The Journal Of
Peace, Prosperity & Freedom

TIM ANDREWS

The High Court's Attack on Federalism

ABSTRACT: It is an indisputable fact that the Australian founding fathers designed a strongly federalist constitution, with the federal government holding few enumerated powers, and the bulk of political authority reserved for the states, and that this was overwhelmingly endorsed by the Australian people at referendum. The descent to centralism can be traced to 1913, with the expansion of the High Court from five to seven in a manner analogous to President Roosevelt's infamous 'court-packing' scandal. The salt in the wound came with the *Workchoices Case*, which gave the Commonwealth power over industrial relations through their power to regulate the trading activities of corporations. The High Court has departed from accepted principles of legal interpretation in its attempt to centralise government power in Canberra.

AUTHOR: Timothy Andrews is a graduate of the University of Sydney, graduating with a Bachelor of Economics (Social Sciences), a Bachelor of Laws (Honours) and a Masters of Public Policy. He is currently Executive Director of the Australian Taxpayers Alliance.

Facilis descensus Averno…[1]

The federal-state question is hip once again. Lying dormant for decades, relegated to gather dust in university history departments, latent questions of Australian federalism have once again emerged in political, academic and media discourse. Not only have media reports investigating the federal-state balance increased exponentially since the previous decade, Australian heads of government are openly calling for a structural overhaul of the current federalist model.

Triggered partially by the WorkChoices legislation[2] – one of the "most important cases with respect to the relationship between the Commonwealth

---

1 *Facilis descensus Averno, Sed revocare gradum, superasque evadere ad auras, Hoc opus, hic labor est*. (Easy is the descent to Avemus, but to retrace one's footsteps, and ascend again to the upper air – that is the labour, that is the toil). As quoted in Harry Gibbs, 'The Decline of Federalism' 18 *University of Queensland Law Journal* 1 at 7.

2 *Workplace Relations Amendment (Work Choices) Act 2005 (Cth).*

and the States to come before the [High] Court in all of the years of its existence"[3] — all areas of Federal-State relations have fallen under intense scrutiny. With the creation of an opposition Federal-State relations portfolio to facilitate "a radical revamp of commonwealth and state responsibilities",[4] combined with the Coalition abandoning its traditional defence of the States in a profound and unambiguous manner[5] (former Ministers Costello, Abbott, Nelson and Bishop all argue for greater central control[6]), it seems inevitable that the paradigm of co-ordinate federalism in place for the majority of the 20th century will die.[7]

Calls are already being made for a Federal criminal code,[8] a nationalised secondary education curriculum[9], water, health care[10] as well as many other previously unmentionable areas. Former Treasurer Peter Costello once argued that states could face a fresh assault on their power as "the public sees the commonwealth as a more competent administrator than the states", and that "Canberra should have full responsibility for the national economy, including the major interstate transport routes and export ports", which were "the lifeblood of our trading systems".[11]

It seems the 21st century will usher in an intensified struggle over federalism. The federalism debate is, perhaps, the most important political and legal debate taking place today — going to our very roots as a nation.[12] Will states become mere administrative units of a national policy to enforce equality, or will they become competitors in a diverse, decentralised political economy?[13]

Yet, as seems to be an all too common occurrence in mainstream political discourse, the present debate remains disconnected from the philosophical underpinnings of Australian federalism, and the rich jurisprudential history surrounding it. The distinction between decentralisation and constitutional

---

3 Callinan J as per *New South Wales v Commonwealth of Australia*; *Western Australia v Commonwealth of Australia* [2006] HCA 52 (14 November 2006) at 619.

4 M Franklin, 'Rudd calls on states to corner PM', *The Australian,* 6 December 2006.

5 L Clegg, 'Can there be a new era of uniform industrial relations? A historical and constitutional analysis of the move towards a national industrial relations regime' (2006) 17 *PLR* 97 at 110.

6 M Franklin, Op cit.

7 See also L Tanner, *Open Australia*. Pluto Press. Melbourne pp 206-10; G Greenward, *The Future of Australian Federalism*, Melbourne University Press, Melbourne, 1946.

8 T Dick, 'Uniform Criminal Code urged for states', *Sydney Morning Herald*, 9 January 2007.

9 D Rood & J Topsfield, 'Libs call for National Curriculum', *The Age*. 6 October 2006.

10 J Dwyer, 'Federating health care would mend our health system', *OnlineOpinion*, 6 June 2004.

11 S Lewis, 'Public Wants Us in Charge', *The Australian*, 17 February 2007.

12 R Pilon, United States House of Representatives, Committee on Government Reform and Oversight, Subcommittee on Human Resources and Intergovernmental Relations, 20 July 1995 p. 1.

13 A Wildavsky, 'A Double Security: Federalism as Competition', *Cato Journal*, Vol. 10, No. 1, 1990 p. 56.

federalism (reserving permanently to the states a measure of sovereignty wholly absent in today's understanding of federalism) remains obscured to most.[14] It is only through revising our understandings that the long ascent up from Hades can begin. Such an understanding cannot be had, however, without appreciating the distinction between normative political theories of federalism and the applicable constitutional issues, in particular, the relationship between the Australian Constitution and that of the United States of America.

I. FEDERALISM: THE NATURE OF THE BEAST

Originating primarily with the writings of Montesquieu[15] and reaching its zenith in *The Federalist Papers*, political theories of federalism have generally accepted that a polity cannot be called federal unless the regional governments have powers which the central government is not able to render inoperative, and moreover that the regional governments have the ability to raise the finances necessary to enable their powers to be exercised[16]. Thus Sir Robert Garran defines federalism as "a form of government in which sovereign or political power is divided between the central and the local governments, so that each of them within its own sphere is independent of the other".[17]

The principles underpinning this division of powers have appealed to philosophers of the classical liberal tradition because any division of authority must, by necessity, tend to limit the potential range of political coercion[18]. Just as the doctrine of the separation of powers inhibits tyranny by preventing the merging of executive and judicial power, so the existence of states means no single government may exercise power nationwide and the central government will always be open to policy critique.[19]

By its nature, politics is coercive: all members of a political unit must be subjected to the same decisions, and the prospect of exit, which is so important in imposing discipline in market relationships, is absent from politics. However the constitution of a federalised structure is seen as a solution to this problem by guaranteeing a degree of inter-jurisdictional competition between states.[20] As such, federalism offers a means of introducing essential features of the market

---

14 PH Aranson, 'Federalism: The Reason of Rules', *Cato Journal*, Vol. 10, No. 1, p. 20.

15 Montesquieu, *The Spirit of the Laws*, 1750, vol I. book IX ch 1, 183-4. See also A de Tocqueville, *Democracy in America*, 1835 pt 1, ch VIII p 103-9.

16 H Gibbs, 'The Decline of Federalism', 18 *University of Queensland Law Journal* 1 at 1.

17 Wheare, *Federal Government* (4th ed) Oxford University Press. New York. 1964 p 2, 14.

18 JM Buchanan, 'Federalism and Individual Sovereignty', *Cato Journal*, Vol 15, Fall 1995, p. 259.

19 G Craven, 'Federalism and the States of Reality', *Policy*, Centre for Independent Studies, Sydney, 2005.

20 JM Buchanan, 'Federalism and Individual Sovereignty', *Cato Journal*, Vol 15, Fall 1995, p. 260.

into politics, and effectively places limits on the ability of the state governments to exploit citizens, quite independently of how political choices within these units are made. Localised politicians and coalitions would be unable to depart significantly from overall efficiency in their taxing, spending and regulatory politics.[21]

The argument for federalism is as much economic as moral. Substantial public policy research has demonstrated the proximity between ruler and ruled is a key factor in determining economic efficiency; as distance increases the capacity for making terrible mistakes increases significantly. Most empirical evidence points to the fact that smaller nations are thus richer than large ones. Apart from the US, the ten richest nations in the world are less than 10 million in population, the highly decentralised nature of the US making it the 'exception that proves the rule'.[22]

Furthermore, by allowing for differences between states, federalism fosters not only competition, but innovation. When states are given greater freedom to compete, they invariably invent administrative solutions to enhance the business climate, with states creating a 'social laboratory' in which public policy innovations may be deployed and evaluated.[23] As such, under the 'Tiebout Hypothesis', by voting with their feet, "people will sort themselves out among jurisdictions that provide the mix of goods and services that they most prefer; improvements in governmental performance will be capitalised into real estate prices, thus giving citizens and public servants incentives to act in appropriate ways".[24]

While there has been an argument against federalism derived from a form of egalitarianism, such an argument is weak at best, and unsupported by scientific or historical data.[25] If we think so well of competition that we enthrone it in democracy, science and economics, why should we not tackle the problem of federal structure in a similar fashion?[26]

Despite a Marxian element in some of the arguments used by proponents of centralism (incorporating Marx's hostility to rigid constitutions, and his belief

---

21 JM Buchanan, Op Cit, p. 260. Federalism's importance has also been explained by empirical evidence that political attitudes do differ from state to state, with significantly varying conditions of climate, geography, society and economy making one-size-fits-all centralist models unsuited to countries such as Australia. See AJ Brown, 'After the Party: Public Attitudes to Australian Federalism, Regionalism and Reform in the 21st century' (2002) 13 *PLR* 171 at 174.

22 M Steyn, *The London Spectator*, 3 April 2005.

23 W Kasper, 'Making Federalism Flourish', Samuel Griffith Society Conference Proceedings, Vol 2, 2004.

24 Aranson, Op Cit. p. 21–22.

25 Egalitarianism opposes competition on the grounds that it is a source of inequality, because the existence of states free to disagree with one another and with the central government inevitably leads to differentiation.

26 A Wildavsky, 'A Double Security: Federalism as Competition', *Cato Journal,* Vol. 10, No. 1. 1990 at 42.

in large-scale central government control of the economy[27]), proponents of centralism have historically tended to focus less on philosophical abstraction, and more on pragmatism, than their federalist counterparts. As such, with the possible exception of the work of British constitutional scholar Dicey,[28] whose opposition to Irish home rule resulted in strong centralist beliefs filtering down into early Australian legal circles,[29] centralist arguments have – after denying inherent differences between the states – focussed almost solely on the economic. Three core themes emerge from this literature. First, the alleged greater efficiency of centralised government.[30] Secondly, the effects of 'waste, expense and duplication' caused by dual governments, and thirdly, the alleged deficiencies of state administration. As wryly noted by Professor Craven, in the minds of centralists at a domestic level, the abolition of the states would result in:

> Australia's affairs handled by a benign Commonwealth government, ruling under a Pax Canberrum through talented civil servants distributed throughout the former States. The complexities of State law would be unsnarled; State inefficiencies dissolved; ghastly State politicians exiled back to their barren wastes and cuisine-deficient hamlets; and the savage instincts of certain State populations firmly restrained. God would be, if not in His heaven, then hovering in the close vicinity of Capital Hill.[31]

In assessing the claims of 'duplication and waste' however, the federalist response is simple – the duplication occurs not due to the states, but because a financially well-endowed Commonwealth has:

> …muscled in on their constitutional act. Blaming them for the resulting overlap is like criticising the householder for wrestling with the burglar over the video machine. If the Commonwealth wants dramatically to reduce jurisdictional overlap it has only to retreat to its own areas of constitutional competence, hand over the money, and the States will be happy to do the rest.[32]

Similarly, the arguments regarding state misadministration were rebutted in the Australian context by constitutional scholar John Quick almost a century ago:

> [I]f it be true…that the State Legislatures have omitted to exercise their powers in certain matters, and have neglected to carry out great or important reforms,

