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# SEPARATION OF POWERS IN THE AUSTRALIAN CONSTITUTION

## Some Preliminary Considerations

"We are only feeling our way. We, ourselves, do not properly understand our Constitution yet. We, who are supposed to be experts, are merely children seeking the light. But what about the people outside? They know nothing in the world about it."

Sir John Downer (1903).<sup>1</sup>

I

## Some Arguments and Problems

Even those who regret it accept that the founders of the Australian Constitution "beyond question"<sup>2</sup> intended the separation of powers now required by the *Boilermakers' Case*<sup>3</sup>. This article seeks first to show that the arguments advanced to prove the alleged intention are no more probative than the draftsman's literary arrangement which has prompted the accepted view of constitutional history; and second, to discuss the proper strategy of approach to the historical record on these matters.

The first argument for the accepted view appeals to the form and arrangement of sections 1, 61 and 71 of the Constitution<sup>4</sup>. Notoriously, this argument proves too much, since the symmetrical triadic classification of all governmental power, apparently signified by this arrangement, would as much imply a separation of legislative from executive powers as of judicial from legislative and executive; and hardly anyone (except Sir Owen Dixon<sup>5</sup>) has ever

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1. 15 *Parl. Deb.* (Cth.), 3055. Cf. Downer's interesting remark, *Deb. Fed. Conv. (Melb.) 1898*, 275: "With them [the judges] rest the vast powers of judicial decision, in saying what are the relative functions of the Commonwealth and the States. With them rest the interpretation of intentions which we may have in our minds but have not occurred to us at the present time . . ." Downer, of course, was a member of the Drafting Committee of the 1897-8 Convention.
2. Sawyer: "The Separation of Powers in Australian Federalism" (1961) 35 *Australian Law Journal*, 177 at 178. The arguments discussed in section I *infra* are all taken from this source.
3. *R. v. Kirby, ex parte Boilermakers' Society of Australia* (1955-1956) 94 C.L.R. 254; *A-G for Commonwealth v. R.* (1957) 95 C.L.R. 529.
4. Sawyer: *loc. cit. supra* n. 2. *Boilermakers' Case* (1955-1956) 94 C.L.R. 254, at 275.
5. Such seems to be the sense of Dixon: "The Law and the Constitution" (1935) 51 *Law Quarterly Review* 590 at 605-606.

believed that the founders contemplated so radical a departure from the British constitutional model.

Still, the argument has a real fascination; there is no doubt that for lawyers, the phrasing suggests an exhaustive triadic classification which "cannot . . . be treated as . . . of no legal consequence"<sup>6</sup>. There is no short way to exorcise this fascination; to do this, it is necessary, first, to point out a fundamental but rarely noticed ambiguity in the notion of "separation of powers", and second, to show how the legal mind naturally trades on this ambiguity in misconstruing the definite (though ambiguously expressed) intentions of political founders and framers. To these tasks we shall shortly turn.

The second argument appeals to a parallelism with the Constitution of the United States, by which the Australian founders are said to have been fascinated<sup>7</sup>. The parallelism and the fascination have been exaggerated. But those who appeal to Caesar must go to Caesar, and the fact is that the sourcebooks of American constitutional law used by the founders drew distinctions between notions of separation of powers that the present Australian doctrine refuses to draw. The man primarily responsible, it seems, for the present symmetrical form of section 71, Sir Josiah Symon, was wont to quote from the 1891 edition of Story's *Commentaries on the Constitution of the United States*<sup>8</sup>. There he could read that under the United States Constitution there were not a few officers of government, such as justices of the peace, commissioners of excise, commissioners of bankruptcy and the like, whose duties "are partly judicial, and partly executive or ministerial"<sup>9</sup>. Sergeant's comment was quoted in Story with apparent approval, to the effect that "the Constitution, in speaking of courts and judges, means those who exercise all the regular and permanent duties which belong to a court in the ordinary popular signification of the terms"<sup>10</sup>.

The third argument for the accepted view appeals to the apparent testimony of certain founders, contained in more or less contemporaneous commentaries on the new constitution<sup>11</sup>. This argument bears all the marks of a lawyer's, as opposed to a historian's, approach; it ignores the primary sources, preferring always the legal "authority", and setting aside the context and purpose of those

6. (1955-1956) 94 C.L.R. 254 at 275.

7. Sawyer: *loc. cit. supra* n. 2. (1955-1956) 94 C.L.R. 254 at 275.

8. Symon was chairman of the Judiciary Committee of the 1897 Convention. On the work of this Committee see text *infra* at note 52, and Symon's account in 15 *Parl. Deb. (Cth.)*, 2938. Symon referred to Story as "one of the greatest and most unquestionable authorities of all time", *Deb. Fed. Conv. (Syd.) 1897*, 294. The edition of Story owned by Symon, now owned by the Public Library of South Australia, was the fifth (1891).

9. Story: *Commentaries on the Constitution of the United States* (5th ed. 1891), II, 444 n. 1. (Symon was not averse to reading footnotes! See *Deb. Fed. Conv. (Syd.) 1898*, 293).

10. Story: *loc. cit.*, citing Sergeant on the Constitution (2nd ed.), 377, 378. This is the passage picked up as the relevant authority by Harrison Moore: *The Commonwealth of Australia* (1902), 231 n. 1.

