

## THE FORGOTTEN FOUNDING

### Civics Education, the Common Law and Liberal Constitutionalism in Australia

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The Australian founding seems to be little understood and of little consequence for most Australians. To address this problem of the 'forgotten founding', extensive civics education programs have been proposed and implemented. The paper argues that these civics programs need to engage an underlying cause of this problem: the tension between the two traditions — the common law and liberal constitutionalism — that have shaped Australia. In delineating the nature of this tension, the paper argues that a dominant common law tradition, which locates the ultimate constitutional authority in the common law and not the people, has depreciated the founding, divided scholarship into the legal and the political, and thereby constrained the study of Australian constitutionalism.

Australians seem uninterested in the Constitution. There is little appreciation of the political developments that led to the framing of the Australian Constitution; the founders or the framers of the Constitution are little known, let alone admired; few seem to understand the nature of the political and legal settlement secured at the founding.<sup>1</sup> The contrast with America is striking. Where the Americans venerate their Founding Fathers and defer to the Constitution, Australians seem to have forgotten the founding. How can we account for such a difference?

The revolutionary nature of the American founding, its age and other cultural factors may account for some of these differences. Yet the influential

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<sup>1</sup> A 1987 survey indicated that 53.9 per cent of Australians knew Australia had a written Constitution (in the 18–24 age group, nearly 70 per cent of respondents did not know): Constitutional Commission (1988), p 43. A 1994 national telephone survey of 2504 people aged 15 years and over indicated that 30 per cent felt they knew something (a lot or a moderate amount) about the history of Federation and 19 per cent showed some understanding of the effect of Federation on Australia's system of government. The same survey showed that 13 per cent feel they know something about what the Constitution covers, and 18 per cent show some degree of understanding of the Constitution's contents: ANOP Research Services Pty Ltd (1994). According to the Constitutional Centenary Foundation Report (2000), p 3, the great gap in public understanding regarding the Constitution and the Australian system of government became evident in the 1999 referendum campaign.

assessment has been the lack of 'civics' education in Australia. This was the view of the Constitutional Commission (1988) and of the Senate Standing Committee for Employment Education and Training (1989; 1992). Consequently there has been a continuing attempt to develop and implement a comprehensive civics education in Australia. The Civics Expert Group was appointed in June 1994 by the Keating government to 'provide the Government with a strategic plan for a non-partisan program of public education and information on the Australian system of government, Australian citizenship and other civics issues'.<sup>2</sup> In 1997, the Howard government established the Civics Education Group to provide continuing advice on civics and to implement its citizenship program 'Discovering Democracy'. This emphasis on education is also evident in the work of the non-partisan Constitutional Centenary Foundation, established in 1991 for 'encouraging and promoting public discussion, understanding and review of the Australian constitutional system in the decade leading to the centenary of the Constitution'.<sup>3</sup> The aim of educating Australians about the founding, and more generally about the Australian legal system, continues to be a dominant theme for politicians as well as the judiciary.<sup>4</sup>

Such a civics education is welcome — indeed essential — in Australia. In this paper I argue that such an education needs to appreciate an important source of the problem of the 'forgotten founding', a fundamental tension in Australian constitutionalism between two of its constitutive traditions, that of the common law and liberal constitutionalism. Australia has a forgotten founding because a dominant common law tradition has consistently displaced the liberal constitutionalism that sees the founding and the Constitution as politically fundamental or 'constitutive'. This common law depreciation of the people's founding has not only shaped the general understanding of Australia's origins, but also distorted Australian scholarship, separating the legal from the political, and limiting — if not silencing — the study of Australian constitutionalism.

In the first part of the paper I examine the meaning of common law, contrasting the modern 'realist' view of the common law as 'judge made', with its traditional understanding as 'an artificial reason' acquired after long study of judicial precedents and legislative enactments. This understanding of the common law is contrasted with the theoretical origins of a written Constitution, which I argue have their foundations in liberal social contract theories. The second part of the paper traces the way the common law — as a foundation and method — has dominated Australian constitutionalism, displacing liberal conceptions of authority, consent and legitimacy. This can be seen most clearly in the jurisprudence of the High Court, which has had the primary responsibility for interpreting the Constitution. In the final part, I note

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<sup>2</sup> Civics Expert Group (1994), p 1. For the work of the Civics Expert Group, and more generally regarding civics education, see the articles in the 'Political Education and Constitutional Change' edition of the *Australian Quarterly* (1995).

<sup>3</sup> Constitutional Centenary Foundation (2000).

<sup>4</sup> Kirby (1997); Williams (2001).

the theoretical and political consequences of these two competing sources of authority for Australian constitutionalism. These include the way the common law influence has depreciated the founding, and more generally how its atheoretical pragmatism and its tendency to entrench a division between law and politics has impeded a concerted and comprehensive engagement with the traditions that have shaped democracy in Australia.

### The Common Law and Liberal Democracy

What do we mean by the common law? The most prevalent and seemingly uncontested definition of the common law — that it is ‘judge made law’ — is the initial obstacle we confront in attempting to discern the true influence and authority of the common law in Australia. The recent dominance of this view of the common law can be traced to the claims by the famous American jurist and Supreme Court justice Oliver Wendell Holmes who, in his famous work *The Common Law*, argued that what was historically understood as the common law was no more than the incremental exercise of personal discretion by judges and the judiciary.<sup>5</sup> The ‘realist’ tradition thus came to reject the older, so-called ‘declaratory’ theory of the common law as a ‘fairy tale’, a disguise for what judges actually do.<sup>6</sup> In Australia, the view of the common law as ‘judge-made law’ was introduced by Julius Stone, a student of the American jurist Roscoe Pound. Stone, Professor of Jurisprudence at the University of Sydney and later at the University of New South Wales, taught Pound’s ‘sociological jurisprudence’, a version of realism that sought to justify certain forms of judicial law-making.<sup>7</sup> Stone’s influence may be gauged by the comments of one of his students, Justice Michael Kirby of the Australian High Court, who noted: ‘It is only now that the impact of Stone’s jurisprudential teachings upon lawyers of Australia is coming to full flower.’<sup>8</sup>

The ‘declaratory theory’ that realists rejected claimed that judges did not ‘make’ the law; rather, they applied precedents that were appropriate to the case at hand. Thus it was the judge’s duty to discover, not invent, what law governed the case at hand. The written evidence of the common law was to be found in the record of cases previously decided. Where a case was genuinely novel, the judge was to proceed by analogy to the appropriate precedent, on the basis of the common law maxim that a precedent that ran against reason was no law. According to Sir Edward Coke, renowned common-lawyer who had sat as chief justice of the Court of Common Pleas (from 1606) and as chief justice of the King’s Bench (from 1613), the common law was the ‘perfection of reason’. But this reason was not any one individual’s reason. As he writes in

<sup>5</sup> Holmes (1881).