---

27 G De Q Walker, 'The seven pillars of centralism: *Engineers' Case* and Federalism' (2002) 76 ALJ 678 at 684

28 AV Dicey, *Introduction to the Study of the Law of the Constitution*, Macmillan, London, 1885.

29 De Q Walker. Op cit. p 685.

30 A Mason, 'The Role of a Constitutional Court in a Federation', (1986) 16 *Federal Law Review* 1 at 23.

31 G Craven, Op cit.

32 Ibid.

> whose fault is it?…It is the fault of the electors, the people of the State who have the management of their own affairs, the choice of their own representatives, and the control of their constitutional government. Surely they can control their own local constitutional development without resorting to an outside power…to assist them in wresting liberal concessions within their domains?[33]

One may well query whether Australia remains a federation not because its Constitution is federal in character, but because in practice the political influence of the States is such that the nation remains a federation for practical purposes[34]. Arguably, a shift has occurred from constitutional federalism to wholly utilitarian contingent decentralisation, under which the authority of the states is no longer guaranteed as a matter of law but instead remains dependent upon the central government – which then decides as a matter of prudential or political judgement how much authority to devolve to its constituent units.[35]

II. THE FOUNDING FATHERS OF FEDERALISM

In examining the historical evolution of models of federalism, the creation of the Constitution of the United States of America is an obvious starting point; after all, "modern Federalism was born in America".[36] Irrespective of whether or not they *should* have done it, it is clear from the constitutional debates, and the intellectual climate of the time, that US Framers designed a constitutional decentralisation, not a contingent one, reflecting an understanding that the animating spirit of government action all too often ignores evidence in the pursuit of private interest.[37] As articulated by Madison:

> [T]he general government is not to be charged with the whole power of making and administering laws. Its jurisdiction is limited to certain enumerated objects, which concern all the members of the republic…The subordinate governments, which can extend their care to all those other objects which can be separately provided for, will retain their due authority and activity.[38]

To reinforce this, the 10th Amendment was inserted, stating that "[t]he powers not delegated to [the federal government] by the Constitution, nor prohibited by

---

33 J Quick, House of Representatives Parliamentary Debates. 20 October 1910 at 4930.

34 H Gibbs, 'The Decline of Federalism', 18 U. *Qld L.J.* 1 at 1.

35 PH Aranson, 'Federalism: The Reason of Rules', *Cato Journal*. Vol. 10. No. 1 at 17-20.

36 RP Nathan, 'Updating Theories of American Federalism', American Political Science Association, Philadelphia, 2 September 2006.

37 PH Aranson, 'Federalism: The Reason of Rules', *Cato Journal*, Vol. 10, No. 1 at 24.

38 Madison, *The Federalist* XIV.

it to the States, are reserved to the States respectively, or to the people". In other words, if a power has not been delegated to the federal government, then it simply does not have it. This principle is part of a philosophy of government first set forth in the Declaration of Independence – that governments are instituted to secure our rights "deriving their just powers from the consent of the governed".[39] Indeed the Supreme Court has explicitly endorsed the view that the clause clarifies rather than expands Congress's executory powers.[40] For if the framers had meant for Congress to be able to legislate on virtually anything it desired, why would they have enumerated Congress' other powers, much less strenuously defended the doctrine of enumerated powers throughout *The Federalist Papers*?[41] Under the doctrine of enumerated powers, power resides in the first instance in the people who then grant or delegate their power, reserve it, or prohibit its exercise, not immediately through periodic elections but rather institutionally – through the Constitution[42].

In the early years of the fledgling American republic, the Supreme Court was primarily concerned with practical questions regarding the capacities of government, as it was essential to "provide against discord between national and state jurisdictions, to render them auxillary instead of hostile to each other; and so to connect both as to leave each sufficiently independent, and yet sufficiently combined.[43] As such, the early Court's line of decisions was principally important for its contributions to shoring up the new national government's authority, while protecting the claims of the states. Thus, even at the height of the Marshall Court's enthusiasm for broad constructions in a nationalist mode, they were nevertheless imbued with a strong undercurrent of what would later become termed 'dual federalism'.

Thus in *Cohens v Virginia*[44] a powerful nationalising decision which asserted the Supreme Court's power to review state supreme court decisions in criminal cases, Marshall himself conceded that "these states…are members of one great empire, for some purposes sovereign, and for some purposes subordinate".[45] Similarly, in *Gibbons v Ogden*,[46] which broadly asserted national power over commerce, Marshall made explicit reference to the state police powers as embracing

---

39 R Pilon, United States House of Representatives, Committee on Government Reform and Oversight, Subcommittee on Human Resources and Intergovernment Relations, 20 July 1995.

40 *Kinsella v US* 361 US 234.

41 R Barnett, *Restoring the Lost Constitution*, Princeton University Press, New Jersey, 2004.

42 Ibid.

43 Chief Justice Jay as quoted in K Hall (ed), *The Oxford Companion to the Supreme Court of the United States*, Oxford University Press, New York, 1992 at 279.

44 *Cohens v. Virginia*, 19 U.S. 264 (1821).

45 *Cohens v Virginia* 19 U.S. 264 (1821) at 429.

46 *Gibbons v Ogden* 22 U.S 1 (1984).

elements of authority "not surrendered to the general government"[47], a concept he broadened in *Willson v Blackbird Creek Marsh Co*[48] to provide the basic doctrine of the dormant commerce power. Similarly in *Weston v Charleston*,[49] the Court established the doctrine of the immunity of state agencies against federal taxing power.

In the latter part of the antebellum era, from 1836 until the Civil War, the Court led by Chief Justice Roger B Taney moved strongly to shore up the doctrine of 'dual federalism' based on the notion of the state and national governments as coequals, each operating in its own sphere, autonomous within that sphere.[50] The first move in this direction came in *Charles River Bridge v Warren Bridge*,[51] when the Court's new majority declared that state governments enjoyed wide discretionary authority to advance and protect the rights of the public as against the claims of corporations, and the Court further narrowed the effectiveness of the Contract Clause limitation on state action by ruling in *West River Bridge v Dix*[52] that when states exercised the eminent domain power to take property, challenges to the propriety of such takings or to compensation to the former owners of property taken were the exclusive concern of the state's own agencies.[53] In its famous dictum in *Texas v White*,[54] the court held that that "the Constitution, in all its provisions, looks to an indestructible union, composed of *indestructible* states (emphasis added)".[55]

There was admittedly a brief revival of centralisation in the Supreme Court's jurisprudence in the years following the Civil War. The Court found that "[w]ithin the scope of its powers, the national government operates on every foot of territory under its jurisdiction. It legislates for the whole nation, and is not embarrassed by state lines",[56] and that even in the absence of national legislation, state action that burdened interstate commerce would not be tolerated,[57] serving as a trigger for the *Interstate Commerce Act*, and generally building on earlier doctrine of a federal commercial common law to develop a more expansive notion of a 'general jurisprudence' that could be invoked to overturn state court decisions that upheld bond repudiation. Nevertheless, there was no retreat by the

---

47 Marshall CJ as per *Gibbons v Ogden* Op. Cit. at 203.

48 *Willson v. Black-Bird Creek Marsh* Co., 27 U.S. (2 Pet.) 245 (1829).

49 *Weston v. City Council of Charleston,* 27 U.S. (2 Pet.) 449 (1829).

50 K Hall (ed), *The Oxford Companion to the Supreme Court of the United States*, Oxford University Press, New York, 1992, p. 282.

51 *Charles River Bridge v. Warren Bridge*, 36 U.S. 420 (1837).

52 *West River Bridge Co. v. Dix* 47 U.S. (6 How.) 507 (1848).

53 K Hall (ed), Op Cit. p 282.

54 *Texas v. White* 74 U.S. 700 (1869).

55 *Texas v. White* 74 U.S. 700 (1869) at 725.

56 *Penacola Telegraph Co v Western Union* (1877).

57 *Wabash, St. Lousi and Pacific Railway v Illinois* (1886).

Court from general theories of dual federalism, and the Court upheld broad discretionary authority for states to develop their natural resources through various uses of the eminent domain power, the ordering of their water law on highly diverse lines, and even the adoption of a variety of regulatory measures such as public health enforcement. In addition, it declined to extend activist federal judicial censorship over the states' efforts to cope with some of the challenges of economic development and attainment of new goals in areas of welfare, or to extend federal procedural guarantees in the criminal justice area.[58]

Furthermore, the Court began to give close scrutiny to national legislation that it regarded as exceeding constitutional authority. In 1879 it struck down an act of Congress protecting trademarks, and in 1883 it rendered the *Civil Rights Acts* virtually unenforceable, as well effectively eviscerating the *Sherman Antitrust Act* by ruling that control of manufacturing was not authorised by the Commerce Clause powers. Moreover, the Court found unconstitutional[59] a federal income tax.[60]

It is impossible to view the creation of the Australian Constitution in anything but the light of the aforementioned constitutional climate. The single most important precedent for the federation fathers was the US. Like Canada, Australia was a federation of former British colonies, but the US federal system struck a balance between the State and federal authorities which, if adopted in Australia, still protected many of the colonies parochial interests.[61] The idea that Australia could become a single unified nation with colonies reduced to the level of large municipalities was wholly unacceptable to the colonial delegates. The founders considered Canada's constitutional structure too centralist,[62] so the more decentralised distribution of powers used in the Constitution of the US was deliberately chosen,[63] with federalism one of the major features of the American case.[64] Hence the importance of the US experience – in particular the attention given to James Bryce's classic *The American Commonwealth*[65] – cannot be overstated.

A quantitative assessment of citations in the Convention debates, the colonial parliamentary debates, and in Australian books, articles and speeches outside these formal venues confirms the importance of US materials, especially the writings of notables such as James Wilson, John Hay, Alexander Hamilton and James Madison, with *The Federalist Papers* being of decisive importance (along

---

58 K Hall (ed), Op Cit. p 283.

59 *Pollock v Farmer Loan & Trust Co* (1895).

60 K Hall (ed), Op Cit, p 283.

61 M Harvey, 'James Bryce, *The American Commonwealth* and the Australian Constitution', (2002) 76 *ALJ* 362.

62 JA La Nauze, *The Making of the Australian Constitution*, Melbourne University Press, 1972, at 17, 27-8.

63 See *Deakin v. Webb*, (1904) 1 CLR 585 at 606.

64 Kirby J as per *Oil Australia Pty Ltd v Victoria* (2002) 211 CLR 1 at 49.

65 J Bryce, *The American Commonwealth*, London, 1988.

with the scholarship of later authors such as de Tocqueville and Marshall).[66] Whether due to the self-interest of colonial politicians concerned to maintain their power, or for more noble philosophical questions, there can be no doubt that the framers of the Australian Constitution intended that it should establish a federal government in the true sense; this conclusion is inescapable, whether one has regard to the Constitution itself, or the debates at the conventions, which generally proceeded on the assumption that State functions would include "almost all matters which have a direct bearing on the social and material welfare of the people".[67] According to Samuel Griffith, the Australian colonies had been "accustomed for so long to self-government" that they had "become practically almost sovereign states",[68] and that in this context "the creation of a unitary nation-state of Australia was both impossible and unthinkable".[69]

The Australian Constitution, subject to the overarching role of the Imperial Parliament, was to follow a 'very similar course' to that of the United States Constitution, partly because of the "practical, institutional conditions under which the Australian Constitution came into being" were analogous to that of the US, but also because the "theoretical reflection on the American system" suggested that such process and outcomes were essential to the idea of a 'true federation'[70].

