Influences of Federalism On Constitutional Interpretation In Australia

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A vexed question in a federal system is the extent to which the central and regional governments can bind each other or, alternatively, are immune from each other's actions. With a few exceptions, this question is not dealt with expressly in the Australian Constitution but is left for decision by the courts. The attitude of the courts is the subject matter of this Article. In particular, the Article examines a series of recent cases in which the issue of whether the powers of Australian Governments are limited by federal implications has received renewed prominence.

INTRODUCTION

This Article considers how the federal nature of Australia's Commonwealth Constitution influences courts' interpretation of the respective powers of the Commonwealth and the states in Australia. At one level, the influence is obvious. The distribution of powers and hence the opportunity for judicial interpretation are themselves products of the decision to create a federal system of government. The constitutional enumeration of the exclusive and concurrent Commonwealth powers

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I first met Ed in the 1970's on one of his several visits to Australia. Since then we have corresponded regularly and met occasionally, in both the United States and Australia. During that time Ed became an invaluable source of knowledge about the United States Constitution for me and an extremely useful colleague with whom I could explore bases for comparisons between our two constitutional systems. He also became a good friend. I hope those contacts will continue despite his retirement.

Ed is a scholar with a broad vision of the sweep of constitutional law which carries with it the capacity to put individual rules into perspective. These skills are all too rare. I am honoured to be asked to contribute to this scheme of the *U.C. Davis Law Review* to mark his retirement.

expressly limit the powers of the Commonwealth and the states. Their powers are also limited by the rule that, in the event of conflict with state law, Commonwealth law will prevail.[1]

However, this Article does not address the axiomatic link between governmental powers and federalism. Rather, it addresses the implied effects of the federal constitutional context on the interpretation of constitutional powers. These effects are manifested by limitations on governmental branches' ability to bind each other, restrictions on the general scope of powers, and prohibitions on their use in particular ways.

Principles limiting governmental branches' power to bind each other tend to become entangled with the doctrine of Crown immunity. This doctrine invokes the rule of construction that a court must find in the statute an express or implied intent to bind the Crown.[2] This rule must be satisfied before the court reaches the substantive issue.

The proposition that the Commonwealth of Australia Constitution Act 1901 (Cth) empowers the Commonwealth to bind the Crown and that the Crown is "ubiquitous and indivisible" were central to the High Court of Australia's judgments in *Amalgamated Society of Engineers v. Adelaide Steamship Co.*[3] The *Engineers* Court temporarily disavowed using federal implications in interpreting the Constitution. The majority's reservation of the issue raised by Commonwealth laws, which purported to affect the prerogative of the Crown in right of a state, also suggests the influence of Crown immunity. Lingering traces of that reservation remained until 1985.[4] Courts have used the Commonwealth's statutory waiver of its own procedural immunity as a basis for decisions subjecting the Commonwealth to substantive state law.[5]

However, the considerations underpinning implied restrictions on governments in a federal system differ from those that resulted in the principles of Crown immunity. The two doctrines are conceptually distinct. This Article addresses only the former, except to the extent that it bears traces of its occasional encounters with Crown immunity.

The existence and extent of federalism's influence has been a recur-

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[1] COMMONW. CONST. § 109: "When a law of a State is inconsistent with a law of the Commonwealth, the latter shall prevail, and the former shall, to the extent of the inconsistency, be invalid."

[2] Bradken Consol. v. Broken Hill Proprietary Co., 145 C.L.R. 107 (Austl. 1978-79).

[3] 28 C.L.R. 129, 152-53, 166, 173-74 (Austl. 1920).

[4] Queensland Elec. Comm'n v. Commonwealth, 59 A.L.J.R. 699 (1985).

[5] Judiciary Act 1903-1973 (Cth), § 64, 7 AUSTL. ACTS P. 58 (1975); *see also* Evans Deakin Indus. v. Commonwealth, 62 A.L.R. 295 (1985); Strods v. Commonwealth, 2 N.S.W.L.R. 182 (1982); Maguire v. Simpson 139 C.L.R. 362 (Austl. 1976-77).

ring issue throughout Australian federal constitutional development. Its recent prominence, after a long period of relative quiescence, coincides with a series of judicial decisions broadening the scope of Commonwealth powers over external affairs,[6] corporations,[7] and industrial relations.[8] In these decisions the Court affirmed the existence of some implied restrictions on Commonwealth power.

However, late in 1985, the Court invalidated a Commonwealth Act that applied only in the State of Queensland.[9] The Court held that the Act violated one limb of the current doctrine of federal implications, which restricts Commonwealth discrimination against states.[10] In invalidating the Act, the Court went out of its way to clarify the other limb of the doctrine as well, which applies to Commonwealth legislation that affects the existence of the states or their capacity to function.[11]

More recently still, the Court held that no implied restriction on the Commonwealth's power to impair a state's ability to function prevented applying the Conciliation and Arbitration Act 1904 (Cth) to regulate a state's employment of school teachers.[12] While the decision itself was unsurprising, comments by three Justices on the place of implications in interpreting the conciliation and arbitration power show that the issue still generates passionate debate.[13]

Jurists have debated the same subject in the United States in recent years. In 1985, the United States Supreme Court overturned an earlier decision[14] in order to "reject, as unsound in principle and unworkable in practice," a rule providing state immunity from federal regulation. The invalid rule turned on a judicial appraisal of whether a particular governmental function was "integral" or "traditional."[15] The majority accepted that the Constitution assumed the continued role of the states, but stated that the political process, rather than the judicial process,

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[6] COMMONW. CONST. § 51 (29); *see* Commonwealth v. Tasmania, 57 A.L.J.R. 450 (1983); Koowarta v. Bjelke-Petersen, 153 C.L.R. 168 (Austl. 1982).

[7] COMMONW. CONST. § 51 (20); *see* Commonwealth v. Tasmania, 57 A.L.J.R. 450 (1983).

[8] COMMONW. CONST. § 51(35); *see* Regina v. Coldham, 153 C.L.R. 297 (Austl. 1983).

[9] *See* Queensland Elec. Comm'n v. Commonwealth, 59 A.L.J.R. 699 (1985).

[10] *Bjelke-Petersen*, 153 C.L.R. 168; Commonwealth v. Tasmania, 57 A.L.J.R. 450 (1983).

[11] *Queensland Elec. Comm'n*, 59 A.L.J.R. at 704 (Gibbs, C.J.), 707-10 (Mason, J.), 713 (Wilson, J.), 715-17 (Brennan, J.), 723 (Deane, J.), 728 (Dawson, J.).

[12] *See* Re Lee, 60 A.L.J.R. 441 (1986).

[13] *See id.* at 448-49.

[14] National League of Cities v. Usery, 426 U.S. 833 (1976).

[15] Garcia v. San Antonio Metro. Transit Auth., 469 U.S. 528, 546 (1985).

was primarily responsible for protecting the states' role:

> [T]he framers chose to rely on a federal system in which special restraints on federal power over the States inhered principally in the workings of the National Government itself, rather than in discrete limitations on the objects of federal authority. State sovereign interests, then, are more properly protected by procedural safeguards inherent in the structure of the federal system than by judicially created limitations on federal power.[16]

Since the doctrines appear prone to dramatic reversals, the difference between the current attitudes of the United States Supreme Court and the High Court of Australia in this regard may be a temporary phenomenon.

I. Express Limitations

The entire Commonwealth Constitution comprises express limitations on the powers of the Commonwealth government, state governments, or both. This Article discusses only those express limitations that parallel implied limitations whose existence is accepted, or that cast the absence of implied limitations into relief.

