

# *An Uncommon Court: How the High Court of Australia Has Undermined Australian Federalism*

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## *Abstract*

The authors contend that Australia's High Court, in deciding federal distribution of powers cases over the last century, has created an end product that looks like one of A P Herbert's UNCOMMON LAW mock hypothetical cases. These were sustained parodies of common law reasoning in which each step in the fictional judge's train of thought followed plausibly from what went before. And yet from such unexceptionable starting points the conclusions reached were ridiculous. The same general sort of analysis is here applied to the High Court's federalism jurisprudence, the fit being a surprisingly good one.

## *1. Introduction*

A P Herbert's *Uncommon Law*<sup>1</sup> is a brilliantly sustained parody of the common law. Its 66 so-called 'misleading cases', which over time first appeared in *Punch*, appear technically correct in both the language and reasoning typically used in common law judgments. Each step in the fictional judge's train of thought follows plausibly from what went before — some steps are wholly non-contentious and mirror orthodoxy, some choose between alternatives that are all within the realm of reasonable possibilities, none is obviously identifiable as beyond the Pale.

And yet from sound, unexceptional starting points, the conclusions reached are ridiculous; they are laughable — which is, of course, Herbert's intention. He is trying to make the reader laugh by shepherding him along a path that ends in absurdity, but whose twists and turns all appear well-chosen, or at least not strikingly wayward.

Our contention in this paper will be that Australia's High Court, in deciding federal distribution of powers cases over the last century, culminating in the recent *Work Choices* case,<sup>2</sup> has created an end product that looks not unlike one of Herbert's misleading cases, although of course the High Court's intentions have

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1 New ed, 1969 (First published 1935).

2 *New South Wales v Commonwealth* (2006) 229 CLR 1 ('*Work Choices*').

been something other than simply the reader's amusement. Such a contention, we readily acknowledge, will come as no surprise to those familiar with the constitutional jurisprudence of the superior courts of other countries. The Australian High Court has been by no means unique in its ability, over time, to interpret the *Constitution* in a manner widely at variance with the intentions and expectations of its founders. However, the techniques by which the High Court of Australia has done this are perhaps unique, for they have rested upon a rather unlikely foundation: a certain kind of textual formalism, the professed motivating reason for which has been the idea that by following this method the judges will *avoid* imposing their own subjective and idiosyncratic views upon the authoritative text of the *Constitution*.<sup>3</sup> The ironic result — to adopt Herbert's terminology — has been a most uncommon body of constitutional law, generated by a most uncommon court, using what appear to be the most orthodox techniques of common law reasoning, applied to the text of the *Constitution*.

Before we attempt to support this contention, let us recall some of the outcomes produced in Herbert's *Uncommon Law* cases. In *Dahlia Ltd v Yvonne* (pp 314–319) a decision of the House of Lords is argued to be in the nature of an act of God, something no reasonable man could assess or predict in advance. In *Fardell v Potts* (pp 1–6) the notion of a reasonable man is held not to encompass or subsume that of a reasonable woman. In *Rex v Puddle* (pp 159–163) a Collector of Taxes is held to be a blackmailer. In *HM Customs and Excise v Bathbourne Literary Society* (pp 408–413) a lecturer who makes people laugh, and so is entertaining as well as informative, is held (against expectations) not to be subject to a heavy tax and not to be doing something illegal. In *Haddock v Mogul Hotels, Ltd* (pp 269–274) it is held that every waiter must know by heart the whole text of the Licensing Acts before being permitted, lawfully, to remove a patron's alcoholic beverage after closing time. In *Haddock v Thwale* (pp 124–129) motor cars are held to be subject to the same treatment, at law, as wild beasts (and in this case ordered to be put down). And so on, and so on.

Each time the conclusion reached looks laughably far-fetched, or at minimum implausible, when viewed from the initial vantage of the rules (statutory or case law ones) used to determine the outcome. The self-evident problem with each case — the point which enables Herbert to demonstrate the absurdity of the result — is that the enactors of those rules (or the earlier judges creating them in a previous case) would never have envisaged that they would be used or interpreted in this way.

It is precisely this claim that we will make in relation to the *Australian Constitution* and how it has been interpreted by the High Court in federalism cases since 1920. None of the Constitution's framers would ever have imagined, back in the 1890s or in 1901, that a century or so later the Australian States would be as emasculated as they are today: that they would be so dependent upon the Commonwealth for their governmental finances;<sup>4</sup> and that their policy-making

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3 *Huddart, Parker & Co Pty Ltd v Moorehead* (1909) 8 CLR 330 ('Huddart, Parker') at 388 (Isaacs J); *Amalgamated Society of Engineers v Adelaide Steamship Co Ltd* (1920) 28 CLR 129 ('Engineers') at 142 (Knox CJ, Isaacs, Rich & Starke JJ).

capacities would be so contingent upon political decisions taken by the Federal Government.<sup>5</sup> More specifically, none of the framers would have anticipated that the ‘corporations’ power (s 51(xx)) would be held to allow the Commonwealth to take over the field of industrial relations;<sup>6</sup> that the ‘external affairs’ power (s51(xxix)) would be deemed to enable the Commonwealth to enact far-reaching environmental, human rights and industrial relations laws;<sup>7</sup> or that the States could be cajoled into abjuring income tax powers, not least because four federal statutes — passed at the same time (during the Second World War) and consecutively numbered — were assessed or judged individually (and, of course, held to be valid) and not as part of a package.<sup>8</sup> And this is merely to highlight some of the better known ways in which the competencies of the Commonwealth have waxed while those of the States have waned.<sup>9</sup>

Nothing in the language of the *Australian Constitution*, or its structure, or the process that was used to adopt it, or the basis upon which its approval by the voters was promoted, or the likely original understandings of most of those voters, or anything else at the time would have suggested that the States would become the enfeebled, emasculated creatures they have become. Put slightly differently, no one, or almost no one,<sup>10</sup> would have guessed or predicted that virtually all of the *important* division of powers cases would eventually go the Commonwealth’s way<sup>11</sup> — or at least there would have been no grounds at the time for thinking that Australia’s political centre would do so much better<sup>12</sup> at the hands of the judiciary than would be the case in Canada,<sup>13</sup> Germany<sup>14</sup> or even the United States.<sup>15</sup>

## 2. *Constitutions and Constitutionalism*

Of course to make this sort of claim begs an initial and crucial issue, namely how a constitution and constitutionalism generally are best understood. Very broadly speaking there are two competing views. One is that written constitutions are about locking things in.<sup>16</sup> So perhaps a constitution might contain an enumeration of

4 Compare Russell L Mathews & William R C Jay, *Federal Finance: Intergovernmental Financial Relations in Australia since Federation* (1972); Cliff Walsh, ‘Federalism Australian-Style: Towards Some New Perspectives’ in Geoffrey Brennan, Bhajan Grewal & Peter Groenewegen (eds), *Taxation and Fiscal Federalism: Essays in Honour of Russell Mathews* (1988) 222; Brian Galligan & Cliff Walsh, ‘Australian Federalism: Developments and Prospects’ (1990) 20(4) *Publius: The Journal of Federalism* 1 at 7–13; Neil Warren, ‘Benchmarking Australia’s Intergovernmental Fiscal Arrangements: Final Report’ (New South Wales Government, 2006); Anne Twomey & Glenn Withers, ‘Australia’s Federal Future: Delivering Growth and Prosperity’ (Council for the Australian Federation, 2007) at 26–7, 34–9.

5 See Brian Galligan, *A Federal Republic: Australia’s Constitutional System of Government* (1995); Brian Galligan, *A Federal Republic: Australia’s Constitutional System of Government* (1995), ch 9; David Meale, ‘The History of the Federal Idea in Australian Constitutional Jurisprudence: A Reappraisal’ (1992) 8 *Australian Journal of Law and Society* 25.

6 See *Work Choices* (2006) 229 CLR 1.

7 See *Commonwealth v Tasmanian Dam* (‘*Tasmanian Dam*’) (1983) 158 CLR 1. See, also, Sir Harry Gibbs, ‘Address Launching UTAC Vol. 1’ (1993) 3 *Upholding the Australian Constitution* at 135, 137 where he characterises this case as having the effect of deleting the words ‘external affairs’ and substituting ‘anything’.

8 See *South Australia v Commonwealth* (1942) 65 CLR 373 (‘*First Uniform Tax*’).

Federal and possibly State powers, rules related to how members of the chambers of Parliament are selected, provisions related to who chooses the most senior judges and till what age they can sit, as well as a procedure for making constitutional amendments.<sup>17</sup> These things and others will be made harder than usual to alter or remove. To a certain degree they will be locked in, and in federal constitutions they will be locked in through formation and amendment procedures which are themselves characteristically federal in nature.<sup>18</sup>

On this first view, locking these things in is the very point of adopting a written constitution. It is to take a path diametrically opposed to those who would opt to leave each generation to decide such matters for itself by a simple Act of Parliament (along the lines followed in New Zealand, for example).<sup>19</sup> As Larry Alexander (a proponent of this first view) puts it, in going down the route of a written constitution we have decided that ‘risking rigidity rather than risking security’<sup>20</sup> is the better bet. Constitutions and constitutionalism are on this view best understood as a ‘series of rules that impose second-order constraints on the first-order preferences of the people and of their elected representatives and executive officials’.<sup>21</sup> Justice Antonin Scalia of the United States Supreme Court puts it this way:

It certainly cannot be said that a constitution naturally suggests changeability; to the contrary, its whole purpose is to prevent change — to embed certain rights in such a manner that future generations cannot readily take them away. A society that adopts a bill of rights [for instance] is skeptical that ‘evolving standards of decency’ always ‘marks progress,’ and that societies always ‘mature’ as opposed to rot.<sup>22</sup>

On this way of understanding a constitution, a series of rules related to the legislature, executive and judiciary, a division of powers between the States and the Federation, an amending formula, and more are locked in — made hard (but

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9 There is an extensive literature on this question. For a sample, see R D Lumb, ‘The Franklin Dam Decision and The External Affairs Power: A Comment’ (1984) 13 *University of Queensland Law Journal* 138; Gregory Craven, ‘The States—Decline, Fall or What?’ in Gregory Craven (ed), *Australian Federalism: Towards the Second Century* (1992) ; Harry Gibbs, ‘The Decline of Federalism?’ (1994) 18 *University of Queensland Law Journal* 1; Geoffrey de Q Walker, ‘The Seven Pillars of Centralism: Engineers’ Case and Federalism’ (2002) 76 *Australian Law Journal* 678; Leslie Zines, ‘Changing Attitudes to Federalism and its Purpose’ in Robert French, Geoffrey Lindell & Cheryl Saunders (eds), *Reflections on the Australian Constitution* (2003) 86; George Winterton, ‘The High Court and Federalism: A Centenary Evaluation’ in Peter Cain (ed), *Centenary Essays for the High Court of Australia* (2004) 197.

10 It is quite possible that Sir Isaac Isaacs foresaw the potential for interpreting the *Constitution* in a pro-federal manner from the beginning, so long as the High Court’s interpretive approach could be separated from the framer’s original intentions and understandings.

11 This is not to deny that some well-known federalism cases went against the Commonwealth, such as the *Communist Party Case* (*The Communist Party v The Commonwealth* (1951) 83 CLR 1), the *Bank Nationalisation Case* (*Bank of New South Wales v The Commonwealth* (1948) 76 CLR 1), the *State Banking Case* (*Melbourne Corporation v The Commonwealth* (1947) 74 CLR 31) and the *Incorporation Case* (*New South Wales v The Commonwealth* (1990) 169 CLR 482), nor that s 51 was in part a ground for these decisions. The point is that the general trend has undeniably been in the Commonwealth’s favour.

by no means impossible) to change. Outside these locked-in provisions, there is parliamentary sovereignty.

The second view of constitutions and constitutionalism is very different. On this second view, a constitution is *not* about locking anything in at all; rather it is at most understood to be 'a statement of our most important values and the vehicle through which these values are created and crystallised'.<sup>23</sup> Significantly more than under the first view, this second understanding sees a constitution as an empty vessel (or at least as a not particularly constraining one) that does little more than set out a relatively amorphous, indeterminate list of guidelines and values, a list that will need updating, changing and altering as society 'advances' and grows.<sup>24</sup> Proponents of this second view rarely worry too much about who effects these 'upgrades', though a moment's thought will tell you that it will almost always be the unelected judges. When a constitution is conceived of as being a 'living tree',<sup>25</sup> 'constantly evolving',<sup>26</sup> and needing to 'keep pace with civilisation',<sup>27</sup> — the variety of available metaphors is itself revealing — then some group of real life human beings will have to do the changing or altering or branching out, and will do so according to that group's best lights (whether the end product happens to fall in line with the demands of something called 'civilisation' or not). Save for the few, rare times when the amending machinery is successfully used,<sup>28</sup> the group of real life human beings that will be in a position to make all these changes will be the unelected judges. No one else will be able to do so. Accordingly, even on this second view of constitutions and constitutionalism, for all the rest of us — the 99.99 percent of the population who are not superior court judges — the constitution will be locked in. Whatever updating, unshackling or fixing is claimed by some to be needed, regular citizens<sup>29</sup> will not be doing it.

The first view of constitutions and constitutionalism, then, leaves the unelected judges just about as shackled as the rest of us. Major change (including re-writing the federal balance of power) has to come via the amending provision,<sup>30</sup> the only leeway for judicial input being interstitial. The second view, in stark contrast to the

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12 For comparative studies which have recognised the particularly centralist orientation of Australian federalism as it has become, see Daniel J Elazar, *Federal Systems of the World: A handbook of federal, confederal and autonomy arrangements* (2nd ed, 1994) at 19–25; Ronald L. Watts, *Comparing Federal Systems* (2nd ed, 1999) at 25, 39, 46; John M. Williams & Clement Macintyre, 'Commonwealth of Australia' in Akhtar Majeed, Ronald Lampman Watts & Douglas M Brown (eds), *Distribution of Powers and Responsibilities in Federal Countries* (2006) 8, 23–4; Thomas O Hueglin & Alan Fenna, *Comparative federalism: A systematic inquiry* (2006) at 165–6, 309–11; Greg Taylor, *Characterisation in Federations: Six Countries Compared* (2006) at 17–20.

13 See Alan C Cairns, 'The Judicial Committee and Its Critics' (1971) 4(3) *Canadian Journal of Political Science* 301; Christopher Gilbert, *Australian and Canadian federalism 1867-1984: A study of judicial techniques* (1986); Bruce W Hodgins, *Federalism in Canada and Australia: Historical perspectives: 1920-1988* (1989); Nicholas Aroney, 'Formation, Representation and Amendment in Federal Constitutions' (2006) 54(1) *American Journal of Comparative Law* 277, 291–8.

14 See Donald Kommers, *The Constitutional Jurisprudence of the Federal Republic of Germany* (2<sup>nd</sup> ed, 1997).

15 See cases and articles cited below nn72–73, 75.

16 For a defence of this view in relation to the *Australian Constitution*, see Nicholas Aroney, *Freedom of Speech in the Constitution* (1998), ch 2.

first, most assuredly does *not* leave our top judges more or less as shackled as the rest of us.

We recognise, of course, that in suggesting that there are at base only two competing views about the role, place and function of a constitution — the lock-things-in view and the express-our-most-important-values view — there will be some who balk at both. For instance, some critics might want to disavow the first view because of the privileged position it gives to the founding generation and the second because of the largely unconstrained power it effectively hands over to unelected judges.<sup>31</sup> Such critics might be inclined to think that a New Zealand-style parliamentary sovereignty system is the route to go for those who dislike the idea of locking-in future generations, or at least that the New Zealand route (which gives the ‘nothing is locked-in’ updating job to an elected Parliament) is preferable to a view (the second one) that has the effect of putting virtually all the updating power in the hands of a largely unshackled judiciary.

Now, abstractly put, this qualification might or might not be agreed upon.<sup>32</sup> The fact is, however, that in the vast preponderance of modern liberal democracies there *is* a written constitution which defines and limits the powers of the government, legislature and judiciary and, further, it is difficult to imagine how a specifically *federal* system of government could be established and operate without a binding, written constitution.<sup>33</sup> Thus, the fact is that in Australia, as in most other federal states, we *do* have a written constitution. What is contentious is *how* this constitution is to be interpreted by the courts.

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17 Some jurisdictions might even lay down, in vague, amorphous but emotively stirring terms, a set of individual rights, though one of us is a strong critic of bills of rights and believes the decision to forswear one here in Australia was a wise one. See, for instance, James Allan in: ‘Bills of Rights and Judicial Power — A Liberal’s Quandary?’ (1996) 16 *Oxford Journal of Legal Studies* 337; *Sympathy and Antipathy: Essays Legal and Philosophical* (2002); ‘Rights, Paternalism, Constitutions and Judges’ in Grant Huscroft & Paul Rishworth (eds), *Litigating Rights: Perspectives from Domestic and International Law* (2002); ‘Oh That I Were Made Judge in the Land’ (2002) 30 *Federal Law Review* 561; ‘Paying for the Comfort of Dogma’ (2003) 25 *Sydney Law Review* 63; ‘A Modest Proposal’ (2003) 23 *Oxford Journal of Legal Studies* 197; ‘An Unashamed Majoritarian’ (2004) 27 *Dalhousie Law Journal* 537; ‘Portia, Bassanio or Dick the Butcher? Constraining Judges in the Twenty-First Century’ (2006) 17 *King’s College Law Journal* 1; ‘Thin Beats Fat Yet Again — Conceptions of Democracy’ (2006) 25 *Law & Philosophy* 533.

18 We simplify things here to a certain extent. For more detail see Aroney, above n13; John Kincaid & G Alan Tarr, *Constitutional Origins, Structure, and Change in Federal Countries* (2005).