<sup>6</sup> See, for example, Mason (1996); Gleeson (1999); Fullagar (1993).

<sup>7</sup> Pound’s sociological jurisprudence and his pragmatic theory of justice and law were developed and applied by Julius Stone in his major works, *The Province and Function of Law* (1961); *Human Law and Human Justice* (1965); and *Social Dimensions of Law and Justice* (1966). For an evaluation of Stone’s influence generally see Patapan (2000), pp 20–24.

<sup>8</sup> Kirby (1997), p 201.

his famous and influential *Institutes*, 'for reason is the life of the law, nay the common law itself is nothing else but reason; which is to be understood of an artificial perfection of reason gotten by long study, observation, and experience, and not every man's naturall reason'.<sup>9</sup>

The realist attack on this view of the common law had an ancient provenance. If we trace Holmes' 'realism' back, to Bentham's attack on the confederacy of rulers, lawyers and religious leaders whose 'sinister interest' resists reform,<sup>10</sup> and to Blackstone's attempt at reform of the 'old Gothic castle' that is the common law,<sup>11</sup> we arrive at the source and origin of this critique, the tension between the common law and the liberal constitutionalism detailed by the political philosopher Thomas Hobbes. Hobbes is the modern philosopher who 'legalises politics', one of the most influential to employ the legal concept of 'contract' to establish the political principles of the modern state. In his best known work, the *Leviathan*,<sup>12</sup> we see the lineaments of the modern liberal constitutionalism, especially the notions of rights, consent and sovereignty.

Hobbes criticises the 'artificial reason' of the common law because it directly challenges the new conceptions of legal reason and sovereign power at the core of his new formulation of political authority.<sup>13</sup> We can see this clearly in his early political works, *De Cive*<sup>14</sup> and the *Leviathan*, as well as his *A Dialogue between a Philosopher and Student of the Common Laws of England*,<sup>15</sup> a polemic against Sir Edward Coke.<sup>16</sup> As we have seen, Coke contended that the way the common law proceeded assured its wisdom: the gradual and incremental wisdom that accrued as judges determined the merits of each case, following precedent but adjudging it with what was reasonable, resulted in an artificial reason that was superior to the views of any one individual. As a consequence, in the famous *Doctor Bonham's* case, he claimed that the common law controlled Acts of Parliament, and in

<sup>9</sup> Coke (1832), p 97b; Stoner (1992), p 23.

<sup>10</sup> On Bentham's discussion of such a confederacy, see Bentham (1977), p 539. On his critique of the common law as the 'dead hand of the past' and his rejection of judicial review generally, see Bentham (1977), pp 485–89.

<sup>11</sup> See Blackstone's *Commentaries*, Book III, (1884), p 268 and Storing (1987), pp 622–34.

<sup>12</sup> (1651); Hobbes (1981).

<sup>13</sup> See in this context the succinct critique of Hobbes' position by Sir Matthew Hale in his incomplete *Reflections by the Lrd Cheife Justice Hale on Mr. Hobbes His Dialogue of the Lawe* in Stoner (1992), pp 131–33.

<sup>14</sup> 1642; Hobbes (1978).

<sup>15</sup> 1681; Hobbes (1971).

<sup>16</sup> Hobbes' title alludes to Christopher St. Germain's *Dialogues between a Doctor of Divinity and a Student in the Law of England*. For a discussion of Hobbes' work see the introduction by Cropsey in Hobbes (1971).

*Prohibitions del Roy* he advised James I that the artificial reason and judgment of the common law were superior to the natural reason of individuals.<sup>17</sup>

The general tenor of Hobbes' arguments challenging these claims can be seen in his 'Of Civill Lawes', Chapter XXVI of the *Leviathan*.<sup>18</sup> In this chapter, Hobbes rejects the 'foolish opinion of Lawyers' who contend that legislative power depends on 'private men, or subordinate judges'.<sup>19</sup> He specifically rejects Coke's claim that the reason that is the basis of law is the 'Artificial perfection of Reason, gotten by long study, observation and experience'. According to Hobbes, the sovereign is the legislator and laws are the commands of the sovereign. Therefore the authority of law derives not from the artificial reason of the common law, but from the will of the sovereign. It is the reason and command of the sovereign and not the '*Juris prudentia*, or wisdom of subordinate Judges' that make laws. Subordinate judges are no more than interpreters of the sovereign's will and reason.<sup>20</sup>

In Hobbes' critique of Coke's common law, we discern the origins of the familiar modern 'realist' arguments rejecting the possibility of the common law. Hobbes rejects Coke's 'artificial reason' because such a view represents a fundamental challenge to the authority of the sovereign, manifested practically in the way judges may challenge and perhaps contradict the decisions of the sovereign. More fundamentally, however, the notion of an 'artificial reason' of the common law provides a theoretical challenge to the constitution of the modern state. It questions the ability of individuals to reason and thereby discern the natural law and natural rights. In doing so, it undermines the foundations of the social contract that individuals enter into to escape the inconveniences of the state of nature, and thereby challenges the authority of the sovereign who assures the security of the modern state. In short, Coke's common law questions the basis of modern liberal constitutionalism by challenging the efficacy of individual abstract reasoning that founds the consent necessary for the social contract and the authority of such sovereignty.

