

JAMES BRYCE AND THE AUSTRALIAN CONSTITUTION

*Stephen Gageler**

ABSTRACT

James Bryce was a contemporary of Albert Venn Dicey. Bryce published in 1888 *The American Commonwealth*. Its detailed description of the practical operation of the *United States Constitution* was influential in the framing of the *Australian Constitution* in the 1890s. The project of this article is to shed light on that influence. The article compares and contrasts the views of Bryce and of Dicey; Bryce's views, unlike those of Dicey, having been largely unexplored in contemporary analyses of our constitutional development. It examines the importance of Bryce's views on two particular constitutional mechanisms – responsible government and judicial review – to the development of our constitutional structure. The ongoing theoretical implications of *The American Commonwealth* for Australian constitutional law remain to be pondered.

I INTRODUCTION

Save for the want of any hint of personal scandal or extreme eccentricity, James Bryce fits perfectly the description, made famous by Lytton Strachey, of an 'Eminent Victorian'.¹ Queen Victoria said that she liked Mr Bryce, because he knew so much and was so modest.² A 'learned, conscientious and highly cultured man',³ a 'kindly sage',⁴ a 'gentlemanly bearded intellectual', Bryce was noted for his character and his writing as distinct from either his personality or his oratory.⁵ A 'profound empiricist', distrustful of abstract theorisation, Bryce believed in and practised the application of scientific method to the study of social and political institutions.⁶ He had an 'enlightened curiosity'.⁷ He was 'first of all, a traveller, collector, observer, photographer; after that an analyst', 'more interested in accurately describing and justly interpreting ideas and institutions than in their criticism or in the construction of modified mechanisms of control'.⁸ Liberal, in temperament and in politics, realistic but never cynical, reasoning always from observed facts and never dogmatic in his conclusions, he came to be recognised as occupying in Victorian and Edwardian England as something of a 'moral referee'. There was, it was said of him, a 'deep moral purpose which directed every thought and action of his life'.⁹ Singularly free from insularity, prepared to embrace empire only so far as it served to advance universal

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and not national interests, he supported home rule for Ireland, opposed the Boer War, and was deeply sympathetic to the Armenian cause. When asked as to his allegiance, he said that he saw himself as 'a citizen of the world'.¹⁰ Yet his moral frame of reference was steadfastly and unashamedly British.

Born in Belfast in 1838, the eldest son of a Presbyterian schoolteacher, Bryce moved with his family to Glasgow where he attended high school and first attended university, before going on to Oxford, from which he graduated in 1862, and then to the London Bar, to which he was called in 1867. At Oxford he formed what was to be a lifelong friendship with Albert Venn Dicey, four years his senior. From 1870 to 1893, Bryce was Regius Professor of Civil Law at Oxford, overlapping with Dicey, who was appointed Vinerian Professor of English Law in 1882. From 1880 to 1907, Bryce was a member of the House of Commons. He held ministerial office in the administrations of William Gladstone and later of Sir Henry Campbell-Bannerman. From 1907 to 1913, he was Ambassador to the United States of America. Raised to the peerage in 1914, as Viscount Bryce, he served as a member of the House of Lords until his death in 1922, six weeks before that of Dicey.

As a member of the House of Commons, Bryce participated in the parliamentary debates which preceded the enactment in 1885 of the *Federal Council of Australasia Act*. He participated also in the parliamentary debates which preceded the enactment in 1900 of the *Commonwealth of Australia Constitution Act*. As to the *Federal Council of Australasia Act*, he said in 1885 that it established 'a federation of the feeblest and most transitory kind' and was to be 'looked upon ... more as a first sketch than as a complete Constitution'.¹¹ As to the *Commonwealth of Australia Constitution Act*, he said in 1900 that it witnessed to the 'vitality of the principles by which England had begun to be guided as far back as the days of Magna Charta', foretold that 'generations to come' would look back to the circumstances which had led to its framing over the previous nine years and said that 'even to the British Parliament, with its long and famous record, it [was] a new honour to be invoked for [the] purpose' of its enactment.¹²

In 1901, Bryce published *Studies in History and Jurisprudence* in which he devoted a chapter to the new *Constitution* of the Commonwealth of Australia, describing the causes which had brought it into existence, examining its provisions, and considering

¹ Cf Lytton Strachey, *Eminent Victorians* (1918). See also Frank Prochaska, *Eminent Victorians on American Democracy* (Oxford University Press, 2012) v, 96–121.

² H A L Fisher, *James Bryce* (Macmillan, 1927) vol 1, 295.

³ Alfred Deakin, *The Federal Story* (Melbourne University Press, 1944) 128. See also Sir Robert Garran, *Prosper the Commonwealth* (Angus and Robertson, 1958) 237.

⁴ Charles E Merriam, 'James Bryce' (1922) 8(2) *American Bar Association Journal* 87, 88.

⁵ John T Seaman Jr, *A Citizen of the World: The Life of James Bryce* (Tauris, 2006) 5, 13.

⁶ Hugh Tulloch, *James Bryce's American Commonwealth* (1988) 51.

⁷ Frederick Pollock, 'James Bryce' (1922) 237 *The Quarterly Review* 400, 401.

⁸ Merriam, above n 4, 88.

⁹ Lord Cecil of Chelwood, House of Lords Debates, February 1922, as quoted in Edmund Ions, *James Bryce and American Democracy 1870-1922* (Macmillan, 1968) 293.

¹⁰ Seaman Jr, above n 5, 12.

¹¹ United Kingdom, *Parliamentary Debates*, House of Commons, 4 August 1885, vol 300, col 1121–1122 (James Bryce).

¹² United Kingdom, *Parliamentary Debates*, House of Commons, 21 May 1900, vol 83, col 766–785 (James Bryce).

the lines on which the political life of Australia was likely to develop under it. As to the causes which brought the *Constitution* into existence, he said:

Like America in 1787, Australia was fortunate in having a group of able statesmen, most of whom were also lawyers, and so doubly qualified for the task of preparing a constitution. Their learning, their acuteness, and their mastery of constitutional principles can best be appreciated by any one who will peruse the interesting debates in the two Conventions.¹³

As to its provisions, he said after an extensive and detailed review that '[t]he Australian instrument' was 'the true child of its era, the latest birth of Time' compared with which the *American Constitution* seemed 'old fashioned'.¹⁴ The *Australian Constitution* was, he said, 'at least abreast of European and American theory, and ahead of European or American practice', representing 'the high-water mark of popular government' and 'penetrated by the spirit of democracy'.¹⁵ As to the lines on which the political life of Australia was likely to develop under it, he said that it was 'questions of the economic order that [were] likely to occupy, more than any others, the minds and energies of Australian statesmen' and predicted that 'financial relations between the Commonwealth and the States will be another fertile source of controversy'.¹⁶

In 1912, Bryce briefly visited Australia on a fact-finding voyage which also took him to New Zealand. In the words of an early biographer, his 'attack on the Continent was brisk and vivacious, the responsive regions well selected and the point of interrogation driven home hard and fast'; '[w]herever he went, Auckland, Wellington, Sydney, Melbourne, Adelaide, Brisbane, Hobart, men of every calling were brought into contribution, lawyers, politicians, pressmen, scholars in the first place, but also industrialists and farmers'.¹⁷ Amongst numerous other events, he was hosted at dinner in Sydney by Sir Edmund Barton, was given a seat on the floor of the House of Representatives in Melbourne, and was given there a parliamentary reception hosted by Prime Minister Andrew Fisher and attended by Justices of the High Court.¹⁸ He had conferred on him an honorary doctorate of laws by the University of Adelaide and, in a joint ceremony, he and Sir Samuel Griffith had conferred on them honorary doctorates of laws by the University of Queensland.¹⁹

In 1921, Bryce published his last major work, *Modern Democracies*, in which he devoted seven chapters to the history and functioning of Australian democracy. 'There is no such thing as a Typical Democracy', he then declared, 'for in every country physical conditions and inherited institutions so affect the political development of a nation as to give its government a distinctive character'. 'But if any country and its government were to be selected as showing the course which a self-governing people pursues free from all external influences and little trammelled by intellectual influences descending from the past, Australia would be that country'.²⁰ In a chapter which surveyed contemporary characteristics of Australian democracy, he acutely

¹³ James Bryce, *Studies in History and Jurisprudence* (Clarendon, 1901) vol 1, 482.

¹⁴ *Ibid* 535.

¹⁵ *Ibid* 536.

¹⁶ *Ibid* 545.

¹⁷ H A L Fisher, *James Bryce* (Macmillan, 1927) vol 2, 78.

¹⁸ 'Mr James Bryce Arrival in Melbourne Parliamentary Reception', *Bendigo Advertiser*, 12 July 1912, 6; 'Mr James Bryce Address on Imperial Unity', *The Argus*, 13 July 1912, 25.

¹⁹ *National Advocate*, 14 August 1912, 2.