A. Commonwealth Places: Section 52(1)

Section 52(1) gives the Commonwealth Parliament exclusive power over "[t]he seat of government of the Commonwealth, and all places acquired by the Commonwealth for public purposes."[17] That state power would not extend to the seat of government is not surprising, but the justification for immunizing all other Commonwealth places from state law is much less obvious. In a series of cases in the early 1970's dealing with various Commonwealth defense establishments in New South Wales and Western Australia, the High Court ruled state law inapplicable in a place acquired by the Commonwealth for public purposes, whether the law was enacted before or after the acquisition.[18]

Such a broad interpretation of the section was unnecessary in principle. Under the doctrine of paramountcy, Commonwealth law will override inconsistent state law. The result therefore was both inconvenient and surprising. The interpretation was overcome for practical purposes shortly afterwards by a new Commonwealth law automatically apply-

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[16] *Id.* at 552.

[17] Commonw. Const. § 52(1).

[18] *See* Regina v. Phillips, 125 C.L.R. 93 (Austl. 1970); Attorney General (N.S.W.) v. Stocks & Holdings (Constructors) Proprietary Ltd., 124 C.L.R. 262 (Austl. 1970); Worthing v. Rowell & Muston Proprietary Ltd., 123 C.L.R. 89 (Austl. 1970).

ing the law of each state to Commonwealth places within the state's borders.[19] This device is ineffective when other reasons exist for excluding state law. For example, state law does not apply if an entity to which section 52(2) applies occupies the Commonwealth place.

B. Transferred Departments: Section 52(2)

Section 52(2) confers exclusive power on the Commonwealth to make laws regarding "[m]atters relating to any department of the public service the control of which is by this Constitution transferred to the Executive Government of the Commonwealth."[20] Precisely which departments this provision covers is uncertain. The provision clearly extends to the Department of Customs and Excise, which Constitution section 69 transferred directly to the Commonwealth. Section 69 lists four other departments to be transferred to the Commonwealth at a future date. The departments of posts, telegraphs and telephones, and naval and military defense were transferred in this way and are likely covered by the exclusive power in section 52(2). The departments of lighthouses, lightships, beacons and buoys, and quarantine, which are also listed in section 69, were never transferred to the Commonwealth in accordance with the section.[21] Therefore, these entities presumably are not subject to the Commonwealth's exclusive power. However, Quick and Garran, contemporary commentators on the Constitution, express a contrary view:

> It may, however, be argued that the words "the control of which is by this Constitution transferred" are merely intended to identify the departments enumerated in sec. 69, and not to define the time at which the character of exclusiveness attaches; and that consequently, though the administration of the departments is not transferred till a later date, the power of legislation in respect of them is exclusively vested in the Federal Parliament from the establishment of the Commonwealth.[22]

Under any view, the Commonwealth's exclusive section 52 power to

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[19] Commonwealth Places (Application of Laws) Act 1970. The Fiscal Powers subcommittee of the Australian Constitutional Convention recommended in 1984 that the reference to Commonwealth places be removed from § 52(1), to subject them to concurrent State power. *Report of the Fiscal Powers Sub-Committee of the Executive Committee of the Australian Constitutional Convention, 1984*, 3.19-3.22 [hereafter *Report, 1984*].

[20] COMMONW. CONST. § 52(2).

[21] Attorney-General's Department, Canberra, *Australian Constitution Annotated*, AGPS, Canberra (1980), 205.

[22] J. QUICK & R. GARRAN, THE ANNOTATED CONSTITUTION OF THE AUSTRALIAN COMMONWEALTH 661 (1901).

legislate is patchy in its operation. Section 69's authors may originally have distinguished between transferred and other departments to emphasize the effect of the ownership transfer. Also, they may have sought to negate any state efforts to continue to interfere with administrative units that they had long controlled. If so, these justifications have long since passed.

The Court of Appeal of New South Wales recently considered section 52(2)'s purpose and contemporary operation in *Australian Postal Commission v. Dao*.[23] *Dao* addressed whether the Anti-Discrimination Act 1977 (N.S.W.) applied to the Australian Postal Commission so as to authorize investigating sexually based employment discrimination.[24] The Commission is a statutory corporation providing a postal service. Earlier, departments transferred to the Commonwealth in 1901 under section 69 provided the postal service.

All three members of the Court denied that the Commission was subject to the state Act. President Kirby and Judge Advocate Samuels based their decisions on the Commonwealth's exclusive power under section 52(2). In effect, they held that section 52(2) extends to any entity in the public sector that takes the place of the transferred departments. President Kirby justified the continuing operation of section 52(2), *inter alia*, on the ground that the transferred departments performed "governmental functions . . . essential to the viability of the new Commonwealth."[25]

The third member of the Court, Judge Advocate McHugh, expressed doubt that the Commission fell within the section 52(2) exclusive power.[26] He referred to the Commission's establishment, its purchase of assets from the department, and its use of employees transferred from the public service as indications that it was "distinct and separate from the departments of public service transferred."[27] He nevertheless found the Commission immune from state law under a section in the Commission's constituent statute exempting it from state laws to which the Commonwealth itself was immune. The Commonwealth's immunity from such laws in turn was "implicit in the very nature of the compact" enacted in the Constitution.[28]

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[23] 63 A.L.R. 1 (1985).

[24] *Id.*

[25] *Id.* at 16. The Commission had described them as the "heartland of Federal legislative responsibility," a description that is less than convincing in the case of lighthouses and quarantine. *Id.*

[26] *See id.* at 39.

[27] *Id.* at 33.

[28] *Id.*

As Justice McHugh's judgment suggests, section 52(2)'s distinction between transferred and other departments is more apparent than real. The Commonwealth enjoys considerable implied immunity from state law that extends to all its departments of state, including those covered by section 52(2). This consideration alone suggests that the additional provision in section 52(2) is no longer necessary.[29] The justification for a more comprehensive, implied immunity for the Commonwealth from state law is considered later in this Article.

C. Taxation of Property: Section 114

The Constitution expressly confers reciprocal immunity from taxation by another level of government on the property of the Commonwealth and the states. Section 114 provides that: "A State shall not, without the consent of the Parliament of the Commonwealth . . . impose any tax on property of any kind belonging to the Commonwealth, nor shall the Commonwealth impose any tax on property of any kind belonging to a State."

Both the Australian states and local governments levy taxes on real property. The states impose a land tax, and local governments impose rates. Section 114 exempts the Commonwealth from liability for such taxes, even though, as will be seen, the implied immunities doctrine would achieve the same result if section 114 did not exist.[30] The Commonwealth Parliament can waive the exemption. The immunity of other governments[31] from municipal rates causes local governments considerable hardship and has led to repeated requests for reform.[32]

Immunizing state property from Commonwealth taxation under section 114 has had limited effect. The Commonwealth does not tax real property, and the Court has applied the section narrowly to taxes that the Commonwealth does impose. Thus, the Court has held that the section does not prevent imposing customs duties on goods imported by

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[29] The Fiscal Powers sub-committee of the Australian Constitutional Convention recommended its deletion from the Constitution. *Report, 1984*, *supra* note 19, at 3.23-3.27.

[30] Most state properties are also exempt from local government rates under state legislation. In 1984 the Australian Council of Local Government Associations estimated the total amount of rate revenue foregone through these exemptions as between $100m. to $200m. per annum and approximately equal to ten per cent of rate revenue collected. *Report, 1984*, *supra* note 19.

[31] "Other governments" include both the Commonwealth and the State governments.