Thus, in attempting to retrieve the original conception of the common law covered over by the realist understanding of 'judge made law', we discern a more fundamental debate between two traditions — that of the common law and the new liberal conception of individual rights, social contract and sovereignty introduced by Hobbes and developed subsequently by Locke and modern social contract theorists. It is not possible in this context to trace the

<sup>17</sup> *Doctor Bonham's case* (1610) 8 Co Rep 114; *Prohibitions del Roy* (1608) 12 Co Rep 63.

<sup>18</sup> Hobbes (1981), pp 311–35.

<sup>19</sup> Hobbes (1981), p 316.

<sup>20</sup> Hobbes (1981), p 317. For his argument in *De Cive*, see in particular Chapters II, V, VI and XI and his claim in Chapter XIV, para 15, that the 'orations of the wise' are laws not due to their source, that is, judges, but due to the consent of the supreme sovereign who allowed his sentence to pass into customs': Hobbes (1978). For the discussion of the common law in the *Dialogue*, see especially his critique of the common-lawyer and his rejection of artificial reason: 'the reason of the common law is not a special treasure of a single guild': Hobbes (1978), pp 54–55, 61–62.

subtle and dynamic tensions between these traditions in later philosophical and jurisprudential thought.<sup>21</sup> The important question for us concerns how these two traditions informed, shaped and constituted the Australian founding.

### The People and the Founding

The American founding, informed and shaped by liberal and republican traditions, was an important model for the framers of the Australian Constitution.<sup>22</sup> Thus the American constitution became a major source of liberal constitutionalism in Australia.<sup>23</sup> It is clear from the founding, and from the specific provisions of the Constitution itself, that at the core of Australian constitutionalism is the principle of popular sovereignty and liberal notions of 'social contract'. The history of the Australian founding, from the first-hand reports of the founders and the records of those who contributed to Federation, to more recent historical accounts documenting different dimensions of Federation, reveals the overriding popular or democratic character of the founding.<sup>24</sup> For our purposes, it is useful to consider the two major conventions that were significant in determining the ultimate provisions of the Constitution: the National Australasian Convention of 1891 and the Australasian Federal Convention of 1897–98.

After Henry Parkes' famous Tenterfield Oration favouring a national government, the National Australasian Convention was held in Sydney from 2 March to 9 April 1891. Forty-five delegates from seven colonies, including New Zealand, attended the Convention, drafting the first, and influential, version of the Constitution. For various reasons, however, the Federation cause was not resumed until the Australasian Federal Convention met in three sessions, the first in Adelaide (22 March to 6 May 1897), the second in Sydney (2 September to 24 September 1897) and the third in Melbourne (20 January to 17 March 1898).<sup>25</sup> The significant feature of this Convention, which drafted

<sup>21</sup> See generally Macpherson (1962); Stoner 1992; and Strauss (1952, 1953).

<sup>22</sup> For the contending traditions in American constitutionalism, contrast the earlier scholarship of Corwin (1955), and McIlwain (1947) with the distinction made between classical and modern republicanism in Pangle (1988), Mansfield (1989) and Stoner (1992). For the framing of debates over the American Founding in terms of economic considerations and civic republicanism, see Bailyn (1967); Wood (1969); Pocock (1975).

<sup>23</sup> See in this light the important contribution of Andrew Inglis Clark (Howard and Warden (1995); Reynolds (1958); Williams (1995)), as well as James Bryce's *The American Commonwealth* which, according to La Nauze (1972), p 273, was 'quoted or referred to more than any other single work; never criticised, it was regarded with the same awe, mingled with reverence, as the Bible would have been in an assembly of churchmen'.

<sup>24</sup> For first-hand accounts, see, for example, Deakin (1944); Moore (1902); Wise (1913). For more contemporary accounts, see La Nauze (1972); Crisp (1988); Irving (1999).

<sup>25</sup> The official records of the Convention Debates are in Craven (1986) and available electronically at [www.aph.gov.au/Senate/pubs/records.htm](http://www.aph.gov.au/Senate/pubs/records.htm) and <http://setis.library.usyd.edu.au/oztexts/index.html>.

the final version of the constitution, was that its delegates were elected by the people.<sup>26</sup> Importantly, after the Convention adopted the draft of the Constitution of the Australian Commonwealth, it was put to the people in the form of a referendum on the Constitution Bill.<sup>27</sup> When the Bill was amended to take into account certain concerns of New South Wales, it was again put to the people in 1899, where it was endorsed by all the states except Western Australia.<sup>28</sup> As this brief account of the making of the Constitution indicates, in the popular election of delegates for drafting the Constitution and in its final endorsement by the people through referenda, the Australian founding revealed and confirmed its democratic credentials.<sup>29</sup>

It should not surprise us, then, that these democratic credentials are evident in the terms of the Constitution itself. Even a cursory inspection of its broad architecture reveals its democratic foundations. 'Whereas the People', its very first words, signals the decisive importance of the people.<sup>30</sup> Consistent with the intention of the preamble, the people are decisive for the parliamentary democracy secured by the Constitution: it is the people who choose members of the House of Representatives and Senators (ss 7 and 24). Importantly, it is only the people (as 'electors') who can alter the Constitution (s 128).

This view of the Constitution, as a 'contractual' founding based on the authority and consent of the people, is clearly indebted to the liberal democratic tradition that can be traced to American constitutionalism and its theoretical origins in the social contract theories of Hobbes and Locke. It is this view of the Constitution that endows the founding, both in Australia and America, with the dignity, gravity and awe of a foundational enactment. It is this view that justifies the respect due to framers of the Constitution as 'founding fathers'. Finally, it is this view that sees the Constitution as 'constitutive' in a profoundly political sense, as entrenching the authority of the people, defining and limiting government, and securing the rule of law.