However, differences nevertheless remained, and the uniquely Australian combination of federalism with responsible government is its principal unique contribution to world constitutionalism.[71] Federalism was "the foundational institution of the Australian Constitution and the nation it created",[72] with its constitutions, legislative powers, and laws protected. Indeed, while federalism is one of the four fundamental political principles upon which the Commonwealth is founded – the others being representative government, responsible government and the separation of powers – the latter two are implied rather than expressed, and representative government is common to all modern democracies[73]. Federalism was not only of vital importance to the Australian Constitution, but in the Commonwealth context it was *unique*.

---

66 N Aroney, *Imagining a Federal Commonwealth: Australian Conceptions of Federalism, 1890-1901*, 266 *Federal Law Review* Vol 30, p 269.

67 L Zones, 'The Federal Balance and the Position of the States', G Craven (ed) *The convention Debates 1891-1898 Commentaries, Indicies and Guide*, Sydney, Legal Books Pty Ltd, 1986 at 77.

68 S Griffiths, Official Record of the Debates of the Australian Federation Conference, Melbourne, 10 February 1980 at 10.

69 N Aroney, Op Cit. p 267.

70 Aroney, Op Cit. p 294.

71 L Zines, Op Cit. p 77.

72 B Galligan, 'Parliament's development of federalism' in R Bennett, *Parliament: The Vision in Hindsight*, Federation Press, Sydney 2001 at 5.

73 G Winterton, 'The High Court and Federalism: A Centenary Evaluation', in P Cane, *Centenary Essays for the High Court of Australia*, Butterworths, Chatswood. 2001.

The first two decades of Australian constitutional jurisprudence, dominated by Sir Samuel Griffith, discerned in the Constitution a governmental structure whereby both the Commonwealth and the states were sovereign within their respective spheres, which, as independent political societies, were thus subject to no other power, and were given immunity from any interference from another government in the exercise of its power.[74] Therefore, the separate states continued "as autonomous bodies, "surrendering only so much of their power as is necessary to the establishment of a general government to do for them collectively what they cannot do for themselves".[75]

Indeed, noting that before federation the colonies had almost unlimited powers, the court consistently stated that "in considering the respective powers of the Commonwealth and the States it is essential to bear in mind that each is, within the ambit of its authority, a sovereign state".[76] Two guiding concepts had already emerged from the court's perspective on the Constitution as a whole: that of the reciprocal immunity of instrumentalities doctrine, under which the Commonwealth could not subject the States to Commonwealth law, nor the States subject the Commonwealth to State law,[77] and of the doctrine of implied prohibitions or State 'reserved powers'.

A. Immunity of Instrumentalities

In the seminal US constitutional case of *McCulloch v Maryland*[78], the state of Maryland attempted to impede operation of a branch of the Second Bank of the US by imposing a tax on all notes of banks not chartered in Maryland. The Court decided that the Constitution grants to Congress implied powers for implementing the Constitution's express powers in order to create a functional national government, and state action may not impede valid constitutional exercises of power by the federal government. As such, this judgement is considered the foundation stone on which the doctrine of immunity of instrumentalities rests. In striking down the "destructive and discriminatory" tax on the operations of a federal bank, Marshall CJ set down the principle that the states did not have a power to tax any instrument employed by Congress to execute its powers[79] because "the power to tax involves the power to destroy", and the states

---

74 C Parkinson, 'The Early High Court and the Doctrine of the Immunity of Instrumentalities' (2002) 13 *Public Law Review* 26 at 27.

75 S Griffith, 'Notes on Australian Federation: Its Nature and Probable Effects' (1896) p 6-7.

76 *D'Emden v. Pedder* (1904) 1 CLR 91 at 109.

77 *Texas v White* 74 US 70 (1968) with its ringing declaration that "the constitution, in all its provisions, looks to an indestructible Union, composed of indestructible States".

78 *McCulloch v Maryland* 4 Wheat 316 (1819) at 429.

79 Marshall CJ as per *McCulloch v Maryland* 4 Wheat 316 (1819) at 429.

should not be in possession of a power to destroy the federal government.[80] Although no authority was cited for this judgment, it appears from other decisions Marshall delivered that he developed this principle from his understanding of the relationship between sovereign states in international law.[81]

In the 1842 case of *Dobbins v Commissioners of Erie County*,[82] the doctrine was extended to invalidate a general non-discriminatory state tax on "all offices and posts of profit" in its application to a federal officer because it interfered with the instrument in which the US exercised its powers. With the 1870 case of *Collector v Day*[83] that "Pandora's box" was opened, with the Court making the doctrine reciprocal for states, striking down a general federal income tax on the salary of a state judge on the ground that in its own sphere each government is sovereign.[84] It is clear that throughout the entire 19th century, the doctrine was viewed as "an axiom of federal government".[85]

Sir Robert Garran gave an opinion to Sir Edmund Barton[86] that comparable provisions in the Australian and US Constitution should be similarly interpreted, emphasising the Australian Constitution should be interpreted using US precedent on the doctrine of the immunity of instrumentalities.[87] Following this line of reasoning in *D'emden v Peddler*,[88] the Court held that:

> [I]n considering the respective powers of the Commonwealth and of the States, it is essential to bear in mind that each is, within the ambit of its authority, a sovereign State, subject only to the restrictions imposed by the Imperial connection and to the provisions of the Constitution, either expressed or necessarily implied… it must, therefore, be taken to be of the essence of the Constitution that the Commonwealth is entitled, within the ambit of its authority, to exercise its legislative and executive powers in absolute freedom, and without any interference or control whatever except that prescribed by the Constitution itself.[89]

Despite the arguments of the Attorney-General for Tasmania, who whilst not questioning the validity of the McCulloch doctrine argued its inapplicability to

---

80 Ibid at 430.

81 See *Antelope Case* 10 Wheaton 66 at 112 (1825).

82 *Dobbins v Commissioners of Erie County* 15 Peters 435 (1842).

83 *Collector v Day* 11 Wallis 113 (1870).

84 C Parkinson, 'The Early High Court and the Doctrine of the Immunity of Instrumentalities' (2002) 13 *PLR* 26 at 28.

85 Ibid.

86 Opinion by Robert Garran, 13 June 1902, Australian Archives, CRS. A 432 29 2751, File No 1.

87 C Parkinson, Op Cit. at 31.

88 *D'emden v Peddler* (1904) 1 CLR 91.

89 Griffith CJ as per *D'emden v Peddler* (1904) 1 CLR at 110.

Australia because ss 106-109 of the Australian Constitution were different from the Tenth Amendment to the US Constitution, Griffith CJ was unable to find "any such difference"[90] and held that that:

> [A]s the United States Constitution and the Constitution of the Commonwealth are similar, the construction put upon the former by the Supreme Court of the United States may well be regarded by us in construing the Constitution of the Commonwealth, not as an infallible guide, but as a most welcome aid and assistance.[91]

It was not an unreasonable inference that the framers intended provisions in the Constitution "indistinguishable in substance, though varied in form, from provisions of the Constitution of the US" to "receive like interpretation",[92] an assertion based on the fact that the delegates of the Federal Convention were familiar with both the Canadian and US Constitutions, and they deliberately chose the US model.[93]

In the years following *D'Emden*, the Australian High Court repeatedly indicated it would apply the decision rigorously in future cases,[94] and that whilst the High Court had not indicated any preference for American decisions or any disregard for British decisions, the "interpretation of the American Constitution had been long since settled by judicial decisions that it is reasonable inference to draw that the framers intended similar language in the Australian Constitution to be similarly interpreted",[95] with it being of no relevance that the source of the American Constitution is the people, while the Australian Constitution is a grant of the Imperial Parliament.[96] Furthermore, the court turned to the US case of *Collector v Day*[97] and held the doctrine of immunity was reciprocal, and extended the provision to include activities outside the traditional branches of government.[98]

Despite this, in a move that "left legal commentators in both Australia and England bemused as to its reasoning",[99] there was a rejection of the doctrine of instrumentalities in Australia by the Privy Council (in proceedings probably illegal

---

90 Ibid at 112.
91 Ibid at 116.
92 Ibid at 113.
93 C Parkinson, Op Cit. at 32.
94 *Sydney Municipal Council v The Commonwealth* (1904) 1 CLR 208.
95 *Sir William Lyne v Thomas Prout Webb (Commissioner of Taxes)* (1904) 1 CLR 585 at 605.
96 C Parkinson, Op Cit. at 33.
97 *Collector v Day* 11 Wall 113 (1870).
98 *Federated Amalgamated Government Railway and Tramway Service Association v NSW Railway Traffic Employees Association (Railway Servants Case)* (1906) 4 CLR 488.
99 C Parkinson, Op Cit. at 40.

under the common law rules of champerty[100]), where it was ruled that Royal Prerogative made the doctrine an unnecessary implication.[101] The Privy Council left unaddressed the arguments of the High Court in *D'Emden*, nor did it consider the issue of inconsistency and ss 106-109. It was almost universally conceded that Halsbury, although a greatly respected Judge, in making the ruling for the Council was unable to interpret a federal constitution and was acting more to subordinate the High Court to the Privy Council. Griffith CJ commented how Halsbury knew about as much about the Constitution "as he did about Calvinism when the *Free Church case* was decided",[102] and Barton wrote that he had a vendetta against Australia and that the decision was "of itself an insult to every Australian... fatuous and beneath consideration" and that the "old pig wants to hurt this new federation and does not care how he does it".[103]

B. Reserve State Powers

The principle underpinning the reserved state power doctrine, whereby the s 51 grants of Commonwealth legislative power were read down in light of power supposedly reserved to the States by s 107, first emerged in *Peterswald v Bartley*.[104] In this case, the High Court expounded that that regard must be had to the Constitution's general provisions, as well as its particular sections. In *R v Barger*[105] the court took the idea further, declaring that the Constitution's scheme was to confer definite powers on the Commonwealth "and to reserve to the States, whose powers before the establishment of the Commonwealth were plenary, all powers not expressly conferred upon the Commonwealth".

Specific reliance was placed on s 107 and on the effect of the almost identical US 10th Amendment.[106] The High Court's duty was to interpret the Constitution as a whole,[107] so as to give effect – as far as possible – to all its provisions. If two provisions are in apparent conflict, a construction which will reconcile the con-

---

100 C Parkinson, Op Cit. at 40.

101 *Webb v Outrim* [1907] AC 81.

102 Sir Samuel Griffith to Alfred Deakin, 29 Dec 1906 Deakin Papers, National Library of Australia MS 1540/15/34 15-6.

103 Letter to Sir Thomas Bavin, Bavin Papers, NLA. MS 560/1/40.

104 *Peterswald v Bartley* (1904) 1 CLR 497.

105 *R v Barger* (1908) 6 CLR 41 at 67.

106 G De Q Walker, 'The seven pillars of centralism: Engineers' Case and federalism' (2002) 76 *ALJ* 678 at 680.

107 See Griffith CJ in *Peterswald v. Bartley* (1904) 1 CLR 497 at 507: "in construing a Constitution like this it is necessary to have regard to its general provisions as well as to particular sections and to ascertain from its whole purview whether the power [in question] was intended to be withdrawn from the States, and conferred upon the Commonwealth".

flict is to be preferred.[108] While the immunity of instrumentalities doctrine was based on implications from the Constitution rather that express provisions, this was much less so of reserved powers, which was based mainly on s 107. The reserved powers approach was not primarily an exercise in finding implications, but a normal piece of judicial construction based on the standard principle that written instruments are to be construed as a whole, the general provisions along with the specific.[109] This approach has been called unsupportable because s 107 does not, unlike the 10th amendment, use the word 'reserved'. However this criticism seems to be little more than an insubstantial matter of labelling, and if anything s 107 is more forcefully expressed, as it saves "every" power and excepts only those powers "exclusively" vested in the Commonwealth. These words of emphasis do not appear in the American model,[110] as pointed out by Griffith CJ in *D'Emden v Peddler*.