[32] *See* most recently the *Report to the Standing Committee of the Fiscal Powers Sub-committee of the Australian Constitutional Conventions, 1984*, 2.110-2.111 [hereafter *Standing Report, 1984*] and the sources there cited.

a state,[33] or imposing a payroll tax on wages paid by states to their employees.[34]

In practice, the states enjoy a degree of freedom from Commonwealth taxation attributable to considerations of practicality and political comity rather than to legal rules. States' general exemption from federal sales taxes provides an example. The recent Commonwealth proposal to tax the states on fringe benefits paid to employees drew protests from several state governments. One state, Queensland, threatened to challenge the tax's validity under section 114.[35] The existing case law suggests that such a challenge would likely fail.[36]

D. Discrimination and Preference: Sections 51(2) and 99

Two sections expressly prohibit discrimination by the Commonwealth against individual states in particular matters.[37] Section 51(2)'s taxation power is subject to the proviso: "but so as not to discriminate between States or parts of States."[38] Section 99 provides that "the Commonwealth shall not, by any law or regulation of trade, commerce, or revenue, give preference to one State or any part thereof over another State or any part thereof."[39]

While theoretically the concepts of discrimination and preference are distinguishable,[40] in practice the two sections operate identically. Courts have interpreted both narrowly. With only minor exceptions, the Court has decided the relatively few cases in which an Act has been challenged under section 51(2) or section 99 by referring to the legal regime established by the Act rather than to its actual effect on the states. Also, courts have interpreted section 99's reference to trade and commerce laws literally, confining that aspect to laws enacted under section 51(1), the trade and commerce power. The courts have not applied section 99 to laws attributable to other powers, which, in a

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[33] *See* Attorney-General (N.S.W.) v. Collector of Customs (N.S.W.), 5 C.L.R. 818 (Austl. 1908).

[34] *See* Victoria v. Commonwealth, 122 C.L.R. 353 (Austl. 1970-71).

[35] *See also* COMMONW. CONST. § 51(3) (requiring bounties on the production or export of goods to be "uniform throughout the Commonwealth").

[36] *See, e.g.*, Attorney-General (N.S.W.) v. Collector of Customs (N.S.W.), 5 C.L.R. 818 (Austl. 1908).

[37] COMMONW. CONST §§ 51(2), 99.

[38] *Id.* § 51(2).

[39] *Id.* § 99.

[40] "Preference necessarily involves discrimination or lack of uniformity, but discrimination or lack of uniformity does not necessarily involve preference." Elliott v. Commonwealth, 54 C.L.R. 657, 668 (Austl. 1935-36).

broader sense, might nevertheless be described as laws of trade and commerce.[41]

So far, courts have construed section 99's reference to laws of "revenue" to apply only to taxation laws.[42] Specifically, one court held the section not applicable to grants to the states under section 96,[43] even when the grant is part of a legislative scheme intended to circumvent the prohibitions in sections 51(2) or 99.[44] Chief Justice Latham justified *Moran*'s result on the grounds that it facilitated correcting the inequalities created by the need for uniform taxation.[45] Justice Evatt questioned Chief Justice Latham's logic in a strong dissent, suggesting fundamental disagreement over how to measure discrimination:

> In truth, there is nothing in the Commonwealth scheme of distributing moneys derived from the flour tax which ensures any equality of the States even in economic result; to say nothing of the extraordinary theory that because (say) New South Wales is a great wheat-producing State, the large consuming population of that State should pay more for their flour and their bread than the small wheat-producing States.[46]

On appeal, the Privy Council affirmed the High Court's decision. The Council warned, however, against exercising powers under section 96 "with a complete disregard of the prohibition contained in sec. 51(2), or so as altogether to nullify that constitutional safeguard."[47] In the event that "the real substance and purpose" of an Act was "simply . . . to effect discrimination," they foreshadowed that it might be held invalid.[48] A case testing their warning has not yet arisen.

E. Express State Immunity: Banking and Insurance

Section 51(13) expressly prohibits Commonwealth regulation of state banking other than "[s]tate banking extending beyond the limits of the

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[41] *See* Morgan v. Commonwealth, 74 C.L.R. 421 (Austl. 1947).

[42] A suggestion that it extends further is found in the joint judgment in *Morgan*, 74 C.L.R. at 452: "It is clear that the words 'law' and 'revenue' in s. 99 include laws with respect to taxation."

[43] Victoria v. Commonwealth, 38 C.L.R. 399 (Austl. 1926) (upholding 1926 Federal Aid Roads Act).

[44] Deputy Fed. Comm'r of Taxation (N.S.W.) v. W.R. Moran Proprietary Ltd., 61 C.L.R. 735 (Austl. 1939), *aff'd on appeal*, 63 C.L.R. 338 (Austl. 1940) (P.C.).

[45] "[D]iscrimination may be just or unjust. A wise differentiation based upon relevent circumstances is a necessary element in national policy. The remedy for any abuse of sec. 96 is political and not legal in character." *Moran*, 61 C.L.R. at 764.

[46] *Id.* at 790.

[47] W.R. Moran Proprietary Ltd. v. Deputy Fed. Comm'r of Taxation (N.S.W.), 63 C.L.R. 338, 349-50 (Austl. 1940) (P.C.).

[48] *Id.*

State concerned." Section 51(14) similarly excludes regulation of state insurance. In both situations, the exclusions have had a significant practical effect on the federal regulatory regime. Their existence also implies that Commonwealth powers not expressly excluding state activities authorize laws extending to and binding the states.

II. Federal Implications: The Early Years

Two doctrines attributable to federalism considerations influenced the Court's interpretation of the Constitution for the two decades following federation. The first, known as the doctrine of implied immunities, restricted the power of both the Commonwealth and the states to make laws binding on each other. The Constitution provided no express authority for the doctrine. Rather, the High Court implied it from the nature of the federal system, which calls for two spheres of independent governments. The Court relied on principles similar to those applied by the United States Supreme Court in *McCulloch v. Maryland*,[49] in which the Court denied the power of the states to tax the national government.

The Australian High Court initially developed and applied the doctrine of implied immunities to restrict state taxation of the Commonwealth. Thus, the Court held that states could not demand state stamp duty[50] nor state income tax[51] from the salaries of Commonwealth employees. However, the Court eventually made the doctrine reciprocal. In the different context of industrial conciliation and arbitration legislation, the Court held that the Commonwealth Act did not apply to disputes between a state and its railway employees. Therefore, railway employees were not entitled to register as an organization under the Act.[52] The Court attributed the resulting reciprocal immunity to necessity.[53]

The second doctrine was that of reserved powers. Utilizing section 107 of the Constitution, which leaves the residue of legislative power to the states, the doctrine prescribed a more general approach to interpret-

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[49] 17 U.S. (4 Wheat.) 316 (1819).

[50] D'Emden v. Pedder, 1 C.L.R. 91 (Austl. 1904).

[51] Baxter v. Comm'rs of Taxation (N.S.W.), 4 C.L.R. 1087 (Austl. 1907); Deakin v. Webb (Comm'r of Taxation), 1 C.L.R. 585 (Austl. 1904).

[52] Federated Amalgamated Gov't Ry. & Tramway Serv. Ass'n v. New South Wales Ry. Traffic Employes Ass'n, 4 C.L.R. 488 (Austl. 1906).

[53] *See* Attorney-General for Queensland v. Attorney General for the Commonw., 20 C.L.R. 148 (Austl. 1915).

ing the federal division of power.[54] The doctrine tended to interpret Commonwealth power so as to protect the state's residual power in cases of ambiguity. It thus relied not only on an implication drawn from federalism, but also on an implication about the type of federal system that the Constitution was designed to establish.