Though influential in political and historical scholarship in Australia, this comprehensive and apparently incontestable view of the founding needs to confront a different perspective that fundamentally challenges all its

<sup>26</sup> A conference at Corowa in 1893 had devised the 'Corowa Plan' for a new popular constitutional process. In 1897, popular elections returning ten delegates from each state were held in New South Wales, South Australia, Victoria and Tasmania. The Western Australian Parliament appointed its delegates and Queensland did not send any representatives. For a discussion of the limited conception of 'the people' see, for example, Irving (1996).

<sup>27</sup> The referendum took place in all states but Western Australia and Queensland. It was unsuccessful in New South Wales.

<sup>28</sup> Including Queensland. Western Australia held its referendum on 31 July 1900.

<sup>29</sup> Even when the Bill was taken to the United Kingdom for its passage as an Act of Parliament, the delegates strongly resisted changes to its terms. On the nature of the compromise regarding the High Court provisions, see Deakin (1944), pp 155–56.

<sup>30</sup> On the importance of preambles as 'preludes' — persuasive and educational parts of laws — see Plato (1980), pp 722d–723b.

assumptions, a view that claims the common law as the foundation of the Australian Constitution.

### Common Law Constitution

According to orthodox understanding, the common law as a body of law entered colonies with its first settlers as their 'inheritance and birthright'.<sup>31</sup> This colonial common law was shaped by the English common law, due to the continuing authority of the English House of Lords and the Judicial Committee of the Privy Council. Even after Federation and the establishment of the High Court of Australia, the common law in Australia agreed with English common law.<sup>32</sup> It was only after the gradual restriction of appeals to the Judicial Committee of the Privy Council that the High Court effectively became the final court of appeal in Australia, and thereby the authority on Australian common law.<sup>33</sup>

If the common law preceded the Australian founding, then to understand the place of the common law in Australian Constitutionalism it is essential to ascertain the relationship between the common law and the Constitution. Indeed, given the discussion above regarding the theoretical provenance of the Australian founding, it would seem that the Constitution becomes the focal point where the two traditions intersect and, in confronting each other, determine the meaning of the Constitution. How does the common law see and understand the Constitution?

The Constitution is much indebted to the common law, using many of its terms and concepts, including the powers, privileges and immunities of the executive (s 61); the meaning of trial by jury (s 80); the office of the Speaker

<sup>31</sup> In contrast, the 'reception date' for statutory law was established for New South Wales and Van Diemen's Land by the *Australian Courts Act 1828* (Imp) as those laws and statutes in force in England on 25 July 1828 (so far as they could be applied). This was also the reception date for Victoria and Queensland as a result of their separation from New South Wales. The reception date for South Australia is 28 December 1836, and for Western Australia it is 1 July 1829: Zines (1999), p 3. For detailed accounts of the reception of the common law, see Castles (1982) and Windeyer (1961). For the history of the reception of representative and responsible government in the colonies, see Melbourne (1963) and McMinn (1979).

<sup>32</sup> One of the important changes made in London in the course of enacting the Constitution Bill was to retain appeals to the Privy Council. This was supported by the British Colonial Office, a group of colonial Chief Justices and retired judges, as well as English investors: see generally La Nauze (1972), pp 173, 220–22, 248–49.

<sup>33</sup> The enactments that gradually limited such appeals were the *Privy Council (Limitation of Appeals) Act 1968* (Cth) and the *Privy Council (Appeals from the High Court) Act 1975* (Cth). The *Australia Acts 1986* (Cth and UK) abolished the remaining avenues of appeal to the Privy Council so that by 1986 the High Court was effectively the final court of appeal in Australia. In theory, a right of appeal to the Privy Council remains under section 74 of the Constitution, but because it requires a certificate from the High Court it is effectively obsolete.



(ss 35–37, 40); and the legal remedies of prohibition, mandamus and injunction (s 75(v)).<sup>34</sup> Therefore the interpretation of the Constitution requires an appreciation and understanding of the common law. But this does not resolve the larger question concerning the relative authority of the common law. This foundational question — whether the Constitution derived its authority from the common law or from the people — is at the crux of Australian constitutionalism. It was answered in favour of the common law by Sir Owen Dixon, regarded as one of the greatest common law jurists.<sup>35</sup> In the 35 years he spent on the court, first as Justice in 1929, and subsequently as Chief Justice from 1952 until his retirement in 1964, he left an impressive and influential legacy in the interpretation of the Constitution and the common law in Australia.<sup>36</sup> Dixon claimed the common law as the ‘ultimate constitutional foundation’.<sup>37</sup> To ascertain what he meant by this, as well as gaining an insight into his understanding of the nature of the common law, the sources of legal authority and the legal foundation of the Constitution, it is useful to consider his extra-curial writings.<sup>38</sup>

In the spirit of Coke’s ‘artificial reason’, Dixon favours the ‘high technique and strict logic of the common law’. He cites with approval Maitland, who claimed the common law was ‘not vulgar common sense and the reflection of the layman’s unanalysed instincts; rather ... strict logic and high technique, rooted in the Inns of Court, rooted in the Year Books, rooted in the centuries’.<sup>39</sup> His defence of the common law approach is evident in his rejection of Holmes’ view that ‘law in the sense in which courts speak of it today does not exist without some definite authority behind it’. According to Dixon: ‘In Australia we subscribe to a very different notion. We conceive a state as deriving from the law; not the law as deriving from a State.’ He goes on:

<sup>34</sup> Saunders (2003), p 230; Zines (1999), p 15.

<sup>35</sup> He was considered as ‘perhaps the most distinguished exponent in the world of the common law’ (Lord Diplock) and as ‘one of the greatest common lawyers of all time’ (Lord Pearce). For these and other assessments see Stephen (1986), p 293.

<sup>36</sup> His extra-curial contributions included wartime administration and diplomatic work as Minister to the Australian Legation in the United States between 1942 and 1944, and as United Nations mediator in Kashmir in 1950 (see generally the recent biography by Ayres (2003) and the entries on Dixon, the Dixon Court and the Dixon Diaries in the *Oxford Companion to the High Court*: Blackshield et al (2001), pp 218–24.

