**Judicial Review of Statutes**

Sir Maurice Byers Lecture

The Honourable Justice Nye Perram[[1]](#footnote-1)

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Sir Maurice Byers died on 16 January 1999 which is a quarter of a century ago. More than any other person including High Court judges it is likely that Sir Maurice was responsible for the dramatic expansion in Commonwealth powers that occurred whilst he held the office of Solicitor-General, from 1973 to 1983. When I came to the Bar in 1993 Sir Maurice had returned to the private bar doing such bric-a-brac as *Wik*[[2]](#footnote-2) and *Kable*[[3]](#footnote-3) whilst at that time I was seeking to set aside default judgments in the District Court. I did however once have the very good fortune to be led in a case against him before the Full Court of the Federal Court. He was appearing for a party who, up until the moment of Sir Maurice’s appearance, had in all earlier interlocutory rounds attracted the ire of the Bench. But with the unexpected appearance of Sir Maurice at the appeal it was as if I was now in a different case. He did not so much address the Full Bench as enter into an amiable colloquy with them. In this colloquy he adopted the role, to which to my observation he seemed naturally suited, of an indulgent but humorous teacher and they, attentive students. He also said a few kind words to me when he had no reason to speak to me at all which made quite an impression on me as a young barrister. Something else made an impression on me as well. Sir Maurice had come to Court wearing a very handsome pair of bedroom slippers. Initially, I suspected that perhaps the wearing of slippers was some ancient privilege of apparel afforded only to the most distinguished members of the inner bar but I subsequently found out that he was quite unwell and this made going to court easier for him. I will return to Sir Maurice a little later.

This lecture is about the judicial review of statutes which is a highbrow way of referring to the power of courts to strike down statutes as invalid. I think it is a topic that Sir Maurice might have approved. In Australia, this power largely goes unnoticed since its orthodoxy is so widely accepted. But the question of what this power is and from where it derives is not one which gets a lot of attention in this country. Correspondingly, in Australia – except perhaps as part of the debate about whether there should be a constitutional bill of rights – little attention is given to this central feature of the *Constitution* or to the justifications which may be proffered for its existence.

So you may know how close we are getting to the end of this speech and therefore how close to the promised refreshments, I will tell you that I am going to talk about four topics. First, we will peer into the King’s Bench’s brief adventure in judicial review which occurred between 1609 and 1653 most notably in *Dr Bonham’s Case*[[4]](#footnote-4) but also in some other cases. I will suggest that *Dr Bonham’s Case* is considerably overrated and that its only relevance emerges from what the American colonies made of it in the lead up to the War of Independence.

Secondly, I will suggest that another source for judicial review of statute law may be provided by the exercise of the King’s prerogative power to hear appeals from his subjects. As we shall see, during the early 18th century, the Privy Council in the exercise of that prerogative power struck down colonial laws in the Americas on the basis of repugnancy with English law. In addition, the colonies were very familiar with having the Privy Council annul their laws on the basis of the repugnancy doctrine although this was not a judicial process but rather an aspect of its supervision of the colonies.

Thirdly, perhaps inevitably, we will have a look at the decision of *Marbury v Madison*[[5]](#footnote-5) which is thought in some quarters to be the source of the power of judicial review. I want to emphasise the extraordinary circumstances which gave rise to the case and I want to suggest that its conclusion that there was a power of judicial review was not really that surprising.

Fourthly, I will then turn to the reception of judicial review into Australia which is perhaps more interesting than you might expect.

**1. The Court of King’s Bench between 1609 and 1653**

Many people look to *Dr Bonham’s Case* for the origins of judicial review. The Royal College of Physicians, a body incorporated by letters patent confirmed by statute, prohibited Dr Bonham from practising medicine in London for a month because he did not have a licence from the college. Despite that, Dr Bonham stubbornly went on practising medicine and, in due course, he was fined and ordered to stop practising medicine again. When once more he refused to comply, he was arrested and imprisoned. Dr Bonham sued successfully for wrongful imprisonment. The Chief Justice of the King’s Bench, Coke CJ, held that the letters patent granted to the College only permitted it to fine and imprison a person for malpractice and that operating without a licence was not malpractice. Coke CJ added, quite unnecessarily I think, that if the letters patent authorised by statute had permitted the College to fine Dr Bonham for practising without a licence, then the provision which permitted it to retain half the fine made it a judge in its own cause. He then made the well-known statement that:

In many cases the common law will controul Acts of Parliament and sometimes adjudge them to be utterly void: for when an Act of Parliament is against the common right and reason, or repugnant, or impossible to be performed, the common law will controul it and adjudge such Act to be void.

This was said in 1609. As Mr Zhou in his very excellent chapter on the case points out,[[6]](#footnote-6) Coke made this point twice more. in 1610 and 1612.[[7]](#footnote-7) Further, he had earlier made the point in 1578 (at the tender age of 26) when, whilst at the bar, he had acted in *Lord Cromwell’s Case*[[8]](#footnote-8) for a vicar in a slander suit brought by Thomas Cromwell’s grandson, the second Baron Cromwell.[[9]](#footnote-9) Coke successfully argued that the statute in question, which dealt with the slandering of, amongst others, barons, had been mistranslated from the Latin in the pleadings so that it said irrationally that the innocent should be punished, that Lord Cromwell was bound by the way his case had been pleaded and that, as pleaded, the statute was contrary to law and reason and hence void. This novel submission was upheld. Coke was apparently very proud of this victory describing it in his *Reports* as ‘an excellent point of learning in actions of slander’.[[10]](#footnote-10)

Coke CJ’s adventures in judicial review were not to the taste of James I. On 17 October 1616 Coke was summoned before Lord Ellesmere LC at the King’s direction and asked about several of his decisions and, in particular, about the provocative passage in *Dr Bonham’s Case*. He gave his answer a few days later on 21 October 1616. The answer involved no backward step and, on 15 November 1616, the King removed him as the Chief Justice,[[11]](#footnote-11) a salutary reminder of the importance of judicial tenure. There are intermittent statements by judges asserting between 1609 and 1658 that a statute might be void if contrary to common reason.[[12]](#footnote-12) But these statements hardly amount to a developed jurisprudence of judicial review or even its common practice and they were not to last.

It is quite possible that Coke’s conception of judicial review sprung from a different understanding of the nature of Parliament at the time. For example, at this time the King had a prerogative legislative power which he could exercise through the Privy Council in the form of proclamations so that Parliament was not the only source of legislation (indeed, this power still exists). Further, Parliament sat as a Court to try certain important matters (such as the trial of Anne Boleyn on, inter alia, charges that she had committed incest with her brother, Lord Rochford) and, as we shall see, the King also exercised judicial power through the Privy Council via his prerogative to receive petitions. Further, it is also important to recall that Parliament exercised no authority over the regulation of the established Church which instead had its own Parliament in the form of Convocation. It is possible to imagine, in the midst of this forest of legislators, that the instinctive shock that a generation of constitutional lawyers raised at the bosom of Dicey feel at *Dr Bonham’s Case* may not have been quite so outré at the time.

Between 1642 and 1701 a series of seismic political events occurred in England which changed the understanding of the nature of Parliament: a civil war beginning 1642, the execution of Charles I in 1649 and the formation of a non-monarchical government in the form of Oliver Cromwell’s protectorate from 1653 until the restoration of the Stuart monarchy in 1660. These upheavals were followed by the deposition of James II in November 1688, his replacement by William and Mary of Orange, the passage of the *Act of Settlement 1688* and the *Bill of Rights 1701*. It was a busy 60 years.

These titanic events resulted in a new legal order in which it was clear that sovereignty now lay with the King in Parliament. At around the same time, philosophers such as Thomas Hobbes[[13]](#footnote-13) and John Locke[[14]](#footnote-14) had been developing political theories which would ultimately coalesce into forms of legal positivism, in Locke’s case a distinctly democratic form of legal positivism. In such a heady atmosphere, the concept of constraints on Parliamentary power could not prosper.

It is no surprise, therefore, that the concept fell from fashion, if it ever really was in fashion. By 1765, when Blackstone published his *Commentaries*,there was no doubt that it was dead. Blackstone himself wrote that if Parliament positively enacted a thing to be done which was unreasonable, he knew of no power that could control it and he thought that judicial control of legislation was ‘subversive of all government’.[[15]](#footnote-15) Thereafter English legal thought on judicial review of statutes reached its ultimate expression in the writings of Dicey and Austin, who denied that there was such a thing as an invalid statute.