11. Sawyer: *loc. cit. supra* n. 2, cites passages from Quick and Garran, Harrison Moore (1910) and Inglis Clark. The comments in the text *infra* apply to all these works, not least to that of Inglis Clark, a dogmatic exponent of American constitutional doctrines who was not present at the Conventions after 1891. See Reynolds: "A. I. Clark's American Sympathies and his influence on Australian Federation" (1958) 32 *Australian Law Journal* 62.

authorities' pronouncements. In the last analysis, it is a *bootstrap* argument. The modern lawyer looks at the Constitution, and his habits and techniques of thought persuade him that its form indicates a certain intention; in support of this inference he cites, not available *travaux préparatoires*, but the opinions of early *legal* commentators. He fails to ask whether these commentaries were written as histories grounded on their authors' experience as founders, or whether they merely relied on the very same habits, techniques and systematically restricted data as grounded his own original inference.

For one thing, it is a little disconcerting to find appeals to the second edition of Harrison Moore's *Commonwealth of Australia* (1910). In the first edition of the work (1902) Harrison Moore gave considerable prominence to Story's quotation from Sergeant, quoted above<sup>12</sup>. He raised "the question whether any judicial power may be exercised, except by courts constituted as required by section 72"<sup>13</sup>, and began his answer:

In the United States it is accepted, notwithstanding the general terms used, that a certain amount of judicial power has been commonly, and perhaps necessarily, associated with certain offices; and that this power is exercisable under the United States by the like officers, though they are not protected under the terms of the Constitution [relating to judicial tenure]<sup>14</sup>.

On the question as it related to Australia he made no further general comments. But in 1910, under the influence of the decision in *Huddart Parker v. Moorehead* (1909), he added a whole chapter to emphasise a vigorous, if nuanced, conception of separation of powers that simply is lacking in the first edition<sup>15</sup>. Is the second edition closer to the intentions of the founders than the first? If the later is to be admitted as better evidence than the earlier, one should proceed straight to the memoirs (1958) of Sir Robert Garran, secretary to the final Drafting Committee (1897-8)! And here it is declared that the language of forms of "powers" was introduced, in section 71, only "as a draftsman's neat arrangement, without any hint of further significance"<sup>16</sup>.

Once again, to consider fairly what the founders might have had in mind in distinguishing between powers, one is forced to consider further the *possible* types of distinction or separation between "powers". It is here that one meets the ambiguity already mentioned, to which we now turn.

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12. *Loc. cit. supra* n. 10.

13. Harrison Moore: *op. cit. supra* n. 10, at 280 .

14. *Ibid.*

15. Harrison Moore: *The Commonwealth of Australia* (2nd ed., 1910), 303-324. *Huddart Parker v. Moorehead* (1909) 8 C.L.R. 330, is cited in the first footnote at 303.

16. Garran: *Prosper the Commonwealth* (1958), 194. Of course, Garran's evidence is of no more historical value than that of the writers cited by Sawyer. Garran refers for support to Griffith C.J.'s remarks in *Baxter v. Ah Way* (1909) 8 C.L.R. 826. Moreover, his opinion as expressed in his memoirs happens to reproduce as history the legal arguments he had to make as Attorney-General and counsel for the Commonwealth in *Roche v. Kronheimer* (1921) 29 C.L.R. 329, at 334-335; cf. also his submissions in *ex parte Walsh and Johnson* (1925) 37 C.L.R. 36, at 45.

## II

**A Theoretical Distinction**

At a verbal level, this ambiguity springs from the word "power", which may signify either an institution (cf. "a power in the land") or the powers of that institution<sup>17</sup>. The ambiguity is not peculiar to English; it may be discerned, for example, in Aristotle<sup>18</sup>. Historically, the ambiguity has been exacerbated by the eighteenth century usage of such words as "judiciary" indifferently as substantives ("the judiciary") or as adjectives ("the judiciary power")<sup>19</sup>.

But the ambiguity goes beyond the verbal level. There are in fact two different ways of conceiving and working with any theory or doctrine of separation of powers. On the one hand, one may postulate a number of government institutions, and require that no person be a member of more than one of these, that none of these institutions do any of the jobs assigned to the others, and in general that their organisation, personnel and tasks be kept entirely separate. For example, one might plan a constitution in which there would be a bicameral Legislature, a body of officials from which all members of the Legislature were excluded, and a Supreme Court and a regular hierarchy of specified courts in which membership of the Legislature or employment in any other official capacity was a disqualification for office. One could delimit more or less exactly the respective tasks of these three institutions. Then, if one left it at that, one would be thinking about the separation of these three "powers-in-the-land" in a way which we shall call *Institutional*. In particular, one's demand for separation would extend only to the three institutions, their personnel and their jobs; it would have no further necessary implications. Thus, if it were later, or collaterally, decided to establish a new institution to deal with a special social problem, no implication would necessarily arise concerning the staffing or work of this body; for the doctrine of separation concerned itself—one might say, exhausted its concern—with the effective separation from one another of the three concrete institutions named and defined.

On the other hand, one may postulate a conceptual system of governmental functions, and require that these functions be exercised so entirely separately that no institution of government should exercise more than one of them. For example, one might conceive a constitution in which there would be three functions or powers of government: legislative, executive and judicial. Then there might be any number of institutions set up to exercise these powers, or functions, but all of them subject to the overriding requirement that no person or body should exercise more than one such function. Then one would be thinking about the separation of these three powers of government in a way which we shall call *Abstract*. Here the doctrine of separation is logically prior to every particular institution, whereas in the *Institutional* way of thinking the

17. Vile: *Constitutionalism and the Separation of Powers* (1967) at p. 12, discusses further ambiguities not relevant here.

18. See the use of the term *morion* throughout the *Politics*.

19. See for example Blackstone: *Commentaries*, Intro. s.2; also 1, 2, ii; I, 3; Montesquieu: *The Spirit of the Laws* (trans. Nugent 1750), xi, 6; (and the original French likewise); Locke: *Of Civil Government*, xii, 143, 148.