<sup>37</sup> See his 1957 essay, ‘The Common Law as the Ultimate Constitutional Foundation’, in Dixon (1997), pp 203–18.

<sup>38</sup> These are collected in *Jesting Pilate* (1997). Of course, a comprehensive assessment of Dixon’s jurisprudence would require an understanding of his judgments in the course of the 35 years on the High Court. For a review of the scholarship, see generally Ayres (2003). For a recent examination of his jurisprudence, see Wait (2001).

<sup>39</sup> ‘Concerning Judicial Method’ (1955), in Dixon (1997), p 153.

We do not of course treat the common law as a transcendental body of legal doctrine, but we do treat it as antecedent in operation to the constitutional instruments which first divided Australia into separate colonies and then united her in a federal Commonwealth. We therefore regard Australian law as a unit. Its content comprises besides legislation the general common law which it is the duty of the courts to ascertain as best they may. But subject always to the binding authority of some disturbing precedent, we treat it as the duty of courts to recognize that it is one system which should receive a uniform interpretation and application, not only throughout Australia, but in every jurisdiction of the British Commonwealth where the common law runs. The anterior operation of the common law in Australia is not just a dogma of our legal system, an abstraction of our constitutional reasoning. It is a fact of legal history.<sup>40</sup>

The primacy of the common law could be seen in the principle of parliamentary sovereignty itself. According to Dixon: 'It is not the least of the achievements of the common law that it endowed the Parliament which was evolved under it with the unrestricted power of altering the law.'<sup>41</sup> It is because the common law is the source of the authority of the Parliament at Westminster — the English constitution forms a part of the common law — that Australia had as its ultimate constitutional foundation the common law. Contrasting with the American case where there is no such anterior common law, Dixon states: 'With us the common law was in fact an antecedent system of jurisprudence and has been instinctively so regarded.'<sup>42</sup> The fundamental difference between the American and Australian Constitutions, according to Dixon, concerns the common law. Although the American model fascinated the framers of the Australian one, so much so that 'Its contemplation damped the smouldering fires of their originality', there was a decisive difference according to Dixon:

But, although they copied it in many respects with great fidelity, in one respect the Constitution of our Commonwealth was bound to depart altogether from its prototype. It is not a supreme law purporting to obtain its force from the direct expression of a people's inherent authority to constitute a government. It is a statute of the British Parliament enacted in the exercise of its legal sovereignty over the law everywhere in the King's Dominions. In the interpretations of our Constitution this distinction has many important consequences. We treat our organs of government simply as institutions established by law. American doctrine treats them as agents for the people who are the source of power and their powers as authorities committed to them by a principal.<sup>43</sup>

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<sup>40</sup> 'Sources of Legal Authority' (1943), in Dixon (1997), p 199.

<sup>41</sup> 'The Law and the Constitution' (1935), in Dixon (1997), p 40.

<sup>42</sup> 'The Common Law as the Ultimate Constitutional Foundation' (1957), in Dixon (1997), p 205.

<sup>43</sup> 'The Law and the Constitution' (1935), in Dixon (1997), p 44.

In Dixon's view, the common law is more than a means for understanding the terms of the Constitution. It is the foundation of the Constitution. As the antecedent jurisprudential principle for the Australian founding, it shapes the nature of Australian institutions and how they are to be understood and interpreted by the judiciary.<sup>44</sup>

Dixon's view of the primacy of the common law in Australia has been orthodoxy for the judiciary, and specifically the High Court, which had the primary responsibility for interpreting the meaning of the Australian Constitution. It expressed itself most clearly in the view that the Constitution was an Act of Imperial Parliament.<sup>45</sup> It could also be seen in those major decisions of the court that had far-reaching consequences for Australian constitutionalism, such as *Mabo*.<sup>46</sup> The strength of this common law tradition is perhaps most clearly evident when we turn to the jurisprudence of the court that seemed to challenge fundamentally this common law view by apparently endorsing popular sovereignty and therefore a liberal constitutionalism.

In a series of decisions in the 1990s, the High Court held that the Constitution secured an implied freedom of political communication.<sup>47</sup> In the course of these decisions, a number of justices held that sovereignty resides in, or derives from, the people, and therefore the Constitution is founded upon popular sovereignty. Thus Justices Deane and Toohey in *Nationwide News* (1992) decided that 'the powers of government belong to, and are derived from ... the people'.<sup>48</sup> Chief Justice Mason in *ACTV* (1992) held: '*The Australia Act* 1986 (UK) marked the end of legal sovereignty of the Imperial Parliament and recognized that ultimate sovereignty resided in the Australian people'.<sup>49</sup> In the subsequent decision of *Theophanous* (1994), Justice Deane stated: 'The present legitimacy of the Constitution lies exclusively in the original adoption (by referendum) and subsequent maintenance (by acquiescence) of its provisions by the people'.<sup>50</sup> According to Justice McHugh in *McGinty* (1995):

<sup>44</sup> On the importance of the common law for the institutions of government, ranging from the principle of parliamentary sovereignty to responsible government, see Saunders (2003), pp 229–31.

<sup>45</sup> See, for example, Windeyer (1962); Latham (1961); Mason (2000); and generally Winterton (1998).

<sup>46</sup> *Mabo v Queensland (No 2)* (1992) 175 CLR 1. In *Mabo*, the court held that the common law recognised native title in Australia. Though not a 'constitutional' case as such, the extent to which the decision led to a reconsideration of the nature of the Australian polity points to the far-reaching influence of the common law in shaping Australian constitutionalism.

<sup>47</sup> *Australian Capital Television Pty Ltd v Commonwealth* (1992) 177 CLR 106 (*ACTV* case); *Nationwide News Pty Ltd v Wills* (1992) 177 CLR 1; *McGinty v Western Australia* (1996) 186 CLR 140; *Theophanous v Herald and Weekly Times Ltd* (1994) 182 CLR 104; *Lange v Australian Broadcasting Corporation* (1996) 189 CLR 520; *Levy v Victoria* (1997) 189 CLR 579. For a discussion regarding these cases and general references, see Patapan (2000), pp 41–69.