III. THE DESCENT TO AVEMUS

The descent to centralism in Australian constitutional law can be traced back to 1913, with the expansion of the High Court from five to seven in a manner analogous to Roosevelt's infamous 'court-packing' scandal. Following the defeat of referendums to increase Commonwealth power over industrial relations in 1911 and 1913, federalism came under considerable attack. Attorney-General Billy Hughes, under Prime Minister Andrew Fisher, took the opportunity to try to 'stack' the court.[111] The initial appointment of Albert Piddington was met with controversy due to perceived bias; before being appointed Piddington had assured Hughes of his "sympathy" in favour of Commonwealth powers[112] and public opposition led to Piddington's resignation from the bench not having tried a single case. The subsequent appointments of justices Rich and Starke achieved Hughes' object of influencing the court's composition – with the death of O'Connor and an expanded High Court, Griffith and Barton found themselves in a minority. By 1920, both Griffith and Barton had left the bench, and, with the appointment of Knox as Chief Justice by Hughes, the scene for a constitutional showdown was set.

In the *Engineer's Case,* the entire enterprise of Australian federalism was set on a diverging track that carried it to destinations far removed from those intended by the generation that had brought the federation into being.[113] From a

---

108 *R v. Barger*; *Commonwealth v. McKay* (1908) 6 CLR 41, 72.

109 Ibid at 681.

110 Ibid.

111 *G Fricke, Judges of the High Court, Century Hutchison Australia, Melbourne, 1986, p 82.*

112 Ibid p 80.

113 G De Q Walker, Op Cit, at 678.

jurisprudential standpoint, the *Engineers Case* profoundly affected constitutional doctrine in three respects: in "exploding" the immunity of instrumentalities doctrine and the 'heresy'[114] of reserved state powers, and finally as to the methodology of constitutional interpretation. The case has been regarded as radically changing the approach to interpretation to that of 'literalism'[115] which involves construing the Constitution as if it were nothing more than a British statute, to be interpreted by reference to its explicit terms and without reference to history, to implications from federalism, or even those terms' own context in the Constitution,[116] and as such, signalled the start of a long-term trend of High Court decisions centralising political power in the Commonwealth, culminating in the 2006 *WorkChoices* decision. Was the rejection of previous doctrine justified, and if so, does that rejection necessarily exclude all federal considerations in interpreting Commonwealth legislative power?[117]

The rejection of the reserved powers doctrine has been justified on three grounds. Firstly, that the subject of s 107 is state legislative power and states nothing expressly regarding Commonwealth power. Secondly, because employing the States' supposedly reserved powers to limit Commonwealth power and thereby determine what is left exclusively to the States by s 107 is "a circular process whereby the conclusion is contained in the premise", and thirdly, because there is no objective method of determining what residue was supposedly guaranteed to the states,[118] and that it is "impossible to determine from the Constitution or from the nature of the Commonwealth what powers should be exclusive to the states".[119] It remains difficult, to sever this debate from the method of constitutional interpretation used, as relying solely on the express terms of the Constitution's grant of Commonwealth legislative powers in ss 51, 52 and 122 and giving them a broad liberal interpretation, while ignoring any impact such interpretation may have on state residuary powers, is a core component of the literalist methodology.[120]

The aforementioned approach has come under significant criticism for its lack of any articulated theoretical justification, and for its ahistorical outlook, which has been used to reverse the Constitution's intended operation and is at odds with the modern purposive approach to legal interpretation.[121] It has been argued that through the practice of selecting from a range of possible meanings

---

114 *Attorney-General Victoria v Commonwealth* (1962) 107 CLR 529 at 582 per Windeyer J.

115 G Winterton, 'The High Court and Federalism: A Centenary Evaluation', in P Cane, *Centenary Essays for the High Court of Australia*, Butterworths, Chatswood, 2001, p 202.

116 G De Q Walker, Op Cit. at 682.

117 G Winterton, Op Cit, p 205.

118 G Winterton, Op Cit. p 205-6.

119 Zines in '*Engineers* and the Federal Balance' in Coper and Williams (eds) *How Many Cheers for Engineers?,* Federation Press, Sydney, 1997, 81 at 87.

120 G Winterton, Op Cit. p 204.

121 Craven (1997) 'The High Court and the States' (1995) 6 *UTAC* at 86-91.

of a grant of Commonwealth power the widest one that the words are capable of bearing, it has been used for the purpose of defeating that intent to which the words are supposedly the safest guide. If history is a guide, this commitment to literalism is often contingent on the production of the desired result – namely the expansion of the powers of the Commonwealth.[122] The 'ordinary sense' of a word will be adopted if it will have this result,[123] or an interpretation at odds with the 'ordinary meaning' may also be adopted.[124] Sometimes the court will refer to consider the "high object" of a power,[125] or the result of empirical study[126] or alleged practical or functional considerations where they favour the Commonwealth.[127] Thus, "a literal, ordinary, arcane, technical or otherwise convenient meaning can be used as desired, but, as we have seen, it must be the widest (that is most centralist) meaning that the words can possibly bear".[128]

At a more fundamental level, a purely literalist approach seems at odds with the basic rule of legal interpretation that requires a document be read as a whole,[129] and that "the starting point to the understanding of any document is that it must be read in its entirety", with Courts consistently holding that "every passage in a document must be read, not as if it were entirely divorced from its context, but as part of the whole instrument".[130] In violation of this basic rule, the effect of *Engineers* was to discourage reference to context. Even though the court's reasons themselves did countenance reference to context,[131] the court took no account of the fact that a broad reading of a power will make another enumerated power redundant or meaningless, and doing so must clearly defeat the intention of the framers.[132] Although it has been argued that *Engineers* in its effect has been more symbolic than substantive, in that it has been treated as establishing more than it actually did because the actual commentary on constitutional interpretation is relatively modest[133], it must be said that, to the contrary, while the Court did appear to acknowledge that when the text is ambiguous recourse must be had to

---

122 M Cooray, 'The High Court - The Centralist Tendency' (1992) 1 *UTAC* 105.

123 *Re Lee; ex parte Harper* (1986) 160 CLR 430, 448.

124 *R. v. Brislan; ex parte Williams* (1935) 54 CLR 362; *Jones v. Commonwealth (No.2)* (1965) 112 CLR 206, 218, 225-27; *Herald and Weekly Times Ltd v. Commonwealth* (1966) 115 CLR 418, 433-34, 439-400.

125 *R. v. Coldham; ex parte Australian Social Welfare Union* (1983) 153 CLR 297, 314.

126 *Australian Coarse Grains Pool Pty Ltd v. Barley Marketing Board (Qld)* (1985) 157 CLR 605, 627-28.

127 *Tasmanian Dams*.

128 De Q Walker, Op Cit. at 689.

129 Sir Harry Gibbs, 'The Threat to Federalism' (1993) 2 *UTAC* 183 at 185.

130 DC Pearce, *Statutory Interpretation in Australia*, 2nd ed., Butterworths, Sydney, 1981 p 31.

131 De Q Walker, Op Cit. at 689.

132 LR Zines, *The High Court and the Constitution*, 3rd edn, Butterworths, Sydney, 1992, p 22.

133 G Winterton, Op Cit. p 202.

the context and scheme of the Constitution, in reaching its decision it gave no weight to the fact that the Constitution was of a federation, and not of a unitary state.[134] Thus the stress on the express words of the Constitution, discouraging reference to context, also deterred the drawing of implications from the federal nature of the Constitution and as such, the rejection of submissions based on federal balance in the later *Tasmanian Dams*[135] and the *Incorporations Case*[136] can be seen as a direct result of this doctrine. Ironically, the doctrine of immunity of instrumentalities has since been resuscitated in Australia by Chief Justice Dixon, who developed the "most coherent theory of intergovernmental immunity" that led to the exposition of this "new doctrine". His theory has been described as "the most faithful and effective recapitulation of Marshall's spheres of sovereignty thesis", and his dissent in *Re Foreman & Sons*; *Uther* v *FCT*, later adopted by the court in *Commonwealth v Cigamatic Pty Ltd* is "classical Marshall".[137]

Shortly after *Engineers*, in *R. v. Licensing Court of Brisbane; ex parte Daniell*,[138] a further blow against federalism was struck, with the Court holding that since the Commonwealth law evinced a legislative intention to "cover the whole field" of the subject matter, the state law would in that area be rendered inoperative, overturning the previous approach that a federal Act made a state law inoperative to the extent that it was impossible for the citizen to obey both. This ruling also goes against Canadian precedent where the paramountcy rule has been shaped so as to save provincial laws wherever possible, not only rejecting the 'covering the field' doctrine, but adopting a 'direct clash' inconsistency rule that is far narrower than the Australian counterpart.[139] In Australia, the door was opened for the broad-brush invalidation of State law even where the Commonwealth law is silent, and enabled the Commonwealth to indirectly prevent the states from legislating.[140] Note must also be made of the later doctrine in *Murphyores Inc v The Commonwealth*,[141] where it was held that the Commonwealth may attempt, but fail, to enact legislation under one field, yet score under another, an "unconvincing" doctrine that asks the Court to "do what the legislature itself was unwilling or unable to do: to strip-mine the Constitution to try to discover in it, or extend for the Commonwealth, some supportive head of power".[142]

---

134 H Gibbs, 'The Decline of Federalism' 18 U. *Qld L.J.* 1 at 2.

135 *Commonwealth v Tasmania* 158 CLR 1.

136 *New South Wales v The Commonwealth* 169 CLR 482.

137 C Parkinson, Op Cit. at 50.

138 *R. v. Licensing Court of Brisbane; ex parte Daniell* (1920) 28 CLR 23.

139 CD Gilbert, *Australian and Canadian Federalism 1867-1984: A Study in Judicial Techniques*, Melbourne University Press, 1986 at 153.

140 De Q Walker, Op Cit. p 694.

141 *Murphyores Inc v The Commonwealth* (1976) 136 CLR 1.

142 Callinan J as per *NSW & Ors v Commonwealth* Op Cit at 676.

C. A Stitch in Time…

Simultaneous to the Australian debate about the federal-state balance, similar deliberation was taking place in the United States. In the 1918 *Hammer v Dagenhart*[143] decision, the Supreme Court led by the "Four Horsemen"[144] overturned an act of Congress that would have banned the products of child labour from interstate commerce, crystallising the 'dual federalism' doctrine that insisted enumerated powers be read literally and be measured against the guarantees in the 10th amendment. The majority held that "the powers not expressly delegated to the National Government are reserved…and the power of the States to regulate their purely internal affairs by such laws as seem wise to the local authority is inherent, and has never been surrendered to the general government".[145] In *US v Butler*[146] the Court overturned the New Deal's agricultural program on 10th Amendment and dual federalism grounds, reasserting the sacredness of "reserved rights of the states" and holding that commerce did not include agriculture, mining and manufacturing, and hence could not be reached by congressional regulations.[147] And in *Carter v Coal*[148] the Court voided legislation regulating the coal industry. Finally, in a decision striking down one of the keystones of the early New Deal, the *National Industrial Recovery Act*, the court "declaimed with horror against the heresy that the commerce clause might be construed as reaching all enterprises and transactions which could be said to have an indirect effect upon interstate commerce"[149] as such a doctrine would permit federal power to "embrace practically all the activities of the people" and in such event "the authority of the state over its domestic concerns would exist only by sufferance of the federal government".[150]

In response to the striking down of key New Deal legislation, in possibly the most scandalous episode in US judicial history, President Franklin D. Roosevelt proposed the *Judiciary Reorganization Bill of 1937*, a proposal to appoint an extra Supreme Court justice for every sitting Justice over the age of 70 and six months, allowing Roosevelt to immediately appoint six more Supreme Court justices and so making the Court cease to lay what he termed its "dead hand" on a "desperately needed program".[151] With the previous cases decided by a 5-4 margin, the

---

143 *Hammer v. Dagenhart* 247 U.S. 251 (1918).