²⁰ James Bryce, *Modern Democracies* (Macmillan, 1921) 166.

observed: that '[q]uestions regarding the distribution of political power' had by then long been settled, 'for universal suffrage obtain[ed] everywhere'; that '[q]uestions regarding the machinery of government and administration' remained, 'but receive[d] little attention from the people at large, and are discussed, less upon their merits, than as they affect party policies'; and that the 'matters which occup[ied] the mind of the nation' and which 'dominate[d] politics' were 'its material or economic interests – business, wages, employment, the development of the country's resources'.²¹ Demonstrating even further his sensitivity to our national manners, he immediately added:

There is a love of out-door life, favoured by the climate, and a passion for all kinds of 'sport' and competitions – cricket, football, and, above all, horse-racing – matters which overshadow political interests. A great cricket match is a more important event than a change of ministry.²²

The significance of Bryce to the *Australian Constitution* lies, however, less in the observations he made about democracy in the first two decades of the twentieth century than in what he contributed to the development of the *Constitution* in the last two decades of the nineteenth century, through similarly acute observations which he then published about government and manners in the United States.

II THE AMERICAN COMMONWEALTH

In 1870, Bryce and Dicey together visited the East Coast of the United States. They toured extensively, 'accomplished a good deal of thinking',²³ and forged a wide range of enduring friendships, including with Oliver Wendell Holmes and James Bradley Thayer. If that trip had not occurred, Dicey was later to tell Bryce, he would never have written his *Introduction to the Study of the Law of the Constitution*, which he first published in 1885.²⁴

In the case of Bryce, further and more extensive trips ensued, in 1880 and 1883. In them, Bryce deliberately trod in the footsteps of Alexis de Tocqueville, who had toured the United States half a century before and whose *Democracy in America*, published in 1835, had come to be recognised as a classic work in the emerging field of political science. Geographically and culturally, Bryce deliberately ranged further than de Tocqueville, convinced that de Tocqueville had failed adequately to understand and to explain the nature and functioning of American democracy.

The result was *The American Commonwealth*, which Bryce first published in three volumes in 1888 and which he dedicated to Dicey and to Thomas Erskine Holland, then Professor of International Law at Oxford. Volume 1 of *The American*

²¹ Ibid 244.

²² Ibid.

²³ Letter from Dicey to Bryce, 17 May 1912, quoted in Mark D Walters, 'Dicey on Writing the Law of the Constitution' (2012) 32(1) *Oxford Journal of Legal Studies* 21, 48.

²⁴ Letter from Dicey to Bryce dated 12 February 1907, quoted in Ions, above n 9, 79. Bryce reviewed the manuscript: Walters, above n 23, 29-30. The first two editions of Dicey's book, published in 1885 and 1886 respectively, were each entitled *Lectures Introductory to the Study of the Law of the Constitution*. The first edition is reproduced in J W F Allison (ed), *The Law of the Constitution A V Dicey* (Oxford University Press, 2013). The third edition, published in 1889, and subsequent editions, were entitled *Introduction to the Study of the Law of the Constitution*. All subsequent references in this paper are to the third edition.

Commonwealth described the national government, in respect of which Bryce explained that he deliberately avoided using the term 'United States'. That term, he evidently thought, was something of a misnomer. 'America', he said, was 'a Commonwealth of commonwealths'.²⁵ The national government was not a mere league of States; nor were the States mere subdivisions of the national government. The national government was 'itself a commonwealth as well as a union of commonwealths, because it claim[ed] directly the obedience of every citizen, and act[ed] immediately upon him through its courts and executive officers'.²⁶ Volume 2 of *The American Commonwealth* separately described the governments of what were then the 38 States, and described as well municipal government and the party system. Volume 3 went on to set out a more general explanation of the nature and means of manifestation of public opinion, included a number of specific illustrations and general reflections, and concluded by describing in some detail a range of social institutions which included the bar, the bench, railroads, Wall Street, the Universities, the influence of religion, the position of women, equality, and what Bryce called 'the temper of the West'.

The American Commonwealth was published to immediate critical acclaim on both sides of the Atlantic. It 'was reviewed in almost every distinguished journal and newspaper in the English-speaking world'.²⁷ Lord Acton, reviewing it in the *English Historical Review*, ventured to suggest that the distinctive impact of the book was 'its power of impressing American readers'; it was written 'with so much familiarity and feeling - the national, political, social sympathy [was] so spontaneous and sincere - as to carry a very large measure ... of quiet reproach', 'sweeten[ing] and lubricat[ing] a medicine such as no traveller since Hippocrates has administered to contrite natives'.²⁸ Impress Americans it did. Theodore Roosevelt wrote to Bryce saying that he preferred it to de Tocqueville.²⁹ Woodrow Wilson, reviewing it in *Political Science Quarterly*, said it was 'a noble work possessing in high perfection almost every element that should make students of comparative politics esteem it invaluable'.³⁰ Gladstone wrote to Bryce perceptively referring to it as 'an event in the history of the United States'.³¹

American authorship was in those days required to ensure American copyright and, as a consequence, each volume of *The American Commonwealth* contained a small contribution from an American collaborator. The contribution of one of those American collaborators, detailing government corruption in New York City, very quickly led to a threat of defamation proceedings.³² The threat caused Bryce to produce, out of caution, a slightly revised second edition, which he published in two volumes in 1889. The defamation proceedings never materialised, and the overall result of producing a second edition appears only to have increased sales. Bryce produced a revised third edition in 1893. Bryce went on to produce later editions, but the next was not until 1910. Such differences as existed between the first three editions are of no present significance.³³ By 1910, over 200,000 copies of *The American*

²⁵ James Bryce, *The American Commonwealth* (Macmillan, 1st ed, 1888) vol 1, 17.

²⁶ *Ibid* 18.

²⁷ Ions, above n 24, 129.

²⁸ James Bryce, *The American Commonwealth* (Liberty Fund, 3rd ed, 1995) vol 2, 1585.

²⁹ Ions, above n 24, 130.

³⁰ Bryce, *The American Commonwealth*, above n 28, 1584.

³¹ Ions, above n 24, 129.

³² *Ibid* 136.

³³ Save where otherwise stated, all quotations are taken from the first edition.

Commonwealth had been sold in the United States alone.³⁴ The population being just over 92 million at that time,³⁵ one copy had by then been sold for every 460 Americans.

In Australia, the publication of the first edition of *The American Commonwealth* was greeted with laudatory reviews in each of the *Argus*³⁶ and the *Sydney Morning Herald*.³⁷ The timing of the publication – in 1888 – was fortuitous. As historian Professor J A La Nauze was to put it, the publication occurred 'just at the right time for the Australians who would soon be earnestly seeking to inform themselves about the working in practice of the greatest example of a federation'.³⁸

At the Australasian Federation Conference in 1890, Alfred Deakin, in a speech to delegates, referred to *The American Commonwealth* as a 'monumental work' in which were 'summed up ... almost all the lessons which the political student could hope to cull from an exhaustive, impartial, and truly critical examination of the institutions of that country'.³⁹ As La Nauze described it, Deakin 'was announcing the compulsory reading of the framers of the Constitution'.⁴⁰ In the subsequent conventions of 1891 and of 1897 and 1898, *The American Commonwealth* was, in the words of La Nauze, 'quoted or referred to more than any other single work; never criticized, it was regarded with the same awe, mingled with reverence, as the Bible would have been in an assembly of churchmen'.⁴¹ '[T]he cleverest and the dullest of the men', as La Nauze put it, 'would quote Bryce to add weight to their words'.⁴² Arthur Rutledge, a delegate from Queensland, probably fell within the second of those categories. He 'dar[ed] to say', during debate in the National Australasian Convention of 1891, that 'honourable gentlemen have nearly all of them carefully read the admirable work of Mr Bryce'.⁴³

The term 'Commonwealth of Australia' emerged in the draft Bill annexed to the report of the Constitutional Committee of the National Australasian Convention in Sydney in March 1891.⁴⁴ It was approved by the Convention after some slight debate,⁴⁵ and thereafter 'passed without much notice into the popular discussion of federation'.⁴⁶ There was no public record of the deliberations of the Constitutional Committee. Contemporary commentary acknowledged that the term was adopted at the suggestion of Sir Henry Parkes and that it was associated with the title of Bryce's

³⁴ Tulloch, above n 6, 178.

³⁵ United States Census Bureau, *1910 Fast Facts* <http://www.census.gov/history/www/through_the_decades/fast_facts/1910_fast_facts.html>.

³⁶ 'The February Magazines No 11', *The Argus*, 30 March 1889, 4.

³⁷ *The Sydney Morning Herald*, 16 March 1889, 9. See also *Newcastle Morning Herald and Miners' Advocate*, 16 May 1889, 3.

³⁸ J A La Nauze, *The Making of the Australian Constitution* (Melbourne University Press, 1972) 19.

³⁹ *Official Record of the Proceedings of the Australasian Federation Conference*, Melbourne, 10 February 1890, 89 (Alfred Deakin).

⁴⁰ La Nauze, above n 38, 18.

⁴¹ *Ibid* 273.

⁴² *Ibid* 19.

⁴³ *Official Record of the Debates of the National Federal Convention*, Sydney, 9 March 1891, 147 (Arthur Rutledge).

⁴⁴ John M Williams, *The Australian Constitution: A Documentary History* (Melbourne University Press, 2005) 316–317.

⁴⁵ *Official Record of the Debates of the National Federal Convention*, Sydney, 9 April 1891, 550–557.