19 See Philip A Joseph, *Constitutional and Administrative Law in New Zealand* (2nd ed, 2001).

20 Larry Alexander (ed), *Constitutionalism: Philosophical Foundations* (1998) at 4. See too Richard Kay, ‘American Constitutionalism’ in Larry Alexander (ed), *Constitutionalism: Philosophical Foundations* (1998) at 16.

21 Frederick Schauer, ‘Judicial Supremacy and the Modest Constitution’ (2004) 92 *California Law Review* at 1045, 1046.

22 Antonin Scalia, *A Matter of Interpretation* (1997) at 40–41.

23 Schauer, above n21 at 1045.

24 A rather Whiggish set of presuppositions about the inevitability of societal progress seems to be assumed by this view.

25 *Edwards v Canada (Attorney-General)* [1930] AC 124 at 136 (‘Edwards’) (Lord Sankey).

26 *Al-Kateb v Godwin* (2004) 219 CLR 562 at 643 (Kirby J).

27 *Ministry of Transport v Noort* [1992] NZLR 260 at 271 (Cooke P).

### 3. *Interpretive Literalism*

It is at this point that we have to confront the proposition, peculiar to the High Court of Australia, that the best way to interpret a written constitution — in particular, the best way to avoid idiosyncratic, subjective judicial interpretation — is to adopt a policy of interpretive literalism.<sup>34</sup> As we indicated at the outset, constitutional literalism entered Australian constitutional jurisprudence on the basis that it would eliminate, or at least minimise, the power of unelected judges to impose their views about the meaning of the *Constitution* on the rest of us.<sup>35</sup> On this view, yes, we have locked something in, but what we have locked-in is simply a collection of words. Nothing more. And those words need to be read according to their isolated, literal, natural meaning, without invoking anything about the expectations, understandings or intended meanings of those who drafted, approved or enacted the document.

Such a position is a recurrent one, fundamental to the Australian High Court's distribution of powers jurisprudence.<sup>36</sup> Yet at the outset it is possible to identify a number of difficulties with this sort of appeal to literalism. When construing statutes judges, including Australian judges, frequently make use of what might be called a purposive approach to interpretation.<sup>37</sup> According to this approach, a contested statutory provision is interpreted in the light of propositions about the statute's purpose. Yet to talk of a statute's purpose is at base a kind of shorthand for talking about the purpose or intentions of those who enacted the statute. After all, only living beings have purposes. No set of words on paper literally has a purpose separate from the understandings and aspirations of its author or authors.<sup>38</sup> So a purposive approach in statutory interpretation is, in effect, an appeal to enactors' intentions. What was *their* purpose in enacting this contested provision?

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28 We here have in mind the amendment history of common law countries such as Australia, Canada and the United States. Other constitutions, such as the Swiss — a constitution that does not have judicial review of federal legislation, but protects the interests of its constituent cantons through much more directly democratic mechanisms, including the referendum — have been amended much more regularly. See Nicolas Schmitt, *Federalism: The Swiss Experience* (1996) at 46–8, 61–3, 155–7.

29 Of course it may be pointed out in response that ordinary citizens do not have all that much real influence over elected politicians. But on any analysis, they have more influence over elected politicians than over unelected judges. This is our point. Those readers so inclined can read this point with whatever degree of qualification they tend to bring to their understanding of representative democracy.

30 Unlike the special majorities of State legislatures or conventions required under the *United States Constitution* and the special majorities and unanimity required under the *Canadian Constitution*, the *Australian Constitution* requires simple majorities of the voters of the States and the voters of the entire Commonwealth. Most of the many failed amendment proposals in Australia have not been due to the dual majority requirement but simply because a simple majority of Australian voters — whatever their reasons — did not wish to ratify the proposed amendment. And, notably, many of the failed proposals involved either an increase in Commonwealth legislative power or the insertion of Bill of Rights-type provisions.

31 Not for them the nebulous 'constitutions are about articulating and crystallising rather amorphous values and then leaving it to the judges to tell us what the ramifications of this 'living tree' we have planted might be'! See *Edwards* [1930] AC 124 at 136 (Lord Sankey).

32 It is certainly the view of one us. See Allan, 'A Defence of the Status Quo'; 'Portia, Bassanio or Dick the Butcher', above n17.

As it happens, even literalism as an approach to statutory interpretation can be understood as a sort of appeal to enactors' intentions: we give the words used their literal meaning (appealing only to wider considerations when there is, say, ambiguity) because this, itself, is what the enactors intended (and because there might also be good pragmatic future consequences in forcing legislators to say more precisely and clearly what they mean, a justification which not only appeals indirectly and in a long-term sense to upholding enactors' intentions but one that is unavailable in the constitutional context where there is no way for the elected branches to gainsay the judges or to come back with a clearer, more precise form of words). Indeed, when literalism was first introduced into Australian constitutional law, it was couched in terms very similar to this, indeed as the application of ordinary principles of statutory interpretation to the construction of the *Australian Constitution*.<sup>39</sup> Since then, however, statutory interpretation has taken a much more purposive turn, whereas constitutional interpretation in Australia has remained stubbornly literalist. Thus the first difficulty with literalism is that appeals to the bare, literal meaning of the text are relatively rare in the context of statutory interpretation, and even when they are made in that context they rest most plausibly on an implicit background appeal to enactors' intentions.<sup>40</sup> One might wonder, then, why some disembodied version of literalism would be attractive in constitutional interpretation but unattractive as regards statutes.<sup>41</sup>

The second difficulty with the literalism gambit is even more damning. It is this. A constitution is not a regular statute. A constitution is superior law, and a constitution is a framework of government, intended to endure. Now leave aside for the moment the higher status of a constitution — the fact that an elected legislature can overturn or trump judicial interpretations of a statute with which it disagrees but that it cannot do so in the case of constitutional interpretations — and

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33 *R v Kirby; Ex parte Boilermakers' Society of Australia* (1956) 94 CLR 254 at 267–8. See also AV Dicey, *Introduction to the Study of the Law of the Constitution* (8<sup>th</sup> ed, 1920) at 134–67, 476–480, discussed in Nicholas Aroney, 'A Commonwealth of Commonwealths: Late Nineteenth-Century Conceptions of Federalism and Their Impact on Australian Federation, 1890-1901' (2002) 23(3) *Journal of Legal History* 253 at 273–6.

34 The strategic importance of interpretive literalism in Australian federalism cases has been noted in LJM Cooray & Suri Ratnapala, 'The High Court and the Constitution - Literalism and Beyond' in Greg Craven (ed), *The Convention Debates 1891-1898; Commentaries, Indices and Guide* (1987) vol 6, 203; Gregory Craven, 'The Crisis of Constitutional Literalism in Australia' in H P Lee & George Winterton (eds), *Australian Constitutional Perspectives* (1992); Gregory Craven, 'More Cracks in the Façade of Literalism: Is there an Engineer in the House?' (1992) 18 *Melbourne University Law Review* 540. On the related theme of interpretive legalism in Australia, see Jeffrey Goldsworthy, 'Australia: Devotion to Legalism' in Jeffrey Goldsworthy (ed), *Interpreting Constitutions: A Comparative Study* (2006) 106.

35 *Engineers* (1920) 28 CLR 129 at 142 (Knox CJ, Isaacs, Rich & Starke JJ).

36 See Nicholas Aroney, 'Constitutional Choices in the Work Choices Case, or What Exactly is Wrong with the Reserved Powers Doctrine?' (2008) 32 *Melbourne University Law Review* (forthcoming).

37 Purposive interpretation is now mandated by the *Acts Interpretation Act* 1901 (Cth) s 15AA and similar State legislation. See DC Pearce and RS Geddes, *Statutory Interpretation in Australia* (6 ed, 2006) at 25.

relatedly that the tasks of statutory and constitutional interpretation are asymmetrical in terms of the relative powers of the elected and unelected branches. Leave that aside for the moment, and focus upon the fact that a constitution is a framework of government, intended to endure. This last kind of difference between a regular statute and a constitution has implications for the level of specificity and detail contained in each kind of document. Constitutions are charters of government, specifying the ways in which law is to be made, enforced and adjudicated, rather than specifying the particular laws under which those subject to the law are to be governed. For this reason, constitutions are overwhelmingly more general, less specific, more abstract than ordinary statutes. They are made to last a long time, in the knowledge that amendments and changes to the entire framework of government will be — and, save *in extremis*, probably ought to be — relatively infrequent.

In such circumstances, any professed attachment to a literal mode of interpretation will leave the point-of-application interpreters — the judges of our superior courts — largely unconstrained in reaching the outcomes they otherwise desire. Why? Well, consider what is involved when interpreting a general phrase in a constitution rather than a specific phrase contained within a detailed tax or corporations statute. To make what is at stake more evident still, imagine a constitution containing a US- or Canadian-style bill of rights. These kinds of instruments all make mention, *inter alia*, of a right to ‘freedom of speech’ or to ‘freedom of expression’. Adopt a literal approach to interpretation, one divorced from original understandings and intentions, and how constraining on the point-of-application interpreters will this injunction to guarantee freedom of speech and expression be?<sup>42</sup> How does literalism as regards these three words play out when it comes to, say, campaign finance rules, hate speech provisions or defamation regimes? Does a literal or textual approach to interpreting these and other rights in

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38 See Richard Kay, ‘Original Intentions, Standard Meanings and the Legal Character of the Constitution’ (1989) 6 *Constitutional Commentary* 39; Richard Kay, ‘Adherence to the Original Intentions in Constitutional Adjudication: Three Objectives and Responses’ (1988) 82 *Northwestern University Law Review* 226; Jeffrey Goldsworthy, ‘Implications in Language, Law and the Constitution’ in Geoffrey Lindell (ed), *Future Directions in Australian Constitutional Law: Essays in Honour of Professor Leslie Zines* (1994) 150; Jeffrey Goldsworthy, ‘Originalism in Constitutional Interpretation’ (1997) 25 *Federal Law Review* 1; Jeffrey Goldsworthy, ‘Interpreting the Constitution in its Second Century’ (2000) 24 *Melbourne University Law Review* 677.

39 *Engineers* (1920) 28 CLR 129 at 148–154 (Knox CJ, Isaacs, Rich & Starke JJ), 161–2, 165 (Higgins J).

40 See James Allan, ‘Constitutional Interpretation v. Statutory Interpretation: Understanding the Attractions of “Original Intent”’ (2006) 6 *Legal Theory* 109. Furthermore, when a statute is given a meaning — is interpreted — by the unelected judges, that meaning can be overturned by the elected legislature. The statute can be amended by the normal 50 percent plus one procedure.

41 Scalia (above n22) and Allan (above n40) both argue that approaches to interpreting statutes and constitutions can differ, and should differ. For instance, one can be against purposive interpretation when it comes to statutes (because it gives judges too much interpretive power) while being in favour of some form of originalism as regards constitutional provisions (because this is the best option for minimising judicial adventurism, in this different context).

a bill of rights ‘leave the citizen at the mercy of the interpreter’s judgment or discretion’?<sup>43</sup> Clearly the answer is ‘yes’. Just compare *RAV v City of St Paul*<sup>44</sup> with *R v Keegstra*<sup>45</sup> (concerning laws criminalising hate speech in the US and Canada) or *New York Times Co v Sullivan*<sup>46</sup> with *Hill v Church of Scientology of Toronto*<sup>47</sup> and even with *Lange v Atkinson*<sup>48</sup> and *Reynolds v Times Newspapers*<sup>49</sup> (concerning defamation laws in the US, Canada, New Zealand and the UK — the latter two countries having statutory bills of rights with the same phrases). Or look at how the right to freedom of speech has been interpreted in relation to campaign spending in *Buckley v Valeo* and *Harper v Canada (Attorney General)*.<sup>50</sup> Or take just about any of the other rights enumerated in these bill of rights instruments. Does a textual literalist approach tell us where to draw the line when it comes to voting,<sup>51</sup> or who can marry,<sup>52</sup> or limits on advertising?<sup>53</sup> Does literalism have any decisive effect in ruling on what does or does not constitute ‘cruel and unusual punishments’, ‘due process of law’, ‘unreasonable search and seizure’ or any of the usual mandates found in a bill of rights?

Our immediate point here is not that the judges in these cases actually appealed to literalism in their reasoning. It is that such appeals, in these contexts, would be empty, that they would provide next to no guidance in the interpretation of the abstract language used, and without more would amount to leaving the decisions almost completely to the open-ended discretion of the point-of-application judges. In other words, a resort to literalism in this context collapses into the second view of constitutions and constitutionalism sketched above, one where 99.99 percent of the population is locked-in but where judges sitting at the zenith of the court hierarchy are left free to upgrade or change or alter it as they think best or right. Insisting on ‘the authoritative nature of the text and nothing but the text’<sup>54</sup> when it comes to constitutionalised rights guarantees is akin to handing the judges a blank cheque. Appeals to literalism might possibly make sense as regards interpreting the preponderance of statutes,<sup>55</sup> but not as regards vague, rather indeterminate

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42 In Canada’s case, the ‘freedom of expression’ right can be limited by laws which the judges deem to be reasonable and justifiable (see *Canadian Charter of Rights and Freedoms*, s 1). Of course in the US this is implicit. Canada’s two-step process (identify the right then ask if limits on it are reasonable) is simply rolled up into a single step in the US. But rights are no more treated as absolutes there than in Canada. See Allan, above n17.

43 Jeremy Waldron, *Law and Disagreement* (1999) at 83–84.

44 505 US 377 (1992).

45 [1990] 3 SCR 697.

46 376 US 254 (1964).

47 [1995] 2 SCR 1130.

48 [2000] 3 NZLR 385.

49 [2001] 2 AC 127.

50 *Buckley v Valeo* 424 US 1 (1976); *Harper v Canada (Attorney General)* [2004] 1 SCR 827.

51 See *Sauve v Canada (Chief Electoral Officer)* [2002] 3 SCR 519, a 5–4 decision of the Supreme Court of Canada.

52 See *Halpern v Canada (Attorney General)* (2003) 65 OR (3d) 161 and *Quilter v Attorney-General* [1998] 1 NZLR 523.

53 Consider *RJR-MacDonald v Canada* [1995] 3 SCR 199 and *Canada (Attorney General) v JTI-Macdonald Corp* [2007] SCC 30.

54 Waldron, above n43 at 145.

rights guarantees in a constitution. For the latter, an insistence on literalism and textualism is effectively the rejection of the ‘lock-things-in’ view of constitutions. Whatever proponents of literalism might otherwise say, in this context, at least, the few words on their own are in no way constraining. Either one appeals to original intentions and understandings or one shrugs and hands the decision over to the point-of-application judiciary.

As Australia has no constitutionalised bill of rights — meaning that our reference to these instruments and to phrases such as ‘freedom of expression’ was illustrative<sup>56</sup> — the question for us in thinking about division of powers cases is whether advocating literalism and textualism is somehow more constraining when applied to the various heads of legislative power conferred upon the Commonwealth by the *Australian Constitution* compared to its use in the case of rights guarantees. Is the appeal to literalism in this context, whether intended or otherwise, little more than a dressed-up form of advocating the second view of constitutionalism — the one where superior judges are free to upgrade and alter the law of the constitution in order to keep pace with what they happen to feel ‘civilisation’ or ‘progress’ or ‘efficiency’ demands, all the while unencumbered by constraints other than those they impose on themselves? Is the invocation of literalism in constitutional interpretation just an invitation to opt for a kind of judicial activism?

That depends on the degree of specificity and detail one finds in the following language, used in s 51 of the *Australian Constitution* to confer certain heads of legislative power upon the Commonwealth Parliament:

The Parliament shall, subject to this Constitution, have power to make laws for the peace, order, and good government of the Commonwealth with respect to: ...

- (i) Trade and commerce with other countries, and among the States ...
- (xx) Foreign corporations, and trading or financial corporations formed within the limits of the Commonwealth ...
- (xxix) External Affairs ...
- (xxxv) Conciliation and arbitration for the prevention and settlement of industrial disputes extending beyond the limits of any one State ....

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55 See Allan, above n40, for an argument that it does make sense in that context (though, also, that it involves an implicit sort of reliance on originalism even there).

56 Although note the implied freedom of political communication which the High Court ‘discovered’ to be ‘necessarily implied’ by the *Australian Constitution* in *Australian Capital Television Pty Ltd v Commonwealth* (1992) 177 CLR 106 and *Nationwide News Pty Ltd v Wills* (1992) 177 CLR 1, and later revised in *Lange v Australian Broadcasting Corporation* (1997) 189 CLR 520. The implied freedom gives the High Court similar interpretive freedom. For a critical discussion, see Aroney, above n16 and, more recently, Nicholas Aroney, ‘Justice McHugh, Representative Government and the Elimination of Balancing’ (2006) 28 *Sydney Law Review* 505.

Does the literal or ordinary or natural meaning<sup>57</sup> of these paragraphs put any more constraints on the point-of-application judges than does invoking the phrase ‘freedom of expression’ in disputes over where to draw highly contested lines in cases concerning campaign finance or hate speech or defamation regimes? Or is it the case — as we think — that appeals to literalism or plain meaning, by themselves and without more, leave it virtually wide open whether a Commonwealth statute which has at least some connection to these topics will be upheld as constitutional?<sup>58</sup>

We stand by our earlier claim that broadly speaking there are two competing views about the role, place and function of a constitution, and add that relatively unvarnished appeals to literalism in the division of powers context amount to endorsements of the second view (‘express our most important values and leave the details to the judges’), not the first view (where judges, too, are locked-in). And this brings us back to our starting contention. Australia’s High Court, in deciding distribution of powers cases over the last century, and culminating most recently in the *Work Choices* case, has created an A P Herbert-like end product, one both seductively plausible in the terms presented,<sup>59</sup> and yet one implausibly far-fetched when considered in the light of a reading of the *Constitution* as a whole, and more so still when prevailing understandings and expectations at the time of adoption are considered relevant. We rest that contention of implausibility, and what follows in this paper, explicitly on the first view of constitutions and constitutionalism — the one that sees them as at heart about locking things in.