144 The nickname given to the four conservative justices - Justices James Clark McReynolds, George Sutherland, Willis Van Devanter and Pierce Butler.

145 K Hall (ed), *The Oxford Companion to the Supreme Court of the United States*, Oxford University Press, New York, 1992, p 284.

146 *United States v. Butler* 297 U.S. 1 (1936).

147 Ibid p 284.

148 *Carter v Carter Coal* 298 U.S. 238 (1936).

149 *Schechter Poultry v US* (1935).

150 Ibid p 284.

151 K Hall (ed), Op Cit. p 284.

removal of appointees of Presidents Harding and Coolidge would have ensured the success of Roosevelt's legislation. Two months following the announcement of this plan, in "the switch in time that saved nine", Justice Roberts switched his vote and upheld a Washington State minimum wage law.[152] This, together with the resignation of Justice Van Devanter – triggered by Congress voting full pay for justices over 70 who retired – and his replacement with Justice Hugo Black, what has been dubbed a 'constitutional revolution' in doctrine began, largely completed by 1941.[153] The commerce clause as a limitation on congressional regulatory power was entirely discarded and made as "broad as the economic needs of the nation required".[154] Similarly, the 10th amendment was now renounced as 'but a truism' and so of no limiting effect in *Darby*[155], sounding the 'death-knell' for dual federalism.[156] Taken together these initiatives amounted to a massive centralisation of agenda setting, financing and administrative decision making, and, in large measure, government in the US had become unitary rather than truly federal in the sense that there was any perceptible constitutional limit on nationalisation of authority. The Court's decisions as to congressional authority, taken together with a new commerce clause doctrine, amounted to a broad – virtually plenary – federal police power, and although the states survived as constitutional and political entities, the extent and importance of their autonomous powers had been dramatically attenuated.[157]

There can be little doubt that the rise of the American modern regulatory and redistributive state since 1937 – the state the Framers sought explicitly to prohibit –has come about through just two clauses in the Constitution: the Commerce Clause and the General Welfare Clause respectively. Deeper understanding of these clauses is essential to any coherent analysis of the history of federal-state relations.[158]

The Commerce Clause, which gives Congress the power to regulate commerce among the states, arose out of concern that the free flow of commerce among the states might break down if states had the power to erect protectionist measures,[159] and was adopted only after the Convention delegates rejected more general grants of legislative power as overly vague.[160] Yet underlying the constitutional interpretation of the commerce clause for much of the 20th century is the

---

152 *West Coast Hotel Co. v. Parrish* 300 U.S. 379.

153 K Hall (ed) Op Cit. p 284.

154 *Light v SEC* 1946 at 104.

155 Stone J as per *US v Darby* 312 U.S. 100 (1941) at124.

156 D Dickson (ed) 'The Supreme Court in Conference (1940-1985)', *The Private Discussions Behind Nearly 300 Supreme Court Decisions*, Oxford University Press, New York, 2001, p 20.

157 K Hall (ed) Op Cit. p 285.

158 R Pilon, Op Cit. p 1.

159 Ibid.

160 R Barnett, *Restoring the Lost Constitution*, Princeton University Press, New Jersey, 2004 p 274.

notion that the Court could regulate wholly intrastate non-commercial activity, if such activity viewed in the aggregate would have an effect on commerce, even if trivial.[161] This meant the obliteration of the commerce/manufacture distinction, as well as the distinction between interstate and intrastate commerce. As a result, power was given to Congress to regulate virtually every aspect of enterprise and even enterprise confined wholly within a particular state, with the Commerce Clause becoming the vehicle for federal control of all aspects of private economic life, including matters of industrial organisation, labour relations, worker and product safety, environmental quality, race relations and matters involving gender.[162] Such a construction was defended, in an eerie parallel to the *WorkChoices* debate, as an unavoidable implication of an increasingly interconnected national economy that was unforseen by the founders. Such an argument, however, is dubious at best, with evidence that an interconnected economy was far from unforseen by the founders. Madison explicitly recognised that "in the great system of political economy, having for its general object the national welfare, everything is related immediately or remotely to every other thing" and warning that "a power over any one thing, if not limited, may amount to a power over every other thing".[163]

There can be little doubt that some degree of ambiguity over the precise definition of the commerce clause exists in the Constitution. Commerce might be limited to trade or exchange of goods, which would exclude agricultural, manufacturing and other methods of production. Conversely, it might expansively be interpreted to refer to 'any gainful activity'. To regulate might be limited to 'make regular' which would exclude any prohibition on trade as an end in itself, or it might expansively be interpreted to mean 'to govern' which would include prohibitions as well as pure regulations. "Among the several States" might be limited to commerce that takes place between the states, or between people of different states, as opposed to commerce that occurs between persons of the same state, or might expansively be interpreted to refer to commerce "among the people of the States", whether such commerce occurs between people in the same state or in different states.[164] In a debate paralleling the Australian experience with 'literalism', significant scholarly attention has been devoted to the use of 'originalism', or seeking the 'original meaning' of the text. Originalism has been criticised on the grounds that it is impossible to ascertain and then aggregate the "intention

---

161 See *Wickard v Filburn* 317 U.S. 111 (1942) where it was held that the act of growing wheat on one's own land for one's own consumption affected interstate commerce, and therefore came under the commerce clause and was subject to federal regulation.

162 PH Aranson, Op Cit. at 27.

163 Madison as quoted in R Barnett, *Restoring the Lost Constitution*, Princeton University Press, New Jersey, 2004 at 315.

164 R Barnett, 'The Original Meaning of the Commerce Clause' 68 *U.Chi L. Rev* (2001) 101, 112.

votes" of a multitude of framers, much less to carry them forward to apply to a current controversy,[165] and that "the modern resort to the intent of the framers' expectation gains no support from the assertion that such was the framers' expectation, for the framers themselves did not believe such an interpretive strategy to be appropriate".[166] But originalism, contrary to some claims, does not seek the intentions or will of the lawmakers or ratifiers, but rather seeks the public or objective meaning that a reasonable listener would place on the words used in the constitutional provision at the time of its enactment.[167]

An examination of every appearance of the word 'commerce' in the records of the Constitutional Convention, the ratification debates, and the Federalist Papers yields no evidence of the presently popular 'broad' definition. The founders certainly distinguished between commerce and activities that affect or are benefited by commerce. Jefferson himself stated that "For the power given to Congress by the Const does not extend to the internal regulation of the commerce of a State, that is to say the commerce between citizen and citizen, which remain exclusively with its own legislature".[168]

Similarly the general purpose clause, which gives Congress the power to collect taxes, duties, imposts and excises,[169] was initially viewed narrowly, with taxation having to be tied to one of the specifically enumerated powers such as regulating commerce or providing for the military.[170] This view has been rejected, and replaced by one whereby the clause gives Congress a plenary power to impose taxes and to spend money for the 'general welfare', and is an independent power that gives Congress power it might not have anywhere else, including the power to force the states to abide by national standards by threatening to withhold federal funds[171] - similar to the Australian situation after the *Uniform Tax Case*s.

D. Vertical Fiscal Imbalance and the End of State Financial Sovereignty

Despite lively debate, the Depression-era US cases had little effect on Australian constitutional thought and the federal-state balance remained unchanged until WWII and the introduction of the 'uniform tax', which involved four

---

165 Brest, 'The misconceived quest for original understanding' *Boston Uni Law Review* (1980) 204, 221.

166 HJ Powell, in 'The Original Understanding or Original Intent' *Harvard Law Review* 98 (1980) at 204.

167 R Barnett, *Restoring the Lost Constitution*, Princeton University Press, New Jersey, 2004 p 91.

168 Ibid at 316.

169 Article I, Section 8, Clause 1.

170 *Bailey v. Drexel Furniture Co.* 259 U.S. 20 (1922).

171 *South Dakota v. Dole* 483 U.S. 203 (1987).

Commonwealth statutes which together were designed to drive the States out of the income tax field by means of a combination of inducements, penalties and coercion.[172] In a decision representing a complete triumph of form over substance, the core feature of the *First Uniform Tax Case*[173] was the decision to treat the States' ouster from the field as voluntary; they were not legally forbidden to levy income tax, but merely succumbed to the Commonwealth's temptation in two forms of the s 96 grant.[174] This ran contrary to US precedent that could have been cited in support of a substantive approach which viewed such legislation as non-voluntary.[175]

The effect of the *First Uniform Tax Case* cannot be underestimated. It has been seen as marking a "turning point in Australian constitutionalism"[176]and in federal financial relations,[177] which overshadowed *Engineers* in its practical consequences,[178] with Sir Robert Gordon Menzies stating it marked "the end of the Federal Era" in Australia,[179] and Justice Dawson calling it the "most important single step in the increase in the effective powers of the Commonwealth at the expense of the powers of the state". The case not only heralded a great deterioration in the States' financial independence by depriving them of their independent source of income tax, but effectively enshrined Australia's long-term gross vertical fiscal imbalance.[180]

Despite the arguments of the Court that "temptation is not coercion",[181] since the states were not legally forbidden to levy income tax, such a decision in disregarding clear ulterior motives, would surely be at odds with general legal principle, especially today where substance rather than form is the overwhelming focus of legal analysis,[182] as seen in all other jurisdictions.[183] In disregarding purpose and motive in its treatment of legislative schemes, no notice was taken of how the separate parts of a machine have little meaning if examined without reference to the function they will discharge in the machine. As a result, the States raise for themselves less than half of the revenue they need for their own purposes, and rely on grants for about 55%, whereas the

---

172 De Q Walker, Op Cit. p 695.

173 *South Australia v Commonwealth* (1942) 65 CLR 373.

174 G Winterton, Op Cit. p 211.

175 *US v Butler* (1936) 297 US 1.

176 C Saunders, *The Uniform Income Tax Cases*, p 62.

177 J Gillespie, 'Court's conception of Federalism', in *Oxford Companion.*

178 Ibid at p 274.

179 Quoted in Saunders p 78.

180 Winterton, Op Cit. p 211.

181 Latham CJ as per *South Australia v Commonwealth* (1942) 65 CLR 373 at 417.

182 De Q Walker, Op Cit. p 695.

183 See *Murphyores Inc. Pty Ltd v. Commonwealth* (1976) 136 CLR 1; *Northern Suburbs General Cemetery Reserve Trust v. Commonwealth* (1993) 176 CLR 555.