⁴⁶ W Harrison Moore, *The Constitution of the Commonwealth of Australia* (Maxwell, 2nd ed, 1910) 66.

book.⁴⁷ George Barton, brother of Edmund and author of notes on the draft *Bill to Constitute the Commonwealth of Australia* published by order of Parkes in June 1891, wrote to Bryce saying that *The American Commonwealth* was 'in great vogue among Australian politicians' and that he 'fanc[ied] that the title 'Commonwealth' had been adopted from [its] pages'.⁴⁸ Parkes sent Bryce a copy of the proceedings and debates of the Convention,⁴⁹ and in August 1891 Parkes chose to publish Bryce's courteous and encouraging letter in reply.⁵⁰

Speaking on the seventh day of the National Australasian Convention in Adelaide in 1897, Deakin referred to Bryce as 'an authority to whom we have often referred' and 'to whom our indebtedness is almost incalculable'.⁵¹ In 1898, Edwin Blackmore, Clerk of the Australasian Federal Convention of 1897 and 1898 and later to become the first Clerk of the Australian Senate, wrote to Bryce telling him that *The American Commonwealth* had been kept on 'the Table' throughout each of the sessions in Adelaide, Sydney and Melbourne.⁵²

III BRYCE'S PERSPECTIVE

In a lecture delivered at the University of Melbourne in 1935, Sir Owen Dixon said of the Constitution of the United States that the framers of the *Australian Constitution* 'could not escape its fascination' and that '[i]ts contemplation dampened the smouldering fires of their originality'.⁵³ The reality which emerges from an examination of the Convention Debates of the 1890s was closer to that stated by Dixon's teacher, Sir William Harrison Moore, in his contribution to *The Cambridge History of the British Empire* published in 1933. The framers of the *Australian Constitution*, Harrison Moore then said, looked to both the United States and Canada and 'deliberately preferred the United States system, not from any aspiration for purity in federal theory, but from practical exigency and practical expediency'.⁵⁴ In an earlier essay entitled 'The Political System of Australia', published in 1920 in a collection of essays on Australian democracy dedicated to Bryce, Harrison Moore referred to the framers as 'men of political experience' for whom 'it was natural to build on existing foundations'.⁵⁵ Based on his own reading of the Convention Debates, Bryce himself wrote of them in his *Studies in History and Jurisprudence*, published in 1901, as having

⁴⁷ Quick & Garran, *The Annotated Constitution of the Australian Commonwealth* (Angus and Robertson, 1901) 311–314; Sir W Harrison Moore, *The Constitution of the Commonwealth of Australia* (Maxwell, 2nd ed, 1910) 66.

⁴⁸ John M Williams, 'Bryce, Tocqueville, Clark and Australian Federation' (speech delivered at Manning Clark House, Canberra, 1 January 1999).

⁴⁹ La Nauze, above n 38, 87.

⁵⁰ *Bowral Free Press and Berrima District Intelligencer*, 12 August 1891.

⁵¹ *Official Record of the Debates of the Australasian Federal Convention*, Adelaide, 30 March 1897, 288.

⁵² La Nauze, above n 38, 273.

⁵³ Sir Owen Dixon, 'The Law and the Constitution', 14 March 1935, reprinted in Sir Owen Dixon, *Jesting Pilate* (Lawbook, 1st ed, 1965) 44.

⁵⁴ Sir W Harrison Moore, 'The Constitution and its working' in J H Rose, A P Newton and E A Benians (eds), *The Cambridge History of the British Empire* (Cambridge University Press, 1929–1959) vol 7, 456.

⁵⁵ Sir W Harrison Moore, 'The Political System of Australia' in Meredith Atkinson (ed), *Australia: Economic and Political Studies* (Macmillan, 1920) 57, 59.

'used the experience of the mother country and of their predecessors in federation-making ... in no slavish spirit, choosing from the doctrines of England and from the rules of America, Switzerland, and Canada those which seemed best fitted to the special conditions of their own country', 'guided by a clear practical sense' and 'animated by a spirit of reasonable compromise'.⁵⁶

A close reading of the 592 pages of Volume 1 of *The American Commonwealth* readily reveals why it would have had significance to the Australian statesmen engaged in that essentially practical endeavour of framing a distinctly *Australian Constitution*. As Bryce explained in his introduction to *The American Commonwealth*, while it might have seemed natural for him to have taken de Tocqueville's book as a model for his own, he had chosen not to do so. What emerges from the introduction is that Bryce had two main criticisms of de Tocqueville. One was that, as a Frenchman who had never visited England, de Tocqueville had an insufficient understanding of the British political system. The other was that de Tocqueville engaged in what would now be labelled 'top down' reasoning. De Tocqueville was theory-driven, using factual observations less to describe the actual operation of the American political system than to illustrate arguments which, although de Tocqueville sought to present them in terms of universal democratic principles, were in truth a reflection of what were, during his own time (the time of Louis-Philippe) current French political controversies. Bryce spelt out in his introduction that he, in contrast, had 'striven to avoid the temptations of the deductive method, and to present simply the facts of the case ... letting them speak for themselves rather than pressing upon the reader [his] own conclusions'.⁵⁷ Although Bryce wrote half a century after de Tocqueville, the clear implication with which the reader of *The American Commonwealth* is left is that, had he sought to describe the facts in the same balanced way, and had he more fully understood the English political system, de Tocqueville would not have portrayed the American federal system as the exceptional product of enlightenment philosophy. De Tocqueville would have recognised it in the 1830s, as Bryce portrayed it in the 1880s, as a late eighteenth century adaptation of an essentially British political and legal tradition which stretched back through the *Bill of Rights* of the seventeenth century to encompass the *Magna Carta* of the early thirteenth century.

The *United States Constitution*, as expounded by Bryce, was not revolutionary but post-revolutionary. It was the product of its framers' attempt in 1787 to return to a constitutional normalcy which had been disrupted by events in and after 1776, including the adoption of a somewhat ineffectual precursor to the *Constitution*, the Articles of Confederation, which were settled by the Continental Congress in 1777 and officially came into force in 1781. It was the work of lawyers and of colonial politicians, adapting for the purposes of the new republic colonial institutions which had been developed over the previous two centuries, the practical working of which they were well familiar. The framers of the *United States Constitution* were men who 'held England to be the freest and best-governed country in the world, but [who] were resolved to avoid the weak points which had enabled King George III to play the tyrant'.⁵⁸ They built upon what they knew of English institutions, introducing such

⁵⁶ Bryce, *Studies in History and Jurisprudence*, above n 13, 482.

⁵⁷ Bryce, *The American Commonwealth* above n 25, 5. Bryce gave a more extensive critique of de Tocqueville in his essay entitled 'Hamilton and Tocqueville' in Bryce, *Studies in History and Jurisprudence*, above n 13, 381–429. See also: Seaman Jr, above n 5, 143–145.

⁵⁸ Bryce, *The American Commonwealth*, above n 25, 42.

innovations as they thought best to meet the peculiarities of their particular circumstances. So, they created 'an executive magistrate, the President', as 'an enlarged copy of the State governor, or to put the same thing differently, a reduced and improved copy of the English King';⁵⁹ even the title 'President' had been used in place of 'Governor' in four of the original 13 States.⁶⁰ So too, they created 'a legislature of two Houses, Congress, on the model of the two Houses of their State legislatures, and of the British Parliament';⁶¹ even the name 'Senate' had been used for the upper house in seven States, and the name 'House of Representatives' had been used for the lower house in five States.⁶² The provision they made for money bills to originate only in the House of Representatives they took 'almost word for word from the Constitutions of Massachusetts and New Hampshire'.⁶³ 'And following the precedent of the British judges, [who were] irremovable except by the Crown and Parliament combined, they created a judiciary appointed for life, and irremovable save by impeachment'.⁶⁴ Even '[t]he subjection of all the ordinary authorities and organs of government to a supreme instrument expressing the will of the sovereign people, and capable of being altered by them only', which Bryce acknowledged was 'usually deemed the most remarkable novelty of the American system', was 'merely an application to the wider sphere of the nation, of a plan approved by the experience of the several States'.⁶⁵ 'They already had such fundamental instrument in the charters of the colonies, which had passed into the constitutions of the several States', Bryce explained, 'and they would certainly have followed, in creating their national constitution, a precedent which they deemed so precious'.⁶⁶

As to the nature of the *United States Constitution* and its contemporary operation, Bryce's explanation is best summarised by highlighting its similarities with, and differences from, Dicey's now much better known explanation of the nature and contemporary operation of the constitution of the United Kingdom. Dicey, like Bryce, adopted as a basic conceptual distinction that between a 'rigid constitution' and a 'flexible constitution'. Indeed, Dicey acknowledged that the distinction had originally been suggested to him by Bryce.⁶⁷ The distinctive mark of a rigid constitution was its superiority in law to an ordinary statute. The distinctive mark of a flexible constitution was its susceptibility to change by ordinary statute. To Dicey and to Bryce, the *United States Constitution* was the prime modern example of a rigid constitution and the constitution of the United Kingdom was the prime modern example of a flexible constitution.⁶⁸

59 Ibid 43, 49.

60 Ibid 547.

61 Ibid 43.

62 Ibid 543.

63 Ibid 546.

64 Ibid 43.

65 Ibid 45–46.

66 Ibid 45.

67 A V Dicey, *Introduction to the Study of the Law of the Constitution* (Macmillan, 3rd ed, 1889) 119. Bryce gave two lectures on the topic of 'Flexible and Rigid Constitutions' in 1884. They are reproduced in a revised form in James Bryce, *Studies in History and Jurisprudence* (Clarendon, 1901) vol 1, 145–254.