So we do not beg the initial and crucial issue of how a constitution is best understood. Rather, we reject the second view. It is implausible; it cannot explain why people argue for so long and so passionately over the text as a whole; it has great difficulty in explaining why regular citizens would find it even remotely attractive; it imposes an essentially undemocratic, judicially-driven process; and, when urged by judges, it is a self-serving understanding of the constitution, as its practical effect is to leave those same judges free to update, upgrade and even upset what the *Constitution* means while the rest of us are locked-in.

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57 *Engineers* (1920) 28 CLR 129 at 142, 148–9 (Knox CJ, Isaacs, Rich & Starke JJ).

58 Indeed, it could be said that, while judges interpreting Bills of Rights have almost universally thought that no right can be absolute but must be ‘balanced’ against competing public goals, the High Court of Australia has chosen to exercise its discretion by reading federal heads of legislative power in absolute terms, without any significant concern to maintain a ‘balance’ between the Commonwealth and the States. Thus, on textual literalist grounds, the High Court in the *Work Choices* case emphatically rejected any appeal to ‘federal balance’. See *Work Choices* (2006) 229 CLR 1 at 56, 57, 59. See also *Attorney-General (WA) v Australian National Airlines Commission* (1976) 138 CLR 492 at 530 (Murphy J); *Commonwealth v Tasmanian Dam* (1983) 158 CLR 1 at 129 (Mason J).

59 Compare Nicholas Aroney, ‘A Seductive Plausibility: Freedom of Speech in the Constitution’ (1995) 18 *University of Queensland Law Journal* 249, citing *United States v 12 200-Ft. Reels of Film* 413 US 123 (1973) at 127 (Burger CJ) (‘The seductive plausibility of single steps in a chain of evolutionary development of a legal rule is often not perceived until a third, fourth, or fifth “logical” extension occurs. Each step, when taken, appeared a reasonable step in relation to that which preceded it, although the aggregate or end result is one that would never have been seriously considered in the first instance.’)

The remainder of this paper seeks to demonstrate and to explain precisely how Australia's distribution of powers jurisprudence has an *Uncommon Law* quality to it.

#### 4. *Where Are We Now?*

Debate over the current state of Australian federalism is polarised. The basic reason is political. The political polarisation derives from the general tendency of Australian voters in recent decades to vote differently in Federal and State elections, with the result that, at any particular time, the major party which does not control the Federal government usually comes to control most if not all of the State governments. Thus, during the Hawke and Keating Federal Labor governments from 1983 to 1996, the States soon came to be ruled by Liberal-National Coalition governments, whereas after the election of the Howard Coalition Federal government in 1996, the States progressively became Labor dominated to the point where all the States currently have Labor governments. In this context, relationships between the Commonwealth and the States have been shaped by party politics, and prevailing attitudes to federalism on both sides of politics have shifted — rather remarkably — depending on which side has been in control of which level of government. During the Hawke and Keating Labor governments, conservative politicians often accused the Federal government of an over-reaching centralism which threatened the proper balance between the Commonwealth and the States. On the other hand, during the recent Howard Coalition government, Labor party politicians, particularly at a State level, frequently accused the Federal government of centralism and presented themselves as guardians of the federal balance.

Many of the most important constitutional cases of recent decades illustrate this tendency. The best example of a confrontation between a Federal Labor government and State Liberal governments is the *Tasmanian Dam* case of 1983.<sup>60</sup> The case involved an attempt by the Hawke Labor government to prevent a State Liberal government from constructing a dam on the Gordon River in south-western Tasmania for the purpose of hydro-electric power generation. The Federal legislation was challenged not only by the State government of Tasmania, but also by the governments of Victoria, New South Wales and Queensland, on the ground that the *Constitution* did not authorise Federal intervention. When the High Court narrowly upheld the legislation on the basis of the Commonwealth's external affairs and corporations powers, the decision was widely regarded by conservative commentators as a major setback for Australian federalism and a failure by the High Court to maintain a proper balance between the Commonwealth and the States.<sup>61</sup> On the other hand, the best example of the reverse pattern, a confrontation between a Coalition Federal government and State Labor governments is the recent *Work Choices* case of 2006.<sup>62</sup> In this case, the *Workplace Relations Amendment (Work Choices) Act 2005* (Cth) replaced the existing centralised

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60 *Commonwealth v Tasmanian Dam* (1983) 158 CLR 1.

61 Lumb, 'Franklin Dam Decision', above n9.

62 *Work Choices* (2006) 229 CLR 1.

system of compulsory industrial arbitration with a national scheme founded upon individualised workplace agreements, a system more in accord with the economically liberal outlook of the Coalition Federal government. The legislation was challenged by five State Labor governments, technically because it was beyond the legislative powers of the Commonwealth, but substantively because the State Labor governments objected to the extent to which the law implemented a policy of individualised workplace agreements. When the High Court upheld the legislation in late 2006 the decision was, once again, criticised as spelling the end of federalism.<sup>63</sup>

How much of these criticisms is an accurate description of the state of Australian federalism, and how much is hyperbole? It would certainly be an exaggeration to say that, as a consequence of these and other decisions, there is now no limit on the legislative powers of the Commonwealth, so that the continuing functions of the States now owe their existence entirely to the good graces of the Commonwealth. It is an exaggeration because the legislative powers of the Commonwealth remain tied to specific heads of power. Hence, although the High Court has clearly cemented the view that Federal powers are to be interpreted just about as widely as their language could possibly bear, it is still necessary for the Commonwealth to show that there is at least some connection, indeed a 'sufficient' connection, between the legislation and a particular head or heads of power. It is also an exaggeration because there remain very significant institutional and political obstacles in the way of an attempt by the Commonwealth actually to exercise its legal powers to the full. Statutes still have to be passed by both Houses of the Commonwealth Parliament and, although the Howard Coalition government enjoyed a numerical majority in the Senate, this is not usually the case.<sup>64</sup> Moreover, Federal governments have to face the electors at least every three years and they face a potential electoral backlash should they push the envelope too far, especially if they should do so in a non-incremental manner. Finally, although the legislative powers of the States may have waned, the existence of the States as independent constituent elements of the Federation remains constitutionally secure, and thus a Federal government will continue to face pressure and opposition from State governments wielding not insignificant institutional powers, not to mention a certain level of political legitimacy. Federal governments may threaten, as they often do, to take over traditional State activities, but there are significant political and institutional obstacles which lie in the way of a complete Federal takeover.

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63 Gregory Craven, 'How the High Court failed us', *Australian Financial Review* (24 November 2006) at 81; ABC Radio National, 'Work Choices Shipwreck', *Perspective*, 6 December 2006.

64 The voting system for the upper house Senate is single transferable vote (STV) unlike the preferential or alternate transferable voting system used for lower house elections. The move in 1984 of allowing 12 rather than only 10 Senators per State has made it more difficult for any one party to control the Senate. The basic reason is this. Half of all Senators must contest each election (their terms being 6 years and general elections being mandated every 3 years). Under STV it is harder to win 4 of 6 State spots than it is to win 3 of 5.

But if declamations of a complete collapse of Australian federalism are an exaggeration, is there nothing to the common perception that the Commonwealth is waxing larger than ever, while the States are progressively being subordinated to the role of mere administrative units in a consolidated and centralised system of government? A dispassionate analysis of the respective legal capacities of the States and the Commonwealth — as distinct from the uses to which these powers have actually been put — certainly bears out the common perception. The constitutional causes are twofold. Firstly, the High Court has consistently upheld the capacity of the Commonwealth to dominate the States financially — through its control over the most important forms of taxation revenue,<sup>65</sup> through its freedom to appropriate this revenue to any purposes that it thinks appropriate,<sup>66</sup> and through its ability to make grants to the States on any terms and conditions that it thinks fit.<sup>67</sup> Secondly, the High Court has adopted and consistently applied a method of the interpretation of Federal legislative powers which enables the Commonwealth to enter almost any imaginable field of public regulation, albeit in a way which is somehow tied to a specific head of power and thus sometimes through highly convoluted means. It is difficult to identify any area of State regulation which could not, in practice, be substantially shaped, if not wholly dominated, by Federal policy. Thus, the external affairs power can be used to regulate any field of activity whatsoever, so long as a relevant international treaty can be identified and so long as it can be shown that the Commonwealth is indeed implementing the terms of that treaty.<sup>68</sup> Likewise, it is now clear that the corporations power can be used to regulate both the internal and external activities of any trading, financial or foreign corporation in Australia, as well as the actions of persons having dealings with such corporations.<sup>69</sup> The fact that so much private activity is pursued through corporations of these kinds means that Federal power extends in this respect very far indeed — not only into trade practices and industrial relations (as the cases have illustrated), but also in principle into traditional areas of State regulation, such as education, hospitals and local government.<sup>70</sup>

Of course, the Commonwealth has not, and probably will not, enter all these fields to the full extent possible, essentially on account of the political and institutional barriers mentioned earlier. However, the existence of these capacities means that it always has the potential to do so, a fact not lost on State politicians and not irrelevant to their negotiations with their Commonwealth counterparts. Thus, where the States adopt policies in specific areas of particular concern to the

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65 *First Uniform Tax* (1942) 65 CLR 373; *Victoria v Commonwealth* (1957) 99 CLR 575.

66 *Attorney-General (Vic) (ex rel Dale) v Commonwealth* (1945) 71 CLR 237; *Victoria v Commonwealth* (1975) 134 CLR 338.

67 *Deputy Commissioner of Taxation v WR Moran Pty Ltd* (1939) 61 CLR 735.

68 *Tasmanian Dam* (1983) 158 CLR 1. Again, there are different judicially-expressed views on how closely the Commonwealth must implement the terms of the relevant treaty. See *Richardson v Forestry Commission* (1988) 164 CLR 261; *Queensland v Commonwealth* (1989) 167 CLR 232; *Victoria v Commonwealth* (1996) 187 CLR 416.

69 *Work Choices* (2006) 229 CLR 1.

70 ABC Radio National, 'The Workchoices case', *Law Report*, 21 November 2006.

Commonwealth government, the Commonwealth is always liable to enter, and even to take over the field,<sup>71</sup> provided the political costs are not too great. And, short of direct intervention, the mere fact that the Commonwealth has this legal capacity — backed by financial control — places it in a superior bargaining position in inter-governmental discussions. The States face serious incentives to accede to Commonwealth demands if they wish to retain at least some role in the formation and implementation of government policy.

The general result is that while the Commonwealth faces what at times amounts to significant political and institutional obstacles to exerting its powers to their fullest extent, it has the legal power to do so and is likely to do so when the political conditions are suitable; and even where they are not, its powers place pressure on the States to tailor their policies in accord with federal expectations. For these reasons, when compared to other federations, the circumstances in which the Australian States find themselves are particularly problematic and their powers comparatively enervated.

Even allowing for some recent backtracking,<sup>72</sup> we recognise that the United States Supreme Court has gone further than the Australian High Court in its pro-centre interpretations of the interstate trade and commerce power.<sup>73</sup> However, this is more than counterbalanced by the much smaller list of federal legislative powers contained in the *United States Constitution*,<sup>74</sup> the relatively much more significant political barriers to federal government activity and intervention in the United States,<sup>75</sup> a political culture which places much greater emphasis upon local and state oriented policy development,<sup>76</sup> and the significantly stronger financial position of the American States.<sup>77</sup>

Other comparisons cast the position of the States in Australia in just as poor, if not worse, a light. Take Switzerland. Even though there is no judicial review of federal legislation in that country, the Swiss Cantons are amply protected through

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71 Particularly through its capacity to pre-empt State laws under the ‘covering the field’ doctrine, first enunciated by Isaacs J in *Clyde Engineering Co Ltd v Cowburn* (1926) 37 CLR 466 and affirmed by the Court in *Ex parte McLean* (1930) 43 CLR 472.

72 See, in particular, *United States v Lopez* 514 US 549 (1995); *Printz v United States* 521 US 898 (1997).

73 See, eg, *Wickard v Filburn* 317 US 111 (1942); *United States v Darby* 312 US 100 (1941). For a general discussion see Edward S Corwin, ‘The Passing of Dual Federalism’ (1950) 36 *Virginia Law Review* 1; William Van Alstyne, ‘The Second Death of Federalism’ (1985) 83 *Michigan Law Review* 1709.

74 Compare *US Constitution* Art. I, s 8 with *Australian Constitution* s 51.

75 See Herbert Wechsler, ‘The Political Safeguards of Federalism: The Role of the States in the Composition and Selection of the National Government’ (1954) 54 *Columbia Law Review* 543; Larry D Kramer, ‘Putting the Politics Back into the Political Safeguards of Federalism’ (2000) 100 *Columbia Law Review* 215. Although compare Steven G Calabresi, ‘“A Government of Limited and Enumerated Powers”’: In Defense of *United States v. Lopez*’ (1995) 94 *Michigan Law Review* 752; John Yoo, ‘The Judicial Safeguards of Federalism’ (1997) 70 *Southern California Law Review* 1311; Ernest A Young, ‘The Rehnquist Court’s Two Federalisms’ (2004) 83 *Texas Law Review* 1.

76 See Thomas O Hueglin & Alan Fenna, *Comparative federalism: A systematic inquiry* (2006) at 233–4, 321–4.

77 Warren, above n 4, 78–9.

a whole range of political mechanisms and practices, undergirded by a significant degree of financial independence and supported by a political culture which is highly decentralist.<sup>78</sup> Similarly, although the competences granted to the central government under the *German Constitution* are very extensive,<sup>79</sup> the Lander governments enjoy a constitutionally-guaranteed voice in the development of national policy and retain control over its implementation.<sup>80</sup> On the other hand, while the Canadian Provinces do not enjoy the same level of formal political safeguards which exist under the United States, Swiss and German Constitutions,<sup>81</sup> they enjoy the benefit of a political culture which has been forced to recognise the claims of the Province of Québec (as well as the claims of the growing western Provinces). This is further buttressed by the fact that the legislative powers of the Provinces are explicitly set out in the *Constitution*,<sup>82</sup> a feature which although originally intended to reflect the derivative nature of provincial powers has turned out otherwise, with the Supreme Court of Canada having to take account of the constitutionally-guaranteed legislative powers of the Provinces when determining the scope of Federal legislative power. Thus, the cumulative effect of early Privy Council decisions on the legislative powers of the Dominion and the Provinces on the whole strongly favoured the Provinces,<sup>83</sup> and subsequent Supreme Court decisions, while modifying these outcomes sometimes significantly, have not wholeheartedly reversed them. The explicit enumeration of provincial powers, together with the already mentioned political imperatives, means that in Canada there is a tangible limit on the scope of Federal legislative powers as interpreted by the courts.<sup>84</sup>

Now, when the *Australian Constitution* was first drafted, the framers deliberately took as their models certain features of the United States, Swiss and Canadian systems, all with a view to constructing a fairly balanced system in which the Commonwealth would be given powers adequate to the responsibilities of a genuinely national government, while the States would retain a very significant role in the formulation of government policy on a more regional and localised level. In so doing, the framers were no fools, although perhaps with the benefit of hindsight they took certain missteps which have made possible what we see today. What were these missteps, and how have they been used by the High Court of Australia to upend the framers' expectations? Like the mock

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78 See Wolf Linder, *Swiss Democracy: Possible Solutions to Conflict in Multicultural Societies* (1994); Schmitt, above n28.

79 See *Basic Law for the Federal Republic of Germany*, Arts 73, 74.

80 See Arthur B Gunlicks, *The Länder and German federalism* (2003). This is not to suggest that there is no disquiet in Germany: see, for example, Arthur Gunlicks, 'German Federalism Reform: Part One' (2007) 8(1) *German Law Journal* 111.

81 The Provinces are not equally represented in the Canadian Senate and, more significantly, Senators are appointed by the Federal government. See *Canadian Constitution*, ss 22, 24.

82 See Patrick J Monahan, 'At Doctrine's Twilight: The Structure of Canadian Federalism' (1984) 34 *University of Toronto Law Journal* 47.

83 See Cairns, above n13.

84 See Bruce Ryder, 'The Demise and Rise of the Classical Paradigm' (1991) 36 *McGill Law Journal* 309; Martha A Field, 'The Differing Federalism of Canada and the United States' (1992) 55 *Law and Contemporary Problems* 108.

hypotheticals of A P Herbert's *Uncommon Law*, the answer is through a number of discrete steps, each of which seemed at the time to be itself certainly plausible, usually reasonable, sometimes inevitable, and never beyond the Pale, yet which cumulatively created an effect that today is indeed remarkable.