Thus, the little trickle which runs from *Dr Bonham’s Case* is, at least in English law, just that: a little trickle. Were it not for the influence *Dr Bonham’s Case* seems to have had in the Americas, it would warrant barely a footnote. However, because *Dr Bonham’s Case* concerns lost ancient powers it has, like *Magna Carta*, become a kind of a legal Excalibur to lawyers of a certain romantic outlook. As we shall see, like the return of Arthur, *Dr Bonham’s Case* was summoned from the lake to disregard the British *Stamp Act* of 1765 in Massachusettsand Maryland.

**2. The Privy Council**

The Privy Council is old. Kings in the Middle Ages were generally advised by councils of advisers and the Norman kings were no different. These councils were somewhat informal in nature. But by the time of Henry VIII, and certainly by 1540, this informal body had begun to coalesce into a formal body. This body exercised extensive judicial power, advising the King on how he should exercise his prerogative power to give justice to his subjects when petitioned to do so. One manifestation of this power was the Court of Star Chamber which was established under Cardinal Wolsey along with several other lesser tribunals. The Court of Star Chamber is usually regarded as having been a part of the Privy Council but, whether this is true or not, it was an example of what is known as a conciliar court – that is to say, a court proffering advice to the King on how he should exercise his prerogative judicial power. By the reign of Charles I there was an extensive ecology of such conciliar courts. The best known of these remains the Court of Star Chamber but the Court of Requests is also reasonably well known. There were also regional conciliar courts. These conciliar courts were part of the judicial landscape and they operated alongside the Royal Courts, the Chancery and the Ecclesiastical Courts.

This changed during the reign of Charles I. Charles I used the Star Chamber to persecute his enemies and under his influence it took up novel punishments such as branding, whipping and the cutting off of ears. These remedial innovations brought it into disrepute such that in 1640 the Long Parliament passed the *Habeas Corpus Act*. That Act abolished, by s 4, all of the conciliar courts and not just the Court of Star Chamber. From 1640, the King’s prerogative power to receive a petition seeking justice from his subjects no longer existed. But this was only so in England and Wales because it was only in those places that the *Habeas Corpus Act* applied.

For those interested in comparative administrative law, it will be immediately apparent that the Privy Council up until 1640 looks very much like the French Conseil d’Etat, that is to say, a body which exercises executive and judicial power and, on occasion, some legislative power. It is interesting to speculate what path English administrative law might have taken if the conciliar courts had not been abolished and the executive had continued to exercise judicial power in England, as it still does in France.

Immediately after 1640, the King could continue to receive petitions from those parts of his realm where the Act did not apply. Initially, this was the Bailiwick of Jersey and the Bailiwick of Guernsey, which was all that remained of the Duchy of Normandy (that is to say, the Channel Islands). It also included the Isle of Man which had finally been taken permanently from the Scots in 1346 after much to-ing and fro-ing. However, as England began its colonial expansion in the 17th century, the judicial power of the Privy Council expanded with it. By the second half of the 19th century, it exercised an appellate jurisdiction over an area of the earth’s surface upon which the sun literally did not set and over a population which amounted to around 20% of the world’s population. For comparison, the US Supreme Court exercises jurisdiction over just 4% of the world’s population.

In the thirteen US colonies, the Privy Council exercised legislative, executive and judicial power. The Privy Council’s control of the legislative activity of the nascent American colonies is a topic to which books have been devoted and it is very interesting reading.[[16]](#footnote-16) For example, when after the Restoration the Puritans in the colony of New Haven helped hide three of the regicides and provocatively named a neighbouring town Cromwell, Charles II was so infuriated that the Privy Council punished the colony by merging it with Hertford to become Connecticut.[[17]](#footnote-17)

The King’s prerogative power to receive petitions was exercised prior to 1632 in the Jamestown Colony and the Massachusetts Bay Colony.[[18]](#footnote-18) By 1662 it had discovered that it had inherent jurisdiction to determine boundary disputes between the colonies.[[19]](#footnote-19) That jurisdiction may be traced directly into Article 9 of the Articles of Confederation (which conferred it on the Congress), into Article III s 2 of the US Constitution (which conferred it on the Supreme Court) and into our own – never used – s76(iv) (which permits such a jurisdiction to be conferred on the High Court).

From 1663 all new royal charters for colonies contained a clause which forbad them to make laws repugnant to the laws of England. There is an interesting theory that the *ultra vires* doctrine as applied by the Privy Council to legislation actually came from company law.[[20]](#footnote-20) It was already known that ultra vires acts of a company established by royal charter were invalid. It was natural to extend this to royal charters establishing a colony and giving it legislative power.

Chiefly, repugnancy to English law was rooted out by the routine submission of colonial statutes to London for the scrutiny of the Board in Trade, a committee of the Privy Council, whereupon the Board would either confirm or disallow the statute. Through this process 8,563 colonial statutes were reviewed. 469 (or just over 5%) of those statutes were disallowed by Orders in Council.[[21]](#footnote-21)

The repugnancies which resulted in disallowance could be technical, for example where colonial statutes used vague and loose language such as ‘Devilish Practice’ and ‘playing at cards, dice or lotteries of such like’.[[22]](#footnote-22) Of course, repugnancy also arose from more substantive inconsistencies with the laws of England. For example, several colonial statutes were disallowed which treated slaves as chattels when used as security for debts, when British custom was that slaves in the colonies were real property annexed to the land on which they worked.[[23]](#footnote-23)

But disallowance was not the only means by which the Privy Council scrutinised colonial statutes for their repugnancy to English law. It was also clear that the Privy Council considered it could declare statutes void for repugnancy on an appeal from a colonial court, albeit that this occurred on a much lesser scale. Indeed, the case which first countenanced the possibility of such judicial review was likely the only instance of the Privy Council actually declaring a statute void by this means.[[24]](#footnote-24)

The case was *Winthrop v Lechmere*. The terrain was the evergreen paddocks of Connecticut intestacy law. Mr Wait Winthrop had died intestate with realty and two adult children to his name. Under a 1699 Connecticut statute, the *Act for the Settlement of Intestate Estates*, his realty was to go to each of his children equally except that his eldest son should receive a double portion. That son, John, contended that the Act was invalid for its repugnancy to the English common law, which made the eldest son sole heir to all of an intestate’s realty. The Privy Council agreed, ordering in February 1728 that the Connecticut law be declared invalid and that John be given the whole of his father’s realty.[[25]](#footnote-25)

For all its import as an apparent progenitor of judicial review, the actual result in *Winthrop* was not long to last. 10 years later, in 1738, a challenge to a materially identical Massachusetts statute produced a diametrically opposite result. The case was *Philips v Savage*. The Massachusetts Act, unlike its Connecticotian forbear, had been confirmed by the King in Council although only by a lapse of time under the terms of the provincial charter of Massachusetts. But it had also been confirmed more than once by Order in Council.[[26]](#footnote-26) *Winthrop* was discussed at the hearing but these differences between the statutes were conceded. Without explicitly predicating its decision on the fact of confirmation the Privy Council dismissed the appeal, upholding the legality of the Massachusetts Act.

Meanwhile, another case about the 1699 Connecticut statute invalidated in *Winthrop* was brewing. The case was *Clark v Tousey*. Before news of *Winthrop* reached the colony the estate of Captain Samuel Clark had been distributed in accordance with the 1699 Act. His eldest son took a writ of error to the Superior Court of the colony in 1729, alleging that the Act was inconsistent with English law and that he should, in accordance with that law, receive the entire estate. The Superior Court was unsympathetic and so Mr Clark Jr appealed to the Privy Council. Owing to some procedural complexities he was required to petition the Privy Council for leave to proceed. That petition was dismissed.[[27]](#footnote-27)

The Privy Council’s decision did not overturn *Winthrop* or declare the 1699 Connecticut Act to be valid. It only dismissed Mr Clark’s petition for leave to proceed. Indeed, that decision may well have been founded on a certain sluggishness on Mr Clark’s part which caused him to fall afoul of the one-year limitation period which applied to his petition for leave to proceed. But even if not in law, in fact the decision reinstated the 1699 Act. The colony proceeded on the basis of its validity and later the British confirmed similar statutes of New Hampshire and Pennsylvania.[[28]](#footnote-28)

Three cases might seem a meagre foundation for the concept of judicial review, particularly given the trajectory they followed. But *Winthrop* did not fade into irrelevancy; indeed, it was cited in 1774 by counsel who had apparently learned of its existence through the works of a Bostonian physician tracing the history of settlement in the colonies.[[29]](#footnote-29)

There are also two features of the milieu in which the cases arose which should be appreciated. First, there was evident elision of disallowance and judicial declarations of voidness. Both were the work of the Privy Council and both were concerned with repugnancy. Indeed, the heresy of elision was committed even by the solicitor who handled the successful appeal in *Philips v Savage*, a Mr Ferdinand John Paris.[[30]](#footnote-30)

Secondly, disallowance achieved a similar result to judicial nullification, earlier in the process, and its prerogative foundations were unquestioned.[[31]](#footnote-31) It is unsurprising then that the judicial route was ‘rare and unpopular’.[[32]](#footnote-32) But that is not to gainsay what *Winthrop* and its progeny establish, which is a power in the Privy Council to declare statutes void on appeal.[[33]](#footnote-33)

I am going to move to *Marbury v Madison* shortly and the events leading up to it. To round out the Privy Council, obviously enough it ceased exercising this jurisdiction in the American colonies from 1776. Of course, it prospered as a Court and its best years were ahead of it. What it lost in the American colonies was more than compensated for by the work flowing to it from the colonies in India and elsewhere as the Empire expanded.