Not all of the Court's decisions during this period were inspired by concern for preserving the federal system. Most noteworthy was *New South Wales v. Commonwealth*.[55] In this case the Court effectively eliminated the only permanent constitutional requirement for redistributing revenue from the Commonwealth to the states.

In a dramatic reversal in 1920, the Court rejected using implications in interpreting the Constitution. It held in *Amalgamated Society of Engineers v. Adelaide Steamship Co.*[56] that the Conciliation and Arbitration Act 1904 (Cth) extended to disputes between state governments and their employees that otherwise fell within the terms of the power to legislate for "industrial disputes extending beyond the limits of any one State."[57] The Court emphasized that the Constitution was an act of the United Kingdom Parliament. Thus, just as any other statute, it should be read "naturally in the light of the circumstances in which it was made, with knowledge of the combined fabric of the common law, and the statute law which preceded it."[58] This approach excluded implied restrictions on the power of governments to bind each other. They were "based on distrust, lest powers, if once conceded to the least degree, might be abused to the point of destruction,"[59] and therefore were not appropriate for judicial determination. Once the "true meaning" of constitutional powers is ascertained:

> [T]hey cannot be further limited by the fear of abuse. The non-granting of powers, the expressed qualifications of powers granted, the expressed retention of powers, are all to be taken into account by a Court. But the extravagant use of the granted powers in the actual working of the Constitution is a matter to be guarded against by the constituencies and not by the courts.[60]

The Court distinguished the American precedents, not very convincingly, on the ground that the Australian Constitution was "permeated through and through with . . . the institution of responsible govern-

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[54] *See, e.g.*, Huddart Parker v. Moorehead, 8 C.L.R. 330 (Austl. 1910).
[55] 7 C.L.R. 179 (Austl. 1908).
[56] 28 C.L.R. 129 (Austl. 1920).
[57] COMMONW. CONST. § 51(35).
[58] *Engineers*, 28 C.L.R. at 152.
[59] *Id.* at 151.
[60] *Id.*

ment, a government under which the Executive is directly responsible to — nay, is almost the creature of — the legislature."[61] The Court did not make clear why this should limit the need for implying restrictions on governmental power.

Engineers also rejected applying the doctrine of reserved state powers to test the validity of Commonwealth law. The Court held that ordinary principles of statutory interpretation should also apply in this area. The majority quoted with approval the test stated by the Privy Council in *Regina v. Burah* while applying the Indian Councils' Act 1861:

> If what has been done is legislation, within the general scope of the affirmative words which give the power, and if it violates no express condition or restriction by which that power is limited . . . it is not for any Court of Justice to inquire further, or to enlarge constructively those conditions and restrictions.[62]

III. The Position of the Commonwealth After 1920

Notwithstanding *Amalgamated Society of Engineers v. Adelaide Steamship Co.*,[63] the Commonwealth enjoys broad immunity from state law unless it voluntarily submits to state law. The precise limits of its immunity are unsettled. It might not be total, although all of the acknowledged exceptions could be attributed to the Commonwealth's implied or express consent to be bound. The doctrine that the Commonwealth may be affected by state law, for example, is explainable either on the basis that under the Judiciary Act 1903 the Commonwealth voluntarily submitted to state law, or that the Commonwealth has otherwise evinced an intention to submit to state law.[64]

Commonwealth immunity from state law extends only to the Commonwealth itself, and to its authorities falling within the "shield of the Crown." Immunity does not extend to authorities established by the Commonwealth but maintaining some autonomy or independence. However, Commonwealth legislation, which prevails over inconsistent state law, can and often does confer immunity on these sources. If *Australian Postal Commission v. Dao*[65] is correct, authorities that are the successors of transferred departments under section 52(2) acquire im-

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[61] *Id.* at 147.

[62] *Burah*, 3 App. Cas. 889, 905 (P.C. 1878).

[63] 28 C.L.R. 129 (Austl. 1920).

[64] Australian Postal Comm'n v. Dao, 63 A.L.R. 1, 33 (1985). For a critical analysis of the various theories advanced to explain the "affected by" doctrine, see Donaldson, *Commonwealth Liability to State Law*, 16 W. Austl. L. Rev. 135 (1985).

[65] 63 A.L.R. 1.

munity from that provision.

In *Engineers*, the Court explained earlier decisions recognizing Commonwealth immunity from state law as instances of conflict between Commonwealth and state law in which Commonwealth law prevailed under Constitution section 109. However, subsequent decisions have demonstrated that Commonwealth immunity depends, at least in some degree, on implications drawn from the Constitution.

One suggested basis for Commonwealth immunity from state law purports to draw on the provision in Constitution section 107 preserving for the states the powers held by the colonial parliaments at the establishment of the Commonwealth:

> Like the goddess of wisdom the Commonwealth *uno ictu* sprang from the brain of its begetters armed and of full stature. At the same time the Colonies became States; but whence did the States obtain the power to regulate the legal relations of this new polity with its subjects? It formed no part of the old colonial power. The Federal constitution does not give it. Surely it is for the peace, order and good government of the Commonwealth, not for the peace, welfare, and good government of New South Wales, to say what shall be the relative situation of private rights and of the public rights of the Crown representing the Commonwealth, where they come into conflict. It is a question of the fiscal and governmental rights of the Commonwealth and, as such, is one over which the State has no power.[66]

The proposition that state parliaments cannot bind the Commonwealth because the latter did not exist before federation, and thus was not subject to the colonial legislatures, is unconvincing. However, the argument is rarely stated so baldly. Usually it is supported by reference to the Commonwealth's position as the federation's central government. Thus in *Dao*, for example, Judge Advocate McHugh argued that "[n]othing in the Constitution indicates that the activities of the Commonwealth are subject to State power. The nature of Australian federalism, in my opinion, indicates the contrary."[67]

The Commonwealth's implied immunity from state law is far broader than its express immunity in sections 52(2) and 114, and has rendered those provisions largely redundant. Scholars have strongly criticized implied immunity as unnecessary, causing practical inconvenience and legal confusion. Critics point out that the Commonwealth could confer immunity on itself whenever necessary, and that any such law would prevail over inconsistent state law. Thus Professor Zines has argued:

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[66] *In re* Richard Foreman & Sons Proprietary Ltd. v. Federal Comm'r of Taxation, 74 C.L.R. 508, 530-31 (Austl. 1947).

[67] *Dao*, 63 A.L.R. at 31.

> [H]owever the justification for Commonwealth immunity may be put, it is submitted that it is neither an inevitable nor a desirable doctrine. It leads to difficult distinctions as to whether the Commonwealth is merely using State law for its purposes and when it is being 'bound.' But, above all, it is not necessary to maintain the Commonwealth's position as either a federal or a national government. Decisions such as *Pirrie v McFarlane* and *Uther*'s case put the onus where it belongs, namely, on the Commonwealth, to consider why it should not be treated as subject to the appropriate law like anyone else. If the national interest is affected, it will act soon enough and obtain the benefits afforded by s. 109. . . .[68]

Appropriate legislative change could largely overcome both the practical inconvenience and the legal confusion. New South Wales recently argued at the Australian Constitutional Convention for more sweeping reform through adopting "mutual subjection to law."[69] The Convention[70] accepted the principle that the Constitution should be amended to provide that "[e]very power of the parliament of a State shall, subject to section 109, extend to the Commonwealth in its operations within that State; but the Commonwealth shall not be bound by a State law unless the Crown in right of the State is bound by that law."[71]

Judge Advocate McHugh argued the contrary view in *Dao*:

> [I]t is, in my opinion, the doctrine which best serves the needs of Australian federalism. If it was overturned, the difficulties which would face the Commonwealth Parliament in determining which State statutes should or should not apply to the Commonwealth would be enormous. Even if a list of State statutes which were to apply to the Commonwealth was enacted, it would soon be out of date. State legislation would require continual monitoring. On the other hand, the blanket exclusion of State laws might result in the exclusion of laws which the Commonwealth and its citizens might, in particular situations, find useful and appropriate. The doctrine . . . when coupled with ss. 56, 64 and 79 of the Judiciary Act, enables the courts to proceed on a case by case basis. This provides for flexibility in the application of State law without any real loss of that certainty which is an essential attribute of the administration of justice.[72]

The debate remains unresolved. The present law's uncertainty suggests that eventual action is inevitable.

