little pressure on the constitution's allocation of legislative powers to the commonwealth and virtually no controversy about judicial review by the Court. During the Whitlam period the Court had to rule on innovative Labor schemes and interpret important machinery clauses of the constitution, but this only quickened the tempo of constitutional politics. Sir Garfield Barwick provoked a certain amount of political interest and controversy during his last years as chief justice, but that was largely diffused by his retirement in 1981 and subsequent judicious appointments to the bench made by the Fraser government. In the wake of the 1975 constitutional crisis and with continuing controversy over the Senate's powers with respect to appropriation bills and deep disagreement about the conventions of responsible government and the powers of the governor-general,[10] the High Court and judicial review are now among the more settled and universally accepted parts of the constitutional system.

Nevertheless there were important constitutional developments during this period. Moreover, the harmonious operation of the system and the uncontroversial character of judicial review are themselves significant political matters that require analysis and explanation. The chapter begins by looking at judicial appointments which explain a good deal about judicial decision making during the period, and ends with an analysis of the Tasmanian *Dam* case which was the first major constitutional decision of the Court involving the Hawke Labor government. This controversial decision marked a new plateau in the Court's incremental

centralization of formal constitutional powers that began with the 1920 *Engineers* case, but also exposed deep divisions among the High Court justices and showed how thin their accustomed disguise of legalism is becoming.

Judicial appointments

Once it is recognized that the High Court is a powerful political institution—adjudicating high-level disputes that produce winners and losers among federal and state governments and influential private interest groups, and shaping aspects of the political process and of public policy by interpreting the constitution in one way rather than another—the character of those who exercise such power becomes an important political consideration. Since judges are neither representative nor electorally accountable, the main routine political control over the composition and character of the High Court bench is through the power of appointment.[11] Once appointed, High Court judges have tenure and cannot be removed "except by the Governor-General in Council, on an address from both Houses of the Parliament in the same session, praying for such removal on the ground of proved misbehaviour or incapacity".[12] Under a 1977 amendment to the constitution, judges appointed since that time are required to retire on reaching the age of seventy years. Since judges are guaranteed tenure and independence until retirement, subject to removal under section 72(ii) on the ground of "proven misbehaviour or incapacity", the process of their appointment is highly significant.

According to the leading American political scientist Robert Dahl, writing in 1957 on the American Supreme Court, the power of appointing judges was the main way of ensuring "that the policy views dominant on the Court are never for long out of line with the policy views dominant among the lawmaking majorities". Dahl claimed that "it would be most unrealistic to suppose that the Court would, for more than a few years at most, stand against any major alternatives sought by a lawmaking majority" [13] Dahl backed up this claim with figures that showed on average a new judge had been appointed to the American Supreme Court every twenty-two months. President Roosevelt had to wait four years before making his first appointment, but subsequently appointed five new Supreme Court justices by the end of his second presidential term, and by 1941 eight new justices. In this way Roosevelt was able to remake the Supreme Court to bring it into line with the broad social thinking and policy views of his "New Deal" Democratic alliance that dominated Congress.[14]

Judicial appointments in Australia have not been seen in this way, nor have federal Labor governments been willing or able to use the power of appointing High Court justices to bring the Court into line with their policies. That is because the Labor party has been in federal office for less than a quarter of Australian political history and usually not for successive terms of office. Labor governments

have made less than a quarter of the judicial appointments to the High Court, appointing only eight of the thirty-four justices. Since Labor has been more the reformist outsider in Australian politics, and because the specialist bars, whence most Liberal appointees come, are not usually sympathetic to Labor's social and economic policies, federal Labor governments have either gone to their own party members (Evatt, McTiernan and Murphy) or to lawyers like Piddington and Powers who have been seen by the legal establishment as having less orthodox backgrounds or views for the bench.

Federal Labor governments have invariably found judicial appointments troublesome. The story of Hughes's 1913 "court-packing" plan that backfired when Piddington resigned in the face of scathing criticism from the bar associations and that of the furore over the Labor caucus's successful push to put Evatt and McTiernan on the court in 1930 have already been told. But in neither instance were Labor governments in office long enough to remake the Court, even if they had been game enough to try. The conservative appointments of Rich in 1913 to replace Piddington, and Webb in 1946 after Evatt had defeated the Caldwell-Ward "High Court Reconstruction" plan, both suggest that Labor appointments to the High Court are, as often as not, extremely cautious. Also it should be remembered that Prime Minister Scullin and Attorney-General Brennan opposed the Evatt and McTiernan appointments in 1930. Labor was unlucky not to be able to make any appointments through natural attrition during its "golden years" of office between 1941 and 1949. The six original judges who made up the Court in 1941 outlasted both the Curtin and Chifley governments. To make a single appointment in those eight years, Labor had to restore the size of the Court to seven. That period was quite exceptional because on average an Australian government can expect to appoint a High Court justice every third year. The average time since federation is twenty-eight months, since 1940 twenty-six months and since 1950 twenty-two months between appointments. But of course averages are an unreliable guide since judicial appointments are often bunched together.

Thus Dahl's American observations that the power of appointment is the main way of bringing the dominant policy views of the Court into line with those of the law making majorities have not applied to periods of federal Labor government in Australia. Labor has not been in federal office long enough to reshape the Court through routine appointments. Moreover because of the strongly conservative legal ethos in Australia, Labor governments have been more cautious in balancing their more controversial political appointments with other unexceptional ones like those of Rich and Webb, and more recently Jacobs. In this respect the Whitlam Labor government (1972-75) was typical.

The Whitlam government's appointments

The Whitlam government made two appointments to the Court, Kenneth Jacobs in January 1974 and Lionel Murphy in February 1975. Jacobs was a learned and

respected judge who had served on the New South Wales Supreme Court for fourteen years and was at the time president of the New South Wales Court of Appeal. Attorney-General Murphy who was responsible for the appointment selected Jacobs because of his learning and humane vision. Whitlam accepted Murphy's choice and cabinet agreed after some brief discussion about whether other possible candidates had been considered.[15] The attorney-general's views were accepted in this, and later in his own appointment. Murphy chose well because on the High Court Jacobs was sympathetic to the constitutional validity of whatever Labor legislation managed to get through the hostile Senate and was challenged in the Court. His judgments were notable for their "wisdom and clarity", as Liberal Attorney-General Senator Durack acknowledged on Jacob's premature resignation in 1979 because of ill health.[16]

Justice Murphy's own appointment and judicial style have been far more controversial. A vacancy was created by the death of Justice Menzies in late 1974. Murphy had been an innovative and a stormy figure throughout his political career. In the early days of the Whitlam government he had drawn an immense amount of criticism for staging an impulsive raid on ASIO headquarters in Melbourne to seize files that he suspected were being withheld from him by secret service officials. Despite his outstanding work in refurbishing the moribund Senate and as a law reformer, Murphy also had the reputation of being an impulsive politician and somewhat "accident prone" It was widely reported at the time that Prime Minister Whitlam was relieved to be rid of his stormy attorney, but it is also clear that Murphy chose his own exit from politics—or as Michelle Grattan put it, his transition to another phase of his legal career and his political career as well.[17]

Murphy had advised Whitlam that he wanted the position on the court; Whitlam agreed and put it to cabinet which accepted the decision. Murphy did not attend the meeting. The only opposition came from fellow New South Wales left-winger, Tom Uren, who was concerned about the gap that Murphy's appointment would leave for the left in cabinet.

Predictably the opposition and the conservative press reacted quite differently from the attorney-general's colleagues. Murphy was an articulate leader of the left wing of the Labor party, a committed and outspoken social reformer and a tough politician, qualities considered by his opponents to be unbecoming to a judge. In an angry response, opposition leader Snedden said he did not welcome Murphy's appointment because it had been made "for sheer political purposes" and would "lower the stature of the Court" [18] Both the *Sydney Morning Herald* and the *Age* sourly pronounced the appointment "a bad one" [19] A former attorney-general, Senator Greenwood, called it "an appalling example of political double-dealing" and "a scandal of the first order", while Premier Court of Western Australia said it showed Australia was "fast drifting toward the American situation where judges become the play-thing of political change".[20]

All these critics expressed concern that Murphy would sit on the half-dozen important challenges to Labor legislation that were scheduled to be heard in the forthcoming session of the Court. In all of this there was a good deal of political vindictiveness and dishonest posturing. As the *Canberra Times* realistically pointed out: "past appointments to the Court had been political and as all appointments are made by the government of the day, a balance in political ideologies is not a bad thing".[21] Geoffrey Sawer even said that Labor "should always make political appointments to the High Court" and "go for the 'bold spirits'".[22] The *National Times* sarcastically contrasted the fulminations of the conservative press against Murphy's elevation to the Court with its strange silence in 1964 when Menzies appointed Garfield Barwick, "an embarrassing member of his cabinet to chief judgeship" [23]

There were some nasty aspects to the affair. Justice Murphy was sworn in on Friday 14 February in Sydney and was due to sit for the first time in Melbourne on the following Monday. In one of its less illustrious convocations the Victorian Bar Association met for more than an hour and a half on Friday evening and debated whether to adopt a motion deploring Murphy's appointment. The motion read:

> That in order to maintain the prestige of the High Court of Australia as the principal appellate court of Australia and to ensure that the public have confidence in its decisions, it is essential that positions on that bench be offered only to persons who are pre-eminent within the legal profession and whose fitness for office is not a matter of public controversy.
>
> And that this meeting of the Victorian Bar expresses its regret that this course was not adopted in the most recent appointment to the bench of the High Court.[24]

The motion was finally defeated by 188 votes to 64 and Murphy was formally welcomed.

The New South Wales Liberal premier, Mr Lewis, threatened to carry through his resentment by breaking with postwar tradition and appointing a non-Labor senator to replace Murphy. He remarked ominously at the time that he was trying to precipitate a federal election by giving the opposition parties control of the Senate.[25] Lewis was to do exactly that with the consequences that he foreshadowed. Thus the Murphy appointment, because of the vindictive passions it aroused and the delicate Senate balance that it altered, led indirectly to the constitutional crisis in October and the sacking of the Whitlam government.

In his candid exposition of the law-making role of judges and his endorsement of the Court as a key agent of social change, Murphy has lived up to the fears of his conservative and traditionalist critics. Murphy's iconoclasm, activism and open reformism have ensured his reputation as a "radical" and "deliberate innovator" on the High Court, something his followers applaud but his critics deplore.[26] Murphy quite openly admits that judges make laws and, moreover, that they do so according to their own social values. At a National Press Club address in 1980,

Justice Murphy said: "One part of the role of a judge, especially a judge in the higher courts, is that he not only applies the law, he often makes or helps make it Judges used to pretend that they only interpreted the law, never made it. But the law-making role of judges is now openly accepted all around the world." This judge-made law, Murphy claimed, "represents the judges' idea of what is appropriate, ideas fashioned on the wisdom of their predecessors and adapted to meet changing conditions" Explaining this law-making role of judges further and specifically pointing his explanation to constitutional interpretation, Murphy was even more explicit:

> The influence of judges, especially in the higher courts on the development of those laws which most closely concern the citizen, is generally far greater than that of even most cabinet ministers. Whether this is good or bad it is a fact of life. In their law-making functions judges necessarily have to use some guidelines. I'm speaking for example of cases where the constitution or an Act of Parliament is not clear or where a novel case arises in the area of judge-made law. If a judge can find no guidance from precedent or logic what does he turn to? He turns to his own social values. No one seriously suggests that judges decide cases on party political lines but it is inescapable that they decide them according to their own broad social values It is really impossible to get a judge who does not bring his own social values to bear on the cases.[27]

When admissions like these are combined with Murphy's other statements about the Court being an agent of social change which should be responsive to contemporary public opinion, we have the Australian equivalent of an American activist-reformist judge like Earl Warren (US chief justice 1953-69). For instance, at his swearing in Murphy predicted: "many of the issues which affect the lives of our fellow Australians will be determined over the rest of this century by the application of the judicial process and judicial principle in this court".[28] Earlier, as shadow attorney-general at the conclusion of his argument before the High Court that eighteen-year-olds should have the right to vote at the forthcoming federal election in late 1972, Murphy stressed the Court's responsiveness to public opinion:

> In the end the courts do reflect the demands of the community. Right now the social climate is for widened commonwealth power, and I think the high court is beginning to recognise that. The highest court in English-speaking countries is so important socially and politically, that whenever it falls behind the current social outlook it becomes subject to criticism and fairly soon corrects itself.[29]

To ensure that the court remains responsive to, and representative of, current social values, Justice Murphy claims that two things are necessary: a balance in the selection of judges and informed public discussion of judicial decisions.[30] Both have been severely lacking in Australia, particularly during the earlier postwar decades of Liberal government.

Liberal appointments 1950 to 1972

Justice Murphy's controversial appointment and his radical views on the role of judges and the Court have been set out in some detail in order to highlight the opposite character of most other appointments to the High Court. Murphy summed up Australian appointment practices in this way: "no attempt is made to achieve any balance. With rare exceptions appointments are made of persons who can fairly be regarded as conservative or ultra conservative."[31] The reasons why there has been no attempt to balance judicial appointments, particularly in the post-1950 period, are threefold: first, nearly all the appointments were made by Liberal governments; second, the appointees have generally come from the very select group of leading barristers and Supreme Court judges in Sydney and Melbourne, and to a much lesser extent Brisbane; and third, the dominant orthodoxy has been that technical experts make ideologically neutral judges who perform an apolitical legalist function. In short, Liberal governments do not have to make controversial appointments to put on the Court judges who share their broad social values.

This was never more apparent than during the Menzies Liberal era which corresponded to the "Golden Age of the High Court" under the chief justiceship of Owen Dixon. The Menzies government made seven appointments to the Court, including that of Garfield Barwick as chief justice in 1964 after Dixon retired. Previously, in 1952, Menzies had made the obvious elevation of Dixon, his revered legal mentor, to the chief justiceship. During his prime ministership Menzies filled every position on the High Court except that of McTiernan, and the chief justiceship and one of the puisne positions twice over. All the Menzies appointees were eminent lawyers and none except Barwick had held political office. Barwick had been for years the pre-eminent leader of the Australian bar before he was handpicked by Menzies for the attorney-generalship and enticed into federal politics in 1958 with the offer of Liberal party endorsement for the safe Sydney seat of Parramatta. He became attorney-general and, after Casey's retirement in 1960 and the close 1961 general election in which the Menzies government barely hung on to office, minister for external affairs as well.[32]

Besides Barwick, all the other Menzies appointees were from the Sydney and Melbourne bars. Kitto, Douglas Menzies (a cousin of the prime minister) and Windeyer were leading barristers, while Fullagar, Taylor and Owen had also served on the Supreme courts of their respective states. Fullagar and Menzies came from Melbourne while all the others were from Sydney.

Appointments during the Menzies era were generally seen as apolitical and raised no controversy. Even Barwick's appointment as chief justice in 1964 was seen by commentators more as an escape from politics than as a political appointment to the Court. Because of Barwick's legal reputation, it was generally assumed that he would be the next chief justice if he wanted the job. There was a time earlier on when Barwick was considered a possible successor to Menzies, but his

political performance was not of that calibre. His final departure from politics was precipitated by Dixon's wish to retire and Barwick's own mishandling of Australia's relations with the United States over possible American involvement should Australia's troops in Borneo come under Indonesian attack. Barwick rashly claimed that America would be automatically drawn into any possible fracas between Australia and Indonesia through the obligations of the ANZUS pact. This led to evasive denials by officials of the Johnson administration which was becoming increasingly absorbed in the escalating Vietnam war, and produced in parliament a sustained and effective attack on Barwick's handling of the affair by the Labor opposition.[33] To relieve the situation, Barwick was forced by Menzies and the cabinet to make a quick decision on the chief justiceship, and when he accepted it to take up the position immediately. The Labor opposition, however, had no quarrel with the suitability of Barwick for such high legal office nor with the appropriatenesss of his appointment. Calwell paid this generous tribute to Barwick in the House:

> His political experience will add useful practical knowledge of the problems of administration to great legal attainments. He is the better fitted for his new duties for having been a politician and for the better understanding of popular opinion and public needs that only a parliamentarian can attain.[34]

Menzies's exit from politics in 1967 was particularly smooth since the Liberal coalition remained in office for a further five years. This allowed the successive Gorton and McMahon governments to replace four of the old Menzies appointees with judges of similar calibre and background. In fact all the four replacements were already judges: Walsh and Mason of the New South Wales Supreme Court, Stephen of the Victorian Supreme Court and Gibbs of the Federal Court of Bankruptcy and the Supreme Court of the Australian Capital Territory and previously of the Queensland Supreme Court. Mason, who had served as commonwealth solicitor-general for three years from 1964 to 1969, was the only one of these four judges who had worked professionally outside the narrow confines of bar and bench.

Hence for twenty years from 1950 until 1970 when the Queenslander Harry Gibbs was appointed to the High Court, successive Liberal governments appointed only Sydney and Melbourne judges and barristers. After the retirement of the previous Queenslander William Webb in 1958, the Court was entirely made up of judges from New South Wales and Victoria until 1970. Even the balance between Victoria and New South Wales was skewed severely in favour of New South Wales which had either five or six judges on the Court between 1958 and 1972. The appointments of Gibbs and Stephen in the early 1970s reduced the New South Wales representatives to four, but with Labor's appointment of Murphy to replace the Victorian Menzies in 1975 the number of New South Wales judges again rose to five.

Reaction to this predominance on the High Court of New South Welshmen and the total exclusion of South Australians, Western Australians and Tasmanians had been building for years. The Murphy appointment was for many the last straw. If judicial appointments were to be political, as in a sense they must be since they are made by the government of the day, then they should at least reflect something of the politics of federalism. At least that was a common response that Murphy's appointment provoked. The conservative *Australian Law Journal* branded the resultant "disproportionate preponderance of New South Wales judges, five out of seven, without representation of the three non-Eastern states . objectionable . and . . a mockery of Federation" It questioned whether such a High Court could be "regarded as a truly 'Federal' Court?"[35] The Queensland government announced that it would seek ways and means in which the state could participate in future High Court appointments.[36] Meanwhile a special committee of the non-Labor New South Wales Legislative Assembly was set up to inquire into the appointment of judges. This committee rejected the practice of making no appointments from the three smaller states: "We cannot and do not accept the proposition that the bar and the Supreme Court bench of South Australia, Western Australian and Tasmania are chronically incapable of producing a candidate well fitted for High Court appointment."[37] As a result of such pressures from the states, the Fraser government changed the appointment procedures when the Liberal coalition returned to office in December 1975.

The Fraser government's appointments: consultative procedures and a more balanced court

After the dismissal of the Whitlam Labor government in November 1975, the four non-Labor state governments of New South Wales, Victoria, Queensland and Western Australia met as a council of states and, as one of their demands of the new Fraser government, asked that they be consulted in judicial appointments.[38] The question of the states' participation in High Court appointments had been before the Australian Constitutional Convention from its first plenary session in 1973. At the fourth plenary session of the convention in Perth in 1978 a motion advocating state participation was endorsed. The attorney-general, Senator Durack, a West Australian, accepted the principle of consulting with the states and in 1979 had that requirement enshrined in federal legislation.[39] This change to the formal procedures of appointing justices to the High Court was due to the backlash against Whitlam-style centralism and also a reaction against the previous practices of postwar Liberal governments. It reflected the Fraser government's more sensitive commitment to "co-operative federalism" and the influence of the state governments, particularly of Western Australia and Queensland, on the Fraser government.

Immediately these new consultative procedures had been given legislative endorsement, the Western Australian solicitor-general, Ronald Wilson, was appointed to the High Court to replace Jacobs who resigned in May 1979. The

Western Australian premier, Charles Court, greeted the appointment as the"first fruit of the new consultative procedure" that he had been pushing for years. This was "an event of historic importance". Court said, because it remedied the Court's historical lack of "a precious asset—the perspective of the less populous but equally important member States of Federation".[40] In rather poor taste the deputy Labor leader, Lionel Bowen, claimed that the appointment of a West Australian with such conservative views on constitutional matters was clearly made by the West Australian government: "The Attorney-General, Senator Durack, has meekly complied with the demands of his State Premier", Bowen claimed.[41] While the attorney-general denied this charge, it was clear that the new procedures and the influence of Western Australian Liberals on and in the federal government had been significant factors in Wilson's appointment to the Court. At the same time Wilson was a strong candidate for appointment, being the senior solicitor-general at this time and a very experienced counsel before the High Court.

In its next appointments when Chief Justice Barwick eventually retired in February 1981, the Fraser government favoured two Queenslanders. Harry Gibbs was elevated to the chief justiceship while Gerard Brennan was appointed to the vacant position on the court. Again, though the state of origin may have been a consideration in these two appointments, both men had excellent credentials for their respective positions. Gibbs was the senior puisne justice on the Court, and was described by one commentator as "a consensus man" who would make "an outstanding Chief Justice".[42] Unlike the assertive Barwick, who liked to refer to himself as "Chief Justice of Australia". Gibbs at his swearing in described the chief justice as "only first among equals in the work of the court" Gibbs had a much lower public profile than Barwick and could be expected to take a more collegiate approach to the office. Gibbs also expressed a more flexible, although still cautiously conservative, approach to the role of the Court. Whereas Barwick had defended a rigidly literalist view of judging in his farewell speech, Gibbs at his swearing in allowed that the Court should "develop the law in a way that will lead to decisions that are humane, practical and just" He added, however, that "it would eventually be destructive of the authority of the courts if they were to place social or political theories of their own in place of legal principle".[43] Labor's shadow attorney-general, Gareth Evans, was less kind than most in describing Gibbs as "a safe, stop gap choice" and "a competent, uncontroversial and thoroughly unimaginative Chief Justice".[44]

Brennan's appointment was universally acclaimed. He had been appointed the first president of the Administrative Appeals Tribunal when it was set up in 1976 and had pioneered its working procedures. He had also been a judge of the new Federal Court of Australia since its inception in 1977. Even opposition spokesman Evans was lavish in his praise of Brennan as "a first class lawyer, a thoroughly humane and charming man, sensitive on civil liberties issues and well alive to the larger social and economic implications of the constitutional decisions the court

has to make."[45] Brennan's appointment was a key one since, as the *Age* noted, "the distinctive role of the Chief Justice is largely symbolic", and Gibbs was already on the Court. Brennan's appointment was something of a surprise since he did not fit the typical prototype of a Liberal appointee. As the *Age* explained:

> Conservative Governments in the past have generally chosen conservative judges, men whose professional career has been spent acting for big corporations and such individuals as can afford their fees. This time a Liberal-NCP Government has chosen the son of a Labor politician, a former member of the Law Reform Commission, a barrister who often cut his fees to serve Aboriginal clients, and a man of pronounced social conscience. It is a remarkable appointment for a conservative Government to make, and the Fraser Government deserves full credit for it.[46]

The appointment of Gibbs and Brennan reflected astute statesmanship on the part of the Fraser government. Barwick had politicized the chief justiceship by formally sanctioning Sir John Kerr's dismissal of the Whitlam government in 1975. In doing so Barwick had used his high judicial office in a partisan political way. He supported his own and Sir John's unprecedented actions by subscribing to a novel reading of the executive sections of the constitution and by both downgrading and altering the basic conventions of responsible government.[47] Moreover, during the late 1970s under Barwick's leadership, the High Court's public image had become tarnished because it was seen to have been partly responsible for legitimating highly artificial tax avoidance schemes that spawned a whole professional industry of public cheating and cost the government billions of dollars in lost revenue.[48] The crusading commitment to economic libertarianism and sharp advocacy that Barwick had built his professional reputation upon and carried over to judicial office appeared more objectionable as their deleterious consequences became obvious in the late 1970s and early 1980s. The new chief justice and the new judge were seen as something of a corrective antidote. Again, as the *Age* put it:

> The new appointments will enhance the standing of the High Court in the community. They may also enhance the quality of its judgments. Sir Garfield Barwick was a formidable ideologue of economic libertarianism, the kind of individualism that concerns itself mainly with such freedoms as the freedom to make money. Sir Garfield's thinking influenced the court in a number of judgments involving tax avoidance and business regulation which caused real damage to Australian society. Our present problems with tax avoidance, for instance, stem largely from the court's refusal to uphold the plain meaning of the law which declares it illegal.[49]

The changes in the Court's personnel were expected to reorientate its work in this sensitive area and restore its credibility with large sections of the community.

The other important political aspect of the Gibbs-Brennan appointments was the fact that Robert Ellicott was passed over. Ellicott was minister for home affairs at the time, having resigned the attorney-generalship in 1977 after being prevented from further harassing former leading Labor ministers, Whitlam and Murphy, over conspiracy accusations in the Loans affair that had triggered the political

downfall of the Whitlam government. It was Ellicott who as shadow attorney-general in 1975 had first expounded the novel doctrine that a government that did not have the confidence of the Senate in the matter of supply must either call an election or resign or be dismissed by the governor-general. Before being enticed into politics by the Liberal party, and winning the federal seat of Wentworth in 1974, Ellicott had been the commonwealth solicitor-general from 1969 to 1973. Few questioned Ellicott's ability to be a judge on the High Court or even chief justice. Writing in the *National Times* Paul Kelly and David Marr said: "Ellicott would be a young, vigorous and relatively innovative chief. These are his qualities as a minister. Ellicott has long displayed a concern about individual liberties."[50] As attorney-general Ellicott had been a reformer in administrative law, he was committed to Aboriginal land rights and was considered a centralist since his days as solicitor-general. All these qualities should have made him acceptable to the Labor opposition if it had not been for his partisan role in ousting the Whitlam government in 1975, and subsequently his desire to facilitate the prosecution of Labor ex-ministers for their actions while in government.[51]

The Labor party had been trying to settle scores from 1975 for some time. In 1980 it had launched an attack on Chief Justice Barwick for alleged irregularities in a family company, Mundroola Pty Ltd, of which he had been a director until 1974. The company had apparently failed to lodge annual returns with the Corporate Affairs Commission. Opposition leader Hayden signalled that public confidence in the chief justice would be an issue at the next election. Gareth Evans eagerly led the charge in the Senate and called for a parliamentary inquiry into Barwick's affairs.[52] The "Mundroola affair" proved to be much ado about nothing and soon fizzled out. But it did show that Labor's 1975 wounds were still tender and that the party was prepared to use partisan political tactics to undermine public esteem for high legal offices that were held by its opponents. As Barwick's retirement approached, Labor politicians turned their attack on Ellicott who was widely tipped as his successor. The New South Wales Labor attorney-general, Frank Walker, made a scathing attack on Ellicott in late 1980 with these remarks:

> His disgraceful conspiratorial role in the events that led to the sacking of the Whitlam Government . has made him a figure subject to much public hatred, ridicule and contempt. It would not be possible for any reasonable State Government to contemplate the appointment of Mr Ellicott to the High Court.[53]

Ellicott's prospects for the chief justiceship might well have weathered the storms of Labor's opposition had it not been for additional strong opposition from the non-Labor states. Towards the end of 1980 it was reported that both Queensland and Western Australia were strongly opposed to Ellicott because of his "centralist" stance as solicitor-general and attorney-general.[54] By mid-January 1981 when Barwick's retirement was announced, Tasmania had been added to the list and there were now said to be five states in "violent opposition" to Ellicott's

appointment.[55] Influential papers like the *Age* warned: "To appoint an active politician as its chief—particularly a politician who was one of the architects of the divisive constitutional crisis of 1975—would invite the public to see it as a stacked court" and as "a job for one of the boys".[56] It can be seen from this example how the new consultative procedures have complicated the occasional practice of Australian governments of appointing practising politicians to the High Court.

There are two stories about the cabinet meeting that made the appointment decisions. One from the *Age* has it that cabinet discussed appointing Ellicott to replace Barwick, but that despite "strong support" from Prime Minister Fraser, most ministers though that his appointment would "damage the standing of the High Court" It is claimed that Ellicott was then called into the cabinet room and offered the puisne position which he refused.[57] The more likely account is that by this time, because of all the media speculation and bitter opposition against Ellicott, there "was no question of his being offered the Bench job" The same report claimed that Ellicott had been offered a seat on the High Court bench the previous year but had refused, "preferring to gamble on getting the top job".[58] In a surprise move a few weeks later Ellicott resigned from the Fraser ministry and took a judicial appointment to the Federal Court bench.[59] He was said to be disillusioned with politics and to be positioning himself for subsequent more senior judicial appointments. Apparently disillusioned by the bench, however, he resigned from the Federal Court in early 1983 and returned to private practice in Sydney.

As was expected, Gibbs's appointment as chief justice depoliticized the Court. Prime Minister Fraser carried the post-1975 healing process a step further the following year by announcing the appointment of Sir Ninian Stephen, senior puisne justice of the High Court, to succeed Sir Zelman Cowen as governor-general in July 1982.[60] Aickin's death in June 1982 created a second vacancy on the court at the same time. The two new appointees were William Deane and Daryl Dawson. Deane was an eminent Sydney barrister who had been appointed to the New South Wales Supreme Court in early 1977, and within a couple of months to the Federal Court of Australia. He had also been president of the Trade Practices Tribunal. His qualifications for appointment to the High Court were as obvious as those of his Federal Court colleague Brennan who had been appointed the previous year. Deane's appointment was balanced by that of the Victorian solicitor-general Daryl Dawson. As solicitor-general of Victoria since 1974, Dawson had developed a national reputation as a conservative states' righter, particularly early on in that office when he vigorously opposed the Whitlam government's centralist policies.[61] It was reported at the time that five out of the six states supported Dawson's appointment.[62]

Trends in appointments 1950 to 1984

In summary, judicial appointments in the post-1950 period continued, and carried to an extreme, the earlier practice of appointing to the Court legal specialists who lacked broader public or political experience. All eleven appointments that were made by successive Liberal coalition governments between 1950 and 1972 were of Sydney or Melbourne judges or leading barristers, with the sole exception of Gibbs who had served a comparable apprenticeship at the Queensland bar and on the Queensland and specialist federal courts. None of these men had political experience except Barwick, and none had served in a public law position except Mason, who had been Australian solicitor-general for three years. All had been successful barristers who had risen to the top of their specialized profession in the large and lucrative metropolitan centres, predominantly Sydney and Melbourne. Their qualification for appointment to the High Court was technical legal expertise as measured by individual professional entrepreneurship in servicing mainly corporate and wealthy litigants.[63] What better preparation could there be, one might ask, for ensuring the exacting technical competence required of High Court judges? At the same time, by happy coincidence, what better way of guaranteeing that the broad policy views dominant on the Court—limiting government under law to the federal division of legislative powers as interpreted by the Court, and protecting individual and private property rights—would be in line with the policy views of Liberal governments. The ruling Liberal coalition was in the fortunate position of being able to make seemingly "apolitical". or at least uncontroversial, appointments that were completely in accordance with its basic political goals.

The political requirements of federalism, however, had not been satisfied. Reaction had been building and was brought to a head when the Whitlam Labor government appointed two more justices from Sydney, particularly as both were progressive centralists, and one was Labor's forceful and controversial attorney-general, Lionel Murphy, who had gained his seat on the High Court bench through politics rather than normal legal promotion. Subsequent changes in appointment procedures brought in by the Fraser Liberal government produced a greater balance in the state of origin of subsequent appointees to the Court. There are now three judges from New South Wales, two from Queensland, and one each from Victoria and Western Australia, comprising the most federally diversified Court in Australian history.

The other significant change in appointment patterns in recent years has been a marked swing away from bar and bench experience in Sydney and Melbourne which was for decades the typical career route to the High Court. In recent appointments experience either in federal institutions, particularly the new Federal Court of Australia, or public law positions in the states has been favoured. This new trend reflects on the one hand the growing size and significance of the Federal Court of Australia, and on the other hand the support of state goverments for state solicitors-general who have served their own states and developed reputations

with other states through the formal and informal networks of that office. All the current members of the High Court have either had experience in a federal institution or as state solicitors-general. Wilson and Dawson were both state solicitors-general for a considerable period immediately prior to their appointments – Wilson of Western Australia for ten years and Dawson of Victoria for eight years. The five other judges all had prior experience in federal institutions: Murphy as attorney-general, Mason as solicitor-general, and Gibbs, Brennan and Deane on federal courts.

These recent trends in High Court appointments suggest that the Court is coming to be seen less as a private law appellate court and more as a public law "Federal Supreme Court", as section 71 of the constitution describes it, with the qualification for appointment being specialized service with a federal institution or as a state solicitor-general. This is a reflection of the politics of federalism; the federal government which makes appointments favours those who have served in some federal capacity, while the states, now entitled to be consulted, prefer those who have served the states directly as law officers. While the High Court has been politicized to this limited extent, it remains the preserve of specialist lawyers rather than public figures or leading politicians. Since the initial appointments of five of the founding fathers to the first Court, only five lawyer-politicians have ever been appointed (Evatt, McTiernan, Latham, Barwick and Murphy) and only two in the last fifty years. The Murphy and Ellicott experiences in recent times indicate that the appointment of practising politicians remains highly controversial and will be strenuously opposed by powerful elite groups. Thus the extreme partisanship of Australian politics combined with its conservative legal ethos have ensured that the High Court remains a court of lawyers who are apolitical in any partisan sense, but who are now more publicly orientated through prior service within the federal jurisdiction or as state law officers.

The "Golden Age" of the High Court

Chief Justice Dixon was reputedly Australia's greatest judge, and the period of Dixon's chief justiceship was the most eminent that the High Court has ever enjoyed. This has been attested in glowing terms by a wide range of commentators. Lord Denning in 1975 described the 1950s and early 1960s when Fullagar (1950-61) served on the Court and Dixon was chief justice (1952-64) as the "Golden Age" of the High Court when it "established a reputation which overtopped even that of the House of Lords" [64] The *Australian Law Journal*, in a tribute published on behalf of the Victorian Bar Association on Dixon's death, was no less modest in its claims:

> In the fifties the work of the court attained a standard of excellence that gained for

> it the reputation of being the finest court of law in the English-speaking world. Possibly there had been no stronger court since the Courts of Common Pleas under King's Bench in the third quarter of the last century. Under Dixon's presidency subtle yet perceptible changes occurred in the manner and method of the court's proceedings, and his own work provided a touchstone for his colleagues. Though aged 66 when he assumed office as Chief Justice, Dixon was at the height of his powers, and his judgements, more concentrated in style than they had been before the war, had a profundity without example since the death of Willes.[65]

Barwick, Dixon's successor as chief justice in 1964, praised Dixon's subtle yet effective leadership of the Court (something Barwick himself failed to achieve) in a fine tribute:

> His influence as Chief Justice was marked by quite subtle yet noticeable changes in the atmosphere in which cases were argued. Also, as Chief Justice, he endeavoured to achieve a coherence in the court which would comprehend the differences of approach likely to exist in an appellate court of five or seven members, without diminishing the desirable strong individuality of those members.[66]

Some insight into Dixon's method and the overpowering influence that he exercised over his fellow judges as chief justice has been given by Douglas Menzies (1958-74) who served on the Dixon Court:

> His authority was, of course, enormous, and when he was concerned that a decision should go in a particular way, his aim was to get his own judgement out first for circulation to other members of the Court. To differ from him was a course always taken with hesitation and never without foreboding. Never, however, did he attempt to win support for his opinion by arguing with other members of the Court. If his judgement did not convince, then nothing more could or would be done. Nevertheless, he was always willing to talk with other judges about their difficulties and about their judgements. Thus wisdom was distilled. It was in this manner that the Court inevitably took on something of the quality of the Chief Justice. When Dixon was Chief Justice there were with him on the Court at least two other judges of quite remarkable ability. Greatness encouraged greatness and set a high standard for those who could not aspire to greatness. It is small wonder, therefore, that the Court over which Dixon presided gained the world-wide eminence and authority which it did.[67]

As explained earlier, the Dixon Court flourished during the Menzies Liberal era and was, through appointment, the creation of the Menzies government. Menzies too was in awe of Dixon and committed to his judicial standards. Consequently the judges he handpicked for the High Court were all specialist lawyers from Sydney and Melbourne who emulated Dixon's jurisprudential style. Dixon had been the dominant figure on the Court for the decade before he became chief justice. The judges whom Menzies appointed to the Court, particularly Wilfred Fullagar and Frank Kitto, were disciples of Dixon from a younger generation of lawyers who had risen to the top of their profession while Dixon was a leading influence on the Court. Not surprisingly they served as a team under his leadership in a way that has rarely been matched.

If continuity in interpretive method and judicial technique has been a characteristic of judicial review in the post-1950 period as Zines claims, it is in no small part due to the towering influence of Owen Dixon. Although doctrine has been developed and judicial technique become somewhat less abstruse since Dixon's time, Dixon remains the epitome of the Australian legal establishment's model of a judge. He both reflected, and made the leading contribution towards articulating, the legalist approach of the High Court. But to appreciate the lofty eminence and uncontroversial character of the Court during Dixon's chief justiceship, it is also important to recognize the relatively serene and tranquil political atmosphere in which the Court operated. After the great constitutional battles of the previous Chifley period and an early rebuff to the Menzies government in the *Communist Party* case, the Court was able to disengage significantly from politics. Following its abortive attempt to ban the Communist party, the Menzies government settled down to moderate government and passed little controversial legislation. All its appointments to the Court were of legal specialists of the Dixon mould. Consequently Dixon's description of the Court's constitutional work as "strict and complete" legalism did portray some of the major traits, and certainly the spirit, of the Court's work during his chief justiceship.

Nevertheless there were times when the Dixon Court was involved in important political decisions. Perhaps as befits the most eminent and least troubled High Court that Australia has had, the Dixon Court was particularly concerned with enhancing its own constitutional position. A grand occasion for asserting judicial supremacy over both the legislative and executive branches of government was provided early on by the Menzies Liberal government's most illiberal pursuit of Communists. The other occasion was created by the Court in the *Boilermakers* case (1956) through seizing upon a routine arbitration dispute to insist upon a strict doctrine of separation of powers and the pristine independence of the judiciary. On the other hand in the *Second Uniform Tax* case (1957), the Court upheld the continuation of uniform taxation as a settled part of Australian federalism, despite the reservations of Dixon who had not sat on the *First Uniform Tax* case (1942). At a more routine level the unfinished business of section 92 provided the Court with a steady flow of constitutional work. Since the *Communist Party* and *Boilermakers* cases and the ongoing interpretation of section 92 were politically significant in their own right and are also indicative of the method of the Dixon Court, they will be examined in detail.

The Communist Party *case*

The *Communist Party* case was not primarily about civil liberties but about the limits of legislative and executive power and supremacy of the judiciary in deciding such questions. There were two important issues: first, whether the federal legislature could ban the Communist party under the section 51(vi) defence power in a period of "cold war"; and second, whether the federal executive could be

given absolute discretion to determine what was required for national security and which groups or individuals were prejudicial to it. A more fundamental issue raised by the *Communist Party* case was the basic one of "who decides?" Latham pointed out in forceful dissent in his last major judgment as chief justice, that the scope of the defence power was elastic and depended upon the security circumstances of the time "as viewed by some authority" The question was: "By what authority—by Parliament or by a court?"[68] Citing Cromwell's severe dictum that "Being comes before well-being", Latham held for parliament, but all the other judges came out strongly in favour of the Court.

Likewise, the Court overruled the government's attempt to give itself the unlimited discretion to name individuals and bar them from holding office in any industry declared to be "vital", and to dissolve groups and seize their property on "nothing but the vague or intangible conception of being prejudicial to the executive power", as Dixon described the legislation. According to the legislation the governor-general's proclamation on these matters was to be conclusive. Evatt, soon to be leader of the Labor opposition and appearing for a left-wing union that had Communist officials, charged that this was "not the rule of law [but] the arbitrary fiat of a supreme power" [69] Dixon and all the other judges except Latham agreed. In discussing the legislation, Dixon said that it left "the actual decision whether the body ought to be considered unlawful and dissolved accordingly completely to the final determination of the Executive" This offended Dixon's sense of constitutional propriety and the rule of law under the supervision of a watchful court. Taking up Latham's championing of Cromwell, Dixon warned that: "History and not only ancient history, shows that in countries where democratic institutions have been unconstitutionally superseded, it has been done not seldom by those holding the executive power."[70]

In this instance it was the chief justice and ex-politician Latham who played the role of "devil's advocate". The majority justices reached their decision by asserting the superiority of the judiciary's view of the constitutional position over those of parliament and the executive. The issue, as Latham put it, was "whether legislation for such a purpose approved by Parliament cannot be valid unless it is also approved by a court after hearing evidence as to the existence of national danger" Since there were no "actual or objective facts" that could be found by a court, Latham argued that the question of whether national defence required the suppression of the Communist party would therefore turn on "the political opinions of the judges". Latham stuck by the legalist principle that the Court should have "no political opinions" According to his restrictive test the only legitimate question for the Court to determine was whether there was a "real connection" between the legislation and "activities and possibilities which Parliament had said in its opinion do exist and do create a danger to Australia".[71] Although it was not clear how a real connection might be tested without second-guessing the legislature, it seems Latham was leaving that decision to parliament.

The other judges, however, required an "objective test" that they would both devise and administer. Otherwise, as they all pointed out, the legislature and the executive would be judges in their own cases, a right they reserved for the judiciary alone. If there were no objective test administered by the Court, argued Dixon, "the Act would have the effect of making the conclusion of the legislature final and so the measure of the operation of its own power" [72] McTiernan insisted that it was "wrong to make the Executive arbiter of an executive power" Williams damned the legislation as "in effect an assertion by Parliament that it can decide for itself" whether the particular legislation was required by sufficient facts to link it to a constitutional head of power. Stressing it was "the actual facts and only the actual facts which count", Williams asked if there were "any relevant facts, notorious or otherwise" that were sufficient to support the Communist Party Dissolution Act. He concluded with the judicial assertion that "in my opinion there could not be", while rejecting outright "the mere assertion of Parliament or the Executive" to the contrary. Fullagar buttresses his holding against the legislation by appealing to the "axiomatic" principle of *Marbury v. Madison* which gave "the courts, rather than the legislature itself . . . the function of finally deciding whether an Act of a legislature in a Federal system is or is not within power" But as we have already seen, the authoritative opinion of Marshall in *Marbury v. Madison* is flawed because it begs that fundamental question of "who decides?" what is within power. Thus the Court struck down the draconian Communist Party Dissolution Act by asserting its own supremacy over parliament. In this instance the judicial strategy of the Australian High Court was reminiscent of Marshall's great decision in *Marbury v. Madison* that formally established judicial review in America. It used the occasion of deciding a key constitutional case to advance its own position.

The niceties of judicial reasoning were of little concern to the protagonists outside the sober confines of the Court, but the decision handed down on 9 March 1951 had a major political impact. The "anti-Red" Act, as it was dubbed by the press, was a key plank of the new Menzies government. With its other major legislation to reconstitute the Commonwealth Bank under an independent board being held up by the Labor-controlled Senate, the government was brought to an impasse. The anti-Communist bill had only scraped through the Senate because it compromised the Labor party. Chifley called it a "monstrous" Act and most Labor supporters were opposed to it, but the legislation was grudgingly enacted by Labor senators because of right-wing pressure from within the party and fear of having to fight an election on the issue in the cold war atmosphere of the early 1950s. The Court's adverse decision on the constitutional issues put the Menzies government in a bind, as the *Age* explained:

> Prodigious preparations of the anti-Communist bill and long argument inside and outside Parliament, not to speak of the large cost involved, have gone for nought.

> The national Goverment is shown to be in a weak position on the eve of setting out to launch what the Prime Minister outlined as a three years' programme that would involve stringent economic controls and reconsideration of public and private investment, as well as a great increase of the defence services.[73]

Menzies's responses to this double impasse were bold ones; he sought to override the Court's decision and change the Labor Senate. First he obtained a double dissolution of parliament from Governor-General McKell on the basis of a broad and controversial reading of section 57.[74] The Labor Senate that desperately wanted to avoid an election had been trying to hold up government legislation without actually "failing to pass" it, and so provide grounds for a double dissolution. Menzies, however, was granted his double dissolution and in the ensuing election won majorities in both Houses of parliament.

Menzies's second initiative was to seek sweeping legislative power to deal with Communists through a constitutional amendment. He had first responded to the Court's decision with a ringing declaration: "On behalf of the Government, I say this is not the end of the fight against Communism, it is merely the beginning."[75] Menzies claimed that the decision had "disclosed grievous limitations" on the powers of parliament and the government to deal with Communists in the way he saw fit:

> We cannot deal with a hidden conspiracy such as the Communist conspiracy urgently and effectively if we are first bound to establish by strict legal process what a body or individual is actually doing.
>
> Wars against enemies, external or internal, cannot be waged by judicial process.[76]

Menzies sought a general power to make laws with respect to communism and members of the Communist party and a specific power to validate the Communist Party Dissolution Act and so override the Court. The referendum was lost because neither requirement of section 128 was met: the proposal failed narrowly to carry a national majority and did not obtain support in a majority of states with New South Wales, Victoria and South Australia voting against it.