Up until 1833 the judicial work of the Privy Council was not necessarily of a particularly high standard because there was no requirement for it to be done by lawyers. But this changed in 1833 on the passage of the *Judicial Committee Act 1833* which was introduced at the instigation of Lord Brougham. The Act sets up the Judicial Committee of the Privy Council with which we are familiar. Section 1(2) provides that its members are to be members of the Privy Council who hold or have held high judicial office. It proffers advice to the sovereign on the disposition of petitions seeking justice.[[34]](#footnote-34)

As we shall see when I turn to the position in Australia, the nascent jurisdiction to strike down colonial statutes on the ground of repugnancy flourished for about 15 years reaching its zenith, probably anywhere in the Empire, in South Australia. However, the ground was abolished in 1865 by the *Colonial Laws Validity Act 1865* (Imp).

It is difficult to gauge how much impact the Privy Council’s exercise of the power of judicial review in the American colonies had when the Supreme Court came to look at the question in *Marbury v Madison*. Some writers have expressed the view that the colonies were very familiar with having their statutes struck down by the Privy Council and that the result in *Marbury* just caused the Supreme Court to fill the niche in the judicial environment which had been formerly occupied by the Privy Council. However, this view rests I think on a confusion between the role of the Privy Council in annulling colonial laws in a supervisory fashion and its role as a court in striking them down as invalid.

**3. *Marbury v Madison (1803)***

Although *Marbury v Madison* is cited as the foundational statement of judicial review, like all cases, it needs to be understood on its facts. And the facts were unusual and exceptional. To understand them one needs to understand the political situation which had come to exist in the United States between November 1800 and March 1801. The Constitution had come into effect in 1789 as the result of efforts of the Federalists. They had been opposed by a group who the Federalists brilliantly labelled as the Anti-Federalists,[[35]](#footnote-35) one of the best examples of debate framing ever deployed. The Anti-Federalists in the main did not wish to see the States giving sovereignty away to a strong central government. Although this is overly simplistic, the Anti-Federalists tended to be aligned with the larger colonies whilst the Federalists had more support amongst the smaller colonies. Once the Constitution came into effect in 1789 the President for the first two terms was George Washington, who ran on both occasions unopposed. He was supportive of the Federalists and, indeed, was unanimously elected to preside over the Constitutional Convention in Philadelphia which had resulted in the adoption of a text for the Constitution.[[36]](#footnote-36) He was very popular. During his second term, however, a political movement favouring small government began to appear which largely congealed out of the Anti-Federalists. Its leader in Congress was Thomas Jefferson whilst the leader of the Federalists was Alexander Hamilton. Jefferson’s bloc eventually became the Democratic-Republican Party.[[37]](#footnote-37) The Democratic-Republicans distrusted the Federalists whom they regarded as aristocratic in intention and rather too comfortable with Britain. The Democratic-Republicans’s support was most concentrated in the South and the Western Frontier.[[38]](#footnote-38)

By way of a side note because of the interesting times in which we live, after President Adams the Federalist Party would never return to power which was held by the Democratic-Republican Party between 1801 and 1824.[[39]](#footnote-39) By the 1824 election, which it did not contest, the Federalist Party had withered away. Faced with no real opposition in 1824, the Democratic-Republican party split into factions which sided with Andrew Jackson and John Quincy Adams. Adams won the election and his faction became the National Republican Party, from which the modern Republican Party is partly descended.[[40]](#footnote-40) The faction of Jackson became the Democratic Party.[[41]](#footnote-41)

John Adams had been Washington’s Vice-President. When Washington decided not to seek a third term, John Adams defeated Jefferson in the 1796 election. As the system then stood, because Jefferson had come second in the Electoral College vote, he became Adams’s Vice-President.[[42]](#footnote-42) There was then a quirk in the system, whereby both parties put up two candidates for President, one of whom was expected to become President and one, coming second in the Electoral College, the Vice-President. This quirk concealed an architectural flaw in presidential elections which would contribute to the chaos in 1801. In short, the losing party could use its votes in the Electoral College to elect the winning party’s nominee for President as the Vice-President and to elect its Vice-President as the President.[[43]](#footnote-43)

Returning to the Adams administration, in 1800, Adams made John Marshall his Secretary of State.

The presidential election of November 1800 therefore pitted Adams against Jefferson and, in the Congressional election of the same year, the Federalists were pitted against the Democratic-Republicans. By this stage, the Federalists had been in power for 12 years and Adams had been Vice-President or President for that whole period. At the time of the 1800 election, the Federalists also controlled the Congress.

The election for the Presidency was held between 31 October and 3 December 1800. However, the Electoral College votes were only opened and counted by Jefferson in his capacity as Vice-President on 11 February 1801. Leaving out a lot of colourful detail, there was a tie between Jefferson and his Vice-Presidential candidate, Aaron Burr, who then took advantage of the situation to see if he could become the President by secretly parlaying with the defeated Federalists.[[44]](#footnote-44) Since there was a tie, this meant that the outcome had to be determined by the House of Representatives, an example of one of only three so-called contingent elections ever held by the House under Article II of the US Constitution.[[45]](#footnote-45)

This contingent election occurred between 11 February to 17 February 1801 and involved 36 ballots. This was necessary because the Federalists still controlled the House and sought to thwart the election of Jefferson for a time.[[46]](#footnote-46) But this ended when the Federalist Alexander Hamilton urged the Federalists to support the election of Jefferson rather than Burr,[[47]](#footnote-47) on the basis that it was better to elect someone with wrong principles than someone with no principles.[[48]](#footnote-48) Famously, Hamilton would be killed by Burr in a duel in 1804 when the latter was Vice-President.

The point for present purposes is that the outcome of the Presidential election was not definitively known until 17 February 1801, although it was known from 11 February 1801 that the Federalists had lost and that Adams would not be President. These dates are important in the following chronology of events.

In late 1800 the Chief Justice, Oliver Ellsworth, had retired due to ill health. Attempts to fill the position with the former Chief Justice John Jay had failed when Jay turned the position down on 20 January 1801. Marshall as Secretary of State then suggested to President Adams that he appoint one of the associate justices, William Paterson. But the President rejected this and suggested to Marshall that he would appoint him instead.[[49]](#footnote-49) Marshall accepted. His appointment was ratified by the Federalist-controlled Senate on 27 January 1801 and he took office on 4 February 1801. He continued to serve, however, as Secretary of State which, as will be seen, is of some importance.[[50]](#footnote-50) At this time, it would not be known for another week that Adams had lost the election and that he would leave office on 4 March 1801.

Marshall’s appointment as Chief Justice was one development. Another development was the passage on 13 February 1801 of the *Judiciary Act 1801*.[[51]](#footnote-51) This was two days after it had become clear that Adams would not be re-elected for a second term and that a Democratic-Republican President would. It was also in the midst of the 36 ballots which were taking place to determine whether that President would be Jefferson or Burr.

The Act brought about a series of significant changes to the federal judiciary which had been set up under the *Judiciary Act 1789*. The number of federal districts courts, i.e., trial courts, was increased by 10.[[52]](#footnote-52) The district courts had been arranged into 3 circuits with separate circuit courts having appellate jurisdiction over them. The circuit courts also had original jurisdiction in diversity matters and in cases of serious federal crimes. However, circuit courts had never had their own judges and were instead usually constituted by two Supreme Court justices and a local district court judge.[[53]](#footnote-53)

In practice, this required the then six justices of the Supreme Court to travel extensively throughout the country and to spend large amount of time away from their homes. Although the Court has frequently been split on various issues, it remained unanimous during the 19th century that the Congress should relieve it of this obligation which was known as ‘circuit riding’.[[54]](#footnote-54)

The 1801 Act legitimately sought to solve this problem by doubling the number of circuit courts to 6 and, for the first time, providing for the appointment of permanent judges to them to relieve the Justices of this burden. It also expanded the original jurisdiction of the circuit courts to include jurisdiction to hear all matters arising under the Constitution and the laws of the United States. Finally, the Act reduced the size of the Supreme Court from six justices to five upon the occurrence of the next vacancy. This was intended to prevent the incoming Democratic-Republican President from filling any vacancy which arose.

