PUBLIC LAW REVIEW

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COMMENTS

Future challenges on the path to constitutional recognition of Indigenous peoples – *Megan Davis* 233

Dedicated Indigenous representation in New Zealand's Parliament – *Andrew Geddis* 240

SPEECH

The changing character of judicial review in Australia: The legacy of Marbury v Madison? – *Ronald Sackville AO QC*

Judicial review of legislation has been an "axiomatic" characteristic of Australian federalism from the beginning. The standard narrative is that the legitimacy of judicial review was established single-handedly by Marshall CJ in *Marbury v Madison* (1803) and uncritically accepted by the framers of the Australian Constitution. According to this narrative, the High Court has exercised the power of judicial review in a consistent manner since Federation. The standard narrative is dubious in a number of respects. *Marbury v Madison* was not necessarily central to the acceptance of judicial review in the United States and, in any event, Marshall's reasoning is flawed. Judicial review in Australia owes less to American constitutional doctrine than to the power of courts to invalidate colonial legislation held to be inconsistent with imperial statutes. The expansion of judicial review, particularly in recent times, has taken the institution well beyond its original rationale and altered the balance between the courts and Parliaments. A re-evaluation of judicial review as a counter-majoritarian force in Australian constitutionalism is overdue. 245

ARTICLES

The Constitution and its common law background – *Jeffrey Goldsworthy*

This article examines the interrelationship between the Constitution and the common law, which formed part of the background against which the Constitution was enacted. The common law supplies principles guiding its interpretation, the meanings of many of its words and phrases, and complementary principles of a constitutional nature. But Sir Owen Dixon's suggestion that the common law was the ultimate source of the Constitution's legal authority is wrong, if the common law is understood in its usual modern sense of judge-made law. The Constitution is a fundamental law whose legal authority does not need to derive from deeper legal principles. It is a superior law that overrides incompatible common law, which necessarily limits the capacity of common law principles of interpretation to authorise the creative judicial development of constitutional law. 265

Dual federal and State judicial appointments: An Australian impossibility? – *Sarah Murray*

The Australian judicature has been the subject of numerous reform proposals in recent years, including for a national judicial framework. This article explores the constitutional and practical complexities of judicial appointments in Australia through a case study of the

co-operative reform proposal which, as part of the national judicial framework, was to see Federal Court judges dually appointed as State Supreme Court judges and State Supreme Court judges dually appointed to the Federal Court. It sets out the nature and motivations for the proposal, the historical and reform context in which it was conceived and some of the difficulties that would have been experienced had it been fully implemented. Ultimately, it argues that the benefits of dual appointments would have been too faint, would have encountered hefty obstacles and that alternative reform avenues would better serve to integrate the Australian judiciary. 284

BOOK REVIEW

Governance Without a State? Policies and Politics in Areas of Limited Statehood – *Reviewed by Padraig McAuliffe* 303

DEVELOPMENTS 308

VOLUME 25 – 2014

Table of Authors 317

Table of Cases 319

Index 329