In purely electoral terms Menzies was more successful, winning the first round of the anti-Communist fight which he continued to promote and win through the 1950s and 1960s. In doing so Menzies cleverly exploited some of Australia's most deep-seated fears during the cold war years. A lurid *Bulletin* cover for the issue reporting the Court's adverse decision in the *Communist Party* case said it all; it depicted a ferocious gorilla-like man carrying a huge club emblazoned with the word "Communism" emerging from a dark cave to strike down the terrified maiden "Civilization".[77] Menzies's anti-Communist strategy in attempting to ban the Communist party in 1950-51, and during the Petrov Royal Commission in 1954, left the Labor party hopelessly divided. Evatt, who became Labor leader after Chifley's death in June 1951, was easily tarred with the "soft-on-Communism" brush. After all, Evatt had accepted the brief of the Waterside Workers' Federation, a union with Communist officials and one of the plaintiffs in the sensational

Communist Party case and had spearheaded the case for the "No" vote in the Communist powers referendum. Menzies's cleverly orchestrated campaign against Communists provided the larger stage on which the Labor party under Evatt's incompetent leadership would soon tear itself apart. If Menzies lost both the *Communist Party* case and the referendum, he nevertheless won all the other political and electoral battles. Meanwhile, however, the High Court had reasserted its supremacy and restored its credentials with Labor and the Left. It had shown that it was as shrewdly perceptive of politics and public opinion as Menzies himself.

The Boilermakers *case*

The *Boilermakers* case,[78] although much less of a political drama than the *Communist Party* case, was as important in terms of constitutional significance and impact on public policy. The decision overturned the established machinery of industrial arbitration which had combined both arbitral and limited judicial authority in one tribunal for over half a century. In ruling that the exercise of non-judicial powers by the Arbitration Court was unconstitutional, the High Court gave an extreme and purist view of the judicial function that relied upon an exaggerated doctrine of the separation of powers. In J. M. Finnis's terms the Court preferred its own "abstract" doctrine of separation that relied on neat conceptualization to a more pragmatic "institutional" separation of particular functions.[79]

The case arose out of a routine industrial dispute. The Boilermakers Society of Australia refused to pay a fine of $1,000 imposed by the Arbitration Court. The background to the dispute was that the ironworkers at Morts Dock ship repair yard in Sydney were on strike and the boilermakers put a ban on themselves doing any work that the ironworkers should have done. The Arbitration Court, on application from the employers, ordered the Boilermakers Society to lift the bans. The union passed on this order to its members but some continued to contribute voluntarily to the ironworkers' strike fund. The Arbitration Court decided that the union was in contempt of court for not controlling its members and having them obey the order, so fined the union $1,000. In response to this rather severe treatment, the Boilermakers Society challenged the constitutionality of the Arbitration Court.

The boilermakers' claim, as put by R. M. Eggleston, rested squarely on the abstract doctrine of separation of powers:

> The basis of this fundamental proposition [i.e. that judicial power cannot be vested in a non-judicial body] is the division of powers under the Constitution as recognized in this country and the United States.
>
> Unless the power is incidental to judicial power, the doctrine of the separation of powers forbids the amalgamation of judicial and non-judicial functions.[80]

A majority of the Court consisting of the Dixonian trio of Dixon, Fullagar and Kitto and, surprisingly, also McTiernan adopted this view. Geoffrey Sawer has

commented that the decision could equally well have gone the other way and that the majority view relied mainly on "legal casuistry".[81] Finnis has shown, conclusively in my view, that the abstract concept of separation adopted by the Court had no historical basis in the founders' work but was attained by reading an "abstract" concept of rigid separation into the constitution's more flexible "institutional" division of powers. In his words: "The abstract conclusion that no tribunal exercising *any* federal judicial power may exercise any other power is attained by a slide from the Institutional 'judicature' to the Abstract 'judicial power'."[82]

The Dixon opinion[83] is worth examining since it is a classic example of Dixonian techniques. A full battery of legal argument and rhetorical devices was used, textual analysis, quasi-logical inference, historical interpretation and the distillation of fundamental principle inherent in the structure of the constitution. First, the opinion emphasized the basic federal structure of the constitution and the complementary role "necessarily assigned to the judicature which places it in a position unknown in a unitary system or under a flexible constitution where Parliament is supreme" This institutional innovation derived from American federal theory disposed of the defendant's claim, argued by Douglas Menzies, that the separation doctrine embodied in the Australian constitution was the pragmatic British, rather than the stricter American, variety. It also served as a reminder of the Court's "ultimate responsibility" for deciding the limits of federal government powers. Next the Dixon opinion examined the language of chapter 3 of the constitution on the judicature which it said was "an exhaustive statement" of judicial power. It then made the controversial claim that it was beyond the power of parliament to invest any part of judicial power in a body other than a court created under the judiciary sections of the constitution, particularly section 71.

The difficulty was in establishing this last extreme proposition. Before marshalling its arguments, the Dixon opinion summed up the aberrant alternatives of

(a) attaching judicial power to a body, such as the Arbitration Court, whose principal function was non-judicial in order that it might better accomplish its function;

and

(b) adding to a court some non-judicial powers that were not ancillary but directed to some non-judicial purpose.

If (b) could not be done, the opinion claimed, (a) must be completely out of the question. But this does not follow because the two alternatives are logically unrelated. The inference from (b) to (a) presupposed that the strong abstract doctrine of separation controls both alternatives. All subsequent appeals to a broad reading of the text, to logical inference and to the American origins of the Australian constitution as articulated by Inglis Clark and Harrison Moore were rhetorically self-serving. The conclusion that "Chapter III does not allow the exercise of a jurisdiction which of its very nature belongs to the judicial power of the

Commonwealth by a body established for purposes foreign to the judicial power" derived not from the constitution as originally drafted and applied up until then, but from the judicial decision in this instance to enforce a stricter doctrine of separation to safeguard and enhance the judicial function with judicial power. The Dixon view was subsequently endorsed by the Privy Council.[84]

The *Boilermakers* decision has been criticized for inhibiting the development of a sound system of administrative law and in recent years support for such a strict doctrine of separation has declined.[85] The impact of the decision was muted because the government quickly persuaded parliament to make the legislative adjustments necessary to salvage the arbitration system. This was done by splitting the arbitral and judicial functions of the old Arbitration Court between a separate commission and a court. As a result the public policy impact of the decision was restricted, but Australia's industrial relations machinery was made more cumbersome and unwieldy. The case was important as an exercise of judicial power over legislative will and established administrative procedures, and because of the justifactory theory of an exaggerated separation of powers that it relied upon.

Unfinished business: section 92

More transport cases

As the *Communist Party* and *Boilermakers* cases demonstrate, a major concern of the Dixon Court was to reassert its authority to exercise judicial review and to strengthen doctrinally the constitutional foundations of the power. In its more routine constitutional work that centred mainly around interpreting section 92,[86] the Court also applied Dixonian principles that tended to expand the scope of judicial review. The *Transport* cases of the 1930s in which Dixon had persistently filed trenchant dissents stood as the last major bridgehead against the triumph of Dixonian principles. The smooth disposal of these troublesome precedents together with the reworking of ground rules to order this large judicial domain provide an interesting case study of Dixon's leadership and judicial craft.

It is often said that the constitution means what judges say it means. That is true, subject to the severe institutional constraints under which judges operate and the delicate balance of public confidence that they must retain to give force and legitimacy to their decisions. In addition, however, certain preconditions have to be met before judges can make or change the law; first, there must be a majority of judges who are prepared to make or change the law; and second, there must be affected individuals or interest groups sufficiently aggrieved and monied to challenge the existing law. It also helps if skilled counsel who appreciate the changed views of the judiciary are at hand to present the cases. All these ingredients were present in the 1950s to ensure that the Dixon Court would carry through the

unfinished business of re-interpreting section 92 to protect individual traders from government regulations and taxes.

After Dixon had replaced Latham as chief justice and Fullagar, Kitto and Taylor, all of whom were disciples of Dixon, were appointed to the Court, there was a majority of judges who strongly favoured the Dixonian view of section 92. At the same time Australia's postwar economy was becoming more integrated and affluent. The boom in local import-substituting manufacturing industry and improvements in motor vehicle technology spawned large private transport interests that were prepared to persistently challenge inhibiting state road transport regulations that were designed to protect state railways. Moreover since Sir Garfield Barwick (personally knighted by the Queen in 1954 for his achievements in law) had raised section 92 litigation to the highest pinnacle of legal practice, there was at hand a whole bevy of barristers, led by Sir Garfield himself, eager to work this lucrative field. If anything further were necessary to facilitate the process of changing the law, it had been provided by the range of imprecise and self-contradictory "authoritative obiter dicta" contributed by the Privy Council in the leading *Bank Nationalization* case.

The first postwar challenge to the established systems of state road tranport regulations came early, in the 1950 case *McCarter v. Brodie*.[87] The facts of the case were straightforward: a road carrier taking beer from South Australia through Victoria to New South Wales was charged by Victorian police for failing to obtain a licence from the Victorian government to cover the Victorian segment of the journey. Counsel for the carrier, Hughes and Vale, asked the Court to ignore the *Transport* cases precedent that favoured Victoria because it was inconsistent with the Privy Council's reasons in the *Banking* case. Dixon wholeheartedly agreed. He reiterated his persistent dissents of the 1930s and argued that the judges should no longer consider themselves bound by the authority of the *Transport* cases. The key to Dixon's position was his preference for individual freedom over state regulation, and his commitment to using "strictly legal" criteria rather than public policy considerations in constitutional interpretation. Dixon repeated his earlier criticism from the *Airline* case that the *Transport* cases gave only a "pragmatic solution" based on considerations of the "practical operation" of legislation upon interstate commerce. Therefore in the *McCarter* case he damned the Victorian government's "uncontrolled discretion to grant a licence which impaired the carrier's guaranteed freedom to engage in inter-state trade".[88] In this 1950 case, however, only Fullagar joined Dixon in dissent. A majority of the Court consisting of Latham, McTiernan, Williams and Webb stuck to the *Transport* precedents and upheld the constitutionality of the Victorian legislation.

The issue was reopened after Kitto and Taylor had been added to the Court and Dixon made chief justice in 1952. This time the Hughes and Vale trucking business challenged the constitutional validity of New South Wales regulations which imposed a discriminatory fee on road transport vehicles that ran in

competition with the state's railways. The New South Wales regulations prevented individuals from using their vehicles on state roads without a licence and payment of a fee. The purpose of these regulations was to ensure an orderly transport sector and protect the financial viability of the state's railways. Dixon reiterated his long-standing "personal opinion" that such a system "prohibiting transport unless licensed and authorizing the imposition of such a levy" was inconsistent with section 92. As chief justice, however, he was prepared to abide by the *Transport* precedents that had been affirmed so recently by the Court in *McCarter v. Brodie*, provided they were given as narrow an application as possible. Dixon therefore joined McTiernan, Williams and Webb, who with Latham had made up the *McCarter* majority, in upholding the New South Wales legislation.[89] Fullagar, Kitto and Taylor, however, dissented on the grounds Dixon had previously set out in dissenting opinions.

But the case did not rest there. It was allowed to go to the Privy Council by special leave of the High Court, and was overruled.[90] Once again the Privy Council performed a backup function of sweeping away old doctrine and precedent that a new majority on the High Court disagreed with. This time their Lordships adopted "the unusual course" of settling the issue "not in language of their own but in the language of Judges of the High Court". Their opinion simply reproduced page after page of Dixon's and Fullagar's judgments on section 92. In particular the Privy Council finally scuttled the *Transport* precedents and the leading *Vizzard* case that had been so highly praised by an earlier Judicial Committee of the Privy Council.

As was to be expected, the High Court formally endorsed the Privy Council's ruling at the first opportunity which came a year later in response to a further challenge by the Hughes and Vale trucking company to amended New South Wales legislation that tried to sidestep the Privy Council's ruling. This time all the High Court judges fell in behind the Dixon view and held the licensing provisions of the New South Wales Act invalid for infringing section 92.[91] Dixon wrote a comprehensive judgment in which McTiernan and Webb joined, although McTiernan added a rather pathetic little note of his own to point out that he was now endorsing a view he had been unable to share in the past. McTiernan said he remained "personally far from convinced that the result [was] one which the framers of S.92 either intended or foresaw".[92] The anomalous *Transport* precedents that had allowed the states to regulate intrastate aspects of interstate road transport for twenty years had finally been rooted out. Now that Dixon had been joined by a majority of like-minded disciples on the High Court, his view that interstate road transport must be "as free from governmental prohibition, restriction, impediment or burden as any other transaction of inter-state trade" was read into the Australian constitution.[93] While denying the states any discretionary control, most of the judges allowed them to make fair and reasonable

charges to cover the wear and tear on their roads, although Kitto and Taylor took the extreme view that states could make no such charges.

The judiciary was finally in control of the potentially enormous jurisdictional field of section 92. The judges had made of section 92 "an overriding section applicable to the whole range of legislative and governmental activity of every kind. The section had been constantly and almost as a matter of course used to invalidate governmental acts of almost every kind far removed from fiscal matters."[94] At least that was the view taken by Earl Wright of Dudley when he recanted in 1954 in favour of a narrow fiscal interpretation of the troublesome section. Dudley previously had sat for fifteen years on the Judicial Committee of the Privy Council and had been jointly responsible for its 1936 *James* intepretation of section 92. The same point can be made by comparing these Australian constitutional developments with what was happening at the time in the United States. There, Congress was gaining control over virtually every aspect of national life through a broad interpretation of the commerce power by the American Supreme Court, while the Australian High Court was interpreting section 92 to carve out for itself a comparable jurisdiction.

The Australian judges had not simply claimed this new territory in order to substitute thier own discretion and values for those of legislators and administrators. Not in theory at least, as far as Dixon was concerned. He laboured to formulate objective criteria that embodied a moderate version of his free enterprise doctrine. As was to be expected, Dixon's test for section 92 entailed a highly abstract conceptual analysis of "essences" rather than a prudent weighing of public policy requirements and practical consequences. The test depended on whether a law regulating interstate trade imposed a "direct" burden on an "essential feature" of interstate trade. If the regulation were "indirect" or the aspect of trade "incidental", however, the legislation was valid.[95] Even if such a test were conceptually clear, its application entailed practical judgment about what was essential rather than incidental, and direct rather than indirect. A more substantial problem for the judges in purporting to apply such a test was the need to see beyond the possible deceits of wily legislators. As Zines notes,

> Yet even though the Dixon formula purported to oust the relevance of legislative purpose, economic consequences and value judgments in this area, His Honour made one qualification that threatened (or promised) to open them all up again. ". . . nothing that has been said means that by circuitous means or concealed design legislation may impair the freedom of inter-State trade, commerce, and intercourse although if the impairment were achieved by overt or direct means it would be invalid".[96]

The *Margarine* cases

The free enterprise view that the High Court had read into section 92 of the constitution opened up a gap in the combined coverage of federal and state government powers. Some judges, and at times a majority, were concerned that

this free enterprise view of section 92, put "more and more matters outside the authority of all the parliaments of Australia, Commonwealth and state" Consequently the Court restricted the extent of this legislative vacuum created by such an interpretation of section 92 by confining the scope of interstate trade. In the *Margarine* cases this entailed a highly artificial distinction being made between manufacture and trade. These cases take us beyond the period of the Dixon Court, but show how the judiciary battled to contain the breach it opened up.

The *Margarine* cases are significant because they show a different facet of the Court's interpretation of section 92 that was contrary to its *Hughes and Vale* transport decisions. In the *Margarine* cases the Court upheld an important regime of state regulation that substantially restricted interstate trade. There were four margarine cases, all of which directly or indirectly involved Marrickville, the large Sydney-based producer which persistently sought to bring interstate trade in margarine within the protective umbrella of section 92. The states severely restricted margarine production by imposing low quotas in order to protect their dairying industries. The first constitutional test came in *Grannall v. Marrickville* (1955) when Marrickville challenged highly restrictive legislation in New South Wales that prohibited the manufacture of margarine without a licence from the minister of agriculture.[97] The licence set the quantity of margarine that could be produced and had to be renewed each year. All the other states had similar legislation so that the whole nation was covered with a web of restrictive regulation. This was freely admitted by the Victorian solicitor-general, intervening by leave of the Court on behalf of his own state and South Australia: "All the other States have legislation similar to New South Wales", he said, in order to preserve "what each regarded as one of its basic primary industries, the dairy farming industry."[98]

Marrickville had been manufacturing large quantities of margarine for both local and interstate trade without any licence at all. When charged with breaking the New South Wales law, the company raised section 92 as a defence. It briefed Sir Garfield Barwick, the high priest of section 92 litigation and subsequently as chief justice the leading dissenter in the later *Mowbray* margarine case, to argue its case before the High Court. Barwick claimed that while every prohibition of manufacture might not interfere with the freedom of trade guaranteed by section 92, the prohibition in this instance did because a large proportion of the product was sent interstate. The Court, however, unanimously upheld the New South Wales legislation on the basis of a clear distinction between manufacture and interstate trade. According to the joint opinion of Dixon, McTiernan, Webb and Kitto, manufacture was concerned "entirely with the liberty of persons in New South Wales to bring a given commodity into existence by operation in that State" and formed "no part of the freedom of the individual to engage in activities conducted across state boundaries" The opinion said that while section 92 presupposed an ordered society where goods would be produced and traded, it

gave no constitutional guarantee to such preconditions but secured only "inter-State dealing, movement, interchange, passage etc."[99]

A decade later in 1966, Marrickville again confronted the Court but with a stronger set of facts. The company had made separate batches of margarine in excess of its quota specifically for interstate orders. The company argued that section 92 extended at least to the beginning of the manufacturing process for goods that were to move in interstate trade. But again a unanimous Court of five justices applied the rule of the earlier *Grannall* case and upheld the New South Wales legislation. As Kitto pointed out, this second case "propounded no new doctrine; it places no new interpretation on section 92".[100]

These two decisions left the states with virtually absolute discretion in regulating the margarine trade from the production end. By co-operating as they did, the states could restrict the interstate trade in margarine before it commenced. But such apparently tight regulation was not sufficient for some of the smaller states that wanted to further regulate margarine trade from the receiving end of interstate trade through restricting the sale of goods that had moved in such trade. The other two margarine cases involved such regulations and showed the more doctrinaire view of section 92 that was adopted by the new chief justice, Sir Garfield Barwick.

In the first, *O'Sullivan v. Miracle Foods (SA)*,[101] the defendant had sold margarine from the Sydney company Marrickville in South Australia in violation of that state's regulations. Miracle Foods had broken South Australian law in three respects: the margarine sold had not been labelled with thirty point print, it did not contain one-tenth percentage part by weight of arrowroot, and the ingredients had not been inspected by South Australian officers before production. The five-judge Court allowed the constitutional validity of the labelling regulation while noting its considerable nuisance value; South Australia's labelling specifications differed only slightly from those of other states. The Court, however, disallowed the prior inspection rule as a blatant violation of section 92, but split three-to-two over the legality of the arrowroot additive, the purpose of which was to allow a simple test to be performed by inspection officers to distinguish margarine from butter. Barwick, Taylor and Owen found that the law requiring arrowroot additive was regulatory of interstate trade since it directly affected the sale of goods that had moved in such trade. Barwick preferred a broader scope for section 92 than had been previously allowed by the High Court. In his view the states could regulate only those aspects of trade and commerce that "are so far removed from interstate movement as not relevantly to form part of that movement".[102] Menzies and Windeyer dissented on the basis of a much narrowed reading of section 92. In their view banning the sale of margarine without an arrowroot additive operated *after* interstate trade and hence did not interfere with such trade.

This dissenting view won out in the final case, *SOS (Mowbray) v. Mead*,[103]

when Menzies and Windeyer were joined by McTiernan who had not sat on the *Miracle Food* case, and Gibbs, who had recently been appointed to the Court. This case involved the sale of cooking margarine, again supplied by Marrickville, that had been artificially coloured and flavoured in violation of the Tasmanian Dairy Produce Act 1969. In a narrow four-to-three decision the Court held that the sale of goods that had moved in interstate trade was not part of that trade but part of the business of retail selling. The test applied by Windeyer, now in the majority, presupposed a very narrow scope for section 92: "If such regulation could be done by the Commonwealth with respect to all States, then it can be done by a State Parliament with respect to its own state."[104]

Barwick, in vigorous dissent, argued that sale was inseparably connected with the export and import of goods and hence was "part and parcel" of interstate trade.[105] Barwick seems to have the better part of reason and common sense because if states could control the sale of interstate goods they could surely also control the interstate trade in such goods. But if Barwick's argument was more convincing, the decision of the majority was more responsible. Having earlier on decided to interpret section 92 too broadly so as to protect individual traders against government regulation of their interstate transaction, the Court had subsequently to cut down the scope of this regulatory vacuum. The *Mowbray* decision was the somewhat bizarre extension of the Court's responsible efforts to redeem an extreme situation from within an artifical framework that it had created. Otherwise, as Windeyer put it, the Court would be putting "more and more matters outside the authority of all the parliaments of Australia, Commonwealth and State".[106]

The Whitlam interlude

A major theme of this book has been the way Australia's federal constitution constrains federal Labor governments that try to impose reformist and socialist policies. The earlier antagonisms between Labor and the constitution that we have examined were summed up by Whitlam in 1957 as "the Constitution versus Labor" in these terms:

> [T]he Australian Labor Party, unlike the British and New Zealand Parties, is unable to perform, and therefore finds it useless to promise, its basic policies. It has been handicapped, as they were not, by a Constitution framed in such a way as to make it difficult to carry out Labor objectives and interpreted in such a way as to make it impossible to carry them out.[107]

By 1978, despite the disappointing record of his own government, Whitlam had changed his opinion. He then said there was nothing that a Labor government would want to do that could not be done under the existing constitution. Whitlam claimed that "the major obstacles against a program of reform are not constitutional

but political. Even the Federal system itself, for all its restrictions, limitations, and frustrations, need not prevent reform.[108]

What had changed? Basically Whitlam and the Labor party in their objective, constitutional strategy and policy direction. Labor had partly transformed itself in fundamental ways and hence was less at odds with the constitution. Nevertheless, as the experience of the Whitlam government showed, the federal constitutional system remains a substantial obstacle to a reforming federal Labor government. The Whitlam government, however, was not hampered by the High Court as the previous Chifley Labor government had been, but by a hostile Senate and unfriendly state governments. During the Whitlam period, the Court's more sympathetic stance in upholding the constitutionality of Labor legislation was due in large part to the balance of its composition. There were three Labor-appointed judges, McTiernan, Jacobs and Murphy, who were regularly joined by "middle-of-the-roaders" like Stephen and Mason to form a favourable majority. This section examines how the Labor party was transformed between the 1950s and 1970s and the favourable manner with which an evenly balanced Court dealt with the Whitlam government's "explorations and adventures with Commonwealth powers".[109]

Whitlam's 1957 statement of "the Constitution versus Labor" had summed up over half a century of conflict between a Labor party formally pledged to both the socialization of industry and the abolition of federalism, and a constitution that embodied and protected both federalism and private enterprise. The Labor party at the time was riven by sectarian and ideological strife, backward looking and old fashioned in its policies and nostalgic for the golden years of the Curtin-Chifley era. Continued postwar affluence together with the consolidation of the welfare state and the continuation of Keynesian centralized management of the economy by successive Liberal governments had necessitated a basic rethinking of Labor policy. This was not achieved until Whitlam succeeded Calwell as leader in 1967 and the Labor party updated its policies in the reform conferences of 1967, 1969 and 1971. Labor reorientated itself away from working-class antagonism to private enterprise towards a benign acceptance of capitalism and a primary concern with middle-class and quality of life issues. This transformation of Labor policy was carried out under the dynamic leadership of Gough Whitlam and brought the federal Labor party back into office in 1972.

Labor's new economics

A major new development in Labor's economic thinking during the 1960s was the total abandonment of nationalization of industry as a possible option, even if it were not precluded by the Court's interpretation of section 92. The roots of Labor's economic rethinking went back a decade earlier and can be most strikingly seen in Whitlam himself, who was the architect and chief apostle of Labor's new economic approach. In 1957 after the party had reaffirmed its "socialist faith" of

the Chifley era and the goal of nationalization, Whitlam complained that the federal constitution as interpreted by the High Court made it impossible for Labor to implement its basic objective. By 1961, however, Whitlam was dismissing nationalization as "the most difficult and least important aspect of socialism", and was chiding his fellow Laborites with too little initiative and imagination in exploiting available constitutional powers, particularly section 96 which allowed federal grants to the states to be tied to specific conditions laid down by the federal government. "In our obsession with Section 92, which is held up as the bulwark of private enterprise", he said, "we forgot Section 96, which is the charter of public enterprise." The Whitlam government would use specific purpose grants under section 96 to occupy large tracts of territory in the policy domain of the states.

The other point Whitlam insisted upon was the transformation of the economy in the postwar decades so that Australian socialists no longer needed to "ration scarcity but to plan abundance" The sins of modern capitalism were "ones of omission rather than commission", so that the function of modern socialism should not be to expropriate or create productive capital, but to fill in the gaps left behind by private enterprise through expanding public welfare spending.[110]

Whitlam's new socialism was strikingly similar to that put forward by Anthony Crosland in his influential 1956 book, *The Future of Socialism*. Crosland rewrote the modern charter of British democratic socialism on the basis of a bland optimism similar to Whitlam's. Crosland claimed that the old intellectual framework of socialist discussion, particularly the concern with nationalization, was obsolete in postwar conditions because of two facts: rapid economic growth and the transformation of capitalism. On the second point Crosland insisted that capitalism no longer existed, having been recently replaced by "Keynes-plus-modified-capitalism-plus-Welfare-State".[111] As a result the task of socialism had been muted to producing "more social equality, a more classless society, and less avoidable social distress" That meant in practice public spending on pensions, superannuation, health and education so as to ensure the free universality of benefits. Crosland was even more optimistic about the inevitability of growth and the resultant ease with which the "new socialism" could be achieved. Consequently he counselled against being too obsessed with growth: "I therefore see no reason, in contemporary Britain, to make the maximum possible rate of growth the premier objective of socialist policy. If we maintain, or moderately increase, our post-war rate of growth, we shall be able, over a period, to accommodate all reasonable claims without excessive difficulty."[112] If postwar capitalism had been transformed in the ways Crosland and Whitlam thought, then clearly old fashioned democratic socialism with its preoccupation with nationalizing industry was obsolete. Moreover, if economic growth could be taken for granted, democratic socialist governments could concentrate, as Whitlam advocated, on plugging the gaps left by capitalist growth with quality of life programmes. Such views of Crosland, Whitlam and the reformed Australian Labor party proved overly optimistic and economically

shallow, apt products of the decades of easy growth and rising affluence that helped spawn them.

The Whitlam government swept to office in 1972 with a slogan "It's Time!"—as Whitlam said in his 1972 policy speech, "time for a new team, a new program, a new drive for equality of opportunities"; time "to liberate the talents and uplift the horizons of the Australian people" Whitlam boasted that Labor's programme was the most carefully developed and consistent ever put before the Australian people. It included a universal health insurance system, dramatic increases in education spending including free universities and tertiary colleges, a National Compensation Scheme, "a massive effort to rebuild our existing cities and establish new ones", "a massive attack on the problem of land and housing costs", and a start to "buying Australia back" by reversing the accelerating trend toward foreign ownership in the expanding and lucrative minerals sector. In addition to such grandiose promises, Whitlam pledged that Labor's first priority in government would be to restore genuine full employment, but he failed to mention inflation. The Whitlam programme stands as a monument to enormous vision, unbounded optimism and naive economics.[113]

The whole Labor package promised in 1972 had no apparent cost. It was to be entirely funded through accelerated economic growth and the accompanying income tax creep. Whitlam explained that the programme depended on an extraordinary growth rate in the Australian economy of 6 to 7 per cent in each of the subsequent three years. Such a growth rate would automatically generate an additional $5 billion of income tax for commonwealth coffers.[114] Economic growth was the key to the cost side of Labor's reform equation, but how was it to be achieved? The national economy was already slowing down, and even in the boom years of the 1960s gross domestic product grew at slightly less than 4 per cent in real terms. Labor spokesmen piously invoked "national planning" and "national co-operation", but their concrete proposals were devoid of both. Whitlam promised elaborate machinery to review prices, outlaw restrictive trade practices and to set and enforce national consumer standards, all of which appeared to be directed towards regulating rather than stimulating the private sector. Growth required a careful nurturing of private enterprise or alternatively increasing activity by government but neither was forthcoming.

According to the Crosland-Whitlam brand of socialism in affluent times, the increased role of the state was one of distributing the largesse, not producing it. This quality of life socialism depended on economic growth but did nothing to sustain it. Even if growth was occurring, it is likely that such a parasitic strategy would stifle it. It is hardly surprising that the Crosland-Whitlam model of democratic socialism that was built around so flawed a political economy should fail in Australia when growth virtually ceased in the early 1970s. Real growth in the Australian economy fell to little more than 2 per cent per annum in the

early 1970s and declined further to 1.2 per cent during the Whitlam government's term of office.[115]

Without growth, the failure of Labor's programme was virtually assured, but the Whitlam government did not see it that way. As late as September 1974 when severe economic problems were piling up, treasurer Crean pledged that the government would "remain steadfast in implementing its programs" The keynote of Crean's 1974-75 budget was "social progress" which was to entail increasing total commonwealth government expenditure by 32 per cent over the previous year with most of the increase going to education and health. The actual increase turned out to be 46 per cent, not 32 per cent as budgeted. Public expenditure by the commonwealth climbed from 24 per cent to 29 per cent of gross domestic product in a single year, with half the increase being funded by a large increase in the deficit. Crean's extravagance cost him his job. Cairns, who was deputy prime minister and soon to replace Crean for a brief term as treasurer, proposed no practical alternative. In a public lecture at the time, Cairns admitted that the economy was structurally unresponsive to Keynesian management techniques but also rejected the "draconian method", advocated by the opposition, of administering a sharp shock to deflate bloated expectations while at the same time allowing unemployment to rise. Instead, he preached the need for vague social reform and communal responsibility which he admitted was an "impossible attainment".[116] A year after Crean's 1974-75 "social progress" budget, the Whitlam government was reaping the harvest it had helped to sow; inflation of nearly 17 per cent and unemployment of 5 per cent. Sanity returned with Hayden's 1975-76 budget which was directed towards consolidation and restraint. Unfortunately for Labor, Hayden's budget was blocked by the hostile Senate and the Whitlam government dismissed by Governor-General Kerr.

It has to be admitted that the poor economic performance of the Whitlam government was due to a combination of factors, many of which were outside its control. It was unlikely that the dependent Australian economy could have been effectively shielded from the contagion of stagflation and recession that beset the leading international economies during the early 1970s and was conflagrated by the OPEC oil crisis in late 1973. Moreover, the government did make some significant improvements in social welfare and education, areas where Australia's public expenditure still lags well behind the levels of support in comparable countries. The record of the Fraser Liberal government after seven years in office was worse in certain areas with unemployment doubling to 10 per cent. Nevertheless the Whitlam government's record of economic management was poor. To excuse it as the fate of a reform government during recession is to fail to diagnose the fatal flaw in such a reform strategy. The problems of the Whitlam government went to the core of Labor's postwar version of democratic socialism. They were rooted in the benign expectation that economic growth was inevitable and could be taken for granted, and that the function of a democratic socialist government

was simply to syphon off for social welfare more of the surplus generated by self-sustaining economic growth. Spending the money without shouldering responsibility for generating the funds, either by cultivating the private sector more assiduously or by expanding productive enterprise in the public sector, was the Crosland-Whitlam recipe for reform. It is hardly surprising that with such a reform strategy Whitlam's government should suffer the fate that it did during a recession.

Whitlam's "New Federalism"

If Whitlam was a poor political economist, he was a perceptive and articulate advocate of social reform. Trained as a lawyer and by disposition an orderly rationalist, Whitlam had invested a good deal of effort in rethinking Labor's strategy for working with the constitution. He was acutely conscious of the fact that a federal constitution that fragments power and administration and leaves the states with most of the responsibility for social welfare imposes a substantial barrier to centrally-imposed reform. Yet Whitlam remained "a committed centralist" who had wholeheartedly supported the Curtin government's sweeping powers referendum in 1944. He continued to believe "that the distribution of powers between the Australian government and the States under the Constitution, appropriate enough for a transitional government of a group of former colonies, [was] wholly inadequate to the needs of a modern federal state".[117] Rather than abolish federalism which had previously been Labor's unrealistic dream, and in addition to promoting constitutional changes by popular referenda, a largely fruitless practice routinely pursued by previous Labor administrations, Whitlam proposed a "new federalism" alternative. Whitlam thought that the Labor party could live with a federal system by carefully exploiting existing powers, since the whole orientation of Labor's reform policies had changed.

A major concern of Whitlam's was with quality of life which, for most Australians, depended on the quality of public services available in the local areas in which they lived, particularly the sprawling western suburbs of Melbourne and Sydney. As Whitlam explained in a 1970 speech:

> In modern societies the role of local government is increasing. There are few aspects of our environment, our culture or our welfare which can be tackled adequately without involving local government. Ours will not be a modern society nor shall we begin to solve our urban problems until we permit local government to widen its role.
>
> Inequality in Australia is more public than private. A family's standard of living is determined much more by where they live than by what they earn. The inequalities between regions are now far greater than any between States and indeed greater than they ever were between States. In developing regions the inequalities and the burdens are growing. The areas with the greatest needs are precisely those with the least resources.[118]

Consequently Whitlam proposed a "new federalism" that would "rest on a national framework for the establishment of investment priorities and a regional framework for participation in all those areas which most directly determine the quality of our lives" [119] The key was local government which was the legislative creature of jealous states that starved it of funds. Whitlam's solution was quite simple: target abundant federal money to needy regions and worthy public welfare programmes determined by federal commissions, and establish local government as "a full partner in the federal system".[120]

The constitutional means for Whitlam's "new federalism" were largely at hand. The commonwealth government's monopoly over income taxation that had been established by the Curtin war administration and sanctioned by the Court in the *Uniform Tax* cases, had been consolidated by successive federal Liberal governments despite periodic opposition from state Liberal party branches.[121] The *Second Uniform Tax* case (1957)[122] had also reaffirmed the enormous potential scope of section 96, originally opened up by the 1926 *Roads* case,[123] for allowing the federal government to tie detailed policy conditions to financial grants to the states. The incremental creep of federal power under successive postwar federal Liberal administrations had extended the variety and extent of such tied grants. Tied grants under section 96 were therefore commonplace before the Whitlam government came to office, but as Whitlam himself pointed out: "What had never before been attempted was the use of those grants to achieve far-reaching reforms in education, medical services, hospitals, sewage, transport and other urban and regional development programs."[124] The result during the Whitlam administration was a dramatic increase in specific purpose payments to the states which quadrupled in the three years 1972-73 to 1975-76. By the end of the Whitlam period specific purpose grants accounted for fully one-third of the states' recurrent revenues, roughly equalling both general revenue grants and the states' own taxes which each made up the other two-thirds.[125]

There were additional heads of commonwealth power available to the Whitlam government that had not been previously or fully exploited. The 1967 amendment striking out the exception of the Aboriginal race from section 51 (xxvi) of the constitution that allows the commonwealth parliament to make "special laws" for "the people of any race" had effectively made that section into a power to make special laws for Aborigines. This power allowed the Whitlam government to take over the administration of Aboriginal affairs and override some of the more obnoxious aspects of Queensland's legislation. In addition the court had restored a broad, although imprecise, scope to the section 51 (xx) corporations power in the 1971 *Concrete Pipes* case.[126] That decision sanctioned the increasing use of the section by federal Liberal governments to regulate restrictive trade practices, and allowed the Whitlam government to bring in its tougher 1974 Trade Practices Act. As well there was the potentially enormous scope of the external affairs power, section 51 (xxix), to support broad-ranging human rights legislation. To this end,

the Whitlam government made Australia a party to the United Nations International Covenant on Civil and Political Liberties immediately on taking office, but subsequently had to abandon a proposed Bill of Rights because of a storm of opposition. A much less ambitious but nevertheless significant piece of legislation that was passed under the constitutional head of external affairs was the 1975 Racial Discrimination Act implementing a 1965 International Covenant against racial discrimination. This was to be challenged and upheld in the 1982 *Koowarta* case.[127]

Policy implementation, however, depends as much on the politics of federalism as on formal constitutional powers. If section 96 provided Labor's new constitutional charter for commonwealth action in social welfare areas, it could not guarantee co-operation from the states. Many saw Whitlam's "new federalism" as a thin disguise for Labor's traditional centralism. Russell Mathews has summed up the Whitlam period with its extensive use of specific purpose grants as the height of "coercive federalism" [128] Not surprisingly the Whitlam government's incursions into state policy domains using the section 96 power sparked opposition from non-Labor state governments. To bypass recalcitrant states that opposed the establishment of regional structures under the Australian Assistance Plan and provision of legal aid through the Australian Legal Aid Office, the Whitlam government reverted to the strategy of making direct grants of funds using the section 81 appropriation power.

Victoria challenged this open-ended use of the appropriation power on the grounds that the commonwealth parliament could not validly appropriate money for purposes other than those that were specified in the constitution. That had been the finding of an earlier Court in the *Second Pharmaceutical Benefits* case against the Chifley government, as we have seen. In this instance, however, the Court split three-to-three on the substantive issue of the scope of section 81, with Stephen holding that the plaintiffs lacked standing to bring the challenge.[129] In this way the Australian assistance plan was upheld by the Court. Whitlam's subsequent claim that "the *AAP* case presents Australian governments with great opportunities to tackle national problems through the appropriations power"[130] is a dubious one, however, because there was no majority holding on the substantive issue of the scope of section 81. In any case the decision came down in 1975 when only preliminary amounts of money had been appropriated and Whitlam was soon to be deprived of office.

A more secure expansion of commonwealth legislative power occurred in the *Offshore* case (1975) in which the Court upheld the constitutional validity of commonwealth legislation that claimed jurisdiction over the entire offshore area. The case will be examined in some detail in the following section. It showed that there was some expansion of commonwealth powers during the Whitlam period even though the major constitutional means that the Whitlam government exploited—monopoly over income tax and section 96 tied grants—were already

in place. Since the *Offshore* case was decided on the eve of Whitlam's dismissal, there was no chance for his government to occupy the field by legislating to put in place a comprehensive commonwealth regime to regulate the offshore. Therefore on balance the main reformist initiatives of the Whitlam government were accommodated within established constitutional structures.

That is not to say that the Whitlam government was effective in implementing its policies. It was not. The Labor administration was too hurried and too harassed by the Senate and more entrenched state premiers. Even the Labor premier of South Australia, Don Dunstan, cricitized the Whitlam government's heavy-handed centralism at the state conference of the South Australian branch of the Labor party in 1974: "A centralisation of decision-making in Canberra will not be an advance in democracy. There is no substitute for State organisations."[131] As Michael Wood concludes, the Whitlam government's lasting achievements in this area were minimal:

> If Labor's attempt to force the establishment of regions in the State is seen as an exercise in administrative and political reform, then it failed. The policy failed because it involved too fundamental a reform and used too crude a method . . . no permanent institutions were established outside Canberra so the national capital became the venue for the formation, execution, co-ordination and control of the policy.[132]

Whitlam's plan to make local government a full partner in the federal system through constitutional amendment was also unsuccessful. In fact all the referenda proposals on this and other matters put to the people in 1973 and 1974 were defeated. In 1973 separate proposals to give the Australian government control over prices and wages were defeated in all states. In May 1974, concurrent with the general election following the double dissolution obtained by Whitlam to try to win control of the Senate, Labor's major electoral reform proposals, with those for enhancing the financial status of local government, were also defeated. There were three important electoral reform proposals: to synchronize Senate elections with those of the House of Representatives, to require substantial equality of electoral divisions for all Australian parliaments, and to require all state Houses of parliament to be elected directly by the people. There was a further proposal to facilitate constitutional amendment by changing the requirements of section 128 to require in addition to approval by an overall majority of voters, approval by majorities in not less than half (in other words three) rather than a majority (four) of the states. The local government proposals were to empower the Australian parliament to legislate for local government loan borrowings, and to bring local government bodies under section 96 so that they could become direct beneficiaries of federal grants. Since all these proposals were defeated,[133] the Whitlam government was forced to work within the existing system, with the minimal success sketched above.

The other major factor that has to be taken into account when evaluating both the performance of the Whitlam government and Whitlam's claim that "the major

obstacles against a program of reform are not constitutional but political" is the Senate which Labor never controlled. Not only was the Senate hostile to Labor's proposed legislation, it continually called in question the government's right to govern by threatening, and finally cutting off, supply. Some important legislation such as the Petroleum and Minerals Authority Bill, which was to be struck down by the High Court on technical grounds, was passed in the first ever joint sitting of parliament after the 1974 double dissolution and general election had left Labor again without control of the Senate. Other important legislation such as the proposed Bill of Rights was abandoned in the House. The Senate was manipulated in a partisan way by the opposition coalition to restrict, harass and finally bring down the Whitlam government with Governor-General Kerr's assistance. Because it controlled only half the legislative machinery, the Whitlam government proposed and passed little controversial legislation.

The Whitlam government has been aptly summed up by Geoffrey Sawer as a government of vague promise and "attractive largesse of vision", but its achievements were "certainly very small".[134] Despite reconciling itself with private enterprise and redirecting its reformist bent to social welfare programmes and to bolstering local and regional government, Labor under Whitlam achieved very little. That was partly due to its own blundering haste and administrative inexperience, and partly due to the sheer bad luck of being in office when the international recession hit Australia in 1974. Nevertheless Whitlam's claim that the major obstacles to a reformist federal Labor government are now political rather than constitutional is a superficial one. Underpinning the effective political opposition that crippled the Whitlam Labor government were the federal constitutional structures of states, Senate and weighted amending formula.

The democratic socialist who retains any real commitment to socialism or even to the implementation of a nationally co-ordinated social welfare system can take small consolation from the Whitlam experience. Malcolm Fraser, who defeated Whitlam in the struggle for political power, had a shrewder appreciation of federalism. Just before ousting Whitlam's government he called on Australians to renew their commitment to federalism: "We must now re-inforce the division of power in Australia and return to a federal system of government." Fraser saw the fostering of vigorous capitalism and the strict limitation of central power as a pre-condition for the preservation of individual and corporate liberties. As he put it: "A federal system of government offers Liberals many protections against those elements of socialism which Liberals abhor."[135] The same point has been made by Geoffrey Sawer in reviewing the Whitlam government's experience, and at the same time reflecting on a lifetime spent in studying Australian constitutional politics. Sawer said:

> My inclination as a student of Australian social and political history is to say that the A.L.P. would do well to return to a frank unificationist platform. I doubt whether the detailed programme can be achieved on a basis of co-operative federalism, even if

> the electoral basis of the States—not to mention the Commonwealth—is corrected to secure approximately one man one vote, and the upper Houses are abolished. I am quite certain that the socialisation programme could not be achieved or maintained in operation on such a basis.[136]

Since unification is totally unrealistic, however, the Labor party remains caught in the old constitutional bind. To work the system effectively it needs to move further to the liberal centre. All the indications of the Hawke government's orientation and policies suggest that the modern federal Labor party has done exactly that.

Balanced review by the Court

Compared with the constitutional trauma of the Senate's blocking supply and the governor-general's dismissing the government, judicial review during the Whitlam period was relatively low key and routine. Moreover, compared with the great High Court battles and losses of the previous Chifley Labor government, challenges to the Whitlam government's legislation were less significant and usually unsuccessful. The reasons for this have been set out above. The Labor party had changed the direction of its social and economic policies and had become more sophisticated in working the constitution. As well, successive postwar Liberal governments and Courts had carried forward the process of incremental centralism. And because it never controlled the Senate, the Whitlam government was severely restricted in its legislation. Hence as the second institution of review after a spoiling Senate controlled by a hostile opposition, the Court was significantly shielded from having to make hard decisions. Finally, after the appointments of Jacobs and Murphy, there was a core of three Labor-appointed judges on the Court who consistently upheld the legislation of the Labor government that was challenged.

For judicial review, therefore, the Whitlam period was not one of constitutional confrontation and challenge, but rather one in which there was a quickening of pace in established trends and some novel applications and extensions of existing powers. As Sawer has put it, even the adventurous legislation of the Whitlam period contained no "frontal assaults on accepted constitutional doctrine" [137] In their comprehensive review of the Whitlam government's "explorations and adventures with Commonwealth powers", Crommelin and Evans conclude that there was "little evidence of any drastic re-shaping of the Australian federal system" Rather the achievement of the Whitlam government was in applying "already recognized powers to new fields of endeavour" [138] This conclusion was corroborated by a less sympathetic critic of the Whitlam government, Victorian solicitor-general Daryl Dawson, who said that "any real development of constitutional principles during Labor's period of office was limited", being "quantitative rather than qualitative".[139]

Nevertheless there were significant instances of judicial review that legitimated

novel uses of constitutional powers, sanctioned further development of established doctrinal trends and clarified some key aspects of institutional structures. The Court's balanced and generally accommodating review is best illustrated by some of the leading cases for the period. These also indicate something of the Labor government's policy direction and its constitutional strategy under Whitlam's prime ministership.