<sup>48</sup> *Nationwide News Pty Ltd v Wills* (1992) 177 CLR 1 at 138.

<sup>49</sup> *Australian Capital Television Pty Ltd v Commonwealth* (1992) 177 CLR 1 at 138.

<sup>50</sup> *Theophanous v Herald and Weekly Times Ltd* (1994) 182 CLR 104 at 171.

the sovereignty of Australia originally resided in the United Kingdom Parliament. Since the *Australia Act* 1986 (UK), however, the sovereignty of the Australian nation has ceased to reside in the Imperial Parliament and has become embedded in the Australian people. Only the people can now change the Constitution. They are sovereign.<sup>51</sup>

That these decisions were regarded by commentators as 'revolutionary', a 'fundamental paradigm shift' and a new '*grundnorm*' supports the above argument that the common law as a constitutional foundation was the orthodox view, and that the court was introducing a liberal constitutionalism.<sup>52</sup> But did these decisions really mark the end of the authority of the common law tradition and thereby found liberal constitutionalism in Australia? When we look closely at the way the court formulated the notion of popular sovereignty, we in fact see the continuing dominance of the common law.

The decisive importance accorded to the *Australia Acts* 1986 (UK) by the justices in these cases is most revealing. The *Australia Acts* were enacted simultaneously by the United Kingdom and the Commonwealth, in effect severing legislative authority of Westminster Parliament over Australia. That the justices chose this enactment as establishing the sovereignty of the people confirms that the people were not sovereign at the founding. They became sovereign after parliamentary enactment (Imperial and Commonwealth) which, as Dixon claims, can trace its authority to the common law. Therefore, just as parliamentary sovereignty is a child of the common law, these decisions reveal popular sovereignty as founded upon the common law. That popular sovereignty is interpreted in terms of the common law, and is therefore subject to it, can be seen in the gradual or incremental adoption of the concept by the court. The claim of incremental or gradual adoption of popular sovereignty clearly employed the common law method of adjudication and therefore change — the founding was not popular from the beginning; it became so in time as a consequence of changes enacted by Parliament. Thus popular sovereignty is a manifestation of parliamentary will, not of popular will expressed at the founding. As a consequence, the abstract conception and formulation of sovereignty is mitigated — perhaps even made irrelevant — for constitutional adjudication. Where the law unfolds gradually and incrementally, in the way of the common law, popular sovereignty doesn't 'do' anything. Indeed, this was in evidence in the free speech cases themselves. The notion of popular sovereignty was not employed by the court to ground its understanding of rights. Instead, the court located the implied freedom of communication in the provisions of the Constitution that secured the institution of representative democracy — not in the natural or human rights of individuals.<sup>53</sup>

The way the court proceeded in its determination of popular sovereignty highlighted an important aspect of common law — its far-reaching influence is

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<sup>51</sup> *McGinty v Western Australia* (1996) 186 CLR 140 at 237.

<sup>52</sup> See generally Winterton (1998); Wright (1998).

<sup>53</sup> See generally Patapan (2000), pp 59–63.

due as much to the way it proceeds (and reveals itself) as to its substantive authority. As we have seen, common law adjudication is incremental, deciding each issue on its facts. The disposition of a case by the application of law as revealed in previous decisions to the facts properly before the court shows the reserve and prudent judgment of the common law. Decisions are not reached on the basis of overarching and comprehensive ‘theories’, ‘programs’ or ‘systems’ — the common law fundamentally rejects such an approach to adjudication. The adoption of the common law way of interpreting statutes, and especially the Constitution, has meant that the common law has had an iron grip on Australian jurisprudence.<sup>54</sup> The Constitution has been founded by the common law, and the court, in interpreting the Constitution, has been in effect a common law court: the court interprets the Constitution primarily to dispose a dispute; it will not give advisory opinions<sup>55</sup> and its decisions are never prospective.<sup>56</sup>

### The Forgotten Founding

In attempting to retrieve and articulate two powerful and competing traditions in Australia — that of the common law and liberal constitutionalism — we gain a better appreciation of how tensions between the two have had profound implications for politics in Australia. The most striking, a consequence of the continuing influence of the common law approach to the founding, is a ‘common law Constitution’, where the common law as the ultimate authority for the Constitution (either directly or mediately, by means of a statute of Imperial Parliament), displaces contending notions, especially those that see the founding as establishing a new Australian polity.<sup>57</sup> In simple terms, the common law has tended to make us forget the founding. In doing so, it has moreover limited our attempts at remembering, recovering and engaging with

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<sup>54</sup> Thus the High Court’s view in *Lange v Australian Broadcasting Corporation* (1997) 189 CLR 520 that, though the common law may inform the interpretation of the Constitution, where there is a conflict between the two the Constitution prevails can be explained in terms of the common law principle that Parliament may alter and even revoke the common law. As we have seen, common law deference to Parliament is itself a creature of the common law.

<sup>55</sup> Unlike the Canadian Supreme Court, the High Court of Australia has held that it will not provide advisory opinions; the court will not hear a matter unless there is a dispute or controversy where some immediate right, duty or liability needs to be established by the determination of the court: *Crouch v Commissioner for Railways (Qld)* (1985) 159 CLR 22.

<sup>56</sup> In striking down a provision as unconstitutional, the court has held that such invalidity exists from the beginning or is *void ab initio*: see *South Australia v Commonwealth* (1942) 65 CLR 373; *Victoria v Commonwealth* (1975) 134 CLR 338; Mason (1989). In rejecting prospective invalidity, the court adopts the common law view that it interprets and declares the law, rather than making it.