"doctrine" of separation can really be spoken of only as a sort of shorthand, very circumscribed in reference, *derived* from the planned separation of certain particular institutions. Hence, according to the Abstract doctrine, all proposed institutions would be required, like all existing ones, to conform to the requirement that only one of the (say, three) postulated types of work be done by any one person or body.

There will be special legal problems for any constitution embodying either form of the doctrine. There will always, for example, have to be some effective principle of *ultra vires* to restrain one institution from trespassing on the ground of another. Where the Institutional doctrine is ruling, the problem of *ultra vires* arises only in connection with the particular institutions required to be kept separate, and is soluble by reference to the respective definitions of the powers of these institutions. Of course, these definitions may be more or less general, and at the extreme of generality may do no more than invoke such a schema of functions as in any case grounds the Abstract doctrine. But in the Institutional scheme, *even in this extreme case*, the need for an explication of these functions arises only in connection with certain nominated institutions, and the demand for separation of functions will tend to be subordinate to any other purposes or principles discernibly inherent in those institutions and in the constitution as a whole. In the Abstract scheme, by contrast, the functions of the institutions will be understood very generally; for it is the functions (in their exercise, of course, by persons or institutions) that are to be kept separate. Moreover, all persons and institutions (unless specifically exempted) have to conform to a requirement which overrides any particular purposes or principles that, as embodied in offices or institutions, might conflict with its quite general application. So the problem of explicating general terms, which may arise in a more or less subordinate way in the context of an Institutional doctrine, will certainly be paramount in the context of any Abstract doctrine of separation of powers.

### **The Distinction Applied**

The question whether the Constitution embodies an Abstract doctrine of separation of powers is the question underlying the *Wheat Case* (1915)<sup>20</sup>. For in this case, the question arose whether an institution provided for in the Constitution, but falling outside the explicit provisions of Chapters I, II and III for the Parliament (or legislative power), Executive (or executive power) and Judiciary (or judicial power), *must* conform to a doctrine of separation of powers conceived precisely in the Abstract fashion. Not all the judges faced this issue<sup>21</sup>; but most did, and the clash between Institutional and Abstract doctrines was in fact direct. That this was the real problem in the *Wheat Case* has not been noticed, partly because the language of all the judgments of the High Court appears at first glance to reflect only the Abstract doctrine that has prevailed unchallenged since 1915. But first impressions are misleading; as we have pointed out, it is possible in the extreme case, (as here), for

20. *N.S.W. v. Commonwealth* (1915) 20 C.L.R. 54.

21. Griffith C.J. and Powers J. can be said to have avoided it.

the definition of the nominated institutions in an Institutional scheme to invoke the same schema of powers and functions as in any case grounds the Abstract doctrine. What is in question is not the language employed to define the powers of institutions, but whether a schema of powers is invoked as basic, prior to all institutions, and hence as both exhaustive and controlling.

There can be little doubt that in the *Wheat Case* it was the opinion of Isaacs J. that was decisive; the judgments of Griffith C.J., and Powers and Rich JJ. have a perfunctoriness that would, in so important a case, be remarkable (especially for Griffith C.J.), were it not that the majority view was so exhaustively argued by Isaacs J. The judgment of Isaacs J., in fact, is seminal in the history of the Australian Constitution; it provides the major premise for almost every significant development in the law of separation of powers, and its implications are not yet exhausted.

For Isaacs J. the primary consideration was "the general frame of the Constitution"<sup>22</sup>. The fundamental principle was the "separation of powers", the "dominant principle of demarcation":

we find delimited with scrupulous care, the great branches of Government. To use the words of Marshall C.J. in *Wayman v. Southard*: "the difference between the departments undoubtedly is that the legislature makes, the executive executes and the judiciary construes the law." That describes the primary function of each department, though there may be incidents to each power which resemble the other main powers, but are incidents only<sup>23</sup>.

It would require "very explicit and unmistakable words to undo the effect of the dominant principle of demarcation"<sup>24</sup>. Thus the linchpin of his argument was precisely that there could be no "fourth branch"<sup>25</sup> of the Constitution; that every institution must conform itself to one or other of the three exhaustive categories of power, but never to more than one; that the federal courts referred to in Chapter III were the sole repositories of every judicial power that was not merely quasi-judicial and subordinate.

Historically speaking, to show that the Constitution was intended to embody a three-way "dominant principle of demarcation", one would have first to consider whether section 101, as intended, was not inconsistent with the postulation of such a principle<sup>26</sup>. In the *Wheat Case*, Isaacs J. sought to demonstrate the true intention of section 101 by postulating as primary and self-evident the very principle whose validity (as a matter of real intention) is in part dependent on a prior judgment as to the intended meaning of section 101. By adhering to this reasoning of Isaacs J.: ever since, the High Court has absolved itself from further inquiry into actual intentions. The legal principle

22. (1915) 20 C.L.R. 54, at 90.

23. *Ibid.*

24. *Ibid.*

25. Isaacs at *Fed. Conv. Deb. (Melb.) 1898*, 2279; quoted in text *infra* at n. 68.

26. Const. s.101. "There shall be an Inter-State Commission, with such powers of adjudication and administration as the Parliament deems necessary for the execution and maintenance, within the Commonwealth, of the provisions of this Constitution relating to trade and commerce, and of all laws made thereunder."

of demarcation in the Australian Constitution prescinds from, and is superior to, both provisions as to particular institutions and establishments, and questions of what historically was intended by the arrangements of the Constitution. To put the matter very shortly: since the *Wheat Case* it has been possible for the High Court to hold that any institution established or authorised to be established by the Constitution must conform to the triadic demarcation of powers, regardless of whether the founders intended it to be conformed or not<sup>27</sup>.