A good example of the Whitlam government's successful use of existing powers to achieve novel ends was its environmental protection legislation that was upheld by a unanimous Court in the *Murphyores* case.[140] The Environmental Protection (Impact of Proposals) Act 1974 was used by the Whitlam government to order an environmental impact inquiry into Murphyores' mining operations on Fraser Island in Queensland. Although Murphyores was an established producer of zircon and rutile concentrates, it had to obtain (under customs regulations) periodic permission for the export of its product overseas from the minister for minerals and energy. The company was strongly supported by the development-orientated National party government of Queensland led by Premier Joh Bjelke-Petersen, but had come under increasing pressure from environmentalists for its mining of ecologically sensitive foreshore areas. Fearing, correctly as it turned out, that the environment impact inquiry would report unfavourably and therefore that the minister would not approve future exports, Murphyores challenged the constitutionality of the Environment Protection Act and sought an injunction to prevent the minister's taking account of environmental considerations in his decision on whether to grant an export permit. Before the Court, the plaintiff argued for a narrow interpretation of the section 51(i) trade and commerce power, and in particular that a law concerned with protecting the environment was not a law with respect to trade. The Court, however, simply applied well-established precedents to uphold the law. The Court's decision was consistent with such earlier decisions as that prohibiting the import of airplanes into Australia by Ipec-Air to challenge the "two-airline" policy.[141] It fulfilled Justice Fullagar's 1954 prediction that the commonwealth's power over exports could enter "the factory or the mine or the field" [142]

Unlike in the *Murphyores* case, the Court was not usually unanimous in its decisions, nor did it always uphold the constitutionality of commonwealth legislation. The most important setback to the government, and particularly to its tough minister for minerals and energy R. F. X. Connor, came in the *PMA* case.[143] The Petroleum and Minerals Authority (PMA) was to be the government's vehicle for participating directly in the petroleum and minerals development boom, particularly in the promising offshore area over which it had declared commonwealth sovereignty. The legislation was championed by Connor who retained dogmatic views about, and an "old fashioned" commitment to, direct government ownership and control in this lucrative growth area of the economy. Such an authority was anathema to the non-Labor state premiers and the federal

opposition who saw it as being "designed for nothing but naked socialism",[144] so the PMA legislation was never passed by the Senate. However it was included as one of the six bills listed in the governor-general's proclamation dissolving both Houses of parliament on 11 April 1974, and was subsequently passed at the joint sitting of parliament and signed into law. It was held unconstitutional by the Court on the grounds of having failed to satisfy the preconditions of section 57. Connor immediately announced that new legislation would be introduced, but Labor lacked the numbers in the Senate to have it passed. The case was significant as an interim setback to an important Labor inititative, but more so because it showed that the Court was prepared to review the internal workings of parliament.

The constitutionality of the PMA Act first arose in an earlier case in which the Court hurriedly considered a challenge by opposition senators to the proposed joint sitting of parliament.[145] The Court dismissed the senators' challenge and ruled that the joint sitting could proceed, but took the opportunity to proclaim its authority to review the legality of vice-regal proclamations made under section 57 and to determine whether legislation had "failed to pass" in the Senate in accordance with the requirements of section 57. A majority of judges had indicated that they would be prepared subsequently to examine the validity of legislation that might be passed at the joint sitting. Barwick even broadcast what his future decision on the PMA Act would be, remarking that he "would have little difficulty in finding" that the PMA Act had not satisfied the requirements of section 57.[146] Only McTiernan held that section 57 matters were "intrinsically of concern to the Senate and the House of Representatives respectively" and were not suitable "for a trial in this Court".[147]

In due course four non-Labor state governments mounted a challenge to the PMA Act and it was ruled unconstitutional by a majority of the Court. The grounds for the decision were that the Senate's decision to hold over consideration of the bill when it was first received in the Senate in December 1973 did not constitute "failure to pass" under section 57, and so the mandatory three-month interval required before the House of Representatives could pass the legislation a second time had not been satisfied. McTiernan stuck by his earlier dissent that these were "political questions" for which courts were "not fit instruments of decision" [148] Jacobs, also in dissent, suggested a technical way out; measuring the three-month interval from the date when the House of Representatives first passed the legislation. While this reading of the section strained the obvious meaning of its language, it would have allowed the Court to avoid some "very considerable difficulties and uncertainties" such as determining the precise point at which the Senate actually failed to pass legislation. Jacobs's novel proposal precluded the further possibility, allowed by the majority view, of a double dissolution being invalidly granted and a general election held before the Court could give its ruling. The majority judges, however, were not deterred from pronouncing on the working of parliament by such judicially intractable consequences.

The second challenge to controversial legislation passed at the 1974 joint sitting came in the *Territory Senators* case.[149] Although aspects of section 57 were again raised, the main issue was the apparent contradiction between section 122 of the constitution which allows the government to provide for representation of the territories "in either House of the Parliament to the extent and on the terms which it thinks fit" and section 7 which requires that "the Senate shall be composed of Senators for each State" A narrow majority of McTiernan, Mason, Jacobs and Murphy upheld the government's legislation that made provision for two full-voting senators from each of the territories, the Northern Territory and the Australian Capital Territory. This majority held that section 7 applied to the original Senate but that section 122 allowed for future representation of territories in the Senate. The minority led by Barwick argued that territorial representation in the Senate was a severe abrogation of federal principles and therefore section 122 had to be read subject to section 7.

In the *AAP* case[150] the same three Labor appointees, McTiernan, Jacobs and Murphy, upheld the constitutionality of appropriations for the Australian Assistance Plan. The *AAP* case was decided in favour of the government because Stephen ruled that the plaintiff did not have standing to bring such a challenge. The government had made direct appropriation of some $6 m for preliminary stages of the Australian Assistance Plan, which was to target federal money directly to regional government organizations within the states. At stake was the key issue of whether the federal government had power to spend money direct on its own programmes in the states in areas other than those for which it had specified constitutional powers. Ever since the *Pharmaceutical Benefits* case, such direct appropriations had been considered suspect. The issue was not satisfactorily resolved in this case because the court split three-three on the substantive issue, with Stephen giving victory to the government by ruling that Victoria and the other states lacked standing to challenge the appropriation.

The most important decision of the Whitlam years was the *Offshore*[151] case which upheld the federal government's legislative assertion of sovereignty over the entire offshore area, including the sea, airspace, seabed and subsoil. The government's legislation, the Seas and Submerged Lands Act 1973, was declaratory in nature and had been modelled on the earlier draft legislation of the Gorton Liberal government. John Gorton, one of Australia's most nationalistic and centralist Liberal prime ministers, had been forced to abandon the legislation because of angry opposition from state premiers and a revolt within his own parliamentary Liberal party. When the Whitlam government revived the legislation and finally had it passed at the 1974 joint sitting, all the states challenged its constitutional validity. The states preferred the previous arrangement under which the ultimate constitutional issue was left untested, while they enjoyed a partnership with the commonwealth in administering offshore petroleum and sharing in its royalties. The states laid strong claims to sovereignty over the three-mile territorial sea and

argued that the commonwealth had no constitutional power to support its sweeping claims.

In upholding the federal government's assertion of commonwealth sovereignty over the whole of the offshore area, the Court rejected the competing claim of the states that they already possessed jurisdiction over their adjacent territorial seas. The Court decided that the commonwealth could validly claim sovereignty over the offshore under its section 51(xxix) external affairs power. Although a milestone decision of enormous consequence, the *Offshore* case was decided by applying, and to some extent extending, established lines of precedent. The external affairs power was given plenary scope and applied literally to the sea and seabed area external to Australia. Regarding the states' claim of proprietary rights to the territorial sea before federation, some judges denied such claims outright while others thought that even if such rights existed they had been transferred to the commonwealth at federation. Most also made the additional point that such a finding was consistent with the development of Australia's nationhood. As Barwick put it in one of his most lucid judgments:

> The result conforms to an essential feature of federation, namely, that it is the nation and not the integers of the federation which must have the power to protect and control as a national function the area of the marginal seas, the seabed and airspace and the continental shelf and incline.[152]

The High Court's decision was consistent with equivalent American and Canadian Supreme Court decisions.[153]

Much of the political heat was taken out of the Court's decision because it came down in December 1975 just after the new Fraser Liberal government had been sworn in. The Fraser government welcomed the decision as clearly establishing the offshore sovereignty of the commonwealth. The new minister for minerals and energy and deputy prime minister, Doug Anthony, described the outcome as "undoubtedly one of the most significant constitutional verdicts ever handed down by the Court". At the same time he reassured the states that existing royalty arrangements on offshore oil production would remain, and that "sensible arrangements" would be quickly settled with the States.[154] The Fraser government was keen to get the giant North-West Shelf natural gas project, over which the previous Labor minister Connor and premier Court had been continually squabbling, off the ground. Moreover it needed to establish its good faith with the states and to give some concrete substance to its "new federalism" rhetoric. For the Queensland National party government that had worked so hard and effectively to oust the federal Labor government, the decision was not unexpected but the consequences for the state were not calamitous because of the change of federal government. As one Queensland spokesman said:

> Fraser and Anthony made it in time. This decision would have given Whitlam carte blanche to cut our throats. Had Whitlam still been Prime Minister this would have

> been a major defeat for the State. Now it is a whole new ball game and we can expect a co-operative approach with Fraser and Anthony.[155]

The Fraser government's subsequent offshore constitutional settlement with the states was proclaimed as "a milestone in co-operative federalism" and "a unique achievement in the history of Commonwealth and State relations" [156] This new agreement was certainly the most significant fruit of Fraser's new federalism. The federal government restored the states' right to control their traditional three-mile territorial seas via the Coastal Waters (State Powers) Act 1980. The system of a co-operative federal-state authority to control offshore petroleum with day to day administration vested in the states was retained. As well, the states were given control over local offshore fishing and coastal trading. In matters of international responsibility, however, the federal government reserved its right of control.

This offshore settlement with the states which was put in place in early 1979 undid part of the High Court's ruling. It was the result of several years of negotiation and was enacted in a novel way using section 51(xxxviii) for the first time. That curious section, which was probably included in the constitution to allow unforeseen matters to be dealt with in the early transition to federal nationhood, reads as follows:

> The exercise within the Commonwealth, at the request or with the concurrence of the Parliaments of all the States directly concerned, of any power which can at the establishment of this Constitution be exercised only by the Parliament of the United Kingdom or by the Federal Council of Australasia.

It was picked up by the Fraser government and put forward as a possible way of binding future (Labor) governments on the grounds that what was done with unanimous state approval could only be undone by similar unanimous approval.[157] All the states, including New South Wales, South Australia and Tasmania that had Labor governments, passed legislation requesting the commonwealth to enact the Coastal Waters (State Powers) Act.[158] In so co-operating with the federal Liberals to recoup their traditional offshore positions, these state Labor governments were acting against Labor party policy. Federal Labor spokesmen bitterly criticized the joint legislative action and John Cain, the Victorian shadow attorney-general, denounced it as regressive for diminishing the "national stature of the country and benefiting only parochial state rights and the interests of large international companies". Frank Walker, the New South Wales Labor attorney-general, summed up the pragmatic attitude of the state Labor governments that endorsed the scheme when responding to criticisms that his explanation of the state legislation had been "fairly cursory"; he replied "the less said the better" [159]

Political convergence and judicial restraint

After the defeat of the Whitlam Labor government, the tempo of constitutional review slackened. Australian federal politics once again reverted to the accustomed pattern of dominance by the Liberal coalition and acceptance of the constitutional status quo. The euphoria and optimism of the early Whitlam years was replaced by a mood of pessimism and public uncertainty that was reflected politically in the austere rhetoric and stern demeanour of Mr Fraser. In this domineering, humourless politician and the established parties of government, the Liberal coalition, Australians clung to political certainties in an economically uncertain world. The Fraser government was elected with comfortable majorities in three successive federal elections despite little progress in managing a worsening economy.

Meanwhile after a second devastating electoral defeat in 1977 Whitlam resigned from politics, leaving the Labor party to become more pragmatic and cautiously moderate in its policies. Labor's federal electoral victory under Hawke in 1983 was a skilful exercise in public relations that offered new faces and a kinder, if largely vacuous, public rhetoric of consensus and national reconciliation to an electorate that had become restless and dissatisfied with Fraser's style of government. Under Hawke's populist leadership and because of the dominance of the New South Wales right and of pragmatists within the Labor party, there has been a marked convergence in Australian politics. The Hawke government is orthodox and conservative in its economic policy, largely conventional and pro-American in foreign policy and moderate in constitutional matters. In short, it fits the standard mould of postwar Liberal coalition governments.[160]

Concurrently with the increasing convergence within Australian federal politics, judicial review by the High Court has become more accommodating of commonwealth initiatives. The High Court's dominant tendencies of restraint and incremental centralism have proceeded apace during the last decade. Just as it is highly unlikely that the modern Labor party would challenge the constitution as it did in the past, it seems equally unlikely that the High Court would interpret the constitution in the same negative way that it did in the 1940s. This section traces the themes of judicial restraint and incremental centralism, both old themes in Australian judicial politics from as far back as the *Engineers* decision, through their development in some of the major recent cases.

Judicial restraint

Throughout most of its history the Australian High Court has been a conservative and restraining force on Australian politics through its exercise of judicial review. When most active and creative, as for example in interpreting section 92 against the Chifley Labor government in the 1940s, the Court has wielded its considerable power to protect established liberal values and private enterprise against reformist

and socialist challenges. Even when the Court abruptly changed direction in the *Engineers* case in 1920, it was to embrace a more traditional British approach to interpreting the constitution as a statute of the Westminster parliament in place of its earlier American-style balancing of federal and state powers. Eminent judges like Dixon and Barwick have been able to describe the Court's conservative approach as strict legalism. Barwick and others have contrasted this "legalism" of the Australian Court with the "political" decision making of the American Supreme Court, accounting for the difference in terms of Australia's not having a constitutional bill of rights.

The argument that has been put forward throughout this book is that the Australian Court is just as political as its American counterpart, but that its politics are different. The difference, at least in the post-World War II period, has been between an openly freewheeling and reformist court and a conservative one that uses a more traditional legal method and rhetoric. Put another way, the difference is between an Earl Warren and an Owen Dixon: the one a populist politician who used the highest judicial office to impose his views of "what America stands for" and what appeared just and right upon recalcitrant federal and state legislatures;[161] the other an austere rationalist steeped in the traditions of nineteenth-century English law who sought always to draw his conclusions from legal technique and principle.

In performing a highly political and judgmental function, as when interpreting a constitution, it is not possible to be apolitical and neutral. But it is possible to be "interpretive" rather than "non-interpretive": that is, to draw out principles and values from the constitution and apply them incrementally to cases as they arise, rather than to read one's own preferred principles and values back into the constitution using the opportunities provided by particular cases.[162] While it is true that having a constitutional bill of rights provides far greater scope for the latter, the choice of method remains a basic value or policy choice for judges. The openly reformist approach to interpreting the American bill of rights that was pursued by the Warren Court is a relatively recent phenomenon for the United States Supreme Court. For most of its history the American Court has been a conservative, and at times a reactionary, force in American politics. Hence it is not having a bill of rights to interpret, but rather interpreting it in a "non-interpretive" manner, that makes a court political in the sense that the term is applied to the Warren Court.

In recent years the Australian Court has been given the chance on a couple of notable occasions to adopt the bold American non-interpretive approach. Some would see Justice Murphy as an advocate and practitioner of such a method. For the most part, however, the Australian judges have eschewed the American approach and in several instances declined to follow the American Supreme Court's reforming decisions. This was apparent in the *McKinlay* voting case in the mid-1970s and the *DOGS* case that concerned the establishment of religion in 1981, and

in a somewhat different way in recent trends in the interpretation of section 92. These will be examined in turn.

It has become common in the United States for minority groups who cannot win redress for their grievances or get their way in the political arena to go directly to the Supreme Court. There, through judicial fiat, sweeping reforms in important political and social matters such as correction of malapportionment in electoral districts, a woman's private right to an abortion and racially desegregated schooling were all achieved. These reforms were not possible at the time in the more cumbersome process of democratic politics that has to build a majority coalition, surmounting mass inertia and entrenched pockets of elite resistance. Not only does such judicially-imposed reform bypass elected governments, it also binds them by entrenching the reform in the constitution. The *McKinlay* voting case was the first attempt to replicate this process in Australia; the *DOGS* case on the establishment of religion was the second. Fortunately for the integrity of both the democratic process and judicial review in Australia both cases were unsuccessful.

The *McKinlay* case

In the *McKinlay* case[163] the Court was asked to rule in effect that the strict egalitarian principle of "one person one vote" or equal sized electorates was required for electoral apportionment by section 24 of the Australian constitution which stipulates that "the House of Representatives shall be composed of members directly chosen by the people of the Commonwealth, and the number of such members shall be, as nearly as practicable, twice the number of the senators." The remainder of section 24 sets out the further requirement that the number of members from each state is to be in proportion to its population. The section also gives a method for calculating the number of members from each state. This is the quota method that works as follows: a quota is obtained by dividing the population "of the Commonwealth" by twice the number of senators; the number of members from each state is then obtained by dividing the state's population by the quota. If there is a remainder greater than one half, the state is entitled to an extra member. Finally there is a guarantee that each original state in the federation is entitled to five members regardless of the quota calculation. In summary, section 24 requires direct election of members of the House of Representatives; it limits the numbers of such members to as nearly as practicable twice the number of senators; and it gives a formula for distributing seats among the various states on a population basis. However section 24 says nothing about how electorates are to be apportioned *within* each state.

McKinlay argued that the phrase "directly chosen by the people" meant equal representation so that electoral divisions must contain an equal number of people. Brian McKinlay was a Labor party activist from Victoria's largest electorate of Diamond Valley, a rapidly growing suburban electorate that at the time had 91,818

electors. This was nearly twice as large as Victoria's smallest electorate, the country seat of Wimmera which had only 50,208 electors. There were similar discrepancies in sizes of electorates in the other states. In 1974 one of the Whitlam government's unsuccessful referenda proposals had sought to require substantial equality in all electoral divisions in Australia. McKinlay was trying to win from the Court what the Whitlam government had failed to achieve from the people through constitutional amendment. He was supported by the Labor attorney-general in whose name the suit was formally brought; hence the anomalous formality of a challenge brought by the commonwealth attorney-general against the constitutional validity of commonwealth legislation.

Only Justice Murphy accepted the American Supreme Court's holding that "chosen by the people" (Article 1 of the US constitution) "contained a command of equal representation in the House of Representatives for equal numbers of people". Murphy argued that because the Australian constitution's equivalent phrase "directly chosen by the people" had been copied from the United States constitution it should be given the same meaning. He was led to this conclusion by such loose reasoning as "the democratic theme of equal sharing of political power which pervades the Constitution" [164] All the other judges interpreted the phrase "directly chosen by the people" narrowly, as requiring only direct, rather than indirect, elections. The caution and restraint typical of the majority were spelt out in the opinions of Gibbs and Stephen:

> we are not justified in importing new requirements into [section 24] simply because, as a matter of policy, they may seem to be desirable. Our duty is to declare the law as enacted in the Constitution and not to add to its provisions new doctrines which may happen to conform to our own prepossessions.
>
> Having entrusted to their elected legislatures rather than to this Court these wide powers of shaping as they see fit the details of this nation's electoral system it is not for this Court to intervene so long as what is enacted is consistent with the existence of representative democracy. [165]

Some judges were prepared to admit that "gross discrepancies" in electoral size or the absence of some essential quality of representative democracy might vitiate the requirement of being "directly chosen by the people", but they did not consider that such an extreme situation was involved in this instance.[166]

All the judges, except Murphy, were happy to leave electoral apportionment within states to the processes set up by the legislature. However, the Court did require strict adherence to the constitution's requirements that numbers of seats be allocted to states on the basis of their proportionate populations, and that the size of the House be as nearly as practicable twice the size of the Senate. The Representation Act was found to be constitutionally deficient because it did not require regular calculations and, if necessary, redistributions of the proportionate number of seats for the various states. In the subsequent *McKellar* case[167] the Court held invalid sections of the Act that gave an additional seat to a state if

any remainder were left when the state's population was divided by the quota. The Court required that the remainder be greater than one half to ensure that the House remained as nearly as practicable only twice the size of the Senate. The Representation Act was changed accordingly by parliament.[168]

The *McKellar* case challenged the method of calculating the number of members for each state after territorial senators had been introduced. The Act presupposed that for calculating the quota, section 24 could be read as follows: that the "people of the commonwealth" meant the people of the states only, and that the "number of Senators" meant the number of senators from the states. In other words the people from the territories and territorial senators were both excluded from the calculation. This was upheld unanimously by the Court. Barwick, however, could not resist questioning the whole validity of territorial representation in the Senate. He regretted that the propriety of the Court's favourable decision in the *Territorial Senators* case in which he had dissented was not re-argued, because he said it represented "a serious departure from the federal nature of the Constitution" that would otherwise become "entrenched in constitutional practice by the mere passage of time" [169]

The *DOGS* case

The *DOGS* case[170] was an Australian example of a phenomenon that has become commonplace in America; a special interest group that failed to get its way with the legislature through the normal democratic means of electoral and pressure group politics sought to have its views imposed by means of a sweeping ruling from the Court. State aid to independent schools, most of which are needy Catholic schools, was brought in by the Menzies Liberal government in the mid-1960s despite some bitter sectarian opposition. It has since become a settled, albeit contentious, policy with strong bipartisan support. While church schools receive considerably less government funding per capita than state schools, the government subsidy has been steadily increasing and now amounts to hundreds of millions of dollars per annum.[171] Most of this comes from the federal government via section 96 grants. DOGS (Defence of Government Schools) is a stridently secularist organization that has tried persistently to have state aid to religious schools cut off. First it ran candidates in elections and when that failed it tried to influence the major political parties, particularly the Labor party. But since neither party could afford to alienate the large Catholic vote, the DOGS organization was left with the alternative of mounting a constitutional challenge.

That was based on section 116 of the constitution that forbids the commonwealth to "make any law establishing any religion". Since most state aid to church schools came from the commonwealth, it could be stopped if it were shown to constitute establishing a religion within the meaning of section 116. To succeed in a

constitutional challenge, DOGS had to surmount two substantial obstacles: first, it was necessary to obtain standing to bring its case; and second, DOGS had to persuade the Court to adopt the radical distinction between church and state that the American Supreme Court has read into a comparable clause in the first amendment of the American constitution. DOGS succeeded on the first issue but not on the second. The group managed to win the agreement of the Victorian attorney-general at the time, Vernon Wilcox, for formally using his name to bring its case before the High Court.

Again, as in the *McKinlay* voting case, Murphy was the sole judge to accept American constitutional doctrine. He was prepared to read "establishing any religion" very broadly to include "sponsorship or support (including financial support) of any religion" This interpretation was taken directly from American decisions that forbade state aid to church schools in the United States. Murphy claimed that the controversial American doctrine applied to Australia because such an interpretation of the establishment clause was "well settled and accepted judicially in the United States prior to the framing of the Australian Constitution".[172] Therefore, he concluded, a similar meaning must have been intended by those who wrote a variation of the American establishment clause into the Australian constitution. This is a controversial historical claim to say the least, and is more likely than not a spurious one. It is not clear just what the founders did intend in adopting Higgins's amendment, which was put forward to allay the fears of Seventh Day Adventists who thought that it might be inferred from the recognition of Almighty God in the preamble that the commonwealth had power to legislate on religion. The fear was unfounded, and the amendment considered unnecessary by most delegates since the commonwealth was given no power over religion.[173]

The majority of judges were on surer ground in interpreting "establishing any religion" to mean constituting a particular religion or religious body such as a state religion or state church. As Gibbs correctly pointed out, it had not been decided by the American Supreme Court at the time of Australian federation that Congress was forbidden, by the establishment clause of the American constitution, to give financial aid to religious bodies. That decision was not made until 1947 in *Everson v. Board of Education*.[174] Hence it could not be said that the Australian founders meant to prohibit state aid to church schools constitutionally.

Perhaps it is not surprising that the traditionally more conservative Australian Court was reluctant to barge into such sensitive political areas as voting apportionment and state aid to religious schools, and upset existing political arrangements in favour of its preferred views on public policy, as the American Court has done. These were rather novel areas of adjudication and the American Court's rulings that were proffered as guidance represented the sort of broad-brush judicial policy making that the Australian Court has persistently eschewed. More surprising has been the Court's recent restraint in handling section 92, which has

previously been the major area for judicial activism and non-interpretive review in Australia.

Changing impressions of section 92

The judicial unanimity on section 92 that Dixon had laboured for decades to establish proved to be short-lived. That was hardly surprising because it was such a highly artificial view. As had happened periodically in the past, a new generation of judges bringing their own personal views to the interpretation of section 92 and applying old precedents to new cases produced yet another metamorphosis of meaning. In fact at present there is profound confusion and a welter of conflicting interpretations. As a prominent lawyer, Ian Temby, recently complained, "in this labyrinth there is no golden thread":

> Rules have been laid down which allow different answers to particular factual situations. Those rules have been changed with remarkable frequency. It is unusual to find a s. 92 case without one or more dissenting judgments, and very frequently it will be found that High Court Justices have used different paths of reasoning to reach the same or similar conclusions. . Individual High Court Justices have obviously worked from impressions, no matter the extent to which their judgments are delivered in the language of logic.[175]

The most notorious recent examples of unsatisfactory interpretation of the troublesome section arose in the hoary area of section 92 litigation, compulsory agricultural marketing schemes, and in this instance involved challenges to the Australian Wheat Board. Since 1948, successive Wheat Industry Stabilization Acts have given the Wheat Board an exclusive monopoly over the sale and distribution of wheat in Australia. Federal legislation is supplemented by "mirror" legislation in the states. This legislation requires all wheat that is not used by the grower on his own farm to be delivered to the Wheat Board which controls every aspect of its sale, delivery, movement and processing. There have been two recent attempts to break the Wheat Board's monopoly on section 92 grounds: the first by a Victorian flour and feed miller, Clark King, who bought wheat direct from New South Wales growers, and the second by a large New South Wales grower, Uebergang, who sold wheat direct to Queensland millers.

In *Clark King* (1978)[176] the Wheat Board's monopoly was narrowly upheld by Mason, Jacobs and Murphy, with Barwick and Stephen dissenting. Among the five judges who sat on the case, however, there were four quite different interpretations of section 92. At one extreme Barwick claimed that "it had been established that the freedom constitutionally guaranteed is the freedom of individuals" Certainly much of Barwick's professional career had been built on having that view adopted by an earlier Court, but now times and the personnel of the Court had changed. Nevertheless Barwick remained unrepentant in his doctrinaire isolation, freely admitting the consequences of his extreme view that section 92 created "a legislative gap": "the Constitution undoubtedly has created,

and if it matters has deliberately created, such a void".[177] At the other extreme was Murphy who, in a one-page opinion, concluded that the legislation did not infringe section 92 because it did "not impose, directly or indirectly, any customs duty or similar tax discriminating against trade or commerce among the States".[178] A few years earlier Murphy had set out his contrary radical view that cast aside three-quarters of a century of turgid precedents by holding that section 92 was directed solely against customs duties on interstate trade.[179]

The more interesting opinions were those of the remaining judges who wrestled with the Privy Council's inscrutable *dictum* from the *Bank Nationalization* case that allowed a government monopoly in special circumstances. In a concluding flourish that was at odds with the thrust of their substantive holding on section 92, their Lordships had said that they did

> not intend to lay it down that in no circumstances could the exclusion of competition so as to create a monopoly either in a State or Commonwealth agency or in some other body be justified. Every case must be judged on its own facts and in its own setting of time and circumstance, and it may be that in regard to some economic activities and at some stage of social development it might be maintained that prohibition with a view to State monopoly was *the only practical and reasonable manner of regulation* and that inter-State trade commerce and intercourse thus prohibited and thus monopolized remained absolutely free.[180]

The question at issue therefore was whether the stabilization scheme that gave the Wheat Board a monopoly was "the only practical and reasonable manner of regulation" Stephen held that it was not. He cited in support a contemporary Industries Assistance Commission report that condemned the stabilization scheme as inefficient and ineffectual, and recommended its replacement by an alternative free market arrangement. Because of this report, Stephen was not convinced that the defendants had established that the state monopoly was justified as 'the only practical and reasonable manner of regulation" [181]

Mason and Jacobs came to the opposite conclusion, that the wheat scheme was the only practical and reasonable manner of regulating the interstate wheat trade. They did not mention the unfavourable Industries Assistance Commission report that Stephen had relied upon, but instead gave a sympathetic outline of the probable calamities of an unregulated market. The last paragraph of their joint opinion suggested that these two justices favoured watering down the strict "only practical and reasonable" test to one of "practicality and reasonableness" [182]

The *Clark King* case did not resolve the substantive constitutional question of the meaning of section 92. As Barwick emphasized in his justification for the Court's reconsidering the matter in *Uebergang* soon afterwards, one of the majority, Murphy, "took a ground which has never been accepted by any justice of the court in any case" and which was "inconsistent with every decision of the Privy Council and of this court upon the meaning and operation of s. 92" [183] Moreover, two of the more conservative members of the court, Gibbs and Aickin, had not sat on the *Clark King* case. Hence only a couple of months after the *Clark King*

decision came down in favour of the Wheat Board a large wheat grower from Northern New South Wales, Colin Uebergang, challenged the constitutionality of the wheat monopoly scheme rather than deliver his grain to the Wheat Board. By the time the case was argued, Wilson had replaced Jacobs on the Court, so it seemed likely that Uebergang might win.

The *Uebergang* case was to be only an exploratory foray into possible meanings of section 92, however, since the Court had set itself abstract questions about what evidence would be necessary to determine the validity of the wheat stabilization scheme. Most of the judges decided that they needed more factual evidence to decide the case. Only the two extremists, Barwick and Murphy, held that the validity of the Wheat Board could be determined *a priori* on doctrinal grounds in the opposing ways they had put forward in *Clark King*.[184]

Gibbs and Wilson in a joint opinion adopted essentially the Stephen position from *Clark King*. They thought that section 92 protected the private rights of individuals and so prohibited a state monopoly unless there were compelling reasons for such a monopoly. They proposed a stringent test that required exceptional circumstances and retained the ambivalence of the Privy Council formula:

> Therefore what must first be shown in order to establish validity is that a monopoly covering both intrastate and interstate trade is the only practical and reasonable course open in the circumstances. The test remains a most stringent one, not likely to be satisfied except in exceptional circumstances. If that test is satisfied, it is still necessary for the Court to consider whether the interstate trade, so regulated, is "absolutely free" within the meaning of s. 92.[185]

On the strength of his *Clark King* dissent Stephen should have joined this opinion, but did not. Apparently he had changed his mind, and now joined Mason in debunking the Privy Council test because of its ambiguities and "seeds of uncertainty" Stephen and Mason proposed instead a mild test of reasonableness: "whether or not the restrictions which the legislation imposes upon interstate trade are no greater than are reasonably necessary in all the circumstances" In putting this another way, Mason and Stephen brought in the "public interest" consideration that Mason had been insisting for some time was the primary purpose of section 92. The criterion of "permissible regulation" of interstate trade was that the legislation be "no more restrictive than is reasonable in all the circumstances, due regard being had to the public interest" [186]

Since Aickin agreed substantially with Barwick, it seemed that Uebergang could now challenge the Wheat Board before the High Court and win by four votes to three. But Colin Uebergang decided to quit. He and the independent Graingrowers' Association that represented fellow disgruntled farmers in northern New South Wales and southern Queensland had already been involved with the litigation for several years and spent an estimated $320,000. This, coming on top of several years of severe drought, had dampened their enthusiasm for a final legal

showdown with the Wheat Board.[187] The upshot was that the Wheat Board survived and the meaning of section 92 remains uncertain.

The *Uebergang* case showed that the Court was hopelessly fragmented over the meaning of section 92. With three new justices now on the Court its meaning is even more uncertain. There would seem to be two plausible ways out of this labyrinth which have emerged already. Murphy's method is radical and effective but is unlikely to be followed. The more likely course is for Mason's "public interest" view to gain increasing acceptance and for his and Stephen's "reasonableness" test to be used. Mason had earlier rejected the "private right" interpretation of section 92 in favour of his own view that it has a "predominant public character".[188] If this view is accepted by a majority and developed, it could lead finally to the Court's exercising judicial restraint in its interpretation of section 92. Such a development would be in keeping with the attitude of judicial restraint that has been an important element in much of the Court's other work in recent years. It would also be in line with the sentiments of the present Court majority in allowing extensive scope for commonwealth action by interpreting broadly grants of power such as the external affairs power. This current dominant tendency of the Court is considered in the final section.

The Tasmanian *Dam* case: a watershed

The Tasmanian *Dam*[189] case is an appropriate historical point at which to end this study of the politics of judicial review because it is probably the most significant, and certainly the most dramatic, exercise of judicial review in recent decades. The dispute that the High Court resolved was a classic federal one between the Hawke Labor government and the Gray Tasmanian Liberal government over building a controversial hydro-electric dam on the Gordon river, below its junction with the Franklin river, in Tasmania's south-west wilderness. Both governments were locked into their opposing hard-line positions by firm commitments that had been endorsed by recent substantial electoral majorities. The two sides championed conflicting sets of values and interests; the federal government was intent on preserving a wild and beautiful river environment that was of national and international heritage significance, while the state government insisted on its traditional right to develop its own natural resources to provide interim employment in an economically depressed region and cheap hydro-electric power for further industrialization.

Besides resolving this bitter controversy, the Court's decision was even more significant for its broader political and constitutional implications. The *Dam* case was the first major constitutional decision for the newly constituted High Court at the very beginning of the term of office of the Hawke federal Labor government. Justices Deane and Dawson had been appointed by the previous Fraser Liberal

government only in July 1982, and therefore had not sat on the key *Koowarta* case[190] that was decided earlier in May. In the *Koowarta* case, the Court had split four to three in narrowly upholding federal legislation that outlawed racial discrimination, in this instance in the state of Queensland, on the basis of a broad interpretation of the commonwealth's "external affairs" power, section 51(xxix). Stephen, Mason, Murphy and Brennan made up the majority while Gibbs, Aickin and Wilson dissented. After the *Koowarta* case, however, both sides lost a judge; Stephen was appointed governor-general and Aickin died. Since the *Dam* decision turned on the interpretation of the external affairs power, the votes of the two new judges were crucial. It turned out that Deane joined the *Koowarta* majority and Dawson the minority. As a result, the Court by a four to three majority gave a broad reading to the external affairs power, and also to the "corporations" power, section 51(xx), and the "Aboriginals" power, section 51(xxvi). The same majority of Mason, Murphy, Brennan and Deane consolidated its centralist stand in the subsequent *Pipeline Tax* case when it ruled that the Victorian government's multi-million dollar tax on each of its three onshore oil and gas pipelines was an excise duty that only the commonwealth could levy.[191]

The High Court's adjudication of the *Dam* case in favour of the commonwealth is especially significant in light of Australia's constitutional history. A major focus of this book has been the High Court's intermittent adjudication of the ongoing saga of "the Constitution versus Labor" whenever the Labor party has been in federal office. In the past, as Whitlam rightly claimed in 1957, the Australian Labor party had been "handicapped by a Constitution framed in such a way as to make it difficult to carry out Labor objectives and interpreted in such a way as to make it impossible to carry them out". But, as we have also seen in examining the Whitlam experience in government during the early 1970s, both the Labor party and the High Court had changed substantially since the 1940s. The Tasmanian *Dam* decision showed that the constitution as currently interpreted by the High Court is unlikely to be an obstacle to the Hawke government or indeed to any future federal Labor governments. This section explains why this is so and examines other aspects of the *Dam* case that have important implications for judicial review of federalism in Australia.

The *Dam* decision raised a number of questions about judicial review that are of primary significance for our study. Has the political character of judicial review finally been exposed by the conservative press and losing politicians as an undemocratic and improper way of amending the constitution? Or does it still remain a settled part of the federal political process? Did the *Dam* decision mark the end of federalism, or, if not, the destruction of the federal balance? Or was it just another incremental step in the process of centralization of formal power in the Australian constitution?

It will be argued that the *Dam* case did not spell the end of federalism, but was another milestone in the process of incremental centralism of formal

constitutional powers that has been going on since the 1920 *Engineers* case. In a sense the *Dam* case was a rather straightforward application of *Engineers* principles of interpretation to a head of commonwealth power that is topical today. The Court's broad interpretation of the external affairs power in the *Dam* case was essentially the same as that advocated by Evatt and McTiernan in the earlier 1936 *Burgess* case.[192] Nevertheless the *Dam* decision marks a new stage in the Court's centralization of constitutional powers, and it has opened up a potentially enormous area for expanding commonwealth powers at the expense of the states. What the *Dam* decision might well imply is not the end of federalism, but the beginning of the end of the judicial review of federalism by the High Court. In the future the political dynamics of intergovernmental relations and political conflict and compromise are likely to be more important, and judicial review less important, in determining the shape of the Australian federal system.

Changing perceptions of judicial review

The High Court's portrayal of itself and the way it is in turn perceived are important factors in explaining the Court's political effectiveness in exercising judicial review. In this book it has been argued that the Court's public rhetoric and legalistic technique have disguised judicial power and helped legitimate the Court's controversial decisions. The Tasmanian *Dam* case provides a contemporary snapshot of current perceptions of the Court's role. It shows that although the judges continue to invoke traditional disclaimers of apolitical legalism, the more conservative and parochial newspapers and Liberal and National party state politicians are now emphasizing the real political character of judicial review and questioning its legitimacy. This significant development in the politics of judicial review in Australia warrants closer examination.

The extent of the breach between the Court's own portrayal of its role and the perception of this newly alienated right-wing constituency can be seen from comments by the two sides. Chief Justice Gibbs began his opinion in the *Dam* case with a disclaimer of policy making and an assertion of strict legalism:

> The wisdom and expediency of the two competing courses are matters of policy for the Governments to consider, and not for the Court. We are concerned with a strictly legal question

Justice Wilson concluded his opinion with a similar refrain:

> It cannot be emphasised too strongly that, although the subject matter of the actions before the Court provides the occasion for much political controversy, the role of the Court is wholly divorced from that controversy. The questions which have been referred to it are strictly legal questions involving important issues of constitutional interpretation. The Court is neither equipped, empowered, nor permitted to enter upon the merits of that controversy.

Justice Deane, from the majority, also insisted on the same point, that the questions

before the Court were "questions of law" which were to be resolved "in accordance with legal method and legal principle" [193]

Such claims were denied by influential Australian newspapers which lamented the decision and blasted the Court as a political usurper. After pointing out the consistent reluctance of the people to change the constitution by referendum, the Hobart *Mercury* complained that:

> By the narrowest of margins, four judges from a Bench of seven have wrought the most fundamental change to the Australian Constitution since Federation in 1901. It is a decision from which there is no appeal
>
> [N]ow, whether they like it or not, the Australian people have been presented with a rewritten Constitution—rewritten by judicial interpretation in a way which could never have been envisaged by the founding fathers of this nation.[194]

In its special front-page editorial, titled "The Constitution belongs to the People", the *Australian* argued that control over the basic principles of Australia's system of government had been "taken out of the hands of the people and delivered to judges not answerable to any electorate". It pointed out that a group of unelected judges had brought about a massive change to the constitution "without the people as a whole being given any notice whatsoever" The consequences of such bold judicial politics were ominous, warned the *Australian*: "It is inevitable that in future any federal government will face an overpowering temptation to stack the Court with those who agree with its political objectives."[195]

Similarly, the *Financial Review* accused the Court of producing "a really new federalism" in which "the States must now be considered to have no certain, irremovable jurisdiction over anything at all". It claimed that the High Court's *Dam* decision had produced the most important change to the balance of power within the Australian federation since the *Uniform Tax* case, and had "extended Commonwealth hegemony virtually without limit". Despite the deep division on the Court over the meaning of the external affairs power, the *Financial Review* concluded:

> there is one issue upon which all members of the High Court Bench are agreed—that is, the enormous power of the High Court. Both the majority and the minority agree that the High Court can take it upon itself to interfere in the foreign policy of the Commonwealth Government.[196]

There is emotive exaggeration in all these reactions, but there are also important elements of truth. Most of the concern was not because the dam had been stopped—both the *Australian* and the *Financial Review* professed opposition to its construction on financial and environmental grounds. Rather concern was directed at the deeper issue of non-elected judges making that decision and in so doing, changing the constitution and the federal balance of power. Naturally enough those who applauded the decision had fewer qualms about the democratic conundrum of judicial review. The *Age*, which had championed the anti-dam campaign and supports most progressive causes, praised the Court for being

"sensitive to contemporary political circumstances" and "more adventurous than its predecessors" [197] It seems that the *Age* could accept the Court's action of making the decision because it agreed with the outcome.

While the reaction of losing state politicians was somewhat more restrained than that of the conservative press, there were similar signs that the public facade of legalism is also beginning to crumble in the political arena. Premier Gray, the key figure in the dispute who had shrewdly built his political career on promoting hydro-dams and states' rights, expressed "bitter disappointment" at the decision. While sticking to his earlier pledge to abide by the High Court's ruling, Gray described the "decision itself as a blow to the federal system" Gray was critical of the fact that a court could make such a far-reaching constitutional and political decision, and further that it could do so by such a slender majority:

> Overall it's a very sad decision for Australia as a whole, a decision which will concern the majority of thinking Australians, not because of the environmental question, but because of the effect it is going to have on the role and responsibility of the States in future to determine their own direction.
>
> I hope there will be a recognition of the seriousness of the problem and that we will not move to a situation where the Constitution of this country is determined by High Court judges.[198]

Queensland's Premier Bjelke-Petersen made essentially the same points. The decision, he said, marked a "black day for Australia that could herald the beginning of the end of Federation" Petersen pledged his state's support for "a campaign for a referendum to make it mandatory to have unanimous High Court decisions rather than majority decisions" [199] Sir Charles Court, former premier of Western Australia and aggressive champion of states' rights, attracted national media coverage with his broadsides against the Court titled "Decision strikes at the heart of Australia" and "Australia's black day" Court claimed that the Australian constitution was being "rewritten by the High Court and not by the people" in a way that highlighted "the impossibility of these matters being considered as matters of pure law".[200]

How significant are such hostile reactions by the media and leading state Liberal and National party politicians for the continuation of judicial review by the High Court? To answer that question we need to know what sustains the Court in its adjudicative and constitutional role. In Australia, unlike America, we lack empirical studies of the way in which the Court is perceived by the public. But if, as is likely, American findings are indicative of the Australian situation, it is not popular sentiment that sustains the Court's national policy-making role, as earlier romantic scholars speculated.[201] Rather American studies have found that the public is largely ignorant of the Supreme Court, while those who know something of its leading and more controversial decisions, such as the ones forcing school desegregation and allowing abortions, are often unfavourably disposed towards the Court.[202] If the Supreme Court is not supported by popular

sentiment, what does sustain its continued national policy-making role? A plausible answer has been given by Adamany and Grossman who argue that the Supreme Court's political role is supported and protected by strategic elites who hold places in dominant national party coalitions and key institutions of government.[203] If something similar applies for Australia, the above responses of political leaders and elite opinion makers are highly significant, suggesting that in the *Dam* case the High Court alienated powerful sections of its elite constituency. It is ironical that the High Court retains its traditional legalistic rhetoric while moving to the progressive Labor side of politics.

The Dam *decision*

Despite some of the wild accusations that were made by those who supported the losing side in the Tasmanian *Dam* case, the Court's decision did not mean the destruction of federalism. The majority judges themselves acknowledged that the basic federal structure of the constitution required the continued existence of the states and the maintenance of their capacity to function. But the consequences that could be derived from such federal implications they saw as minimal. For example Mason claimed that all that could be "distilled from the federal nature of the Constitution", was

> that the Commonwealth cannot in the exercise of its legislative powers enact a law which discriminates against or "singles out" a State or imposes some special burden or disability upon a State or inhibits or impairs the continued existence of a State or its capacity to function. This implied prohibition—for it is in truth an implied prohibition . . .—has been recognized and discussed in many cases . . . So much and no more can be distilled from the federal nature of the Constitution and ritual invocations of "the federal balance".[204]

The three dissenting judges strongly disagreed. Gibbs emphasized that

> The division of powers between the Commonwealth and the States which the Constitution effects could be rendered quite meaningless if the Federal Government could, by entering into treaties with foreign governments on matters of domestic concern, enlarge the legislative powers of the Parliament so that they embraced literally all fields of activity.[205]

This was acknowledged quite freely by Mason who, after listing numerous examples of international agreements covering a wide range of humanitarian, cultural and idealistic objectives, concluded: "Indeed, the lesson to be learned . . is that there are virtually no limits to the topics which may hereafter become the subject of international co-operation and international treaties or conventions."[206] The Court was deeply split over the basic issue of what was entailed by, and precluded from, federalism.

The majority ruling in effect allowed any "internal" affair that was previously within the states' jurisdiction to become an "external" affair within commonwealth jurisdiction if it became the subject of a treaty. With the increased international-

ization of affairs in recent decades and the greater propensity of national governments to enter into treaties and accords on a whole range of "internal" affairs, such an interpretation entails a major potential threat to virtually all of the states' powers. In his opinion Brennan explained how the dynamic effect of the majority's holding eroded the position of the states under modern conditions:

> The complexity of modern commercial, economic, social and political activities increases the connections between particular aspects of those activities and the heads of Commonwealth power and carries an expanding range of those activities into the sphere of Commonwealth legislative competence. This phenomenon is nowhere more manifest than in the field of external affairs.

The inevitable consequence was, as Brennan put it quoting an earlier judgment of Windeyer in the *Payroll Tax* case, that "the position of the Commonwealth has waxed: and that of the States has waned" [207] Or as Premier Burke of Western Australia said in commenting on "Federalism after the Franklin", the significance of such a decision by the Court was to "provide the potential for a massive intrusion into the traditional responsibilities of the states".[208] Quite clearly the *Dam* decision changed the federal division of powers quite remarkably.