<sup>57</sup> The contrast with America is instructive. Stoner (2003) attempts to recover and reassert the common law’s far-reaching influence in American constitutionalism on the basis that this influence has been occluded by the liberal constitutionalism that now dominates the judiciary and scholarship more generally.

the notion of an Australian constitutionalism. The common law and the way it proceeds — a resolution of specific disputes, with decisions limited to the facts of the case — discourages theoretical and abstract engagement with the Constitution. This has been exacerbated by the way the competing traditions have entrenched a split between a ‘legal’ and a ‘political’ constitution, reflected in the contrasting legal scholarship that favours the study of the ‘constitution’ as opposed to ‘constitutionalism’,<sup>58</sup> and a political scholarship that assumes a democratic and republican founding.<sup>59</sup>

Those who question why Australia is so different from America, and who seek to revive an Australian sense of the grandeur of the founding and the great achievement of its founders, need to appreciate that Australia’s forgotten founding can be traced in part to the dominance of the common law in Australian constitutionalism. It is the ‘artificial reason’ of the common law that has helped in denying the Australian people their founding. Therefore, an essential aspect of civic education in Australia should be a renewed appreciation, thoughtful reflection and engagement with those powerful ideas and traditions that have sustained and enriched the Australian founding.

## References

### Secondary Sources

- ANOP Research Services Pty Ltd (1994) ‘The Australian Community and Its Governments, The Constitution, Citizenship and Civics: Community Knowledge and Understanding’, ANOP Executive Summary in Civics Expert Group (ed), *Appendix 3*, pp 128–60.
- Australian Quarterly* (1995) ‘Political Education and Constitutional Change’ 67 *Australian Quarterly* 1.
- Philip Ayers (2003) *Owen Dixon*, Miegunyah Press.
- Bernard Bailyn (1967) *The Ideological Origins of the American Revolution*, Belknap Press of Harvard University Press.
- Jeremy Bentham (1977) *A Comment on the Commentaries and A Fragment on Government*, eds James H Burns and Herbert LA Hart, The Athlone Press.
- Anthony R Blackshield (ed) (1983) *Legal Change: Essays in Honour of Julius Stone*, Butterworths.
- Tony Blackshield, Michael Coper and George Williams (2001) *The Oxford Companion to the High Court of Australia*, Oxford University Press.

<sup>58</sup> In general legal scholarship has tended to focus on the ‘written’ and ‘legal’ Constitution and its interpretation by the judiciary. For the exceptions see generally Lumb (1983); Detmold (1985).

<sup>59</sup> See, for example, Galligan’s (1995) assessment of Australian constitutionalism in terms of federalism and republicanism. For a history of the republican tradition, see McKenna (1996) and McKenna and Hudson (2003). Recent scholarship has tended to look at the Australian ‘settlement’ rather than constitutionalism: see the Symposium on the ‘Australian Settlement’ in the *Australian Journal of Political Science* (2004) and especially Stokes (2004).

- Sir William Blackstone (1884) *Commentaries on the Laws of England*. 3rd edn, Callaghan.
- Alex C Castles (1982) *An Australian Legal History*, Law Book Co.
- Civics Expert Group (1994) *Whereas the people ... Civics Education and Citizenship Education. Report of the Civics Expert Group*, AGPS.
- Edward Coke (1832 [1628]) *The First Part of the Institutes of the Laws of England.; or, a Commentary Upon Littleton*, ed Charles Butler, Volume 1, 19<sup>th</sup> edn, Clarke.
- Constitutional Centenary Foundation (2000) *Report on a Decade of Experience*, [www.centenary.org.au](http://www.centenary.org.au); [http://pandora.nla.gov.au/pan/10740/20030630/www.centenary.org.au/involving\\_people/decade\\_report/CCF\\_Decade\\_Report.pdf](http://pandora.nla.gov.au/pan/10740/20030630/www.centenary.org.au/involving_people/decade_report/CCF_Decade_Report.pdf)
- Constitutional Commission (1988) *Final Report of the Constitutional Commission: Volume One*, AGPS.
- Edward S Corwin (1955) *The 'Higher Law': Background of American Constitutional Law*, Cornell University Press.
- Gregory Craven (ed) (1986) *Official Record of the Debates of the Australasian Federal Convention*, Legal Books.
- Lesley F Crisp (1990) *Federation Fathers*, Melbourne University Press.
- Albert Deakin (1944) *The Federal Story: The Inner History of the Federal Cause*, Robertson & Mullens.
- Michael J Detmold (1985) *The Australian Commonwealth: A Fundamental Analysis of its Constitution*, Law Book Co.
- Sir Owen Dixon (1997) *Jesting Pilate and Other Papers and Addresses*, collected by Judge Woinarski, 2<sup>nd</sup> edn, William S Hein & Co Inc.
- Ian Fullagar (1993) 'The Role of the High Court: Law or Politics?' 67 *Law Institute Journal* 72.
- Brian Galligan (1995) *A Federal Republic: Australia's Constitutional System of Government*, Cambridge University Press.
- Anthony M Gleeson (1999) 'Legal Oil and Political Vinegar', Address to the Sydney Institute, Sydney, 16 March.
- Thomas Hobbes (1981 [1651]) *Leviathan*, ed and intro CB Macpherson, Penguin.
- Thomas Hobbes (1978) *Man and Citizen*, ed and intro Bernard Gert, Peter Smith.
- Thomas Hobbes (1971 [1681]) *A Dialogue Between A Philosopher and a Student of the Common Laws of England*, ed and intro Joseph Cropsey, University of Chicago Press.
- Oliver Wendell Holmes (1881) *The Common Law*, Little, Brown and Company.
- Marcus Howard and James Warden (eds) (1995) *An Australian Democrat: The Life, Work and Consequences of Andrew Inglis Clark*, Centre for Tasmanian Historical Studies.
- Helen Irving (ed) (1999) *The Centenary Companion to Australian Federation*, Cambridge University Press.
- Helen Irving (ed) (1996) *A Woman's Constitution?: Gender & History in the Australian Commonwealth*, Hale & Iremonger.
- Michael Kirby (1997) 'Teaching Australian Civics' *Queensland University of Technology Law Journal* 13.
- John A La Nauze (1972) *The Making of the Australian Constitution*, Melbourne University Press.
- Rae Else-Mitchell (ed) (1961) *Essays on the Australian Constitution*, Law Book Co.
- Richard D Lumb (1983) *Australian Constitutionalism*, Butterworths.
- Crawford Brough Macpherson (1962) *The Political Theory of Possessive Individualism: Hobbes to Locke*, Oxford University Press.
- Harvey C Mansfield Jr (1989) *Taming the Prince: The Ambivalence of Modern Executive Power*, Free Press.