## 5. *Where Did We Begin?*

The framers of the *Australian Constitution* deliberately created a system that was intended to give the Commonwealth adequate powers to govern the nation as a whole in those areas thought necessary at the time but which was also intended to preserve to the States a significant capacity to govern themselves in all other respects. To ensure that this would be the case, they instituted a range of constitutional mechanisms, political, financial and judicial, intended to preserve the integrity of the system as a whole.<sup>85</sup>

The most obvious political safeguard was to ensure that the States would be equally represented in the Senate.<sup>86</sup> The idea, following the example of the United States and Swiss Constitutions, was that it was appropriate in a genuine federation that the people of the entire nation should be represented on a proportional basis in one house of the Federal legislature, and that the peoples of each of the constituent States should be equally represented in the second chamber. For some, there was an expectation that senators would represent the interests of their respective States. Among others it was rather hoped that the design of the Senate would help to integrate the peoples of the States into a federal commonwealth, and that it was in their view a matter of justice, rather than *Realpolitik*, that the Federal Parliament should be so constructed. Unlike the Swiss and United States systems, however, the Australians were committed to constructing a national government which would remain under British imperial authority. Moreover, the Australian colonies had been governed for at least fifty years under local systems of responsible parliamentary government, and there were many who wished to adopt such a system, as had been done in Canada, for the federal government. Now, Westminster systems of parliamentary government turn on the capacity of parliaments to refuse to pass the annual supply bills and it is the lower house in particular which, being popularly elected, is regarded as the house to which the government is especially accountable. As a result, those among the framers of the *Australian Constitution* who strongly supported the adoption of such a system generally sought to restrict the powers of the Senate, especially in relation to money bills, with a view to giving the House of Representatives a pre-eminent role in the formation of governments. At the same time, however, there was a significant number of framers who believed that genuine federalism required not only a Senate in which the States were equally represented, but also a Senate that had powers equal, or near-equal, to those of the House of Representatives, no matter what consequences this might have for the traditional Westminster idea that

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<sup>85</sup> For more detail, see Nicholas Aroney, *The Constitution of a Federal Commonwealth: The Making and Meaning of the Australian Constitution* (2008) (forthcoming).

<sup>86</sup> *Australian Constitution* s 7.

only the lower house should have significant financial powers. The clash between these two partly-overlapping groups — those in favour of parliamentary responsible government and those in favour of a powerful Senate — lay at the heart of much of the debate at the Federal Conventions of the 1890s.<sup>87</sup> And the compromise at which they arrived was that the House of Representatives would have sole responsibility for the initiation of budgetary legislation, that the Senate would have no power to make amendments to such bills, but that the Senate would otherwise have the same powers as the House, including a power to reject or refuse to pass such bills.<sup>88</sup> Within these parameters the practices of parliamentary responsible government were left to develop, however they might.

In the very early stages of the new federal Parliament, as MPs were adjusting to the new arrangements and the party system was still in an early stage of development, the Senate seems to have exercised a significant role in the formation of governments, but this soon gave way to a relatively rigid system of parliamentary responsible government, dominated by the House, especially as the hegemonic powers of the parties progressively took hold.<sup>89</sup> Governing parties were increasingly able to secure not only stable majorities in the House of Representatives, but also in the Senate. As a result, so far from protecting the political interests of the States, the Senate became a house dominated by party-discipline, such discipline being undergirded by the realpolitik of parliamentary government on the one hand and ideological divisions on the other. If Senators in any sense continued to represent the interests of their States or the political values of their respective peoples, this was rendered invisible upon the floor of Parliament, and could only be given expression within the secretive confines of the party-room floor. And if — as was in fact quite evidently the case — new life was injected into the Senate following the introduction of proportional voting in 1948,<sup>90</sup> it has remained equally the case that the Senate stands up to the government not because it represents the diverse interests of the States but because proportional voting has often enabled minor parties to secure the balance of power. Federal governments today only rarely command majorities in the upper house.<sup>91</sup> The Senate has become a house where the interests of a more diverse range of voters are represented, but it has not become — at least in terms of votes on the floor of the Senate — a house which represents the States in any practically significant sense. The Australian Senate, as was suggested earlier, is far less effective in representing the Australian States than its United States, Swiss and especially German counterparts. And in this respect, the first safeguard of Australian federalism has largely failed to live up to the expectations of its framers.

A collection of financial provisions, calculated to protect the interests of the States, has also failed to secure their intended objectives. At the time of Federation,

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87 See Brian Galligan & James Warden, 'The Design of the Senate' in Gregory Craven (ed), *The Convention Debates, 1891-1898: Commentaries, Indices and Guide* (1987) vol 6, 89.

88 *Australian Constitution* s 53.

89 See Geoffrey Sawer, *Australian Federal politics and law 1901-1929* (1956).

90 Harry Evans and J R Odgers, *Odgers' Australian Senate Practice* (11th ed, 2004), ch 4.

91 *Id.*, ch 1, Table 1.

the most ready and significant source of government revenue consisted of a number of different commodity taxes, most particularly excise and customs duties. In this context, elaborate arrangements were made under the *Constitution* for the eventual centralisation of the collection of taxes of this kind, balanced by provisions designed to return much of this revenue to the States.<sup>92</sup> Apart from this, however, the plan of the *Constitution* was that both the Commonwealth and the States would be financially independent and autonomous, in terms of their capacities to impose taxes, borrow money and determine government expenditure.<sup>93</sup> The Commonwealth would also have the power to make financial grants to the States, and to impose conditions on its expenditure. However, in terms of both expenditure and grants, it was expected that the Commonwealth would be limited to operating within the areas of legislative power expressly conferred upon it.

As it has happened, though, the Commonwealth was able to avoid the redistribution of excise and customs duties to the States by appropriating excess funds into trust accounts, a practice which the High Court upheld.<sup>94</sup> And while the States still have legal power to impose income taxes, the Commonwealth has now made it politically impossible for them to do so.<sup>95</sup> Worse, as has been noted, the High Court has allowed the Commonwealth to spend money on any purpose or objective that it likes<sup>96</sup> and, likewise, has allowed the Commonwealth to make grants to the States literally on the terms and conditions that it thinks fit<sup>97</sup> — an interpretation that has enabled the Commonwealth to exercise legally unlimited influence over the direction of State government policy in all manner of areas. The result in many of these areas has been Commonwealth policy domination<sup>98</sup> and fiscal imbalance,<sup>99</sup> under which the State governments spend vast revenues for which they are not politically accountable. Thus, while the framers intended to secure the continuing financial independence of the States, the system has been transformed (not least by High Court decisions). Yet another of the framers' federal safeguards has failed to operate as many had hoped or expected.

This brings us finally to the judicial safeguards of federalism. The framers of the *Australian Constitution* — who had the United States and Swiss examples before them, and who explicitly rejected the Canadian model as one designed to create a very strong centre and relatively weak provinces (a design admittedly mocked by subsequent events) — deliberately chose to construct a system which presupposed the existing powers of the States (as self-governing political

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92 See, eg, *Australian Constitution* s 94.

93 See Cheryl Saunders, 'The Hardest Nut to Crack' in Greg Craven (ed), *The Convention Debates 1891-1898: Commentaries, Indices and Guide* (1987) 149.

94 *New South Wales v Commonwealth* (1908) 7 CLR 179.

95 See Cheryl Saunders, 'The Uniform Income Tax Cases' in H P Lee and George Winterton (eds), *Australian Constitutional Landmarks* (2003) 62.

96 See above n66.

97 See above n67.

98 See above n4, n5.

99 See Brian Dollery, 'A Century of Vertical Fiscal Imbalance in Australian Federalism' (2002) 36 *History of Economics Review* 26; Warren, above n4.

communities) and in which only specific, limited legislative powers were conferred upon the Commonwealth.<sup>100</sup> The framers also deliberately chose to invest the High Court of Australia with jurisdiction to hear matters in which the constitutional validity of federal legislation could be placed at issue.<sup>101</sup> Moreover, the framers were particularly careful in drafting federal legislative powers to ensure that they were defined with as much precision as possible, very explicitly with the objective of enabling the States to continue to regulate those matters best reserved to the States. With the benefit of hindsight — in particular, with our experience of a High Court that has been at best indifferent to the framers' intentions — we may argue whether their drafting was deficient to achieve their purposes. However, their purposes were abundantly clear: only those matters properly of 'national concern' were to be conferred upon the Commonwealth.<sup>102</sup> As the first of two resolutions introduced by Edmund Barton at the Federal Convention of 1897 insisted:

... the powers, privileges, and territories of the several existing colonies shall remain intact, except in respect of such surrenders as may be agreed upon to secure uniformity of law and administration in matters of common concern.<sup>103</sup>

What is more — a point that has not been generally recognised — there is evidence that the framers intended that the various heads of power be read together, and in conjunction with the structure of the *Constitution* as a whole, so that each head of power should be interpreted in a manner which strikes an appropriate balance between the enumerated powers of the Commonwealth and the reserved powers of the States. Or, to put the point more specifically, on a number of occasions the view was expressed that the limitations written into each head of power were intended

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100 See, for example, *Official Report of the National Australasian Convention Debates, Adelaide* (1897), 29 (Baker), 41–2 (Turner), 175 (Isaacs), 245 (Fysh), 271 (Reid), 318 (Gordon), 338 (Cockburn), 377 (Barton). For a discussion, see Aroney, above n85, chs 9 and 10.

101 See, eg, *Official Report of the National Australasian Convention Debates, Sydney* (1891), 698 (Clark); *Convention Debates, Adelaide* (1897) at 24–5 (Barton), 115 (Wise), 129 (Symon), 272 (Reid), 336 (Trenwith), 369 (Barton), 937 (Dobson), 938 (Downer), 940 (Kingston), 950–51 (Symon), 952–3 (Barton), 953 (Higgins), 956 (Downer, Cockburn); *Official Report of the National Australasian Convention Debates, Melbourne* (1898) at 268 (Barton), 271 (Symon), 272 (Kingston), 275 (Downer), 279 (Higgins), 286 (O'Connor), 289 (Isaacs) 291 (Downer).

102 See, eg, *Convention Debates, Sydney* (1891) at 523–5, 781, 699–701 (Griffith), 698–9 (Inglis Clark); *Convention Debates, Adelaide* (1897), 767 (Holder), 769 (Carruthers), 770 (Deakin), 772 (Cockburn), 774 (Reid), 776–7 (Carruthers), 779 (Symon), 786 (Wise), 788, 790 (Symon), 792 (Braddon), 793–4 (Barton); *Official Record of the National Australasian Convention Debates, Sydney* (1897) at 1046 (Carruthers), 1077 (O'Connor), 1078–9 (Wise); *Convention Debates, Melbourne* (1898) at 11 (McMillan), 24 (Trenwith), 28 (Downer), 213–14 (Barton).

103 *Convention Debates, Adelaide* (1897) at 17, 395. This echoed the view of Samuel Griffith that the 'essential' and 'preliminary' condition of federation was that 'the separate states are to continue as autonomous bodies, surrendering only so much of their powers as is necessary to the establishment of a general government to do for them collectively what they cannot do individually for themselves, and which they cannot do as a collective body for themselves.' See *Convention Debates, Sydney* (1891) at 31–32; and compare Samuel Griffith, *Notes on Australian Federation: Its Nature and Probable Effects* (1896) at 6–7, 10.

to limit the capacities of the Commonwealth, not only under each paragraph of section 51, but under the entirety of section 51 as a whole.<sup>104</sup>

It should come as no surprise, then, that the early High Court, composed of three leading figures among the framers — Samuel Griffith, Edmund Barton and Richard O'Connor<sup>105</sup> — should have interpreted the *Constitution* in a way that largely reflected the prevailing assumptions, understandings and intentions of the founding generation. To this end, the Court developed a set of basic interpretive principles and fundamental doctrinal frameworks for the interpretation of Commonwealth legislative powers. As to basic interpretive principles, the Griffith Court held that the *Constitution* was to be interpreted in accordance with the principles established for the construction of parliamentary statutes, the general objective being to ascertain the intentions of the enacting legislature as these could be discerned from the words used, interpreted in their natural and ordinary sense. At the same time, however, it was recognised that the ordinary and natural sense of the words might not always be clear, and so the Court further accepted that, particularly to resolve ambiguity, evidence relating to the legislative history of the statute (in this case, the *Constitution*) might be admitted (although the Court also rather strictly insisted that while reference could be made to successive drafts of the Constitution through the course of the Federal Conventions, reference could not be made to opinions expressed by individual members of those Conventions).<sup>106</sup>

To this set of fundamental interpretive principles was added a basic doctrinal framework. Essential to that framework was the proposition that, although the *Australian Constitution* had finally been enacted into law by the Imperial Parliament, the *Constitution* was as to its text, structure and objectives the product of a federating agreement: negotiated upon the initiative of the governments of the several Australian colonies, within Federal Conventions established by legislation enacted by the colonial Parliaments, by delegates chosen by or on behalf of the voters in each colony, and ultimately approved by those same electors, voting on a State-by-State basis.<sup>107</sup> As such, the *Constitution* presupposed the existence of the States as self-governing and mutually independent political communities which were not forced, but freely agreed, to enter into the Federation upon terms negotiated among themselves. This, in turn, meant not only that each of the constituent States ought to be equally represented in one of the houses of the Commonwealth Parliament (the Senate), but also that the legislative and other

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104 Compare, eg, *Convention Debates, Sydney* (1891) at 201 (Cockburn); *Convention Debates, Melbourne* (1898) at 502–4, 596–7, 600, 1008–10 (Barton), 504–5 (Symon). For more detail, see Aroney, above n85, chs 7 and 8.

105 Griffith and Barton were acknowledged 'leaders' of the Conventions of 1891 and 1897–8 respectively, and O'Connor one of Barton's closest associates.

106 *Tasmania v Commonwealth* (1904) 1 CLR 329 at 333 (Griffith CJ), 350–55 (Barton J), 358 (O'Connor J).

107 See, in particular, the judgments of Griffith CJ in *Federated Amalgamated Governmental Railway and Tramway Service Association v New South Wales Railway Traffic Employees Association* (1906) 4 CLR 488 ('*Railway Servants case*') and *Baxter v Commissioners of Taxation (NSW)* (1907) 4 CLR 1087.

governmental powers of the States were prior to those of the Commonwealth, and indeed that the powers of the Commonwealth were essentially derivative in origin, and entirely dependent upon and wholly defined by the *Constitution*.

In this context, the framers emphatically rejected the Canadian model in which the existence and powers of the Provinces would be established and defined within the *Constitution*.<sup>108</sup> Rather, they decided merely to affirm that the Australian State Constitutions, and likewise the constitutional powers of the States, would 'continue' to exist after Federation.<sup>109</sup> It would take specific provision (predicated upon prior negotiated agreement) for the status and powers of the States to be in any respect altered or limited, and in certain particular respects this was done.<sup>110</sup> By contrast — and perhaps so obviously so that it is often overlooked — the Commonwealth was itself created, and its powers were conferred and defined, by the *Constitution*. That the Commonwealth is a government of enumerated powers is not, therefore, simply the result of the parties to the Federal agreement insisting on that as some kind of mindless accident of history. It flows rather from the fact that the Commonwealth was necessarily a creature of the *Constitution*, itself a creature of the States, and was created for particular, specifically-defined purposes.

Two further, more specific features of the constitutional scheme devised by the framers were important to the Griffith Court. The first was that the States and the Commonwealth stood in relation to one another as mutually independent, virtually sovereign, self-governing bodies politic. In order to preserve this constitutionally-intended state of affairs, this meant that the capacity of one to interfere directly with the other would have to be limited. The doctrine of the immunity of instrumentalities was the result.<sup>111</sup> Given that the Commonwealth and the States, like any entity recognised by the law as having legal personality, would have to act through various instrumentalities, the idea was that neither the Commonwealth nor the States could interfere with the instruments through which either sought to pursue its governmental purposes. The second feature of significance had to do with the conferral of specific, carefully delineated powers upon the Commonwealth and the preservation of all powers not so conferred to the States. This scheme, the Griffith Court reasoned, suggested a particular approach to the interpretation of Federal legislative powers, commonly known today as the State reserved powers doctrine.<sup>112</sup> Reference to the doctrine is often made, but its textual foundations and precise meaning are not always clearly explained or well-understood.<sup>113</sup>

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108 *Official Record of the Proceedings and Debates of the Australasian Federation Conference* (1890) at 106, 108, 110, 133–8.

109 *Australian Constitution* ss 106, 107.

110 For example, s 90 of the *Australian Constitution*, which provides that the power to impose duties of customs and excise is exclusive to the Commonwealth.

111 *D'Emden v Pedder* (1904) 1 CLR 91; *Railway Servants* (1906) 4 CLR 488; *Baxter v Commissioners of Taxation (NSW)* (1907) 4 CLR 1087.

112 *Peterswald v Bartley* (1904) 1 CLR 497; *Attorney-General (NSW) v Brewery Employees' Union of New South Wales* (1908) 6 CLR 469 ('*Union Label Case*'); *R v Barger* (1908) 6 CLR 41; *Huddart, Parker* (1909) 8 CLR 330.

For instance, the reserved powers doctrine is sometimes said to consist simply in the idea that Federal powers are to be interpreted in a way which does not allow the Commonwealth to legislate in certain fields said to be reserved to the States.<sup>114</sup> When more precision is added to this amorphous idea, it is said that the fields reserved to the States have to do with matters concerning their ‘internal’ or ‘domestic’ affairs,<sup>115</sup> and that the textual basis for this idea is contained in s107, which lays down that those State powers not exclusively conferred upon the Commonwealth or removed from the States shall continue.<sup>116</sup> Yet articulated in this way it is difficult to ascertain precisely what the reserved powers doctrine means, and it is even more difficult to see how s107 could provide any clear guidance as to what exactly is reserved to the States.<sup>117</sup> Indeed, on close analysis, this way of understanding the doctrine *seems* to have the process backwards. Given that it is the powers of the Commonwealth that are specifically enumerated, should we not first identify what is given to the Commonwealth *before* we are in a position to say what has been retained by the States? Without that step, the reserved powers doctrine seems to suggest that certain (undefined) fields of power have been reserved to the States, and that these reservations help to define and limit the scope of power that has been (explicitly) conferred upon the Commonwealth. When presented in this way, the reserved powers doctrine *seems* incoherent indeed.<sup>118</sup> However, the problem is that this is to conjure with a caricature of the doctrine and not with the reserved powers doctrine as it was actually developed by the Griffith Court.