By contrast, there are Barton and Gavan Duffy JJ. in dissent in the *Wheat Case*. Their views, though in all respects in conformity with the historically discoverable intention of section 101<sup>28</sup>, have been rejected beyond call. In their view the word "adjudication" in section 101 embraced both administrative and judicial functions<sup>29</sup>, and there were no grounds for saying that the judicial must be subordinate to the administrative<sup>30</sup>. It was for Parliament to grant such powers as it considered necessary:

The Parliament, in giving the Commission the status and some of the powers of a Court, has acted in exercise of a discretion expressly committed to it, an exercise which this Court cannot dispute or frustrate except in obedience to *some controlling context*. The opposite contention amounts to this, that Parliament was bound to withhold any status or power of a Court from a body which was to perform the extremely important functions which the framers of the Constitution declared that this Commission was to exercise, the nature of those functions being such that many of them could only be exercised *inter partes*.<sup>31</sup>

Thus the reasoning of the dissenting Justices was founded on an Institutional approach to the interpretation of the whole Constitution. They would not admit that a "controlling context" could be deduced from the arrangement of the first three chapters of the Constitution, nor from the apparent exhaustiveness of section 71 read apart, or in abstraction, from Chapter IV<sup>32</sup>. They insisted that Chapter III was concerned only with the "general Judicature" of the Commonwealth<sup>33</sup>; it did not prevent the establishment of other institutions:

Under this Chapter the general judiciary system of the Commonwealth is provided for, and it has no relation to tribunals instituted or appointed for special purposes and confined in their jurisdiction to the

27. This is not to deny that the High Court has not sometimes admitted exceptions to the principle, such as powers conferred under s.122 of the Constitution with respect to Commonwealth territories, the judicial powers of Parliament under ss.47 and 49 of the Constitution, and the powers of courts-martial under s.51(vi).

28. See text *infra* s.IV, (v).

29. (1915) 20 C.L.R. 54, at 101-102 (Gavan Duffy J.).

30. *Id.* at 70 (Barton J.); 102 (Gavan Duffy J.).

31. *Id.* at 71 (Barton J.) (emphasis added).

32. *Id.* at 103.

33. *Id.* at 72-73, 103. Compare O'Connor ("your ordinary courts") in *Deb. Fed. (Conv. (Melb.) 1898*, 2284; Higgins J. ("general jurisdiction") in *Alexander's Case* (1918) 25 C.L.R. 434, at 476.

enforcement and upholding of any special and limited class of laws<sup>34</sup>.

Thus there was no Abstract principle of demarcation which was to be assumed to be superior and prior to such special purposes and institutions as might be found otherwise unambiguously in, for example, the last five Chapters of the Constitution<sup>35</sup>. It might well be that the words "execution and maintenance", as used in both section 101 and section 61, connoted "executive" rather than "judicial". But the powers conferred by sections 101 and 61 were:

not directed to perform the same functions but to attain the same end. Powers entirely different in their nature may be exercised for the purpose of bringing about the same result, and the exercise of judicial functions may appear to Parliament to be as necessary for the prescribed purposes as the exercise of administrative functions<sup>36</sup>.

There was thus no rule that every institution established under the Constitution must always and necessarily be confined to the performance of one type of function to which other functions could only be ancillary; particular intentions and purposes were prior and superior to questions of types of powers or function:

It is true that a Court usually confines itself to the performance of strictly judicial duties and that many of the duties of the Commission must be purely executive, and it is equally true that a "corporation" (section 4) discharging judicial duties as a Court and executive duties which require none of the special powers of a Court, must look ugly and anomalous in the eyes of a lawyer, but that does not determine the question at issue. It may well be that those who framed the Constitution were impressed with the necessity of giving to the Inter-State Commission in Australia such an anomalous character because they recognised that in the United States the Inter-State Commission was enfeebled and impeded in the performance of its duties by its want of judicial power and by the inability of Congress to give it such power.<sup>37</sup>

In brief, the Constitution was to be regarded as primarily a disposition of institutions established for their own particular ends, and only secondarily and subordinately as a demarcation of functions; it was not to be interpreted simply by reference to a principle, by prescinding from the possibility of anomalous or special institutions; it was not to be interpreted by prescinding from the historically determinable intentions of the founders<sup>38</sup>.

If a further illustration of the distinction between Abstract and Institutional

34. *Id.* at 73.

35. *Id.* at 75.

36. *Id.* at 102.

37. *Ibid.*

38. Rich J.'s judgment closely followed the theories and conceptual structure of Isaacs J.'s. Griffiths C.J.'s judgment, strictly construed, involved no large principles of constitutional interpretation; it turned on a construction of s.72 and of the emphasis of s.101. It is, of course, possible to speculate whether so odd and limiting a construction of s.101 must not have had some more abstract premise, such as Isaacs J. articulated. Powers J. agreed, he said, with the reasoning of both Griffiths C.J. and Isaacs J., and added nothing to their analyses.



doctrines and strategies is required, it may be useful to look at the *Boiler-maker's Case*<sup>39</sup>. The basic premise of the High Court's judgment is that essentially non-judicial functions may not be vested in essentially judicial institutions<sup>39</sup>. To support this premise, explicit and repeated appeal is made, as well as to the arguments already noted in section I above<sup>40</sup>, to a fundamental principle of federalism:

The position and constitution of the judicature could not be considered accidental to the institution of federalism: for upon the judicature rested the ultimate responsibility for the maintenance and enforcement of the boundaries within which governmental power might be exercised and upon that the whole system was constructed . . .<sup>41</sup>

But this argument really supports only the Institutional conclusion that the High Court (or at most, the general federal judicature) must be kept free for purely judicial activities<sup>42</sup>. For section 75 (v) ensures, even if section 73 (ii) gives only a partial guarantee, that the High Court retains an overall judicial control of the Constitution<sup>43</sup>. No other tribunal *could* supplant its "ultimate

39. This is the "basal reason" offered to justify, *a fortiori*, the major premise immediately relevant to the case: that judicial powers may not be attached to a body whose essence is non-judicial. (1955-56) 94 C.L.R. 254, 289, 267, 271, 296.