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[68] L. ZINES, THE HIGH COURT AND THE CONSTITUTION 277 (1981).

[69] *Standing Report, 1984, supra* note 32, at 3.4.

[70] Australian Constitutional Convention, *Official Record of Debates 1985*, Queensland Government Printer, 47-103.

[71] *Resolutions Adopted at the Australian Constitutional Convention*, 29 July-1 August 1983, Item No. B.2:I.

[72] *Dao*, 63 A.L.R. at 35.

IV. The Position of the States After 1920

Notwithstanding *Amalgamated Society of Engineers v. Adelaide Steamship Co.*,[73] implied limits on the Commonwealth's powers re-emerged also, although in a more limited form than the broad immunity from state law enjoyed by the Commonwealth. *Engineers* did not purport to decide that the Commonwealth's power to bind the states was unlimited. Later cases, with the exercise of some imagination, found in *Engineers* an exception for laws discriminating against the states.[74] This exception has persisted and is discussed further below.[75] More obviously, the joint majority judgment expressly declined to decide that the Commonwealth could bind states in the exercise of "prerogative in the broader sense," by which they apparently meant "the power of the Crown apart from statutory authority."[76] They also noted that subjecting states to Commonwealth law in the exercise of other powers might require courts to take into account the "special nature" of a power.[77] The Court used the taxation power as an example, presumably because of its nature and of what Justice Dixon later described as its "conspicuous place" in the history of implied immunities.[78] The Court left these outstanding issues to a later day, although it made clear that any subsequent inquiry should "proceed consistently with the principles upon which we determine this case . . . ."[79]

The Court has since further explored both issues, and has found neither to require significant limitations on Commonwealth power. Apparently, the Commonwealth can legislate to affect the Crown's prerogative in right of a state if the law is directly supported by a Commonwealth power,[80] although its ability to do so in exercise of the incidental power might be more limited. Similarly, later decisions show that, subject to section 114, Commonwealth taxation laws of general application extend to the states as they do to any other taxpayer.[81]

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[73] 28 C.L.R. 129 (Austl. 1920).

[74] *See, e.g.*, Melbourne Corp. v. Commonwealth, 74 C.L.R. 31, 79 (Austl. 1947) (*State Banking* case).

[75] *See* in particular the discussion of Queensland Elec. Comm'n v. Commonwealth, 59 A.L.J.R. 699 (1985); *infra* notes 113-25 and accompanying text.

[76] *Engineers*, 28 C.L.R. 129, 143 (Austl. 1920).

[77] *Id.* at 144.

[78] *Melbourne Corp.*, 74 C.L.R. at 80.

[79] *Engineers*, 28 C.L.R. at 144.

[80] Federal Comm'n of Taxation v. Official Liquidator of E.O. Farley Ltd., 63 C.L.R. 278 (Austl. 1940). *See generally* C. Howard, Australian Federal Constitutional Law 170-73 (3d ed. 1985).

[81] *See, e.g.*, Victoria v. Commonwealth, 122 C.L.R. 353 (Austl. 1970-71).

Even legislation that effectively eliminated states' power to levy income tax twice survived judicial challenge in the *Uniform Tax* cases.[82]

The uniform income tax scheme initially involved four acts that imposed Commonwealth income tax at the former level of Commonwealth and state income tax combined; conferred payment priority on the Commonwealth tax;[83] offered grants to states agreeing not to impose their own income tax; and took over from the states their income tax records and officers.[84] The Court upheld the acts on the ground that they all fell within a literal construction of Commonwealth power. It rejected an argument that the scheme as a whole violated states' fundamental constitutional power to tax. The most sweeping formulation of the relevant principle came from Chief Justice Latham:

> [T]he scheme . . . could be applied to other taxes so as to make the States almost completely dependent, financially and therefore generally, upon the Commonwealth. If the Commonwealth Parliament, in a grants Act, simply provided for the payment of moneys to the States, without attaching any conditions whatever, none of the legislation could be challenged by any of the arguments submitted to the Court in these cases. The amount of the grants could be determined in fact by the satisfaction of the Commonwealth with the policies, legislative or other, of the respective States, no reference being made to such matters in any Commonwealth statute. Thus, if the Commonwealth Parliament were prepared to pass such legislation, all State powers would be controlled by the Commonwealth — a result which would mean the end of the political independence of the States. Such a result cannot be prevented by any legal decision. The determination of the propriety of any such policy must rest with the Commonwealth Parliament and ultimately with the people. The remedy for alleged abuse of power or for the use of power to promote what are thought to be improper objects is to be found in the political arena and not in the Courts.[85]

However, federalism considerations similar to but more muted than those that influenced the earlier immunities doctrine culminated eventually in a suggestion in *Melbourne Corp. v. Commonwealth*[86] that some implied limitations restricted the Commonwealth's power over the states. The Banking Act 1945 (Cth) purported to prohibit banks from conducting banking business for the states. Its purpose was to compel

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[82] *See* Victoria v. Commonwealth, 99 C.L.R. 575 (Austl. 1957); South Austl. v. Commonwealth, 65 C.L.R. 373 (Austl. 1942) (*Uniform Tax* cases).

[83] The Court held this element of the scheme invalid in *South Austl.*, 65 C.L.R. 373.

[84] This Act originally was based on the defense power. South Austl. v. Commonwealth, 65 C.L.R. 373 (Austl. 1942). It therefore was limited in duration, but effective.

[85] *South Austl.*, 65 C.L.R. at 429.

[86] 74 C.L.R. 31 (Austl. 1947).

the states to use the Commonwealth Bank. In *Melbourne Corp.* the Court held the Act invalid.

Various Justices offered different formulations of the limitations transgressed by the Act. Chief Justice Latham found the Act faulty because it related to "State governmental function[s] . . . a subject as to which the Commonwealth Parliament has no power to make laws."[87] To the extent that this view was based on a characterization argument it did not require implying limitations on Commonwealth power. As the judgment of Justice Dixon showed, however, *Engineers'* literal approach to interpreting Commonwealth power made the argument difficult to sustain on a characterization analysis alone.[88] Justice Dixon considered the Act invalid because it was discriminatorily "aimed at the restriction or control of a State in the exercise of its executive authority."[89]

The other Justices offered still different formulations. Justice Williams relied on the Commonwealth's inability to direct its legislation against an essential State Government activity.[90] Justice Rich felt that the Commonwealth could not act to "prevent a State from continuing to exist and function as such,"[91] whether the legislation was discriminatory or of general application. He suggested a "general income tax Act which purported to include within its scope the general revenues of the States derived from State taxation" as an example of the latter.[92] Justice Starke argued that "neither federal nor State governments may destroy the other nor curtail in any substantial manner the exercise of its powers . . . ."[93]

Most of the Justices agreed on one point: the limitations on Commonwealth power arise from the federal nature of the Constitution. Justice Dixon attributed the result to the states' role as "separate governments in the system exercising independent functions."[94] The rest of the Court, with the possible exception of Chief Justice Latham, would have agreed with Justice Dixon's observation. Otherwise, however, their views were inconveniently different. Subsequently Justice Dixon's reasons for the decision were more generally accepted,[95] although most

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[87] *Id.* at 61-62.
[88] *See id.* at 79-80.
[89] *Id.* at 83.
[90] *See id.* at 99.
[91] *Id.* at 66.
[92] *Id.*
[93] *Id.* at 74.
[94] *Id.* at 83.
[95] *See, e.g.*, Bank of New South Wales v. Commonwealth, 76 C.L.R. 1 (Austl.

of the separate judgments remained influential, at least at the theoretical level.