Commonwealth raises more than 75% of all taxes levied in Australia, although its expenditure only represents about 50%.[184] The fact that the Commonwealth raises many millions of dollars more than it needs for its own purposes, and that the States raise much less, not only imposes a strain on the working of the federal system and puts the financial relationship out of balance, but more crucially, results in a reduction of accountability, because the Commonwealth raises money although it is not responsible for the way in which it is spent, while the States spend money although they are not responsible for the manner in which it is raised.[185]

E. The External Affairs Blank Cheque

The 'third wave' of centralism, roughly categorised as 'cosmopolitanism' or 'globalism', began to dominate Australian constitutional thought since the late 1960's but came to prominence in the 1980's. This school revolved around the use of UN conventions to transfer power from the States to the Commonwealth. Though it has been common to view *Tasmanian Dams*[186] as entrenching the use of the external affairs power, no serious critique can be made without first analysing *Koowarta v Bjelke-Peterson*,[187] where it was held that *The Racial Discrimination Act*[188] was a valid exercise of the 'external affairs' power. Enacted to give effect to the United Nations Convention on the Elimination of All Forms of Racial Discrimination, the Act was a significant departure from previous external affairs jurisprudence,[189] as its effects applied entirely within Australia, and did not involve either foreigners or foreign powers.

In a powerful dissent, Gibbs CJ and Aitkin and Wilson JJ reaffirmed the Dixon ratio of *R v Burgess*, which focussed on whether a treaty was "indisputably international". More critically however, the dissent represented one of the last serious efforts to resuscitate the federal balance doctrine, with an argument being made that:

> In determining the meaning and scope of a power conferred by s 51, it is necessary to have regard to the federal nature of the Constitution. Accordingly, no single power should be construed in such a way as to give to the Commonwealth parliament a universal power of legislation which would render absurd the assignment of particular carefully defined powers to that constitution.[190]

---

184 H Gibbs, 'The Decline of Federalism', 18 *U. Qld L.J.* 1 at 6.

185 Ibid.

186 *Commonwealth v Tasmania* (1983) 158 CLR 1.

187 *Koowarta v Bjelke-Peterson* (1982) 153 CLR 168.

188 *Racial Discrimination Act (Commonwealth) 1975.*

189 The use of the power to implement treaties was affirmed in *R v Burgess; ex parte Henry* and also *New South Wales v Commonwealth* (1975) 135 CLR 337.

190 Gibbs CJ as per *Koowarta v Bjelke-Peterson* Op Cit at 199.

Reading s 51 powers in their federal context merely assumes that the states retain sufficient legislative powers that the system can realistically be described as 'federal'.[191] Although such an approach has been criticised because it does not overcome the fundamental proposition that a treaty with another nation is inherently international in character and thus an 'external affair',[192] a view adopted by Mason, Brennan and Murphy JJ, such a view would, respectfully, seem naïve and simplistic at best. The Australian Constitution *mandates* a federal balance and this cannot be ignored when construing the Constitution – that the federal balance exists, that it must continue to exist, that the States must continue to exist and exercise political power and function independently both in form and substance, until the people otherwise decide in a referendum under s 128 of the Constitution, are matters that necessarily inform and influence the proper construction on the Constitution.[193] In *Koowarta*, the deciding opinion was that of Stephen J, who despite taking a narrower construction regarding whether a treaty is of 'international concern' ultimately agreed with Mason, Brennan and Murphy JJ and the Act was deemed valid.

Not a year after the decision in *Koowarta* was handed down the use of the external affairs power to allow the Federal Government to regulate purely internal matters was confirmed in *Commonwealth v Tasmania*.[194] Essentially, the *World Heritage Properties Conservation Act 1983*, based upon the United Nations Convention Concerning the Protection of the World Cultural and Natural Heritage, in conjunction with the *National Parks and Wildlife Conservation Act 1975*, enabled the Federal Government to prohibit the construction of the Franklin Dam.

Prior to *Tasmanian Dams*, it was still possible to distil within the court a general majority consensus for a narrow view of s 51(xx), and although cases such as *Concrete Pipes* and *Actors Equity* unambiguously broadened the scope, it was still possible to glean from both cases underlying support for the proposition that a valid law about trading and financial corporations must be a law about the trading or financial activities of those corporations,[195] and similarly in *Koowarta*, the lack of a clear majority distinguished it significantly from *Tasmanian Dams*. The finding that the Commonwealth can legislatively implement a genuine treaty on any subject represented a considerable increase in Commonwealth legislative power.[196] Whilst defenders of *Tasmanian Dams* contend that the treaty must nevertheless be "of international concern", that legislation implementing a treaty "must be reasonably capable of being considered appropriate

---

191 G Winterton, Op Cit. p 209.

192 Ibid p 212.

193 Callinan J as per *WorkChoices* at 797.

194 *Commonwealth v Tasmania* (1983) 158 CLR 1.

195 L Clegg, 'Can there be a new era of uniform industrial relations? A historical and constitutional analysis of the move towards a national industrial relations regime' (2006) 17 *PLR* 97 at 105.

196 Winterton Op Cit at 212.

and adapted to that end" and the Commonwealth Parliament cannot simply treat the subject of the treaty as a new head of power,[197] these qualifications do little, if anything, to narrow the width of power granted. There is no limit to the matters that may be dealt with through treaty by the Executive, resulting in a situation where the legislative power of the Commonwealth can be expanded by Executive action, and the expansion can be wide enough to extend over almost all, if not all, of the matters within State legislative power, making the Constitutional grant of power to the Commonwealth quite irrelevant, and, arguably, making a mockery of the doctrine that the Commonwealth cannot legislate in a way that is inconsistent with the continued existence of a State, as it nevertheless has power to legislate in a way that will enable it if it wishes to render most or all State powers ineffective.[198]

Consideration must also be given to the argument that, as set out by Mason J,

> …it is possible that the framers of the Constitution thought or assumed that the external affairs power would have a less extensive operation than this development has brought about and that Commonwealth legislation by way of implementation of treaty obligations would be infrequent and limited in scope…But it is not, and could not be, suggested that by reason of this circumstance the power should now be given an operation which conforms to expectations held in 1900. For one thing, it is impossible to ascertain what these expectations may have been. ..Mere expectations held in 1900 could not form a satisfactory basis for departing from the natural interpretation of words used in the Constitution."[199]

Such an argument seems weak at best, and there is little evidence to attribute to the founders the limited vision and foresight alleged by Mason J. To the contrary, significant evidence exists that they were greatly concerned with international affairs, in particular regional affairs, and discourse about international affairs. Agreements and treaties throughout the 19th century were intense and prolonged, and, as noted by Callinan J:

[T]he century before federation was a century of many wars between both large and small belligerents. In 1900 Australia aspired to be a nation of significance. The founders did not intend it to be tied to the apron strings of Britannia forever, otherwise there would have been no need for an external affairs power.[200]

---

197 Ibid.

198 H Gibbs, Op Cit. p 4.

199 Mason J, *Commonwealth v Tasmania* Op Cit at 126.

200 Callinan J as per *WorkChoices* at 867.

IV. A FEDERALIST REVOLUTION?

Simultaneously, across the Pacific, the Burger Court began a significant retreat from some of the most assertive nationalist doctrines. As early as 1971, Justice Black wrote for a majority in *Younger v Harris* that when a state dependent applied for relief on civil rights grounds from a federal court, there must be "a proper respect for state functions, a recognition of the fact that the entire country is made up of a Union of separate state governments".[201] Furthermore, *National League of Cities v. Usery*[202] invalidated an act that applied wage and hour limitations to state and local government employees, the court for the first time in 40 years overturning an act of Congress regulating economic relationships (although the shift of one justice's vote led to an abandonment of the Usery doctrine in *Garcia v San Antonio Transit Authority*, where Justice Harry Blackman wrote for the court that "political safeguards" such as representation of states on an equal basis in the Senate were protection enough[203]). In the ensuing two decades, an "increasingly conservative court has frequently invoked this language with reverence to reduce the level and intensity of federal courts' interference with state judicial functions".[204]

It was not until the Rehnquist Court that a 'revolution' occurred in federalism doctrine,[205] focussing on identifying areas where regulation by the states, rather than by the national government, is so important that the national government has to stay out – the so-called "enclave theory". The philosophy was based upon the Constitution's overall structure rather than on the words of particular provisions, as well as the fact that the Constitution is pervaded by the assumption that states exist and have an important role, a notion rejected by the New Deal constitutional transformation which treated states as administrative units that Congress could use and bypass whenever it chose.[206] Beginning with Rehnquist's sole dissent against one of Nixon's anti-inflation measures and picking up pace in *Garcia*,[207] by *United States v Lopez*,[208] for the first time since the New Deal, a statute was found unconstitutional on the grounds that it exceeded the jurisdiction of the Commerce Clause.

---

201 Black J as per *Younger v Harris* 401 U.S. 37 (1971).

202 *National League of Cities v. Usery* 426 U.S. 833 (1976).

203 Blackman J as per *Garcia v San Antonio Transit Authority* 469 U.S. 528 (1985) at 565.

204 K Hall, Op Cit. p 296.

205 M Tushnet, *A Court Divided: The Rehnquist Court and the Future of Constitutional Law*, WW Norton & Company, New York, 2005. p 249.

206 Ibid p 255.

207 With Justice O'Connor stating that "The Court today surveys the battle scene of federalism and sounds a retreat … I would prefer to hold the field, and, at the very least, render a little aid to the wounded" *(Garcia v San Antonio Transit Authority)*.

208 *United States v Lopez* 514 U.S. 549 (1995).

In *US v Lopez*, Alfonso Lopez Jr. carried a handgun and cartridges into his high school, in violation of the *Gun-Free School Zones Act of 1990*. Lopez argued that the federal government had no authority to regulate firearms in school zones, despite the government's position that possession of a firearm may lead to violent crime which would affect general economic conditions by limiting travel in the area and prevent people from learning effectively due to the constant fear of violence, leading to a weaker economy. In a 5-4 decision, Rehnquist writing for the Court said that Congress held powers limited to regulating the channels of commerce, the instrumentalities of commerce, and action that substantially affects interstate commerce. He rejected the arguments of the government, stating that:

> To uphold the Government's contentions here, we would have to pile inference upon inference in a manner that would bid fair to convert congressional authority under the Commerce Clause to a general police power of the sort retained by the States… to do so would require us to conclude that the Constitution's enumeration of powers does not presuppose something not enumerated, and that there never will be a distinction between what is truly national and what is truly local. This we are unwilling to do.[209]

Similarly, in a concurring judgment of O'Connor and Kennedy, eerily similar to that of Gibbs CJ in *Koowarta*:

> This case requires us… to appreciate the significance of federalism in the whole structure of the Constitution… the federal balance is too essential a part of our constitutional structure and plays too vital a role in securing freedom for us to admit inability to intervene when one or the other level of Government has tipped the scales too far and…The statute before us upsets the federal balance to a degree that renders it an unconstitutional assertion of the commerce power, and our intervention is required.[210]

Perhaps the most revolutionary judgment, however, was that of Thomas J, who going back to the Constitution's language demonstrated that "at the time the original Constitution was ratified, commerce consisted of selling buying and bartering as well as transportation for these purposes"[211] and that the etymology of the word literally means 'with merchandise", and was used "in contradistinction to productive activities such as manufacturing and agriculture". Thomas J also points out that that it was hard to replace the term commerce in the commerce

---

209 Rehnquist CJ as per *United States v Lopez* 514 U.S. 549 (1995).

210 Kennedy & O'Connor JJ as per *United States v Lopez* Op Cit.

211 Thomas J as per *United States v Lopez* Op Cit at 585.

clause with the words 'agriculture and manufacturing'[212], warning that "our case law has drifted far from the original understanding of the Commerce Clause." and urging the court to "temper our Commerce Clause jurisprudence in a manner that both makes sense of our more recent case law and is more faithful to the original understanding of that Clause".[213]

The pro-federalism trend continued in *US v Morrison*,[214] which, in examining the Commerce Clause powers, held that the *Violence Against Women Act of 1994*, which provided a federal civil remedy to victims of gender-based violence even when no criminal charges were filed, was unconstitutional:

> [W]ere the Federal Government to take over the regulation of entire areas of traditional state concern, the boundaries between the spheres of federal and state authority would blur, and it is difficult to perceive any limitation on federal power, even in areas such as criminal law enforcement or education where States historically have been sovereign…if Congress may regulate gender-motivated violence, it would be able to regulate murder.[215]

V. THE LAST STAND

An opportunity for a similar revolution occurred in Australia in 2006, with the passage of the *Workplace Relations Amendment (Work Choices) Act 2005*, described by the Prime Minister as containing the most sweeping industrial reforms since 1904. Since the late 1970's and early 1980's, labour law academics had begun to champion a single national system of industrial relations based on alternative heads of power. In line with this, *WorkChoices* was a complete dismantling of Australia's six separate industrial relations regimes and their replacement with one national regime covering all employees of 'constitutional' corporations, as well as covering all employers and employees in the Territories, the Commonwealth, Victoria, as well as waterside, maritime and flight crew, and converting existing State industrial instruments. The policy achieved this through a broad view of both the corporations power in the Constitution, and of what constitutes a 'constitutional corporation'. Furthermore, it can be seen from the objects of the Act that the whole purpose is not just to affect, but to govern completely, all aspects of the relationship between employers and employees, without any attempt to connect these objects with an implementation of the corporations power.[216]

---

212 M Tushnet, Op Cit. p 288.

213 Thomas J as per *United States v Lopez* Op Cit at 584.

214 *United States v. Morrison* (2000) 529 US 598.