40. Summarily stated at (1955-56) 94 C.L.R. 254, 275.

41. *Id.* at 276; also 267-268. See also the remarks of Dixon C.J., Williams, Webb and Fullagar, J.J. on the special nature and problems of federalism in *O'Sullivan v. Noarlunga Meat Ltd.* [No. 2] (1955-56) 94 C.L.R. 367 at 375.

42. That is, if it supports any relevant conclusion at all—for it might be thought that the demands of s.72 for life tenure of all persons exercising federal judicial power already provided a sufficient guarantee of the independence of the judiciary. And after all, nothing in the Constitution can prevent the Executive packing even the High Court with its creatures. Oversight of this fact vitiates, too, the arguments of Isaacs J. in the *Wheat Case* (1915) 20 C.L.R. 54, at 94, to the effect that the Inter-State Commission could not be allowed to exercise judicial powers because its members might be non-lawyers. For where is the provision that Justices of the High Court shall be lawyers? Not in the Constitution. Notice that the objection raised in the text *supra* was put to Owen Dixon in cross-examination on his evidence before the Royal Commission on the Constitution in 1927 (*Minutes of Evidence*, 729):

*Dixon:* I am very much in favour of hedging the judiciary with the greatest possible safeguards. They have an extremely difficult function to perform. The independence of the judiciary is worth a great deal more than, perhaps, people fully realise, and the tendency to interfere with the judiciary is necessarily great, because everyone who has power of his own naturally resents being overruled by the judiciary. It is the judiciary's function to overrule those who have the power, and, I think the less it is possible for the judiciary to be interfered with, the better. That is what independence is given to them for.

*Counsel:* That is in regard to the High Court and a major Court?

*Dixon:* I think it is true of all courts. It crops up in the most unexpected ways and in the most inferior tribunals.

43. Const. s.75 "In all matters— . . . (v) In which a writ of Mandamus or prohibition or an injunction is sought against an officer of the Commonwealth: the High Court shall have original jurisdiction". See Wynes: *Legislative, Executive and Judicial Powers in Australia*, (3rd ed. 1962), at 604-607. Const. s.73 "The High Court shall have jurisdiction, with such exceptions and subject to such regulations as the Parliament prescribes, to hear and determine appeals from all judgments, decrees, orders and sentences . . . (ii) Of any other federal court, or court exercising federal jurisdiction . . ." See Wynes: *op. cit.*, at 648-653. Compare Dixon's remark in 1927 (*Minutes of Evidence*, 782): "It is competent to Parliament (by a combined exercise of the power to create new courts and the power given under the words "with such exceptions"), to create a new tribunal *without* appeal to

responsibility for the maintenance and enforcement of the boundaries within which governmental power [may] be exercised". The Abstract conclusion that no tribunal exercising *any* federal judicial power may exercise any other power is attained by a slide from the Institutional "judicature" to the Abstract "judicial power".



### Another Theoretical Distinction

The *Wheat Case*, the *Boilermakers' Case* and not a few other cases may prompt the reflection that the requirement of an Abstract separation of powers has been insisted upon by the judiciary against the legislature and the executive. This record of struggle between politico-legislative projects and legal-judicial canons of interpretation may suggest caution in accepting the view that a separation of powers, in the legally established sense, was intended by the founders of the Constitution. It suggests that, quite apart from the generalities of "realist" iconoclasm, one's initial hypothesis ought to be: that the relation between judicial interpretation and the politico-legislative intentions of the founders is similar to the relation between judicial interpretation and the politico-legislative projects declared unconstitutional in the light of that interpretation. And the latter relation can be described as the product of a *method* of abstraction.

What does abstraction mean in this context<sup>44</sup>? It means a presupposition of the systematic nature of the relevant data. It means a prescinding from, or elimination of, further questions (as to history, intention, practicality, etc.) that would tend to undermine the foregoing presupposition. It means systematising the data by reference to principles of the greatest possible generality and scope of application (to which, if need be, exceptions can be admitted) in preference to the enunciation of a greater number of less general principles that might require fewer unexplained exceptions but that would fail to present a comparable appearance of symmetry and "principle." It means preferring distinctions between apparently sharply defined "concepts" to distinctions between "greater and lesser", "partly and partly", "more and less", "in one sense and in another sense", etc., within the same concept. It means using the notion of "the criterion" ("the test") with an apparent unselfconsciousness hardly consistent with firm recognition of the analogical character of most of the concepts in a legal system<sup>45</sup>. It means (though the connection is not

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the High Court, and to confide to a single person the decision of any question, however momentous". Unless s.75(v) is borne in mind, Dixon's remark can involve a *suggestio falsi*.

44. Compare the following account with Dixon's remarks about generalization and analysis, *op. cit. supra* n. 5, at 590.

45. A term is analogical when its meaning shifts systematically as one moves from one area of usage to another. A term like "judicial power" is analogical because it embraces a set of features and values, of which all may be present in one case of judicial power (which may be called the central analogate), but of which only some may be present in other cases that still can be usefully called cases of

analytic, and the phenomenon is partly explicable by other causes) never or rarely acknowledging in judgments the difficulties of decision, of reconciling precedents, of defining principles and of selecting definitions, but always or normally presenting the conclusion as an apodeictic consequence of principles and definitions whose scope and place in the system is undoubted. In our present case, it means in particular, the radical tendency to prefer the Abstract to the Institutional interpretation of the separation of powers in the Australian Constitution, and to employ the essentialist method of once-for-all characterisation in the application of the Abstract doctrine<sup>46</sup>.