The majority holding derives from a potent mix of two lines of decisions. The first is the well-established *Engineers* stricture against relying on federal implications to limit the scope of the commonwealth's section 51 powers. The second is the much more controversial interpretation of section 51(xxix) that does not require that a subject matter have any international character or quality of international concern in order to qualify as an "external affair" Any matter can become an external affair by becoming the subject of a treaty. If the very substantial change to the federal division of powers that the *Dam* case produced and the potentially enormous threat to the states that it sanctioned are to be reversed, one or the other of these lines of decision would need to be reversed. Neither alternative, however, seems likely.

The doctrine of *Engineers* still dominates the Court as holy writ. If "constitutional lawyers play a role in Australian politics similar to that of theologians in the practice of religion" as Sir Paul Hasluck recently observed,[209] High Court judges function as the infallible college of bishops who authoritatively sanction dogma. *Engineers* principles of interpretation were unanimously endorsed by all judges in the *Dam* decision, while "reserved" state powers were said to be anathema. The language of theological discourse was even used by some of the judges in their opinions. For example, Mason summarily dismissed arguments from Tasmania that the federal corporation power should be read within the context of a federal constitution—a perfectly reasonable request except for *Engineers* dogma—for subscribing to "grave constitutional heresies, notably the doctrine of reserved powers, which have long since been denounced".[210] Unwilling to recant on such established doctrine, the minority judges were unable to make coherent and persuasive arguments to limit the scope of the external affairs power.[211]

The second more controversial part of the *Dam* case was the majority's adoption of a wide view of the external affairs power. According to this wide view, treaty obligation alone is sufficient to qualify a subject as an external affair. There is no further requirement that the subject have some peculiarly international characteristic or be of international concern. This was a significant advance on the *Koowarta* case where only three judges, Mason, Murphy and Brennan, adopted such a view. Stephen, the fourth majority judge in *Koowarta*, thought that the treaty subject needed to be of some "international concern". Admittedly Stephen's was an "elusive concept" as Mason observed in the *Dam* case, but it at least suggested some plausible way of limiting the scope of section 51(xxix). Without some such restriction to this section, the implications for federalism are profoundly disturbing, as Wilson pointed out:

> . . an expansive reading of S. 51(xxix) so as to bring the implementation of any treaty within Commonwealth legislative power poses a serious threat to the basic federal polity of the Constitution. Such an interpretation, if adopted, would result in the Commonwealth Parliament acquiring power over practically the whole range of domestic concerns within Australia.[212]

A major factor in the majority's position that has entirely escaped the attention of the angry conservative critics was the commendable commitment of these judges to judicial restraint. This was evident in their retention of the *Engineers* prohibition against reading in implied restrictions to limit commonwealth powers, and in their rejection of tests of sufficient international character or concern before treaty subjects could come within the external affairs power. The majority judges were concerned not to impose their views of what constituted an external affair over those of the national executive and legislature. Mason rejected Stephen's notion of "international concern" because it would involve the Court in devising judicial tests of what constituted the "elusive" concept of international concern. This would be "an invidious task" for the Court because such decisions would involve "nice questions of sensitive judgment which should be left to the Executive Government for determination". According to Mason: "The Court should accept and act upon the decision of the Executive Government and upon the expression of the will of Parliament in giving legislative ratification to the treaty or convention".[213] In endorsing the "presumption of validity" for impugned laws, Murphy pointed out that the fact that the Court had ignored it in the past "may help to explain the considerable number of laws, extraordinary by the standards of other national courts, which have been held by this Court to be beyond the powers of the Parliament" Likewise in explaining how the internationalization of affairs has caused the federal government's position to wax and that of the states to wane, Brennan said "it is not the function of this Court to strike some balance between the Commonwealth and the States". Deane also affirmed that in characterizing a law with respect to external affairs, "what is the appropriate method of achieving a desired result is a matter for the Parliament and not for the Court"

Such judicial restraint on the part of the majority judges, if it continues, will mean a less active role for the Court in adjudicating jurisdictional disputes between governments. By interpreting the commonwealth heads of power so broadly, the Court has left the commonwealth with enormous potential power. That is the consequence of the Court's broad reading of specific heads of power combined with the basic structural design of the Australian constitution in which only commonwealth powers are specifically entrenched. Hence, as commonwealth powers wax, the states' residue of powers must wane. The Court's commitment to judicial restraint, its firm commitment to *Engineers* methods for interpreting heads of power, and the structural way in which the constitution divides powers have ensured that judicial review of federalism in Australia has produced an increasingly centralized constitutional system. The formal distribution of constitutional powers, however, does not determine the actual distribution of political power; it is only one of the ingredients. Nevertheless there is now the potential for enormous centralization of power and corresponding erosion of the states' position. Whether that occurs will depend on the interplay of political forces and on the outcomes of conflicts and compromises between federal and state governments which, to a large extent, has always been the case.

6

Conclusion: The High Court's Political Achievement and the Legitimacy of Judicial Review

The High Court is the authoritative interpreter of the constitution, which in very general language sets up the various branches of government and specifies the division of powers between federal and state levels of government. It performs a crucial political function that is both adjudicative and constitutional since it settles key disputes involving governments and branches of government and in so doing also interprets the constitution to give it new meanings at different historical points of time. As interpreter of the basic instrument of government, the Court is in a certain sense superior to the other parts of the system of government and above politics. At the same time the Court is an integral part of the machinery of federal government and carries out its functions within a dynamic political environment. Since the Court has to contend with the actions and reactions of elites in the other branches and levels of government, its ability to exercise judicial review depends on the complex mix of political factors that have been discussed throughout this book. For example, the Court's work has been greatly facilitated by Australia's political culture that favours moderation and the rule of law, and by the primacy in federal politics of the Liberal coalition parties that have supported the constitutional status quo. Hence the Court's own considerable political skills only partly explain its success in exercising judicial review. The Court's real power, as distinct from its formal power, can only be determined by carefully examining its actual performance within the field of politics in which it operates.

The Court's achievement

This study has shown that the Australian High Court has been highly successful in its overall exercise of judicial review. The Court was well designed by the founders of the constitution and its primary function of judicial review was thoroughly discussed by them in convention. Its initial success was assured by the successive appointments to the early Court of five of the leading founders and senior statesmen of federation. After initially balancing federal and state powers as befitted a nation of states, the Court subsequently adopted the *Engineers* method of interpreting commonwealth legislative powers in a plenary sense, irrespective

of their impact on the states. This produced a persistent, if irregular, incremental centralization of constitutional power that roughly paralleled Australia's growth to nationhood. The Court's interpretive method modified the constitutional system to keep pace with Australia's national development and integration. By so doing the Court preserved both the constitution and its own institutional position as guardian and interpreter of the constitution. Geoffrey Sawer's persistent claim that Australia is constitutionally speaking a frozen continent[1] is not supported by a historical study of the effects of judicial review.

At a less general level of analysis the Court's interpretation of the constitution has not always been consistent with the structural dynamics of the nation, nor particularly with the political demands of federal Labor governments that have at times pursued centralist, reformist and socialist policies. There are several reasons for this. The first is a consequence of the tenure of High Court justices who often outlast the governments that appoint them. Consequently the Court often acts as a conservative drag on progressive developments and novel policy initiatives. The Fisher-Hughes Labor government (1910-13) and the Chifley Labor government (1945-49) examined in chapters 3 and 4 are prime examples of the Court at work in this role. But if the political mood of the nation swings back to become more conservative, as during the era of the Bruce-Page government in the 1920s, the Court and its judicial doctrine can be left out of kilter with the requirements of ruling national coalitions.

There are at least some indications that the current High Court's extremely centralist interpretation of the external affairs power has shifted formal constitutional powers more to the centre than the actual balance of political forces between state and federal governments favours. Such a decision as the Tasmanian *Dam* case undoubtedly has a centralizing impact, but its real effect is far less than the formal possibilities it allows. The real politics of federal-state relations rather than the formal prognostications of the Court are just as important in determining the shape of the political system. Judicial decisions have an impact, but the extent of that impact on the actual pattern of political events can only be determined by taking account of the larger political environment in which the Court operates and in which it has a dialectical relationship with other political actors and institutions.

A second important reason why the Court may not be in step with the structural dynamics of the nation or its partisan politics at a particular point of time has to do with the semi-autonomous position of the Court and the dynamics of constitutional law. The Court and the law have an institutional life and an internal logic of their own. While cases come to the Court through the political process, the Court decides them according to its own legal method in the light of precedents and rules that usually lack explicit concern for the state of the nation or its politics. In fact such considerations are normally eschewed by judges. But if strict and complete legalism were an adequate description of the Court's method, there would

be nothing except chance to keep constitutional decisions compatible with national requirements. We have seen throughout this study that the Court's professed method of legalism is more a public rhetoric than a description of its real decision making. The "hidden" political premises of judges are usually not too well hidden, as for instance with the Latham-Dixon Court's interpretation of section 92 to protect private enterprise. It would be naive to accept legalism at face value and assume that judges do not, at least covertly, assess the likely impact of their constitutional decisions upon national politics.

There is a final reason why the Court might seem out of step with the nation's requirements or its partisan politics at a particular time. What are the nation's requirements and what constitute appropriate policies are fundamental political questions to which there are usually a multiplicity of competing answers and no obvious solutions. Each government will have partisan answers and policies which may or may not be the right ones. The judges of the Court might simply eschew policy considerations, or be overtly or covertly opposed to those being pursued by the government. That was the case in the late 1940s when a conservative Court blocked Labor's radical nationalization policies and some of its more moderate welfare legislation. The shape of the nation is as much the product of the interaction and clash of competing ideas and institutions as it is of any intentional order or national consensus. That is particularly and deliberately so for a federal system of government that breaks up national majorities and sets government institutions against one other. Moreover the Court is a particularly inappropriate instrument for discerning national requirements, which is probably why it formally denies that such policy issues are any part of its concern. The Court does have the constitutional document to guide it, but in having to interpret and apply that document in controversial cases the Court often relies on extra-constitutional criteria. Discerning and evaluating such extra-constitutional considerations is one of the challenges for the student of judicial review.

A major focus of this study has been the High Court's adjudication of "Labor versus the Constitution". As a populist, reformist and mildly socialist party formally pledged to the abolition of federalism and the reform of capitalism, the Labor party in the past provided the major challenge to Australia's constitutional system and its predominantly liberal capitalist economic order. While Labor's challenge has been relatively modest because of the ameliorating historical and political reasons discussed in previous chapters, it has nevertheless produced periodic landmark cases as during the 1940s postwar period. Perhaps more importantly Labor governments have occasionally threatened to restructure the Court. The most significant High Court "reconstruction" plan was that of Calwell and Ward that narrowly failed in the mid-1940s. But because Labor has been infrequently in federal office and as often as not has been rather moderate and conventional in its appointments, the Court has enjoyed renewed vigour, rather than being significantly changed by Labor's more daring appointments.

The Court's political skills were best demonstrated in its adjudication of federal Labor government initiatives in the 1940s. During wartime the Court sanctioned an enormous expansion of central power, but in the postwar period it overruled Labor's centralist, socialist and at times even mildly reformist social welfare legislation. Yet its authority was not seriously challenged by the Labor government; Labor rather than the Court was forced to moderate its policies and effectively modify its objective. The Court upheld Australia's liberal constitutional order against Labor's more extreme challenges, but did sanction a more moderate expansion of commonwealth powers to support the postwar Keynesian welfare state. The bulk of Labor's policies as constitutionally sanctioned or modified by the Court's decisions—centralized uniform taxation; extensive social welfare with continuing strong professional practice; central, but not nationalized, banking; and direct government participation in, but not monopoly control of, banking and airlines—were all continued by subsequent federal Liberal governments and became more or less settled parts of national policy. After being ruled unconstitutional by the Court, Labor's nationalization policy was soon dropped from its platform because it was considered obsolete, and replaced by technocratic managerialism and quality of life concerns.

The Court has been highly successful as a political institution, carrying out its difficult role with relative ease. But that is not to say that all its decisions have been wise, prudent and politically astute, or even logically coherent and internally consistent. In fact the detailed analysis of this book has shown that the Court can often be faulted on political and technical criteria. For example, the decision of the Court to strike down the Chifley government's pharmaceutical benefits scheme for the second time, after the government had been re-elected and carried an enabling constitutional referendum, was objectionable. Similarly its "private enterprise" interpretation of section 92 during the 1940s and 1950s was a notorious example of non-interpretive review. Yet, despite such decisions, the Court was not challenged nor its legitimacy questioned.

From legalism to realism

It has been argued that the High Court's professed method of "strict and complete legalism" has played a major part in facilitating its political work. Shielded by its cloak of legalism, the Court has been able to perform a high profile but delicate political function without becoming embroiled in political controversy. Legalism has enhanced the Court's political effectiveness and helped to legitimate its decisions. Consequently doubts about the legitimacy of judicial review that have plagued the American Court in recent decades have not been such an issue in Australia. That may soon change, however, as public opinion becomes more informed and critical of the Court's true function. For a couple of decades some academic lawyers

have been criticizing legalism and advocating a more realistic account of judging. That view is beginning to permeate sections of the judiciary. Justice Michael Kirby, whose articulate views are a barometer of progressive legal opinion in Australia, ridiculed the established ethos of "strict and complete legalism" in his recent public lectures on *The Judges.* Kirby said:

> The belief that the law is a certain, definite and discoverable rule, which brooks no personal or idiosyncratic interpretation by the Judge, is one that dies hard. It is undoubtedly the view of the law held in the general community Uncomfortably for Australian Judges, increasingly left as a kind of Antipodean backwater in the approach to this question, a number of developments have occurred to produce the necessary realisation that Judges have, and ought to have, a function in developing the law and determining policy.[2]

Kirby went on to expose the "official gospel" of adherence to the high techniques of legal argument that still dominates legal discourse in Australia. He honestly admitted there was "no inevitable and objectively right decision" in much of the judicial work of higher courts. Consequently he recommended that judges should expose to public scrutiny the public policy factors which are an integral part of their decision making. As well they should delve into their subconscious minds and reveal for critical public inspection personal factors that may have determined their approach. Given that judges are policy makers, Kirby recommended that "Brandeis briefs", cost-benefit analysis and multidisciplinary information on sociology, psychology and economics be used to assist them in making policy choices.[3]

Already Justice Murphy has openly espoused such views, while other judges like Justice Mason have adopted a "public interest" interpretation of section 92. In fact by an expansive interpretation of the external affairs power in the *Dam* case and a restrictive interpretation of section 92 in the *Uebergang* case, a majority of the High Court justices now seem to be concerned with broad public policy and political issues. The "Antipodean backwater" of the Australian judiciary that Justice Kirby identifies is changing markedly.

Legalism is increasingly being restricted to ritual invocations that judges make at the beginning or end of controversial opinions. Whether it is "undoubtedly the view of law held in the general community", as Kirby claims, is uncertain because we lack empirical data. Even if that were so, it must be changing as the broadcast views of Kirby and other realist critics permeate public opinion. The opinions of elite opinion makers like Kirby have probably always been more consequential than those of the general community for determining how the Court is viewed. The *Dam* decision jolted many of the Court's traditional elite supporters out of uncritical acceptance of legalism. Leading state Liberal and National party politicians and editors of some of the more conservative major newspapers, when confronted with a decision they thought objectionable, recognized the true character of judicial review and questioned its legitimacy.

The realist view of judges and judicial decision making is becoming more

common among legislators, as evidenced by the recent endorsement of a purposive approach for interpreting legislation. In 1981 the Liberal attorney-general Senator Durack had the Acts Interpretation Act amended to require courts to interpret legislation in a manner that would "promote the purpose or object underlying the Act (whether that purpose or object is expressed in the Act or not)" [4] This attempt by government to direct the judiciary to adopt a more purposive approach to statutory interpretation was part of the troubled Liberal government's package to salvage some credibility in stamping out tax avoidance and evasion that was rampant at the time. This was partly as a consequence of the Barwick Court's highly literalist interpretation of income tax legislation that frequently led to judgments contravening its spirit and parliament's objective.[5] Durack advocated a greater law-making role for judges: "Parliament should stop churning out detailed legislation and leave more of the job of law-making to judges." Durack's recommendation was that parliament's laws be simpler and that judges use accompanying explanatory memoranda and have a greater latitude in filling in the details.[6] At a seminar held to discuss "Extrinsic Aids to Statutory Interpretation" in February 1982, one judge argued that parliament should do nothing at all because the matter was well in hand. Judges were no longer overly literal in their interpretation.[7]

Should Australia adopt a bill of rights, as advocated by the governing Labor party's platform, there will be further pressure to erode traditional legalism in favour of a more overtly creative legislative and social policy-making role for the judiciary. The immediate response of Labor's dynamic attorney-general, Senator Gareth Evans, to the favourable *Dam* decision was to announce that the Labor government would bring in a bill of rights later in the year (1983) based on Australia's "clear-cut obligations" under the International Covenant on Civil and Political Rights which Australia has ratified.[8] Senator Evans promised a bill of rights "designed to act as an inspirational and educative charter providing general guarantees to basic rights and freedoms" and to be accompanied "by provisions for administrative and limited judicial enforcement".[9] Such a bill was designed to be a transitional stage towards a constitutionally entrenched bill of rights. A bill was drafted and circulated in 1984, but because of likely opposition it was held over until after the 1984 election. The Hawke government's commitment to a bill of rights appeared to waver when Lionel Bowen replaced Gareth Evans as attorney-general in the ministerial reshuffle after the election. But more recently a statutory bill of rights that will bind only the commonwealth has been put back on the Labor government's probable legislative agenda. Under an independent reference the Senate Standing Committee on Constitutional and Legal Affairs is investigating "A Bill of Rights for Australia?"

The legitimacy of judicial review

The eminent American constitutionalist Alexander Bickle described judicial review as "a present instrument of government": "It represents a choice that men have made, and ultimately we must justify it as a choice in our own time."[10] As legalism is eroded and judicial review in Australia becomes more widely recognized as "a present instrument of government", sustaining its legitimacy will become an important public issue.

Legitimacy is a vital consideration for politics, particularly liberal democratic politics, because politics is not simply concerned with power and the way it is organized and exercised in society. It is also concerned with legitimacy without which the exercise of power is but coercion based on force or trickery. The requirement of legitimacy is built into the very definition of liberal and democractic politics. Locke, the founder of modern liberalism, began his famous definition of political power with the notion of legitimacy: political power is "a *Right* of making Laws ." [11] Likewise Rousseau, the champion of democracy, taught "that force does not create right, and that we are obliged to obey only legitimate powers" [12] A recent political science text maintains this tradition in claiming that "maintenance of legitimacy is the supreme task of politics" [13]

Within a liberal democratic polity, legitimacy is as important a consideration for a particular institution as for the political system as a whole. Unless it is legitimate, either in its own right or as an integral part of the overall system that is accepted, an institution will lack authority and as a consequence become either abolished, modified or simply bypassed and ignored. The Canadian Senate is a typical example. Despite being entrenched in the constitution with substantial legislative powers, the Canadian Senate has become completely ineffectual because it has an appointed rather than an elected base and hence lacks legitimacy.[14]

Legitimacy is an important consideration for our study because judicial review entails a court staffed by appointed and tenured judges who are neither representatives of, nor responsible to, the people overruling acts of the legislative or executive branches of government that are formally representative and accountable. In fact Philip Bobbitt has recently claimed that in America: "The central issue in the constitutional debate of the past twenty-five years has been the legitimacy of judicial review of constitutional questions by the United States Supreme Court."[15] As realist accounts of judging replace legalism, the legitimacy of judicial review is likely to become the central issue for constitutional debate in Australia as well.

There would seem to be an obvious legitimacy problem with judicial review since, as we saw in chapter 2, it lacks any explicit constitutional basis. Nor can it be justified by the classic *Marbury v. Madison* argument of Marshall that Australian judges have sometimes invoked because that argument is circular and fallacious, as was shown. It is ironic that a legalist or literalist who looks only at the

constitutional text cannot provide a justification for judicial review. Once it is accepted that legalism and literalism are not adequate accounts of judging or appropriate methods for interpreting the constitution, however, the lack of an explicit textual authorisation for judicial review becomes less of a problem. There is ample evidence that the founders intended judicial review as the High Court's main function and designed the federal constitution accordingly. Moreover judicial review has been accepted as an integral part of the constitutional system ever since by generations of judges, politicians and the public.

In not having an explicit textual basis in the constitution, judicial review is no different from responsible government which is an even more important part of the constitution. The offices of prime minister and cabinet are not mentioned in the constitutional text, nor are their rules of operation or tenure spelt out. That does not mean that they were not clearly understood by those who drafted the constitution and by Australians since, at least until the 1975 crisis. And then it was the legalists and literalists who gave primacy to the text and came up with a novel version of responsible government. There is a problem with judicial review, as with responsible government, if one takes a too narrow view of the constitution that looks solely or primarily to the written text. In that instance judicial review like responsible government will have only conventional status or implied legal status in the text.[16] However if a broad view is taken that includes as integral parts of the constitution both the written text and those practices, institutions and rules that formed part of the founders' constitutional design and have been accepted by Australians ever since, judicial review can be accepted as an integral working part of the Australian constitutional system.

Two important consequences follow from this broad view of the constitution. The first is that to properly understand our constitution we need a thorough understanding of the founders' views as expressed in the federation debates.[17] The words of the constitutional text do not necessarily make complete sense by themselves, and in any case important parts of the constitution like judicial review and reponsible government are not included in the text.

The second consequence is that constitutional law, at least in the traditional sense, does not give a complete account of the constitution, nor is the Court that interprets the constitutional text the sole interpreter of the constitution. That is because the constitution includes, as well as the legal text, those practices, institutions and rules that formed part of the founders' design and have been accepted as established parts of the constitution ever since. Those who persist with a narrow literalist view of the constitution solely as the written text have an insuperable problem in establishing a legitimate basis for judicial review.

But there is more to establishing the legitimacy of judicial review than demonstrating its constitutional basis. While a constitutional grounding is necessary, it is considered by many not to be sufficient on democratic grounds. Judges are not accountable for their decisions, and in exercising judicial review

they formally determine the shape of key parts of the system of government, including the scope of their own powers. The legitimacy issue is heightened because these two factors are interrelated; unaccountable judges are constitutional law makers. Are they not then tyrants with unlimited power? If that appears so in some highly abstract sense, it is less so if the range of constraints upon judges and the Court are taken into account.

In the first place the Court's scope for decision making is limited since it can decide only the cases that come to it. Important jurisdictional issues can be kept out of the court as the federal-state dispute over offshore ownership was by mutual agreement beween federal and state governments for a decade before 1975. Furthermore Court decisions can be modified or set aside by the affected parties, as parts of the *Offshore* decision were by subsequent mutual federal-state agreement and legislation. In a more formal manner court decisions can be overturned by constitutional amendment as was the *First Pharmaceutical Benefits* case by the 1946 social security amendment to the constitution. This is an extremely cumbersome democratic check, however, because of the inertia in an established political system and the likelihood of extraneous issues muddying referenda campaigns.

The power of appointing judges provides an indirect democratic hold over the composition and direction of the Court, and a possible means of bringing the Court up to date or into line with the demands of ruling national coalitions. Because vacancies are unpredictable and governed by chance, this is a problematical and haphazard check on the Court. Nevertheless governments can ensure through their appointments that a range of judicial types are put on the bench. A whole court of Barwicks or a whole court of Murphys would be intolerable to large sections of the community, but a court on which there is a Barwick and a Murphy is quite acceptable and perhaps preferable. In this respect it is important for the legitimacy of judicial review that the power of appointment not be "depoliticized" by handing it over to some "independent" board of professional lawyers, as some, usually lawyers, have advocated.[18]

The most potent checks on how judges exercise their power are probably the less formal institutional and professional ones that shape judicial behaviour, and the dynamic political ones that in practice determine how far judges can go in exercising judicial review. The formal procedures of the court system routinize and severely constrain judicial power. The long professional socialization of judges and the strong professional peer pressure to conform to judicial standards of rationality, objectivity and integrity are much stronger than on other political actors. And as we have seen in case studies throughout this book, the Court in, exercising judicial review has to perform its task in a complex political environment that includes other competing institutions and elite groups.

In the final analysis the Court has only the power of its own judgment; its authority depends on the recognition and acceptance of others. Hence the power of judges and the boundaries of judicial review are in practice set not by what

judges prefer or formally pronounce but by what the rest of the political system tolerates. In this very practical way legitimacy is built into the effective operation of judicial review. If judges go beyond what the political community tolerates at any historical point of time, the Court will not be obeyed and its power will decline. The Court has legitimacy as long as its decisions are considered authoritative and binding by the political community.

Interpretive versus non-interpretive review

The distinction between "interpretive" and "non-interpretive" review that has been made in recent American constitutional scholarship helps clarify the complex issue of the legitimacy of judicial review.[19] As one of the leading protagonists in the current American debate has remarked: "The legitimacy of non-interpretive review is the central problem of contemporary constitutional theory."[20] Since the debate between "interpretivists" and "non-interpretivists" will likely be reproduced in Australia as realism replaces legalism as the accepted view of the judicial process, it will be canvassed briefly in this section.

The distinction between interpretive and non-interpretive review is reasonably clear, at least at the level of a broad concept. Interpretive review entails deciding the constitutionality of a legislative or executive act or determining the boundaries of federal and state powers by reference to the constitution, either its actual language and structure or the values and intentions of the founders which it embodies. The interpretive paradigm is not the mythical strict and complete legalism of the literalist who purports to look only at the plain meaning of the actual language of the text. As Thomas Grey has recently explained, interpretive review "certainly contemplates that the courts may look through the sometimes opaque text to the purposes behind it in determining constitutional norms. Normative inferences can be drawn from silences and omissions, from structures and relationships, as well as from explicit commands."[21] Interpretivism requires that constitutional inferences and rules be drawn out from the constitution, not read back into it. Interpretivism holds that only interpretive review is legitimate while non-interpretive review is illegitimate. In John Ely's summing up, interpretivism requires "that judges deciding constitutional issues should confine themselves to enforcing norms that are stated or clearly implicit in the written constitution".[22] In other words, interpretivism allows for judicial creativity but constrains it within the notional bounds of what can be reasonably derived from the constitutional text.

Non-interpretive review has no such limits. As Ely says, non-interpretivism sanctions the progression of the court beyond the constitutional reference to "enforce norms that cannot be discovered within the four corners of the document".[23] Or according to Perry, non-interpretive review is "the determination of constitutionality by reference to a value judgment other than one constitutionalized by the framers of the constitution" [24] Perry makes clear the difference between

creative interpretivism that includes the broad-ranging decisions of a John Marshall, and non-interpretive review that refers to the free-wheeling jurisprudence of the post-Warren Court.[25]

Non-interpretive review involves judges reading their own preferred values and policy views into the constitution, and overruling elected legislatures on the basis of what the judges prefer or think is desirable or advantageous. According to one critic, non-interpretive review means construing the constitution according to one's own personal answers to the question: "Is this what America stands for?"[26]

The difference between interpretive and non-interpretive review is best illustrated by some judicial examples. The interpretive position is epitomized in the stands of two famous American judges, Holmes and Frankfurter, against activist, non-interpretive Courts at difference periods of America's constitutional history. In the early decades of this century when a reactionary American Supreme Court was persistently striking down on substantive "due process" grounds state regulatory legislation that interfered with the assumed market freedom of business, Holmes objected to his fellow judges: "I cannot believe that the Fourteenth Amendment was intended to give us *carte blanche* to embody our economic or moral beliefs in its prohibitions."[27]

Some decades later Frankfurter warned an increasingly activist liberal Court that "judges were not justified in writing their private notions of policy into the Constitution", no matter how dearly they cherished them or how mischievous they deemed their disregard.[28] Frankfurter warned more generally that the Court should respect the narrow limits of interpretive review:

> there is not under our Constitution a judicial remedy for every political mischief, for every undesirable exercise of legislative power. The Framers carefully and with deliberate fore-thought refused so to enthrone the judiciary. In this situation, as in others of like nature, appeal for relief does not belong here. Appeal must be to an informed, civically militant electorate. In a democratic society like ours, relief must come through an aroused popular conscience that sears the conscience of the people's representatives.[29]

Earl Warren, chief justice from 1953 to 1969, is the epitome of the non-interpretive judge. Previously a long-serving, populist-reforming governor of California, Warren, according to one biographer,

> equated judicial lawmaking with neither the dictates of reason as embodied in established precedent or doctrine, nor the demands imposed by an institutional theory of the judge's role, nor the alleged "command" of the constitutional text but rather with his own reconstruction of the ethical structure of the Constitution.[30]

Thus for Warren, and in many instances the Warren Court, and to a lesser extent the subsequent Burger Court, constitutional adjudication provided judges with the opportunity for instigating sweeping social reforms. On many burning social issues such as racial segregation and discrimination, abortion and voting mal-apportionment where the representative branches of government would not, or could not, take action because of political opposition or inertia, the Court became

the legislator of social policy. As a result during the last three decades in America since the original school desegregation case in 1954, the Supreme Court has been a major institutional source of social reform.[31] Leading this revolution in the judicial function was Warren:

> reaching out to do justice, "innovating", righting wrongs, protecting liberties and privileges, "testing every case . . to see if justice (had) truly been done". He had engaged in an "awesome" but exhilarating exercise of power, and he had become convinced that he had exercised that power for noble purposes.[32]

American constitutional scholars have invested enormous effort into trying to justify non-interpretive review, either in certain specific areas such as free speech and voting rights or generally through the constitution.[33] The reason is that they agree with what the Court has mandated, yet realize that such unprincipled judicial decision making cannot be legitimated on traditional grounds.[34] In my view none of the elaborate theoretical attempts to justify non-interpretive review are adequate. Such bold judicial politics will survive only as long as the political community tolerates it. Already the backlash has been felt and a majority of the current Burger court have adopted a more restrained approach.

Providing the Australian Court steers clear of non-interpretive review, it should experience no major legitimacy crisis as realist views of judging replace legalism. The High Court has indulged in a certain amount of non-interpretive review in the past, for example in its interpretation of section 92, but it has disguised such review behind a legalistic front. Moreover the whole ethos of legalism has tended to make Australian judges more strictly interpretivist. There is a danger that in liberating themselves from the narrow constraints of legalism, Australian judges and their critics might simply embrace non-interpretivist methods. Result-orientated jurisprudence has a certain heady appeal for reformist judges and lawyers.

The future of judicial review

Judicial review in Australia is presently in a transitional period. The Court is relatively young and inexperienced. At the same time a new era of Labor-dominated federal politics seems to have been ushered in by the Hawke government. In the past such a combination might have been dangerous for the politics of judicial review, but now that seems highly unlikely. The new Labor government has occupied the middle ground of Australian politics while the Court, through its recent decisions, has left the federal government with virtually unlimited formal powers. The present Court has a majority of judges who favour centralism and judicial restraint towards federal government initiatives. From now on the politics of federal-state rivalries and intergovernmental relations will likely be more important in determining the shape of Australian federalism, and the High Court less important. It is as if the Court is disengaging from its old primary function

of policing federalism in preparation for a possible new function of interpreting an Australian bill of rights. If that is the case the Australian High Court will be following the direction of the American Supreme Court that for nearly half a century has worked primarily in interpreting the American bill of rights, and the Canadian Supreme Court that is beginning to move in that direction with the new Canadian Charter of Rights and Freedoms.

In other important respects the Australian Court has recently followed the pattern of the American and Canadian Supreme Courts. In May 1980 the lavish new High Court building on the shores of Lake Burley Griffin in Canberra was opened by the Queen. The High Court is now located in the national capital in an imposing public monument that symbolizes its independence and importance, and in 1984 the Court was finally given full control over its own docket. Although both these developments were opposed by sectional groups,[35] they have enhanced the public status of the Court and its ability to devote its attention to the most significant matters.

The brave new world for judicial review after 1984 will be a realistic one where judicial power is more openly recognized. Hence the Court will need to develop a new method and a more plausible public rhetoric than legalism if it is to retain credibility. Since the Court's role of judicial review is a public one, the Court does need an appropriate public language to explain itself, not just to its own captive clientele but to a more discerning public. Judicial review has always been a highly political activity and it will continue to be so. It is likely that in the future the judicial branch of government will be recognized for what it is and its political work more closely scrutinized.

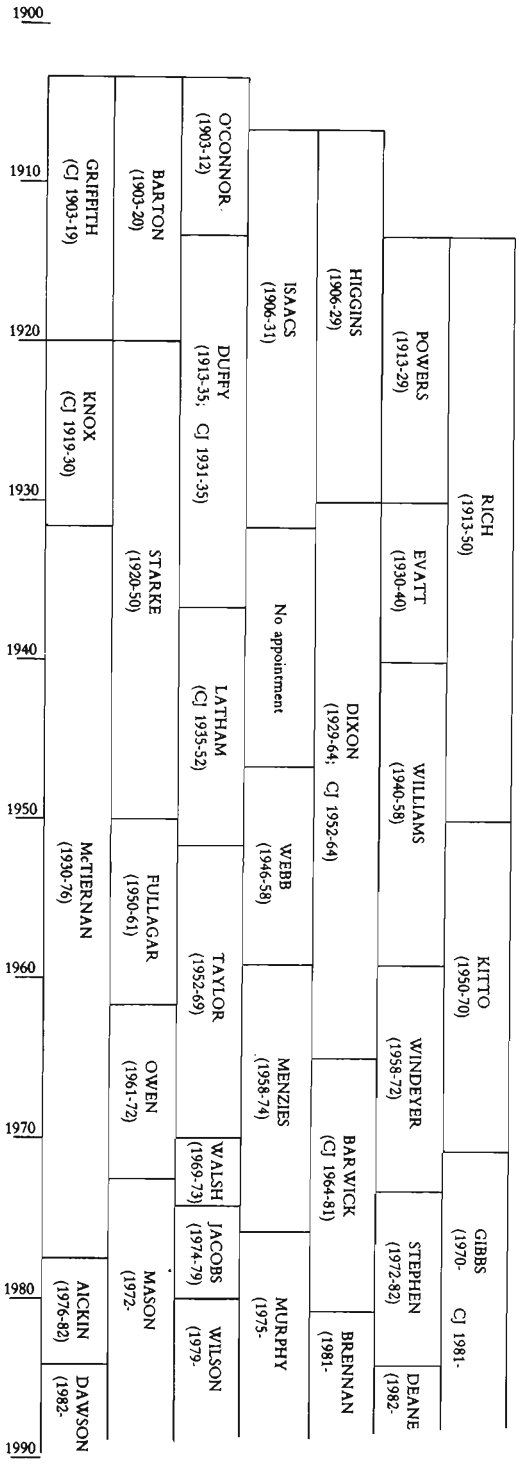
Appendix

Justices of the High Court 1903 to 1984

Griffith	(1903-19;	CJ 1903-19)
Barton	(1903-20)	
O'Connor	(1903-12)	
Isaacs	(1906-31;	CJ 1930-31)
Higgins	(1906-29)	
Duffy*	(1913-35;	CJ 1931-35)
Powers*	(1913-29)	
Rich*	(1913-50)	
Knox	(1919-30;	CJ 1919-30)
Starke	(1920-50)	
Dixon	(1929-64;	CJ 1952-64)
Evatt*	(1930-40)	
McTiernan*	(1930-76)	
Latham	(1935-52;	CJ 1935-52)
Williams	(1940-58)	
Webb*	(1946-58)	
Fullagar	(1950-61)	
Kitto	(1950-70)	
Taylor	(1952-69)	
Menzies	(1958-74)	
Windeyer	(1958-72)	
Owen	(1961-72)	
Barwick	(1964-81;	CJ 1964-81)
Walsh	(1969-73)	
Gibbs	(1970- ;	CJ 1981-
Stephen	(1972-82)	
Mason	(1972-	
Jacobs*	(1974-79)	
Murphy*	(1975-	
Aickin	(1976-82)	
Wilson	(1979-	
Brennan	(1981-	
Deane	(1982-	
Dawson	(1982-	

(*Appointed by Labor government)

Justices of the High Court 1903 to 1984



Notes to the text

Abbreviations

CPD Commonwealth Parliamentary Debates
SMH Sydney Morning Herald

Introduction

1. For an attempt at a sociology of the Australian legal order, see P. O'Malley, *Law, Capitalism and Democracy* (1983).
2. D. Easton, *A Systems Analysis of Political Life* (1965); G. Almond and G. Bingham Powell, *Comparative Politics: A Developmental Approach* (1966), 16-61.
3. J. Thomson, "The Teaching of Constitutional Law: Are the Materials Adequate?", *University of Western Australia Law Review* 15 (1983): 418-19, footnotes omitted.
4. D. Aitkin, "Political Science in Australia: A Report Prepared for UNESCO" *Working Papers in Political Science,* Research School of Social Sciences, Australian National University (1982), 14.
5. For example, C. Howard, *Australian Federal Constitutional Law,* 2nd ed. (1972); J. I. Fajgenbaum and P. Hanks, *Australian Constitutional Law,* 2nd ed. (1980); W. A. Wynes, *Legislative, Executive and Judicial Powers in Australia,* 5th ed. (1976); R. D. Lumb and K. W. Ryan, *Constitution of the Commonwealth of Australia Annotated,* 2nd ed. (1977); P. H. Lane, *The Australian Federal System, 2nd ed.* (1979). See also L. Zines, *The High Court and the Constitution* (1981).

Chapter 1 Stability and Conflict in Australian Politics: The Political Environment of Judicial Review

1. F. W. Eggleston, *Reflections of an Australian Liberal* (1953), 57. Eggleston attacked Labor for being a closed, class party based on the trade unions and espousing an alien objective.
2. R. Menzies, "Our Liberal Creed", speech to the Liberal Party, 1964, in H. Mayer, ed., *Australian Politics: A Reader* (1966), 266.
3. D. W. Rawson, *Unions and Trade Unionists in Australia* (1978), 151, 195. Also "The Paradox of Trade Unionism: The Australian Case", *British Journal of Political Science* 4 (1974): 399-408.
4. D. Kemp, *Society and Electoral Behaviour in Australia* (1978), 348, 352.
5. Ibid., 357. For a trenchant criticism of Kemp's thesis, see R. W. Connell and M. Goot in *Meanjin* 38(1), April 1979.
6. See Manning Clark, *A Short History of Australia,* rev. ed. (1969), ch. 8, "The Age of the Bourgeoisie 1861-83" Also P. Loveday and A. W. Martin, *Parliament, Factions and Parties* (1966).
7. This theme is central to Bede Nairn's detailed and painstaking account of the formation of the Labor party in New South Wales: *Civilizing Capitalism* (1973). Loveday and Martin trace the

origins of the party back earlier to the free trade and protectionist factions that immediately preceded the Labor party (*Parliament, Factions and Parties,* ch. 6, "The First Parties").

8. C. B. Macpherson, *The Life and Times of Liberal Democracy* (1977), 65-66.
9. Don Aitkin, *Stability and Change in Australian Politics* (1977), 1.
10. Ibid., 14.
11. Ibid., 268.
12. Ibid., 3.
13. Ibid., 121-23, 130-33; 51 per cent put themselves in the middle class and 43 per cent in the working class.
14. D. Aitkin, *Stability and Change in Australian Politics,* 2nd ed. (1982), 276, 316.
15. Ibid., 136. Giovanni Sartori, "From the Sociology of Politics to Political Sociology", in S. M. Lipset, ed., *Politics and the Social Sciences* (1969).
16. Aitkin, *Stability and Change in Australian Politics,* 2nd ed., 301, 318. For an attempt to rework Aitkin's data to show a more meaningful role for class, see H. Gold, "Class Identification and Party Choice: The Data Re-examined", in H. Mayer and H. Nelson, eds, *Australian Politics: A Fifth Reader* (1980). For Aitkin's critical comment, *Stability and Change in Australian Politics,* 2nd ed., 317.
17. R. W. Connell, *Ruling Class Ruling Culture* (1977), vii, 2, 9.
18. R. W. Connell and T. H. Irving, *Class Structure in Australian History* (1980), xi.
19. J. Rickard, "The Middle Class: What Is to be done", *Historical Studies* 19 (1981): 446-53. Rickard surmises that when Connell and Irving "negotiated their theoretical approach for this joint endeavour, the exclusion of the middle class must have been written into the contract" (450).
20. The classic in this respect is Russel Ward's *The Australian Legend* (1958). For Ward's response to his critics, see "The Australian Legend re-visited", *Historical Studies* 18 (1978): 171-90.
21. See Henry Mayer's critical review of the literature, "Some Conceptions of the Australian Party System 1910-50", *Historical Studies* 7, Selected articles, 2nd series (1967), 217-40.
22. Louis Hartz, *The Founding of New Societies* (1964), 40-44; and Richard Rosecrance, "The Radical Culture of Australia", ch. 8 of *The Founding of New Societies,* 275-318.
23. For a sample of this, see Gad Horowitz, "Conservatism, Liberalism, and Socialism in Canada: An Interpretation", *Canadian Journal of Economics and Political Science* 32 (1966): 143-71; and his notes, *Canadian Journal of Political Science* 11 (1978): 383-99.
24. The leading critique of the Hartzean thesis on Australia is given by A. W. Martin, "Australia and the Hartz 'Fragment' Thesis", *Australian Economic History Review* 13 (1973): 131-47. For further criticisms and an account of the revolution in Australian historiography, see G. C. Bolton, "Louis Hartz" ibid., 168-76.
25. Hartz, *The Founding of New Societies,* 43.
26. Rosecrance, "The Radical Culture of Australia" 304.
27. The British developments are summarized in Roger Moore, *The Emergence of the Labour Party 1880-1924* (1978).
28. T. Mann, "The Political and Industrial Situation in Australia", *The Nineteenth Century* 56 (1904): 475-91; also *The Labour Problem in Both Hemispheres* (1903).
29. *The Webbs' Australian Diary 1898,* ed. A. G. Austin (1965), 108.
30. M. B. and C. B. Schedvin, "The Nomadic Tribes of Urban Britain: A Prelude to Botany Bay", *Historical Studies* 18 (1978): 254-76.
31. G. Davison, "Sydney and the Bush: An Urban Context for the Australian Legend", *Historical Studies* 18 (1978): 191-209.
32. See H. V. Evatt, *Liberalism in Australia: An Historical Sketch of Australian Politics Down to the Year 1915* (1918).
33. For a summary of their extraordinary opportunism, see entries on John Macarthur (1767-1834) and William Wentworth (1790-1872) in *Australian Dictionary of Biography,* vol. 2: 1788-1850 (1967). Though Wentworth's political principles changed with his material fortunes, he is here described as a noble Whig.
34. Charles Dilke visited Australia in 1897 and described a colonial conservative as anyone who had anything whatever to lose and objected to giving a share in government to those who had nothing, *Greater Britain* (1868), II, 39.
35. Manning Clark, *A Short History of Australia,* 135-46.

36. Robin Gollan, *Radical and Working Class Politics* (1960), 38, 51. Gollan persists in describing as conservatives the members of Legislative Councils who were recruited from big business, landowning and pastoral interests.
37. In recent years, excellent biographies of both men have been published: A. W. Martin, *Henry Parkes* (1980); R. B. Joyce, *Samuel Walker Griffith* (1984).
38. Martin, *Henry Parkes*, 396.
39. Joyce, *Samuel Walker Griffith*, 168. Griffith was at the 1891 Sydney convention when the shearers' strike erupted in Queensland. Joyce concludes that "although Griffith was undoubtedly partisan during the strike", he "deserves more credit than historians so far have given him for preventing the Queensland government from extreme action that might have led to blood staining the wattle", 166, 168.
40. See N. G. Butlin's authoritative study, *Investment in Australian Economic Development 1861-1900* (1964), and *Australian Domestic Product, Investment and Foreign Borrowing 1881-1938/39* (1962); and P. G. Macarthy, "Wages in Australia, 1891 to 1914", *Australian Economic History Review* 10, no. 1 (March 1970): 56-76.
41. In an important article in 1961, "The 1890 Maritime Strike in New South Wales", *Historical Studies* 10 (1961): 1-18, Bede Nairn gave notice that the traditional view of the maritime strike and the origins of the Labor party was "radically erroneous" The traditional view was that of W. G. Spence, *Australia's Awakening* (1909); T. A. Coghlan, *Labour and Industry in Australia* (1918), vol. 3, 1591-607; H. V. Evatt, *Australian Labour Leader* (1940); and Brian Fitzpatrick, *A Short History of the Australian Labour Movement* (1944). This tradition received its definitive statement and defence in Gollan's *Radical and Working Class Politics*. In *Civilizing Capitalism* Nairn presented his own painstaking account of the development of the Labor party without 1890 as a turning point, and without the previous framework of radicalism versus conservatism, or labour versus capital. Nairn's account overcorrects for the deficiencies of the traditional histories and is in turn corrected by John Rickard, *Class and Politics* (1976). A recent comprehensive study of the state Labor parties fills in any gaps: D. J. Murphy, ed., *Labor in Politics* (1975).
42. Rosecrance, "The Radical Culture of Australia" (supra note 22), 306.
43. Nairn chose this as the title of his book on the founding of the Labor party.
44. Review of Gollan's *Radical and Working Class Politics, Historial Studies* 9 (1960): 325.
45. Martin, "Australia and the Hartz 'Fragment' Thesis", 145.
46. "In Australia", report in R. N. Ebbles, *The Australian Labour Movement 1850-1907* (1960), 243-45.
47. For an exposition and critique of Lenin's "insurrectionary" Marxism, see Ralph Miliband, *Marxism and Politics* (1977), ch. 6.
48. See Alastair Davidson, *The Communist Party of Australia: A Short History* (1969), especially 177-83.
49. R. Catley and B. McFarlane, *From Tweedledum to Tweedledee* (1974), 1.
50. H. McQueen, *A New Britannia* (1970), 231-32.
51. "Who Rules Australia?", in J. Playford and D. Kirsner, eds, *Australian Capitalism* (1972), 132-33.
52. A. Hamilton, J. Madison and J. Jay, *The Federalist Papers*, ed. C. Rossiter (1961), 77.
53. But see C. Sharman, "The Australian Senate as a States' House", *Politics* 12 (1977): 64-75; and J. Uhr, "The Australian Senate and Federalism: A Research Note", a paper delivered to the Third Federalism Project Conference, Australian National University, 1983. The Senate is examined more generally by J. M. Hutchison, "The Australian Senate: 1901-1972", unpublished Ph.D.thesis, Australian National University (1976); and J. Uhr, "The Canadian and Australian Senates: Comparing Federal Political Institutions", unpublished paper (1984).
54. This is evident even in the titles of two leading studies of Canadian federalism: D. V. Smiley, *Canada in Question: Federalism in the Seventies* (1972); and Edwin Black, *Divided Loyalties: Canadian Concepts of Federalism* (1975).
55. The following is essentially a summary of the argument in *The Federalist Papers*, the classic exposition of the theory of the American constitution. See especially *Federalist Papers* nos 9 and 51 (supra note 52), 71-76 and 320-25.
56. A. de Tocqueville, *Democracy in America* (Vintage Books edition), I, 162. For a detailed account of the American innovation, see Martin Diamond, "The Federalist's view of Federalism", in Institute for Studies in Federalism, *Essays in Federalism* (1961), 21-64.
57. In this respect it is important to note that the famous American constitutional bill of rights was adopted after the framing of the constitution and in order to placate the fears of the anti-

federalists. The constitutional convention of 1787 considered that a bill of rights was unnecessary because all the great liberal rights of the Declaration of Independence would be sufficiently protected within the constitutional system of checks and balances. See Hamilton's powerful argument in *Federalist* no. 84 explaining why a bill of rights was unnecessary in the proposed constitution. Hamilton said: "The truth is . . that the Constitution is itself, in every rational sense, and to every useful purpose, A BILL OF RIGHTS," *Federalist Papers,* 515.