- Sir Anthony Mason (2000) 'Judicial Review: A View from Constitutional and Other Perspectives' 28 *Federal Law Review* 2.
- Sir Anthony Mason (1996) *The Judge as Law-Maker*, 3 *James Cook University Law Review* 1.
- Keith Mason (1989) 'Prospective Overruling', 63 *Australian Law Journal* 526.
- Charles H McIlwain (1947) *Constitutionalism: Ancient and Modern*, Cornell University Press.
- Mark McKenna (1996) *The Captive Republic: A History of Republicanism in Australia 1788-1996*, Cambridge University Press.
- Mark McKenna and Wayne Hudson (2003) *Australian Republicanism: A Reader*, Melbourne University Press.
- Winston G McMinn (1979) *A Constitutional History of Australia*, Oxford University Press.
- Alexander CV Melbourne (1963) *Early Constitutional Development in Australia*, 2<sup>nd</sup> edn, University of Queensland Press.
- W Harrison Moore (1902) *The Constitution of the Commonwealth of Australia*, John Murray.
- Thomas L Pangle (1988) *The Spirit of Modern Constitutionalism: The Moral Vision of the American Founders and the Philosophy of Locke*, Chicago University Press.
- Haig Patapan (2000) *Judging Democracy: The New Politics of the High Court of Australia*, Cambridge University Press.
- Plato (1980) *The Laws of Plato*, trans with interpretive essay by TL Pangle, Basic Books.
- John GA Pocock (1975) *The Machiavellian Moment: Florentine Political Thought and the Atlantic Republican Tradition*, Princeton University Press.
- John Reynolds (1958) 'AI Clark's American Sympathies and his Influence on Australian Federation' 32 *Australian Law Journal* 62.
- Robert French, Geoff Lindell and Cheryl Saunders (eds) (2003) *Reflections on the Australian Constitution*, The Federation Press.
- Senate Standing Committee for Employment Education and Training (1989) *Education for Active Citizenship in Australian Schools and Youth Organisations*, AGPS.
- Senate Standing Committee for Employment Education and Training (1992) *Active Citizenship Revisited*, AGPS.
- Sir Ninian Stephen (1986) Address by His Excellency the Right Honourable Sir Ninian Stephen Upon the Occasion of the Commemoration of the 100<sup>th</sup> Anniversary of the Birth of Owen Dixon, University of Melbourne, 28 April, in Sir Owen Dixon (1997) *Jesting Pilate And Other Papers and Addresses*, Collected by Judge Woinarski, 2<sup>nd</sup> edn, William S Hein & Co Inc.
- Geoffrey Stokes (2004) 'The "Australian Settlement" and Australian Political Thought' 39 *Australian Journal of Political Science* 1.
- James R Stoner Jr (2003) *Common Law Liberty: Rethinking American Constitutionalism*, University Press of Kansas.
- James R Stoner Jr (1992) *Common Law and Liberal Theory: Coke, Hobbes, and the Origins of American Constitutionalism*, University Press of Kansas.
- Storing, H (1987) 'William Blackstone', in Leo Strauss and Joseph Cropsey (eds), *History of Political Philosophy*, 3<sup>rd</sup> edn, University of Chicago Press.
- Leo Strauss (1952) *The Political Philosophy of Hobbes, Its Basis and its Genesis*, University of Chicago Press.
- Leo Strauss (1953) *Natural Right and History*, University of Chicago Press.
- Michael Wait (2001) 'The Slumbering Sovereign: Sir Owen Dixon's Common Law Constitution Revisited' 29 *Federal Law Review* 1.



- John Williams (1995) 'With Eyes Open: Andrew Inglis Clark and Our Republican Tradition' 23 *Federal Law Review* 149.
- Daryl Williams (2001) 'Constitutional Change in Australia', Opening Address to the Australian Association of Constitutional Law National Conference, Perth, 22 September.
- Sir Isaac Windeyer (1962) 'A Birthright and Inheritance: The Establishment of the Rule of Law in Australia' *Tasmania Law Review* 1.
- George Winterton (1998) 'Popular Sovereignty and Constitutional Continuity' 26 *Federal Law Review* 1.
- Bernard Wise (1913) *The Making of the Australian Commonwealth*, Longmans, Green and Co.
- Gordon Wood (1969) *The Creation of the American Republic, 1776–1787*, University of North Carolina Press.
- Harley Wright (1998) 'Sovereignty of the People — The New Constitutional Grundnorm?' 26 *Federal Law Review* 1.
- Leslie Zines (1999) 'The Common Law in Australia: Its Nature and Constitutional Significance', Law and Policy Paper 13, The Federation Press in association with the Centre for International and Public Law, ANU.

## Cases

- Australian Capital Television Pty Ltd v Commonwealth* (1992) 177 CLR 106
- Crouch v Commissioner for Railways (Qld)* (1985) 159 CLR 22
- Lange v Australian Broadcasting Corporation* (1996) 189 CLR 520
- Levy v Victoria* (1997) 189 CLR 579
- Mabo v Queensland (No 2)* (1992) 175 CLR 1
- McGinty v Western Australia* (1996) 186 CLR 140
- Nationwide News Pty Ltd v Wills* (1992) 177 CLR 1
- South Australia v Commonwealth* (1942) 65 CLR 373
- Theophanous v Herald and Weekly Times Ltd* (1994) 182 CLR 104
- Victoria v Commonwealth* (1975) 134 CLR 338

## Legislation

- Australia Acts 1986* (Cth and UK)
- Australian Courts Act 1828* (Imp)
- Privy Council (Limitation of Appeals) Act 1968* (Cth)
- Privy Council (Appeals from the High Court) Act 1975* (Cth)