A clue to understanding the underlying logic of the position lies in the observation, often made by commentators and referable to the judgments of the Griffith Court, that the powers said to be reserved to the States consisted, primarily at least, in the regulation of intra-state or domestic trade and commerce.<sup>119</sup> What is the basis of this proposition? Clearly s107 makes no mention of it. Rather, the source of the proposition lies in s51(i) of the *Constitution*, which says that the Commonwealth is empowered to legislate with respect to interstate trade and commerce. And here is the rub. The limited language of s51(i) can be read in one of two different ways.<sup>120</sup> On one hand, it can be understood as meaning simply that the Commonwealth has no power *under the interstate trade and commerce power*

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113 For more detail, see Nicholas Aroney, ‘The Griffith Doctrine: Reservation and Immunity’ in Michael White & Aladin Rahemtula (eds), *Queensland Judges on the High Court* (2003); Aroney, above n36.

114 Katherine Lindsay, *The Australian Constitution in Context* (1999) at 67; Patrick Keyzer, *Constitutional Law* (2<sup>nd</sup> ed, 2005) at 26.

115 Melissa Castan & Sarah Joseph, *Federal Constitutional Law: A Contemporary View* (2001) at 44.

116 Keven Booker, Arthur Glass and Robert Watt, *Federal Constitutional Law: An Introduction* (2<sup>nd</sup> ed, 1998) at 40.

117 *Id* at 41.

118 *State Banking Case* (1947) 74 CLR 31 at 83 (Dixon J).

119 *Huddart, Parker* (1909) 8 CLR 330 at 350 (Griffith CJ).

120 We here put aside interpretations of the United States commerce power, also noting the interpretation that has been given to the Australian provision by the High Court. See below n219.

itself to legislate with respect to intrastate trade and commerce. On the other hand, and more radically, it can be read as meaning that the Commonwealth has no power at all, *under any of its powers*, to legislate with respect to intrastate trade and commerce. On this second view, the limited language of s51(i) has negative implications, not only for the meaning of the paragraph itself, but for all of the other paragraphs in s51.<sup>121</sup>

Thus, at the heart of the reserved powers doctrine, in its most plausible and persuasive form, is the proposition that the limited terms in which each head of power is conferred upon the Commonwealth has implications for how each other head of power is to be interpreted. Most strongly put, this amounts to a negative implication and a strict reservation of power. At the least, it amounts to the proposition familiar in every day conversation and discourse, that the heads of power under s51 need to be read in the light of each other; it is not simply a matter of reading each head of power in isolation and giving it the widest possible meaning that is conceivably consistent with the actual words used.<sup>122</sup> When viewed in this way, what is *not* granted under a head of power is just about as significant as what *is* granted. The qualifying language of each head of power implies a prohibition on the use of other heads of power to enter that delimited field.

As applied by the Griffith Court, this did not mean, simply, that a negative prohibition discerned in one head of power would necessarily cut down the plain language of another. While the Griffith Court certainly insisted that the negative prohibition had to be taken into consideration, it also insisted that the positive language of each head of power had to be taken seriously. As a consequence, the Court accepted that the affirmative words in which a head of power was conferred had to be given their due effect, so that if a particular head of power plainly and unavoidably authorised legislation in a field that happened to be excluded from the scope of another, full effect of that first positive grant still had to be given. This meant that careful attention had to be given to both the positive and the negative language used in s51. In practice, then, the Court looked to both provisions. A negative implication from one head of power would only prevail if it could be integrated with a defensible, narrow reading of the positive terms of another head of power. The reserved powers doctrine was not a pretext for emasculating each head of power entirely, otherwise the negative implications of each head of power would threaten to overwhelm the positive grants altogether.<sup>123</sup>

It may help to explain this with an example, taken from the cases. Consider the interstate trade and commerce power (s 51(i)) in its relationship to the power to

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121 The doctrine was for this reason also called, at the time, the doctrine of implied prohibitions. The clearest statement of the doctrine as such appears in *Union Label Case* (1908) 6 CLR 469.

122 After all, each of the heads of concurrent Federal power are collected into the one section (s 51) and are dependent for their operation on the general words that appear at the beginning of the section ('The Parliament shall ... have power to make laws ... with respect to ...'). What more, other than saying so explicitly, could the framers have done to make clear that each head of power was to be read in the context of the others?

123 See Aroney, above n36.

legislate with respect to trading, financial and foreign corporations (s 51(xx)).<sup>124</sup> Notably, the latter power extends to ‘trading corporations’. Let us assume that trading corporations are corporations which engage in trade. Two closely related questions immediately arise. Does the corporations power in principle enable the Commonwealth to make laws which regulate the trading activities of trading corporations and, if so, does it enable the regulation of intrastate trade, as well as interstate trade?<sup>125</sup> One possible view (as will be seen later, in more detail) is that the corporations power is directed to the special issues raised by the formation and operation of corporations *qua corporations* and authorises the Commonwealth to make laws which address these issues in the specific case of trading, financial and foreign corporations. A second possible view is that the power is directed to the special issues raised by the idea, not only of corporations *qua corporations*, but also of trading corporations *qua trading* corporations (and financial corporations *qua financial* corporations, and so on). On this second view, laws regulating the trading activities of trading corporations and the financial activities of financial corporations might be constitutionally justified, but on the first view they would not. A choice has to be made. Here, the reserved powers doctrine did its work by suggesting that, as an interpretive choice has to be made, the existence of the interstate trade and commerce power suggests that the narrower view is to be preferred — s51(i) is *the* source of the Commonwealth’s power to regulate trade and commerce, no matter what kinds of legally recognised persons (artificial or natural) undertake that trade and commerce.<sup>126</sup>

The same basic proposition can be presented in a different way. Assume that the corporations power is especially concerned with the problems that trading corporations present as *trading* corporations. Having assumed that, it remains the case that the trading activities of particular trading corporations may or may not be conducted within the boundaries of a particular State. Can the corporations power be used to support a law which regulates the solely intrastate or domestic trading activities of a trading corporation? Read on its own, without any reference to s51(i), we might conclude that the corporations power can and ought to be read in this way. However, when the corporations power is read with the interstate trade and commerce power, that inference, for some, collapses — the argument being that the requirement in s51(i) that a law under that paragraph can only extend to *interstate* trade and commerce implies a prohibition on the scope of s51(xx), so that a law under the corporations power can likewise only extend to the regulation of the *interstate* trading activities of such corporations.<sup>127</sup> On this view, the idea is that when the framers turned their minds to the general topic of ‘trade and

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124 Both provisions have been reproduced above.

125 This was the question posed in *Huddart, Parker* (1909) 8 CLR 330 and *Strickland v Rocla Concrete Pipes Ltd* (1971) 124 CLR 468 (‘*Strickland*’).

126 Thus the reserved powers doctrine did not operate simply as an absolute prohibition. On the interpretive choice that had to be made, see *Huddart, Parker* (1908) 8 CLR 330 at 370, 363; *R v Barger* (1908) 6 CLR 41 at 69; *Union Label Case* (1908) 6 CLR 469 at 502–3.

127 While space prevents us from elaborating the point, the same conclusion can be arrived at by putting it in terms of the characterisation of the statute, rather than the interpretation of the head of power.

commerce' in s51(i) they decided to limit the Commonwealth's powers to legislating with respect to *interstate* trade and commerce alone, and that this limit was intended to apply to the other heads of power as well as to s51(i). But of course, this view can only come into play when there is a defensible interpretation of the positive grant which can be combined with the negative implication to support this conclusion.

This is the strongest version of the reserved powers doctrine, in its classical and most precise form. We also think it to be the most plausible and persuasive version, and we think this is so for a number of interconnected reasons. Firstly, the evidence from the *Convention Debates* strongly suggests that this is what the framers understood themselves to be doing when they drafted and debated s51.<sup>128</sup> Secondly, it is the approach actually adopted by Griffith, Barton and O'Connor JJ, men who played roles second to none in the actual drafting of the *Constitution*.<sup>129</sup> Thirdly, it is consistent with the well-established general principle of interpretation that legal documents should be construed as a whole.<sup>130</sup> Fourthly, it gives weight to the fact that the (concurrent) heads of power conferred upon the Commonwealth appear in a single section of the *Constitution* (s 51), a fact that supports the proposition that the various paragraphs in that section ought to be read together. Fifthly, it reflects the underlying federal logic of the *Constitution* under which the Commonwealth was granted specific, enumerated powers (while the States' powers were reserved by only a general provision (s 107)), not because the Commonwealth's powers were in any sense original and the States merely derivative, but rather because the Commonwealth was a creature of the *Constitution*, whereas the States were its founding presupposition.<sup>131</sup>

Now the reserved powers doctrine, as is often said, was exploded by the *Engineers* case of 1920.<sup>132</sup> By this time, the first three members of the High Court had retired or died, and had been replaced by a new generation of justices whose intellectual leadership shifted to Justice Isaac Isaacs.<sup>133</sup> Notably, Isaacs J, and with him Higgins J, had consistently found themselves in the minority during the *Convention Debates* on questions of the balance between Commonwealth and State power. Time after time, the weight of opinion in the *Convention Debates* went against them, a weight of opinion with which Griffith and especially Barton and O'Connor were almost always associated.<sup>134</sup> The change in personnel on the

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128 See the references cited above n100–105.

129 Isaac Isaacs and Henry Bourne Higgins were also heavily involved, but they very consistently found themselves in the minority during the debates and had no formal role in the drafting committees.

130 *R v Barger* (1908) 6 CLR 41 at 72; *Huddart, Parker* (1909) 8 CLR 330 at 350.

131 On Isaacs J's contrary theory of the 'residual' powers of the States, see Aroney, above n113.

132 Robert Garran, *Prosper the Commonwealth* (1958) at 180. See also *State Banking Case* (1947) 74 CLR 31 at 83 (Dixon CJ); *Airlines of New South Wales v New South Wales (No 2)* (1965) 113 CLR 64 at 79 (Barwick CJ); *Strickland* (1971) 124 CLR 468 at 485 (Barwick CJ).

133 On Isaacs' life, see Zelman Cowen, *Isaac Isaacs* (1993).

134 See, for example, J A La Nauze, *The Making of the Australian Constitution* (1974) at 120, 150–51. Samuel Griffith, then Chief Justice of Queensland, was not present at the Convention of 1897–8, but his influence was certainly felt.

High Court by 1920 gave Isaacs and Higgins JJ their first real opportunity to re-interpret the *Constitution* in accordance with their own conceptions and preferences.

The majority joint judgment delivered in the *Engineers* case, generally thought to have been written by Isaacs J, turned against the basic interpretive framework that had been adopted by the Griffith Court, even though it continued to adhere to its underlying interpretive methodology. Indeed, the joint judgment strongly reiterated the principle that the *Constitution* is to be interpreted according to the ordinary canons of construction of parliamentary statutes, discerning the intention of the legislature from the actual words used, interpreted according to their ordinary and natural meaning. But, in the joint judgment, this principle now operated within a different conceptual framework. Rather than deriving its legitimacy and underlying logic from the federating agreement between the peoples and representatives of the Australian States, the *Constitution* was now conceived to be a creature of the Imperial Parliament (and perhaps, too, a compact of all the people of Australia, regarded as an undifferentiated whole).

Regarding the *Constitution* in this way left open a very different interpretation of the distribution of powers as between the Commonwealth and States. Of course the idea of a sovereign legislature establishing and distributing power between the Commonwealth and the States might have suggested that neither was to be given interpretive priority. Nothing explicitly foreclosed that reading. Still, given the fact that only the powers of the Commonwealth were specifically enumerated, it was always likely that on this approach the first inquiry would be one of identifying the scope of Commonwealth power, and that the powers retained by the States would merely be those left over after full consideration had first been given to the powers of the Commonwealth.

To this methodological point was added an injunction that even the Griffith Court had entertained, namely that in the interpretation of the powers conferred upon a colony by the Imperial Parliament, it was the duty of the courts to read the grant as widely and liberally as the words used permitted.<sup>135</sup> If the scope of Commonwealth power were to be ascertained without giving thought to the scope of power left over to the States, and if the terms of each grant of power to the Commonwealth were to be read as widely as the language would permit, it is (and was) to be expected that the Commonwealth's powers would wax and what was left over to the States would wane as the full scope of Commonwealth power was progressively determined, in case after case.

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135 In the hands of the Griffith Court, the principle operated in the context of a recognition that Federal heads of power were inherently capable of alternatively wider and narrow interpretations, and that the wider interpretation was to be preferred unless there was something in the context or in the rest of the Constitution to indicate that the narrower interpretation would best carry out its object and purpose. See *Jumbunna Coal Mine, No Liability v Victorian Coal Miners' Association* (1908) 6 CLR 309 at 367–8 (O'Connor J). In later cases, the principle was not so qualified. See the development in *R v Public Vehicles Licensing Appeal Tribunal (Tas)*; *Ex parte Australian National Airways Pty Ltd* (1964) 113 CLR 207 at 225–6; *Grain Pool of Western Australia v Commonwealth* (2000) 202 CLR 479 at 492.

The interpretive framework presented by the Court in *Engineers* is now orthodoxy and the received understanding of most commentators. But in terms of the federal division of powers, what was at least as critical was an even more specific methodological principle. This was the proposition that each head of power is to be read, not only originally and liberally, but without any reference to what was and what was *not* granted under the other heads of power. By isolating the interpretation of each head of power from its context, the reserved powers doctrine in its strongest and most persuasive and plausible form was thoroughly undermined. While little attention (until recently) has been given to this aspect, we think this was the critically important move that enabled the powers of the Commonwealth to wax so large. As this method and this principle have been applied over the decades since 1920, the result has been an ever-widening vista of Commonwealth legislative power. Each step, since then, has often made sense enough when tested solely against what went before and confined to the post-1920s interpretive framework and heads of power isolationism. And yet, as we indicated at the outset of this article, the overall result has been a most *uncommon* one indeed.

## 6. *How Did We Get to Where We Are?*

It is not enough, however, simply to assert that a particular interpretive method has produced extraordinary results. We need to be more specific. In our view, the corporations power provides one of the clearest illustrations of how the implications of the *Engineers* case have worked themselves out, gradually manoeuvring the Commonwealth into a position of constitutional dominance over the States. In this section, we will seek to show how this has been the case, firstly by identifying a number of different possible views of the scope of the corporations power, and secondly by showing how the High Court has almost always opted, at least eventually, for the widest view available, a tendency most emphatically demonstrated by its most recent decision on the corporations power, *New South Wales v Commonwealth*, commonly known as the *Work Choices* case.<sup>136</sup>

The gradually expanding scope of the corporations power has played itself out in a number of dimensions. Under s51(xx), as has been noted, the Commonwealth has power to legislate with respect to ‘foreign corporations, and trading or financial corporations formed within the limits of the Commonwealth’. The first dimension in which the power has been interpreted has had to do with the significance accorded to the noun ‘corporations’, the limiting adjectives ‘trading’, ‘financial’ and ‘foreign’, and the participle ‘formed’. The narrowest view, the position adopted by the majority in the High Court’s first case on the power, *Huddart, Parker & Co Ltd v Moorehead*,<sup>137</sup> places a great deal of emphasis on the distinctive characteristics of ‘corporations’, as distinct from other types of legal persons. The idea here is that the power is concerned with the particular kinds of issues which corporations pose for a legal system. Corporations are by nature artificial legal persons, recognised by the law only because a statute grants them legal status. Corporations are also distinct from their members or shareholders.

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<sup>136</sup> *Work Choices* (2006) 229 CLR 1.

<sup>137</sup> *Huddart, Parker* (1909) 8 CLR 330.

This means that, especially in the typical case of limited liability companies, the liability of the corporation to outsiders is limited to its paid-up share capital. Shareholders are thus able to pool their resources to achieve joint objectives, but they are also able to distance themselves from the corporation and avoid personal responsibility for its debts and other obligations. A unique and very significant set of policy issues are thus raised by statutes which provide for the incorporation of companies, and for this reason laws enabling the formation of corporations are usually accompanied by laws regulating questions of responsibility and liability for corporate activities.

Now, the effect of corporations statutes will necessarily be limited to the territorial jurisdiction of the enacting legislature. If a company is incorporated under foreign law, there is the question of whether, and if so on what terms and conditions, its distinct legal personality is to be recognised within Australia. Similarly, if the company is incorporated under the law of a particular Australian State, there is the question of whether, and if so on what terms and conditions, its distinct legal personality is to be recognised throughout the Commonwealth. In both cases, there is a need for extra-jurisdictional recognition of the juridical personality of corporations, and consideration has to be given to whether special regulations need to be imposed on such corporations in light of their distinct legal personality and limited liability. To return to the interpretation that is to be given to the corporations power, then, the point is that, given these characteristic features of corporations, the kinds of laws that can be made under the corporations power on this narrow view extend only to the recognition of such corporations beyond their 'home' jurisdictions and to the placing of conditions upon this recognition appropriate to their status and operation as such (such as making special provision for the protection of creditors and the like). On this view, the qualification 'foreign' is significant in that it is obviously in respect of foreign corporations that there is a need for Australian 'recognising' legislation, and the qualifications 'trading' and 'financial' are significant in that it was thought necessary that the Commonwealth have power to legislate for the Australia-wide recognition of these particular kinds of corporations more than any others. (The interstate recognition of other kinds of corporations was thought either to be unnecessary, or if necessary, appropriately the subject of a referral of powers or interstate agreement.) In this context, the qualifying adjectives (trading, financial and foreign) indicate the types of corporations that can be the object of laws under the corporations power but, beyond this, they have no further significance.<sup>138</sup>

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138 In the majority joint judgment in *Work Choices*, much is made of differences in the precise formulations proposed by the individual justices in *Huddart, Parker* as if this rendered the general approach somehow suspect. (See *Work Choices* (2006) 229 CLR 1 at 29–30.) However, firstly, the most significant difference was between the view of Isaacs J, on one hand, and the views of Griffith CJ, Barton and O'Connor J on the other, which was of course premised on their disagreement over the reserved powers doctrine. Secondly, the phenomenon of difference in points of detail is a general characteristic of High Court decision-making whatever general view of the scope of federal power is adopted. Relatively wider approaches to interpretation do not exempt the Court from having to define the precise boundaries of the power, and on questions of detail such as these, differences of opinion are just as likely as when the Court adopts a relatively narrower approach.