If P. H. Lane's analysis<sup>47</sup> were to be adopted, the foregoing method or tendency would have to be described, perhaps, as a "metafactor". Nonetheless, it is a reality that students of Australian constitutional law will be able to readily verify and amply illustrate. So to forestall misunderstanding it will be as well to point out that the tendency in question is nothing but a particular modality of a quite general phenomenon—legal discourse and lawyer-like habits of mind. Without exploring the phenomenon in detail, it is possible to indicate why legal thought and system are characterised almost inescapably by abstraction. For they are grounded in desire for system in affairs and in the need to opt definitely as between parties to disputes. The first can be attained only by, and the second demands, the definition of terms, restriction on further ques-

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judicial power. This set of features and values constitutes a system because of the more or less definite place of the central analogate or model, and because a link between this central case and the other (that is, analogous) cases is provided by the values that are more or less common to all cases of "judicial power" and that should have, therefore, a certain priority in the characterisation of that power.

46. Thus the fundamental minor premise of the majority judgment in the *Boilermakers' Case*: "One thing that *Alexander's Case* did decide once and for all is that the function of an industrial arbitrator is completely outside the realm of judicial power and is of a different order": (1955-1956) 94 C.L.R. 254, at 281. This should be read along with the claim made by Isaacs and Rich JJ., in *W.W.F. v. Gilchrist, Watt and Sanderson* (1924) 34 C.L.R. 482, at 507, that *Alexander's Case* had "definitely ascertained" the "nature" of arbitral functions. This claim was rejected by the majority in *W.W.F. v. Gilchrist, Watt and Sanderson*, and the distinction has been maintained ever since, between "judicial" in the sense of s.71 and "judicial" in the sense relevant to the issue of prohibition. And it is not true that *Alexander's Case* settled the question whether arbitral powers are irredeemably non-judicial, whatever the character of the institution on which they are conferred. For the "essence" of the Arbitration Court was not, in the relevant sense, in question in that case; all that was necessary for Isaacs and Rich, JJ. was to determine whether the arbitral powers were severable from the improperly conferred judicial powers of the Court. True, they said at one point that the Court was not constituted "in reliance on" Chapter III (25 C.L.R. 434, at 467; but contrast 469, quoted *infra* note 78); but it is equally true that in the various reconstitutions of the Court after *Alexander's Case* (notably that of 1926) the Parliament did act "in reliance on" Chapter III. True, the majority in the *Boilermakers' Case* made their own examination of the historical essence of the Arbitration Court, concluding that its judicial powers were no more than "consequential, accessory or incidental authorities annexed to the powers and functions in the performance of which the Arbitration Court finds the real or dominant purpose of its being." (1955-1956) 94 C.L.R. 254, at 288-289. But this examination was prefaced by the fallacious interpretation of *Alexander's Case*, and consequently never alluded to the possibility that the institution might have a double "essence". If Parliament determines that annexation of judicial powers to the Court is a *sine qua non* for the settlement by arbitration of industrial disputes, on what grounds does the High Court declare that these judicial powers are not "essential"? (On the misinterpretation of *Alexander's Case* in the *Boilermakers' Case* see further n. 78 *infra*).

47. Lane: *Some Principles and Sources of Australian Constitutional Law* (1964).

of Governor-General, Lieutenant-Governor, Chief Executive Officer, or Administrator of the Government, or any other executive office"<sup>53</sup>. Isaac Isaacs said:

We will leave ourselves open to ridicule if we pass the provision.

*Symon:* My hon. friend does not seem to appreciate the position of a judge in a Federation. He seems to have forgotten that we are establishing a Federation.

*Isaacs:* The word "Federation" is an answer to everything; it is like the word "Mesopotamia"<sup>54</sup>.

Symon's motion was passed, and became clause 80 of the Draft Bill of 1897. On 1st February, 1898, the clause was confirmed in Committee of the whole Convention by 25 votes to 20, with Downer, O'Connor, Symon and Barton ranged in the majority against Isaacs and Higgins<sup>55</sup>. Thereupon Holder moved an amendment to ensure, further, that no person holding parliamentary office could be appointed to any of the executive positions which Symon's clause 80 barred to holders of judicial office<sup>56</sup>.

*Isaacs:* I think that, accepting the vote which has just been taken, we ought at least to be consistent.

*Symon:* The ground on which we have proceeded is a ground of principle . . . .

*Isaacs:* And I want to maintain the principle of separating the legislative, executive and judicial offices.

*Symon:* The only reason for our retaining the clause is that we consider that the Judiciary should be kept absolutely apart from everything in relation to the Executive . . . .<sup>57</sup>

Holder's amendment was rejected by 20 votes to 17, with Barton O'Connor and Symon ranged in the majority against Isaacs and Higgins<sup>58</sup>. But on 11th March, without debate, clause 80 was deleted from the Bill by 26 votes to 11 with Isaacs and Higgins in the majority, and Downer, O'Connor, Symon and Barton in the minority<sup>59</sup>. In 1902 Barton explained that the intention of the Convention in omitting clause 80 was to leave the matter to the option of the Parliament<sup>60</sup>.

- (v) The Inter-State Commission was undoubtedly intended by the founders to have, or to be able to have, judicial powers of the very sort struck down in the *Wheat Case*<sup>61</sup>. The unsuccessful campaign against the

53. *Deb. Fed. Conv. (Adel.)* 1897, 1174.

54. *Id.* at 1175.

55. *Deb. Fed. Conv. (Melb.)* 1898, 369.

56. *Id.* at 370.

57. *Id.* at 372.

58. *Id.* at 375.

59. *Id.* at 2343.