215 Rehnquist, CJ as per *United States v. Morrison* Op Cit.

216 Callinan J as per *New South Wales & Ors v Commonwealth* [2006] HCA 52 at 675.

With some commentators treating decisions such as *Davis*, *Dighan* and the *Incorporations Case*, as well as *Re Residential Tenancies Tribunal of NSW; Ex parte Defence Housing Authority*[217] as evidence of a revival of states-rights (despite none of these cases affecting any significant retrieval of power from Canberra), hope for change was high, the challenge billed as the most important constitutional case in a generation. If ever there was an opportunity for the High Court to make a retreat – to reign in *Engineers* – this was it.[218] Hope was further heightened with the joint dissent of Callinan and Heydon JJ in *XYV z Commonwealth*.[219] Drawing upon the judgments of *R v Burgess; Ex parte Henry, an almost originalist position was argued, stating that the Convention debates were relevant where* "the extent that their linguistic usages are the primary sources from which a conclusion about the meaning of the words in question can be drawn", and that "it might be asked whether it is not legitimate to seek to measure the ambit of the power by reference to the meaning which, in 1900, that expression bore or might reasonably have been envisaged as bearing in the future".

In order to fully appreciate the constitutional impact of *WorkChoices*, a few historic notes must be made, and this requires brief consideration of where the regulation of Australia's IR began: s 51(xxxv) the conciliation and arbitration power.[220] This provision received disproportionate attention in the Convention debates with future Prime Minister George Reid remarking that "no part of the Bill has received more careful consideration than this particular clause". The transcripts of the debates reveal that there was as much controversy surrounding the regulation of industrial relations then as there is now, and there was extended argument about whether the Commonwealth parliament should have the power, or indeed any similar power, and that the proposal succeeded very narrowly[221] because a number of opponents were persuaded that the power was very confined and would be used only in limited circumstances,[222] leaving "no doubt that the architects of the Constitution assumed that the States would be responsible for the regulation of IR, the intention was that the Commonwealth should only be permitted to make laws supporting the resolution of a small number of interstate industrial disputes".[223] Despite the desire of delegates such as Higgins who

---

217 *Re Residential Tenancies Tribunal of NSW; Ex parte Defence Housing Authority* (1997) 190 CLR 410.

218 L Clegg, 'Can there be a new era of uniform industrial relations? A historical and constitutional analysis of the move towards a national industrial relations regime' (2006) 17 *PLR* 97 p 109.

219 *XYZ v The Commonwealth* [2006] HCA 25 (13 June 2006).

220 L Clegg, 'Can there be a new era of uniform industrial relations? A historical and constitutional analysis of the move towards a national industrial relations regime' (2006) 17 *PLR* 97 at 98.

221 In Melbourne it was upheld by 22-19, having been defeated at the Adelaide Session 22-12.

222 Records of the Australasian Federal Convention of the 1890's, Australian Senate, Melbourne Session, March 1989 at 11.

223 L Clegg, Op Cit. p 98.

"felt that labour legislation should be exclusively vested in the Commonwealth Parliament... There was a general belief in the Convention that factory legislation should be left to the States Parliaments".[224] Thus the drafters chose to define Commonwealth legislative power in the area of IR by reference to two limitations: firstly, a restricted class of disputes was chosen - industrial disputes extending beyond the limits of any one state, reflecting a concern for the federal balance. Secondly, the ends and means of the legislation were limited: conciliation and arbitration were to be the means, and the prevention and settlement of such disputes were to be the ends.[225]

Unlike most other s 51 powers, the arbitration power, like defence, is of a purposive nature, resulting in more limitations than other plenary powers.[226] In the first half of the last century, there were a total of six failed referenda attempting to amend the arbitration power to give more power to the Commonwealth; the first as early as 1911 and the last in 1946. The fierce opposition to these proposals, as articulated through parliamentary debate, was grounded on the premise that:

> These amendments, if carried, will mark the beginning of the end of the Commonwealth of Australia as a union of States. They will mark the beginning of the destruction and the degradation of the Australian States as political units and partners in a scheme for the government of the Australian people…there can be no doubt that if they are enacted upon the Constitution they will deal a staggering blow to the State Legislatures and Governments.[227]

The 1911 referendum received 38.42% of the vote, with only Western Australia voting in favour. Similar amendments to those in 1911 were proposed in 1912, however this was even more prescriptive, and, as noted by Kirby J:

> [T]he rejection by the electors of the Commonwealth of a proposed amendment to the federal constitution… suggests a reason for special caution when this Court is invited, effectively, to impose on the Constitution of the State a requirement which the electors, given the chance, declined to adopt.[228]

Of particular relevance to the *WorkChoices* debate, however, was that the referenda demonstrated "the repetitiveness and ingenuity of the attempts made by the

---

224 Australia, HOR, Debates, Hansard 12 Aug 1903 at 3467.

225 N Williams and A Gotting, 'The interrelationship between the Industrial Power and Other Heads of Power in Australian Industrial Law' (2001) 20(3) *Australian Bar Review* 264.

226 Note the original limited operation which was overruled in *Coldham*, when the court decided that all types of employees, including white collar employees, could be involved in an industrial dispute.

227 J Quick, Hansard, Parliament of Australia, 21 May 1926 at 4924-4925.

228 Kirby J as per *Durnham Holdings Pty Ltd v NSW* (2001) 205 CLR 299 at 428.

Commonwealth to gain the power which in this case it now says it has always had". As articulated in the dissent of Callinan J:

> The court should not disregard that history. The people have too often rejected an extension of power to do what the Act seeks to do. To ignore the history would be, not only to treat s 128 of the Constitution as irrelevant, but also for the court to subvert democratic federalism for which the structure and text of the Constitution provide.[229]

Similarly, as noted by Kirby J:

> [I]f s 51(xx) of the Constitution now provides a legitimate source for a comprehensive federal law with respect to industrial disputes, by inference it always did. All those hard-fought decisions of this Court and the earnest presentation of cases, the advocacy and the judicial analysis and elaboration within them concerning the ambit of s 51(xxxv) of the Constitution, were (virtually without exception) a complete waste of this Court's time and energies.[230]

Indeed, the question must be asked:

> Why were repeated attempts taken by well-advised federal governments, none of them successful, to amend the Constitution to enhance the federal legislative power with respect to terms and conditions of employment in industry, if, waiting in the wings for easy deployment, was the corporations paragraph, there to solve virtually all of the deficiencies of power and to fulfil all of the Commonwealth's law-making dreams of industrial regulation? The answer to these questions is not that the earlier Justices, or other lawyers of the Commonwealth and the well-resourced parties, lacked the intelligence, insight and imagination of those of the present generation.[231]

With the appointment of 'capital-C' conservatives to the High Court of Australia, there were high hopes for a federalism revolution similar to the US. Ultimately, however, in *New South Wales & Ors v Commonwealth*[232], by a 5-2 decision, these hopes were dashed, the court holding that "a law which regulates the relationship between a constitutional corporation and its employees or affects constitutional corporations in the manner upheld in *Fontana Films* is a law with respect to a corporation under the corporations power".[233] The *WorkChoices* decision represented a complete break from historical and constitutional precedent.

---

229 Callinan J as per *New South Wales & Ors v Commonwealth* Op Cit at 733.

230 Kirby J as per *New South Wales & Ors v Commonwealth* [2006] HCA 52 at 474.

231 Kirby J Op. Cit. at 478.

232 *New South Wales & Ors v Commonwealth*.

233 Gleeson CJ, Gummow, Hayne, Heydon and Crennan JJ, *New South Wales & Ors* Op Cit at 198.

VI. RESTORING THE FEDERAL BALANCE

There is no more basic rule of legal interpretation than the one requiring that a document be read as a whole.[234] It is the legal version of the axiom common to all rational discourse that one must not take statements out of context.[235] When it comes to constitutional law, however, the opposite has reigned supreme. Through the High Court's interpretation of the external affairs powers in *Tasmanian Dams*, the external affairs power is now subject to no significant limits, leading Gibbs to observe that it is as if s 51 (xxix) had been amended to delete the words "external affairs" and substitute "anything".[236] Much the same was *Lopez*, where the US federal Attorney General was "unable to think of a single Act" that could possibly be unauthorised under the Clinton Administration's view of the Commerce Clause. Yet, as stated by Latham CJ in the *State Banking Case*:

> [N]o single power should be construed in such a way as to give to the Commonwealth Parliament a universal power of legislation which would render absurd the assignment of particular carefully defined powers to that Parliament. Each provision of the Constitution should be regarded, not as operating independently, but as intended to be construed and applied in the light of other provisions of the Constitution.[237]

To recognise this, and to construe the Constitution in light of its federal nature is distinct from reviving the doctrine of reserved powers, and would simply mean that grants of Commonwealth power be read in conjunction with all other power-recognising or power-conferring sections such as s 106 and s 107,[238] for it is an impossibility to say that the Commonwealth has power over everything, whilst still maintaining a nation is a federal one.[239] As wryly noted by Professor De Q. Walker:

> The High Court's disregard of the Constitution's overall federalist structure and content resembles diagrammatically a kind of Schlieffen Plan. One arm of the thrust is the maximalist interpretation of Commonwealth powers without regard to their context. The other is the use of s 109 to annihilate whole areas

---

234 Sir Harry Gibbs, 'The Threat to Federalism' (1993) 2 *UTAC* 183, 185.

235 De Q Walker, Op Cit. p 689.

236 Sir Harry Gibbs, Address Launching Volume 1 of *Upholding the Australian Constitution* (1993) 3 *UTAC* 137.

237 Latham CJ as per *Bank of New South Wales v. Commonwealth (Bank Case)* (1948) 76 CLR 1 at 184–185.

238 De Q Walker, Op Cit at 691.

239 L Zines, Op Cit. p 90-91.

> of State legislative power. Together they complete an impressive double envelopment strategy.[240]

The idea of a purely 'political' rather than constitutional federalism contradicts every known fact about the framing and adoption of the Constitution. A right that cannot be enforced in a court is a right that does not exist.[241] All power calls for its use, and absolute power calls absolutely: allowing the central government to be judge in its own cause will not result in a negotiated pattern of political give and take, because the Commonwealth now holds all the cards:

> Instead it will lead to the indefinite expansion of Commonwealth regulation. There is no limit to the hunger of lobby groups for more wealth transfers, of parliamentarians for new portfolios, or of bureaucrats for larger departments. Public choice research shows that bureaucracies are an independent factor in the growth in the size of government, a factor that increases in power according to size.[242]

The Constitution, like any institution, is first and foremost its history – "it is the memories and the experience of all those who have ever lived by it, and of all those who continue to live by it. It is the written commentaries upon it, the judicial pronouncements, the learned discussions, the controversies, the public inquiries, the parliamentary debates, and the referenda polemics".[243] To disregard entirely the fundamental 'policy' of the Constitution, federalism and the careful division of power that it involves, is to disregard the object which the framers intended, the people who voted in favour of federation adopted and the Imperial parliament enacted. It represents a departure from not only common sense, but current purposive techniques of statutory interpretation, especially when the text – as is the case with constitutions in general – is expressed in some instances in other than absolute language.[244] Yet this is precisely what has occurred in both Australia and the US. Since the adoption of the US Constitution, courts have eliminated clause after clause that interfered with the exercise of government power, starting with the necessary and proper clause, continuing through Reconstruction with the destruction of the Privileges or Immunities Clause, and culminating in the post New-Deal Court that gutted the Commerce Clause and the scheme of enumerated powers affirmed in the 10th amendment.