An alternative, moderately wider view, rests upon a significantly different interpretation of the words of s51(xx). On this view, the noun ‘corporations’ is given no real significance beyond that of identifying the particular kinds of legal persons that are the object of the power, while the qualifying adjectives (especially ‘trading’ and ‘financial’) are given a special, additional significance. They indicate not only the particular kinds of corporations to which the power relates but also the kinds of activities of those corporations that can be regulated under the power. It follows, on this second view, that legislation based on the corporations power extends not only to the legal recognition of particular kinds of corporations within and throughout Australia but also to the regulation of the specifically *trading* activities of trading corporations and the specifically *financial* activities of financial corporations. Perhaps, at a stretch, the power might even extend on this general view, not only to the regulation of the trading activities of trading corporations, but also to activities undertaken for the purposes of those trading activities.

This second view is the position at which the High Court more or less arrived in its decision in *Strickland v Rocla Concrete Pipes Ltd* in 1971.<sup>139</sup> In this case, the Court rejected the attempt in *Huddart, Parker* to read the corporations power as being concerned only with the recognition and regulation of corporations *qua* corporations, anathematising the decision as one illegitimately founded upon the reserved powers doctrine. Instead, the Court upheld legislation which regulated the trading activities of trading corporations, whether or not such activities extended beyond the confines of any particular State. In this way, the Commonwealth was allowed to regulate the *intrastate* trading activities of trading corporations, notwithstanding the fact that s51(i) of the *Constitution* deliberately confers legislative power only in respect of *interstate* trade and commerce; and, indeed, the ‘outer limits’ of the power were deliberately left open for determination in future cases.<sup>140</sup> In subsequent cases, this policy of deciding only so much as was necessary to determine the issues before the Court meant that, while a determined minority often wished to go further by way of *obiter dicta*,<sup>141</sup> they were met by a countervailing majority consisting of justices who either limited their decisions to the exact issues raised in each case,<sup>142</sup> or else believed that the power ought to be limited to the regulation of trading activities (or, at most, to activities engaged in for the purpose of trade)<sup>143</sup> lest the power be used to regulate trading corporations in any respect whatsoever, and thereby upset what some justices were still willing to call ‘the federal balance’.<sup>144</sup>

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139 *Strickland* (1971) 124 CLR 468.

140 *Id* at 489–90 (Barwick CJ).

141 For example, *Actors and Announcers Equity Association of Australia v Fontana Films Pty Ltd* (1982) 150 CLR 169 (‘*Actors and Announcers Equity*’) at 207–8 (Mason J), 211 (Murphy J); *Tasmanian Dam* (1983) 158 CLR 1, 148–9 (Mason J); *Re Pacific Coal Pty Ltd; Ex parte Construction, Forestry, Mining and Energy Union* (2000) 203 CLR 346 (‘*Re Pacific Coal*’) at 375 (Gaudron J).

142 For example, *Actors and Announcers Equity* (1982) 150 CLR 169 at 218–22 (Brennan J).

143 *Id* at 182 (Gibbs CJ) (‘the nature of the corporation to which the laws relate must be significant as an element in the nature or character of the laws’); *Tasmanian Dam* (1983) 158 CLR 1 at 117–9 (Gibbs CJ).

Beyond this position, however, is a third, significantly wider view, which is that the noun 'corporations' and the qualifying adjectives 'foreign', 'trading' and 'financial' do no more than indicate the kinds of legal persons to which Federal laws must relate under the power. On this much broader view, all that is necessary is that the law takes as its discriminating feature the existence of one or more of these kinds of corporation (for convenience, we might call them 'constitutional corporations') and makes such corporations the direct or indirect objects of its command.<sup>145</sup> The position is seductively simple and seemingly straightforward. However, the ramifications are significant and many. In the first place, on this expansive view it would now fall entirely within the power of the Commonwealth to regulate *any* of the activities of constitutional corporations: imposing duties, bestowing powers and conferring rights in *any* respect. Furthermore, where rights are bestowed or powers are conferred, the correlative duties and liabilities must fall on other persons, and thus it would follow that laws enacted under the corporations power impose duties on such persons and expose them to potential liability. That would mean that while the scope of the power under this third, expansive view might be limited to the imposition of duties upon persons having direct dealings with constitutional corporations, it could also be possible to take the position that the power extends to the imposition of duties (and perhaps even to the conferral of rights) upon persons whose relationship to a constitutional corporation is only indirect as when one person provides goods or services to, or has other kinds of dealings with, a second person who in turn provides those (or related) goods or services to, or has dealings with, a constitutional corporation.<sup>146</sup> Moreover, because this expansive view more or less eliminates the significance of the kind of corporation that is being regulated, there is no reason why Federal laws cannot regulate not only the external relations of corporations but also their internal relations, including the relations of constitutional corporations with their employees. As will be seen, the High Court, in the recent *Work Choices* case, has arrived at substantially this expansive position.

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144 As Dawson J put it, 'the way in which the law operates upon [constitutional corporations] must be such that they impart their character to the law ... the fact that it is a trading or financial corporation should be significant in the way in which the law relates to it': *Re Dingjan; Ex parte Wagner* (1995) 183 CLR 323 (*'Re Dingjan'*) at 346. In the cases, there was a division among the justices as to whether the power was limited to the regulation of trading activities, of activities undertaken for the purpose of engaging in trading activities or extended to the regulation of any activities of a trading corporation whatsoever. This latter position, on our analysis, merges into the third and widest view of the scope of the power in this respect.

145 See the judgments cited below n149, 171–2, 174.

146 In *Actors and Announcers Equity* (1982) 150 CLR 169, the Court held that the corporations power extended not only to the regulation but also to the protection of the trading activities of trading corporations, upholding a law which penalised acts of third parties which caused loss or damage to such corporations. However, in *Re Dingjan* (1995) 183 CLR 323, a majority of the Court were not prepared to uphold a law which gave the Australian Industrial Relations Commission power to set aside or vary unjust contracts entered into between natural persons which had some relation to the business of a constitutional corporation.

Related to these three competing views or interpretations of the significance in s51(xx) of the words ‘corporation’, ‘trading’, ‘financial’ and ‘foreign’ are others concerning the significance of the participle ‘formed’. Given that the word is connected to the noun ‘corporations’ in the passive voice (i.e., ‘corporations formed’), different interpretations are again possible. Firstly, there is a narrow view, in which the past tense or perfect form of the participle is significant. On this view, the power is understood as being related strictly to corporations that have already been formed, so that it does not extend to a power to provide for the incorporation or creation of corporations, but only for their regulation once in existence. However, on a second, wider view, the word ‘formed’ has no such significance, but rather leaves room for the Commonwealth to enact comprehensive corporations laws providing for the formation, internal management, external regulation and dissolution of corporations. On the former view, corporations can only become objects of the power if they have already been formed under the laws of another country or under the laws of one of the States. If a strong political consensus were to emerge that a uniform companies code was warranted, then on this view, any such scheme would have to be a matter for co-operative legislation or a referral of powers to the Commonwealth by the States. And, indeed, just this has occurred in Australia where companies have for some time been regulated by co-operative legislation.<sup>147</sup>

Despite the general trend noted so far, on this point it has to be acknowledged that the High Court in the *Incorporation* Case actually adopted the narrower view, rejecting the proposition that the Commonwealth has the capacity under the corporations power to legislate for the incorporation of companies.<sup>148</sup> However, having conceded that, it also has to be noted that in the very decision to reject a power to legislate for incorporation, there is a sense in which the Court at the same time provided itself with grounds for adopting the third and widest view of the scope of the corporations power, as outlined above. Notice that the third and widest view rests on the proposition that the corporations power simply extends to laws that have a sufficient connection to a *given* set of legal persons, namely to the three specific categories of constitutional corporation. These are taken as *existing* because they are already *formed*. Although in the *Work Choices* case the idea that the Commonwealth’s power does not extend to the formation of corporations was used by the plaintiffs as a basis upon which to conclude that the power does not include the regulation of matters ‘internal’ to corporations (such as its relations with its employees),<sup>149</sup> there is a sense in which the proposition that the power extends only to corporations already *formed* undergirds the conclusion that the corporations power enables the Commonwealth to make laws which take as their discriminating feature the *existence* of one or more of these kinds of corporation.<sup>150</sup>

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147 The *Australian Constitution* s 51(xxxvii) confers upon the Commonwealth the power to exercise legislative powers referred to it by the States.

148 *Incorporation Case* (1990) 169 CLR 482.

149 *Work Choices* (2006) 229 CLR 1 at 23, 28, 30–34, 44 discusses the reasoning of Isaacs J in *Huddart, Parker* (1909) 8 CLR 330.

The final dimension along which the High Court of Australia has recognised an increasing scope for the corporations power concerns the approach taken when determining whether a particular corporation falls within the category of a trading or a financial corporation. The characterisation of foreign corporations has been relatively straightforward; it is a simple question of the location of the jurisdiction in which the company has been incorporated.<sup>151</sup> However, in the case of trading and financial corporations, there are two obvious alternatives. The first is to ascertain the character of the corporation by reference to its objectives and purposes as set out in its corporate constitution. The second is to attend to the actual activities of the corporation and to determine whether these are sufficiently 'trading' or 'financial' in character. Now, considered abstractly, it is possible that either of these alternative approaches might take in a larger number of corporations and thus expose more corporations to the law-making power of the Commonwealth under the corporations power. However, in practice, the question has generally arisen in cases in which the outer limits of the power are being tested. Cases have not arisen in relation to corporations formed unambiguously for trading or financial purposes, but in relation to other categories of corporations not mentioned in the corporations power, such as local government municipal corporations, incorporated social or sporting clubs, statutory corporations, and the like. Adopting the view that the character of such corporations is to be ascertained by reference to their objectives as set out in their corporate constitutions is often going to lead to the conclusion that the corporation is in nature essentially municipal or social or sporting in character and is not a constitutional corporation.<sup>152</sup> However, if attention is focused on the practical activities in which the corporation engages, there is going to be room to conclude that, in practice, a sufficiently significant proportion of the corporation's overall activities involve either trade or the provision of finance.<sup>153</sup> Indeed, this is especially the case if the Court decides, as some justices have suggested, that the trading or financial activities of the corporation need not be its 'predominant' undertaking, but merely 'substantial' or at least 'not insubstantial'.<sup>154</sup> It is even more so if the Court allows either the purposes or the activities tests to be used in the alternative, so that a

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150 In *Work Choices* (2006) 229 CLR 1 at 170, Callinan J observed that the definition of "constitutional corporation" in the Amending Act which introduced the *Work Choices* regime 'effectively assumes that s 51(xx) is capable of embracing every aspect of a corporation apart from its incorporation.'

151 *Incorporation Case* (1990) 169 CLR 482 at 497–8.

152 This was the position affirmed by Justice Isaacs in *Huddart, Parker* (1909) 8 CLR 330 at 393 and later adopted by a majority of the Court in *R v Trade Practices Tribunal; Ex parte St. George County Council* (1974) 130 CLR 533 (Gibbs & Menzies JJ, McTiernan J agreeing, albeit for different reasons).

153 This is the position finally arrived at by a majority of the Court following decisions in *R v Judges of Federal Court of Australia; Ex parte Western Australian National Football League (Inc)* (1979) 143 CLR 190; *State Superannuation Board v Trade Practices Commission* (1982) 150 CLR 282 and *Tasmanian Dam* (1983) 158 CLR 1.

154 Compare *R v Trade Practices Tribunal; Ex parte St. George County Council* (1974) 130 CLR 533 at 543 (Barwick CJ); *R v Judges of Federal Court of Australia; Ex parte Western Australian National Football League (Inc)* (1979) 143 CLR 190 at 234 (Mason J), 219 (Stephen J), 239 (Murphy J).

corporation will be found to be a constitutional corporation so long as it meets the criteria *either* in terms of its purposes (prior to engaging in any activity) or its activities, which is precisely the position at which the Court arrived in *Fencott v Muller* in 1983.<sup>155</sup>

In all of these dimensions we see the judicial exegesis of the corporations power developing from a relatively narrow approach through successively wider approaches, taking in more and more corporations, and more and more kinds of activities and relationships within the purview of the corporations power. In its interpretation of the corporations power, the High Court has steadily ratcheted-up its position from the first, through the second, to the third of the possible views of the general scope of the power, and has progressed from the more narrow to the much wider approach to determining whether a particular corporation is a trading or a financial corporation. When these two wide views are combined, as is now the case as a result the *Work Choices* case, the Commonwealth is given the capacity to regulate vast areas of human activity, far beyond the expectations of those who framed and ratified the *Constitution* and, indeed, far beyond the scope of power that the voting public has been prepared to grant to the Commonwealth when proposals for the amendment of the *Constitution* have been submitted to referendum.<sup>156</sup> It is only in respect of the power to provide for the creation and dissolution of corporations that a relatively narrow construction has been adopted (at least for the time being).<sup>157</sup> Yet even the adoption of this one narrow construction, as has been seen, functions to underwrite the wide reading of the corporations power that the High Court has adopted in all other respects.

## 7. *Is There a Way Back?*

The significance of the *Work Choices* case lies not only in its result, but in the fact that the case presented the High Court with an opportunity to rethink its entire approach to the interpretation of the legislative powers of the Commonwealth under the *Australian Constitution*. For the first time in many decades, and in a sense for the first time since the *Engineers* case, the issues raised and the arguments adduced by the parties enabled the Court to consider whether there could be any sense in which the old reserved powers doctrine might again find a place in the jurisprudence of the Court. Although the plaintiffs explicitly denied that they wished to resurrect the reserved powers doctrine,<sup>158</sup> when the specific elements of the doctrine are carefully compared with the arguments presented, it becomes apparent that the reserved powers doctrine was very much at issue, at least in substance, if not in name.

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155 *Fencott v Muller* (1983) 152 CLR 570.

156 *Constitution Alteration (Legislative Powers) Bill 1910; Constitution Alteration (Industrial Matters) Bill 1912; Constitution Alteration (Industry and Commerce) Bill 1926*, discussed in *Work Choices* (2006) 229 CLR 1 at 41–4, 196–208.

157 Note the dissenting judgment of Deane J in *Incorporation Case* (1990) 169 CLR 482.

158 *New South Wales v Commonwealth* [2006] HCATrans 215 (4 May 2006) 125 (Kirby J).

The principal question in the case was whether the *Workplace Relations Amendment (Work Choices) Act 2005* (Cth), which introduced a number of very significant amendments to the *Workplace Relations Act 1996* (Cth), was validly enacted, primarily under the corporations power. The central objective of the *Work Choices Act* was the replacement of State industrial relations laws (as well as what remained of the old Commonwealth industrial awards system) with a near-comprehensive national system designed to encourage the negotiation of workplace agreements directly between employers and employees without the intervention of third parties, such as trade unions. Under s51(xxxv) of the *Constitution*, the Commonwealth was given an explicit and carefully defined power to make laws with respect to ‘conciliation and arbitration for the prevention and settlement of industrial disputes extending beyond the limits of any one State’. As with the corporations power, the recognised scope of the industrial arbitration power has gradually increased over the years, as the Commonwealth has sought to expand the reach of its industrial arbitration system and the courts have acquiesced. The expression ‘industrial disputes’ was eventually interpreted to cover disputes in any employer-employee relationship, whether ‘industrial’ or not,<sup>159</sup> and the ‘interstate’ element was satisfied by mere ‘paper disputes’ manufactured through the trade union practice of deliberately issuing ambit claims against interstate employers.<sup>160</sup> Moreover, in amendments to the *Industrial Relations Act 1988* enacted in 1993 and 1994, the Commonwealth Parliament had widened the ambit of its industrial relations laws even further by relying not only on the industrial arbitration power, but also on its power to legislate in relation to interstate trade and commerce, external affairs and corporations.<sup>161</sup> However, that earlier regime, as well as the regime introduced by the *Workplace Relations Act 1996*, had left a substantial body of State law and regulation in force. The *Work Choices Act 2005* was calculated to sweep as much of this aside as possible.

The route chosen by the Parliament was one that connected the substantive aspects of the legislation to the definition of ‘employer’ in s 6 of the *Work Choices Act*. This section defined ‘employer’ as, amongst other things, ‘a constitutional corporation’, this expression being in turn defined in s 4 to mean a corporation to which s51(xx) of the *Constitution* applies. The meaning of ‘employee’ under the Act was in turn defined as a person employed or usually employed by such an ‘employer’. In this way the full range of rights and duties imposed by the Act upon employers and employees were given a connection to the Commonwealth’s power to regulate constitutional corporations. The Act also extended to persons who dealt with or represented such employees or employers.

The High Court, by a majority of five to two, upheld the entirety of the law, largely on the basis of s51(xx). Just as importantly, the majority reached this broad understanding of what s51(xx) authorises by rejecting various arguments that would have restricted its ambit. Hence, the argument that the explicit laying down

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159 *R v Coldham; Ex parte Australian Social Welfare Union* (1983) 153 CLR 297.

160 *Burwood Cinema Ltd v Australian Theatrical and Amusement Employees’ Association* (1925) 35 CLR 528.