58. Australasian Federation Conference, *Official Record of the Proceedings and Debates* (1890), 33.
59. The argument being advanced here is derived from political and institutional theory, and is to be distinguished from the more common historical argument that wealthy people can be expected to frame a constitution that protects wealth. For a classic statement of the latter case, see L. F. Crisp, *Australian National Government,* 4th ed. (1978), "The Conservative Men of Property" 14-17. Crisp says "It was for the most part the big men of the established political and economic order, the men of property or their trusted allies, who moulded the federal Constitution Bill", and that "their choices were undoubtedly guided by their conservative philosophies", 14. See also R. S. Parker, "Australian Federation: The Influence of Economic Interests and Political Pressures", *Historical Studies* 3 (1949); and G. Blainey, "The Role of Economic Interests in Australian Federation", *Historical Studies* 4 (1950).
60. L. F. Crisp, *The Australian Federal Labour Party 1901-51* (1955), 14. This has been changed somewhat with the recent introduction of a system for electing delegates to the biennial Federal Conference that gives some weighting to the size of each state branch. Moreover factions rather than state origins have become increasingly important in Labor's internal politics.
61. Evatt, *Australian Labour Leader,* 262-76.
62. Irwin Young, *Theodore* (1971), 90.
63. *New Republic,* 3 May 1939, 367-69. Gordon Greenwood was deeply influenced by Laski while a student in London and applied his thesis to Australia: *The Future of Australian Federalism* (1946). In the second edition of his book (1976), Greenwood admits to "some degree of under-estimation of the extent to which federalism was entrenched" (ix-x).
64. A. Cairns, "The Government and Societies of Canadian Federalism", presidential address to the Canadian Political Science Association, June 1977, *Canadian Journal of Political Science* 10 (1977): 695-725.
65. Ibid., 716. Cairns attacks the sociological and Marxist schools that look for political explanations in underlying social and economic forces. He combines a traditional constitutional and governmental approach with modern elitist theory.
66. D. C. Corbett, "Some Comments on Australian Socialism", Australian Politicial Science Association paper, August 1962.
67. In E. G. Whitlam, *On Australia's Constitution* (1977), 16.
68. Nairn, *Civilizing Capitalism* 45, 161-63.
69. See H. Andersen, ed., *Tocsin: Radical Argument Against Federation 1897-1900* (1977), 93, 95.
70. J. A. La Nauze, *The Making of the Australian Constitution* (1972), 239-47; and Nairn, *Civilizing Capitalism,* ch. 15.
71. For voting figures in all colonies, see Crisp, *Australian National Government,* 12.
72. The accounts of the various state parties and their stands on federation are discussed in the various sections of Murphy, *Labor in Politics,* 165, 251, 306, 349, 396.
73. Nairn, *Civilizing Capitalism,* 162-65, 207.
74. Quoted in Crisp, *Australian National Government,* 181.
75. Quoted in Crisp, *The Australian Federal Labour Party 1901-1951,* 272.
76. See Crisp's discussion, ibid., 281ff.
77. Senator Gareth Evans's attempt to have Labor's modified socialist objective dropped was soundly defeated at the Melbourne National Conference in 1981. See B. Galligan, "A New Objective for Labour?", *Labor Forum* 3, no. 2 (June 1981) and John Button, "The National Conference in Retrospect", *Labor Forum* 3, no. 3 (September 1981).
78. Lloyd Ross, "Socialism and Australian Labour: Facts, Fiction, Future", *Australian Quarterly* 22 (March 1950): 23.
79. Geoffrey Sawer, *Australian Government Today,* rev. ed. (1964), 65.
80. R. Menzies, "Our Liberal Creed", in Mayer, *Australian Politics,* 266.
81. O. Dixon, Address upon Taking the Oath of Office as Chief Justice, Sydney, 21 April 1952,

in *Jesting Pilate* (1965), 247. For a comparable American view, see Justice Roberts's "yardstick" theory in *US v. Butler* 297 US 1, a 1936 decision striking down the New Deal's Agricultural Adjustment Act.

82. R. Menzies, *The Measure of the Years* (1970), 240. Colin Howard's view of Dixon is similar. Howard calls Dixon "a master without parallel of the degree of legal craftsmanship which he doubtless had in mind" and "by far the greatest influence on the interpretation of the Australian Constitution": *Australian Federal Constitutional Law,* 2nd ed. (1972), 7.
83. *Australian Law Journal* 50 (1976): 434.
84. The Tasmanian *Dam* case is discussed in the last section of chapter 5.
85. For a succinct summary of the High Court's legalism as a method of interpretation, see J. Thomson, "Principles and Theories of Constitutional Interpretation and Adjudication: Some Preliminary Notes", *Melbourne University Law Review* 13 (1982): 603-4.
86. P. H. Lane, *The Australian Federal System,* 2nd ed. (1979), 1181ff. For a more recent and more sympathetic examination of the High Court's "neutral stand" by Professor Lane, see "Neutral Principles on the High Court", *Australian Law Journal* 55 (1981): 737-48.
87. "The Law and the Constitution", in Dixon, *Jesting Pilate,* 39.
88. In his occasional addresses and articles, Dixon made some attempt to buttress legalism with theoretical arguments; for instance, "Science and Judicial Method", "Concerning Judicial Method" and "The Law and the Constitution", collected in *Jesting Pilate.* Dixon's theory is not very substantial and can perhaps be read as part of his attempt to entrench legalism as a judicial strategy.
89. E. McWhinney, *Judicial Review,* 4th ed. (1969), 76-95.
90. Lane, *The Australian Federal System,* 1146.
91. G. Sawer, *Australian Federalism in the Courts* (1967), 196-97.
92. Blackshield, "Judges and the Court System", in Gareth Evans, ed., *Labor and the Constitution 1972-75* (1977), 120.
93. For a more careful examination of judicial attitudes than those of the critics of legalism examined here, see L. Zines, *The High Court and the Constitution* (1981), ch. 15.
94. McWhinney, *Judicial Review,* 94.
95. Lane, *The Australian Federal System,* 1196.
96. Ibid., 1197.
97. Ibid., 1138.
98. McWhinney, *Judicial Review,* 95.
99. Glendon Schubert, *The Judicial Mind* (1965), 10.
100. Glendon Schubert, *Judicial Policy Making,* rev. ed. (1974), 142-43.
101. Schubert, *The Judicial Mind,* 286.
102. Schubert, *Judicial Policy Making,* 138.
103. Ibid., 138. For a sample of Schubert's own work on the Australian High Court, see for example "Judicial Attitudes and Policy Making in the Dixon Court", *Osgoode Hall Law Journal* 7 (November 1969): 1-29. For a bibliography of Schubert's articles on Australia and some local quantitative studies, see Eddy Neumann, *The High Court: A Collective Portrait 1903-72 (1973),* 128-29.
104. For example, Blackshield used both a traditional critical method and jurimetrics in different parts of "Judges and the Court System". For a different, more elaborate examination of judging, see A. R. Blackshield, "Five Types of Judicial Decision", *Osgoode Hall Law Journal* 12 (1974): 539-67.
105. "Quantitative Analysis: The High Court of Australia, 1964-69", *Lawasia* 3 (1972): 1-66, 10. For further discussion and application of jurimetrics, see A. R. Blackshield, "X/Y/Z/N Scales: The High Court of Australia, 1972-76" in R. Tomasic, ed., *Understanding Lawyers* (1978), 133-77.
106. "Quantitative Analysis", 3.
107. Ibid., 66.
108. Sawer, *Australian Federalism in the Courts,* 196. The following discussion is based on Sawer's ch. 11, "Evaluation", especially 196.
109. The exceptions are the more traditional writers on Australian political institutions and left-wing academics. See Crisp, *Australian National Government,* ch. 3; A. F. Davies, *Australian Democracy* (1958), 69-75; J. D. B. Miller and Brian Jinks, *Australian Government and Politics,* 3rd ed. (1964), 127-33; and John Playford, "Judges and Politics in Australia", *Australian Political Science Association News* 6, no. 3 (August 1961): 5-11, and "Labour and the High Court", *Australian Left Review,* February-March 1970, 16-22.

110. Sawer, *Australian Federalism in the Courts,* 197.
111. See the recent realist critique of M. Kirby, *The Judges* (1983), 37-38; also M. Sexton and L. W. Maher, *The Legal Mystique* (1982).
112. Commentary on Blackshield's paper, in Evans, *Labor and the Constitution 1972-75,* 127.
113. "The Most Dangerous Branch? The High Court and the Constitution in a Changing Society" in A. D. Hambly and J. L. Goldring, eds, *Australian Lawyers and Social Change* (1976), 73.
114. Of course the relationship between legal reasoning and logic is a difficult and contentious matter. See, for example, Julius Stone, *Legal Systems and Lawyers' Reasonings* (1964); and Joseph Horovitz, *Law and Logic* (1972).
115. "Sir Owen Dixon's Theory of Federalism", *Federal Law Review* 1 (1964-65): 221-41.
116. R. G. McCloskey, *The American Supreme Court* (1960), 11.
117. The *Case of John Wilkes, Esq.,* on two Informations for Libel 4 Burr. 2527, in T. B. Howell, *A Complete Collection of State Trials and Proceedings for High Treason and Other Crimes and Misdemeanors from the Earliest Period to the Present Time,* vol. XIX: AD 1753-71 (1813), no. 542 "Proceedings in the Case of John Wilkes 1763-70"
118. Ibid., 1112.
119. Lord Denning, Fifth Wilfred Fullagar Memorial Lecture, "Let Justice Be Done", *Monash University Law Review* 2 (September 1975): 3-12, 4.
120. D. Marr, *Barwick* (1980).
121. "Address upon taking the oath of office in Sydney", *Jesting Pilate,* 249.

Chapter 2 The Origin and Function of Judicial Review 1890 to 1900

1. Since originally writing this chapter, I have had the benefit of reading James Thomson's excellent thesis, "Judicial Review in Australia: The Courts and the Constitution", S. J. D. thesis, Harvard University, 1979. While I have not changed my basic analysis and argument, I have made some modifications and refinements to take account of some of the points Thomson has raised. My approach and conclusions are somewhat different from those of Thomson who sets much greater store by the fact that judicial review lacks any explicit textual basis in the constitution. We are in agreement, however, that the acknowledgement of that fact raises, or should raise, a fundamental question about the legitimacy of judicial review that needs to be addressed. This chapter, and indeed the whole book, is my attempt to answer that question.
2. E. McWhinney, *Federal Constitution-Making for a Multi-National World* (1966), 9.
3. J. Archer and G. Maddox, "The 1975 Constitutional Crisis in Australia", *Journal of Commonwealth and Comparative Politics* 14 (1976): 141, 147.
4. "Two Constitutions Compared", in O. Dixon, *Jesting Pilate* (1965), 100, 101.
5. But see Thomson's claim that "there has been strong support in Australia for the abolition or curtailment of the judicial power to invalidate parliamentary legislation". "Judicial Review in Australia" 320 and his footnote 1279 on 211.
6. (1803) 5 US (1 Cranch) 137.
7. *Australian Communist Party v. Commonwealth* (1951), 83 CLR 1, 262.
8. "Marshall and the Australian Constitution" in Dixon, *Jesting Pilate,* 166, 174.
9. G. Lindell, "Duty to Exercise Judicial Review" in L. Zines, ed., *Commentaries on the Australian Constitution* (1977), 150, 186. Controversy over the justiciability of aspects of the 1974 double dissolution had given the question of the proper basis and scope of judicial review an immediate practical relevance. This is discussed by L. Zines in "The Double Dissolution and Joint Sitting" in G. Evans, ed., *Labor and the Constitution 1972-75* (1977)), 229.
10. A. Bickel, *The Least Dangerous Branch* (1962), 16.
11. J. Bryce, *The American Commonwealth* (1888), 323, as Thomson notes. Thomson summarizes Bryce's views, "Judicial Review in Australia", 213-17.
12. See, for example, such statements as the following by Dixon: "An exercise of a power, whether legislative or administrative, cannot rise higher than its source, viz., the power itself, and an attempt under the power to make unexaminable what is done in ostensible pursuance of a further

delegation of authority must, to that extent, fail." *Shrimpton v. Commonwealth* (1945), 69 CLR 613, 630.

13. P. H. Lane, *The Australian Federal System* (1979), 1136. Geoffrey Sawer correctly points out that the Australian founders had two great models in the constitutions of the United States and Canada, *Australian Federalism in the Courts* (1967), 76.
14. Lane, *The Australian Federal System,* 1143.
15. Ibid., 1144. The whole passage is italicized in the original.
16. G. Lindell, "Duty to Exercise Judicial Review", in L. Zines, ed., *Commentaries* (1977), 183. Lindell's argument in support of judicial review is essentially the same as that of Marshall.
17. Lindell argues that "the Commonwealth Constitution . . . derived its legal existence by reason of the exercise of the Imperial Parliament's legislative powers . . . [and] that courts in Australia are required to perform the same duties in relation to the Constitution as they are required to perform in relation to any other kind of law in force in Australia (165)."
18. P. H. Lane, *The Australian Federal System* (1979), 1138. For additional references on this orthodox view of the constitution as a statute, albeit a special one, see J. Thomson, "Constitutional Interpretation: History and the High Court: A Bibliographical Survey", *University of New South Wales Law Journal* 5 (1982): 318.
19. Although Lindell does not address himself to this particular issue, the way he sets up his argument that the court has a duty to exercise judicial review does explicitly assume at the beginning that the court possesses jurisdiction (150).
20. See J. Thomson, "Principles and Theories of Constitutional Interpretation and Adjudication: Some Preliminary Notes", *Melbourne University Law Review* 13 (1982): 599-600.
21. Bickel, *The Least Dangerous Branch,* 2.
22. R. G. McCloskey, *The American Supreme Court* (1960), 40.
23. Some early Australian judges did make an attempt. See Thomson, "Judicial Review in Australia" 295, 301.
24. Madison makes the classic argument for this position in *Federalist,* no. 49.
25. Lane's chapter titled "Judicial Review or Government by the High Court", *The Australian Federal System,* 1135.
26. A. Hamilton, *Federalist,* no. 78.
27. "The Law and the Constitution", in Dixon, *Jesting Pilate,* 38, 51.
28. Earlier, judicial review of legislation by colonial Supreme Courts had been a controversial issue in various Australian colonies, particularly South Australia. The extreme views and actions of Judge Boothby in South Australia, who advocated and sought to implement an enormous scope for judicial review of legislative actions, produced a stormy decade of confrontation with the newly created South Australian legislature. This led directly to the passage of the *Colonial Laws Validity Act* 1865 which was meant to bolster the authority of colonial legislatures. By federation, however, most of the earlier controversy had apparently been forgotten. For an extensive treatment, see Thomson, "Judicial Review in Australia", ch. 5.
29. Federal Conference Debates (1890), 89, 91.
30. J. A. La Nauze, *The Making of the Australian Constitution* (1972), 273. La Nauze records that Bryce's book lay on the official table throughout the proceedings of the 1897-98 convention.
31. Federal Conference Debates (1890), 96, 106.
32. B. R. Wise, *The Making of the Australian Commonwealth 1890-1900* (1913), 74.
33. Important exceptions on whose work the author draws are J. Reynolds, "A. I. Clark's American Sympathies and His Influence on Australian Federation", *Australian Law Journal* 32 (1958): 62; J. M. Neasey, "Andrew Inglis Clark Senior and Australian Federation", *Australian Journal of Politics and History* 15, no. 2 (1969): 1; and La Nauze, *The Making of the Australian Constitution,* 23-28, 75-76. Clark's key role is also documented in recent theses by Thomson, "Judicial Review in Australia", ch. 8, and R. Sundberg, "The Origins of the Judicature Chapter of the Australian Constitution and its Development to the end of the National Australasian Convention of 1891", M.A. thesis, University of Melbourne (1982), ch. 4.
34. *Amalgamated Society of Engineers v. Adelaide Steamship Co. Ltd* (1920), 28 CLR 129.
35. Wise, *The Making of the Australian Commonwealth 1890-1900,* 75.
36. Quoted La Nauze, *The Making of the Australian Constitution,* 76.
37. Clark's draft bill is printed as an appendix to Reynolds, "A. I. Clark's American Sympathies", 67.

38. Quoted Reynolds, ibid., 62-63. This paragraph is based on Reynolds's article.
39. A. Deakin, *The Federal Story* (1944), 30.
40. L. F. Crisp, *Charles Cameron Kingston* (1984), 32.
41. Sundberg, "The Origins of the Judicature Chapter", 59. Sundberg concludes that Clark was "the chief father of Chapter III", 231.
42. La Nauze, *The Making of the Australian Constitution,* 76. For an account of Griffith's leading role in the 1891 convention, see R. B. Joyce, *Samuel Walker Griffith* (1984), ch. 8.
43. J. Quick and R. R. Garran, *The Annotated Constitution of the Australian Commonwealth* (1901), 129.
44. Proceedings of the Judiciary Committee printed in Federal Convention Debates (London ed. 1891), cxxvi-cxxvii.
45. Joyce, *Samuel Walker Griffith,* 195-96.
46. Quoted La Nauze, *The Making of the Australian Constitution,* 66.
47. Ch. 3, s. 1 of the 1891 draft bill in Federal Convention Debates (1891), 956, and s. 71 of the final constitution.
48. British North America Act 1867, s. 99(1).
49. For a detailed comparison of Clark's bill and the US Constitution, see Neasey, "Andrew Inglis Clark", 21-26.
50. La Nauze, *The Making of the Australian Constitution,* 78.
51. Ibid., 87.
52. Quick and Garran, *The Annotated Constitution of the Australian Commonwealth,* 140-43; Wise, *The Making of the Australian Commonwealth,* ch. 9; Sundberg, "The Origins of the Judicature Chapter", ch. 7.
53. See A. W. Martin, *Henry Parkes* (1980), 401-7 for an account of the ins and outs of Parkes's political career.
54. Quoted Sundberg, "The Origins of the Judicature Chapter", 208 from *South Australian Parliamentary Debates* (1891), vol. 329. Discussion of the 1891 constitution bill in the colonial parliaments is discussed at greater length in Sundberg's thesis.
55. Federal Convention Debates (Adelaide, 1897), 17.
56. Ibid., 25.
57. Ibid.
58. According to Dixon, nineteenth-century British jurists had so firmly entrenched parliamentary sovereignty as a pivot of the legal system that British settlers in Australia and Australian lawyers and politicians were inclined to attribute such sovereignty to their colonial parliaments, even though it belonged strictly only to Wesminster. See Dixon, "The Law and the Constitution" in *Jesting Pilate,* 38, 45, 50-51. On the other hand, as Thomson's thesis documents, colonial courts and judges periodically held colonial legislation to be *ultra vires.*
59. Federal Convention Debates (Adelaide, 1897), 432, 448-53.
60. La Nauze, *The Making of the Australian Constitution,* 130-31; Joyce, *Samuel Walker Griffith,* 205. This novel innovation was included in s. 77(iii) of the constitution.
61. Quoted from the Hobart *Mercury,* 29 July 1897, in Scott Bennett, ed., *The Making of the Commonwealth* (1971), 166.
62. La Nauze, *The Making of the Australian Constitution,* 173, 220-21, 248-49. Also Higgins's speech, Federal Convention Debates (Adelaide, 1897), 988.
63. See for example Federal Convention Debates (Adelaide, 1897), 969-73, 981. Also Federal Convention Debates (London ed. 1891) cxlii-cxlviii, for Inglis Clark's defence of a local court that was final.
64. Federal Convention Debates (Adelaide, 1897), 987. See also Barton's subsequent statement that "if Australia is to be the maker of its own Constitution, it is fairly competent to be the interpreter of its own Constitution", Federal Convention Debates (1898), vol. 2, 2330.
65. Federal Convention Debates (Adelaide, 1897), 940.
66. Ibid., 935.
67. Ibid., 942.
68. Ibid., 947. The amendment became s. 72(ii) of the constitution.
69. Ibid., 944-47.
70. Ibid., 938-39.
71. Ibid., 947-49. For an extenseive examination of this issue in the federation debates, see J. A.

Thomson, "Some Notes on the History of Section 72(ii) of the Australian Constitution", Occasional Paper no. 2, 1984, Legislative Research Service, Parliamentary Library, Canberra.

72. Federal Convention Debates (Adelaide, 1897), 953.
73. Ibid., 950.
74. Ibid., 952-53. Barton's account of judicial review here and elsewhere demonstrates a thorough grasp of the American tradition. Surprisingly, however, Barton seems to have been unfamiliar with Marshall's leading opinion in *Marbury v. Madison:* see Barton's letter to Clark who had drawn his attention to the case, quoted La Nauze, *The Making of the Australian Constitution,* 234. While this ignorance is puzzling, it is doubtful that much can be drawn from it since Barton undoubtedly had a thorough understanding of judicial review. For a different interpretation of the Australian founders' ignorance of this leading case, see Thomson, "Some Notes on the History of Section 72(ii)" 131, 157.
75. Federal Convention Debates (Adelaide, 1897), 962.
76. Ibid., 957.
77. Ibid., 953. Later, on the High Court bench, Higgins and others were to express scepticism about discerning the intention that the court should exercise judicial review from specific sections of the constitution such as section 74; *Baxter v. Commissioner of Taxation* (New South Wales) (1907) 4 CLR 1087, 1116-70. Such statements are not at variance with the argument being advanced here that, from the federation debates, we can establish that the founders intended that the Court exercise judicial review.
78. La Nauze, *The Making of the Australian Constitution,* 170-76.
79. Federal Convention Debates (1898), vol. 1, 269.
80. Ibid., 270.
81. Ibid., 272.
82. Ibid., 356.
83. Ibid., 286.
84. Ibid., 283.
85. Ibid., 279.
86. Ibid., 344.
87. Ibid., 275.
88. Ibid., 601-2.
89. La Nauze, *Making of the Australian Constitution,* 211.
90. Quick and Garran, *The Annotated Constitution of the Australian Commonwealth,* 138.
91. Constitution s. 51(i).
92. Federal Covention Debates (1898), vol. 1, 66.
93. Ibid., 84.
94. Quick and Garran, *The Annotated Constitution of the Australian Commonwealth,* 194-96.
95. Federal Convention Debates (1898), vol. 1, 388. See also Barton's speeches, ibid., 409, 594.
96. Ibid., 113.
97. Ibid., 442.
98. Ibid., 614, 562-64.
99. Ibid., 426.
100. Ibid., 510.
101. Ibid., 573.
102. Dixon, "The Law and the Constitution", in *Jesting Pilate,* 38, 44.
103. M. Diamond, "The Federalists' View of Federalism", in *Essays in Federation* (1961), 21.
104. For example, Alexis de Tocqueville, *Democracy in America* (1835) (Vintage Books, 1945), I, 162-65.
105. Reply to the Landholder, 19 March 1788, in M. Farrand, ed., *The Records of the Federal Convention of 1787* rev. ed. (1937), III, 292.
106. Madison to Jefferson, 17 March 1787, *The Papers of James Madison* (1975), ix, 318; and Jefferson to Madison, 20 June 1787, *The Papers of Thomas Jefferson* (1955), xi, 480-81. The American historian Charles Warren credits Jefferson with being the first to suggest judicial review: *The Making of the Constitution* (1928), 168.
107. *The Records of the Federal Covention of 1787,* 21. For strong speeches in favour of a national veto power, see Madison, ibid., I, 164-65, 447, and II, 27-28.
108. Gouverneur Morris, in *The Records of the Federal Convention of 1787,* II, 28.

109. The strongest case for judicial review was made by Hamilton in *Federalist* no. 78. The legitimacy of judicial review and the historical intentions of the American founders in this regard have been the subject of periodic controversies that have produced an enormous literature. For a review and references, see Thomson, "Judicial Review in Australia", ch. 4.
110. Switzerland is an exception. There a law can be submitted to popular referendum to determine its constitutionality on both legislative and popular initiative. G. Sawer, *Modern Federalism,* new ed. (1976), 20.
111. K. C. Wheare, *Modern Constitutions,* 2nd ed. (1966), 101.
112. British North America Act 1867, ss. 55, 56, 90. See also J. Saywell, *The Office of the Lieutenant-Governor* (1957).
113. J. Smith, "The Origins of Judicial Review in Canada", *Canadian Journal of Political Science* 16 (1983): 115, reprinted in F. L. Morton, ed., *Law Politics and the Judicial Process in Canada* (1984), 228.
114. See F. MacKinnon, "The Establishment of the Supreme Court of Canada", in W. A. Lederman, ed., *The Courts and the Canadian Constitution* (1964); and B. Laskin, "The Role and Functions of Final Appellate Courts: The Supreme Court of Canada", *Canadian Bar Review* 52 (1975): 469.
115. J. R. Mallory, "Constraints on Courts as Agencies of Constitutional Change: The Canadian Case", *Public Law* (1977), 406, 409.
116. P. Weiler, *In the Last Resort: A Critical Study of the Supreme Court of Canada* (1974), 165.
117. Ibid., 175.
118. Ibid., 164.
119. Ibid., 177.
120. *Commonwealth Parliamentary Debates,* CPD 8 (1902): 10967.

Chapter 3 The Establishment and Consolidation of Judicial Review 1900 to 1940

1. This phrase was used by J. M. Bennett for his historical memoir on the High Court, *Keystone of the Federal Arch* (1980).
2. *Age,* 12 June 1903.
3. A. Deakin, *Federated Australia: Selections from Letters to the* Morning Post *1900-10,* ed. J. A. La Nauze, 1968, 119.
4. *Age,* 19 March 1902.
5. *Argus,* 18 March 1902.
6. *CPD* 13 (1903): 627.
7. Deakin, *Federated Australia,* 119.
8. *Tocsin,* 27 March 1902.
9. *CPD* 13 (1903): 617.
10. Ibid., 592.
11. Ibid., 723, from J. Quick and R. Garran, *The Annotated Constitution of the Australian Commonwealth* (1901), 723.
12. Ibid., 542.
13. *CPD* 8 (1902): 10964.
14. *CPD* 13 (1903): 623, 634.
15. Ibid., 802-3.
16. J. A. La Nauze, *The Making of the Australian Constitution* (1972), appendix 6, 303.
17. Griffith was in close contact with the final stages of Australian federation, as lieutenant-governor of Queensland for six months from September 1899 and as a close confidant of the Queensland government and governor for the whole period. Griffith's biographer concludes that "Griffith was virtually invited to act—albeit at his own instigation—as an undercover agent of the British government, a position that helps explain his role after the Australian delegates reached London in March." R. B. Joyce, *Samuel Walker Griffith* (1984), 209.
18. For a full historical account of this episode, see La Nauze, *The Making of the Australian Constitution,* ch. 16.
19. This is explained in detail by G. Sawer, *Australian Federalism in the Courts,* 1967, 22-28.

20. *CPD* 8 (1902): 10965-66.
21. Barton, *CPD* 13 (1903): 801.
22. Ibid., 804.
23. Ibid., 589.
24. *CPD* 15 (1903): 2693.
25. *CPD* 13 (1903): 807.
26. *Age,* 12 June, 1903.
27. R. G. McCloskey, *The American Supreme Court* (1960), 4; F. MacKinnon, "The Establishment of the Supreme Court of Canada", in W. A. Lederman, ed., *The Courts and the Canadian Constitution* (1964), 106.
28. *CPD* 15 (1903): 3264; 17 (1903): 5464.
29. *Age,* 25 September 1903.
30. *Argus,* 26 September 1903.
31. *CPD* 15 (1903): 3264.
32. J. A. La Nauze, *Alfred Deakin* (1965), ch. 14.
33. *Argus,* 26 September 1903.
34. Ibid.
35. *Tocsin,* 27 March 1903.
36. *Argus,* 25 September 1903.
37. *Argus,* 26 September 1903.
38. *CPD* 17 (1903), 5463.
39. *Age,* 25 September 1903. For an account of Griffith's appointment see Joyce, *Samuel Walker Griffith,* 255-61.
40. *Argus,* 11 June 1903.
41. This is set out in detail in R. Sackville, "The Doctrine of Immunity of Instrumentalities in the United States and Australia", *Melbourne University Law Review* 7 (1969-70): 15-66.
42. (1904) 1 CLR 91.
43. (1904) 1 CLR 585.
44. *Bank of Toronto v. Lambe* (1887), 12 App. Case 575.
45. (1904) 1 CLR 497.
46. *Federated Amalgamated Government Railway and Tramway Service Association v. New South Wales Railway Traffic Employees' Association* (1906), 4 CLR 488.
47. Reported in (1904) 1 CLR 619.
48. (1907) AC 81.
49. *Tocsin,* 13 December 1906.
50. (1907) 4 CLR 1087.
51. *CPD* 32 (1906): 1431-32.
52. *Argus,* 19 July 1906.
53. *Parliamentary Papers* 2 (1906): 1088-89.
54. Ibid., 1085-86.
55. Ibid., 1088.
56. *Argus,* 19 July 1906.
57. *Age,* 27 July 1906.
58. Ibid.
59. Ibid.
60. *Argus,* 19 July 1906.
61. *Argus,* 12 October 1906. Recently an excellent biography of Higgins has been published which covers his appointment and prior experience in detail; see J. Rickard, *H. B. Higgins: The Rebel as Judge* (1984). See also Z. Cowen, *Isaac Isaacs* (1967).
62. *Age,* 12 October 1906.
63. *Tocsin,* 18 October 1906.
64. *Age,* 12 October 1906. See also Joyce, *Samuel Walker Griffith,* 262-66; and W. G. McMinn, "The High Court Imbroglio and the Fall of the Reid-McLean Government", *Journal of the Royal Australian Historical Association* 64 (1978): 14-31.
65. Deakin, *Federated Australia,* 187-88.
66. Age, 12 October 1906.

67. *Baxter v. Commissioner of Taxation (New South Wales)* (1907), 4 CLR 1087, 1190. At the same time, it should be noted that Griffith and the founders' Court rejected any formal resort to the Convention Debates. This curious fact is discussed by J. Thomson, "Constitutional Interpretation: History and the High Court: A Bibliographical Survey", *University of New South Wales Law Journal* 5 (1982): 390-23, footnotes 11 and 13.
68. (1912-13) CLR 15, speech at first subsequent sitting after O'Connor's death on 25 November 1912, front of report.
69. For details of the Labor attitude to the constitution in the various states, B. Nairn, *Civilizing Capitalism* (1973), ch. 15; and D. J. Murphy, ed., *Labor in Politics* (1975).
70. *CPD* 13 (1903): 698.
71. *Ex Parte H. V. McKay* (1906), 2 Commonwealth Arbitration Reports, 1.
72. Ibid., 3. For a full account, see Rickard, *H. B. Higgins,* ch. 8.
73. For the New South Wales experience, see H. V. Evatt, *Australian Labour Leader* (1940), 251, 299-300, 356, 384-85. Regarding Lang's unsuccessful attempt to abolish the Legislative Council, *A-G (New South Wales) v. Trethowan* (1931), 44 CLR 395. For Queensland, A.C.V. Melbourne, "Constitutional Developments in Queensland", in his *Early Constitutional Developments in Australia,* 2nd ed., ed. R. B. Joyce (1963). For Victoria, A. G. Serle, "The Victorian Legislative Council, 1856-1950", *Historical Studies* 6 (1954): 186-203. Also see relevant sections in S. R. Davis, ed., *The Government of the Australian States* (1960).
74. Deakin, *Federated Australia,* 218.
75. (1908) 6 CLR 41.
76. In the *Union Labor* case which was somewhat similar, the Court held by the same three-to-two majority that the commonwealth could not authorize workers' trademarks certifying that goods were produced by union labour: *A-G (New South Wales) v. Brewery Employees Union of New South Wales* (1908), 6 CLR 469.
77. Evatt, *Australian Labour Leader* (1940), 222-23.
78. The *Huddart Parker* decision was not finally overruled until the important *Concrete Pipes* case, *Strickland v. Rocla Concrete Pipes* (1971), 124 CLR 468.
79. *Huddart Parker v. Moorehead* (1909), 8 CLR 330, 388.
80. *Labor Call,* 10 June 1909.
81. None of these referenda were supported either by a majority of states or a majority of voters. For a summary of results, see L. F. Crisp, *Australian National Government,* 4th ed. (1978), 45-46.
82. *CPD* 64 (1912): 164; 58 (1910): 4706, 4711.
83. *CPD* 58 (1910): 4711-12.
84. *Colonial Sugar Refining Co. Ltd v. A-G (Commonwealth)* (1912), 15 CLR 182. In 1912 Hughes changed the Act to require a majority decision in constitutional cases, Judiciary Act 1912, section 3, which amended section 23 of the Judiciary Act 1903-10.
85. *A-G (Commonwealth) v. Colonial Sugar Refining Co. Ltd* (PC) (1914), 17 CLR 644.
86. *R and A-G (Commonwealth) v. Associated Northern Collieries* (1911), 14 CLR 387. See especially Isaacs's case that the Vend practices caused public detriment, at 606 ff.
87. *Adelaide Steamship Co. Ltd v. R and A-G (Commonwealth)* (1912), 15 CLR 65, 91.
88. *SMH,* 8 June 1909.
89. *CPD* 64 (1912): 163.
90. Ibid., 57 (1912): 4449.
91. Ibid., 58 (1910): 4703, 4709.
92. *Daily Telegraph,* 30 May 1913.
93. *Labor Call,* 13 March 1912.
94. *Australian Worker,* 20 October 1910.
95. Ibid., 24 March 1909.
96. Cited by Hughes, *CPD* 58 (1910): 4710.
97. *Australian Worker,* 6 July 1911.
98. L. F. Fitzhardinge, *That Fiery Particle, 1862-1914, William Morris Hughes: A Political Biography,* 1 (1964), ch. 16; G. Sawer, *Australian Federal Politics and Law 1901-29* (1956), 105.
99. Information on the Australian judges is conveniently collected in Eddy Neumann, *The High Court of Australia: A Collective Portrait 1903 to 1972,* 2nd ed. (1973), Appendix A. Neumann's statistics are: average age at appointment, fifty-three years; at retirement or death, seventy-two;

average term, seventeen years (44). My slightly higher figure for average term takes account of recent changes on the Court. The American figure is based on H. J. Abraham, *The Judicial Process,* 3rd ed. (1975), 54-55.

100. *CPD* 69 (1912): 6983 ff.
101. Ibid., 6991.
102. Ibid., 6997.
103. Evatt, *Australian Labor Leader,* 222.
104. For details of justices, Neumann, *The High Court of Australia: A Collective Portrait,* appendix A.
105. Fitzhardinge, *That Fiery Particle,* 277. My treatment of the Piddington affair relies on Fitzhardinge's account.
106. H. V. Evatt, *The King and His Dominion Governors,* 2nd ed. (1967), ch. 5; J. R. Odgers, *Australian Senate Practice,* 3rd ed. (1967), 18-22.
107. Ernest Scott, *Australia during the War,* vol. XI of *The Official History of Australia in the War of 1914-1918* (1943), 874; 417,000 Australian, or 39 per cent of males aged eighteen to forty-four, enlisted and 332,000 fought overseas. The Australian casualty rate was the highest among all British Empire forces and at 65 per cent was substantially higher than Britain's 51 per cent.
108. The Canadian experience was somewhat similar; conscription divided the country along English-French lines and broke the Liberal party which was strongly based in Quebec. The major difference was that conscription was carried by a majority in Canada.
109. *Farey v. Burvett* (1916), 21 CLR 433, 453-54.
110. Ibid., 455-56.
111. Detention of suspects, *Lloyd v. Wallach* (1915), 20 CLR 299; deportation of aliens, *Ferrando v. Pearce* (1918), 25 CLR 241; property protection, *Pankhurst v. Kiernan* (1917), 24 CLR 120; confiscation and disposition of enemy subjects' property, *Burkard v. Oakley* (1918), 25 CLR 422; prevention of propaganda prejudicial to recruitment, *Sickerdick v. Ashton* (1918), 25 CLR 506.
112. *New South Wales v. Commonwealth* (1915), 20 CLR 54.
113. (1916) 22 CLR 556.
114. Evatt, *Australian Labor Leader,* 574.
115. An earlier line of High Court decisions in which O'Connor had taken a more liberal view than Griffith or Barton and sided with Isaacs and Higgins allowed a s. 51(xxxv) industrial dispute to be generated by the workers in two or more states acting in concert: *Jumbunna Coal Mine, No Liability v. Victorian Coal Miners' Association* (1908), 6 CLR 309, especially 352-53; *R v. Commonwealth Court of Conciliation and Arbitration; ex Parte Broken Hill Pty Co. Ltd* (1909), 8 CLR 419, especially 446-49. Sawer calls this "the system of manufacturing disputes", *Australian Federalism in the Courts,* 86-87.
116. *Bulletin,* 7 April 1910.
117. Neumann, *The High Court of Australia,* 55, 77.
118. *Argus,* 1 September 1920.
119. R. Menzies, *Central Power in the Australian Commonwealth* (1967), 39, 48. Menzies uses the *Engineers* case as an example of the amendment of the constitution by judicial interpretation.
120. Sawer, *Australian Federalism in the Courts,* 197.
121. *Strickland v. Rocla Concrete Pipes* (1971), 124 CLR 468.
122. *Federated Amalgamated Government Railway and Tramway Service Association v. New South Wales Railway Traffic Employees Association* (1906), 4 CLR 488.
123. Menzies, *Central Power in the Australian Commonwealth,* 37-39.
124. *Strickland v. Rocla Concrete Pipes* (1971), 124 CLR 468, 485.
125. Sawer, *Australian Federalism in the Courts,* 130.
126. *Amalgamated Society of Engineers v. Adelaide Steamship Co.* (1920), 28 CLR 129, 142-43. (Hereafter referred to as *Engineers.*) Lord Macnaghten's opinion is from *Vacher's* case, *Vacher and Sons Ltd v. London Society of Compositors* (1913), AC 107, 118.
127. *Engineers* 149, Haldane's opinion.
128. (1907) AC 81.
129. *Engineers,* 145.
130. Ibid., 142.
131. Federal Convention Debates (1898), vol. 1, 210.
132. The High Court has recently expanded the interpretation of the commonwealth's power in the

Social Welfare Union case, *R v. Coldham, Cohen and Others; ex Parte Australian Social Welfare Union* (1983) 47 ALR 225. For a discussion, see Di Yerbury, "The High Court's recent expansionist approach", *Current Affairs Bulletin* 60, no. 10 (Mar. 1984): 12-23.

133. There are now biographies of both justices: Cowen, *Isaac Isaacs* and Rickard, *H. B. Higgins: The Rebel as Judge.*
134. *Commonwealth v. Colonial Combing, Spinning & Weaving Co. Ltd* (1922), 31 CLR 421, 438-39.
135. *Victoria v. Commonwealth* (1971), 122 CLR 353, 386-97.
136. The Bruce-Page government was intent on unifying the arbitration system. In 1926 it lost a referendum, supported by the federal Labor Party but opposed by the state Labor governments in New South Wales and Queensland, to bring state arbitration authorities under federal control. Subsequently it set out to dismantle the commonwealth arbitration system. Some commentators conclude that this was Bruce's intention all along since there was little chance of the states giving up their jurisdiction. J. Robertson, *J. H. Scullin* (1974), 157.
137. D. Carboch, "The Fall of the Bruce Page Government", in A. Wildavsky and D. Carboch, *Studies in Australian Politics* (1958).
138. (1920) 28 CLR 530.
139. The early section 92 decisions concerned state, not federal, legislation, a fact that is not surprising since the states were accustomed to acting as sovereign legislators. The founders' Court held that section 92 prevented a state, Western Australia, from discriminating in favour of its local product, wine; *Fox v. Robbins* (1908), 8 CLR 115. On the other hand, section 92 did not forbid compulsory acquisition of wheat under a state marketing scheme, even though the wheat could have been sold interstate; *New South Wales v. Commonwealth* (the *Wheat* case) (1915), 20 CLR 54. This ruling depended on the legalistic severance of passing of title, a state matter, from its direct effect of prohibiting interstate trade which section 92 protected. The Court was even more generous in accommodating state interference with interstate trade in wartime; *Duncan v. Queensland* (1916), 22 CLR 556. Reversing its earlier decision *Foggitt Jones and Co. Ltd v. New South Wales* (1916), 21 CLR 357, the Court upheld a state's right to order the holding of cattle without actually acquiring title. It was probably material that the stock were to be purchased by the imperial government for feeding its vast armies. *McArthur* overruled *Duncan*, while the *Wheat* case survived until overruled by the Privy Council in *James v. Cowan* (PC) (1932), 47 CLR 386.
140. *New South Wales v. Commonwealth* (1915), 20 CLR 54, 66.
141. Sawer, *Australian Federal Politics and Law 1901 to 1929*, 329.
142. Robertson has a full discussion of the matter, in *J. H. Scullin*, 382-87.
143. D. V. Copland, *Australia in the World Crisis, 1929 to 1933* (1934); Royal Commission into the Monetary and Banking Systems, *Report* (1937), 12-13, 47-48; C. B. Schedvin, *Australia and the Great Depression* (1970).
144. E. O. G. Shann and D. V. Copland, eds, *The Battle of the Plans* (1931), ch. 4.
145. Geoffrey Sawer, *Australian Federal Politics and Law 1929 to 1949* (1963), 22. Had Labor controlled the Senate, it is reasonable to expect that many more controversial policies than are contained in these fourteen bills would have been legislated.
146. For Theodore's own summary of the plan, see P. Weller, ed., *Caucus Minutes 1901 to 1949*, II (1975) 416-18. B. McFarlane argues that Theodore was influenced by the progressive views of R. F. Irvine, former professor of economics at Sydney University. *Professor Irvine's Economics in Australian Labour History* (1966).
147. See for example the letter of the chairman of the board of directors of the Commonwealth Bank, Robert Gibson, to Theodore, 2 April 1931. Shann and Copland, *The Battle of the Plans*, 44-47. This was an ultimatum to the government that soon "it would be impossible for the bank to provide further assistance for the Governments in the future". For Theodore's stinging but ineffectual response that the board was arrogating to itself the right to dictate financial policy to the government, ibid., 47-56.
148. "National Objectives—Social, Economic and Political Goals" *Australian Quarterly* 47, no. 1 (March 1975): 26. Also A. A. Calwell, *Labor's Role in Modern Society* (1963), 383; and for a more sober appraisal of "Theodore's modest proposals", Whitlam's foreword in I. Young, *Theodore* (1971), vii-xiv.
149. *Caucus Minutes*, II, 357, 365.