60. *14 Parl. Deb. (Cth.)*, 1566, confirmed by Higgins at 1567.

61. It would be contrary to our principles to rely on Quick and Garran: *Annotated Constitution of the Australian Commonwealth* (1901), at 202: "it was thus contemplated that the Commission should have judicial functions"; at 900: "The Commission is intended to be policeman as well as judge."

whole proposal, waged by Isaacs and Higgins in the Convention, was predicated not on a principle of separation of powers but on the view that the supervision of inter-State trade, railways and rivers should be left to the Federal Parliament<sup>62</sup>. No-one in the Conventions pointed to the powers of the Commission as a violation of, or exception to, any principle of separation.

This is not the place to summarise the complex debates on the Inter-State Commission. But the position finally attained may be judged from the following excerpts from debates at the end of the Melbourne Convention of 1898.

*O'Connor*: . . . How will this body exercise its powers? It may exercise them by judicial acts, by decisions in regard to rights, and a number of other matters. If in those decisions it goes beyond the limits of the Constitution as assigned to it, surely there must be power in the High Court to review those decisions . . .<sup>63</sup>

*Higgins*: It is not a court: it is a jury of experts, like our Railway Commissioners<sup>64</sup>.

*O'Connor*: The honourable member says it is not a court. It may or may not be a court in the technical sense of the word; but if it has power to give decisions, surely that is the first essential of a court; and if it gives decisions which are not in accordance with the Constitution there should be some power of reviewing them . . .

*Higgins*: Would you allow an appeal from the directors of a company?

*O'Connor*: I hope the honourable member will ask something relevant and analogous<sup>65</sup>.

The foregoing interchanges occurred during discussion of clause 74, as it then was, providing for appeal to the High Court from decisions of the Inter-State Commission<sup>66</sup>. As part of their strategy of opposing everything to do with the Commission, Turner, Isaacs and Higgins opposed this portion of clause 74.

*Isaacs*: . . . I cannot see why you are to put in clause 74 the Inter-State Commission, when you have given the judicial power of the Commonwealth [under what was then clause 73]<sup>67</sup> extension to all cases under this Constitution or involving its interpretation . . . Why will not that include any decision of the Inter-State Commission which is contrary to this Constitution?

*O'Connor*: For this reason . . . You have given power to the

62. See for example Isaacs, *Deb. Fed. Conv. (Melb.) 1898*, 1495, 1525, 2461.

63. *Id.* at 2277.

64. *Id.* at 2278; also at 1265, 1268.

65. *Id.* at 2279.

66. Now Const. s.73.

67. Now Const. s.71.

High Court to entertain appeals from federal courts and courts invested with federal jurisdiction, and if you want to include the Inter-State Commission, which is not a federal court, and is not invested with federal jurisdiction, you must mention it specially.

*Isaacs*: . . . I want to eliminate the constitutional creation of the Inter-State Commission. I think it is a great mistake that we should erect this body—a fourth branch of the Constitution—when it ought to be a matter for consideration of the people of the Commonwealth hereafter, through the Federal Parliament, to say what they will or will not have.

*O'Connor*: Surely that was decided in clause 96. The proper place to reconsider that question is when we come to that clause<sup>68</sup>.

Glynn, a long-standing opponent of the Inter-State Commission<sup>69</sup>, pointed out that in America the Inter-State Commission (contrary to what O'Connor had represented in 1897) was not a judicial body<sup>70</sup>. This, the Chairman said, was irrelevant. But Higgins sought to put Glynn's point in another way:

*Higgins*: . . . The Inter-State Commission is not a body that acts. It is a body that simply decides upon facts—"Is a rate good?" "Is a charge an infringement of the Constitution?" . . . That is all the Inter-State Commission has to decide, and I understood Mr. Symon to say that it is a court, and that there should be an appeal<sup>71</sup>.

*Symon*: Oh no. I understood you to say that if the Commission did not act; and I say that if the Commission has to decide, there has to be an appeal.

*Higgins*: They have to decide but not as a court.

*Reid*: The Commission is to be "charged with the execution and maintenance within the Commonwealth of the provisions of this Constitution, and of all laws made thereunder relating to trade and commerce."

*Higgins*: It is clumsily expressed, but at the same time I should take that with the other clauses about adjudication, and I should take the intention to be that they are to see by their decisions about rates and the rest that the laws are executed; but they will not execute the laws.

*Reid*: It is an idle tribunal if it simply meets and expresses an opinion and cannot enforce its decisions.

*Higgins*: In America—

*Reid*: I do not mind that; the American conditions are not parallel.

*Higgins*: . . . It is not an executive body in the sense that it has to do a thing, but it simply has to follow the analogy of the United

68. *Deb. Fed. Conv. Melb. 1898*, 2279. Clause 96 became Const. s.101.

69. See *id.* at 1379.

70. *Id.* at 2280, 2281.

71. *Id.* at 2282.

States of America . . . I interjected, and I think relevantly, when Mr. O'Connor was speaking, that it is not usual to allow an appeal from directors of a company if they are acting within the purview of their by-laws . . .

*Reid:* If your understanding of the Commission is right I quite see the force of what you say; but we differ as to what the Commission is to be.

*Higgins:* . . . I am trusting the Drafting Committee to put this language right.

*Holder:* It is right now; it will be wrong if it is altered.

*Higgins:* I do not think it is the intention of this Committee [of the whole Convention] to put the Inter-State Commission in Australia in a different position to what a similar body is in America.