V. Recent Developments

Subsequent decisions occasionally acknowledged the holding in *Melbourne Corp. v. Commonwealth*,[96] but did not allow it to influence their outcome. The case remained as a warning that may have slightly constrained Commonwealth action, but that was increasingly considered purely theoretical. However, the debate began again in earnest in 1982 in the context of the external affairs power.

The extent of the Commonwealth's power to enforce international treaties domestically has been notoriously uncertain. The relevant head of constitutional power in section 51(29), to legislate for "external affairs," gives little guidance. Its existence establishes that the Commonwealth has some power. The difficulty is that an international treaty can concern almost any subject, unless the external affairs power is artificially limited in some way.

In 1982, the High Court addressed the issue in *Koowarta v. Bjelke-Petersen*,[97] a challenge to the Racial Discrimination Act 1975 (Cth). The Act purported to implement within Australia the International Convention on the Elimination of All Forms of Racial Discrimination. By a narrow majority the Court upheld the Act.[98] The majority's reasoning differed, but all would have agreed at least with the view of Justice Stephen that the section 51(29) power enabled the Commonwealth to implement treaties dealing with matters "of international rather than merely domestic concern," and that the treaty in question fell into this category.[99]

In the following year the issue arose again in the context of a treaty that less obviously dealt with matters of international concern. The World Heritage Properties Conservation Act 1983 (Cth) purported to implement the Convention for the Protection of the World Cultural and Natural Heritage. The Act's immediate purpose was to prevent the Tasmanian Hydro-Electric Authority from building a dam in a wilderness area protected by the Convention. Controversy over the dam was a prominent issue in the federal election held shortly before the legisla-

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1948).

[96] 74 C.L.R. 31 (Austl. 1947).

[97] 56 A.L.J.R. 625 (1982).

[98] *Id.* (Stephen, Mason, Murphy, and Brennan, J.J.; Gibbs, C.J., Aickin, and Wilson, J.J., dissenting).

[99] *Id.* at 645.

tion's introduction.

In *Tasmania v. Commonwealth*[100] the Court upheld the Act, again by a narrow four-to-three majority.[101] The majority held that Commonwealth power extends to implementing Australia's international obligations irrespective of the treaty's subject matter. The decision is a landmark case in Australian constitutional development. For present purposes, however, its significance is that it allowed Commonwealth power to extend into any legislative field in which an international obligation exists.

In both *Koowarta* and *Tasmania v. Commonwealth,* the Court was asked to recognize that the Constitution's federal nature limited Commonwealth power. In *Tasmania v. Commonwealth* the request was pressed more urgently, in two alternative forms. First, Tasmania attempted to apply the implied limitations on Commonwealth power that the Court had recognized in earlier cases. Thus, Tasmania alleged that the Commonwealth Act and regulations would "invalidly interfere with or impair the legislative and executive functions of the State of Tasmania and the prerogative of the Crown in right of Tasmania in relation to its lands."[102] Second, Tasmania argued that broadly interpreting the external affairs power would destroy the distribution of legislative power between the Commonwealth and the states. This argument was less orthodox but more appropriate to the case's circumstances. It also resembled the doctrine of reserved state powers. This resemblance was the argument's undoing.

The majority rejected the latter argument outright,[103] and predictably, found the former argument inapplicable. However, the majority accepted the existence of limitations on Commonwealth power in relation to the states. For example, Justice Mason referred to an implied prohibition against Commonwealth legislation that "discriminates against or 'singles out' a State or imposes some special burden or disability upon a State or inhibits or impairs the continued existence of a State or its capacity to function."[104]

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[100] 57 A.L.J.R. 450 (1983).

[101] *Id.* (Mason, Murphy, Brennan, Dean, JJ.; Gibbs, C.J., Wilson and Dawson, JJ., dissenting).

[102] Commonwealth v. Tasmania, 57 A.L.J.R. 450, 483 (1983).

[103] *But see* Dawson, J., in dissent, *id.* at 564: "No doubt the legislative powers of the Commonwealth should not be construed with any preconception in mind of the residual powers of the States, but that does not mean that Commonwealth powers should receive an interpretation which has no regard to the federal context in which they are found."

[104] *Id.* at 487.

The limitation was familiar, clearly reflecting the various views articulated in *Melbourne Corp.*[105] The Court had recognized but not applied the limitation in the *Payroll Tax* case.[106] More recently, the Court had acknowledged it in similar terms in *Koowarta*,[107] in response to similar arguments.

Shortly after *Koowarta*, the question of implied limitations on Commonwealth power arose in a different guise. *Re Coldham*[108] examined section 51(35)'s power to legislate for the conciliation and arbitration of industrial disputes extending beyond the limits of any one state. The case required the Court to decide whether a dispute between an organization of social workers and their employers was an "industrial dispute" within the meaning of the constitutional power.[109] The Court unanimously held that the dispute fell within the constitutional power. The holding considerably expanded the meaning of the term "industrial dispute" beyond the restrictive and somewhat artificial definition that the Court had earlier employed. The earlier definition had removed the Commonwealth's power to settle disputes between states and certain categories of state employees.[110] The Court had removed the power because the relationship was not capable of giving rise to an industrial dispute, rather than because of any implied restriction on Commonwealth power. The expansion of the power revived the possibility of its use in disputes between states and their employees, which would be a significant Commonwealth intrusion into matters central to state government operation. The Court avoided the problem in a carefully worded statement:

> It is also necessary to consider whether or not disputes between a State or a State authority and employees engaged in the administrative services of the State are capable of falling within the constitutional conception. . . . The implications which are necessarily drawn from the federal structure of the Constitution itself impose certain limitations on the legislative power of the Commonwealth to enact laws which affect the States (and vice versa). . . . If at least some of the views expressed in [earlier] cases are accepted, a Commonwealth law which permitted an instrumentality of the Commonwealth to control the pay, hours of work and conditions of employment of all State public servants could not be sustained as valid,

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[105] 74 C.L.R. 31.

[106] *See* Victoria v. Commonwealth, 122 C.L.R. 353 (Austl. 1970-71) (*Payroll Tax* case).

[107] *Koowarta,* 56 A.L.J.R. 625; *see, e.g., id.* at 649 (Mason, J.).

[108] 153 C.L.R. 297 (Austl. 1983).

[109] COMMONW. CONST. § 51(35).

[110] For example, schoolteachers. *See* Federated State School Teachers' Ass'n of Australia v. Victoria, 41 C.L.R. 569 (Austl. 1929).