150. *CPD* 123 (1930): 180.
151. Robertson, *J. H. Scullin,* 233-34.
152. Ibid., 283; K. Tennant, *Evatt* (1970), 66-73. Surprisingly, there is no record in *Caucus Minutes:* see editor's note, II, 408.
153. *CPD* 127 (1930): 1407.
154. Ibid., 128 (1931): 154. The critic was Mr Archdale Parkhill.
155. Ibid., 97.
156. Ibid., 269.
157. Ibid., 271.
158. Menzies to Evatt, 19 December 1930, Evatt Papers, file of congratulatory correspondence on appointment to judiciary, 1930.
159. A Nationalist government in Queensland skilfully manipulated charges of political corruption concerning acquisition of Mungana mining leases by the previous Theodore Labor government in 1919 to destroy Theodore's credibility. This crippled the federal Labor government by destroying its most able minister. For details, see Young, *Theodore,* chs. 11, 20, 25.
160. *Labor Daily,* 7 April 1932.
161. Ibid., and *Advertiser,* 7 April 1932.
162. Evatt, *The King and His Dominion Governors,* ch. 19.
163. For a comprehensive study of the High Court's interpretation of section 92, see M. Coper, *Freedom of Interstate Trade under the Australian Constitution* (1983).
164. The *Transport* cases were: *Roughley v. New South Wales* (1928), 42 CLR 162; *Willard v. Rawson* (1933) 48 CLR 316; *R v. Vizzard* (1933), 50 CLR 30; *O. Gilpin Ltd v. Commissioner for Road Transport and Tramways (New South Wales)* (1935), 52 CLR 189; *Bessell v. Dayman* (1935), 52 CLR 215; *Duncan and Green Star Trading Co. Pty Ltd v. Vizzard* (1935), 53 CLR 493.
165. *R v. Vizzard* (1933), 50 CLR 30, at 93.
166. Ibid., 82.
167. *Peanut Board v. Rockhampton Harbour Board* (1933), 48 CLR 266, at 302.
168. *Argus,* 24 April 1933.
169. *Courier,* 21 April 1933.
170. *O. Gilpin Ltd v. Commissioner for Road Transport and Tramways (New South Wales)* (1935), 52 CLR 189, at 211-12.
171. Sawer, *Australian Federal Politics and Law 1929 to 1949,* 66.
172. Dixon to Latham, 1 June 1937. Quoted Bennett, *Keystone of the Federal Arch,* 67.
173. *James v. South Australia* (1927), 40 CLR 1. The 1920 *McArthur* case, *McArthur v. Queensland* (1920), 28 CLR 530, had forbidden state interference with section 92 free trade, but had left standing the 1915 *Wheat* precedent, *New South Wales v. Commonwealth* (1915), 20 CLR 54, that allowed states to acquire the title of goods *before* they entered interstate trade.
174. *James v. Commonwealth* (1928), 41 CLR 442.
175. *James v. Cowan* (1930), 43 CLR 386. This case was technically different from *James v. South Australia* since it concerned state acquisition in general and not acquisition of fruit already committed to interstate trade.
176. *James v. Cowan* (PC) (1932), 47 CLR 386.
177. *James v. Commonwealth* (1935), 52 CLR 570.
178. *James v. Commonwealth* (PC) (1936), 55 CLR 1.
179. Ibid., 50, The *Vizzard* case was finally overruled only in 1954, again by the Privy Council in the context of changed personnel and opinions on the Court: *Hughes and Vale Pty Ltd v. New South Wales* (PC) (No. 1) (1954), 93 CLR 1.
180. *James v. Commonwealth* (PC) (1936), 55 CLR 1, at 55.
181. Ibid., 20. Menzies's own opinion of the matter, if it were free of authority, was that section 92 referred only to "pecuniary imposts". 26.
182. Ibid., 30.
183. Ibid., 61. Lord Wright, who wrote the Privy Council opinion, later admitted that it had failed to take sufficient account of the implications: "Section 92—A Problem Piece", *Sydney Law Review* 1 (1954): 145.
184. *Hartley v. Walsh* (1937), 57 CLR 372. It is worth noting that the Victorian regulations were enacted in 1936 and the dried fruit in question was sold to James in South Australia.

185. *Milk Board (New South Wales) v. Metropolitan Cream Pty Ltd* (1939), 62 CLR 116.
186. *Hartley v. Walsh*, 389.
187. *Milk Board* case, 150-51. Dixon did not sit in this case but a Dixonian dissent was filed by Starke.
188. For a critical account of Latham's judicial work, see Zelman Cowen, *Sir John Latham and Other Papers* (1965), especially 37, 54.
189. R. Menzies, *Afternoon Light* (1967), 123.
190. Sawer, *Australian Federal Politics and Law 1929 to 1949*, 151.
191. *Bulletin*, 26 April 1933.

Chapter 4 Time of Testing: Labor versus the Constitution in the 1940s

1. Lloyd Ross, "A New Social Order", in D.A.S. Campbell, ed., *Post-War Reconstruction in Australia* (1944), 212.
2. National radio broadcast of 3 September 1939, in F. K. Crowley, ed., *Modern Australia in Documents* (1973) II, 1.
3. R. Menzies, *Afternoon Light: Some Memories of Men and Events* (1967), 31.
4. Caucus resolution, 15 October 1940: *Caucus Minutes 1901 to 1949* III, 238, and statement 243-44. Also caucus mainfesto of 22 October and Menzies's response, ibid., 246-47.
5. P. Spender, *Politics and a Man* (1972), 169.
6. Ibid., 159.
7. Quoted in A. Chester, *John Curtin* (1943), 102.
8. Statement on the fall of Singapore, Cowley, *Modern Australia in Documents*, II, 59.
9. Speech of 26 July 1943, ibid., 88. Of course to some extent Curtin built on the foundations that the Menzies government had laid.
10. Speech of 3 June 1940, in Chester, *John Curtin*, 81.
11. Spender, *Politics and a Man*, 115-16. See also L. F. Giblin's comments regarding the government's lack of capacity to take decisions unpopular with business interests, *The Growth of a Central Bank* (1951), 268.
12. Speech of 15 March 1942, Chester, *John Curtin*, 144.
13. Royal Commission into the Monetary and Banking Systems, *Report* (1937), 210-11, 218. For an account of the origins and early history of the Commonwealth Bank, see R. Gollan, *The Commonwealth Bank of Australia* (1968).
14. Royal Commission, *Report*, summary of recommendations, 275-81.
15. Ibid., 206.
16. Ibid., 262-68.
17. "Monetary Policy of the Australian Labor Party". *Caucus Minutes* III, 140-41 (24 July 1936).
18. During caucus discussion, an amendment from the radical Rosevear calling for a government monopoly in banking and the absorption of all private banks by the Commonwealth Bank was defeated, *Caucus Minutes* III, 141.
19. *Caucus Minutes* III, 252 (26 November 1940). Curtin moved this on 28 November but withdrew it after a compromise had been worked out with the government in the form of a joint war council. See 252 n. 10 and details of agreement, 253.
20. Quoted in L. F. Crisp, *Ben Chifley* (1961), 173.
21. Giblin, *The Growth of a Central Bank*, 230.
22. Ibid., 284-85.
23. The National Security (War-Time Banking Control) Regulations are printed as appendix C in Giblin, *The Growth of a Central Bank*, 357-59.
24. *Cabinet Minutes*, 24 March 1942, Australian Archives A2703, vol. 1, fol. 82.
25. *CPD* 170 (1942): 1577-82.
26. Ibid., 1285.
27. Ibid. Calwell disclosed to the House that caucus had not been unanimous in its decisions on the legislation (1702). For a similar argument by a Liberal apologist, see G. T. Clarke, "Uniform

Taxation", *Australian Quarterly* 19, no. 3 (September 1947): 83-89. Clarke calls the uniform tax scheme "fiscal euthanasia of the states without the consent of the people"

28. *CPD* 170 (1942): 1744.
29. Ibid., 1594-96.
30. Ibid., 1662-69.
31. A. V. Dicey's famous formulation, *The Law of the Constitution,* 10th ed. (1959), 173. Dicey said: "Federalism . . is unfavourable to the interference or to the activity of government."
32. The National Security Act, no. 15 of 1939, s. 5.
33. *Dawson v. The Commonwealth* (1946), 73 CLR 157, at 177.
34. See W. Anstey Wynes, *Legislative, Executive and Judicial Powers in Australia,* 5th ed. (1976), 199-230. Also Douglas Menzies, "The Defence Power", in R. Else-Mitchell, ed., *Essays on the Australian Constitution* (1952), 132-55. For a recent treatment, see H. P. Lee, *Emergency Powers* (1983), ch. 2. For comparison with the defence power in the United States constitution, P. H. Lane, *The Australian Federal System* (1979), 1-97. The Australian constitution has nothing equivalent to the Canadian BNA Act's residual "peace, order and good government" power (s. 91) that has been used to sustain war emergency measures such as price controls: *Fort Frances Pulp and Power Co. v. Manitoba Free Press* [1923] AC 695. See P. W. Hogg, *Constitutional Law of Canada* (1977), 252ff; and C. D. Gilbert, " 'There Will be Wars and Rumours of Wars': A Comparison of Treatment of Defence and Emergency Powers in the Federal Constitutions of Australia and Canada" *Osgoode Hall Law Journal* 18 (1980): 307-35.
35. *Wishart v. Fraser* (1941), 64 CLR 470.
36. *Victorian Chamber of Manufacturers v. Commonwealth* (Prices Regulations) (1943), 67 CLR 335; *Reid v. Sinderberry* (1944), 68 CLR 504; *Stenhouse v. Coleman* (1944), 69 CLR 457.
37. Quoted in *Stenhouse v. Coleman,* 458.
38. *Silk Bros Pty Ltd v. State Electricity Commission of Victoria* (1943), 67 CLR 1; *Miller v. Commonwealth* (1946), 73 CLR 187; *Ferguson v. Commonwealth* (1943), 66 CLR 432; *Peacock v. Newtown* (1943), 67 CLR 25.
39. *Andrews v. Howell* (1941), 65 CLR 225, at 273. The National Security (Apples and Pear Acquisition) Regulations were imposed by the Menzies United Australia-Country party government, and continued by the Labor government.
40. *De Mestre v. Chisholm* (1944), 69 CLR 51, at 63.
41. (1943) 68 CLR 87.
42. *Victorian Chamber of Manufacturers v. Commonwealth (Women's Employment Regulations)* (1943), 67 CLR 347. In this case the Victorian Chamber of Manufacturers represented numerous members who were manufactures of women's clothing.
43. *Australia Woollen Mills Ltd v. Commonwealth* (1944), 69 CLR 476.
44. Ibid., 488.
45. *Victorian Chamber of Manufacturers v. Commonwealth (Women's Employment Regulations),* 380.
46. *R v. Commonwealth Court of Conciliation and Arbitration; ex Parte Victoria;* and *Victoria v Commonwealth* (1942), 66 CLR 488.
47. *R v. University of Sydney* (1943), 67 CLR 95; *Wertheim v. Commonwealth* (1945), 69 CLR 601; *Victorian Chamber of Manufacturers v. Commonwealth* (Industrial Lighting Regulations) (1943), 67 CLR 413.
48. *Adelaide Company of Jehovah's Witnesses Inc. v. Commonwealth* (1943), 67 CLR 116.
49. *Morgan v. Commonwealth* 1947, 74 CLR 421.
50. *Dawson v. Commonwealth* (1946), 73 CLR 157, and 183-84. The Defence (Transitional Provisions) Acts of 1946 and 1947 extended national security regulations into the postwar period.
51. The Court upheld the following as valid exercises of the defence power in the postwar period: regulation of land sales, the above case and *Hume v. Higgins* (1949), 78 CLR 116; share prices, *Miller v. Commonwealth* (1946), 73 CLR 187; housing, *Real Estate Institute of New South Wales v. Blair* (1946), 73 CLR 213; minerals, *Jenkins v. Commonwealth* (1947), 74 CLR 400; and butter and cheese production, *Sloan v. Pollard* (1947), 75 CLR 445.
52. *Crouch v. Commonwealth* (1948), 77 CLR 339.
53. *R v. Foster* (1949), 79 CLR 43.
54. *Andrews v. Howell* (1941), 65 CLR 255, at 278.
55. Wynes, *Legislative, Executive and Judicial Power in Australia,* 26.

56. *South Australia v. Commonwealth* (1942), 65 CLR 373. This was the *first Uniform Tax* case but is referred to here simply as "the *Uniform Tax case*" The *Second Uniform Tax* case, *Victoria v. Commonwealth* (1957), 99 CLR 575, substantially upheld the first case.
57. *CPD* 171 (1942): 1701-2.
58. For instance, state income tax as a percentage of total state taxes differed as widely as 46.8 per cent for Tasmania, 52.6 per cent for Victoria and 67.8 per cent for New South Wales. Consequently, Victorians paid new uniform tax rates at the same high level as New South Welshmen, but received back by way of state grants a much lower proportion (statement of claim, *Uniform Tax* case, 379).
59. Act no. 22 of 1942, s. 31 which amended the principal tax Act of 1936-41 with s. 221.
60. *Uniform Tax* case, 409.
61. Ibid., 437.
62. Ibid., 409.
63. Ibid., 429.
64. *Cabinet Minutes,* 15 April 1942, A2703, vol. 1, fol. 92-93.
65. Ibid., 8 July 1942, A2703, vol. 1, fol. 119.
66. For this and the previous quotations, *SMH,* 24 July 1942.
67. *SMH,* 25 July 1942.
68. *Age,* 24 July 1942.
69. *Bulletin,* 29 July 1942.
70. *Advertiser,* 27 July 1942.
71. *SMH,* 24 July 1942.
72. *Cabinet Minutes,* 20 November 1945, Australian Archives A2703, vol. 3 [A], fol. 136.
73. Memorandum on "Uniform Taxation", *Cabinet Agenda,* CRS2700, vol. 19, Agendum 988A.
74. *Cabinet Minutes,* 6 February 1946, A2703, vol. 3 [A], fol. 176.
75. *Second Uniform Tax* case, 580.
76. Ibid., 601.
77. By Act no. 6 of 1946, s. 20.
78. Though Dixon himself expressed reservations, he indicated that precedent had established the principle that the Court place no limitation on the terms or conditions that the commonwealth was competent to impose under s. 96, *Second Uniform Tax* case, 807.
79. Spender, *Politics and a Man,* 173.
80. Policy speech as leader of the opposition, 28 August 1940. Evatt Papers, Curtin File.
81. J. M. Keynes, *The General Theory of Employment, Interest and Money* (1936), 381.
82. For a longer discussion, see W. J. Waters, "Australian Labor's Full Employment Objective, 1942-45", *Australian Journal of Politics and History* 16 (April 1970): 48-64.
83. D. V. Copland, "The Change-over to Peace", in Campbell, *Post-War Reconstruction in Australia,* 121-67, 123.
84. Ibid., 124-25.
85. Quoted in Crisp, *Ben Chifley,* 151.
86. H. C. Coombs, "The Economic Aftermath of War", in Campbell, *Post-War Reconstruction in Australia,* 67-99, 88.
87. Lloyd Ross, "A New Social Order", in ibid., 212.
88. Ibid., 213.
89. *SMH,* 2 March 1944.
90. Coombs' "The Economic Aftermath of War", 88.
91. "Labor's Post-War Plan", issued as an ALP (Victoria) pamphlet dated 18 June 1943.
92. Ibid.
93. Elwyn Spratt, *Eddie Ward* (1965), 71.
94. *SMH,* 24 April 1943.
95. *CPD* 181 (1945): 13. For a detailed account of Curtin's political life, especially his wartime prime ministership, see Lloyd Ross, *John Curtin* (1977).
96. *CPD* 181 (1945): 10, 12.
97. Ibid., 50-51.
98. Ibid., 183.
99. Ibid., 61-62.

100. Ibid., 103.
101. Ibid., 97.
102. Ibid., 182-3.
103. *CPD* 177 (1944): 139. This and the following arguments and quotations are from Evatt's second reading speech, 11 February 1944, 136-53.
104. "Constitution Alteration (Post-War Reconstruction) Draft Bill—Report by Cabinet Committee", 3 December 1943, *Cabinet Agenda* 2700, vol. 8, agenda 573.
105. *CPD* 177 (1944): 453-54.
106. Ibid., 140.
107. Ibid., 450. The following discussion is based on Menzies's speech of 23 February 1944, 448-69.
108. *Age,* 17 November 1942.
109. *Herald,* 25 November 1942.
110. Professor K. H. Bailey to Evatt, 21 August 1944. Evatt Papers: Miscellaneous Correspondence.
111. Letter to Evatt, 31 March 1943. Evatt Papers: Miscellaneous Correspondence.
112. *Cabinet Minutes,* 18 June 1945, A2703, vol. 3 [A], fol 61.
113. Ibid., 2 July 1945, A2703, vol. 3 [A], fol. 65.
114. Ibid., 24 September 1945, A2704, vol. 3 [A], fol. 109.
115. Ibid., 2 October 1945, A2703 vol. 3 [A], fol. 115.
116. Tennant, *Evatt,* 75.
117. A. A. Calwell, *Be Just and Fear Not* (1972), 197.
118. *Cabinet Minutes,* 17 January 1946, 2703, vol. 3 [A], fol. 1032.
119. *CPD* 186 (1945): 1306-7.
120. Ibid., 185 (1945): 5723.
121. Spratt, *Eddie Ward,* 95-128.
122. *Sun,* 11 August 1943.
123. Barry had identified himself with the more radical line of Calwell and Ward. See Barry to Ward, 20 November 1944, Barry Papers, MS 2396/1/48.
124. See P. Ryan, "Sir John Barry", *Historical Studies* 14 (1970): 329-31.
125. "Estimated Cost of Social Services in Australia", *Cabinet Agenda,* no. 414, CRS2700, vol. 5.
126. Ibid.
127. *Cabinet Minutes,* 15 January 1943, CRS A2703, vol. 1 (D), fols. 206, 207 for this and the following quotations.
128. See E. Page's memoirs, *Truant Surgeon: The Inside Story of Forty Years of Australian Political Life,* ed. A. Mozley (1963).
129. *CPD* Senate 177 (1944): 521.
130. Letter to the Minister of Health, 8 December 1943. Quoted ibid., 522.
131. *Age,* 24 March 1945.
132. Representation of the Federal Council of the BMA to the minister for health, *Medical Journal of Australia,* Sydney, 17 April 1948, in Crowley, *Modern Australia in Documents,* II, 185.
133. BMA pamphlet, undated. For more extensive coverage of the issue, see Thelma Hunter's series of articles: "Some Thoughts on the Pharmaceutical Benefits Scheme", *Australian Journal of Social Issues* I, no. 4 (1963): 32-42; "Pharmaceutical Benefits Legislation, 1944-50", *The Economic Record,* September 1965, 412-25; and "Pressure Groups and the Australian Political Process: The Case of the Australian Medical Association", *Journal of Commonwealth and Comparative Politics* 18 (July 1980): 190-206.
134. *First Pharmaceutical Benefits* case, *A-G (Victoria) v. Commonwealth* (1945), 71 CLR 237, 272. For a critical discussion of the current situation with respect to access to the courts, see the Law Reform Commission's Discussion Paper no. 4, "Access to the Courts—I Standing: Public Interest Suits" (1977).
135. *CPD* 186 (1946): 898.
136. *Mercury,* 20 November 1945.
137. *Age,* 21 November 1945.
138. *First Pharmaceutical Benefits* case, 273-74.
139. See Latham's view, 254, 256; Starke's 266; Williams's 281-82.
140. *First Pharmaceutical Benefits* case, 271-72.
141. *SMH,* 21 November 1945.

142. *Cabinet Minutes,* 20 November 1945, A2703, vol. 3 [A], fol. 135.
143. Cabinet Memo dated 17 December 1945, *Cabinet Agenda,* no. 1005 A, 2700, vol. 21.
144. *CPD* 186 (1946): 649.
145. Ibid., 899-900.
146. Senator McKenna's second reading speech, CPD 192 (1947): 3301-2.
147. Letter of S. G. Hunter, general secretary of BMA, to McKenna, 8 September 1947. *Cabinet Minutes,* A 2703, vol. 3 [A], item 1005C, Appendix D.
148. *CPD* 201 (1949): 1690.
149. Ibid., 1647.
150. Ibid., 1654.
151. See comments of Page and Menzies, CPD 203 (1949): 1845, 1860.
152. *Second Pharmaceutical Benefits* case, *British Medical Association v. Commonwealth* (1949), 79 CLR 201, 209. See also the BMA's statement of claim, 204.
153. Ibid., 277.
154. Ibid., 251.
155. Ibid., 290.
156. *Advertiser,* 10 November 1949; *West Australian,* 8 November 1949; *Courier,* 9 November 1949.
157. *SMH,* 20 November 1949.
158. John Reeves and Gareth Evans, "Two Views of the Socialist Objective", in John Reeves and Gareth Evans, eds, *Labor Essays 1980,* 155-57.
159. *Federal Executive Minutes* 1915-55, 271-72.
160. Memo of Minister for Civil Aviation, 25 September 1944, *Cabinet Agenda* 2700, vol. 12, pt 2, no. 740A, p. 6.
161. *Cabinet Minutes,* 10 November 1944, A2703, vol. 2, fol. 242.
162. Cable from Drakeford, 15 November 1944, *Cabinet Agenda* 2700, vol. 12, pt 2, no. 740.
163. This and the following paragraph are from Drakeford's second reading speech, *CPD* 183 (1945): 4178-89.
164. *CPD* 184 (1945): 4547-57.
165. For a comparative study of national airline policy, see David Corbett, *Politics and the Airlines* (1965), ch. 4, "Public v. Private Airlines"
166. The *Airline* case, *Australia National Airways v. Commonwealth* (1945), 71 CLR 29, at 33-34.
167. Ibid., 81. Marshall's comments were made in *McCulloch v. Maryland* (1819), 4 Wheat. 316, 407.
168. Ibid., 41; and Latham's response, 61.
169. D. Marr, *Barwick* (1980), ch. 6.
170. *Airline* case, 78.
171. Ibid., 89.
172. Ibid., 109-10.
173. Ibid., 73. Rich's finding in this case was hardly consistent with his joining Latham, Evatt and McTiernan in upholding New South Wales restrictive controls on Victorian milk, *Milk Board (New South Wales) v. Metropolitan Cream* (1939), 62 CLR, 116. In that case Starke strongly dissented.
174. *James v. Cowan* (1930), 43 CLR 386, 418.
175. *SMH,* 15 December 1945.
176. *Courier,* 17 December 1945.
177. Hobbes, *Leviathan,* ch. 24, ed. M. Oakeshott (1946), 164.
178. Commonwealth Bank Act (1945), clause 8.
179. Memorandum to cabinet, 10 January 1945, *Cabinet Agenda* 2700, vol. 13, pt 2, no. 768.
180. The Australian legislation was not so different from the Canadian legislation of the early 1950s (introduced by a Liberal government), and the British legislation of 1946: H. Aufricht, *Central Banking Legislation* 4th ed. (1974); also J. O. Olakanpo, *Central Banking in the Commonwealth* (1965).
181. *CPD* 181 (1945): 743-59; Lazzarini's interjection (ibid., 757).
182. Ibid., 783-96.
183. *CPD* 193 (1947): 802-3. Chifley gives a full account of the private banks' persistent opposition to the Labor government's central banking controls.
184. A. L. May, *The Battle for the Banks* (1968), 9.
185. Geoffrey Blainey, *Gold and Paper: A History of the National Bank of Australia Limited* (1958), 363.
186. May, *The Battle for the Banks,* 8-10.

187. *Mercury,* 18 August 1947.
188. *CPD* 198 (1948): 849.
189. See Latham's opinion, *State Banking* case, *Melbourne Corporation v. Commonwealth* (1947), 74 CLR 31, 43.
190. Crisp, *Ben Chifley,* 324-35.
191. Ibid., 325; G. Blainey, *Gold and Paper* (1958), 364.
192. *State Banking* case, 66. For a somewhat different analysis of the majority judges' opinions, see J. Thomson, "A United States Guide to Constitutional Limitations upon Treaties as a Source of Australian Municipal Law", *University of Western Australia Law Review* 13, no. 2 (December 1977): 153-95, especially 163-68.
193. *State Banking* case, 88.
194. See Dixon's opinion in the *Second Uniform Tax* case (1957), 601.
195. *West v. Commissioner of Taxation* (New South Wales) (1937), 56 CLR 657, 682 and 698. Dixon developed and applied his view in *Essendon Corporation v. Criterion Theatres* (1947), 74 CLR at 22-23.
196. *State Banking* case, 67. Also Williams, 98-99; and Starke 74.
197. For a discussion of Dixon's view of federalism based on this case, see Leslie Zines, "Sir Owen Dixon's Theory of Federalism", *Federal Law Review* 1 (1965): 221-41.
198. *State Banking* case, at 84.
199. *Cabinet Minutes,* 15 August 1947, A2703, vol. 4, fol. 83.
200. According to McKenna, quoted in Crisp, *Ben Chifley,* 236.
201. Fred Daly, *From Curtin to Kerr* (1977), 59.
202. *Age,* 18 August 1947.
203. *Mercury,* 20 August 1947; *Courier,* 19 August 1947.
204. President of Victorian Chamber of Manufacturers, *Age,* 19 August 1947; President of Queensland Employers' Federation, *Courier,* 18 August 1947.
205. *SMH,* 18 November 1947.
206. *Age,* 18 August 1947.
207. Secretary of Building Trades Federation, *Age,* 19 August 1947.
208. Crisp, *Ben Chifley,* 327-28. Lloyd Ross has the same opinion. He says the decision was "taken exclusively on the initiative of Mr Chifley" in "Socialism and Australian Labour: Facts, Fiction and Future", *Australian Quarterly* 22, no. 1. (March 1950): 12-35, 27.
209. For example the *Advertiser,* 18 August 1947.
210. K. Tennant, *Evatt* (1970), 217.
211. *CPD* 193 (1947): 803.
212. Ibid., 802. See also comments of Chifley, *CPD* 204 (1949): 1115-16, 1152; and of McKenna, *CPD* 205 (1949): 1384. Also S. J. Butlin, *Australian and New Zealand Bank* (1961), 428-31.
213. *CPD* 198 (1948): 849.
214. *CPD* 193 (1947): 798.
215. "The Effect of the Great Depression on the Federal Labor Government, 1941-49", *Australian Journal of Politics and History* 22 (1976): 258-70.
216. Ibid., 268.
217. See for example, C. V. Janes, "Bank Nationalization Delusions", *Australian Quarterly* 19, no. 4 (December 1947): 9-19.
218. Introduction to *Things Worth Fighting For,* selected and arranged A. W. Stargardt (1952), 6.
219. See R. W. Connell, *Ruling Class Ruling Culture* (1977), 48.
220. A comprehensive account is given by A. L. May, *The Battle for the Banks* (1968).
221. *CPD* 194 (1947): 1279, 1290.
222. *Age,* 8 November 1947.
223. See Senator Sandford's account, *CPD* 198 (1948): 185-86. Sandford implicates the banking interests in the Tasmanian election that Labor won.
224. Quoted in May, *The Battle for the Banks,* 59.
225. For an excellent account of Barwick's role in the various banking cases and of bank strategy, see Marr, *Barwick,* ch. 7.
226. *Caucus Minutes,* 26 November 1947, 436.
227. *Bank Nationalization* case, *Bank of New South Wales v. Commonwealth* (1948), 76 CLR 1, at 380.
228. *SMH,* 2 April 1948.

229. *Bank Nationalization* case, 84.
230. Ibid., 22.
231. Ibid., 309.
232. Ibid., quoted 283 from *O. Giplin Ltd v. Commissioner for Road Transport and Tramways (New South Wales)* (1935), 52 CLR 189, at 211.
233. Ibid., 280, 282.
234. Ibid., 326.
235. Ibid., 388.
236. Ibid., 386.
237. Ibid., 51-52.
238. A comparable example is perhaps Starke's about-turn on the question of whether implied state immunities did or did not imply the right of states to use private banking facilities. He distinguished his strong interpretation of state immunities in the *State Banking* case on the grounds that the states were in that instance subject to a particular direction (ibid., 304-5, 235-36).
239. May gives a full account of this in *The Battle for the Banks*, 88.
240. Crisp, *Ben Chifley*, 336.
241. *CPD* 197 (1947): 2173.
242. *SMH*, 15, 18 and 25 November 1947.
243. Fifth Wilfred Fullagar Memorial Lecture, "Let Justice Be Done", Monash 1974. Printed in *Monash University Law Review* 2 (1975-76): 3-12, 3.
244. These biographical details are drawn from *Who's Who 1949* (London), 818, 1741, 1987, 2068, 2237, 2832.
245. Tennant, *Evatt*, 243.
246. *Herald*, 26 November 1948.
247. See for example Holmes's famous dissent in *Lochner v. New York* (1905), 198 US 54 in which he rightly claimed that the Supreme Court's decision striking down social welfare legislation that restricted the working hours of bakers was decided "upon an economic theory"
248. *Commonwealth v. Bank of New South Wales* (1949), 79 CLR 497, 637. Emphasis added.
249. Ibid., 635.
250. Ibid., 639, 640-41.
251. Ibid., 639, 640-41. For one of the best discussions of the inconsistencies of this decision and of s. 92 generally, see Julius Stone, "A Government of Laws and Yet of Men: Being a Survey of Half a Century of the Australian Commerce Power", *New York University Law Review* 25 (1952): 447-512.
252. Evatt to Clarrie Martin, 14 November 1949. Evatt Papers, *Banking Case* file.
253. *Age*, 27 October 1949.
254. *SMH*, 27 and 28 October 1949.
255. *CPD* 205 (1949): 1396; 204 (1949): 362.
256. See Chifley's response to questions on 6 and 7 October 1949 (*CPD* 204: 1053-54, 1115); and speech to federal executive on 5 October 1949, *Federal Executive Minutes*, 406).
257. *CPD* 204 (1949): 290.
258. Ibid., 209 (1950): 633.
259. Ibid., 204 (1949): 563.
260. Ibid., 205 (1949): 2112.
261. Quoted in Daly, *From Curtin to Kerr*, 59.
262. Ross, "Socialism and Australian Labour", 27.
263. Quoted in Crisp, *Ben Chifley*, 402.
264. Ross, "Socialism and Australian Labour", 28.
265. Daly, *From Curtin to Kerr*, 79.
266. Quoted in Tennant, *Evatt*, 227.

Chapter 5 Judicial Review as a Settled Routine 1950 to 1984

1 On Menzies and the Liberal party see P. G. Tiver, *The Liberal Party* (1978); K. West, *Power*

in the Liberal Party (1965); M. Simms, *A Liberal Nation* (1982); C. Hazlehurst, *Menzies Observed* (1979); R. G. Menzies, "Our Liberal Creed", in H. Mayer, ed., *Australian Politics: A Reader* (1966), 265-67; D. Kemp, "Liberalism: Is it Relevant?", in H. Mayer and H. Nelson, eds, *Australian Politics: A Fourth Reader* (1976), 483-86; M. Fraser, "The Philosophical Basis of Liberalism", address to SA Liberal party, 5 December 1980; D. M. White, *The Philosophy of the Australian Liberal Party* (1978); J. Lonie, "From Liberal to Liberal: The Emergence of the Liberal Party and Australian Capitalism, 1900-1945", in G. Duncan, ed., *Critical Essays in Australian Politics* (1978); P. Loveday, "The Liberals' Image of their Party", in C. Hazlehurst, ed., *Australian Conservatism* (1979); and J. Carroll, "The Battle for Sir Robert Menzies", *Quadrant* (January-February 1985): 66-70.

2. See P. Reynolds, *The Democratic Labor Party* (1974); R. Murray, *The Split* (1970); B. A. Santamaria, *Against the Tide* (1981).
3. For an approving account, see M. Sexton, *Illusions of Power* (1979). The "technocratic" interpretation of Labor was common with the Left in the early Whitlam period: see R. Catley and B. McFarlane, *From Tweedledum to Tweedledee* (1974). The Whitlam government is discussed at length in the subsequent section, "The Whitlam Interlude".
4. See M. Sawer, ed., *Australia and the New Right* (1982).
5. For critical discussions of the 1983 election, P. Weller, "The Anatomy of a Grievous Miscalculation: 3 February 1983", in H. R. Penniman, ed., *Australia at the Polls: The National Elections of 1980 and 1983* (1983), ch. 10.
6. After a series of dramatic interim reports, the Costigan Commission finally reported in late 1984; Royal Commission on the Activities of the Federated Ship Painters and Dockers Union, *Final Report*, vols 1 to 5 (1984).
7. Discussed by C. A. Hughes, "An Election about Perceptions", in Penniman, *Australia at the Polls: The National Elections of 1980 and 1983*, ch. 11. See also P. Kelly, *The Hawke Ascendency* (1984), and *National Reconciliation: The Speeches of Bob Hawke*, selected by John Cook (1984).
8. Most of the High Court's work consists of non-constitutional appellate cases. For some figures and estimates on the Court's constitutional work, G. Sawer, *Australian Federalism in the Courts* (1967), 33-34, 53-54.
9. L. Zines, "The Australian Constitution 1951-1976", *Federal Law Review* 7 (1976): 89-144, 133.
10. This was obvious in the stormy responses to G. Barwick's book *Sir John Did His Duty* (1983). These included G. Evans, "Did Sir John Do His Duty?: A Remembrance Day Response to Sir Garfield Barwick", Press Release 157/83, 11 November 1983; reported *Canberra Times*, 12 November 1983; G. Sawer, "Barwick Disputed on Whether Sir John Did His Duty", *Canberra Times*, 14 December 1983; C. Howard, "But Did Sir Garfield do his duty?", *Law Institute Journal* 58 (1984): 135; and G. Winterton, "The Third Man: Sir Garfield Barwick", *Quadrant* 28, no. 4 (April 1984): 23. For longer reviews of the arguments, see J. Thomson's review of *Sir John Did His Duty* in *University of New South Wales Law Journal* 6 (1983): 255-61; and B. Galligan, "Interpreting the Constitution after 1975", *Australian Quarterly* 56 (1984): 142-52. For the continuing debate, Don Markwell, "The Dismissal: Why Whitlam was to Blame", *Quadrant* (March 1984): 11-21; Gareth Evans, "The Dismissal—Repatriating the Debate", *Quadrant* (Nov. 1984): 76-77; and Garfield Barwick's letter in response to Evans, *Quadrant* (Jan.-Feb. 1985): 3-4.
11. There are two more extreme ways in which the democratically accountable branches of government could affect the Court: parliament could change the Court's jurisdiction under sections 73 and 76 of the constitution, or refuse it sufficient appropriation of funds; or the executive could refuse to enforce court orders. But these are very exceptional possibilities.
12. Section 72(ii) of the constitution. For the historical background of the section, see J. Thomson, "Some Notes on the History of Section 72(ii) of the Australian Constitution", Legislative Research Service, Department of the Parliamentary Library, Occasional paper no. 2 (1984). There has been considerable public interest in the section throughout 1984 because of investigations into allegations against Justice Murphy. These followed publication of the "*Age* tapes" (February 1984) revelations, and highly publicized investigations by two Senate select committees—Senate Select Committee on the Conduct of a Judge *Report* (August 1984); and Senate Select Committee on Allegations Concerning a Judge, *Report* (October 1984). Justice Murphy refused to give evidence before the Senate committees, but following the adverse finding of the second Senate committee, took leave from the Court and was charged with two counts of attempting to pervert the course

of justice. Murphy was alleged to have contacted a New South Wales magistrate and a judge on behalf of Morgan Ryan, a Sydney solicitor, whom Murphy was alleged to have referred to as his "little mate". For the ensuing controversy, see D. Marr, "The Amazing Senate Hearing", *National Times*, 15 October 1984; "The Murphy Affair: a history", *SMH*, 15 October 1984; reports of the second Senate committee's findings and Murphy's statement, *SMH*, 1 November 1984; and comments by constitutional lawyers P. Gerber, P. Lane and C. Howard, *SMH*, 2 November 1984.

Amid a blaze of publicity Murphy was found guilty of one of the charges, that of attempting to influence the magistrate, but exonerated on the other charge. Murphy's subsequent appeal to the High Court, that section 43 of the Commonwealth Crimes Act under which he was charged and convicted was unconstitutional because acquittal proceedings were not an exercise of the judicial power of the commonwealth, was dismissed (*SMH*, 21 August 1985). Justice Cantor, the trial judge, sentenced Murphy to a period of imprisonment in early September, but that was overturned by the New South Wales Supreme Court. At this point the Murphy affair remains unresolved.

13. R. Dahl, "Decision-Making in a Democracy: The Supreme Court as a National Policy-Maker", *Journal of Public Law* 6 (1957): 279-95, 285.
14. See C. H. Pritchett, *The Roosevelt Court* (1948). Dahl's averaging is misleading for shorter periods. President Carter made no appointments during his single term of office while President Reagan made only one appointment in his first term.
15. The background information on these two appointments is based on an interview with one of the leading political actors involved.
16. *Commonwealth Record* 4, no. 1 (1979): 351.
17. *Age*, 10 February 1975.
18. Reported in *Australian*, 10 February 1975.
19. *SMH, Age,* 11 February 1975.
20. *Australian*, 11 February 1975.
21. *Canberra Times*, 11 February 1975.
22. Ibid.
23. *National Times*, 14-20 February 1975.
24. Reported in *Age*, 15 February 1975.
25. *Australian*, 10 Februay 1975.
26. For approving accounts, see M. Turnbull, "A Radical on the High Court", *Bulletin*, 19 March 1977, 38-41, and N. Bolkus, "Murphy's Law: A Radical on the Bench", *Labor Forum*, vol. 1, no. 1 (Autumn 1978): 2-8. For a critical attack on Murphy's judicial work, P. Bickovskii, "No Deliberate Innovators: Mr Justice Murphy and the Australian Constitution", *Federal Law Review* 8 (1977); 460-88.
27. Transcript of National Press Club address, 22 May 1980, Parliamentary Library, Current Information Service, 4-5.
28. *Age*, 15 September 1975.
29. Reported C. McGregor, "The day Lionel spoke up to the big wigs", *Nation Review*, 14-20 February 1975.
30. Transcript of National Press Club address, 6.
31. Ibid.
32. For a detailed account of Barwick's political career, see D. Marr, *Barwick* (1980), chs 12-16. When there was some talk in Liberal circles of Barwick's possible return to politics to replace John Gorton as leader in 1970, this was scotched by Bob Menzies, then a retired senior statesman of the party, who said "he felt that Gar had not really succeeded in being a good parliamentarian and would be unlikely to be a good Prime Minister or leader of a party". Peter Howson, *The Life of Politics: the Howson Diaries* (1984), 622.
33. Marr, *Barwick*, 206. *CPD*, 21 April 1964: 1231.
34. *CPD*, 23 April 1964: 1464.
35. *Australian Law Journal* 49 (March 1975): 109-10.
36. *Canberra Times*, 25 February 1975.
37. New South Wales parliament, Legislative Assembly Select Committee upon the Appointment of Judges to the High Court of Australia, *Report*, September 1975, para. 12.

38. *Australian*, 19 December 1975.
39. Section 6 of the High Court of Australia Act, 1979.
40. Statement, 21 May 1979. Reported *Australian Law Journal* (1979): 471.
41. *Age*, 23 May 1979. See the government's defence, *CPD*, 30 May 1979; 2690.
42. A. R. Blackshield, in the *Age*, 30 January 1981.
43. *Age*, 13 February 1981. For Barwick's comments and a critical evaluation of his work by Colin Howard, see the *Age*, 12 February 1981.
44. *Financial Review*, 30 January 1981.
45. Ibid.
46. *Age*, 31 January 1981.
47. B. Galligan, "The Founders' Design and Intentions Regarding Responsible Government", in P. Weller and D. Jaensch, eds, *Responsible Government in Australia* (1980), 1-10; and "The Kerr-Whitlam Debate and the Principles of the Australian Constitution", *Journal of Commonwealth and Comparative Politics* 18 (1980): 247-71. See also G. Winterton, *Parliament, The Executive and the Governor-General* (1983), 1-10, 71-84. Barwick's contrary view is set out at length in *Sir John Did His Duty*. For an examination of both Winterton's and Barwick's arguments, see Galligan,"Interpreting the Constitution after 1975", 142-52.
48. See D. Solomon, "The Barwick Tax Timebomb", *Financial Review*, 18 October 1982; and K. Kelly's reports, *Financial Review*, 19 and 20 October 1982. For an examination of professional issues, N. M. H. Forsyth, "Tax Avoidance and the Responsibility of the Legal Adviser", *Australian Law Journal* 55 (1982), 583-89.
49. *Age* editorial, 31 January 1981.
50. "The Battle for the High Court", *National Times*, 18 to 24 January 1981, 3-4.
51. Ellicott resigned as attorney-general in September 1977 over differences with the prime minister and cabinet over the government's course of action with respect to the *Sankey* case. Ellicott was keen to investigate conspiracy charges brought against Whitlam, Murphy and other Labor ex-ministers for the actions and advice to the governor-general in the "loans affair". He refused their request for legal aid and tried unsuccessfully to have heads of government departments, particularly Sir Frederick Wheeler from Treasury, produce files from the Whitlam government period. Fraser and cabinet refused to support Ellicott, and instead wanted the case taken over and terminated. See discussion in *Australian Law Journal* 51 (1977), 675-79, and statements by Ellicott and Prime Minister Fraser to the House of Representatives, *CPD*, 6 Sept. 1977: 721-28.
52. *Financial Review*, 21 and 29 April 1980; *National Times*, 4 to 10 May 1980, "Mundroola: What Barwick Left Unsaid"; *Age*, 26 April 1980.
53. In answers to a parliamentary question on the fifth anniversary of the sacking of the Whitlam government, 11 November 1980; cited *Age*, 13 January 1981, "The Making or Breaking of a Chief Justice"
54. *Financial Review*, 29 October 1980.
55. *Financial Review*, 14 January 1981.
56. *Age*, 13 January 1981.
57. *Age*, 30 January 1981.
58. *Financial Review*, 30 January 1981.
59. *Australian*, 18 February 1981.
60. *Age*, 14 January 1982
61. See his comments on M. Crommelin and G. Evans's paper in *Labour and the Constitution 1972-1975* (1977), 71-75.
62. *Australian Law Journal* 58 (September 1982): 499.
63. See M. Sexton and L. W. Maher, *The Legal Mystique* (1982), chs 2, 5; R. Tomasic, ed., *Understanding Lawyers* (1978), various essays; P. O'Malley, *Law, Capitalism and Democracy* (1983), ch. 5; E. Neumann, *The High Court of Australia: A Collective Portrait 1903 to 1972*, 2nd ed. (1973).
64. "Let Justice Be Done", *Monash University Law Review* 2 (Sept. 1975): 3.
65. *Australian Law Journal* 46 (1972), 423.
66. "The Late Sir Owen Dixon", 126 CLR (1971), front of report.
67 "The Right Honourable Sir Owen Dixon", *Melbourne University Law Review* 9 (May 1973): 3.
68. *Australian Communist Party v. Commonwealth* (1951), 83 CLR 1, 142.
69. Ibid., 117-18.

70. Ibid., 178, 187.
71. Ibid., 141, 148, 154.
72. Ibid., 193; and the following citations from 211, 225-27, 262 respectively.
73 *Age* editorials, 12 and 13 March 1951.
74. For a fuller account J. R. Odgers, *Australian Senate Practice*, 5th ed. (1976), 27-33; and the official documents, Commonwealth Parliamentary Paper no. 6, 1957.
75. Quoted *Age*, 10 March 1951.
76. Quoted *Age*, 14 March 1951.
77. *Bulletin*, 14 March 1951.
78. *Boilermakers* case: *R v. Kirby; ex parte Boilermakers' Society of Australia* (1956), 94 CLR 254.
79. J. M. Finnis, "Separation of Powers in the Australian Constitution", *Adelaide Law Review* 3 (1967): 162-63.
80. *Boilermakers* case, 256, 257.
81. G. Sawer, "Separation of Powers in Australian Federalism", *Australian Law Journal* 35 (1961): 178.
82. Finnis, "Separation of Powers in the Australian Constitution", 168. Finnis traces the abstract review of Isaacs's influential, but incorrect, opinion in the *Wheat* case, *New South Wales v. Commonwealth* (1915), 20 CLR 54, which destroyed the interstate commission and the like-minded commentaries on the constitution such as those by Inglis Clark and Harrison Moore.
83. Joint opinion by Dixon, McTiernan, Fullagar and Kitto, *Boilermakers* case, 266-99.
84. *A-G (Commonwealth) v. Queen* (1956), 95 CLR 529.
85. See for example R. Else-Mitchell's comments on Sawer's paper, *Australian Law Journal* 35 (1961), 193. For an analysis of the decline in support for the strict doctrine of separation embraced by the Court in the *Boilermakers* case, see P. H. Lane, "The Decline of the Boilermakers Separation of Powers Doctrine", *Australian Law Journal* 55 (1981): 6-14.
86. See M. Coper, *Freedom of Interstate Trade under the Australian Constitution* (1983), for a comprehensive study of the Court's interpretation of section 92.
87. (1950) 80 CLR 432.
88. Ibid., 464, from the *Airline* case (1945), 71 CLR 29, 90.
89. *Hughes and Vale v. New South Wales* (1953)), 87 CLR 49.
90. *Hughes and Vale v. New South Wales* (PC) (no. 1) (1954), 93 CLR 1.
91. *Hughes and Vale v. New South Wales* (no. 2) (1955), 93 CLR 127.
92. Ibid., 193.
93. Dixon's opinion, ibid., 166.
94. Earl Wright of Dudley, "Section 92—A Problem Piece", *Sydney Law Review* 1 (1954): 146.
95. For a detailed account see L. Zines, *The High Court and the Constitution* (1981), ch. 7.
96. Zines, "The Australian Constitution 1951-1976", 116. The quotation is from *Grannall v. Marrickville Margarine* (1955), 93 CLR 55, 78.
97. Ibid.
98. Ibid., 67. The "mirror" legislation restricting margarine production had been passed in all the states in 1939-40. The Court acknowledged this "preconcert between the States" 76.
99. Ibid., 71, 72.
100. *Beal v. Marrickville Margarine* (1966), 114 CLR 283, 305.
101. (1966), 115 CLR 177.
102. Ibid., 180.
103. (1970), 124 CLR 529.
104. Ibid., 539. A similar test was used by Menzies in the *Miracle Foods* case, 194.
105. Ibid., 540.
106. Ibid., 574.
107. "The Constitution versus Labor", in E. G. Whitlam, *On Australia's Constitution* (1977), 15-45, 16.
108. E. G. Whitlam, *Reform During Recession* (1978), 6.
109. See Crommelin and Evans, "Explorations and Adventures with Commonwealth Powers", 24-66.
110. "Socialism within the Australian Constitution", in Whitlam, *On Australia's Constitution* 47-71, 61, 62, 65 and 70.
111. A. Crosland, *The Future of Socialism* (1956).
112. Ibid., 385.
113. "1972 Labor Party Policy Speech", in Whitlam, *On Australia's Constitution* 265-307, 268-71.