One other Act must now be mentioned, concerning the District of Columbia. It was only on 1 December 1800 that the seat of government moved to Washington. On 27 February 1801, less than a week before Adams left office, Congress now passed an Act which provided for the government of the District of Columbia,[[55]](#footnote-55) utilising its power to make laws in relation to US territories.[[56]](#footnote-56) The District had been carved out of Virginia and Maryland and s 1 of the Act applied the laws of those States to the corresponding parts of the District. Section 3 created a separate circuit court which was to have three judges and which was to exercise the same jurisdiction as the circuit courts established under the *Judiciary Act 1801*. Section 11 provided for the appointment of justices of the peace for a term of 5 years who were to act as the District’s magistrates in all matters.

Between 18 February and 26 February 1801 Adams nominated Federalist judges to fill the vacancies created by the passage of the *Judiciary Act 1801* and the DC statute, together with some other vacancies in the US District Courts. 13 judges were appointed to the 6 circuit courts, two judges to the DC circuit court (including Marshall’s own brother James), and 4 judges to various US District Courts. Some of these were not confirmed by the Senate until 3 March 1801, the day before Adams left office. In addition to these judges, the President also appointed 41 magistrates in Washington, DC.

Adams signed the commissions. Marshall affixed the Great Seal and countersigned them in his capacity as Secretary of State, rather than as Chief Justice. As Secretary of State, it was his responsibility to deliver the commissions to their recipients. By the day of Jefferson’s inauguration, some remained undelivered. One of these was to Mr William Marbury, a successful Federalist businessman from Maryland.

These actions were provocative. A number of the appointees declined the appointments, possibly showing a lack of co-ordination by Adams and Marshall in the appointments process or perhaps revealing a concern that the courts might be abolished. In any event, President Jefferson ordered his Secretary of State, James Madison, not to deliver the remaining commissions.[[57]](#footnote-57)

Throughout 1801 Marbury sought the delivery of his commission but Madison refused. In December 1801, Marbury filed a proceeding in the Supreme Court seeking mandamus to compel Madison to deliver the commission. However, before this suit could be heard by the Supreme Court a bill was introduced into the Senate on 6 January 1802 to repeal the whole *Judiciary Act 1801.* This was vigorously opposed by the Federalists on the basis that the removal of the newly appointed judges would be contrary to Article III of the US Constitution. Nevertheless, the Act became law on 8 March 1802. Of course, Marbury’s commission had not been issued under the *Judiciary Act 1801* but rather under the Act establishing the District of Columbia so he was not directly affected by this development.

But the repeal did have significant effects. Since there had been no vacancies on the Supreme Court whilst the Act was briefly in force it therefore continued to have six seats. The effect of the repeal was to abolish the new restructured circuit courts, impliedly to remove from office the judges appointed to them and to restore the former circuit courts. Possibly to head off the suggested constitutional challenge to the sacking of the judges in this the way by the Federalists, or perhaps to head off *Marbury v Madison* itself, the Congress also passed an Act which prevented the Supreme Court sitting in 1802. The big loser in all of this was the Supreme Court which was forced back into riding circuits, an activity in which it would continue to engage under protest until 1911.[[58]](#footnote-58)

The case was eventually argued on 11 February 1803. To set the background to the argument and the decision it is necessary to consider two provisions governing the Court’s jurisdiction to deal with a suit for mandamus against Madison. There are multiple grants of original jurisdiction in Article III s 2 of the US Constitution but the two which are relevant are the following (which have been broken into bullet points for legibility).

First, s 2 states that:

*The judicial Power shall extend:*

* *to all Cases, in Law and Equity, arising under this Constitution, the Laws of the United States, and Treaties made, or which shall be made, under their Authority;*
* *to all Cases affecting Ambassadors, other public Ministers and Consuls;*
* *to all Cases of admiralty and maritime Jurisdiction;*
* *to Controversies to which the United States shall be a Party;*
* *to Controversies between two or more States;*

*between*

* *a State and Citizens of another State;*
* *Citizens of different States;*
* *Citizens of the same State claiming Lands under Grants of different States; and*
* *a State, or the Citizens thereof, and foreign States, Citizens or Subjects.*

Next, s 2 states that:

*In all Cases affecting Ambassadors, other public Ministers and Consuls, and those in which a State shall be Party, the supreme Court shall have original Jurisdiction.*

*In all the other Cases before mentioned, the supreme Court shall have appellate Jurisdiction, both as to Law and Fact, with such Exceptions, and under such Regulations as the Congress shall make.*

Thus the judicial power extends to suits arising under the laws of the United States but this jurisdiction is, in the case of the Supreme Court, appellate. It also has jurisdiction in relation to controversies to which the United States is a party but again this is appellate. What it does not appear to have is any jurisdiction, original or appellate, in relation to controversies to which an officer of the United States is a party. You will no doubt recall that when those who drafted the Australian Constitution came to transfer Article III into Chapter III, this defect was remedied by s 75(iii) which gave the High Court original jurisdiction in relation to suits to which the Commonwealth or a person suing or being sued on behalf of the Commonwealth was a party. Section 75(v) with its grant of original jurisdiction to hear suits seeking mandamus, prohibition or injunction against an officer of the Commonwealth also seems to have been involved in this thinking and was, as we shall see, a response to *Marbury* itself.

Another point to note is that in the United States at this time and subsequently too, the position seems to have been that an Act of Congress was necessary to confer judicial power to issue writs.[[59]](#footnote-59) This is not the position taken in Australia where it is accepted that the High Court’s powers to grant remedies once it has jurisdiction spring from the fact that it is a superior court of record.[[60]](#footnote-60) That difference leads the legal mechanics of *Marbury* to be somewhat obscure to the Antipodean mind. The question is made relevant by s 13 of the *Judiciary Act* of 1789. It provided (again broken up for legibility):

*And be it further enacted,*

*That the Supreme Court shall have exclusive jurisdiction of all controversies of a civil nature, where a state is a party,*

* *except between a state and its citizens; and*
* *except also between a state and citizens of other states, or aliens, in which latter case it shall have original but not exclusive jurisdiction.*

*And shall have*

* *exclusively all such jurisdiction of suits or proceedings against ambassadors, or other public ministers, or their domestics, or domestic servants, as a court of law can have or exercise consistently with the law of nations;*
* *and original, but not exclusive jurisdiction of all suits brought by ambassadors, or other public ministers, or in which a consul, or vice consul, shall be a party.*

*And the trial of issues in fact in the Supreme Court, in all actions at law against citizens of the United States, shall be by jury.*

*The Supreme Court shall also have*

* *appellate jurisdiction from the circuit courts and courts of the several states, in the cases herein after specially provided for;*
* *[and] power to issue writs of prohibition to the district courts, when proceeding as courts of admiralty and maritime jurisdiction,*
* *and [power to issue] writs of mandamus, in cases warranted by the principles and usages of law, to any courts appointed, or persons holding office, under the authority of the United States.*

There is an issue about the proper construction of this provision. The issue is this: does the last clause granting power to issue writs of mandamus against a person holding office under the authority of the United States apply in the original jurisdiction and, hence, in Marbury’s case? One might have thought that the last sentence is a statement about the appellate jurisdiction. But the perceived need to identify a source of power in the Court to issue a writ of mandamus compelled Marbury to argue that the last sentence of s 13 was to be construed as relating to the original jurisdiction.[[61]](#footnote-61)

I have said above that the case was argued on 11 February 1803, but this is an exaggeration. As the report of the case shows, only Marbury was represented (by a Mr Lee). Madison did not appear, on the instructions of Jefferson.[[62]](#footnote-62) Since the government did not appear it did not object to Marshall CJ sitting although it is clear from the evidence that he was a material witness. The report shows that Mr Lee sought to prove that a commission had been issued to Marbury. To this end, many affidavits were read by Mr Lee including one from the Chief Justice’s brother, James (now a DC circuit judge) explaining the difficulties he had had in delivering the some of the commissions.[[63]](#footnote-63) None of these affidavits, however, specifically identified Marbury’s commission.

Several witnesses were called and examined. It does not appear that any evidence was proffered during the argument which showed that the commission had been issued to Marbury. But the report also shows that after the close of argument, a further affidavit was received in which a clerk in the Secretary of State’s office said that such a commission had been issued to Marbury.[[64]](#footnote-64) Of course, Marshall CJ knew this as he had countersigned the commission and affixed the Great Seal to it. It is interesting to ponder what Marshall would have done without this late affidavit.