161 See *Victoria v Commonwealth* (1996) 187 CLR 416.

of a more limited industrial disputes power in s51(xxxv) served to restrict the ambit or reach that could be attributed to s51(xx) was rejected, principally on the basis that this would entail, as it did, a return to a form of reserved powers reasoning.<sup>162</sup> Likewise, the proposition that a narrower construction of s51(xx) should be adopted to avoid altering the federal balance was rejected, this time on the basis that arguments from the ‘federal balance’ are contrary to the established principle that federal heads of power are to be interpreted as widely as the language used allows, without any thought being given to the impact on the powers left to the States.<sup>163</sup> Appeals to the *Convention Debates* and the original intentions of the framers and to the drafting history of s51(xx) and (xxxv) as evidence of a more limited reach for the power were also rejected.<sup>164</sup> And the fact that three attempts by Commonwealth governments to broaden the scope of its powers in this area had been defeated — that the 1910, 1912 and 1926 proposals to amend s51(xx) and (xxxv) to confer a general industrial relations power on the Commonwealth were put to referenda but each one failed to pass — was not seen as relevant but was dismissed in summary fashion.<sup>165</sup> Thus, each argument that would have restricted the ambit or scope of s51(xx) was rejected. Yet nothing in the majority’s Commonwealth-friendly interpretation or approach specifically required overriding any previous decision.<sup>166</sup> The outer reaches of s51(xx) having never before been specified, the majority in the *Work Choices* case could be seen as simply having adopted one of various plausible alternative readings or interpretations open to it.

The decision is significant for a number of reasons. Firstly, the Court upheld a law that enables the Commonwealth to control virtually the entire body of workplace relations law in Australia, sweeping aside State laws regulating important aspects of the field that, until recently, were thought to have been constitutionally-secure.<sup>167</sup> Secondly, and relatedly, the decision rendered the careful delineation of the Commonwealth’s power in s51(xxxv), in practical terms, almost completely otiose, as the Commonwealth under the corporations power can now regulate the workplace relations of constitutional corporations in any way that it wishes. Thus, the Commonwealth, the High Court has now held, is not limited to making laws dealing with actual or anticipated *industrial disputes*, and there is certainly no requirement that such disputes must *extend beyond the limits of any one State*. Nor is the Commonwealth limited to making provision for a system of *conciliation and arbitration* as a means of preventing and resolving such disputes. The Commonwealth can achieve its goals simply by conferring

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162 See *Work Choices* (2006) 229 CLR 1 at 29–30, 62; see also 33, 40. Justice Kirby denied that this was the case: *Work Choices* (2006) 229 CLR 1 at 125, 127. Whether this reasoning entailed reserved powers thinking depends on how we understand the reserved powers doctrine. For a discussion, see Aroney, above n36.

163 See *Work Choices* (2006) 229 CLR 1 at 20, 46, 55, 56, 57, 59–60, 60, 75, 76.

164 See *Work Choices* (2006) 229 CLR 1 at 34–41. (‘To pursue the identification of what is said to be the framers’ intention, much more often than not, is to pursue a mirage’: at 40.)

165 *Work Choices* (2006) 229 CLR 1 at 43–4.

166 *Work Choices* (2006) 229 CLR 1 at 44.

167 See the survey of the attitudes and assumptions of politicians, lawyers and judges catalogued in Callinan J’s judgment: *Work Choices* (2006) 229 CLR 1 at 186–208.

rights and imposing duties on corporate employers and their employees, including terms as to working conditions, wages, and so on, without limit. Bearing in mind the fact that up to 85% of employment relationships involve constitutional corporations,<sup>168</sup> the scope of the Commonwealth's power over industrial matters is vast indeed.

Such a sweeping result — one certainly not anticipated by the framers of the *Constitution* and, equally, one not contemplated by many successive generations of Australian lawyers, politicians and judges — was nonetheless entirely predictable, for it represented simply the next step in a succession of cases which have allowed increasing scope to the corporations power. Arguing against the validity of the law, as the plaintiffs were, meant they had to contend with a line of cases in which the expansionist implications of *Engineers* have gradually been enumerated. Of course, they could point out that the legislation would apply not only to corporations whose predominant activities were trading or financial in character (and which were formed particularly for this purpose) but would also capture corporations formed primarily for other purposes, such as local government corporations, government corporations, incorporated social and sporting clubs, and corporations formed primarily for charitable and religious purposes. However, the defendants could easily reply that this wider meaning of 'trading' or 'financial' corporation was open to it on the plain language of s51(xx), that the wider view was to be preferred, and that this view had been established in previous cases. Indeed, these had not been open questions since the High Court's decision in *R v Judges of the Federal Court of Australia and Adamson; Ex parte Western Australian Football League*, brought down in 1979.

The principal argument relied upon by the plaintiffs, however, was the proposition that the corporations power is limited to the regulation of the 'external', and does not extend to the 'internal', affairs of corporations. The relations of a corporation with its customers, contractors and creditors should be held to fall under the aegis of s51(xx), but not the relations of a corporation with its officers, employees and other functionaries. To support this argument the plaintiffs could point to the cases that had affirmed that the corporations power extends to the regulation of the trading activities of trading corporations.<sup>169</sup> They could argue that the power in s51(xx) is directed to the special problems posed by trading corporations as corporations *which engage in trade*, and thus is aimed at the regulation of their trading activities — activities that involve relations with persons external to the corporation. However, in response, the Court could just as easily rely on the general proposition which arguably underlay the extension of the power to the regulation of trading activities in the first place — that the power in s51(xx) is directed to certain species of *persons* and that the qualifying word 'trading' has no significance beyond identifying which class or classes of persons can be the object of laws under this head of power.<sup>170</sup> On this view, it suffices that a law discriminates in its application to constitutional corporations.<sup>171</sup> To deny

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168 A point noted in *Work Choices* (2006) 229 CLR 1 at 16–17, 146, 158, 161–2, 235.

169 And perhaps, too, to those activities that were in preparation for such trading activities. See below n171, n173.

this view would be to return to a position more restrictive than had been reached by a majority of the High Court in *Commonwealth v Tasmania*, decided in 1983.<sup>172</sup> In that case, a close majority decided that the corporations power could be used to regulate the non-trading activities of a trading corporation, so long as those activities were done for the purpose of its trading activities.<sup>173</sup> A minority, though, preferred a much less restrictive position, one not even requiring that the activities regulated be trading activities or even activities engaged in for the purposes of trade (the fourth member of the Court declining to address the issue).<sup>174</sup> In effect, all that mattered to those minority justices back in 1983 was that the law imposed duties on a trading corporation — any law directed to a constitutional corporation would be within power.<sup>175</sup>

Given the Commonwealth-friendly position hinted at by the minority in *Commonwealth v Tasmania* and left open by the fourth member of the Court,<sup>176</sup> we wonder whether the plaintiffs in the *Work Choices* case should have been bolder and should have directly attacked the decisions in which the regulation of the trading activities of trading corporations had originally been upheld. They might have argued that the point of the power is to regulate trading corporations in terms of the special issues raised by the specifically *trading* activities of such corporations, and that the power extends only to trading activities (*not* to ancillary activities and therefore *not* to any other non-trading related activities such as regulating the employment relationship). Alternatively, and more radically, the plaintiffs could have attacked the idea that the corporations power extends to the regulation of trading activities of trading corporations at all. The point of the power, they might have urged, is to enable the Commonwealth to deal with the special issues raised by corporations *qua corporations*, namely their corporate existence and character — matters such as providing for their recognition as jural entities throughout Australia, the placing of conditions upon this recognition, and perhaps the laying down of a regulatory scheme protecting creditors. However, to take this more radical line would have meant a reversal of *Concrete Pipes* and a return to the position which the High Court had originally adopted in 1909, in

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170 See *Strickland* (1971) 124 CLR 468 at 507–8 (Menzies J), 519 (Walsh J); but compare 490 (Barwick CJ), 525 (Gibbs J).

171 Compare *Re Dingjan* (1995) 183 CLR 323, 337 (Brennan J); *Re Pacific Coal* (2000) 203 CLR 346, 375 [83] (Gaudron J); *Work Choices* (2006) 229 CLR 1 at 55–6.

172 *Tasmanian Dam* (1983) 158 CLR 1, noting also *Actors and Announcers Equity* (1982) 150 CLR 169 and *Re Dingjan* (1995) 183 CLR 323.

173 In *Tasmanian Dam* (1983) 158 CLR 1, a majority of Gibbs CJ, Mason, Murphy, Brennan and Deane JJ upheld s 10(4) of the *World Heritage Conservation Act* 1983 (Cth), which prohibited a trading corporation from undertaking certain kinds of actions, but which added the qualification ‘for the purposes of its trading activities’. However, a majority of Gibbs CJ, Brennan, Wilson and Dawson JJ were not prepared to uphold s 10(2), which imposed the same prohibition without the additional qualification.

174 *Tasmanian Dam* (1983) 158 CLR 1 (Mason, Murphy & Deane JJ).

175 See *Actors and Announcers Equity* (1982) 150 CLR 169 at 207–8 (Mason J), 211–12 (Murphy J); *Tasmanian Dam* (1983) 158 CLR 1 at 149–50 (Mason J), 179 (Murphy J), 269–70 (Deane J).

176 Brennan J limited his decision to s 10(4) of the *World Heritage Conservation Act* 1983 (Cth), leaving the wider question of s 10(2) open.

*Huddart, Parker*, under the influence of the reserved powers doctrine, and before the landmark *Engineers* case of 1920.<sup>177</sup>

Needless to say, arguments such as those would have succeeded only if the High Court had been prepared to undo much of its corporations jurisprudence. It would also have required the undoing of a vast body of trade practices laws which have developed since the early 1970s.<sup>178</sup> Most crucially, it would have come perilously close to reaffirming the reserved powers doctrine. The plaintiffs in *Work Choices* were clearly very conscious of the formidable body of precedent that the Court would have to overturn, not only in respect of the corporations power itself, but as regards the whole body of federal distribution of powers law, premised as it is on a repudiation of the reserved powers doctrine. So, in the end, the plaintiffs had to find some way of making an argument that avoided any explicit appeal to reserved powers or that suggested a return to *Huddart, Parker*.<sup>179</sup> And so they chose to argue that to uphold the law was to make the elaborate limitations written into the industrial arbitration power (s 51(xxxv)) irrelevant and meaningless, and that the corporations power must be interpreted in a way that does not leave the arbitration power entirely otiose. Yet, to argue in this way necessarily involved a covert appeal to some of the fundamental elements of the reserved powers doctrine, for it was being proposed that the limitations written into the industrial arbitration power should be construed to limit the scope of the corporations power. Although there was no explicit mention of any powers reserved to the States, it was precisely through arguments of this kind that the Griffith Court had defined the content of the powers reserved to the States what is not conferred under one head of federal power is reserved to the States and the Commonwealth cannot use some other head of power to enter that field. The argument thus reeked of the heretical reserved powers doctrine, and the Court was easily able to dispense with it on this basis. Even the minority justices felt compelled to reject these accusations of heresy.<sup>180</sup> Tellingly, though, and as with most charges of heresy, there was not much in the way of a felt need by the majority to justify their underlying position.<sup>181</sup>

The theoretical significance of the *Work Choices* case thus lies in the way in which it involved an attempt — albeit a covert attempt, and a failed attempt — to re-introduce reserved powers reasoning into Australian constitutional law, while the practical significance of the case lies in the extent to which it has opened up yet another vast field of legislative power for the Commonwealth. And yet way back in *Huddart, Parker*, the very first case in which the corporations power was

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177 *Huddart, Parker* (1909) 8 CLR 330; *Strickland* (1971) 124 CLR 468; *Engineers* (1920) 28 CLR 129.

178 On the voluminous decided cases on the *Trade Practices Act* 1974 (Cth) see Russell Miller, *Miller's Annotated Trade Practices Act* (28<sup>th</sup> ed; 2007).

179 *Work Choices* (2006) 229 CLR 1 at 125 (Kirby J).

180 *Work Choices* (2006) 229 CLR 1 at 125, 127, 145–6, 162–3 (Kirby J), 186, 226, 247 (Callinan J). Justice Kirby's attempt to distinguish the external affairs power from the corporations power, in this context, seems weak: at 154–6.

181 The majority joint judgment is remarkably free of any discussion of underlying values and principles — in sharp contrast to the two dissenting judgments.

specifically considered, both fundamental points had already been raised and considered. While he was no friend of the reserved powers doctrine, Higgins J had joined the majority in that case, arguing that to read the corporations power as wide enough to enable to the Commonwealth to regulate the conditions of employment of workers in particular industries would in principle open up a vast spectre of extraordinary consequences. 'The results are certainly extraordinary, big with confusion', he said,<sup>182</sup> for such an interpretation would enable the Commonwealth to introduce a system of libel laws, to enact licensing Acts, to set minimum wages, to control interest rates, to establish schools, and so on, provided that the law somehow was in connection with a trading, financial or foreign corporation.<sup>183</sup> Herbert's *Uncommon Law*-type results were foreseen a century ago! The 'horrible'<sup>184</sup> consequences Higgins J mooted back then have come to pass.

Indeed, at each step in this process of 'uncovering' and delineating the 'hidden potentialities of the corporations power', not all points of view have been equally well-placed. There has been an asymmetry at work. When precedent-respecting judges who also happened to be inclined to adopt relatively narrower interpretations found themselves outvoted in subsequent cases, and outvoted fairly consistently as it transpired, they regarded themselves as bound by those previous decisions. Their self-disciplined adherence to *stare decisis* contributed to a kind of ratchet-up effect; they felt locked into what had gone before, namely a progressively expansionist development of s51 doctrine.<sup>185</sup> On the other hand, a number of judges inclined to adopt relatively liberal interpretations of the Commonwealth's powers were not as attached to *stare decisis*. Although occasionally outvoted, they usually adhered to their minority views in subsequent cases, holding out in some instances until they could form part of a newly-constituted and more expansionist majority.<sup>186</sup> Notice that an asymmetry problem only arises if the judges who more greatly defer to precedent happen also to share some substantive position — one in favour of a federalist, pro-states interpretation of the *Australian Constitution*, for example. If the various substantive judicial views were independent of, or randomly distributed amongst, the approach-to-precedent views, all this might well balance out and amount to nothing. But when the distribution of the two sorts of views is not random, not mutually independent, then we can expect a ratchet-up effect to occur. In our view, this is what has happened with division of powers cases in Australia. It began with Isaacs J in

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182 *Huddart, Parker* (1909) 8 CLR 330 at 409.

183 See also *Huddart, Parker* (1909) 8 CLR 330 at 348 (Griffith CJ).

184 P H Lane, *The Australian Federal System* (1979) at 160.

185 Among these justices, there is most clearly Gibbs CJ, Wilson and Dawson JJ (although see Dawson J in *Re Dingjan* (1995) 183 CLR 323 at 346 (adhering to the 'significance' test)). Also, to a lesser extent, there is Stephen and Brennan JJ. Note also the tendency of Barwick CJ, Menzies and Walsh JJ to limit their decisions to the precise issues raised in each case.

186 For example, *Tasmanian Dam* (1983) 158 CLR 1 at 179 (Murphy, J); *Re Dingjan* (1995) 183 CLR 323 at 333–4 (Mason CJ), 365 (Gaudron J); *Re Pacific Coal Pty Ltd; Ex parte CFMEU* (2000) 203 CLR 346 at 375 (Gaudron J).

1920<sup>187</sup> and has more or less characterised the Court ever since. It is a further reason why the High Court's corporations jurisprudence, like its constitutional jurisprudence as a whole, has such an *Uncommon Law* quality about it.

As we have noted, on only two major occasions since *Engineers* has the High Court actually struck down federal legislation that purported to be based upon the corporations power: the *Incorporation* case in 1990 and *Re Dingjan* in 1995.<sup>188</sup> While these cases demonstrate that the Commonwealth's powers are not simply unlimited, they nonetheless illustrate the ratchet-up effect at work. Thus, as has been noted, in the *Incorporation* case, the Court placed particular reliance on the proposition that the power was the power with respect to particular classes of 'persons' (namely particular kinds of corporations), a principle which had been basic to the overturning of *Huddart, Parker* and the development of the idea that the corporations power extends to the regulation of *any* activity of a constitutional corporation. Similarly, although in *Re Dingjan*, a majority of justices struck down the legislation, it seems clear that a majority of the Court were willing to affirm that the corporations power could be used to regulate contracts entered into by constitutional corporations with independent contractors, whether or not those contracts related to the trading activities, business or any other activities or concerns of the corporation involved.<sup>189</sup> Only on the specific issue of regulating contracts with independent contractors — contracts that had *not* been entered into by a constitutional corporation but which merely had some kind of a relationship to the business of that corporation (e.g., where the contract was for the supply of goods that would eventually be sold to the corporation for use in its manufacturing processes), and then only by a narrow majority — was the legislation struck down.<sup>190</sup>

The outcome in *Re Dingjan* might have suggested that an outer limit of the corporations power had been reached.<sup>191</sup> Not so. Indeed what is striking to us is the number of commentators who regarded cases such as *Tasmanian Dam*, the *Incorporation* case and *Re Dingjan* as leaving the outer reaches of the power as yet undefined and open-ended — a view which was so clearly confirmed in the *Work*

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187 Isaacs J was persistently in the minority in the cases prior to *Engineers*. See, for example, his dissenting judgments in *R v Barger* (1908) 6 CLR 41 and *Huddart, Parker* (1909) 8 CLR 330.

188 *Incorporation Case* (1990) 169 CLR 482; *Re Dingjan* (1995) 183 CLR 323.

189 See *Re Dingjan* (1995) 183 CLR 323 at 333–4 (Mason CJ), 336–7 (Brennan J), 353 (Toohey J), 364–5 (Gaudron J), 368–9 (McHugh J).