For a sympathetically critical review by an economist, see F. Gruen, "What Went Wrong? Some Personal Reflections on Economic Policies under Labor", *Australian Quarterly* 48, no. 4 (Dec. 1976).

114. "1972 Labor Party Policy Speech", 271, 273.
115. These figures and the following ones that give "real" or deflated growth rates are taken from R. B. Scotton, "Public Expenditures and Social Policy", in R. B. Scotton and H. Ferber, eds, *Public Expenditure and Social Policy in Australia*, (1978). Other figures quoted that are not deflated are from budget speeches and papers for 1974-75, 1975-76 (this budget was rejected by the Senate) and 1979-80. *CPD*, 17 September 1974: 1274; 19 August 1975: 52; 21 August 1979: 46.
116. J. F. Cairns, "The Impossible Achievement", 1974, Chifley Memorial Lecture, Melbourne University ALP Club (1974).
117. E. G. Whitlam, "The Labor Government and the Constitution", in G. Evans, ed., *Labor and the Constitution* (1977), 305.
118. "Government and Cities" in Whitlam, *On Australia's Constitution*, 130.
119. E. G. Whitlam, "A New Federalism", *Australian Quarterly* 43, no. 3 (Sept. 1971): 17.
120. Whitlam, "The Labor Government and the Constitution", 307.
121. See G. Starr's account of the long gestation of the Liberal party's "new federalism" "The party roots of the new federalism", in D. Jaensch, ed., *The Politics of "New Federalism"*, 182-91.
122. *Victoria v. Commonwealth* (1957), 99 CLR 575.
123. *Victoria v. Commonwealth* (1926), 38 CLR 399.
124. Whitlam, "The Labor Government and the Constitution", 308.
125. R. Mathews, "The Development of Australian Federalism", in R. Mathews, ed., *Federalism in Australia and the Federal Republic of Germany* (1980), 11.
126. *Strickland v. Rocla Concrete Pipes* (1971), 124 CLR 468.
127. *Koowarta v. Bjelke-Petersen* (1982), 56 ALJR 625.
128. Mathews, "The Development of Australian Federalism", 11. See also R. Else-Mitchell, "The Rise and Demise of Coercive Federalism", *Australian Journal of Public Administration* 36 (1977): 109.
129. The *AAP* case, *Victoria v. Commonwealth* (1975), 134 CLR 338.
130. Whitlam, "The Labor Government and the Constitution", 309.
131. Quoted from the *Australian*, 17 June 1974, by M. Wood, "The 'new federalisms' of Whitlam and Fraser" in Jaensch, ed., *The Politics of New Federalism*, 108.
132. Wood, "The 'new federalisms' of Whitlam and Fraser" 112.
133. For a full account, see J. E. Richardson, "Reform of the Constitution: the Referendums and Constitutional Convention", in Evans, ed., *Labor and the Constitution*, 76-93.
134. G. Sawer, "The Whitlam Revolution in Australian Federalism—Promise, Possibilities and Performance", *Melbourne University Law Review* 10 (1976): 328.
135. M. Fraser, "National Objectives—Social, Economic and Political Goals", *Australian Quarterly* 47, no. 1 (Mar. 1975): 25, 29.
136. G. Sawer, "Towards a New Federal Structure", in Evans, ed., *Labor and the Constitution*, 14.
137. G. Sawer, *Federation Under Strain* (1977), 13.
138. Crommelin and Evans, "Explorations and Adventures with Commonwealth Powers", 64, 65.
139. Comment in Evans, ed., *Labor and the Constitution*, 73.
140. *Murphyores v. Commonwealth* (1976), 136 CLR 1.
141. *R v. Anderson: ex parte Ipec-Air*(1965), 113 CLR 177.
142. *O'Sullivan v. Noarlunga Meat Ltd* (1954), 92 CLR 565, 598. Cited by Stephen in *Murphyores*, 24.
143. *Victoria v. Commonwealth* (1975), 134 CLR 81. For a fuller discussion of cases on section 57, see Sawer, *Federation Under Strain*, ch. 4; and L. Zines, "The Double Dissolutions and Joint Sitting" in Evans, ed., *Labor and the Constitution*, 217-45.
144. Speech by Mr Fairbairn, *CPD*, 12 December 1973: 4598.
145. *Cormack v. Cope* (1974), 131 CLR 432. The grounds were that the joint sitting could consider only one and not the six proposed laws.
146. Ibid., 457.
147. Ibid., 461.
148. *Victoria v. Commonwealth* (1975), 134 CLR 81, 135. The commonwealth had relied on the American doctrine of "political questions" rather than claiming the traditional immunity of parliament

in a Westminster system. McTiernan quoted Justice Frankfurter's famous dissenting opinion in *Baker v. Carr* (1962), 369 US 186, 187.

149. *Western Australia v. Commonwealth* (1975), 134 CLR 201.
150. *Victoria v. Commonwealth* (1975), 134 CLR 338. For a fuller discussion, see C. Saunders, "The Development of the Commonwealth Spending Power", *Melbourne University Law Review* 11 (1978): 369-407.
151. *New South Wales v. Commonwealth* (1975), 135 CLR 337. The Court was unanimous in upholding the provisions of the Act relating to the continental shelf, but Gibbs and Stephen dissented on the further issue that provisions of the Act covering matters other than the continental shelf were also valid under section 51 (xxix) because they gave effect to the Convention on the Territorial Sea and Contiguous Zone.
152. Ibid., 374. For a detailed examination of the nationhood factor see L. Zines, "The Growth of Australian Nationhood and its Effect on the Powers of the Commonwealth", in L. Zines ed., *Commentaries on the Australian Constitution* (1977), 1-49.
153. *United States v. Texas* (1947), 332 US 19 and *United States v. Maine* (1975), 420 US 515; *Reference re Ownership of Offshore Mineral Rights* [1967] SCR 792. The Canadian Supreme Court reiterated its earlier decision and extended it to cover the seabed and subsoil of the continental shelf in *Reference re the Seabed and Subsoil of the Continental Shelf Offshore Newfoundland* [1984], 5 DLR (4th) 385.
154. Statement of 12 December 1975.
155. *Australian*, 18 December 1975.
156. See second reading speeches of Prime Minister Fraser and his ministers on the various bills, *CPD*, 23 April 1980: 2165-182. Also Senator Durack's explanation, "The States and Offshore Rights" *National Times*, 22-28 June 1980.
157. See *Financial Review*, 24 April 1980, "Government hamstrings Labor on offshore control"; *National Times*, 11 to 17 May 1980, "Australa 80 Years on—No Longer a Nation"; and Senator Durack, "The states and offshore rights", *National Times*, 22 to 28 June 1980. For a scholarly analysis of the section, see A. Bennett, "Can the Constitution be Amended Without a Referendum" *Australian Law Journal* 56 (1982): 358-63; and K. Booker, "Section 51 (xxxviii) of the Constitution", *UNSW Law Journal* 4 (1982): 91-112.
158. For a thorough analysis of the constitutional issues, see M. Crommelin, "Offshore Mining and Petroleum: Constitutional Issues", *Australian Mining and Petroleum Law Journal* 2 (1981): 191-212, and comments by P. Brazil and E. Freeman, ibid., 222-31; and on practical problems D. A. W. Maloney, "Offshore Mining and Petroleum—Practical Problems", ibid., 234-70.
159. Reported "Australia 80 Years on—No Longer a Nation", *National Times*. For Walker's short second reading speech, *NSW Assembly Debates*, 24 October 1979, 2221-223.
160. See for example Paul Sheehan's pre-election feature article on the Hawke Labor government, "Why the *Liberals* will win on Dec. 1", *SMH*, 24 Nov. 1984.
161. See G. E. White, *Earl Warren* (1982).
162. This is a current formulation of a long-standing dispute about the American Supreme Court that has been waged in the past using such terms as "activism" versus "restraint" or "strict constructionism". As J. H. Ely explains: "Today we are likely to call the contending sides "interpretivism" and "noninterpretivism"—the former indicating that judges deciding constitutional issues should confine themselves to enforcing norms that are stated or clearly implicit in the written Constitution, the latter the contrary view that courts should go beyond that set of references and enforce norms that cannot be discovered within the four corners of the document." *Democracy and Distrust* (1980), 1. This issue is discussed further in chapter 6 of this book.
163. *A-G (Commonwealth) ex rel. McKinlay v. Commonwealth* (1975), 135 CLR 1. A contrary view to the one put here—that in enforcing principles of equality in voting a court is enhancing rather than usurping democratic processes—has been put in the American context by J. H. Ely, *Democracy and Distrust* (1980).
164. Ibid., 66, 71. The American decisions which Murphy embraced were *Wesberry v. Saunders* (1964), 376 US 1, *Wells v. Rockefeller* (1969), 394 US 542, *Kirkpatrick v. Preisler* (1969), 394 US 526, and *White v. Weiser* (1973), 412 US 783.
165. *McKinlay* case, Gibbs, 44; Stephen, 57-58.
166. Ibid., Mason, 57; and Stephen, 61.

167. *A-G (New South Wales) ex rel. McKellar v. Commonwealth* (1977), 139 CLR 527.
168. For a fuller account of these decisions, see M. Sexton, "The Role of Judicial Review in Federal Electoral Law", *Australian Law Journal* 52 (1978): 28; and G. Lindell, "Judicial Review and the House of Representatives", *Federal Law Review* 6 (1974), 86.
169. *A-G (New South Wales) ex rel. McKellar*, 532.
170. *A-G (Victoria) ex rel. Black v. Commonwealth* (1981), 146 CLR 559.
171. The important facts on state aid are set out by Wilson, ibid., 643 ff.
172. Ibid., 623, 627. Here Murphy cited R. Ely, *Unto God and Caesar* (1976) in support of his extreme separation view of section 116. Ely had rejected, as a tendentious interpretation, J. Quick and R. Garran's contrary view that:

> By the establishment of religion is meant the erection and recognition of a State Church, or the concession of special favours, titles, and advantages to one church which are denied to others. It is not intended to prohibit the Federal Government from recognizing religion or religious worship *(Annotated Constitution* [1901] 951-52.)

It seems, however, that Quick and Garran's account of the intention of the founders in adapting section 116 is the correct one, while Ely's is a tendentious one based on a selective reading of the sources. See W. Phillips, "The church, state aid and the law", *Age*, 31 March 1980, and *Defending "A Christian Country"* (1981), 262 and note 55 on 307-8. Murphy's opinion highlights the pitfalls for judges who rely on partial historical authority.

173. *Federation Debates* (Melbourne, 1898), 1732-41, 1769-80. The history of the section is set out by J. A. La Nauze, *The Making of the Australian Constitution*, 228-29. See also J. Rickard, *H. B. Higgins: The Rebel as Judge* (1984), 98; Phillips, *Defending "A Christian Country"* ch. 9; and Ely, *Unto God and Caesar*, chs 9, 11.
174. (1947) 350 US 1.
175. I. Temby, "'In this labyrinth there is no golden thread'—Section 92 and the Impressionistic Approach", *Australian Law Journal* 58 (1984): 86.
176. *Clark King v. Australian Wheat Board* (1978), 140 CLR 120.
177. Ibid., 150, 152-53.
178. Ibid., 194.
179. *Buck v. Bavone* (1976), 135 CLR 110. Murphy had reiterated the same view in subsequent cases: *H. C. Sleigh v. South Australia* (1977), 136 CLR 475, and *Finamores Transport v. New South Wales* (1978), 130 CLR 315.
180. (1949) 79 CLR 497, 640-41. Emphasis added.
181. *Clark King* case, 174-78.
182. Ibid., 193.
183. *Uebergang v. Australian Wheat Board* (1980), 145 CLR 266, 276.
184. Ibid., Barwick, 295; Murphy, 312.
185. Ibid., 301.
186. Ibid., 303-4, 306.
187. *Financial Review*, 20 May 1981.
188. *North Eastern Dairy Co. Ltd v. Dairy Industry Authority (New South Wales)* (1975), 134 CLR 559, 615. See also *Pilkington v. Frank Hammond* (1974), 131 CLR 124, 186. For a comment on the current state of section 92, see M. Cooper, "Section 92 and the Impressionistic Approach", *Australian Law Journal* 58 (1984): 92. Michael Coper recently published a comprehensive treatise on section 92, *Freedom of Interstate Trade under the Australian Constitution* (1983).
189. *Commonwealth v. Tasmania* (1983), 57 ALJR 450. The discussion of this section draws upon my earlier article "The Dams Case: A Political Analysis", in M. Sornarajah, ed., *The South West Dam Dispute: The Legal and Political Issues* (1983), 102-23. In addition to this collection of essays edited by Sornarajah, the *Dam* case has stimulated a spate of articles: B. Burke, "Federalism after the Franklin", *Australian Quarterly* 56 (1984): 4-10; G. Samuels, "The End of Federalism?", *Australian Quarterly* 56 (1984): 11-19; G. Evans, "The Tasmanian Dam Case: Background and Implications", *The Parliamentarian* 65, no. 1 (Jan. 1984): 10-21; C. Howard, "External Affairs Power of the Commonwealth", *Current Affairs Bulletin* 60, no. 4 (1983): 26. The second number of the *Federal Law Review* 17 (1983-84): 199-302 is devoted wholly to articles and commentaries on the *Dam* case, and includes articles by Geoffrey Sawer, G. J. Lindell, Cheryl Saunders, Leslie

Zines and Michael Coper. As well, the External Affairs Subcommittee of the Australian Constitutional Convention, *Report to Standing Committee* (1984) includes in the Appendices numerous papers on the implications of the *Dam* decision, including important papers by M. Crommelin, H. Burmester, J. Finnis, G. Craven, P. H. Lane, H. B. Connell and C. Howard. See also D. Lowe, *The Price of Power* (1984) for an account by one of the leading participants, and M. Coper, *The Franklin Dam Case* (1983) for a legal summary of the case.

190. *Koowarta v. Bjelke-Petersen* (1982), 56 ALJR 625. The *Koowarta* case was argued in March, and the decision handed down in May 1982.
191. *Hematite Petroleum Pty Ltd v. Victoria* (1983), 57 ALJR 591.
192. *R v. Burgess; ex parte Henry* (1936), 55 CLR 608, 798.
193. For this and the following two quotations, *Commonwealth v. Tasmania* (1983), 457, 520, 541.
194. *Mercury*, 4 July 1983.
195. The *Australian*, 7 July 1983.
196. *Financial Review*, 4 July 1983.
197. *Age*, 4 July 1983.
198. *Mercury*, 2 July 1983.
199. *Age*, 2 July 1983.
200. From "Australia's black day", *Age*, 6 July 1983; "Decision Strikes at the Heart of Australia", *Australian*, 8 July 1983.
201. For example M. Lerner, "Constitution and court as symbols", *Yale Law Journal* 46 (1937): 1290-319; E. Corwin, "The Constitution as Instrument and as Symbol", *American Political Science Review* 30 (1936): 1071-85.
202. See for example G. Casey, "Popular perceptions of Supreme Court rulings", *American Politics Quarterly* 4 (1976): 3-45; and "The Supreme Court and Myth: an empirical investigation", *Law and Society Review* 8 (1974), 385-419; W. Murphy, "Public Opinion and the United States Supreme Court", *Law and Society Review* 2 (1968): 357-84; J. Tagenhaus and W. Murphy, "Patterns of public support for the Supreme Court: a panel study", *Journal of Politics* 43 (1981): 24-39.
203. D. Adamany and J. B. Grossman, "Support for the Supreme Court as a National Policymaker", *Law and Policy Quarterly* 5 (1983): 405-37.
204. *Commonwealth v. Tasmania* (1983), 487-88. Citations omitted.
205. Ibid., 475.
206. Ibid., 486.
207. Ibid., 528. The Windeyer quote is from *Victoria v. Commonwealth* (1971), 122 CLR 353, 395.
208. Burke, "Federalism after the Franklin Dam", supra note 188.
209. P. Hasluck, "Tangled in the Harness", *Quadrant* (Nov. 1983): 37.
210. *Commonwealth v. Tasmania* (1983), 495.
211. See, however, Dawson's strong plea for a restrictive version of the *Engineers* doctrine. Ibid., 564
212. Ibid., 517.
213. Ibid., 486. The following citations are respectively: Murphy, 504. Brennan, 528; Deane, 545.

Chapter 6 Conclusion: The High Court's Political Achievement and the Legitimacy of Judicial Review

1. Concluding his review of "The Whitlam Revolution in Australian Federalism—Promise, Possibilities and Performance", *Melbourne University Law Review* 10 (1976): 315-29, Sawer claimed that Australia is "still, constitutionally speaking, a pretty frozen continent", 329. That was the conclusion of his earlier major book *Australian Federalism in the Courts* (1967), 208.
2. M. Kirby, *The Judges* (1983), 37-38.
3. Ibid., 40.
4. S. 15 AA of the Acts Interpretation Act 1901 added by the Statute Law Revision Act, 1981.
5. *Financial Review* 28, 29 May 1981. Also D. Solomon, "The Barwick Tax Timebomb", *Financial Review*, 18 October 1982.
6. *Age* report, 7 February 1982, "Let judges make more laws: Durack". In 1981 parliament passed 182 acts covering 2,828 pages, Durack said.

7. Reported ibid. The judge was Justice Murphy. For further discussion see *Australian Law Journal* 57 (1983): 129-31, 191-93.
8. *Australian*, 2-3 July 1983, "After the dams victory comes a Bill of Rights" The decision to introduce the bill was deferred until 1984, *Age*, 27 August 1983; and again in 1984 until after the election; *Age*, 28 March 1984, for report and editorial, "Cowardly retreat from rights bill"
9. G. Evans, text of address to Conference on Commissions, Contempts and Civil Liberties, Centre for Continuing Education, Australian National University, Canberra, 25 February 1984, 18.
10. A. Bickel, *The Least Dangerous Branch* (1962), 16.
11. Locke, *Second Treatise of Government*, para 3, in *Two Treatises of Government*, ed. P. Laslett (1960), 308.
12. Rousseau, *The Social Contract*, bk 1, ch. 3, in *The Social Contract and Discourses*, ed. G. D. H. (1973), 168.
13. M. O. Dickerson and T. Flanagan, *An Introduction to Government and Politics* (1982), 13.
14. See report of the Special Joint Committee of the Senate and the House of Commons, *Senate Reform* (1984).
15. P. Bobbitt, *Constitutional Fate: Theory of the Constitution* (1982), 3.
16. G. Winterton argues that responsible government is implied in the constitutional text, *Parliament, the Executive and the Governor-General* (1983). The literalist account is given by G. Barwick, *Sir John Did His Duty* (1983). For a critical review of both, see B. Galligan, "Interpreting the Constitution after 1975", *Australian Quarterly* 56 (1984): 142-52.
17. This is emerging as High Court judges are beginning to refer to the federation debates and to quote the founders, e. g. Deane in the *Dam* case, *Commonwealth v. Tasmania* (1983), 57 ALJR 450, 543 quoted Parkes and Deakin.
18. James Crawford has a similar view, *Australian Courts of Law* (1982), 53. For the contrary position, see G. Barwick, "The State of the Australian Judicature", *Australian Law Journal* 51 (1977): 480-500, 494; and J. Basten, "Judicial Accountability: a proposal for a judicial commission", *Australian Quarterly* 52 (1980): 468-85.
19. Some recent major contributions to an enormous literature are Bobbitt, *Constitutional Fate: Theory of the Constitution*; M. J. Perry, *The Constitution, the Courts, and Human Rights* (1982); J. H. Ely, *Democracy and Distrust: A Theory of Judicial Review* (1980); J. Choper, *Judicial Review and the National Political Process: A Functional Reconsideration of the Role of the Supreme Court* (1980). See also R. Berger, *Government by Judiciary* (1977); and T. Grey, "Do we have an Unwritten Constitution?", *Stanford Law Review* 27 (1975): 703. For a useful review, see J. A. Thomson, "An Endless but Productive Dialogue; Some Reflections on Efforts to Legitimize Judicial Review", *Texas Law Review* 61 (1982): 743-64.
20. M. J. Perry, "Noninterpretive Review in Human Rights Cases: A Functional Justification", *New York University Law Review* 56 (1981): 278.
21. Grey, "Do we have an Unwritten Constitution?" 706, note 9.
22. Ely, *Democracy and Distrust*, footnote p. 1.
23. Ibid.
24. Perry, *The Constitution, the Courts, and Human Rights*, 11.
25. Ibid., 33.
26. H. P. Monaghan, "Our Perfect Constitution", *New York Law Review* 56 (1981): 353-96.
27. *Baldwin v. Missouri* (1930), 281 US 586, 595.
28. The *Second Flag Salute* case, *West Virginia State Board of Education v. Barnette* (1943), 319 US 624, 649.
29. *Baker v. Carr* (1982), 369 US 186, 270. This was the leading malapportionment case that read the principle of "one vote—one value" into the constitution.
30. G. E. White, *Earl Warren: A Public Life* (1982), 359.
31. P. H. Kurland, "'*Brown v. Board of Education* was the Beginning': The School Desegregation case in the United States Supreme Court: 1954-1979", *Washington University Law Quarterly* (1979): 309-405, 404.
32. White, *Earl Warren: A Public Life*, 323. The quotations are from Warren's address to the New York Bar Association on 1 May 1973 after he had retired.
33. Supra note 19. Ely, *Democracy and Distrust*, attempts to justify non-interpretive review only in basic democratic rights areas such as free speech and equal voting rights. Choper, *Judicial Review*

and the National Political Process, attempts a functional justification of bill of rights issues. Perry, *The Constitution, the Courts, and Human Rights*, tries to justify broad-ranging non-interpretive review in human rights areas on quasi-religious ("prophetic") and moral grounds. Bobbitt, *Constitutional Fate*, has a novel approach that allows all types of judicial review as different types or "paradigms" of argument.

34. See for example, R. H. Bork, "The Impossibility of Finding Welfare Rights in the Constitution", *Washington University Law Quarterly* (1979): 695-701, and "Neutral Principles and Some First Amendment Problems", *Indiana Law Journal* 47 (1971): 1-35; W. Berns, "The Least Dangerous Branch, But Only If . . . . ", in L. T. Therberge, ed., *The Judiciary in a Democratic Society* (1977), 1-17; Berger, *Government by Judiciary* and D. J. Galligan, "Judical Review and Democratic Principles: Two Theories", *Australian Law Journal* 57 (1983): 69-79.

35. On the High Court's opening in Canberra, see for example queries by the *Age* 27 May 1980, editorial "Momentous change for High Court" and special feature "Legal bastion of conservatism" The recent abolition of appeals as of right was strongly opposed by the Law Council of Australia on the grounds that the Court's jurisdiction should not be determined solely on discretion, *Canberra Times*, 20 March 1984. The change had been strongly advocated by bench members for some time and was defended publicly by Justice Mason, *Canberra Times*, 2 July 1984.

Select Table of Cases

(Only cases discussed in the text are listed.)

AAP case: Victoria v. Commonwealth (1975), 134 CLR 338.
Airline case: *Australian National Airways Pty Ltd v. Commonwealth* (1945), 71 CLR 29.
Bank Nationalization case: *Bank of NSW v. Commonwealth* (1948), 76 CLR 1.
Bank Nationalization case (PC): *Commonwealth v. Bank of NSW* (1949), 79 CLR 497.
Baxter v. Commissioner of Taxation (New South Wales) (1907), 4 CLR 1087.
Beal v. Marrickville Margarine Pty Ltd (1966), 114 CLR 283.
Boilermakers case: *R. v. Kirby; ex parte Boilermakers' Society of Australia* (1956), 94 CLR 254.
Clark King case: *Clark King & Co. Pty Ltd v. Australian Wheat Board* (1978), 140 CLR 120.
Coal Vend case: *Adelaide Steamship Co. Ltd v. R and A-G (Commonwealth)* (1912), 15 CLR 65.
Colonial Sugar Refining Co. Ltd v. A-G (Commonwealth) (1912), 15 CLR 182.
Communist Party case: *Australian Communist Party v. Commonwealth* (1951), 83 CLR 1.
Concrete Pipes case: *Strickland v. Rocla Concrete Pipes Ltd* (1971), 124 CLR 468.
Dam case: *Commonwealth v. Tasmania* (1983), 57 ALJR 450.
Deakin v. Webb; Lyne v. Webb (1904), 1 CLR 585.
D'Emden v. Pedder (1904), 1 CLR 91.
DOGS case: *A-G (Victoria) ex rel. Black v. Commonwealth* (1981), 146 CLR 559.
Duncan v. Queensland (1916), 22 CLR 556.
Engineers case: *Amalgamated Society of Engineers v. Adelaide Steamship Co. Ltd* (1920), 28 CLR 129.
Farey v. Burvett (1916), 21 CLR 433.
Female Minimum Rates case: *Australian Woollen Mills Ltd v. Commonwealth* (1944), 69 CLR 476.
Garnishee cases: *New South Wales v. Commonwealth* (1932), nos 1, 2, and 3, 46 CLR 155, 235 and 246 respectively.

Gilpin case: *O. Gilpin Ltd v. Commissioner for Road Transport and Tramways (New South Wales)* (1935), 52 CLR 189.
Grannall v. Marrickville Margarine Pty Ltd (1955), 93 CLR 55.
Harvester Arbitration case: *ex parte H. V. McKay* (1906), 2 Commonwealth Arbitration Reports I.
Huddart Parker & Co. Pty Ltd v. Moorehead (1909), 8 CLR 330.
Hughes and Vale Pty Ltd v. New South Wales (1953), 87 CLR 49.
Hughes and Vale Pty Ltd v. New South Wales (PC) (no. 1) (1954), 93 CLR 1.
Hughes and Vale Pty Ltd v. New South Wales (no. 2) (1955), 93 CLR 127.
James v. Commonwealth (1935), 52 CLR 570.
James case: *James v. Commonwealth* (PC) (1936), 55 CLR 1. This was the last and most important of a series of *James* cases.
James v. Cowan (1930), 43 CLR 386.
James v. Cowan (PC) (1932), 47 CLR 386.
Koowarta case: *Koowarta v. Bjelke-Petersen* (1982), 56 ALJR 625.
McArthur case: W. & A. McArthur v. Queensland (1920), 28 CLR 530.
McCarter v. Brodie (1950), 80 CLR 432.
McKellar case: *A-G (New South Wales) ex rel. McKellar v. Commonwealth* (1977), 139 CLR 527.
McKinlay case: *A-G (Commonwealth); ex rel. McKinlay v. Commonwealth* (1975), 135 CLR 1.
Marbury v. Madison (1803), 5 US (1 Cranch) 137.
Murphyores case: *Murphyores Incorporated Pty Ltd v. Commonwealth* (1976), 136 CLR 1.
Offshore case: *New South Wales v. Commonwealth* (1975), , 135 CLR 337.
O'Sullivan v. Miracle Foods (South Australia) Pty Ltd (1966), 115 CLR 177.
Peanut Board case: *Peanut Board v. Rockhampton Harbour Board* (1933), 48 CLR 266.
Peterswald v. Bartley (1904), 1 CLR 497.
(First) Pharmaceutical Benefits case: *A-G (Victoria) v. Commonwealth* (1945), 71 CLR 237.
Second Pharmaceutical Benefits case: *Federal Council of the British Medical Association in Australia v. Commonwealth* (1949), 79 CLR 201.
Pidoto v. Victoria (1943), 68 CLR 87.
PMA case: *Victoria v. Commonwealth* (1975), 134 CLR 81.
R and A-G (Commonwealth) v. Associated Northern Collieries (1911), 14 CLR 387.
R v. Barger; Commonwealth v. McKay (1908), 6 CLR 41.
Railway Servants case: *Federated Amalgamated Government Railway and Tramway Service Association v. New South Wales Railway Traffic Employees' Association* (1906), 4 CLR 488.
Roads case: *Victoria v. Commonwealth* (1926), 38 CLR 399.
SOS (Mowbray) Pty Ltd v. Mead (1972), 124 CLR 529.
State Banking case: *Melbourne Corporation v. Commonwealth* (1947), 74 CLR 31.

Territory Senators case: *Western Australia v. Commonwealth* (1975), 134 CLR 201.
Transport cases: there were six cases between 1928 and 1935; see note 164 of chapter 3 for details. The *Vizzard* and *Gilpin* cases are the main ones referred to.
Uebergang case: *Uebergang and Others v. Australian Wheat Board* (1980), 145 CLR 266.
Uniform Tax case: *South Australia v. Commonwealth* (1942), 65 CLR 373.
Second Uniform Tax case: *Victoria v. Commonwealth* (1957), 99 CLR 575.
Vizzard case: *R v. Vizzard; ex parte Hill* (1933), 50 CLR 30.
Webb v. Outtrim (1907), AC 81.
West's case: *West v. Commissioner of Taxation (New South Wales)* (1937), 56 CLR 657.
Wheat case: *New South Wales v. Commonwealth* (1915), 20 CLR 54.

Select Bibliography

Abraham, H. J. *The Judicial Process.* 3rd ed. New York: Oxford University Press, 1975.

Adamany, D., and J. B. Grossman. "Support for the Supreme Court as a National Policymaker" *Law and Policy Quarterly* 5 (1983): 405-37.

Aitkin, D. *Stability and Change in Australian Politics.* Canberra: Australian National University Press, 1977. 2nd ed. 1982.

——— "Political Science in Australia: A Report Prepared for UNESCO" Canberra: Research School of Social Sciences, Australian National University, *Working Papers in Political Science*, 1982.

Almond, G., and G. Bingham Powell. *Comparative Politics: A Developmental Approach.* Boston: Little, Brown, 1966.

Anderson, R. "The Main Frustrations of the Economic Functions of Government caused by Section 92 and Possible Escapes therefrom". *Australian Law Journal* 26 (1953): 518-24, 566-69.

Archer, J., and G. Maddox. "The 1975 Constitutional Crisis in Australia". *Journal of Commonwealth and Comparative Politics* 14 (1976): 141-57.

Attorney-General's Department. *The Australian Constitution Annotated.* Canberra: Australian Government Printer, 1980.

Aufricht, H. *Central Banking Legislation.* 4th ed. Washington: International Monetary Fund, 1974.

Australasian Federal Convention. *Official Record of the Debates of the Australasian Federal Convention* (Federal Convention Debates). Second session, Sydney, 1897. Sydney: New South Wales Government Printer, 1897.

———. *Official Record of the Debates of the Australasian Federal Convention* (Federal Convention Debates). Third session, Melbourne, 1898. 2 vols. Melbourne: Victorian Government Printer, 1898.

Australasian Federation Conference. *Official Record of the Proceedings and Debates of the Australasian Federation Conference, 1890* (Federal Conference Debates). Melbourne: Victorian Government Printer, 1890.

Australian Constitutional Convention 1984, External Affairs Subcommittee. *Report to Standing Committee.* Brisbane: Government Printer, 1984. The Appendices are a collection of papers on the implications of the Tasmanian *Dam* decision.

Australian Government, Curtin and Chifley Governments. *Cabinet Agenda* and *Minutes*. Canberra: Australian Archives.

Australian Labor Party, Federal Executive. *Federal Executive Minutes*. Edited by P. Weller. Melbourne: Melbourne University Press, 1978.

Australian Labor Party, Federal Parliamentary Party. *Caucus Minutes 1901-1949*. Edited by P. Weller. 3 vols. Melbourne: Melbourne University Press, 1975.

Australian Parliament. *Commonwealth Parliamentary Debates (CPD)*. Canberra: Commonwealth Government Printer.

———. *Report of the Royal Commission appointed to inquire into the Monetary and Banking Systems*. Canberra: Government Printer, 1937.

——— *Report from the Joint Committee on Constitutional Review*. Canberra: Government Printer, 1958.

Bagehot, W *The English Constitution*. 1867. London: Collins/Fontana, 1963.

Bailey, K. "Fifty Years of the Australian Constitution". *Australian Law Journal* 25 (1951): 314-43.

Barry, J. V. Papers. Canberra: National Library.

Barwick, G. "The Late Sir Owen Dixon". *Commonwealth Law Reports* 125 (1971), frontispiece.

——— "The State of the Australian Judicature". *Australian Law Journal* 51 (1977): 480-500.

———. *Sir John Did His Duty*. Wahroonga, NSW: Serendip, 1983.

Basten, J. "Judicial Accountability: a proposal for a judicial commission". *Australian Quarterly* 52 (1980): 468-85.

Becker, T. L. *Comparative Judicial Politics: The Political Functioning of Courts*. Chicago: Rand McNally, 1970.

Bennett, A. "Can the Constitution be Amended Without a Referendum" *Australian Law Journal* 56 (1982): 358-63.

Bennett, J. M. *Keystone of the Federal Arch*. Canberra: Australian Government Publishing Service, 1980.

Bennett, S., ed. *The Making of the Commonwealth*. Melbourne: Cassell, 1971.

Berger, R. *Government by Judiciary*. Cambridge, Massachusetts: Harvard University Press, 1977.

Berns, W. F. "The Least Dangerous Branch, But Only If ." In L. T. Therberge, ed. *The Judiciary in a Democratic Society*. Lexington, Massachusetts: Lexington Books, 1977, 1-17.

Bickel A. *The Least Dangerous Branch*. Indianapolis: Bobbs Merrill, 1962.

———. *The Supreme Court and the Idea of Progress*. New York: Harper and Row, 1970.

Bickovskii, P. "No Deliberate Innovators: Mr Justice Murphy and the Australian Constitution" *Federal Law Review* 8 (1977): 460-88.

Blackshield, A. R. "Quantitative Analysis: The High Court of Australia, 1964-1969" *Lawasia* 3 (1972): 1-66.

——— "Five Types of Judicial Decision" *Osgoode Hall Law Journal* 12 (1974): 539-67.

———. "Judges and the Court System". In G. Evans, ed. *Labour and the Constitution 1972-1975.* Melbourne: Heinemann, 1977, 105-35.

——— "X/Y/Z/N Scales: The High Court of Australia, 1972-1976". In R. Tomasic, ed. *Understanding Lawyers.* Sydney: Allen and Unwin, 1978, 133-77.

Blainey, G. "The Role of Economic Interests In Australian Federation". *Historical Studies* 4 (1950): 224-37.

——— *Gold and Paper: A History of the National Bank of Australia Limited.* Melbourne: Georgian House, 1958.

Blewett, N. "Labor in Power: Style, Strategy and the Glaciers". *Meanjin Quarterly* 32, no. 4 (Dec. 1973): 357-66.

Bobbitt, P. *Constitutional Fate: Theory of the Constitution.*New York: Oxford University Press, 1982.

Bolkus, N. "Murphy's Law: A Radical on the Bench". *Labor Forum* 1, no. 1 (Autumn 1978): 2-8.

Booker, K. "Section 51 (xxxviii) of the Constitution" *University of New South Wales Law Journal* 4 (1981): 91-112.

Bork, R. H. "Neutral Principles and Some First Amendment Problems". *Indiana Law Journal* 47 (1971): 1-35.

———. "The Impossibility of Finding Welfare Rights in the Constitution". *Washington University Law Quarterly* (1979): 695-701.

Brady, A. *Democracy in the Dominions.* 3rd ed. Toronto: University of Toronto Press, 1958.

Brazil, P. "Border Hopping and Section 92 of the Constitution". *Australian Law Journal* 34 (1960): 77-87.

———. "The Ascertainment of Facts in Australian Constitutional Cases". *Federal Law Review* 4 (1970): 65-86.

Brennan, G. "Limits on the Use of Judges". *Federal Law Review* 9 (1978): 1-14.

——— "Eighth Wilfred Fullagar Memorial Lecture: New Growth in the Law—The Judicial Contribution" *Monash Law Review* 6 (1979): 1-22.

Bryce, J. *The American Commonwealth.* London: Macmillan, 1888.

——— *Modern Democracies.* Vol. II. London: Macmillan, 1921.

Burke, B. "Federalism after the Franklin". *Australian Quarterly* 56 (1984): 4-10.

Butler, D. *The Canberra Model.* Melbourne: Cheshire, 1973.

Butlin, S. J. *Australia and New Zealand Bank.* London: Longmans, 1961.

Cairns, A. "The Government and Societies of Canadian Federalism" *Canadian Journal of Political Science* 10 (1977): 695-725.

Cairns, J. F. "The Impossible Achievement" 1974 Chifley Memorial Lecture. Melbourne: Melbourne University ALP Club, 1974.

Calwell, A. A. *Labor's Role in Modern Society.* Melbourne: Lansdowne Press, 1963.

——— *Be Just and Fear Not.* Hawthorn, Victoria: Lloyd O'Neil, 1972.

Campbell, D. A. S., ed. *Post-War Reconstruction in Australia.* Sydney: Australasian Publishing, 1944.

Canadian Special Joint Committee of the Senate and the House of Commons. *Senate Reform.* Ottawa: Canadian Government Publishing Centre, 1984.

Canaway, A. P. *The Failure of Federalism in Australia.* London: Oxford University Press, 1930.

Carroll, J. "The Battle for Sir Robert Menzies" *Quadrant* (Jan.-Feb. 1985): 66-70.

Casey, G. "The Supreme Court and Myth: an empirical investigation". *Law and Society Review* 8 (1974): 385-419.

——— "Popular perceptions of Supreme Court rulings" *American Politics Quarterly* 4 (1976): 3-45.

Catley, R., and B. McFarlane. *From Tweedledum to Tweedledee.* Sydney: Australia and New Zealand Book Company, 1974.

Chester, A. *John Curtin.* Sydney: Angus and Robertson, 1943.

Chifley, B. *Things Worth Fighting For.* Selected by A. W. Stargardt. Melbourne: Melbourne University Press, 1952.

Chifley Government, *Cabinet Minutes* and *Cabinet Agenda.* Canberra: Australian Archives, 1945-49.

Childe, V. G. *How Labor Governs.* 2nd ed. Edited by F. B. Smith. Melbourne: Melbourne University Press, 1964.

Choper, J. *Judicial Review and the National Political Process: A Functional Reconsideration of the Role of the Supreme Court.* Chicago: University of Chicago Press, 1980.

Clark, A. I. *Studies in Australian Constitutional Law.* Melbourne: Charles F. Maxwell, 1901.

Clark, C. M. H. *A Short History of Australia.* Rev. ed. New York: Mentor, 1969.

Clarke, G. T. "Uniform Taxation" *Australian Quarterly* 19, no. 3 (Sept. 1947): 83-89.

Coghlan, T. A. *Labour and Industry in Australia: From the First Settlement in 1788 to the Establishment of the Commonwealth in 1901.* 4 vols. Oxford: Oxford University Press, 1918.

Commonwealth Law Reports (CLR). For particular cases, see "Select Table of Cases"

Connell, R. W. *Ruling Class Ruling Culture: Studies of Conflict, Power and Hegemony in Australian Life.* Cambridge: Cambridge University Press, 1977.

Connell, R. W. and T. H. Irving, *Class Structure in Australian History.* Melbourne: Longman Cheshire, 1980.

Cooksey, R. *Lang and Socialism: A Study in the Great Depression.* Canberra: Australian National University Press, 1971.

Coombs, H. C. *Trial Balance.* South Melbourne: Macmillan, 1981.

Cooray, L. J. M. *Conventions, the Australian Constitution and the Future.* Sydney: Legal Books, 1979.

Coper, M. "The High Court and Section 90 of the Constitution". *Federal Law Review* 7 (1976): 1-48.

——— *The Franklin Dam Case.* Sydney: Butterworths, 1983.

———. *Freedom of Interstate Trade under the Australian Constitution.* Sydney: Butterworths, 1983.

——— "Section 92 and the Impressionistic Approach". *Australian Law Journal* 58 (1984): 92-95.

Copland, D. V. *Australia in the World Crisis, 1929-1933.* Cambridge: Cambridge University Press, 1934.

Corbett, D. *Politics and the Airlines.* London: Allen and Unwin, 1965.

Corwin, E. "The Constitution as Instrument and as Symbol". *American Political Science Review* 30 (1936): 1071-85.

Costigan Commission: Royal Commission on the Activities of the Federated Ship Painters and Dockers Union. *Final Report.* 5 vols. Canberra: Government Printer, 1984.

Cowen, Z. "A Comparison of the Constitutions of Australia and the United States" *Buffalo Law Review* 4 (1955): 155.

———. *Federal Jurisdiction in Australia.* Melbourne: Oxford University Press, 1959.

———. *Sir John Latham and Other Papers.* Melbourne: Oxford University Press, 1965.

——— *Isaac Isaacs.* Melbourne: Oxford University Press, 1967.

Cox, A. *The Role of the American Supreme Court in American Government.* Oxford: Clarendon Press, 1976.

Cranston, R. "From Co-operative to Coercive Federalism and Back?" *Federal Law Review* 10 (1979): 121-42.

——— "'Lawyer in the Social Sciences'—Geoffrey Sawer". *Federal Law Review* 11 (1980): 263.

Crawford, J. *Australian Courts of Law.* Melbourne: Oxford University Press, 1982.

Crisp, L. F. *The Australian Federal Labour Party 1901-1951.* London: Longmans, Green, 1955.

——— *Ben Chifley: A Political Biography.* London: Longmans, Green, 1961.

———. *Australian National Government.* 4th ed. Melbourne: Longman Australia, 1978.

——— *Federation Prophets Without Honour: A. B. Piddington, Tom Price, H. B. Higgins.* Canberra: Australian National University Printery, 1980.

———. *George Houston Ried.* Canberra: Australian National University Printery, 1980.

———. *George Richard Dibbs 1834-1904.* Canberra: Australian National University Printery, 1980.

——— *The Later Australian Federation Movement 1883-1901: Outline and Bibliography.* Canberra: Australian National University Printery, 1981.

———. *The Unrelenting Penance of Federalist Isaac Isaacs 1897-1947*. Canberra: Australian National University Printery, 1981.

Crommelin, M. "Offshore Mining and Petroleum: Constitutional Issues". *Australian Mining and Petroleum Law Journal* 2 (1981): 191-212.

Crommelin, M. and G. Evans, "Explorations and Adventures with Commonwealth Powers". In G. Evans, ed. *Labor and the Constitution 1972-1975*. Melbourne: Heinemann, 1977, 47-71.

Crosland, A. *The Future of Socialism*. London: J. Cape, 1956.

Crowley, F. K. ed. *Modern Australia in Documents*. 2 vols. Melbourne: Wren Publishing, 1973.

Curtin Government, *Cabinet Minutes* and *Cabinet Agenda*. Canberra: Australian Archives, 1940-45.

Dahl, R. "Decision-Making in a Democracy: The Supreme Court as a National Policy-Maker" *Journal of Public Law* 6 (1957): 279-95.

d'Alpuget, B. *Hawke*. Melbourne: Penguin, 1982.

Daly, F. *From Curtin to Kerr*. Melbourne: Sun Books, 1977.

Davidson, A. *The Communist Party of Australia: a Short History*. Stanford, California: Hoover Institution Press, 1969.

Davies, A. and G. Serle, eds. *Policies for Progress: Essays in Australian Politics*. Melbourne: F. W. Cheshire, 1954.

Davies, A. F., *Australian Democracy*. London: Longmans, Green, 1958.

Davis, S. R. "The Australian Bank Nationalisation Case". *Modern Law Review* 13 (1950): 107-11.

———. "Co-operative Federalism in Retrospect" *Historical Studies* 5 (1952): 212-33.

——— "The 'Federal Principle' Reconsidered". *Australian Journal of Politics and History* 1 (1955-56): 59-85, 223-44.

Davis, S. R., ed. *The Government of the Australian States*. London: Longmans, 1960.

Davison, G. "Sydney and the Bush: an Urban Context for the Australian Legend" *Historical Studies* 18 (1978): 191-209.

Deakin, A. *The Federal Story*. Melbourne: Robertson and Mullens, 1944.

———. *Federated Australia: Selections from Letters to the* Morning Post *1900-1910*. Edited by J. A. La Nauze. Melbourne: Melbourne University Press, 1968.

Denning, Lord. "Fifth Wilfred Fullagar Memorial Lecture: 'Let Justice be Done'" *Monash University Law Review* 2 (1975): 3-12.

Derham, D. "Constitutional Law—Section 92. Recent Cases". *Res Judicatae* 6 (1952): 111-22.

Deschenes, J. "The Judge as Lawmaker" In A. M. Linden, ed. *The Canadian Judiciary*. Toronto: Osgoode Hall Law School, York University, 1976, 74-76.

De Tocqueville, A. *Democracy in America*. 1835. 2 vols. Vintage Books, 1945.