Mr Lee set out three questions for the Court to answer: first, could the Supreme Court issue a mandamus in any case; secondly, could it issue one to a Secretary of State (rather suggesting that there may have been more than one Secretary of State); thirdly, could it grant mandamus to Marbury against Madison.[[65]](#footnote-65) Since Madison did not appear he did not make any submissions. In particular, he did not submit that s 13 only applied in the appellate jurisdiction and he did not submit that if it applied in the original jurisdiction it was invalid.

Judgment was reserved on 11 February 1803 and delivered a fortnight later, on 24 February 1803.

A conventional approach to the case would have proceeded in two steps. First, the Court would determine if it had jurisdiction to entertain the suit in its original jurisdiction. Secondly, if it did, it would then determine whether a writ of mandamus should issue.

Instead, Marshall CJ went down a novel route of first determining that Marbury was entitled to the issue of a writ of mandamus and then only afterwards turning to whether the Court had jurisdiction to entertain the suit. He concluded that Marbury was indeed entitled to a mandamus and that Madison was acting unlawfully in not delivering the commission bearing Marshall’s signature.[[66]](#footnote-66) Next Marshall CJ determined that on its proper construction s 13 of the *Judiciary Act* did in fact confer power on the Supreme Court in its original jurisdiction to issue a writ of mandamus against an officer acting under the authority of the United States,[[67]](#footnote-67) a conclusion which strikes me as dubious.

It was after that conclusion that Marshall CJ reached the celebrated conclusion that s 13 was constitutionally invalid. Why? Because it expanded the original jurisdiction conferred by Article III s 2 on the Supreme Court. On this view, the statement in Article III s 2 was an exhaustive statement of the Court’s original jurisdiction and it was beyond the power of the Congress to expand it. The consequence of this structure is that the Court’s conclusions on the illegality of Madison’s refusal to deliver the Commission is entirely an obiter dictum and its central conclusion that s 13 was invalid was not ever suggested to the Court because Madison had not appeared.[[68]](#footnote-68)

The practical result was that the Federalist bench was able to decry the illegality of the actions of Jefferson and Madison in refusing to deliver the commission, to assert the power of judicial review over a provision of interest really only to lawyers and, simultaneously, to avoid a major clash with Jefferson. Whether Madison would have obeyed any writ of mandamus issued is a question which cannot be answered. But Jefferson’s decision not to permit Madison to defend the case suggests that he may have had in mind simply ignoring any such writ. In that regard, it is relevant to note that in the same year the Democratic-Republican House impeached a Federalist judge[[69]](#footnote-69) and the next year, in 1804, it would impeach a member of the Supreme Court, Samuel Chase, who had criticised the Jefferson administration in strong terms.[[70]](#footnote-70) And, of course, Congress had been sufficiently riled by the affair that it had prevented the Court from hearing *Marbury* until 1803. The temperature was high.

Returning then to the reasoning on judicial review, Marshall offered several explanations for its existence. First, the Constitution established a legislature of limited powers. To what end did those limits exist if, as he put it, they ‘may, at any time, be passed by those intended to be restrained’.[[71]](#footnote-71) Secondly, if the Constitution was a paramount law then a law repugnant to it must be void. Thirdly, since it was the duty of the courts to say what the law was this duty cast upon the courts the duty to say whether a law of Congress was invalid because it conflicted with the paramount law of the Constitution. This is when Marshall CJ made his most famous statement: ‘It is emphatically the province of the judicial department to say what the law is’.[[72]](#footnote-72) There is a pun in that statement. The word jurisdiction comes from the Latin *ius* meaning law and *dico* ‘I declare’. Finally, Marshall CJ identified textual indications in the Constitution which showed that it was assumed that the judiciary would have the power of judicial review. These included the grant to the Supreme Court of original jurisdiction in matters arising under the Constitution, which Marshall thought would be rather empty if the Court could do nothing with that Constitution. He obtained similar comfort on Article I s 8 which prohibited Congress from passing bills of attainder.[[73]](#footnote-73)

These statements are surely correct even if they do not reflect anything that was actually argued in the case. It is impossible to see how a federation with polycentric sources of legislative, executive and judicial authority can operate coherently, or perhaps even at all, unless there is an umpire which can determine where the limits lie.

More difficult, I think, is working out the extent to which the judicial review holding in *Marbury v Madison* was novel or even surprising. As I have tried to explain above, the former colonies were certainly familiar with having their legislation annulled by the Privy Council but it is much less clear that they had much familiarity with the Privy Council adjudging their laws invalid on the grounds of repugnancy, even if this had occurred in *Winthrop v Lechmere.*

So too, whilst there were some examples of State courts exercising a power of judicial review before 1803,[[74]](#footnote-74) the extent of this practice is controversial. It is possible that Marshall CJ was aware that before the War of Independence in the lead up to the Boston Tea Party the British *Stamp Act* of 1765 had been declared by the Maryland Assembly (and also by a group of magistrates in Massachusetts) to be invalid on the basis of *Dr Bonham’s Case*,[[75]](#footnote-75) but this is really just speculation.

The debates at the Constitutional Convention likewise yield little on the question. The highwater mark is a statement by an Anti-Federalist speaking against a proposal that the Justices should join with the President in exercise of his power of veto over legislation. Part of the reason was that the ‘point will come before the judges in their proper official character’ so that they would have a double negative.[[76]](#footnote-76) This statement is a pretty thin basis upon which to conclude that the Constitutional Convention recognised that a power of judicial review existed. Others have said that the silence on the issue just shows that everyone assumed that the power would exist.

Much has been written on this topic but I think the best summary of the situation was given by the American legal scholar, Edward Samuel Corwin. The Senate Judiciary Committee convened hearings on Roosevelt’s Court packing plan in 1937. Corwin gave evidence to this Committee that ‘[t]he people who say the framers intended [judicial review] are talking nonsense’, to which he hastily added ‘and the people who say they did not intend it are talking nonsense’.[[77]](#footnote-77) The historian Leonard Levy said that ‘[a] close textual and contextual analysis will not result in an improvement on these propositions’.[[78]](#footnote-78) So these materials are inconclusive.

On the other hand, we know with certainty that Alexander Hamilton thought that a power of judicial review was essential. We know this because of Federalist Paper No. 78 which was published as part of his efforts to ensure that the Constitution was ratified.[[79]](#footnote-79) There are clear thematic similarities between the text of Hamilton’s piece and the wording of *Marbury v Madison* sufficient, I think, to be sure that Marshall was well aware of its contents.

It is unclear from *Marbury* whether Marshall intended that the other branches of government should be bound by Supreme Court’s view on the validity of legislation or whether each branch was entitled to form its own view within its own sphere. A modest form of judicial review would approach the issue on the basis that the Supreme Court’s views on validity would of course apply in proceedings before the courts but that, away from litigation, other departments of government might still be entitled to their own view until that view gave rise to litigation.

Article VI of the US Constitution contains what is sometimes referred to as the Supremacy Clause:

This Constitution, and the Laws of the United States which shall be made in Pursuance thereof; and all Treaties made, or which shall be made, under the Authority of the United States, shall be the supreme Law of the Land; and the Judges in every State shall be bound thereby, any Thing in the Constitution or Laws of any State to the Contrary notwithstanding.

A somewhat grander vision of judicial review might be implied from reading *Marbury* with this provision. On this view, the Constitution is the Supreme Law of the Land and *Marbury* says that it is the Supreme Court’s role to say what the Constitution means. It follows, on this view, that the Supreme Court’s interpretation is binding on the other departments without the need for litigation. This broad interpretation of the power of judicial review now applies in the United States following the Supreme Court’s decision in *Aaron v Cooper*.[[80]](#footnote-80) That case arose after the Court’s decision in *Brown v Board of Education*[[81]](#footnote-81)that the segregated school system in Kansas violated the Equal Protection Clause. Leaving out quite a lot of detail, Governor Faubus of Arkansas concluded that since that State was not a party to the *Brown* litigation it was not bound by the outcome and would not be preceding with desegregation. This elicited a terse unanimous judgment from the Court explaining that the Supremacy Clause and *Marbury v Madison* entailed that its view on desegregation did bind Arkansas.

Following *Marbury* the Court exercised the power of judicial review in relation to State laws with reasonable frequency, perhaps most famously in 1819 in *McCulloch v Maryland*.[[82]](#footnote-82) But it would not strike down a Federal statute again until the notorious decision in *Dred Scott* in 1857, more than half a century later.[[83]](#footnote-83) Following the civil war, the exercise of the judicial review power in relation to federal statutes became more common and, of course, in the 20th and 21st century it has become unquestioned.