68 Bryce, *The American Commonwealth*, above n 25, 477.

But Dicey, unlike Bryce, was not in the business of factual observation. He was in the business of conceptual simplification. He was the self-styled 'prophet of the obvious'.⁶⁹ Taking sweeping generalisations of de Tocqueville as his starting point, in his *Introduction to the Study of the Law of the Constitution*, Dicey made sweeping generalisations of his own. He famously explained the contemporary operation of the *flexible* constitution of the United Kingdom in terms of the outworking of two sublime and stable, if not timeless, mutually reinforcing legal principles – 'parliamentary supremacy' and the 'rule of law'⁷⁰ – supplemented by conventions which belonged not to the realm of law but to the realm of constitutional or political ethics. Dicey was not forever to ignore the changing nature of the constitution of the United Kingdom or the democratic influences on its development and functioning. He was to go on to discuss them at length in his *Lectures on the Relation between Law and Public Opinion in England during the Nineteenth Century* which he delivered at Harvard Law School in 1898 and which, as published in 1905, he regarded as the 'best thing' he had written and as 'much more mature than *Law of the Constitution*',⁷¹ but which are now largely forgotten.

In *The American Commonwealth*, Bryce, in marked contrast to Dicey, explained the contemporary operation of the *rigid* American federal constitution not only from the bottom up but, from beginning to end, in terms of the dynamic interaction of disparate governmental institutions, each responsive in differing ways to public opinion. The institutions themselves were, as Bryce described them, imperfect; as evidenced by an entire chapter devoted to the topic of why great men did not become President, and another describing from first-hand observation the low quality of debate in the House of Representatives. Their interaction was, in Bryce's description, similarly imperfect: the different ways in which the various institutions reacted to public opinion led often to conflicts and sometimes to deadlocks, which were then required to be resolved within and between the institutions involved under the influence of public opinion. The system overall involved 'excessive friction' and resulted in 'a waste of force in the strife of various bodies and persons created to check and balance one another', together with a 'want of executive unity, and therefore a possible want of executive vigour'.⁷² The system was characterised by a 'discontinuity of Congressional policy', a 'want of adequate control over officials', a 'want of any authority charged to secure the passing of such legislation as the country need[ed]' and 'no true leadership in political action'.⁷³ Yet the system, for all its inherent defects, did work. In the end, it was the 'current of the popular will', forcing itself through 'many small channels' which '[bound] all the parts of the complicated system together and [gave] them whatever unity of aim and action they possess[ed]'.⁷⁴

Yet '[a]ll governments are faulty', Bryce soothingly observed, 'and an equally minute analysis of the constitutions of England, or France, or Germany would disclose

⁶⁹ Richard A Cosgrove, 'Dicey, Albert Venn' in *Oxford Dictionary of National Biography* (Oxford University Press, 2004).

⁷⁰ As to which, see: H W Arndt, 'The Origins of Dicey's Concept of the Rule of Law' (1957) 31 *Australian Law Journal* 117.

⁷¹ Richard A Cosgrove, *The Rule of Law: Albert Venn Dicey, Victorian Jurist* (University of North Carolina Press, 1980) 193.

⁷² Bryce, *The American Commonwealth*, above n 25, 402.

⁷³ *Ibid* 400-401.

⁷⁴ James Bryce, *The American Commonwealth* (Macmillan, 1st ed, 1888) vol 3, 30.

mischiefs as serious, relative to the problems with which those states have had to deal, as those ... noted in the American system'⁷⁵. Bryce continued:

It must never be forgotten that ... [w]hen [the Abbey] Sieyes was asked what he had done during the Reign of Terror, he answered, 'I lived'. The Constitution as a whole has stood and stands unshaken. The scales of power have continued to hang fairly even. The President has not corrupted and enslaved Congress: Congress has not paralysed and cowed the President. ... Neither the legislature nor the executive has for a moment threatened the liberties of the people. The States have not broken up the Union, and the Union has not absorbed the States.⁷⁶

The attraction of Bryce to the framers of the *Australian Constitution* is not difficult to appreciate. Bryce 'offered an essentially anglicized account of the [United States] Constitution'.⁷⁷ Bryce showed that it was neither foreign nor revolutionary; at its core it was British. To adopt the often-repeated metaphor⁷⁸ coined by Parkes,⁷⁹ Bryce showed that the 'crimson thread of kinship' which linked the Australasian colonies extended also to America. American institutions, as explained by Bryce, became not only accessible but vaguely familiar. The framers of the *Australian Constitution* also could not help but to take some encouragement from Bryce's portrayal of the *American Constitution*, not as the timeless and perfect creation of philosophers and much less of demigods, but as the flawed but yet still functioning creation of people quite like themselves: practical lawyers and experienced colonial politicians who a century before had adapted what they knew to meet the circumstances which then confronted them.

The utility of Bryce to the framers of the *Australian Constitution* lay in the fact that *The American Commonwealth* was not a work of philosophy or history, and that it was not merely a study of the blueprint of the *American Constitution*, but was instead a warts-and-all description of the contemporary practical operation of the *United States Constitution*. The book presented an honest assessment of what worked and what didn't. As Woodrow Wilson had put it in reviewing the first edition, Bryce had succeeded in portraying 'the institutions of the United States [not] as experiments in the application of theory, but as quite normal historical phenomena to be looked at, whether for purposes of criticism or merely for purposes of description, in the practical, everyday light of comparative politics'.⁸⁰ Bryce's unquestioned knowledge and integrity, the detail of his exposition, the ease of his prose, the evident balance of his presentation, and his lack of overt editorialisation, meant that *The American Commonwealth* was able to be treated by the framers of the *Australian Constitution* as an authoritative repository of objective information: profitably to be mined for the purpose of examining any important topic on which there was something to be gained from a consideration of the experience of the United States, and available to be

⁷⁵ Bryce, *The American Commonwealth*, above n 25, 409.

⁷⁶ Ibid 413–414.

⁷⁷ John S F Wright, 'Anglicizing the United States Constitution: James Bryce's Contribution to Australian Federalism' (2001) 31 *Publius: The Journal of Federalism* 107, 112. See also: Graham Maddox, 'James Bryce: Englishness and Federalism in America and Australia' (2004) 34 *Publius: The Journal of Federalism* 1.

⁷⁸ Eg *Official Record of the Proceedings of the Australasian Federation Conference Melbourne*, 10 February 1890, 79.

⁷⁹ Parkes, *Federal Government of Australasia: speeches delivered on various occasions* (Turner and Henderson, 1890) 75.

⁸⁰ Bryce, *The American Commonwealth*, above n 28, 1571.

deployed by any side in debate if and when any topic of that nature became contentious.

IV RESPONSIBLE GOVERNMENT

One of the most difficult and contentious topics with which the framers of the *Australian Constitution* had to deal was how to reconcile a federal bicameral legislature with responsible executive government. To borrow from the language of the draft resolution introduced by Parkes at the beginning of the National Australasian Convention in Sydney in 1891, the critical problem was how, if at all, it might prove possible to frame a federal constitution so as to establish: on the one hand, a Parliament, consisting of a Senate composed of members in equal numbers from each State and a House of Representatives composed of members elected by districts on a population basis; and, on the other hand, an executive consisting of a Governor-General and ministerial advisers whose term of office was to depend on them having the confidence of the support of a majority of the House of Representatives.⁸¹

Bryce explained in *The American Commonwealth* that responsible government had not been considered as an option by the framers of the *United States Constitution* for the very simple reason that they did not understand it. Responsible government had not existed in the American colonies and, although it was in the eighteenth century beginning to develop in the United Kingdom, that development was by 1787 'so immature that its true nature had not been perceived';⁸² indeed it 'could not be deemed to have reached its maturity till the power of the people at large had been established by the Reform Act of 1832'.⁸³ The framers of the *United States Constitution* did look for an understanding of the government of the United Kingdom to Sir William Blackstone's *Commentaries on the Laws of England*, first published in 1765, and to Baron de Montesquieu's *Spirit of the Laws*, published in 1748. But Blackstone's *Commentaries* was already well out of date in what it said about executive government; it contained a description of 'the royal prerogative more appropriate to the days of the Stuarts than to those in which he wrote'.⁸⁴ And de Montesquieu's *Spirit of the Laws* was marred by the unfortunate, although perfectly understandable, error of perception 'that a foreign observer should underrate the executive character of the British Parliament and overrate the executive authority of the monarch as a person'.⁸⁵

Bryce explained:

There is not a word in Blackstone, much less in Montesquieu, as to the duty of ministers to resign at the bidding of the House of Commons, nor anything to indicate that the whole life of the House of Commons was destined to centre in the leadership of ministers. Whether the [framers of the United States Constitution] would have imitated the cabinet system had it been proposed to them as a model may be doubted. ... But as the idea never presented itself, we cannot say that it was rejected, nor cite the course they took as an expression of their judgment against the system under which England and her colonies have so far prospered.⁸⁶

⁸¹ *Official Record of the Debates of the National Federal Convention*, Sydney 1891 at 23.

⁸² Bryce, *The American Commonwealth*, above n 25, 372.