> but . . . the limitations have not been completely and precisely formulated and for present purposes the question need not be further examined.[111]

In *Re Coldham*, as in *Koowarta* and *Tasmania v. Commonwealth*, the Court held that the Constitution's implied limitations were inapplicable. The case presented grounds for speculation that the occasion never would arise.[112] In recognition of the impracticability of literally interpreting the Constitution, the standard formulation of the limitations was a medley of the different views offered by members of the Court in *Engineers*' aftermath. In particular, the formulation combined the two quite different explanations of *Melbourne Corp.*'s result: the legislation's discriminatory nature, and its effect on a central aspect of state government operations. Each of these explanations had its own practical and theoretical problems. Their combination in a single formulation highlighted their historical origins but strongly suggested the lack of a logical and comprehensive underlying rationale. It was perhaps for this reason, out of understandable caution, that the *Re Coldham* Court described the limitations as not "completely and precisely formulated."

The Court actually applied the limitations in 1985, in *Queensland Electricity Commission v. Commonwealth*.[113] The case involved a challenge to the Conciliation and Arbitration Act 1985 (Cth). The Act responded to a long running and particularly acrimonious industrial dispute between the State of Queensland's electricity authorities and their employees. The Act altered the Conciliation and Arbitration Commission's usual procedures in handling disputes. Section 8, for example, removed the Commission's discretion to refrain from hearing a dispute on the ground that further proceedings are unnecessary to the public interest. Introducing the Bill, the Minister for Employment and Industrial Relations stated that it was "designed to facilitate the restoration of an ordered relationship between employing bodies in the Queensland electricity industry and the unions concerned," and noted that it contained a "sunset clause."[114]

The Court unanimously invalidated the major part of the Act[115] on

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[111] *Re Coldham*, 153 C.L.R. at 313.

[112] In Commonwealth v. Tasmania, Justice Brennan suggested that the result might have been different if the Commonwealth Act was directed to "the buildings that house the principal organs of a State." 57 A.L.J.R. 525 (1983). The illustration was too specialized to provide guidance on the practical significance of the broader doctrine.

[113] 59 A.L.J.R. 699 (1985).

[114] House of Representatives, *Debates*, 21 May 1985, at 2800 (Willis).

[115] Justices Brennan and Deane held that the fault in the Act lay in its potential application under § 6(2) to any relevant dispute in the electricity industry in Queen-

the ground that it violated implied limitations on Commonwealth power. The problem lay in the Act's discriminatory character. The Court traced this aspect of the implied limitations doctrine to Justice Dixon's earlier decisions, and in particular to his judgment in the *State Banking* case.[116]

Although the Justices' reasoning differed somewhat, the common ground between them was sufficient to clarify the limitation's scope considerably. The limitation does not lessen Commonwealth powers intended to enable the Parliament to make laws restricting the states. The defense power is such a power; the conciliation and arbitration power is not. The limitation protects all arms of a state government. The limitation is not, as the *State Banking* case suggested, confined to Acts restricting the state executive. It applies also to laws that discriminate against state agencies.

The limitation does not affect all discriminatory laws. The Commonwealth law must be aimed at the state or states, isolating them from the general law by imposing some special burden or disability. For at least some Justices, the question of discrimination was substantive, to be decided by reference to the law's actual operation.[117]

Each member of the Court, expressly or implicitly, attributed the limitation to an underlying principle of federalism. Justice Mason described it as the "constitutional conception of the Commonwealth and the States as constituent entities of the federal compact having a continuing existence reflected in a central government and separately organised State governments."[118] His formulation probably represented the general views of the other Justices. However, several of the others elaborated on the formulation's practical significance. For example, Justice Brennan referred to the "necessity to provide a measure of protection for the independence of the States," presumably to preserve their "capacity to exercise the powers reposed in them by the Constitution."[119] He identified these powers as their "raison d'être."[120] Justice Deane stated that the Constitution was "predicated upon and embodied . . . an assumption of the continued existence of the States as viable

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sland. Queensland Elec. Comm'n v. Commonwealth, 59 A.L.J.R. 699, 720-25 (1985). They were prepared to sever other, valid, parts of the Act. *Id.* at 721.

[116] Justice Dixon in turn attributed it to the *Engineers* case, although there is little in the judgments in that case to support it. *See id.* at 722.

[117] *See id.* at 723 (judgment of Justice Deane).

[118] *Id.* at 709.

[119] *Id.* at 715.

[120] *Id.*

political entities."[121] Later, he elaborated the point:

> [T]he rationale of such a restriction is the preservation of the federal system. The Commonwealth, unlike the States, is the creature of the Constitution. Its legislative and executive powers are limited to what the Constitution confers. Alone, those powers are inadequate to provide more than a truncated part of the functions of government. If, without constitutional amendment to fill the void, the States were to cease to exist as independent entities, an essential element of the substratum of the Federation would be gone.[122]

All of the Justices also recognized some broader limitation on Commonwealth power (derived from the same conception) protecting the states' continued existence and their capacity to function. To varying degrees, most Justices regarded the broader limitation as separate from the prohibition against discrimination, albeit attributable to the same principle. Thus Justice Mason referred to the principle as "well established" and consisting of two elements, the second of which was "the prohibition against laws of general application which operate to destroy or curtail the continued existence of the States or their capacity to function as governments . . . ."[123] Justice Deane identified this limitation as "the central operation of the reservation," which "also extends to preclude discriminatory treatment of the States . . . ."[124] Only Justice Dawson clearly integrated the two. His analysis viewed prohibiting discrimination as part of a broader prohibition against undue interference with a state's constitutional or governmental functions.[125]

The broader limitation was not, however, at issue in *Queensland Electricity*. The Court's statements merely confirmed the limitation's existence and explored its basis in principle.

The final step in the saga to date was a sequel to *Re Coldham* that contrived to shake the principles so recently given a measure of certainty in *Queensland Electricity*. *Re Lee*[126] addressed whether school teacher associations could be registered as organizations under section 132 of the Conciliation and Arbitration Act 1904 (Cth). The immediate catalyst for the action was *Re Coldham*'s broadening of the industrial dispute concept. This broadening cast doubt on earlier cases holding that teaching was not an industrial activity for purposes of Commonwealth constitutional power. The Court unanimously confirmed that

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[121] *Id.* at 721.
[122] *Id.* at 722.
[123] *Id.* at 709.
[124] *Id.* at 722.
[125] *See id.* at 728.
[126] 60 A.L.J.R. 441 (1986).

the cases were no longer valid.

The Court could have disposed of the case on that basis. Two of the organizations, however, included government school teachers. The prosecutor focused on this in an effort to apply the Court's reservation in *Re Coldham* in favor of employees engaged in the state administrative services. However, the Court had merely declined in that case to decide whether the arbitration power extended to disputes involving such employees; it had not purported to decide the issue.

All of the Justices held that the teachers were not engaged in state administrative services within the meaning of the reservation. Again, the Court could have dismissed the issue at that point. For this reason, the Court refused to hear further arguments on the question of the implied limitation's existence.[127] Three Justices thus expressly refrained from deciding the question.[128] Justices Mason, Brennan and Deane, however, in a joint judgment, chose to indicate a "preliminary view."[129]

Appropriately, the view was tailored to the framework of implied limitations on Commonwealth power recently confirmed in *Queensland Electricity*. Since there was no question of discrimination against the state, the issue was whether extending the conciliation and arbitration power to state administrative services employees would affect the state's continued existence or its capacity to function. The joint judgment suggested that it would not. The judgment argued that, although implied limitations might exist, they were subject to any express power that on its "true construction authorizes legislation the effect of which is to interfere with the exercise by the States of their powers."[130] The conciliation and arbitration power, it seemed, was such a power.