**4. Australia**

It will be recalled from earlier in the evening that the Privy Council had exercised, albeit rarely, a power of judicial review over colonial statutes which were repugnant to the laws of England. The existence of this jurisdiction was accepted in the Australian colonies although the circumstances for its exercise were rare in the first half of the 19th century. The reason for this was that legislation setting up the Legislative Council in New South Wales contained a provision which required the Supreme Court to certify that a bill was not repugnant with the laws of England prior to it being presented to the Council.[[84]](#footnote-84) During the primordial period when New South Wales was gradually dismembered into the other colonies, these provisions were copied into their laws. Thus the first example I have been able to find of a colonial statute being struck down on repugnancy grounds hails from Van Diemen’s Land and is afforded by the decision of the Supreme Court of that place in *Symons v Morgan* which was decided around 1848.[[85]](#footnote-85) A curiosity of that case is that the law struck down by the Court had earlier been certified by the same Court as not being repugnant to the laws of England. This change in position caused some tension between the government and the Court.

However, the case demonstrates that the repugnancy test was difficult to apply in practice. For example, does mere difference constitute repugnancy? If it does not, what is the extra ingredient which is necessary? This meant that the test was to a degree unstable in operation. As Enid Cambell has explained, this instability reached its zenith during the period in which Judge Boothby sat on the bench of the Supreme Court of South Australia.[[86]](#footnote-86) His Honour approached the repugnancy test on the basis that mere difference was sufficient to constitute repugnancy and invalidated a swathe of South Australian statutes including the first Act giving effect to the Torrens system of title by registration, the *Real Property Act 1857* (SA). He also concluded that the South Australian *Constitution Act* of 1855-56 was itself invalid and that the Parliament had not been validly constituted since its passage. When in 1861 one of the other two judges on the bench, Sir Richard Hanson, replaced the outgoing Chief Justice, Boothby insisted that he had not been validly appointed since he had not trained as a barrister in England.[[87]](#footnote-87) Boothby took many other misguided steps and was eventually removed from office in 1867. The Australian Dictionary of Biography says of Boothby that ‘[h]is self-righteous pomposity, disdain for things colonial and inability to compromise played an important part in causing his downfall’.

However, Boothby’s greatest legacy was that he provided the impetus for the passage of the *Colonial Laws Validity Act 1865* (Imp) which, amongst other things, abolished the doctrine of repugnancy. Without intending it, Boothby probably hastened the death of the principle by many decades and thus can be seen as having made a significant contribution to imperial constitutional law, although probably not the one he intended.

When the Constitution came to be drafted, a power of judicial review seems to have been well understood by those drafting it. The supremacy of the coming constitution and the duty of the judiciary to apply that constitution were referred to in both Richard Baker’s *Manual of Reference to Authorities*[[88]](#footnote-88)and Robert Garran’s *The Coming Commonwealth*.[[89]](#footnote-89) These statements explain why the issue received little attention during the drafting process.

Where *Marbury v Madison* did get referred to was in the discussion in the drafting committee of s 75(v), which provides:

In all matters –

…

1. 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.

Matthew Stubbs has very conveniently drawn together the materials on *Marbury* during the drafting process and this account of its role is his.[[90]](#footnote-90) Section 75(v) was the brainchild of Inglis Clark. It was included in the 1891 and 1897 drafts of the Constitution but, at the instigation of Edmund Barton and Isaac Isaacs, was excised from the 1898 draft. Barton and Isaacs’s concern was that by specifically only referring to mandamus and prohibition it might be inferred that the other writs were not available.[[91]](#footnote-91) Isaacs stated that the US Constitution did not expressly give the Supreme Court a power to issue mandamus but that the Court undoubtedly exercised it. Of course, this last statement was exactly what *Marbury* did not say. This led a no doubt alarmed Inglis Clark to send a telegram to Barton about *Marbury*. Barton replied: ‘None of us here had read the case mentioned by you of Marbury v. Madison or if seen it had been forgotten – It seems however to be a leading case’.[[92]](#footnote-92) Section 75(v) was then reinserted.[[93]](#footnote-93)

In the course of explaining to the drafting committee why s 75(v) had to be put back Barton referred to *Marbury*’s holding that Acts contrary to the constitution were void. No one appears to have commented upon this at the time,[[94]](#footnote-94) which is odd if this is the moment when it first occurred to the drafters that statutes contrary to the Constitution would be invalid. The most likely explanation for this is that it was news to nobody. Further, despite Barton’s statement it is clear that, from the drafting committee’s perspective, the relevance of *Marbury* was to justify the inclusion of s 75(v). A review of the materials strongly suggests that the judicial review principle in *Marbury* was not accepted as axiomatic even if the existence of the judicial review principle itself was assumed.[[95]](#footnote-95)

By contrast, in *The Communist Party Case* Fullagar J observed that ‘in our system the principle of *Marbury v Madison* is accepted as axiomatic’.[[96]](#footnote-96) It is certainly true that the drafters accepted judicial review as axiomatic but his Honour’s attribution of this to *Marbury* seems quite wide of the mark. However, Fullagar J’s statement has been often repeated including, on one occasion, by me when I was young, brash and not as well informed.[[97]](#footnote-97)

Here one might think that this story is at an end and that the serving of the refreshments must be imminent. However, there remains one final and odd chapter. Soon after Federation it was argued that the Courts could not strike down laws which were contrary to the Constitution. Both cases happened in Victoria. *Kingston v Gadd*[[98]](#footnote-98) was an action for the imposition of penalties under the *Customs Act 1901* (Cth). The defendant pleaded that the relevant sections were invalid and the plaintiff replied that the Court had no power of judicial review. At this time, the *Judiciary Act 1903* (Cth) had not been passed and the High Court did not yet exist. However, Covering Clause V to the Constitution provided:

This Act, and all laws made by the Parliament of the Commonwealth under the Constitution, shall be binding on the courts, judges, and people of every State and of every part of the Commonwealth, notwithstanding anything in the laws of any State; and the laws of the Commonwealth shall be in force on all British ships, the Queen's ships of war excepted, whose first port of clearance and whose port of destination are in the Commonwealth.

In that regard Covering Clause V somewhat resembles the Supremacy Clause, Article VI, in the US Constitution. The Full Court of the Victorian Supreme Court concluded that it could hear the challenge but rejected it. As has been observed by Mr Stubbs[[99]](#footnote-99) this case makes it impossible to say that it has never been argued that there is no power of judicial review in Australia.

Another reason why it would be quite wrong to say that is because of the Privy Council’s extraordinary 1907 decision in *Webb v Outtrim*[[100]](#footnote-100)which, in fact, held that a statute which was inconsistent with the Constitution was *not* invalid. The case was part of a series of cases in which the Privy Council and the High Court struggled over whose views on the question of the distribution of powers within the Commonwealth was to prevail. The basic problem arose out of s 74 of the Constitution, which relevantly provides:

No appeal shall be permitted to the Queen in Council from a decision of the High Court upon any question, howsoever arising, as to the limits inter se of the Constitutional powers of the Commonwealth and those of any State or States, or as to the limits inter se of the Constitutional powers of any two or more States, unless the High Court shall certify that the question is one which ought to be determined by Her Majesty in Council.

The High Court may so certify if satisfied that for any special reason the certificate should be granted, and thereupon an appeal shall lie to Her Majesty in Council on the question without further leave.

Whilst the High Court’s certificate was necessary for an appeal to the Privy Council on a question as to the limits of the powers of the Commonwealth and the States inter se, this was not necessary where an appeal was brought to the Privy Council from a State Supreme Court.