⁸³ *Ibid* 381.

⁸⁴ *Ibid* 374. See also 35-36.

⁸⁵ *Ibid* 375-376.

⁸⁶ *Ibid* 380-381.

The fact that the framers of the *United States Constitution* had not embraced responsible government, however, had the happy consequence that the frequent conflicts between the Senate and the House of Representatives 'rarely cause[d] alarm outside Washington, because the country, remembering previous instances, [felt] sure they [would] be adjusted, and [knew] that either House would yield were it unmistakably condemned by public opinion' while '[t]he executive government [went] on undisturbed'.⁸⁷ It was difficult for Bryce to see how those conflicts could be tolerated were the President, as head of the executive branch of government, not to be wholly independent of Congress. He commented that '[t]he United States is the only great country in the world in which the two Houses are really equal and co-ordinate' and that '[s]uch a system could hardly work, and therefore could not last, if the executive were the creature of either or of both, nor unless both were in close touch with the sovereign people'.⁸⁸

Could the opinion of the Australian people as felt by their parliamentary representatives alone be relied on to resolve deadlocks between a federally constituted Senate and a popularly constituted House of Representatives in circumstances where the executive government of the Commonwealth of Australia was to depend for its continuing existence on maintaining the confidence of the House of Representatives? Or was some formal mechanism required? The topic was the subject of a great deal of debate in the Australasian Federal Convention of 1897 and 1898, ultimately resulting in the adoption of the mechanism for a double dissolution and subsequent joint sitting in s 57 of the *Constitution*.

Speaking in 1897 to the need for some formal mechanism to resolve deadlocks between a federally constituted Senate and a popularly constituted House of Representatives, Isaac Isaacs said this:

We have been told by speaker after speaker, who evidently had forgotten his 'Bryce', that collisions did not occur in the American legislature. Turn to that author, and you will find that collisions are of frequent occurrence. It is true that he points out that no great block occurs in administration ... but he adds that if the same collisions occurred in countries having responsible government, the consequence would be much more serious. He points out in words of warning, as it seems to me, that it is because the executive government is removed from the legislature that these collisions, such as they are, take place without overturning the state. We are bound to take advantage of all that history, and that writers in their observations upon history afford us, in order to frame for ourselves to the advantage of our constituents, if not to the honour of ourselves, a constitution that should be as free as possible from the disadvantages we have seen around us.⁸⁹

The double dissolution and joint sitting mechanism which the framers of the *Australian Constitution* ultimately adopted after much further debate was a particularly Brycean solution to the problem Bryce's writing had highlighted: it was a mechanism which they did not fashion wholly anew, but which they adapted from a deadlock mechanism which had been introduced into the Constitution of South Australia by amendment in 1881.⁹⁰ Commenting in 1901, Bryce himself described s 57 of the

⁸⁷ Ibid 249

⁸⁸ Ibid 251.

⁸⁹ *Official Record of the Debates of the Australasian Federal Convention*, Sydney, 16 September 1897, 663–664 (Isaac Isaacs).

⁹⁰ Section 16 of the *Constitution Act Further Amendment Act 1881* (SA). See generally J E

Constitution as 'ingenious'; although it involved 'the expenditure of a good deal of time and the worry of a double general election', he then said that it 'may prove to be the best method of solving a problem which neither Britain nor the United States has yet attempted to solve, and which certainly need[ed] a solution.'⁹¹

V JUDICIAL REVIEW

What Bryce had to say in *The American Commonwealth* on the topic of the nature and functioning of judicial review of legislative action under the *United States Constitution* would be of interest even if it had had no influence on the framers of the *Australian Constitution*. It is a subject to which he devoted about 150 pages. What he there said is, again, conveniently summarised by pointing to its similarities with and differences from what have come to be the more familiar observations of Dicey in his *Introduction to the Study of the Law of the Constitution*.

Unlike Dicey, whose references to federalism were made in the context of highlighting the rigidity of the constitution of the United States so as to emphasise by juxtaposition the flexibility of the constitution of the United Kingdom, Bryce did not suggest that judicial review of legislative action was intrinsic to the existence of a federal system. The common supposition of Europeans that judicial review was particular and essential to a federal system, he said, was a mistake.⁹² He specifically pointed to the *Swiss Constitution*, under which 'the Federal Court is bound to enforce every law passed by the Federal legislature, even if it violate the Constitution'.⁹³ The judicial review of legislative action which occurred in the United States was the consequence not of the *federal* nature of its *Constitution* but of the *rigid* nature of its *Constitution* operating, as higher law, within a common law system in which it had always fallen to courts conclusively to declare and apply the law so as to determine disputes about private rights, if and when those disputes might arise.

In an explanation of judicial review of legislative action under the *United States Constitution*, which he noted 'coincide[d] in most points' with that of Dicey,⁹⁴ Bryce identified the underlying principle to be nothing more or less than 'the principle of the English common law' which had been inherited by the colonies that became the United States 'that an act done by any official person or law-making body in excess of his or her legal competence is simply void'.⁹⁵ Properly understood in that way, there was no 'mystery' or 'novelty' about the nature of judicial review at all;⁹⁶ it was 'an application of old and familiar legal doctrines',⁹⁷ 'the natural outgrowth of common law doctrines

Richardson, 'Federal Deadlocks: Origin and Operation of Section 57' (1962) 1 *University of Tasmania Law Review* 706. As to the origin of the South Australian provision, see also Gordon D Combe, *Responsible Government in South Australia* (Adelaide Government Printer, 1957) 114-115.

⁹¹ James Bryce, *Studies in History and Jurisprudence* (Clarendon, 1901) vol 1, 516-517. Section 57 was itself to become a model for deadlock mechanisms adopted in 1909 in South Africa, in 1914 in New Zealand, and in 1935 in India: W Redmond Curtis, 'The Origin and Genesis of the Deadlock Clause in the Australian Constitution' (1945) 60 *Political Science Quarterly* 412.

⁹² Bryce, *The American Commonwealth*, above n 25, 346.

⁹³ *Ibid* 347.

⁹⁴ *Ibid* 327.

⁹⁵ *Ibid* 38. See also 334.

⁹⁶ *Ibid* 323.

⁹⁷ *Ibid* 341.

and of the previous history of the colonies and States'.⁹⁸ To talk of the Supreme Court of the United States, as people sometimes did, as 'the guardian of the Constitution' was therefore to 'mean nothing more than it is the final court of appeal, before which suits involving constitutional questions may be brought by the parties for decision'.⁹⁹

That being the 'true nature' of the constitutional function exercised by the judiciary in the United States, the critical importance of the performance of that function to the operation of the *United States Constitution*, according to Bryce, arose from two facts.¹⁰⁰ One was that, as it 'cannot easily be changed, a bad decision on its meaning, ie a decision which the general opinion of the profession condemns, may go uncorrected'.¹⁰¹ The other was that the considerations affecting its interpretation were 'more numerous than in the case of ordinary statutes, more delicate, larger in their reach and scope', sometimes needing 'the exercise not merely of legal acumen and judicial fairness, but of a comprehension of the nature and methods of government which one does not demand from the European judge who walks in the narrow path traced for him by ordinary statutes'.¹⁰²

Bryce, like Dicey, emphasised that federalism in the United States had in practice meant what Dicey called 'legalism – the predominance of the judiciary in the constitution – the prevalence of a spirit of legality among the people'.¹⁰³ But Bryce, unlike Dicey, went to considerable lengths to explain what American legalism had entailed. The Supreme Court, Bryce said more than once, was 'not so much a third authority in the government as the living voice of the Constitution',¹⁰⁴ in the sense that it was 'the unfold of the mind of the people whose will stands expressed in that supreme instrument'.¹⁰⁵ The Supreme Court needed to be 'stable even as the Constitution is stable',¹⁰⁶ needed to be resistant to 'transitory impulses',¹⁰⁷ yet inevitably it felt to some extent the 'touch of public opinion',¹⁰⁸ recognising whether consciously or unconsciously that '[t]o yield a little may be prudent, for the tree that cannot bend to the blast may be broken'.¹⁰⁹ It occasionally needed to 'choose between the evil of unsettling the law by reversing, and the evil of perpetuating bad law by following, a former decision',¹¹⁰ for 'it must be remembered that even the constitutions we call rigid must make their choice between being bent or being broken' and '[t]he Americans have more than once bent their Constitution in order that they might not be

⁹⁸ Ibid 406.

⁹⁹ Ibid 337.

¹⁰⁰ Ibid 338.

¹⁰¹ Ibid.

¹⁰² Ibid 339.

¹⁰³ A V Dicey, *Introduction to the Study of the Law of the Constitution* (Macmillan, 3rd ed, 1889) 163. Compare James Bryce, *The American Commonwealth* (Macmillan, 1st ed, 1888) vol 1, 408, vol 2, 537.

¹⁰⁴ Bryce, *The American Commonwealth*, above n 25, 473. See also 363.

¹⁰⁵ Ibid 473. Bryce's description was quoted by Richard Chaffey Baker in his *Manual of Reference to Authorities for the Use of the Members of the National Australasian Convention* (W K Thomas & Co, 1891) 126-127.

¹⁰⁶ Bryce, *The American Commonwealth*, above n 25, 363.

¹⁰⁷ Ibid 363.