The Justices acknowledged that their interpretation would result in a "significant subtraction from the autonomy of the State"[131] without invoking the implied limitation on Commonwealth power. They made it clear, moreover, that this approach would not only apply to the conciliation and arbitration power, but would extend to all "powers . . . which contemplate their application to the States."[132] The judgment could be interpreted as rejecting the second limb of the implications doctrine, so recently confirmed, or at least as severely narrowing the

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[127] *Id.* at 458.

[128] *See id.* at 445 (Gibbs, C.J.), 455 (Wilson, J.), 458 (Dawson, J.).

[129] *Id.* at 448.

[130] *Id.* at 449.

[131] *Id.* at 448.

[132] *Id.* at 449.

doctrine's scope. Nevertheless, attributing too much significance to the judgment may be premature. The observations on the federal implications doctrine were dicta and made in the absence of argument. In making them, the Justices appeared principally motivated by a desire to avoid encouraging a distinction between governmental services and others.

Even if the Justices intended the judgment as a major departure from *Queensland Electricity*, they left themselves a loophole by ruling that "the exercise of the arbitration power in the ordinary course of events will not transgress the implied limitations on Commonwealth legislative power."[133] What this means is far from clear. At surface, it seems odd that a law impairing the states' continued existence or their capacity to function could also be described as having been passed in the ordinary course of events. At the very least, it might be expected that its profound effect on the federal structure of the Constitution would cause the Court to reconsider the power's "true construction," which, despite *Engineers*' rhetoric, is unlikely to be self-evident.

CONCLUSION

The influence of federalism on the interpretation of the Commonwealth Constitution has fluctuated dramatically since the Constitution came into force in 1901. For most of the eighty-five years of federation, courts have acknowledged limitations on Commonwealth and state powers attributable to the Constitution's federal nature. However, the limitations' scope has been uncertain, their underlying principles obscure, and their operation uneven. These problems have been most acute regarding the influence of federalism on Commonwealth power.

In recent years, interest in the issue has revived. This revival has paralleled, not surprisingly perhaps, the steady extension of Commonwealth power following *Amalgamated Society of Engineers v. Adelaide Steamship Co.*[134] The process initially was hampered by the long and oddly emotional debate over federal influences on constitutional interpretation. Traces of the past still emerge in occasional exaggerated expressions of horror at the prospect of limitations on Commonwealth power flowing not from express constitutional provisions but from the Constitution's federal context. The Court reconsidered the doctrine's basis for the first time in forty years in *Queensland Electricity Commis-*

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[133] *Id.*

[134] 28 C.L.R. 129 (Austl. 1920).

sion v. Commonwealth.[135] Statutory reform to clarify and rationalize the extent of Commonwealth immunity from state law would supplement the practical principles of constitutional interpretation developed in the case.

The Court traditionally has given three reasons for refusing to limit Commonwealth power on the basis of federalism. First, the Constitution is a statute and should be interpreted in accordance with the accepted canons of statutory construction. Second, doctrines of implications are by their nature imprecise and allow the Court inappropriate discretion. The final reason, clearly connected with the second, is that protecting and maintaining the federal system should be left to the political process.

None of these reasons completely absolves the Court from considering the Constitution's federal context in interpreting Commonwealth powers. The Constitution is not in fact interpreted literally. For example, the Commonwealth's immunity from state law rests in part on implication. Moreover, ordinary canons of statutory interpretation authorize the Court to consider the context in which individual provisions are found. Further, the concept of judicial discretion in constitutional interpretation is not novel. The Court exercises significant discretion when, for example, it finds a sufficient connection between a law and a power for the purposes of characterization;[136] or upholds a law as an exercise of the incidental power;[137] or decides that a state impost is "in substance" a duty of excise and therefore invalid;[138] or holds that the Senate, having had reasonable time to pass a proposed law, has failed to do so within the meaning of the Constitution section 57.[139]

Finally, although the political process must primarily shape the federal system, its role is not exclusive. The United States Supreme Court's argument in *Garcia* that the political process alone was adequate met with widespread disbelief.[140] In Australia, the disbelief

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[135] 59 A.L.J.R. 699 (1985).

[136] *See, e.g.*, Commonwealth v. Tasmania, 57 A.L.J.R. 450 (1983) (holding that sections 7 and 10 of the World Heritage Properties Conservation Act 1983 (Cth) were supported by corporations power, section 51(20)); *see* especially the judgments of Justices Murphy, Mason, and Deane.

[137] *See* South Austl. v. Commonwealth, 65 C.L.R. 373 (Austl. 1942). *Contra* Victoria v. Commonwealth, 99 C.L.R. 575 (Austl. 1957) (disapproved in relation to use of incidental power).

[138] *See* Hematite Petroleum Proprietary Ltd. v. Victoria, 151 C.L.R. 599 (Austl. 1982-83).

[139] *See* Victoria v. Commonwealth, 134 C.L.R. 81 (Austl. 1975).

[140] *See* Garcia v. San Antonio Metro. Transit Auth., 469 U.S. 528 (1985); *see also*

would amount to incredulity. The strong, national party system that is the concomitant of responsible government in Australia has ensured that considerations of federalism get short shrift indeed in the organs of national government. In this regard, *Engineers'* reliance on the Australian system of responsible government in rejecting the doctrine of federal implications appears misplaced.

The joint judgment in *Re Lee* confirms, as earlier cases suggested, that it is harder for the Court to give effect to federalism considerations when the issue involves the validity of a general Commonwealth law applying equally to the states and private citizens. Despite repeated affirmation of the principle, no case since 1920 has unequivocally struck down such a law on the ground that it threatened the states' existence or their capacity to function. It is impossible to imagine the circumstances in which such a case could now arise. If the "preliminary view" expressed in the joint judgment prevails, the Court might in any event abandon the second limb of the federal implications principle. As a result, the Commonwealth could bind the states in any law of general application affecting the states in their capacity as members of the public. The qualification that the law must be passed in ordinary circumstances, whatever that means, might be retained, although the Court would not likely give it effect. This would be consistent with the decision in the *Payroll Tax*[141] case that the states are subject to Commonwealth taxation laws of general application, and with the scope accorded to the conciliation and arbitration power in relation to the states. It would spare the Court from having to develop distinctions between essentially governmental functions and others. To the extent that distinctions would be necessary, for public policy purposes, they would be left to the political process.

Any such development should be matched by the broadening, clarification, and reinforcement of the principle's other aspect, which applies to Commonwealth laws discriminating against the states. The federal principle would continue to prohibit Commonwealth laws that overtly discriminate against the states or against particular states. In addition, however, the Court should extend it to apply to other Commonwealth laws, apparently general in application, which by their nature apply only to the states and which therefore are more likely to unduly impact the federal system. Questions about whether such laws fall within

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supra notes 14-16 and accompanying text. The range of reactions to the decision is canvassed in a recent Information Report. *See* ADVISORY COMMISSION ON INTERGOVERNMENTAL RELATIONS, 1986.

[141] Victoria v. Commonwealth, 122 C.L.R. 353 (Austl. 1971).

Commonwealth power should take into account the Constitution's federal context, with a view to preserving what *Queensland Electricity* described as the "efficacy of the system."[142]

The system's efficacy presumably refers to its fundamental features. One, which distinguishes federal from unitary systems, is the existence of two levels of government, each of which properly bears final political responsibility for the activities that the federal framework allocates to it. This allocation is one of the major advantages of federalism, both in terms of accountability and economy. Its recognition and acceptance as a fundamental component of the Australian federal system might provide a useful yardstick for both the courts and the political process.

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[142] *Queensland Electricity*, 59 A.L.J.R. at 708 (quoting Victoria v. Australian Building Construction Employees' and Builders Labourers' Federation, 152 C.L.R. 25, 79 (Austl. 1981-82)).