The field of combat was over the question of whether Commonwealth officials could be subject to Victorian taxes. In *D’Emden v Pedder*[[101]](#footnote-101)the High Court had overruled the Supreme Court of Victoria and held that federal government employees could not be subjected to Victoria’s stamp tax. The High Court adhered to this view in the next case, *Webb v Deakin.*[[102]](#footnote-102)Then the Victorian Commissioner of Taxes taxed the income of Mr Outtrim, the Commonwealth Deputy Post-Master General. The Victorian Supreme Court decided to follow *D’Emden v Pedder* and concluded that Victoria could not tax Mr Outtrim.[[103]](#footnote-103) The Commissioner then obtained leave to appeal to the Privy Council. The Committee’s advice to the King was given by Lord Halsbury. His Lordship reasoned that a Victorian statute would be invalid if inconsistent with an Imperial statute but, apart from that, inconsistency between a Victorian statute and the Constitution did not result in the former being invalid. He rejected any analogy with the position of the United States Supreme Court on the basis that the US Constitution gave it a jurisdiction to annul a statute on the grounds that it was unconstitutional but that there was no such provision in the Australian Constitution.[[104]](#footnote-104)

This decision revealed a lack of familiarity with legal systems other than Britain’s. The statement about the US Constitution was altogether wrong and it exhibited an ignorance that the Constitution had set up a federal structure based on the United States and of what this necessarily entailed. The fact that it did not refer to *Marbury v Madison* is a lasting blemish on the Committee. The High Court must have been apoplectic when news of the decision reached it. You will be surprised to hear that *Webb v Outtrim* has never been followed. Indeed, the High Court affirmed the power of judicial review almost immediately in the *Railway Servants Case*[[105]](#footnote-105) with a few unkind words to the Privy Council along the way, and its orthodoxy was again confirmed in *Baxter v Commissioner of Taxation*.[[106]](#footnote-106)

The principle underpinning *D’Emden v Pedder* fell when the *Engineers Case*[[107]](#footnote-107)was decided but that was not to happen for many years. In the meantime, the question of whether Commonwealth officials could be subject to State taxes was resolved by the passage of the *Commonwealth Salaries Act* *1907* (Cth) which permitted the States to tax Commonwealth salaries.

To ensure that the Privy Council never got it hands on a case involving a question of the limits of the powers of the Commonwealth and the States, that jurisdiction was made exclusive to the High Court by the insertion of s 38A into the *Judiciary Act 1903* (Cth) in 1907. Section 40A was also added which automatically removed such cases into the High Court. As Sir Maurice observed at the Bench and Bar Dinner on 17 June 1994,[[108]](#footnote-108) the effect of this was that Supreme Courts and most of the bar were deprived of constitutional experience and constitutional litigation was conducted exclusively in the High Court. Privy Council appeals from the High Court were finally abolished in 1976 with the amendment of s 39 of the *Judiciary Act 1903* (Cth) to prevent Privy Council appeals in federal jurisdiction. With that, s 40A could be let go. It was eventually repealed in 1976, in the heartland of Sir Maurice’s tenure as Solicitor-General.

Thus, whilst the power of judicial review is now entirely orthodox, the Privy Council’s decision in *Webb v Outtrim* had the very real impact of changing how constitutional litigation was conducted in this country and by whom. The wide range of courts now hearing judicial review is in no small part due to Sir Maurice.

**5. Conclusion**

What can be drawn from this trip down memory lane? Judicial review of State and Commonwealth statutes is so orthodox now that, like oxygen, we barely notice it. But it is useful to know that at various times it has been very controversial. And it could easily be controversial again. At the moment, the judicial review of statutes which takes place is almost entirely sourced in what can be inferred from the text of the Constitution. That text is principally an instrument creating a federal structure. By and large, whilst federal issues are interesting to lawyers they do not garner much attention more widely. We might find (I do not say that we would) that if the Constitution’s federal provisions were supplemented by provisions providing for the protection of generally expressed rights, the exercise of the power of judicial review would garner much more attention than it does at the moment. Non-elected judges striking down statutes on federal grounds is one thing. *Roe v Wade*[[109]](#footnote-109)and *Dobbs*[[110]](#footnote-110)are quite another. But that is a question for another day.