¹⁰⁸ Ibid 364.

¹⁰⁹ Ibid.

¹¹⁰ Ibid.

forced to break it'.¹¹¹

Bryce described the contemporary practical operation of the Supreme Court with the acuity of an ethnographer:

The Supreme court sits at Washington from October till July in every year. The presence of six judges is required to pronounce a decision, a rule which, by preventing the division of the court into two or more branches, retards the despatch of business, though it has the advantage of securing a thorough consideration of every case. The sittings are held in the Capitol, in the chamber formerly occupied by the Senate, and the justices wear black gowns, being not merely the only public officers, but the only non-ecclesiastical persons of any kind whatever within the bounds of the United States who use any official dress. Every case is discussed by the whole body twice over, once to ascertain the opinion of the majority, which is then directed to be set forth in a written judgment; then again when that written judgment, which one of the judges has prepared, is submitted for criticism and adoption as the judgment of the court.¹¹²

Bryce went on to describe in broad terms the course of decision-making by the Supreme Court over the century of its existence, highlighting the most important and most contentious of its constitutional rulings. They included *Chisholm v Georgia* (decided in 1829),¹¹³ in respect of which Bryce quoted the response of President Andrew Jackson that 'John Marshall has pronounced his judgment; let him enforce it if he can'.¹¹⁴ They included the infamous *Dred Scott* decision in 1857,¹¹⁵ which Bryce explained to have 'worked with tremendous force on politics'¹¹⁶ and to have 'excited the strongest outbreak of displeasure yet witnessed'.¹¹⁷ They included the *Legal Tender Cases* in which the Supreme Court, by a narrow majority after changes in its composition, overruled in 1871¹¹⁸ and 1884¹¹⁹ its own earlier decision given in 1870¹²⁰ so as to hold valid an Act of Congress making government paper a legal tender for debts.¹²¹

By way of general observation, Bryce explained that the Supreme Court had 'changed its colour, ie its temper and tendencies, from time to time, according to the political proclivities of the men who composed it'.¹²² It changed 'very slowly, because the vacancies in a small body happen rarely, and its composition therefore often represent[ed] the predominance of [the] past and not of the presently ruling party'.¹²³ So, he observed:

From 1789 down till the death of Chief-Justice Marshall in 1835 its tendency was to the extension of the powers of the Federal government and therewith of its own jurisdiction ... From 1835 till the War of Secession ... [w]ithout actually abandoning the positions of the previous period, the court, during these years when Chief-Justice Taney presided

111 Ibid 515.

112 Ibid 309.

113 2 US 419 (1793).

114 Bryce, *The American Commonwealth*, above n 25, 358.

115 60 US 393 (1857).

116 Bryce, *The American Commonwealth*, above n 25, 350.

117 Ibid 358.

118 *Knox v Lee; Parker v Davis*, 79 US 457 (1871).

119 *Juilliard v Greenman*, 110 US 421 (1884).

120 *Hepburn v Griswold*, 75 US 603 (1870).

121 Bryce, *The American Commonwealth*, above n 25, 359–360.

122 Ibid 365.

123 Ibid.

over it, leant against any further extension of Federal power or of its own jurisdiction. During and after the war, ... [c]entralizing ideas were again powerful: the vast war powers asserted by Congress were in most instances supported by judicial decision, the rights of States while maintained ... as against private persons or bodies, were for a time regarded with less favour whenever they seemed to conflict with those of the Federal government.¹²⁴

Bryce said of the judges who comprised the Supreme Court in each of the three periods to which he referred, that '[t]heir action flowed naturally from the habits of thought they had formed before their accession to the bench, and from the sympathy they could not help but feel with the doctrines on whose behalf they had contended'.¹²⁵ He added:

Even on the proverbially upright and impartial bench of England the same tendencies may be discerned. There are constitutional questions, and questions touching what may be called the policy of the law, which would be decided differently by one English judge or by another, not from any conscious wish to favour a party or a class, but because the views which a man holds as a citizen cannot fail to colour his judgment even on legal points.¹²⁶

Bryce went on to explain that, together with formal amendment and usage, constitutional adjudication was one of the three means by which '[t]he Constitution of the United States, rigid though it be, [had] changed, [had] developed'.¹²⁷ Using terminology slightly differently from how it has since come to be used in Australia, and drawing (perhaps for the first time) a distinction which has now come often to be drawn in academic writing in the United States,¹²⁸ he observed that significant constitutional questions sometimes arose as 'questions of Interpretation in the strict sense of the term, ie as questions of the meaning of a term or phrase which is ... ambiguous', but that they sometimes arose rather as 'questions to which we may apply the name of Construction', being questions as to which the *Constitution* had not directly spoken but as to which the *Constitution* had 'nevertheless to be applied to [their] solution[s]'.¹²⁹

Along with almost every other commentator on the *United States Constitution*, before or since, Bryce reserved his highest praise for Chief Justice John Marshall. So much had the 'outlines of the Constitution' been 'filled up by interpretation and construction', and so much had the most important of that work been done by Marshall in the early part of the nineteenth century, that it was 'scarcely an exaggeration to call him ... a second maker of the Constitution'.¹³⁰ His judgments, said Bryce, 'for their philosophical breadth, the luminous exactness of their reasoning, and the fine political sense which pervades them', had rarely been matched and had never been surpassed in modern Europe or in ancient Rome.¹³¹ Of the *United States Constitution*, Bryce opined that '[t]hat admirable flexibility and capacity for growth

¹²⁴ Ibid 365-366.

¹²⁵ Ibid 366.

¹²⁶ Ibid.

¹²⁷ Ibid 479.

¹²⁸ See, eg, Lawrence B Solum, 'The Interpretation-Construction Distinction' (2010) 27 *Constitutional Commentary* 95.

¹²⁹ Bryce, *The American Commonwealth*, above n 25, 497-498.

¹³⁰ Ibid 507.

¹³¹ Ibid 508.

which characterize it beyond all other rigid or supreme constitutions, is largely due to him, yet not more to his courage than to his caution'.¹³² In a footnote which would prove to be of great significance to his Australian readers, Bryce then added:

Had the Supreme court been in those days possessed by the same spirit of strictness and literality which the Judicial Committee of the British Privy Council [had] recently applied to the construction of the British North America Act of 1867 (the Act which creates the Constitution of the Canadian Federation), the United States Constitution would never have grown to be what it now is.¹³³

VI APPEALS TO THE PRIVY COUNCIL

That there should be a federal supreme court, which was to constitute a high court of appeal for Australia, was never really controversial. The proposed existence of such a court formed part of the original scheme for the structuring of a federal government set out in the resolution passed after debate on the motion of Parkes at the National Australasian Convention in 1891.¹³⁴ What did end up being a topic of considerable controversy in the framing of the *Australian Constitution* was the extent, if at all, to which provision should exist for an appeal from that court sitting in Australia to the Judicial Committee of the Privy Council sitting in London.

The draft *Constitution* as it emerged from the Convention of 1891 and as it was reintroduced into the Convention of 1897 allowed for the Commonwealth Parliament to provide for appeals previously permitted from the highest court of a State to the Privy Council to be determined by the new federal supreme court. It went on to state that the judgment of that court was to be final and conclusive,¹³⁵ save that the Privy Council might grant leave to appeal against it 'in any case in which the public interests of the Commonwealth, or of any State, or of any other part of the Queen's Dominions, [were] concerned'.¹³⁶

That proposed limitation on the scope of Privy Council appeals provoked the ire of the Colonial Office in London, giving rise to a debate which came to a head during the Convention of 1898.¹³⁷ Section 74 of the draft *Constitution* as it emerged from that debate, and as it was approved in subsequent referenda, provided that no appeal was to be permitted to the Privy Council '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'. The champion of a provision in substantially that form was Josiah Symon. Symon made a long speech in which he quoted in full what Bryce had said in *The American Commonwealth* about Marshall and about the Privy Council, showing what Symon described as 'the limitations on the capacity of the Privy Council, at any rate on their willingness to interpret the *Constitution* with a view to that elasticity that ought to prevail'.¹³⁸ Towards the end of Symon's speech, the temperature that day being 100

¹³² Ibid 509.

¹³³ Ibid.

¹³⁴ *Official Record of the Debates of the National Federal Convention*, Sydney 1891, 500.

¹³⁵ *Draft Bill to Constitute the Commonwealth of Australia* 1891, Chapter III, s 5.

¹³⁶ Ibid s 6.

¹³⁷ See generally: J A La Nauze, *The Making of the Australian Constitution* (Melbourne University Press, 1972) 218-223; Matthew C Harvey, 'James Bryce, 'The American Commonwealth' and the Australian Constitution' (2002) 76 *Australian Law Journal* 362, 366-368.