*O'Connor:* It has been done already in clause 96 . . . You have given power to the Parliament to give power to the Inter-State Commission to adjudicate for the purpose of the maintenance and execution of the provisions of the Constitution. That enables the Parliament to constitute the Commission in such a way as to get rid of the difficulty that has occurred in America; and it may give power, not only to decide that a rate is illegal, but to enforce that decision, and also to award damages or compensation to persons who have been injured by the rate . . . If powers of adjudication of that kind are given, surely you will have a court with a power of adjudication which will deal with matters of infinitely larger concern than your ordinary courts will have to deal with. If you constitute a body of this kind, surely you are not going to put such a body in an absolutely irresponsible position<sup>72</sup>.

Two minutes later Turner's amendment to delete reference to Inter-State Commission from clause 74 was negatived without division<sup>73</sup>, and within a further two or three minutes the clause was amended by adding the words "on questions of law only" (its present form)<sup>74</sup>. It cannot be doubted that O'Connor and Reid had been speaking for the effective consensus.

Later in the morning of the same day, the final reconsideration of the Inter-State Commission's powers took place.

*Isaacs:* There are little over a dozen members present to decide a matter of utmost importance—the creation of a fourth organ—in this Constitution.

*O'Connor:* The question has been pretty well thrashed out already.

*Isaacs:* We have the Parliament, the Executive, and the High Court, and now a fourth branch is created independent of all the rest—the Inter-State Commission.

72. *Id.* at 2284.

73. *Id.* at 2285.

74. *Id.* at 2286.

*Reid*: One you cannot get at—one that is thoroughly independent<sup>75</sup>.

A few minutes later, Turner's wrecking amendments, supported of course by Isaacs and Higgins, were rejected by votes of 22 to 15, and 23 to 13. It remained only for the Drafting Committee to polish the scheme into the present form: sections 101, 102, 103 and 104.

In the light of all that had happened, here only lightly indicated, no-one could have disputed Deakin's remark in his closing speech to the Convention, a week later: the Inter-State Commission, he said, "will feel that they are, by appointment and function, a truly federal court . . ."<sup>77</sup>

- (vi) The power of conciliation and arbitration, now referred to in section 51 (xxxv), was always conceived as a mixed power including judicial and enforcement functions with non-judicial<sup>78</sup>. No attempt was made to justify such a mixture, since no-one at all, however much opposed to it as a solution to industrial disputes, saw anything constitutionally anomalous to it.

## V

It is possible to exaggerate the significance of the High Court's refusal, ever since its foundation in 1904, to refer to the vast bulk of the Constitution's *travaux préparatoires*. The American experience does not suggest that either judicial unanimity or historical accuracy is a necessary consequence of allowing such references. Still, the consequences of the radical limitation on further questions involved in the Australian refusal are not to be overlooked. The judges of the High Court are thrown back upon two acknowledged sources for decision: authority and precedent, and language and linguistic ("formal") arrangement. In the *Wheat Case*, the central passage of Isaacs J.'s judgment reflects both these sources equally:

75. *Id.* at 2391.

76. *Id.* at 2393-2395.

77. *Id.* at 2503. See also Kingston and Barton, *id.* at 2458

78. Consult *Deb. Fed. Conv. 1891*, 164, 688 (Kingston), 688-689 (Griffith and Kingston), 780 (Kingston); *Deb. Fed. Conv. (Adel.) 1897*, 782 (Higgins); *Deb. Fed. Conv. (Melb.) 1898*, 182 (Quick), 185 (Kingston). Notice that the majority judgment in the *Boilermakers' Case* asserts that in *Alexander's Case*, Isaacs, Rich, Powers and Barton JJ. all "regarded the Arbitration Court as a body whose creation, form, constitution and status were referable to s.51 (xxxv). They did not ascribe to the legislature any purpose of exercising the legislative power contained in s.71. The failure of the provisions for the president's tenure to comply with s.72 . . . was used by their Honours as a ground for supposing that no intention to rely on s.71 existed". (1955-1956) 94 C.L.R. 254 at 284. But the conclusion of the relevant argument of Isaacs and Rich, JJ. is: "it follows that any law passed under s.71 which says that a Justice so appointed shall be displaced or removed from his office in seven years—which is what s.12 of the Arbitration Act says—is contrary to the Constitution . . ." (1918) 25 C.L.R. 434, at 469 (emphasis added). (This seems, however, to contradict a passage at 467.) Similarly, Barton J. concluded: "I am thus of the opinion that the tribunal erected by the Act is a court in the strict sense, that part of the judicial power of the Commonwealth is reposed in it, and that this Act creating it must be held to be referable to, and must be interpreted in the light of, Chapter III of the Constitution": at 457 (emphasis added).



we find delimited with scrupulous care, the three great branches of Government. To use the words of Marshall C.J. in *Wayman v. Southard* . . . .<sup>79</sup>

Our brief study may suggest that the scrupulous care to delimit the three branches of government must be ascribed to Isaacs J., rather than to the consensus of the founders. What it should not perhaps be taken to suggest, in itself, is that the judicial construction of the Constitution, as consummated in the *Boilermakers' Case*, is to be regarded as unscrupulous or careless. The lawyer-like habit of mind that facilitates that construction has its role—a role that is defended by the architects of the doctrine of separation so constructed:

It may be that the court is thought to be excessively legalistic. I should be sorry to think that it is anything else. There is no other safe guide to judicial decisions in great conflicts than a strict and complete legalism . . . Lawyers are often criticised because their work is not constructive. It is not their business to contribute to the constructive activities of the community, but to keep the foundations and framework steady.<sup>80</sup>

But just as the work of lawyers should not be confused with the work of legislators, so it should not be confused with the work of historians or social philosophers. Whatever may be said of the separation of powers, a distinction of competences is not in doubt.

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79. (1915) 20 C.L.R. 54 at 90.

80. Sir Owen Dixon, *Swearing-in as Chief Justice of the High Court*, (1952) 85 C.L.R. xi.