---

240 Walker, Op Cit. p 691.

241 Walker, Op Cit. p 701.

242 Ibid p. 702.

243 R Davis, 'The Constitutional Commission or the Inescapable Politics of Constitutional Change'.

244 See *Cooper Brookes (Wollongong) Pty Ltd v Federal Commissioner of Taxation* (1981) 147 CLR 297 at 304-5 per Gibbs CJ, 310-311 per Stephen J, 320 per Mason and Wilson JJ, 223 per Aitken J. Also *Project Blue Sky Inc v ABA* (1998) 194 CLR 355 at 374-375 per Brennan CJ.

Consequently the Constitution that was actually enacted and formally amended "creates islands of government powers in a sea of liberty" but "[t]he judicially redacted constitution creates islands of liberty rights in a sea of government power".[245] Indeed, even if the broadest possible original meaning of the power to regulate commerce is adopted (i.e. that Congress is empowered to make regular or prohibit any gainful activity that occurs anywhere in the US), it is difficult to see how Congress may still regulate non-commercial or non-gainful activities, raising questions about federal laws prohibiting the possession and use of alcohol, tobacco, firearms, drugs, sexual literature or any other items are improper and unconstitutional,[246] or federal criminalisation of acts that are already criminalised by the states, usurping state authority and circumventing (opinion of the Supreme Court notwithstanding) the prohibition of double jeopardy in the 5th Amendment as well as that of the 10th Amendment.[247]

Overall, the question of which is the more federal country, Australia or the US, is a vexed one. On one hand, the political independence of the states, the lack of a uniform common law and a significantly reduced vertical fiscal imbalance would point to the US as the most federal country. On the other, federal bureaucracies/regulatory agencies and in particular the Federal Bureau of Investigations exert far greater influence than their Australian counterparts. In Australia, no federal penitentiaries exist domestically. Yet, at the core of it, neither Australia nor the United States is a federation in any true sense of the word. Despite the 'federalism revolution' tinkering at the edges, constitutional federalism in the US was destroyed by the New Deal Court. In Australia, the death was more protracted, the final gasps of breath extinguished by *Tasmanian Dams*. Federalism exists in name only, political and at the whim of the central government.

A revitalisation of constitutional federalism within Australia does not require the radicalism of a complete overruling of *Engineers*, nor a return to the doctrines of immunity of instrumentalities or reserved state powers. Rather, a revival of the federal balance doctrine can be achieved by purposive interpretation with the founders intentions and understandings, to the extent that these intentions are generally consensual – with the evidence to be found in debates, referenda results and what was said by relevant informed, legally qualified and knowledgeable persons. Such a revival was briefly evidenced in the Gibbs Court:

> [T]here should be two levels of government, each of which is limited to its own sphere, but neither of which is subordinate to the other. There must be a division of powers, effected by a written Constitution which binds both levels of government, so that neither has absolute sovereignty. Each level of

---

245 R Barnett, *Restoring the Lost Constitution*, Princeton University Press, New Jersey, 2004 p 1.

246 Ibid at 313-314.

247 *Cato Handbook for Congress*, The Cato Institute, Washington DC, 2000, p 18.

> government should be independent and supreme within the area of its powers, and each should have under its control the financial resources necessary to enable it to perform its functions.[248]

The views of Sir Harry Gibbs are a welcome return to co-ordinate federalism, and his vision can be summed up as follows: "nothing should be done by the Commonwealth that could be done equally well by the individual States themselves".[249] The resurrection of these views by the Gibbs Court could be seen in *Gazzo*, where it was ruled that s 51 "is concerned with matters incidental to the execution of a power, not with matters incidental to its subject matter. It cannot be used to expand the subject-matter of any of the enumerated legislative powers",[250] and also in *Coldham*[251] by Gibbs CJ. Such an approach recognises that "[t]he limited grant of powers to the Commonwealth can not be exercised for ends inconsistent with the separate existence and self-government of the States, nor for ends inconsistent with its limited grants"[252] and that:

> [T]he maintenance of the States and their powers… is as much the object of the Constitution, as the maintenance of the Commonwealth and its powers … It is inconsistent with the Federal system set up by the Constitution that the Commonwealth should enact legislation compelling the states, as such, to take or refrain from taking any action…in a manner prescribed by the Commonwealth.[253]

The above is *not* contrary to *Engineers*, or analogous to the reserved state powers doctrine (a doctrine *rejected* by Gibbs CJ) but rather a view that draws implications from federalism to prevent the Commonwealth legislating to impose special burdens or disabilities on State governments. In the *Melbourne Corporation case*,[254] it was held that any statute that denies the existence or ability of a State to govern itself or the federal structure of the Commonwealth is invalid, a test which was broadly upheld in *Austin v Commonwealth* in 2003.[255] Its lingering effects are seen in the *WorkChoices Case* in the judgement of Kirby J, who referred to "the federal structure and character"[256] of the Constitution, further stating that:

---

248 Sir Harry Gibbs, 'The Threat to Federalism' in *Upholding the Australian Constitution*, Proceedings of The Samuel Griffith Society, Volume 2 (1993) 183-184.

249 Sir Harry Gibbs, 'Rewriting the Constitution' *UTAC* Volume 1 (1992) xiv.

250 Aickin J per *Gazzo v. Comptroller of Stamps* (Vic) 56 ALJR 143, at 158.

251 *R. v. Coldham*; *ex parte Australian Social Welfare Union.*

252 Starke J as per *South Australia v The Commonwealth* (1942) 65 CLR 373.

253 Starke J as per *R v Commonwealth Court of Conciliation and Arbitration; Ex parte Victoria* (1942) 66 CLR 488 at 515.

254 *Melbourne Corporation v Commonwealth* (1947) 74 CLR 31.

255 *Austin v Commonwealth* (2003) 215 CLR 185.

256 Kirby J as per *NSW & Ors. v Commonwealth* Op. Cit. at 572.

> [T]o take the language of the corporations power in par (xx) of s 51 in isolation and to ignore the other paragraphs of that section, would involve a serious mistake. It is not a mistake that our predecessors in this Court made. They read pars (xx) and (xxxv) together as part of the one section of the Constitution containing a grant of many powers. Clearly, it was not intended that s 51(xxxv) should be otiose, irrelevant or entirely optional to the Commonwealth in its application. Nor was it intended that the important restrictions imposed on the federal exercise of legislative powers in par (xxxv), with respect to laws on industrial disputes, should be set at nought by invoking another head of power, such as that contained in par (xx).[257]

It would seem that the current High Court holds the jurisprudential view that context is of no importance whatsoever. What remains at present therefore, is that states are still protected to a small degree by the fact that any action on the part of the Commonwealth which would prevent a State from continuing to exist and function is necessarily invalid because it is inconsistent with the express provisions of the Constitution. However, such protection is futile if it protects the existence of the States and at the same time places no limit on the extent to which the Commonwealth can deprive the States of their functions.[258] It is only if the powers conferred by s 51 are conferred 'subject to this constitution',[259] that is if they are viewed in context, that the states can survive as constitutional entities. A federal system premised on the existence of the states as meaningful independent entities with a constitutional right to survive necessarily implies certain substantive and structural limits on the powers of the central government. If these limits are to have any real meaning, the legislature must be prevented not only from formally destroying states, but also from acting in ways that would leave a state formally intact but functionally a gutted shell.[260]

To state that modern times require a living, evolving constitution, not only makes a mockery of s 128, but ignores the fact that "The framers of the Constitution and the people who endorsed it by popular vote could not have been unaware of the problems, and the frustrations, to which the division of powers in a federation may give rise. Nor would they have been ignorant of the aversion that those who exercise power generally have to any sharing of it".[261] While it has been argued that the blame for the descent to centralism should be placed not on the High Court, but rather on the framers choice of words in the constitution, such an argument is disingenuous at best. As noted by Chief Justice Gibbs, lamenting the lack of fulfilment of the founders vision: "By a process of

---

257 Kirby J as per *NSW & Ors. v Commonwealth* Op. Cit. at 511.

258 H Gibbs, Op Cit. p 186.

259 Rich J as per *Melbourne Corporation* Op. Cit. at 66.

260 L Tribe, *American Constitutional Law*, 3rd Ed, Foundation Press, NY, 2000, Vol 1 p 865.

261 Callinan J as per *NSW & Ors v Commonwealth* Op Cit at 772.

expansive interpretation some of the powers given to the Commonwealth by the Constitution [have] already ... been widened in a way which no one in 1901 would have thought possible".[262]

The further the interpretation of the Constitution moves from the vision of the founders, the harder it may be to return it to a jurisprudence that has regard to its federal character, with the focus of federalism in the future less on constitutional federalism, but rather political federalism alone. The question is no longer whether the Commonwealth has the power, but merely if it should exercise it.[263] Hope remains however, in that there remains no real possibility of the states being formally abolished within the foreseeable future. 82% of Australians consistently state they are either satisfied or very satisfied with the way the federation currently works.[264] The best hope for the survival of federalism lies in the recognition by politicians of all parties and by the public of the value of maintaining a real federal system in Australia.[265] It seems that this recognition is finally, albeit belatedly, being achieved. The establishment of the Council for the Australian Federation in 2006 — comprised of only the states and territories — as a lobby group designed to prevent further loss of state power may well demonstrate that after decades of centralism, voters and the states have said "enough is enough",[266] and that the ascent from Avemus can finally begin.

---

262 Transcript of Proceedings, 'Welcome to the Chief Justice', Sir Harry Gibbs and Mr Justice Brennan, Perth, High Court of Australia, 21 September 1981.

263 J Leeser, 'Sir Harry Gibbs and Federalism: The Essence of the Australian Constitution' 18 *UTAC* 4.

264 AJ Brown, 'After the Party: Public Attitudes to Australian Federalism, Regionalism and Reform in the 21st century' (2002) 13 *PLR* 171 at 174.

265 Gibbs, Op Cit. p 8.

266 P Williams, Op Cit.