¹³⁸ *Official Record of the Debates of the Australasian Federal Convention*, Melbourne, 31 January

degrees Fahrenheit in the shade, George Reid interjected that his 'arguments and the climate [had] melted all opposition'.¹³⁹

The debate was won in Australia, but was to continue in London where it became decidedly frosty, the continuing opposition of the Colonial Office being championed there by the Colonial Secretary, Joseph Chamberlain. Indeed, it was later to be said that 'the establishment of the Commonwealth very nearly fell through in consequence of the differences of opinion on the point',¹⁴⁰ and that 'the fate of the Constitution hung in the balance' during the negotiations which ensued.¹⁴¹ The impasse was resolved by the colonial delegates, who included Barton and Deakin, reluctantly agreeing to the amendment of s 74 to take the form in which it came to be enacted by the Imperial Parliament. The section as so amended and enacted prohibited an appeal to the Privy Council 'from a decision of the High Court upon any question, howsoever arising, as to the limits inter se of the Constitutional powers of the Commonwealth and those of any State or States, or as to the limits inter se of the Constitutional powers of any two or more States, unless the High Court shall certify that the question is one which ought to be determined by Her Majesty in Council'.¹⁴² Even in that compromised form, the section was momentous. For the first time in the history of the British Empire, a court had been established from which there was no appeal on a designated question to the Privy Council unless the court itself certified that the question was one which ought to be determined by the Privy Council.¹⁴³

The thrust of the debate which led to that compromise as to the form of s 74 of the *Constitution* was summarised by Bryce in what he wrote about the new *Australian Constitution* in his *Studies in History and Jurisprudence* published in 1901. As Bryce then explained it:

There were many in England who thought that it was not in the interest of Australia herself that she should lose, in questions which might involve political feeling and be complicated with party issues, the benefit of having a determination of such questions by an authority absolutely impartial and unconnected with her domestic interests and passions. How much better (they argued) would it have been for the United States at some critical moments could they have had constitutional disputes adjudicated on by a tribunal above all suspicion of sectional or party bias, since it would have represented the pure essence of legal wisdom, an unimpeachable devotion of legal truth!

To this the Australians replied that the experience of the United States had shown that in constitutional questions it was sometimes right and necessary to have regard to the actual conditions and needs of the nation; that constitutional questions were in so far political that where legal considerations were nearly balanced the view ought to be preferred which an enlightened regard for the welfare of the nation suggested; that a Court sitting in England and knowing little of Australia would be unable to appreciate all the bearings of a constitutional question, and might, in taking a purely technical and possibly too literal a view of the Constitution, give to the Constitution a rigidity which would check its legitimate expansion and aggravate internal strife.¹⁴⁴

1898, 344 (Josiah Symon).

¹³⁹ Ibid 346 (George Reid).

¹⁴⁰ *Deakin v Webb* (1904) 1 CLR 585, 622.

¹⁴¹ *Baxter v Commissioners of Taxation (NSW)* (1907) 4 CLR 1087, 1115.

¹⁴² See generally, John M Williams, *The Australian Constitution: A Documentary History* (Melbourne University Press, 2005) 1160–1206.

¹⁴³ This point was made in *Baxter v Commissioners of Taxation (NSW)* (1907) 4 CLR 1087, 1102.

¹⁴⁴ Bryce, above n 13, 510–511.

The resolution of the controversy, as Bryce then explained it, was that:

After some wavering, the British Government, perceiving the risk of offending Australian sentiment, gave way. They dropped in Committee of the House of Commons the alteration which they had introduced into the Australian draft, substituting for it an amendment which, while slightly varying the original terms of the draft, practically conceded the point for which the Australian Delegates, sent to England to assist in passing the measure, had contended.¹⁴⁵

In the course of himself participating in the debate on the amended form of s 74 in the Committee of the House of Commons in 1900, Bryce had then said that he thought it would have been 'a great deal better' if the *Constitution* had simply been enacted in the form in which it had come from Australia.¹⁴⁶

When in 1902, as Commonwealth Attorney-General, Deakin introduced into the House of Representatives the Bill for what came to be enacted as the *Judiciary Act 1903* (Cth), Deakin gave a very long speech in which he repeatedly referenced both Bryce and Dicey and in which he drew a distinctly Brycean parallel between the High Court of Australia and the Supreme Court of the United States. '[T]he nation', he said, 'lives, grows, and expands'; '[i]ts circumstances change, its needs alter, and its problems present themselves with new faces'.¹⁴⁷ He continued:

The organ of the national life which preserving the union is yet able from time to time to transfuse into it the fresh blood of the living present, is the Judiciary[:] the High Court of Australia or Supreme Court in the United States. It is one of the organs of Government which enables the Constitution to grow and to be adapted to the changeful necessities and circumstances of generation after generation that the High Court operates. Amendments achieve direct and sweeping changes, but the court moves by gradual, often indirect, cautious, well considered steps, that enable the past to join the future, without undue collision and strife in the present.¹⁴⁸

In moving that the Bill be read a second time in the Senate, Senator Richard O'Connor was more blunt in pursuing the same theme. Echoing Bryce, he said:

There can be no question that if it had not been for the establishment of the United States Supreme Court, and the position which that court has always occupied in the working out of their system of government, the history of the United States to-day would have been very different indeed. As has been explained by some of her writers, one of the most remarkable qualities of the American Constitution seems to have been its wonderful adaptability to the changing conditions which have gone on in the country during the last 112 years. It is the universal testimony of writers and historians that that adaptability to changing conditions has been made possible only by the power invested in the Supreme Court of the United States, and the way in which that power has been exercised.¹⁴⁹

He turned later specifically to address why the Privy Council was an 'unsatisfactory tribunal' to interpret and apply the *Australian Constitution*:

¹⁴⁵ Ibid 511.

¹⁴⁶ United Kingdom, *Parliamentary Debates*, House of Commons, 21 June 1900, vol 84, col 653 (James Bryce).

¹⁴⁷ Commonwealth of Australia, *Parliamentary Debates*, House of Representatives, 18 March 1902, 10967 (Alfred Deakin).

¹⁴⁸ Ibid 10967-10968.

¹⁴⁹ Commonwealth of Australia, *Parliamentary Debates*, Senate, 29 July 1903, 2693-2694 (Richard O'Connor).

But what is required for the proper solution of any legal question? Not only a knowledge of the document which has to be interpreted, whether it is an ordinary Act of Parliament or a Constitution Act, but a knowledge of the conditions to which it has to be applied. The Court must know the tendencies of the development of the States and of the Commonwealth, and the tendencies of the Constitution. What kind of a Constitution would that of the United States have become if its interpretation had been handed over to the English Judges who flourished about the end of the eighteenth or the beginning of the last century? Would their interpretation have been in furtherance of that national development which has made the United States what it is to-day, or would they have interpreted the Constitution simply as an ordinary legal document? A consideration of these matters will, I think, satisfy most persons that the Privy Council – from the mere fact of it being constituted as it is and having to derive its knowledge of local conditions simply by reading documents – is an unfit tribunal to decide the questions which would have to be submitted to it.¹⁵⁰

When in 1907, the High Court, faced with a question of the ability of a State to tax the income of a Commonwealth public servant, in *Baxter v Commissioners of Taxation (NSW)*, followed by majority its own earlier decision in *Deakin v Webb* in preference to that given some time later by the Privy Council in *Webb v Outtrim*, it unanimously relied on s 74 of the *Constitution* as establishing the High Court and not the Privy Council as 'the ultimate arbiter upon questions as to the limits *inter se* of the constitutional powers of the Commonwealth and [the] States'.¹⁵¹ Although the practice of the High Court at that time was to eschew reference to the detail of the Convention Debates, Chief Justice Griffith and Justices Barton and O'Connor made the point in their joint reasons for judgment that the framers of the *Australian Constitution* could assuredly have been expected to have considered the constitution and history of other federations.¹⁵² Then they expressly deployed Bryce's footnote. They said:

One eminent English constitutional authority (Bryce) had remarked that if the American Constitution (which is also a written instrument), had been dealt with by the Supreme Court of the United States in the same manner in which the Dominion Constitution was treated by the Judicial Committee the United States would never have grown to their present greatness.¹⁵³

They continued:

And no disrespect is implied in saying that the eminent lawyers who constituted the Judicial Committee were not regarded either as being familiar with the history or conditions of the remoter portions of the Empire, or as having any sympathetic understanding of the aspirations of the younger communities which had long enjoyed the privilege of self-government. On the other hand, the founders of the Australian Constitution were familiar with the part which the Supreme Court of the United States, constituted of Judges imbued with the spirit of American nationality, and knowing that the nation must work out its own destiny under the Constitution as framed, or as amended from time to time, had played in the development of the nation, and the harmonious working of its political institutions.¹⁵⁴

Against that background, they said that it was quite clear that by s 74 of the *Constitution* 'the High Court was intended to be set up as an Australian tribunal to

150 Ibid 2699.

151 (1907) 4 CLR 1087, 1100.

152 Ibid 1109.

153 Ibid 1110.

154 Ibid 1111-1112.

decide questions of purely Australian domestic concern without appeal or review, unless the High Court in the exercise of its own judicial functions, and upon its own judicial responsibility, forms the opinion that the question at issue is one on which it should submit itself to the guidance of the Privy Council'.¹⁵⁵ 'It would not, perhaps, have been extravagant to expect that the Judicial Committee would recognize the intention of the Imperial legislature to make the opinion of the High Court final in such matters', they said, '[b]ut that is their concern, not ours'.¹⁵⁶ Their decision on a question of the limits of constitutional powers could not be put any higher than a decision on foreign law as a question of fact, which was not binding on any other court.¹⁵⁷ Justices Isaacs and Higgins dissented vigorously on the merits of the constitutional question in issue, but were equally adamant in expressing the same view of the operation of s 74 of the *Constitution*.