Diamond, M. "The Federalist's View of Federalism" In G.C.S. Benson, M.

Diamond, et al. *Essays in Federalism*. Institute for Studies in Federalism, Claremont Men's College, 1961, 21-64.

Dicey, A. V. *Introduction to the Study of the Law of the Constitution*. 9th ed. Edited by E. C. S. Wade. London: Macmillan, 1939.

Dixon, O. *Jesting Pilate and Other Papers and Addresses*. Collected by Judge Woinarski. Melbourne: Law Book Co., 1965.

Douglas, R. "Judges and Policy on the Latham Court". *Politics* 4 (1969): 20-41.

Drewry, G. "Judges and Political Inquiries: Harnessing a Myth". *Political Studies* 23, no. 1 (1975): 49-61.

Duncan, G., ed. *Critical Essays in Australian Politics*. Melbourne: Edward Arnold, 1978.

Durack, P., and R. Wilson, "Do We Need a New Constitution for the Commonwealth?" *Australian Law Journal* 41 (1967): 231-43.

Easton, D. *A Systems Analsyis of Political Life*. Englewood Cliffs, NJ: Prentice-Hall, 1965.

Ebbels, N. *The Australian Labour Movement 1850-1907*. Sydney: Noel Ebbels Memorial Committee in assoc. with Australasian Book Society, 1960.

Eggleston, F. W. *Reflections of an Australian Liberal*. Melbourne: F. W. Cheshire, 1953.

Else-Mitchell, R. "The Rise and Demise of Coercive Federalism". *Australian Journal of Public Administration* 36 (1977): 109-21.

Else-Mitchell, R., ed. *Essays on the Australian Constitution*. 1952. 2nd ed. Sydney: Law Book Company, 1961.

Ely, J. H. "On Discovering Fundamental Values" *Harvard Law Review* 92, no. 1 (Nov. 1978): 5-55.

——— *Democracy and Distrust: A Theory of Judicial Review*. Cambridge Mass.: Harvard University Press, 1980.

Ely, R. *Unto God and Caesar*. Melbourne: Melbourne University Press, 1976.

Emy, H. *Politics of Australian Democracy*. Rev. ed. Melbourne: Macmillan, 1978.

Evans, G. "The Most Dangerous Branch? The High Court and the Constitution in a Changing Society". In A. D. Hambly and J. L. Goldring, eds. *Australian Lawyers and Social Change*. Sydney: Law Book Co., 1976, 13-76.

———. Address to Conference on Commissions, Contempts and Civil Liberties. Centre for Continuing Education. Australian National University, Canberra, 1984.

——— "The Tasmanian Dam Case: Background and Implications" *The Parliamentarian* 65, no. 1 (Jan. 1984): 10-21.

Evans, G., ed. *Labor and the Constitution 1972-1975*. Melbourne: Heinemann, 1977.

———. *Law, Politics and the Labor Movement*. Melbourne: Legal Services Bulletin and Society of Labor Lawyers, 1980.

Evans, G., and J. Reeves, eds. *Labor Essays*. Melbourne: Drummond for ALP, 1980, 1981, 1982 and 1983.

Evatt, H. V. *Liberalism in Australia: An Historical Sketch of Australian Politics Down to the Year 1915*. Sydney: Law Book Co., 1918.

——— *Australian Labour Leader: The Story of W A. Holman and the Labour Movement*. Sydney: Angus and Robertson, 1940.

——— *The King and His Dominion Governors*. 2nd ed. Melbourne: Cheshire, 1967.

——— Papers, Adelaide: Flinders University Library.

Fadden, A. *They Called me Artie: The Memoirs of Sir Arthur Fadden*. Brisbane: Jacaranda, 1969.

Fajgenbaum, J. I. and P. Hanks. *Australian Constitutional Law*. 2nd ed. Melbourne: Butterworths, 1980.

Farrand, M., ed. *The Records of the Federal Convention of 1787*. Rev. ed. 4 vols. New Haven: Yale University Press, 1937.

Federal Convention Debates. See Australian Federation Conference 1890; National Australasian Convention, 1891; National Australasian Convention 1897; Australasian Federal Convention, 1897 and 1898.

Federal Law Review 17 (1983-84): 199-302, special number devoted to articles and commentary on the Tasmanian *Dams* case.

Finnis, J. M. "Separation of Powers in the Australian Constitution". *Adelaide Law Review* 3 (1967): 159-77.

Fisher, M. "How the 'Miracle' was Cowed: Margarine, Quotas and Politics" *Australian Quarterly* 42, no. 2 (June 1970): 20-33.

Fitzhardinge, L. F. *William Morris Hughes: A Political Biography*. I, *That Fiery Particle 1862-1914*. Sydney: Angus and Robertson, 1964.

——— II, *The Little Digger, 1914-1952*. Sydney: Angus and Robertson, 1979.

Fitzpatrick, B. *A Short History of the Australian Labor Movement*. Melbourne: Rawson's Bookshop, 1944.

Forsyth, N. H. M. "Tax Avoidance and the Reponsibility of the Legal Advisor" *Australian Law Journal* 55 (1981): 583-89.

Fraser, M. "National Objectives—Social, Economic and Political Goals". *Australian Quarterly* 42, no. 1 (March 1975): 24-35.

——— "The Philosophical Basis of Liberalism". Address to S.A. Branch of Liberal Party, 5 Dec. 1980. *Commonwealth Record* 1-7 Dec. 1980: 1840-43.

Freudenberg, G. *A Certain Grandeur: Gough Whitlam in Politics*. Sydney: Macmillan, 1977.

Friedrich, J. *Trends of Federalism in Theory and Practice*. New York: Frederick A. Praeger, 1968.

Galligan, B. "Judicial Review in the Australian Federal System: Its Origin and Function" *Federal Law Review* 10 (1979): 367-97.

——— "The Founders' Design and Intention Regarding Responsible Government" *Politics* 15, no. 2 (1980): 1-10.

——— "The Kerr-Whitlam Debate and the Principles of the Australian

Constitution" *Journal of Commonwealth and Comparative Politics* 18 (1980): 247-71.

——— "Federalism's Ideological Dimension and the Australian Labor Party" *Australian Quarterly* 53 (1981): 128-40.

——— "Legitimating Judicial Review: The Politics of Legalism" *Journal of Australian Studies* 8 (June 1981): 33-53.

——— "The *Dams* Case: A Political Analysis". in M. Sornarajah, ed., *The South West Dam Dispute: The Legal and Political Issues.* Hobart: University of Tasmania, 1983, 102-23.

——— "Interpreting the Constitution after 1975". *Australian Quarterly* 56 (1984): 142-52.

Galligan, D. J. "Judicial Review and Democratic Principles: Two Theories" *Australian Law Journal* 57 (1983): 69-79.

Garran, R. R. *Prosper the Commonwealth.* Sydney: Angus and Robertson, 1958.

Gibbs, H. "The State of the Australian Judicature" *Australian Law Journal* 55 (1981): 677-84.

——— "Comment: The High Court Today". *Sydney Law Review* 10 (1983): 1-4.

Giblin, L. R. *The Growth of a Central Bank: The Development of the Commonwealth Bank of Australia 1924-1945.* Melbourne: Melbourne University Press, 1951.

Gilbert, C. D., "'There Will be Wars and Rumours of Wars': A Comparison of Treatment of Defence and Emergency Powers in the Federal Constitutions of Australia and Canada" *Osgoode Hall Law Journal* 18 (1980): 307-35.

Glazer, N. "Towards an Imperial Judiciary?". *Public Interest* 41 (Fall 1975): 104-23.

Gleeson, A. M. "Judging the Judges". *Australian Law Journal* 53 (1979): 338-47.

Gold, H. "Class Identification and Party Choice: the Data Re-examined". In H. Mayer and H. Nelson, eds, *Australian Politics—a Fifth Reader.* Melbourne: Cheshire, 1973, 426-32.

Gollan, R. *Radical and Working Class Politics: A Study of Eastern Australia, 1850-1910.* Melbourne: Melbourne University Press, 1960.

——— *The Commonwealth Bank of Australia.* Canberra: Australian National University Press, 1968.

Goot, M. "Parties of Initiative and Resistance: A Reply". *Politics* 4 (1969): 84-99.

Grbich, Y. "Anti-Avoidance Discretions: The Continuing Battle to Control Tax Avoidance" *University of New South Wales Law Journal* 4 (1981): 17-42.

Greenwood, G. *The Future of Australian Federalism.* 1946. 2nd ed. St Lucia, Qld: University of Queensland Press, 1976.

Grey, T. "Do we have an Unwritten Constitution?" *Stanford Law Review* 26 (1975): 703-18.

Griffith, J. A. G. *The Politics of the Judiciary.* Fontana/Collins, 1977.

Gruen, F. "What Went Wrong? Some Personal Reflections on Economic Policies under Labor" *Australian Quarterly* 48, no. 4 (Dec 1976): 15-32.

Hambly, A. D., and J. L. Goldring, *Australian Lawyers and Social Change.* Sydney: Law Book Co., 1976.

Hamilton, A., J. Madison and J. Jay. *The Federalist Papers.* Compiled by Clinton Rossiter. New York: Mentor, 1961.

Hancock, W. K. *Australia.* London: E. Benn, 1930.

Hartz, L. *The Founding of New Societies.* New York: Harcourt, Brace and World, 1964.

Hasluck, P. "Tangled in the Harness" *Quadrant* (Nov. 1983): 37-41.

Hawke, R. *National Reconciliation: The Speeches of Bob Hawke.* Selected J. Cook. Sydney: Fontana/Collins, 1984.

Hayek, F. A., "The Economic Conditions of Interstate Federalism" In his *Individualism and Economic Order.* London: Routledge and Kegan Paul, 1949.

Hazlehurst, C. *Menzies Observed.* Sydney: George Allen and Unwin, 1979.

Hiller, J. A. "The Law-Creative Role of Appellate Courts in the Commonwealth". *International and Comparative Law Quarterly* 27 (1976): 85-126.

Hodgins, B. W., D. Wright and W. H. Heick, eds. *Federalism in Canada and Australia: The Early Years.* Waterloo, Can.: Wilfred Laurier University Press, 1978.

Hogg, P. W. *Constitutional Law of Canada.* Toronto: Carswell, 1977.

———. *Canada Act 1982 Annotated.* Toronto: Carswell, 1982.

Holmes, J., and C. Sharman, *The Australian Federal System.* Sydney: Allen and Unwin, 1977.

Horovitz, J. *Law and Logic.* New York: Springer-Verlag, 1972.

Howard, C. *Australian Federal Constitutional Law.* 2nd ed. Sydney: Law Book Company, 1972.

———. "Sir Owen Dixon and the Constitution". *Melbourne University Law Review* 9 (1973): 5-10.

——— *The Constitution, Power and Politics.* Melbourne: Fontana/Collins, 1980.

——— "External Affairs Power of the Commonwealth". *Current Affairs Bulletin* 60, no. 4 (Sept. 1983): 16-24.

Howard, C., and C. Saunders. *Cases and Materials on Constitutional Law.* Sydney: Law Book Company, 1979.

Howson, P. *The Life of Politics: The Howson Diaries.* Edited by D. Aitkin. Ringwood, Vict.: Viking Press, 1984.

Hughes, C. A. ed. *Readings in Australian Government.* St Lucia, Qld: University of Queensland Press, 1968.

Hughes, C. A., and B. D. Graham. *A Handbook of Australian Government and Politics 1890-1964.* Canberra: Australian National University Press, 1968.

———. *A Handbook of Australian Government and Politics 1965-1974.* Canberra: Australian National University Press, 1977.

Hughes, O. "An Explanation of Political Choice in Australia" Ph.D. thesis, University of Western Australia, 1984.

Hughes, W. M., *The Case for Labor.* Sydney: Worker Trustees, 1910.

Hunt, E. M. *American Precedents in Australian Federation.* New York: Columbia University Press, 1930.

Hunter, T. "Some Thoughts on the Pharmaceutical Benefits Scheme". *Australian Journal of Social Issues* I, no. 4 (1963): 32-42.

———. "Pressure Groups and the Australian Political Process: The Case of the Australian Medical Association". *Journal of Commonwealth and Comparative Politics* 18 (July 1980): 190-206.

Hutley, F. C. "The Legal Traditions of Australia as Contrasted with those of the United States" *Australian Law Journal* 55 (1981): 63-70.

Jacobs, K. "Lawyers' Reasonings: Some Extra-Judicial Reflections". A review of J. Stone, *Legal Systems and Lawyers' Reasonings. Sydney Law Review* 5 (1967): 425-31.

Jaensch, D., ed. *The Politics of "New Federalism".* Adelaide: Australasian Political Studies Association, 1977.

Jaffe, L. *English and American Judges as Lawmakers.* Oxford: Clarendon Press, 1969.

James, M., ed. *The Constitutional Challenge.* Sydney: Centre for Independent Studies, 1982.

Janes, C. V. "Bank Nationalization Delusions" *Australian Quarterly* 19, no. 4 (Dec. 1947): 9-19.

Johnston, R. E. *The Effect of Judicial Review on Federal-State Relations in Australia, Canada and the United States.* Baton Rouge: Louisiana State University Press, 1969.

Joske, P. E. *Australian Federal Government.* 3rd ed. Sydney: Butterworths, 1976.

Joyce, R. B. *Samuel Walker Griffith.* St Lucia, Qld: University of Queensland Press, 1984.

Jupp, J. "Socialist 'Rethinking' in Britain and Australia". *Australian Journal of Politics and History* 4 (1958): 193-207.

———. *Australian Party Politics.* Melbourne: Melbourne University Press, 1964.

———. *Party Politics, Australia, 1966-81.* Sydney: George Allen and Unwin, 1982.

Kadish, S. H. "Judicial Review in the High Court and the United States Supreme Court". *Melbourne University Law Review* 2 (1959-60): 4-34, 122-71.

Kelly, P. *The Hawke Ascendency.* Sydney: Angus and Robertson, 1984.

Kemp, D. "Liberalism: Is it Relevant?" In H. Mayer and H. Nelson, eds. *Australian Politics: A Fourth Reader,* 1976.

———. *Society and Electoral Behaviour in Australia.* St Lucia, Qld: University of Queensland Press, 1978.

Keynes, J. M. *The General Theory of Employment, Interest and Money.* London: Macmillan, 1936.

Kirby, M. *The Judges.* Boyer Lectures 1983. Sydney: Australian Broadcasting Corporation, 1983.

La Nauze, J. A. *Alfred Deakin*. 2 vols. Melbourne: Melbourne University Press, 1965.

——— "A Little Bit of Lawyers' Language: The History of 'Absolutely Free' 1890-1900" In A. W. Martin, ed. *Essays in Australian Federation*. Melbourne: Melbourne University Press, 1969, 57-93.

——— *The Making of the Australian Constitution*. Melbourne: Melbourne University Press, 1972.

Lane, P. H. "Judicial Review or Government by the High Court" *Sydney Law Review* 5 (1966): 203-20.

———. "High Court Techniques" *Australian Law Journal* 43 (1969): 172-83.

———. *The Australian Federal System*. 2nd ed. Sydney: Law Book Company, 1979.

——— "The Decline of the Boilermakers' Separation of Powers Doctrine" *Australian Law Journal* 55 (1981): 6-14.

———. "Neutral Principles on the High Court". *Australian Law Journal* 55 (1981): 737-48.

——— "The Federal Government's External Affairs Power: The Tasmanian Dam Case" *Australian Law Journal* 57 (1983): 554-59.

Laski, H. J. "The Obsolescence of Federalism". *New Republic*, 3 May 1939: 367-69.

Laskin, B. "The Role and Function of Final Appellate Courts: The Supreme Court of Canada". *Canadian Bar Review* 53 (1975): 469-81.

Latham, J. Retirement Address. *Australian Law Journal* 26 (1952): 2-3.

——— "Changing the Constitution" *Sydney Law Review* 1 (1953): 14-45.

———. "Interpretation of the Constitution" In R. Else-Mitchell, ed., *Essays on the Australian Constitution*. 2nd ed. Sydney: Law Book Co., 1961, 1-48.

——— "The Constitution in a Changing World". *Tasmanian University Law Review* 1 (1961): 529-35.

——— "Sir Isaac Isaacs" *Australian Law Journal* 22 (1968): 66-67.

——— Papers. Canberra: National Library.

Lee, H. P. *Emergency Powers*. Sydney: Law Book Co., 1983.

Lerner, M. "Constitution and court as symbols" *Yale Law Journal* 46 (1937); 1290-319.

Lindell, G. "Judicial Review and the House of Representatives". *Federal Law Review* 6 (1974): 84-106.

——— "Duty to Exercise Judicial Review" In L. Zines, ed. *Commentaries on the Australian Constitution* (1977), 150-90.

Lindell, G. and L. Zines. *Sawer's Australian Constitutional Cases*. 4th ed. Sydney: Law Book Co., 1982.

Lloyd, C. J., and G. S. Reid. *Out of the Wilderness: The Return of Labor*. Melbourne, Cassell, 1974.

Lonie, J. "From Liberal to Liberal: The Emergence of the Liberal Party and Australian Capitalism, 1900-1945". In G. Duncan, ed. *Critical Essays in Australian Politics*, 47-76.

Loveday, P. "Support in Return for Concessions". *Historical Studies* 14 (1970): 378-405.

———. "The Federal Convention, an Analysis of the Voting". *Australian Journal of Politics and History* 18, no. 2 (1972): 169-88.

———. "The Liberal's Image of their Party" In C. Hazlehurst, ed. *Australian Conservatism.* Canberra: Australian National University Press, 1979, 239-62.

Loveday, P., and A. W. Martin. *Parliament, Factions and Parties.* Melbourne: Melbourne University Press, 1966.

Lowe, D. *The Price of Power.* South Melbourne: Macmillan, 1984.

Lucy, R., ed. *The Pieces of Politics.* 1975. 2nd ed. Melbourne: Macmillan, 1979.

Lumb, R. D. "Fundamental Law and the Processes of Constitutional Change in Australia" *Federal Law Reveiw* 9 (1978): 148-84.

——— *Australian Constitutionalism.* Sydney: Butterworths, 1983.

——— "The Judiciary, the Interpretation of the Constitution and the Australian Constitutional Convention" *Australian Law Journal* 57 (1983): 229-34.

Lumb, R. D., and K. W. Ryan. *The Constitution of the Commonwealth of Australia Annotated.* 2nd ed. Sydney: Butterworths, 1977.

McCloskey, R. G. *The American Supreme Court.* Chicago: University of Chicago Press, 1960.

McFarlane, B., *Professor Irvine's Economics in Australian Labor History.* Canberra: Aust. Society for the Study of Labour History, 1966.

McInerney, M. "The Appointment of Judges to Commissions of Inquiry and Other Extra-Judicial Activities" *Australian Law Journal* 52 (1978): 540-53.

MacMahon, A. W., ed. *Federalism: Mature and Emergent.* New York: Doubleday, 1955.

McMillan, J., G. Evans and H. Storey. *Australia's Constitution: Time for Change?* Sydney: Law Foundation of New South Wales and George Allen and Unwin, 1983.

McMinn, W. G. "The High Court Imbroglio and the Fall of the Reid-McLean Government" *Journal of the Royal Australian Historical Association* 64 (1978): 14-31.

———. *A Constitutional History of Australia.* Melbourne: Oxford University Press, 1979.

MacPherson, C. B. *The Life and Times of Liberal Democracy.* New York: Oxford University Press, 1977.

McQueen, H. *A New Britannia.* Harmondsworth, Middlesex: Penguin Books, 1970.

McWhinney, E. *Federal Constitution-Making for a Multi-National World.* Leyden: A. W. Sijthoff, 1966.

——— "Legal Positivism and Judicial Review in Australia" Ch. 5 of his *Judicial Review.* 4th ed. Toronto: University of Toronto Press, 1969.

Maddox, G. "Federalism: or Government Frustrated". *Australian Quarterly* 45, no. 3 (Sept. 1973): 92-100.

Maitland, F. W. *The Constitutional History of England.* Cambridge: Cambridge University Press, 1931.

Mallory, J. R. *Social Credit and the Federal Power in Canada.* Toronto: University of Toronto Press, 1954.

——— "Constraints on Courts as Agencies of Constitutional Change: The Canadian Case" *Public Law*, Winter 1977: 406-27.

Mann, T. "The Political and Industrial Situation in Australia". *Nineteenth Century* 56 (1904): 475-91.

Marr, D. *Barwick.* Sydney: George Allen and Unwin, 1980.

Marshall, G. *Constitutional Theory.* London: Oxford University Press, 1971.

Martin, A. W "Australia and the Hartz 'Fragment' Thesis". *Australian Economic History Review* 13, no. 2 (September 1973): 131-47.

——— *Henry Parkes.* Melbourne: Melbourne University Press, 1980.

Martin, A. W. ed. *Essays on Australian Federation.* Melbourne: Melbourne University Press, 1969.

Mason, A. "The Courts and their role in changing the law today" In A. Tay and E. Kamenka, eds, *Law-Making in Australia,* 11-19.

Mathews, R. L., ed. *Making Federalism Work.* Canberra: Centre for Research on Federal Financial Relations, 1976.

———. "The Development of Australian Federalism" In R. L. Mathews, ed. *Federalism in Australia and the Federal Republic of Germany.* Canberra: Australian National University Press and Centre for Research in Federal Financial Relations, 1980, 3-13.

May, A. L. *The Battle for the Banks.* Sydney: Sydney University Press, 1968.

Mayer, H. "Some Conceptions of the Australian Party System 1910-1950". *Historical Studies* 7 (1956): 253-70.

———. "Parties of Initiative and Resistance". In H. Mayer, ed., *Australian Politics: A Reader,* 2nd ed. Melbourne: Cheshire, 1966, 223-30.

Mayer, H., ed. *Australian Politics: A Reader.* Melbourne: Cheshire, 1966.

——— *Australian Politics: A Second Reader,* 1969.

——— *Labor to Power: Australia's 1972 Election.* Sydney: Angus and Robertson, 1973.

Mayer, H., and H. Nelson, eds. *Australian Politics: a Third Reader.* Melbourne: Cheshire, 1973. *A Fourth Reader,* 1976. *A Fifth Reader,* 1980.

Melbourne, A. C. V. *Early Constitutional Development in Australia.* 2nd ed. Edited by R. B. Joyce. St Lucia: University of Queensland Press, 1963.

Menzies, R. "The Challenge to Federalism". *Melbourne University Law Review* 3 (1961): 1-14.

———. "Our Liberal Creed" In H. Mayer, ed. *Australian Politics: A Reader.* Melbourne: Cheshire, 1966, 265-67.

——— *Central Power in the Australian Commonwealth.* London: Cassell, 1967.

———. *Afternoon Light: Some Memories of Men and Events.* London: Cassell, 1967.

———. *The Measure of the Years.* London: Cassell, 1970.

Menzies, D. "The Right Honourable Sir Owen Dixon, O.M., G.C.M.G." *Melbourne University Law Review* 9 (1973): 1-4.

Miller, A. S. "The Politics of the American Judiciary". *Political Quarterly* 49 (1978): 200-207.

Miller, J. D. B., and B. Jinks, *Australian Government and Politics.* 3rd ed. London: G. Duckworth, 1964.

Moffatt, R. C. L. "Philosophical Foundations of the Australian Constitutional Tradition" *Sydney Law Review* 5 (1965): 59-88.

Monaghan, H. P. "Our Perfect Constitution". *New York University Law Review* 56 (1981): 353-96.

Morton, F. L., ed. *Law, Politics and the Judicial Process in Canada.* Calgary: University of Calgary Press, 1984.

Murphy, D. J., ed. *Labor in Politics: The State Labor Parties in Australia 1880-1920.* St Lucia, Qld: University of Queensland Press, 1975.

Murphy, L. National Press Club Address, 22 May 1980. Transcript. Canberra: Parliamentary Library, Current Information Service, 1980.

Murphy, W. "Public Opinion and the United States Supreme Court". *Law and Society Review* 2 (1968): 357-84.

Murray, R. *The Split.* Melbourne: Cheshire, 1970.

Myers, M. G. "The Attempted Nationalisation of Banks in Australia, 1947" *Economic Record* 35 (1959): 170-86.

Nairn, B. *Civilizing Capitalism: The Labor Movement in New South Wales 1870-1900.* Canberra: Australian National University Press, 1973.

National Australasian Convention, *Official Record of the Proceedings and Debates of the National Australasian Convention, 1891* (Federal Convention Debates). London: Her Majesty's Stationery Office, 1891.

National Australasian Convention, *Official Report of the National Australasian Convention Debates.* First session, Adelaide, 1897 (Federal Convention Debates). Adelaide: South Australian Government Printer, 1897.

Neasey, J. M. "Andrew Inglis Clark Senior and Australian Federation". *Australian Journal of Politics and History* 15, no. 2 (1969): 1-24.

Neumann, E. *The High Court of Australia: A Collective Portrait.* 2nd ed. Sydney: University of Sydney, Department of Government and Public Administration, Occasional Monograph no. 6, 1973.

New South Wales Parliament. Legislative Assembly Select Committee Upon the Appointment of the High Court of Australia, *Report.* Sydney: Government Printer, 1975.

Newspapers and weeklies.

For the earlier period:

Argus

Australian Worker

Bulletin
Labor Call
Labor Daily
Tocsin
For later decades:
Advertiser
Age
Australian
Courier Mail
Mercury
National Times
Sydney Morning Herald (SMH)
West Australian

Nicholas, A. S. "Fifty Years of the Constitution" *Australian Quarterly* 23, no. 2 (June 1951): 29-34.

——— *The Australian Constitution: An Analysis.* 2nd ed. Sydney: Law Book Co., 1952.

Nicholas, B. "Fundamental Rights and Judicial Review in France" Parts I and II. *Public Law* , Spring 1978: 82-101; Summer 1978: 155-77.

Norris, T. *The Emergent Commonwealth.* Melbourne: Melbourne University Press, 1975.

Nygh, P. E. "An Analysis of Judicial Approaches to the Interpretation of the Commerce Clause in Australia and the United States" *Sydney Law Review* 5 (1965-67): 353-97.

Odgers, J. R. *Australian Senate Practice.* 5th ed. Canberra: Australian Printing Service, 1976.

Olakanpo, J. O. *Central Banking in the Commonwealth.* Calcutta: Bookland, 1965.

Oliver, M., ed. *Social Purpose for Canada.* Toronto: University of Toronto Press, 1961.

O'Malley, P. *Law, Capitalism and Democracy.* Sydney: Allen and Unwin, 1983.

Overacker, L. *The Australian Party System.* New Haven: Yale University Press, 1949.

Page, E. *Truant Surgeon: The Inside Story of Forty Years of Australian Political Life.* Edited by A. Mozley. Sydney: Angus and Robertson, 1963.

Palmer, G. *Unbridled Power? An Interpretation of New Zealand's Constitution and Government.* Wellington: Oxford University Press, 1979.

Parker, R. S. "Australian Federation: The Influence of Economic Interests and Political Pressures" *Historical Studies* 4 (1949): 1-24.

——— "Planning, Federalism, and the Australian Labor Party" *Journal of Commonwealth and Comparative Politics* 14, no. 1 (March, 1976): 3-18.

Parkin, A., and J. Warhurst, eds. *Machine Politics in the Australian Labor Party.* Sydney: Allen and Unwin, 1983.

Partridge, P. H. "The Politics of Federalism" In G. Sawer, ed. *Federalism, an Australian Jubilee Study*. Melbourne: Cheshire, 1952, 174-99.

Patience, A., and B. Head, eds. *From Whitlam to Fraser: Reform and Reaction in Australian Politics*. Melbourne: Oxford University Press, 1979.

Penniman, H. ed. *Australia at the Polls: The National Elections of 1980 and 1983*. Sydney and Washington: Allen and Unwin Australia and American Enterprise Institute, 1983.

Perry, M. J. *The Constitution, the Courts and Human Rights*. New Haven: Yale University Press, 1982.

Phillips, W. *Defending "A Christian Country"*. St Lucia, Qld: University of Queensland Press, 1981.

Playford, J., "Judges and Politics in Australia" *Australasian Political Association News* 6, no. 3 (August 1961): 5-11.

——— "Labour and the High Court". *Australian Left Review*, Feb.-Mar. 1970: 16-22.

Playford, J., and D. Kirsner, eds *Australian Capitalism*. Harmondsworth, Middlesex: Penguin Books, 1972.

Portus, G. V., ed. *Studies in the Australian Constitution*. Sydney: Angus and Robertson, 1933.

Pritchett, C. H. *The Roosevelt Court*. New York: Macmillan, 1948.

Quick, J., and R. R. Garran. *The Annotated Constitution of the Australian Commonwealth*. Sydney: Angus and Robertson, 1901.

Rawson, D. W. "Labour, Socialism and the Working Class". *Australian Journal of Politics and History* 7 (1961): 75-94.

———. *Labor in Vain? A Survey of the Australian Labor Party*. London: Longmans, 1966.

——— "Another Look at 'Initiative and Resistance'". *Politics* 3 (1968): 41-54.

———. "'Initiative and Resistance'—a Brief Rejoinder". *Politics* 4 (1969): 215-16.

———. *Unions and Trade Unionists in Australia*. Sydney: George Allen and Unwin, 1978.

Reeves, J., and G. Evans. "Two Views of the Socialist Objective" In J. Reeves and G. Evans, eds *Labor Essays 1980*, 155-57.

Reid, G. "Australia's Commonwealth Parliament and the 'Westminster Model'" *Journal of Commonwealth Political Studies* 2 (1963): 89-106.

——— "The Changing Political Framework" *Quadrant* (Jan.-Feb. 1980): 5-15.

Reynolds, J. *Edmund Barton*. Sydney: Angus and Robertson, 1948.

———. "A. I. Clark's American Sympathies and His Influence on Australian Federation" *Australian Law Journal* 32 (July 1958): 62-67.

Reynolds, P. L. *The Democratic Labor Party*. Brisbane: Jacaranda, 1974.

Richardson, J. E. *Patterns of Australian Federalism*. Canberra: Centre for Research on Federal Financial Relations, The Australian National University, Research Monograph no. 1, 1973.

Rickard, J. *Class and Politics: New South Wales, Victoria and the Early Commonwealth, 1890-1910.* Canberra: Australian National University Press, 1976.

———. *H. B. Higgins: The Rebel as Judge.* Sydney: George Allen and Unwin, 1984.

Riker, W. H. *Federalism: Origin, Operation, Significance.* Boston: Little, Brown and Co., 1964.

Robertson, J. *J. H. Scullin: A Political Biography.* Nedlands, WA: University of Western Australia Press, 1974.

Rosecrance, R. W. "The Radical Culture of Australia" Ch. 8 of Hartz, *The Founding of New Societies.* New York: Harcourt Brace and World, 1964.

Ross, L. "Socialism and Australian Labour: Facts, Fiction, Future" *Australian Quarterly* 22, no. 1 (March 1950): 21-35.

———. *John Curtin.* Melbourne: Macmillan, 1977.

Ryan, P. "Sir John Barry". *Historical Studies* 14 (1970): 329-31.

Rydon, J. "Frustrations of Federalism" *Australian Quarterly* 47, no. 4 (Dec. 1975): 94-106.

Sackville, R. "The Doctrine of Immunity of Instrumentalities in the United States and Australia" *Melbourne University Law Review* 7: 15-66.

Samuels, G. "The End of Federalism?" *Australian Quarterly* 56 (1984): 11-19.

Santamaria, B. A. *Against the Tide.* Melbourne: Oxford University Press, 1981.

Saunders, C. "The Development of the Commonwealth Spending Power". *Melbourne University Law Review* 11 (1978): 369-407.

Sawer, G. "The Privy Council, the High Court and Section 92". *Res Judicatae* 3 (1947): 155-57.

——— *Australian Government today.* Melbourne: Melbourne University Press, 1948.

——— "Bank of New South Wales and Others v. Commonwealth". *Australian Law Journal* 22 (1948): 213-16.

——— "Implications and the Constitution". *Res Judicatae* 4 (1948) 15-22; 85-91.

———. "Defence Power of the Commonwealth in Time of Peace". *Res Judicatae* 6 (1952-54): 214-23.

——— *Federalism in Australia.* Melbourne: Cheshire, 1949.

——— *Australian Federal Politics and Law 1901-1929,* Melbourne: Melbourne University Press, 1956.

——— "Reforming the Federal Constitution" *Australian Quarterly* 32, no. 1 (March 1960): 29-33.

——— "The Separation of Powers in Australian Federalism" *Australian Law Journal* 35 (1961): 177-96.

——— *Australian Federal Politics and Law 1929-1949.* Melbourne: Melbourne University Press, 1963.

——— "Political Questions" *University of Toronto Law Journal* 15 (1963): 49-61.

——— *Cases on the Constitution of the Commonwealth of Australia.* 3rd ed. Sydney: Law Book Co., 1964.

———. *Australian Federalism in the Courts.* Melbourne: Melbourne University Press, 1967.

——— "The Constitution and its Politics". In H. Mayer, ed. *Australian Politics: A Reader.* 2nd ed. Melbourne: Cheshire, 1969, 85-108.

——— *Modern Federalism.* New ed. Carlton, Victoria: Pitman, 1976.

——— "The Whitlam Revolution in Australian Federalism—Promise, Possibilities and Performance" *Melbourne University Law Review* 10 (1976): 315-29.

——— *Federation Under Strain: Australia 1972-1975.* Melbourne: Melbourne University Press, 1977.

Sawer, G., ed. *Federalism in Australia.* Melbourne: Cheshire, 1949.

——— *Federalism: An Australian Jubilee Study.* Melbourne: Cheshire, 1952.

Sawer, M., ed. *Australia and the New Right.* Sydney: Allen and Unwin, 1982.

Schedvin, C. B. *Australia and the Great Depression.* Sydney: Sydney University Press, 1970.

Schedvin, M. B., and C. B. Schedvin, "The Nomadic Tribes of Urban Britain: A Prelude to Botany Bay" *Historical Studies* 18 (1978): 254-76.

Schubert, G. *Judicial Decision Making.* New York: Free Press of Glencoe, 1963.

——— *Judicial Mind.* Evanston: North Western University Press, 1965.

——— "Political Ideology on the High Court" *Politics* 3 (1968): 21-40.

——— "Judicial Attitudes and Policy-Making in the Dixon Court'. *Osgoode Hall Law Journal* 7 (Nov. 1969): 1-29.

———. *Judicial Policy Making.* Rev. ed. Glenview, III.: Scott, Foresman, 1974.

Scotton, R. B., and H. Ferber, eds. *Public Expenditure and Social Policy in Australia.* Melbourne: Longman Cheshire, 1978.

Serle, A. G. "The Victorian Legislative Council, 1856-1950" *Historical Studies* 6 (1954): 186-203.

Senate Select Committee on the Conduct of a Judge. *Report.* Canberra: Government Printer, August 1984.

Senate Select Committee on Allegations Concerning a Judge. *Report.* Canberra: Government Printer, October, 1984.

Sexton, M. "The Role of Judicial Review in Federal Electoral Law". *Australian Law Journal* 52 (1978): 28-38.

———. *Illusions of Power.* Sydney: Allen and Unwin, 1979.

Sexton, M., and L. W. Maher. *The Legal Mystique.* Sydney: Angus and Robertson, 1982.

Shann, E. O. G., and D. V. Copland, eds. *The Battle of the Plans: Documents Relating to the Premiers' Conference, May 25th to June 11th, 1931.* Sydney: Angus and Robertson, 1931.

Sharman, C. "The Australian Senate as a States' House". *Politics* 12 (1977): 64-75.

———. "Fraser, The States and Federalism". *Australian Quarterly* 52 (1980): 9-19.

Shklar, J. *Legalism.* Cambridge, Massachusetts: Harvard University Press, 1964.

Simms, M. *A Liberal Nation.* Sydney: Hale and Iremonger, 1982.

Smith, J. "The Origins of Judicial Review in Canada" *Canadian Journal of Political Science* 16 (1983): 115-34.

Spender, P. *Politics and a Man.* Sydney: Collins, 1972.

Spratt, E. *Eddie Ward: Firebrand of East Sydney.* Adelaide: Rigby, 1965.

Starke, J. G. "Constitutional Aspects of the Communist Party Dissolution Referendum" *Australian Quarterly* 23, no. 3 (Sept. 1951): 17-24.

Staveley, R. W. "The Australian Inter-State Commerce Clause" Ph.D. thesis, University of Chicago, 1956.

Stephen, N. "Southey Memorial lecture 1981: Judicial Independence—A Fragile Bastion" *Melbourne University Law Review* 13 (1982): 334-48.

Stephens, D. "The Effect of the Great Depression on the Federal Labor Governments, 1941-49" *Australian Journal of Politics and History* 22 (1976): 258-70.

Stevens, B. and P. Weller, eds. *The Australian Labor Party and Federal Politics: A Documentary Survey.* Melbourne: Melbourne University Press, 1976.

Stokes, M. "How to Reform Australian Federalism" *University of Tasmania Law Review* (1980): 277-93.

Stone, J. "A Government of Laws and Yet of Men: Being a Survey of Half a Century of the Australian Commerce Power". *New York University Law Review* 25 (1952): 447-512.

——— *Legal Systems and Lawyers' Reasonings.* Sydney: Maitland, 1964.

Sundberg, R. "The Origins of the Judicature Chapter of the Australian Constitution and its Development to the end of the National Australasian Convention of 1891" M. A. thesis, University of Melbourne, 1982.

Tanenhaus, J., and W. Murphy. "Patterns of public support for the Supreme Court: a panel study". *Journal of Politics* 43 (1981): 24-39.

Tay, A., and E. Kamenka, eds. *Law-Making in Australia.* Melbourne: E. Arnold (Australia), 1980.

Temby, I. "'In this labryinth there is no golden thread'—Section 92 and the Impressionistic Approach". *Australian Law Journal* 58 (1984): 86-91.

Tennant, K. *Evatt: Politics and Justice.* Sydney: Angus and Robertson, 1970.

Theodore, E. G. "Nationalization of Credit". *Economic Record,* 9 (December 1933): 176-84.

Thompson, E. "The 'Washminster' Mutation" In P. Weller and D. Jaensch, eds. *Responsible Government in Australia,* 32-40.

Thomson, J. "A United States Guide to Constitutional Law" *University of Western Australia Law Review* 13, no. 2 (Dec. 1977): 153-95.

———. "Judicial Review in Australia: The Courts and the Constitution". S.J.D. thesis, Harvard University, 1979.

——— "An Endless but Productive Dialogue: Some Reflections on Efforts to Legitimize Judicial Review" *Texas Law Review* 61 (1982): 743-64.

——— "Principles and Theories of Constitutional Interpretation and Adjudication: Some Preliminary Notes". *Melbourne University Law Review* 13 (1982): 597-616.

——— "Constitutional Interpretation: History and the High Court: A Bibliographical Survey" *University of New South Wales Law Journal* 5 (1982): 309-23.

——— "The Teaching of Constitutional Law: Are the Materials Adequate?" *University of Western Australia Law Review* 15 (1983): 418-21.

——— "Some notes on the History of Section 71 (ii) of the Australian Constitution" Canberra: Parliamentary Library, Legislative Research Service, Occasional Paper no. 2, 1984.

Tiver, P. G. *The Liberal Party.* Brisbane: Jacaranda, 1978.

Tocsin. *Tocsin: Radical Arguments Against Federation 1897-1900.* Edited by H. Andersen. Richmond, Victoria: Drummond, 1977.

Tomasic, R. *Legislation and Society in Australia.* Sydney: George Allen and Unwin, 1980.

——— "From Empiricism to the Quest for Theory: Towards a Synthesis in the Sociology of Law". *Australian Journal of Law and Society* 1 (1983): 149-62.

Tomasic, R., ed. *Understanding Lawyers.* Sydney: George Allen and Unwin, 1978.

Turnbull, M. "A Radical on the High Court". *Bulletin*, 19 March 1977, 38-41.

Tushnet, M. V. "Following the Rules Laid Down: A Critique of Interpretivism and Neutral Principles" *Harvard Law Review* 96 (1983): 781-827.

Vile, M. J. C. *Constitutionalism and the Separation of Powers.* Oxford: Clarendon Press, 1967.

Wade, H. W. R. *Constitutional Fundamentals.* London: Stevens and Sons, 1980.

Walter, J. *The Leader: a political biography of Gough Whitlam.* St Lucia, Qld: University of Queensland Press, 1980.

Ward, R. *The Australian Legend.* Melbourne: Oxford University Press, 1958.

———. "The Australian Legend Re-visited". *Historical Studies* 18 (1978): 171-90.

Warhurst, J. "Catholics, Communists and the Australian Party System: a Study of the Menzies Years" *Politics* 14 (1979): 222-42.

Warren, C. *The Making of the Constitution.* 1928. New York: Barnes and Noble, 1967.

Waters, W. J. "Labor, Socialism and World War II" *Labour History* 16 (May 1969): 14-19.

———. *"The Opposition and the 'Powers' Referendum, 1944". Politics* 4 (1969): 42-56.

———. "Australian Labor's Full Employment Objective, 1942-45" *Australian Journal of Politics and History,* 16 (1970): 48-64.

Webb, B. and S. *The Webbs' Australian Diary 1898.* Edited by A. G. Austin. Melbourne: I. Pitman, 1965.

Wechsler, H. "Toward Neutral Principles of Constitutional Law". In H. Wechsler, *Principles, Politics and Fundamental Law.* Cambridge, Massachusetts: Harvard University Press, 1961.

Weiler, P. *In the Last Resort: A Critical Study of the Supreme Court of Canada.* Toronto: Carswell/Methuen, 1974.

West, K. *Power in the Liberal Party.* Melbourne: F. W. Cheshire, 1965.

Wheare, K. C. *Federal Government.* 3rd ed. Oxford: Oxford University Press, 1953.

———. *Modern Constitutions.* 2nd ed. London: Oxford University Press, 1966.

White, D. M. *The Philosophy of the Australian Liberal Party.* Melbourne: Hutchinson, 1978.

White, G. E. *Earl Warren: A Public Life.* New York: Oxford University Press, 1982.

Whitlam,E. G. "A New Federalism". *Australian Quarterly* 43, no. 3 (September 1971), 6-17.

——— *On Australia's Constitution.* Camberwell, Victoria: Widescope, 1977.

———. *Reform During Recession: the way ahead.* Toowong, Qld: University of Queensland ALP Club, 1978.

Wildavsky, A., and D. Carboch. *Studies in Australian Politics.* Melbourne: F. W. Cheshire, 1958.

Winterton, G. *Parliament, The Executive and the Governor-General.* Melbourne: Melbourne University Press, 1983.

——— "The Third Man: Sir Garfield Barwick". *Quadrant* 28, no. 4 (April 1984): 23-37.

Wise, B. R. *The Making of the Australian Commonwealth 1889-1900.* London: Longmans, Green and Co., 1913.

Wood, M. "The 'new federalisms' of Whitlam and Fraser and their impact on local government" In D. Jaensch, ed., *The Politics of New Federalism,* 104-15.

Wright, Lord. "Section 92 — A Problem Piece" *Sydney Law Review* 1 (1954): 145-72.

Wyndham, C. S. "The Future of the ALP". *Australian Quarterly* 38, no. 2 (June 1966): 29-40.

Wynes, W. A. *Legislative, Executive and Judicial Powers in Australia.* 5th ed. Sydney: Law Book Co., 1976.

Yerbury, D. "The High Court's recent expansionist approach" *Current Affairs Bulletin* 60, no. 10 (Mar. 1984): 12-23.

Young, I. *Theodore: His Life and Times.* Sydney: Alpha Books, 1971.

Zines, L. "Sir Owen Dixon's Theory of Federalism". *Federal Law Review* 1 (1965): 221-41.

——— "Mr Justice Evatt and the Constitution". *Federal Law Review* 3 (1968): 153-86.

——— "The Australian Constitution 1951-1976". *Federal Law Review* 7 (1976): 89-144.

Index

POLITICS OF THE HIGH COURT

The High Court is a branch of our federal government and as such has played a key part in Australian politics. Its judges resolve disputes between federal and state governments and within the federal government itself. The Court must exercise judicial review and it is the interpreter of the Australian constitution, the basis of power for all branches of government. High Court decisions on famous cases like *Engineers, Uniform Tax, Bank Nationalization*, and more recently the Tasmanian *Dam* decision, have all been major political events. The Court in those cases changed Australia's constitutional system and the pattern of its politics.

Until now, however, the High Court has been studied mainly by constitutional lawyers and historians, from a narrow perspective. *Politics of the High Court* is the first major study of the High Court as a significant political institution. The book assesses the way the Court has exercised great power, from its beginnings with the birth of our constitution, to the present.

Dr Galligan, a political scientist, has not set out to provide a history of the Court, but a searching analysis of the Court's performance through successive historical periods. The Court is first located as part of a larger political system, then shown as a political institution in its own right. Particular attention is paid to the changing composition of the Court and the varying attitudes of the judges, and to cases of major impact for Australia. The author brings out an important theme in Australian politics, the continuing struggle of ''Labor versus the Constitution'', which is evident in periods of federal Labor government.

This book examines the politics of judicial review in detail. It sets out to inform readers of the manner in which the High Court has exercised its power, and will be a standard reference for law students, lawyers, politicians and interested Australians generally, at a time when the High Court is the focus of increased attention in the wake of the *Dam* case and the Murphy controversy.

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