1. Judge of the Federal Court of Australia. I would like to express my thanks to my associate, Charlie Ward, for his invaluable assistance in the preparation of this paper. [↑](#footnote-ref-1)
2. *Wik Peoples v Queensland* (1996) 187 CLR 1. [↑](#footnote-ref-2)
3. *Kable v Director of Public Prosecutions* (1996) 189 CLR 51. [↑](#footnote-ref-3)
4. (1609) 8 Co Rep 113b; 77 ER 646. [↑](#footnote-ref-4)
5. 5 US (1 Cranch) 137 (1803). [↑](#footnote-ref-5)
6. Han-Ru Zhou, ‘The Continuing Significance of *Dr Bonham’s Case*’ in Paul Daly (ed), *Apex Courts and the Common Law* (University of Toronto Press, 2019) at 282. [↑](#footnote-ref-6)
7. *Case of Proclamations* (1610) 12 Co Rep 63 at 65; 77 ER 1342 at 1343; *Rowles v Mason* (1612) 2 Brownl & Golds 192 at 198; 123 ER 892 at 895; 1 Co Litt 62a. [↑](#footnote-ref-7)
8. (1578) 4 Co Rep 12b at 13a; 76 ER 877 at 880. [↑](#footnote-ref-8)
9. Thomas Cromwell was made Baron Cromwell of Wimbledon in 1536 shortly after becoming the Lord Keeper of the Privy Seal. Subsequently, and near the end of his life, he was made the Earl of Essex. However, these titles were forfeited after his downfall when he was attainted by a bill of attainder, a procedure in Parliament which he had perfected on Henry VIII’s behalf. However, within months of his father’s death, his son Gregory was made Baron Cromwell by Henry, although this was not a restoration of his father’s title, but a new title. The plaintiff in *Lord Cromwell’s Case*, Henry Cromwell,was his son and hence the second Baron Cromwell, not the third. [↑](#footnote-ref-9)
10. Herman Block, *Edward Coke, Oracle of the Law* (Riverside Press Cambridge, 1929) at 52.  [↑](#footnote-ref-10)
11. Han-Ru Zhou, ‘The Continuing Significance of *Dr Bonham’s Case*’ in Paul Daly (ed), *Apex Courts and the Common Law* (University of Toronto Press, 2019) at 282-283. [↑](#footnote-ref-11)
12. *Day v Savadge* (1614) 80 ER 235 per Hobart CJ; *Sheffield v Ratcliffe* (1615) 80 ER 475 at 486; *Hutchins v Player* (1663) 124 ER 585 at 600-601 per Hobart CJ; *Attorney-General v Mico* (1658) 145 ER 419 at 421 per Widdrington CJ. [↑](#footnote-ref-12)
13. Hobbes’s *Leviathan* was published in 1651. [↑](#footnote-ref-13)
14. Locke’s *Two Treatises on Government* was first published in 1689. [↑](#footnote-ref-14)
15. William Blackstone, *Commentaries on the Laws of England* (Oxford University Press, 2016 reprint) Book 1 at 66. [↑](#footnote-ref-15)
16. See, eg, Elmer Beecher Russell, *The Review of American Colonial Legislation by the King in Council*. First published 1915 but reprinted by Octagon Books in 2018. [↑](#footnote-ref-16)
17. Steven G Calabresi, *The History and Growth of Judicial Review* (Oxford University Press, 2021) Vol 1 at 53. [↑](#footnote-ref-17)
18. Steven G Calabresi, *The History and Growth of Judicial Review* (Oxford University Press, 2021) Vol 1 at 51. [↑](#footnote-ref-18)
19. Steven G Calabresi, *The History and Growth of Judicial Review* (Oxford University Press, 2021) Vol 1 at 53. [↑](#footnote-ref-19)
20. Mary Sarah Bilder, ‘The Corporate Origins of Judicial Review’ (2006) 116 *Yale Law Journal* 502 at 543-544. [↑](#footnote-ref-20)
21. Elmer Beecher Russell, *The Review of American Colonial Legislation by the King in Council* (Octagon, 2018 reprint)at 221. [↑](#footnote-ref-21)
22. Elmer Beecher Russell, *The Review of American Colonial Legislation by the King in Council* (Octagon, 2018 reprint) at 142. [↑](#footnote-ref-22)
23. Elmer Beecher Russell, *The Review of American Colonial Legislation by the King in Council* (Octagon, 2018 reprint)at 134-5. [↑](#footnote-ref-23)
24. Joseph Henry Smith, *Appeals to the Privy Council from the American Plantations* (Columbia University Press, 1950) at 537; Enid Campbell, ‘Colonial Legislation and the Laws of England’ (1965) 3 *University of Tasmania Law Review* 148 at 151. [↑](#footnote-ref-24)
25. Joseph Henry Smith, *Appeals to the Privy Council from the American Plantations* (Columbia University Press, 1950) at 550. [↑](#footnote-ref-25)
26. Enid Campbell, ‘Colonial Legislation and the Laws of England’ (1965) 3 *University of Tasmania Law Review* 148 at 153. [↑](#footnote-ref-26)
27. Joseph Henry Smith, *Appeals to the Privy Council from the American Plantations* (Columbia University Press, 1950) at 550. [↑](#footnote-ref-27)
28. Joseph Henry Smith, *Appeals to the Privy Council from the American Plantations* (Columbia University Press, 1950) at 576-7. [↑](#footnote-ref-28)
29. Joseph Henry Smith, *Appeals to the Privy Council from the American Plantations* (Columbia University Press, 1950) at 653. [↑](#footnote-ref-29)
30. Joseph Henry Smith, *Appeals to the Privy Council from the American Plantations* (Columbia University Press, 1950) at 572. [↑](#footnote-ref-30)
31. Enid Campbell, ‘Colonial Legislation and the Laws of England’ (1965) 3 University of Tasmania Law Review 148 at 151. [↑](#footnote-ref-31)
32. Gerald Gunther and Kathleen M Sullivan, *Constitutional Law* (Foundation Press, 13th ed, 1997) at 14. [↑](#footnote-ref-32)
33. Joseph Henry Smith, *Appeals to the Privy Council from the American Plantations* (Columbia University Press, 1950) at 577. [↑](#footnote-ref-33)
34. It also has some other quirky appellate jurisdictions and can hear appeals from ecclesiastical courts, prize courts, the Court of Admiralty of the Cinque Ports, the High Court of Chivalry and, apparently, the Royal College of Veterinary Surgeons. [↑](#footnote-ref-34)
35. See Carol Berkin, *A Brilliant Solution: Inventing the American Constitution* (Houghton Mifflin, 2003) at 175. [↑](#footnote-ref-35)
36. Saul K Padover and Jacob W Landynski, *The Living US Constitution* (Meridian, 3rd ed, 1995) at 8-9. [↑](#footnote-ref-36)
37. James A Reichley, *The Life of the Parties* (Rowman & Littlefield, 2nd ed, 2000) at 38-39. [↑](#footnote-ref-37)
38. Christopher G Bates, *The Early Republic and Antebellum America* (Taylor & Francis, 2010) at 296. [↑](#footnote-ref-38)
39. Christopher G Bates, *The Early Republic and Antebellum America* (Taylor & Francis, 2010) at 296. [↑](#footnote-ref-39)
40. By way of the Whig Party: Daniel Walker Howe, *What Hath God Wrought: The Transformation of America, 1815-1848* (Oxford University Press, 2007) at 210; Spencer C Tucker, *The Encyclopedia of the Wars of the Early American Republic, 1783-1812* (Bloomsbury, 2014) at 163. [↑](#footnote-ref-40)
41. Louis W Koenig, ‘American Politics: The First Half-Century’ (1964) 47 *Current History* 193 at 197-198. [↑](#footnote-ref-41)
42. See Article II of the US Constitution: ‘In every Case, after the Choice of the President, the Person having the greatest Number of Votes of the Electors shall be the Vice President’. This procedure was altered by the Twelfth Amendment in 1804. [↑](#footnote-ref-42)
43. James Roger Sharp, *American Politics in the Early American Republic* (Yale University Press, 1993) at 146. [↑](#footnote-ref-43)
44. Thomas N Baker, ‘“An Attack Well Directed”: Aaron Burr Intrigues for the Presidency’ (2011) 31 *Journal of the Early Republic* 553. [↑](#footnote-ref-44)
45. The other two were in 1824 and 1837: U.S. Congressional Research Service, *Contingent Election of the President and Vice President by Congress: Perspectives and Contemporary Analysis* (Report R40504, 6 October 2020) 1-5. [↑](#footnote-ref-45)
46. James Roger Sharp, *American Politics in the Early American Republic* (Yale University Press, 1993) at 256. [↑](#footnote-ref-46)
47. William E Nelson, *Marbury v Madison: The Origins and Legacy of Judicial Review* (University Press of Kansas, 2000) at 49-50. [↑](#footnote-ref-47)
48. Harold C Syrett (ed), *The Papers of Alexander Hamilton* (Columbia University Press, 1977) at 321. [↑](#footnote-ref-48)
49. William E Nelson, *Marbury v Madison: The Origins and Legacy of Judicial Review* (University Press of Kansas, 2000) at 51. [↑](#footnote-ref-49)
50. William E Nelson, *Marbury v Madison: The Origins and Legacy of Judicial Review* (University Press of Kansas, 2000) at 52. [↑](#footnote-ref-50)
51. Also known as the ‘Midnight Judges Act’. [↑](#footnote-ref-51)
52. *Judiciary Act 1801* s 21. [↑](#footnote-ref-52)
53. Joshua Glick, ‘On the Road: The Supreme Court and the History of Circuit Riding’ (2003) 24(4) *Cardozo Law Review* 1753 at 1757. [↑](#footnote-ref-53)
54. Joshua Glick, ‘On the Road: The Supreme Court and the History of Circuit Riding’ (2003) 24(4) *Cardozo Law Review* 1753. [↑](#footnote-ref-54)
55. *An Act Concerning the District of Columbia* (2 Stat 103 Chapter XV), s 3. [↑](#footnote-ref-55)
56. US Constitution, Article IV, s 3. [↑](#footnote-ref-56)
57. Cliff Sloan and David McKean, *The Great Decision: Jefferson, Adams, Marshall, and the Battle for the Supreme Court* (Public Affairs, 2009) at 76. [↑](#footnote-ref-57)
58. Joshua Glick, ‘On the Road: The Supreme Court and the History of Circuit Riding’ (2003) 24(4) *Cardozo Law Review* 1753 at 1829. [↑](#footnote-ref-58)
59. *Pennsylvania Bureau of Correction v U.S. Marshals Service*, 474 U.S. 34 at 38 (1985). [↑](#footnote-ref-59)
60. *See* *Plaintiff M68/2015 v Minister for Immigration and Border Protection* (2016) 257 CLR 42 at [122]-[126] per Gageler J;  *Bank of New South Wales v Commonwealth* (1948) 76 CLR 1 at 363-64 per Dixon J; *R v Commonwealth Court of Conciliation & Arbitration; Brisbane Tramways Co Ltd, Ex p; Municipal Tramways Trust, Adelaide, Ex p [No 1]* (*The Tramways Case*) (1914) 18 CLR 54 at 65 per Barton J. [↑](#footnote-ref-60)
61. Erwin Chemerinsky, *Constitutional Law: Principles and Policies* (Wolters Kluwer, 6th ed, 2019) at 43. [↑](#footnote-ref-61)
62. Mark Tushnet (ed), *Arguing Marbury v. Madison* (Stanford University Press, 2005) at 1. [↑](#footnote-ref-62)
63. Mark Tushnet (ed), *Arguing Marbury v. Madison* (Stanford University Press, 2005) at 146. [↑](#footnote-ref-63)
64. Mark Tushnet (ed), *Arguing Marbury v. Madison* (Stanford University Press, 2005) at 153. [↑](#footnote-ref-64)
65. Mark Tushnet (ed), *Arguing Marbury v. Madison* (Stanford University Press, 2005) at 146. [↑](#footnote-ref-65)
66. *Marbury v Madison* 5 US (1 Cranch) 137 at 173 (1803). [↑](#footnote-ref-66)
67. *Marbury v Madison* 5 US (1 Cranch) 137 at 175 (1803). [↑](#footnote-ref-67)
68. Thomas Jefferson later described the decision as ‘an obiter dissertation of the Chief Justice’: see Charles Warren, *The Supreme Court in United States History* (Little Brown & Co, rev ed, 1926) at 264. [↑](#footnote-ref-68)
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70. Bernard Schwartz, *A History of the Supreme Court* (Oxford University Press, 1995) at 57. [↑](#footnote-ref-70)
71. *Marbury v Madison* 5 US (1 Cranch) 137 at 176 (1803). [↑](#footnote-ref-71)
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74. See, eg, Mary Sarah Bilder, ‘The Corporate Origins of Judicial Review’ (2006) 116 *Yale Law Journal* 502 at 543-544. [↑](#footnote-ref-74)
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80. 358 U.S. 1 (1958). [↑](#footnote-ref-80)
81. 347 U.S. 483 (1954). [↑](#footnote-ref-81)
82. 17 U.S. 316 (1819). [↑](#footnote-ref-82)
83. *Dred Scott v Sandford*, 60 U.S. 393 (1857). [↑](#footnote-ref-83)
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89. Robert Garran, *The Coming Commonwealth: An Australian Handbook of Federal Government* (Angus & Robertson, 1897) at 23, 25. [↑](#footnote-ref-89)
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96. (1951) 83 CLR 1 at 262. [↑](#footnote-ref-96)
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100. (1906) 4 CLR 356. [↑](#footnote-ref-100)
101. (1904) 1 CLR 91. [↑](#footnote-ref-101)
102. (1904) 1 CLR 585. [↑](#footnote-ref-102)
103. *Re Income Tax Acts (Outtrim’s Case)* [1905] VLR 463. [↑](#footnote-ref-103)
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