When in 1920, following the upheaval of the First World War and a change in its composition, the High Court in the *Engineers' Case*¹⁵⁸ (in a majority judgment delivered by Justice Isaacs with which Justice Higgins concurred) overruled *Baxter and Deakin v Webb* and followed instead *Webb v Outrim*, the High Court refused to certify that the question was one which ought to be determined by the Privy Council.¹⁵⁹ Despite the advocacy of Owen Dixon KC, the Privy Council could not be persuaded that a technical basis existed on which leave to appeal should nevertheless be granted.¹⁶⁰ Through a change in what Bryce had referred to as the 'temper and tendencies' of the High Court, and independently of the Privy Council, an end was thereby brought to the first period of constitutional development in Australia (the pre-*Engineers'* period of so-called 'reserved powers' and 'immunity of instrumentalities'), and a second period was commenced.

Sir Victor Windeyer was later to adopt a particularly Brycean perspective,¹⁶¹ when he said that:

[T]he *Engineers' Case*, looked at as an event in legal and constitutional history, was a consequence of development that had occurred outside the law courts as well as a cause of further developments there. That is not surprising for the Constitution is not an ordinary statute: it is a fundamental law. In any country where the spirit of the common law holds sway the enunciation by courts of constitutional principles based on the interpretation of a written constitution may vary and develop in response to changing circumstances. This does not mean that courts have transgressed lawful boundaries: or that they may do so.¹⁶²

The two decades of controversy within the High Court which culminated in that

¹⁵⁵ Ibid 1117.

¹⁵⁶ Ibid 1117.

¹⁵⁷ Ibid 1118.

¹⁵⁸ *The Amalgamated Society of Engineers v The Adelaide Steamship Company Ltd* (1920) 28 CLR 129.

¹⁵⁹ *The Amalgamated Society of Engineers v The Adelaide Steamship Company Ltd* (1921) 29 CLR 406.

¹⁶⁰ *Minister for Trading Concerns for the State of Western Australia v The Amalgamated Society of Engineers* [1923] AC 170.

¹⁶¹ For an alternative view, linking the perspective of Windeyer J to that of Richard T E Latham in his *The Law and the Commonwealth* (Oxford University Press, 1949) 64, see: Jeffrey Goldsworthy, 'Justice Windeyer on the Engineers' Case' (2009) 37 *Federal Law Review* 363.

¹⁶² *Victoria v The Commonwealth* (1971) 122 CLR 353, 396–397.

event in our legal history was the manifestation of a deep division between its first five members as to the nature of the polity established by the *Australian Constitution* and in particular as to the nature of the relationship between the Commonwealth and the States. It is the fact that one view as to the nature of this polity for a time prevailed, and that another view then gained ascendancy. That such a development should be capable of occurring a generation after the establishment of the *Constitution*, and that if such a development did occur it should occur within the High Court in a manner responsive to what Deakin had described as the 'changeful necessities and circumstances of [that] generation'¹⁶³ was an outworking of the national sentiment which had informed the adoption of s 74 of the *Constitution*.

VII CONCLUDING REFLECTIONS

This survey of the significance of Bryce to the development of the *Australian Constitution* provides reason for reflection as to why Bryce has so much faded from our collective legal consciousness. Two British lawyers, both to become Professors of Law, visited the United States together in 1870. Building on that experience, both published leading texts on constitutional law in the 1880s. Both texts were widely read and highly influential. One of them continued as part of our legal canon. The other at some stage became part of the 'great unread'.¹⁶⁴ An examination of the High Court's published reasons for judgment reveals that, during each of their lifetimes, Dicey's *Introduction to the Study of the Law of the Constitution* was referred to in two decisions,¹⁶⁵ and Bryce's *The American Commonwealth* received the one reference in the passage I have quoted. After their deaths, the various editions of Dicey's *Introduction to the Study of the Law of the Constitution* have been cited in 29 decisions,¹⁶⁶ but Bryce's *The American Commonwealth* has been cited in just three decisions.¹⁶⁷

¹⁶³ Commonwealth, *Parliamentary Debates*, House of Representatives, 18 March 1902, 4, (Alfred Deakin).

¹⁶⁴ Seaman Jr, above n 5, 3.

¹⁶⁵ *The Municipal Council of Sydney v The Commonwealth* (1904) 1 CLR 208, 237; *McCawley v The King* (1918) 26 CLR 9, 44, 52.

¹⁶⁶ *Williams v The Commonwealth* (2012) 248 CLR 156; *PGA v The Queen* (2012) 245 CLR 355; *Green v The Queen* (2011) 244 CLR 462; *Bennett v The Commonwealth* (2007) 231 CLR 91; *Australian Broadcasting Corporation v O'Neill* (2006) 227 CLR 57; *Re Woolleys* (2004) 225 CLR 1; *Fardon v Attorney-General (Qld)* (2004) 223 CLR 575; *Austin v The Commonwealth* (2003) 215 CLR 185; *Durham Holdings Pty Ltd v New South Wales* (2001) 205 CLR 399; *Mann v Carnell* (1999) 201 CLR 1; *Re Wakim* (1999) 198 CLR 511; *Residential Tenancies Tribunal of New South Wales v Henderson*; *Ex parte Defence Housing Authority* (1997) 190 CLR 410; *Kruger v The Commonwealth* (1997) 190 CLR 1; *Victoria v The Commonwealth* (1996) 187 CLR 416; *Theophanous v Herald and Weekly Times Ltd* (1994) 182 CLR 104; *Chu Kheng Lim v Minister for Immigration, Local Government and Ethnic Affairs* (1992) 176 CLR 1; *Nationwide News Pty Ltd v Wills* (1992) 177 CLR 1; *Leeth v The Commonwealth* (1992) 174 CLR 455; *Polyukovich v The Commonwealth* (1991) 172 CLR 501; *Jago v District Court of New South Wales* (1989) 168 CLR 23; *Re Tracey*; *Ex parte Ryan* (1989) 166 CLR 518; *Davis v The Commonwealth* (1988) 166 CLR 79; *Walden v Hensler* (1987) 163 CLR 561; *Re Queensland Electricity Commission*; *Ex parte Electrical Trades Union of Australia* (1987) 61 ALJR 393; *R v Howe* (1958) 100 CLR 448; *Australian Community Party v The Commonwealth* (1951) 83 CLR 1; *New South Wales v Bardolph* (1934) 52 CLR 455; *Attorney-General (NSW) v Trethowan* (1931) 44 CLR 394; *Re Yates*; *Ex parte Walsh* (1925) 37 CLR 36.

¹⁶⁷ *The Commonwealth v Tasmania* (1983) 158 CLR 1; *Western Australia v The Commonwealth*

Perhaps the answer lies in the fact that the immediate effect of the decision in the *Engineers' Case*, just two years before Dicey and Bryce died, was to make reference to what were then the prevailing doctrines of the Supreme Court of the United States less relevant, with the somewhat ironic consequence of making recourse to what Bryce had written about the development of those doctrines seem less important. Perhaps the answer lies in Bryce's more descriptive style of writing and more sociological style of jurisprudence being seen to be out of keeping with the development of what came to be the dominant positivist strand of Anglo-Australian legal thought in the twentieth century. There is not much doubt that one of the results of the process of the professionalization of knowledge which was occurring during the lifetimes of Dicey and Bryce was that Dicey came to be assigned almost exclusively to the discipline of law (his *Lectures on the Relation between Law and Public Opinion in England during the Nineteenth Century* very soon being largely forgotten) and Bryce to the separate discipline of political science.¹⁶⁸ *The American Commonwealth* never set out to be a work of history and, if treated as nothing more than a description of American politics, it provided a snapshot of the 1880s which was already well out of date by the time of Bryce's death.¹⁶⁹ Perhaps there was something in Oliver Wendell Holmes' suggestion to Sir Frederick Pollock that he suspected that Bryce 'was too industrious and that the steady flow of his production diluted his personality', and therefore his enduring impact.¹⁷⁰

In Australia, *The American Commonwealth* has in this century received justified attention in an article by Professor Greg Craven¹⁷¹ and in Professor Nicholas Aroney's historical examination of intellectual influences on the federation movement.¹⁷² In the United States, it has quite recently been rediscovered in Professor Adrian Vermeule's work on constitutional theory.¹⁷³ Its ongoing theoretical implications for Australian constitutional law remain to be pondered.

(1975) 134 CLR 201; *Attorney-General (NSW) v Trethowan* (1931) 44 CLR 394.

168 Cf Seaman Jr, above n 5, 10.

169 Gary L McDowell, 'Introduction' in James Bryce, *The American Commonwealth* (1995) at xi-xiii, xxvii-xxix.

170 Holmes to Pollock, 26 February 1922 in Mark DeWolfe Howe (ed), *The Pollock-Holmes Letters*, Volume 2 (Harvard University Press, 1941) 89.

171 Greg Craven, 'Heresy as Orthodoxy; Were the Founders Progressivists?' (2003) 31 *Federal Law Review* 87.

172 Nicholas Aroney, *The Constitution of a Federal Commonwealth* (Cambridge University Press, 2009). See also Matthew C Harvey, above n 137.

173 Adrian Vermeule, *The Constitution of Risk* (Cambridge University Press, 2013).