190 Only s 127C(1)(b) of the *Industrial Relations Act* 1988 (Cth) was put in issue in *Re Dingjan*. This provision limited the operative provisions of the Act to contracts 'relating to the business of a constitutional corporation'. Compare s 127C(1)(a), which limited the operative provisions of the Act to contracts 'to which a constitutional corporation is a party', and s 127C(1)(c), which limited the operative provisions of the Act to contracts 'entered into by a constitutional corporation for the purposes of the business of the corporation'. Neither of these provisions was challenged in the case.

191 See Anthony Mason, 'Towards 2001 — Minimalism, Monarchism or Metamorphism?' (1995) 21 *Monash University Law Review* 1 at 11.

*Choices* case.<sup>192</sup> Similarly remarkable was the disproportionate attention given in the *Work Choices* case to the *obiter dicta* comments of Gaudron J in *Re Pacific Coal Pty Limited* (even though her Honour struck down the relevant aspect of the law in that case).<sup>193</sup> Gaudron J had observed:

I have no doubt that the power conferred by s 51(xx) of the Constitution extends to the regulation of the activities, functions, relationships and the business of a corporation described in that sub-section, the creation of rights, and privileges belonging to such a corporation, the imposition of obligations on it and, in respect of those matters, to the regulation of the conduct of those through whom it acts, its employees and shareholders and, also, the regulation of those whose conduct is or is capable of affecting its activities, functions, relationships or business. More relevantly for present purposes, I have no doubt that it extends to laws prescribing the industrial rights and obligations of corporations and their employees and the means by which they are to conduct their industrial relations.<sup>194</sup>

The Court's reliance on this passage in *Work Choices* is the ratchet-up effect at work. Given all these trends, and the built-up series of precedents, the outcome in *Work Choices* was entirely predictable. The *uncommon* body of constitutional law generated by our *uncommon High Court*, using what appear to be wholly orthodox techniques, has become, alas, all too common. The sustained parody of Herbert has become the reality of Australia.

## 8. *Where Should We Go From Here?*

Thus far we have argued that Australia's High Court has taken the *Australian Constitution* and created a Herbertesque product, one that ignores (or discounts so massively its weight that it amounts to ignoring) (1) the obvious attempt to create a federal system in fact, not just in name; (2) the process used to adopt the *Constitution*; (3) its structure as a whole; (4) the *Convention Debates* and drafting history; (5) various *failed* referenda aimed at increasing Commonwealth powers; and (6) the logic that tells you that a narrower, more circumscribed power that has been explicitly laid down and granted to the Commonwealth in some area (as in s51 (xxxv)) forecloses granting the Commonwealth a wide-open, virtually uncircumscribed power over that same area via some other head of power (as via

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192 See Geoffrey Kennett, 'Constitutional Interpretation in the *Corporations* Case' (1990) 19 *Federal Law Review* 223; Rob McQueen, 'Why High Court Judges Make Poor Historians: The Corporations Act Case and Early Attempts to Establish a National System of Company Regulation in Australia' (1990) 19 *Federal Law Review* 245; A. R. Blackshield and George Williams, *Australian constitutional law and theory: Commentary and materials* (2nd ed, 1998), 636; Leslie Zines, *The High Court and the Constitution* (4<sup>th</sup> ed, 1997) at 99–100; Anthony Grey, 'Precedent and Policy: Australian Industrial Relations Reform in the 21st Century using the Corporations Power' (2005) 10(2) *Deakin Law Review* 440.

193 *Work Choices* (2006) 229 CLR 1 at 54–5, 55–6, 60; cf 132 (Kirby J), 220 n 993, 261 (Callinan J).

194 *Re Pacific Coal; Ex parte Construction, Forestry, Mining & Energy Union* (2000) 203 CLR 346 at 375.

s51(xx)). This Herbertesque product is premised on a version of textualism and facilitated by an asymmetrical attitude to precedent that encourages the ratchet-up effect.

Yet that is diagnosis, not cure. For those readers who agree with the general thrust of our case thus far, we finish by asking whether anything can be done.

Two routes to salvaging some of the federal aspects of the *Australian Constitution* are open in theory. The first is formal constitutional amendment under s128 of the *Constitution*, either specifically to redefine the Commonwealth's powers or to give the States more explicit power. (The latter option amounts to a mimicking of the Canadian system in which provincial powers are derivative and therefore have to be conferred by the *Constitution* — nevertheless the history of constitutional interpretation in Canada, Australia and the United States suggests that this might make an important difference.)<sup>195</sup> Yet this route appears to be a non-starter. The Australian amendment process can only be triggered by the Commonwealth. Although the States have called for a constitutional convention aimed at restoring the equilibrium,<sup>196</sup> they have no way to have any question put to the electors in a referendum to amend the *Constitution*. Nor is there incentive for, or prospect of, the Commonwealth doing so. This first route appears to be a theoretical one only. It would take an extraordinary concurrence of events for such an outcome to eventuate.

That leaves the judges themselves. They are the ones who have interpreted the *Australian Constitution* heavily in favour of the Commonwealth and consistently at the expense of the States. They have brought us to where we are today. They can also take us back to where the jurisprudence stood in 2005, or 1971, or even 1919. Or rather, anyone seriously interested in rebalancing our federalist arrangements is forced into relying on the judges, for want of other alternatives.

We now moot some possible strategies in that vein.

### 1. Overrule *Engineers*:

The time may have come explicitly to argue that the reasoning in the *Engineers* case was faulty and must be overhauled. We refer, here, neither to the specific outcome in *Engineers*, nor to the overruling of the immunity of instrumentalities

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195 In the United States, as in Australia, the absence of any explicit statement of the particular fields over which the States have reserved powers has enabled the courts of both countries to abjure the reserved powers doctrine. As Stone J famously once observed, delivering the opinion of the Court in *United States v Darby*: 'Our conclusion is *unaffected* by the Tenth Amendment which provides: "The powers not delegated to the United States by the Constitution, nor prohibited by it to the States, are reserved to the States respectively, or to the people". The amendment states but a *truism* that all is retained which has not been surrendered.' See *United States v Darby* 312 US 100 (1941) at 123–4 (emphasis added). Contrast, for example, the reasoning of the Privy Council in *Bank of Toronto v Lambe* (1887) 12 App Cas 575 and, more recently, of the Supreme Court of Canada in *Ontario Public Service Employees Union v AG Ont* [1987] 2 SCR 2.

196 Council for the Australian Federation, *Communiqué*, 9 February 2007 at 6 <[http://www.greenhouse.nsw.gov.au/\\_data/assets/pdf\\_file/0016/6343/CAF\\_communique\\_9feb07.pdf](http://www.greenhouse.nsw.gov.au/_data/assets/pdf_file/0016/6343/CAF_communique_9feb07.pdf)> accessed 12 March 2008.

doctrine. The latter doctrine was indeed overdrawn in our view (based as it was on a conception of inviolable ‘sovereignty’ — a conception inapplicable within a federation).<sup>197</sup> However, the *Engineers* reasoning went too far in its reading of the *Constitution* simply as an Act of the Imperial Parliament, as containing only British political conceptions, and in the proposition that each federal head of power should be read not only literally, but in isolation from the other heads of power and without regard to the ‘federal logic’ which underlay the configuration of power between the Commonwealth and the States. Noting that the High Court has already alleviated the extremities of the *Engineers* doctrine in relation to the issue of intergovernmental immunities,<sup>198</sup> our suggestion is that the rejection of the reserved powers doctrine implicit in the reasoning in *Engineers* should similarly be reworked.

However, counsel have been understandably wary of undertaking such a radical line of argument. They shied away from it in *Work Choices* and in the equally significant *Tasmanian Dam* case. Yet if the States were now to instruct counsel to make this argument it would, at the very least, send a clear signal to the seven High Court Justices just how dissatisfied the States are with the Court’s federalism decisions and just how lopsided the States take them to be.

Certainly, post-*Work Choices*, there appears to be little advantage in conceding that *Engineers* was correctly decided. Attempts to make fine or subtle distinctions or to argue that the case benefits the Commonwealth less than is commonly supposed have failed. A sustained attack on this case is now well worth considering, and in our view worth pursuing.

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197 Aroney, above n113 at 229–35, 249–51.

198 In relation to State immunity from Federal laws, see *State Banking Case* (1947) 74 CLR 31; *Austin v Commonwealth* (2003) 215 CLR 185. In our view, this reworking should also be applied to Commonwealth immunity from State laws, notwithstanding the decision in *Commonwealth v Cigamic Pty Ltd (In Liq)* (1962) 108 CLR 372, which was essentially retained in *Re Residential Tenancies Tribunal of NSW; Ex parte Defence Housing Authority* (1997) 190 CLR 410.

## 2. Appoint More High Court Judges from Smaller States:

In 2005, five of the seven High Court Justices came from the Sydney Bar. One of the other two was from the Melbourne Bar. To Canadian or American eyes this is nothing less than incredible. Nothing remotely similar could happen, or has happened, in either of those federal jurisdictions.<sup>199</sup> Yet in Australia the two largest States (and perhaps one in particular) dominate when it comes to the appointment of High Court Justices. In fact, the two smallest of Australia's six States, South Australia and Tasmania, have never — not once in over a century — had a single High Court judge appointed from their State, notwithstanding the existence of a number of very credible candidates for the position.<sup>200</sup> More to our point here, it has often been judges appointed from the other smaller States — Queensland and Western Australia — who have been the more balanced in their judgments and more solicitous of the point of view of the States,<sup>201</sup> although as one might expect, the picture is by no means uniform.

We do not suggest, therefore, that the correlation here amounts to rigid causation. But there is a striking correlation. Regularly appointing two or even three of the High Court's judges from outside New South Wales and Victoria may bring with it more advocates for federalist interpretations.<sup>202</sup> At this stage there is frankly nothing to lose in finding out, at least not when it comes to division of powers cases.

Of course this presupposes that such dispersed (some might say geographically balanced) appointments would actually be made. The power to appoint High Court justices, after all, lies with the Commonwealth,<sup>203</sup> and Canberra governments have a history of opting predominantly for those who have a connection with the Sydney

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199 Even the United Kingdom, which is not a federation, appoints a higher percentage of law lords from Scotland and Northern Ireland — indeed in terms of relative populations a significantly higher percentage — than are appointed in Australia to the High Court from the four small States of Western Australia, South Australia, Queensland and Tasmania.

200 From the federation era, for example, most obviously Andrew Inglis Clark of Tasmania and Josiah Symon of South Australia. Clark was appointed to his State's Supreme Court.

201 Thus, in the context of their times, Griffith CJ, Gibbs CJ and Callinan J from Queensland, and Wilson J from Western Australia frequently favoured relatively narrower interpretations of federal powers; whereas Isaacs and Higgins JJ and later Knox CJ from New South Wales, Latham CJ from Victoria and, more recently, Mason CJ, Murphy, Deane and Gaudron JJ from New South Wales favoured national power in many of their decisions. But the picture is not altogether neat: Dixon CJ, Stephen and Aickin JJ from Victoria, Barwick CJ and Kirby J from New South Wales and Brennan CJ from Queensland are harder to classify. Moreover, just as Gavan Duffy J from Victoria had followed Griffith CJ and Barton and O'Connor JJ from New South Wales, so Dawson J, also from Victoria, tended to join with Gibbs CJ and Wilson J.

202 In mid-2007, only Callinan J could be described as a committed federalist. Indeed his dissenting judgment in the *Work Choices* case is a strong argument for just that sort of position. The other members of the majority, Gleeson CJ, Gummow, Hayne, Heydon and Crennan JJ, all of them from either New South Wales or Victoria, upheld the law. Justice Callinan retired at the end of August 2007, replaced by Kiefel J, also from Queensland.

203 The framers seriously considered, but decided against, making provision in the Constitution for the High Court to be 'representative' of the various States. See *Convention Debates, Melbourne* (1898) at 265–85.

and Melbourne Bars. We concede that. We simply suggest that a campaign to have High Court justices chosen from a broader geographical pool has a far higher chance of success than a campaign to have the Commonwealth initiate a constitutional referendum. Even non-federalist centralists might favour, on other grounds, a broadening of the geographical pool of candidates.

### 3. Defend Originalism, Recover Federal Structuralism:

Some of the current High Court Justices, including the Chief Justice,<sup>204</sup> have disparaged originalism as an interpretive approach.<sup>205</sup> But it is a caricature of originalism that is often attacked.<sup>206</sup> As we argued above, it is originalism — be it in the form of original intentions interpretation or in the form (as we prefer) of original understanding interpretation<sup>207</sup> — that is in keeping with viewing a constitution as something that locks things in. Other interpretive approaches end up collapsing into the second view of constitutions, the express-our-most-important-values view, the one that has the effect of giving us an unshackled judiciary uniquely free to change it in ways those judges happen to think advances society or keeps pace with others or allows the metaphorical tree to branch out in ways it should. Literalism does nothing to prevent this same end result of an unshackled judiciary, with its concomitant inroads into democratic legitimacy.<sup>208</sup>

We think a more vigorous defence of originalism as a method of constitutional interpretation is needed. Certainly it is a far more defensible approach to interpreting constitutional provisions than some of the current High Court Justices suppose.<sup>209</sup> And if it does have flaws — and who would seriously deny that any and all interpretive approaches will have weaknesses and flaws? — they are less, we would argue, than the flaws or weaknesses of literalist approaches or ‘do the right thing’ approaches<sup>210</sup> or ‘living tree’ approaches.<sup>211</sup>

Stronger advocacy of this sort of originalism could also be coupled with the explicit aim of having appointed High Court judges who are committed

204 Murray Gleeson, ‘The Constitutional Decisions of the Founding Fathers’ (University of Notre Dame School of Law (Sydney) Inaugural Annual Lecture, 27 March 2007). See, also, *Singh v Commonwealth* (2004) 222 CLR 322 at 331–337.

205 Michael Kirby, ‘Constitutional Interpretation and Original Intent: A Form of Ancestor Worship?’ (2000) 24 *Melbourne University Law Review* 1.

206 See Jeffrey Goldsworthy, ‘Interpreting the Constitution in its Second Century’ (2000) 24 *Melbourne University Law Review* 677.

207 See Goldsworthy, ‘Originalism’, above n38.

208 Justice Heydon has recently argued that ‘literalism’ has never been advocated by judges of the High Court: Dyson Heydon, ‘Theories of Constitutional Interpretation: A Taxonomy’, *Sir Maurice Byers Lecture* (Sydney, 3 May 2007) at 73–6. It goes without saying that when we refer to clause-bound literalism, we have in mind the way in which the High Court has very clearly read the provisions of particular heads of power in isolation from their wider, federal context in the specific ways explained above. We do not claim that the High Court has not taken context into consideration in other senses or for other purposes.

209 See references above n20, 23, 38, 40.

210 See Allan, ‘Portia, Bassanio or Dick the Butcher’, above n17.

211 See Grant Huscroft, ‘The Trouble with Living Tree Interpretation’ (2006) 25 *University of Queensland Law Journal* 3.

originalists. Where sincerely held, such a commitment is likely to push a judge to decide in ways that are more in keeping with federalist outcomes, even where the judge appears personally to agree with the Commonwealth legislation being challenged (as seems likely to us in the case of Justice Callinan in the *Work Choices* case).

#### 4. Compare Division of Powers Cases to Implied Rights Cases and Emphasise the Irony

In what was widely taken to be a major challenge to *Engineers* literalist orthodoxy,<sup>212</sup> in 1992 the High Court of Australia ‘discovered’ in the ‘text and structure’ of the *Constitution* an implied freedom of political communication. Despite the fact that the Australian framers were aware of the protection given to free speech in the First Amendment to the *United States Constitution* but chose not to insert any such provision into the Australian document,<sup>213</sup> the High Court said that a right to freedom of political communication was nonetheless somehow implied by the provision within the *Constitution* for a system of representative democracy.<sup>214</sup> Such an implication involves a succession of complicated and contested value judgments, both in terms of the derivation of the implied freedom from the text of the *Constitution* and in its application to specific cases.<sup>215</sup> But this did not prevent the Court from imposing a significant limitation on the powers of the Commonwealth and State Parliaments in terms of the implied freedom.

Compare this to the state of the Court’s federalism jurisprudence. It is true that the Court has likewise derived an implied intergovernmental immunities doctrine from the federal structure of the *Constitution*, but in its interpretation of the heads of power conferred upon the Commonwealth, the High Court has entirely rejected any appeal, not only to the federalist intentions of the framers, but to the far-reaching federal structure of the *Constitution*.

The contrasting results are ironic. In division of powers cases, the High Court has whittled away the checks on the Commonwealth Parliament, the checks that were intended to be there by those who drafted and voted on the *Constitution*. Yet the same Court has imposed constraints on the Commonwealth Parliament in the form of implied, or as we would characterise them, made-up rights. Where some sort of federalist set-up was clearly and obviously intended by those who drafted and those who voted to adopt the *Australian Constitution*, it is just as clear that an American-style set of vague, amorphous rights was explicitly rejected. However,

212 See, for example, George Williams, ‘*Engineers* is Dead, Long Live the *Engineers*’ (1995) 17 *Sydney Law Review* 62.

213 Compare *Official Report of the National Australasian Convention Debates, Melbourne* (1898) at 688–90; *Official Report of the National Australasian Convention Debates, Adelaide* (1897) at 1167.

214 *Australian Capital Television Pty Ltd v Commonwealth* (1992) 177 CLR 106; *Nationwide News Pty Ltd v Wills* (1992) 177 CLR 1.

215 See Aroney, above n16; Adrienne Stone, ‘The Limits of Constitutional Text and Structure’ (1999) 23 *Melbourne University Law Review* 668.

this has not stopped the judges from creating or ‘discovering’ these rights in the text and structure of the *Constitution*. In a federal configuration of power, legislative competencies are distributed between two (or more) levels of government — with the result that the powers of one democratically-elected government are checked by the powers of a second set of democratically-elected governments. In the case of implied rights, however, it is the High Court judges themselves, the ones who ‘discovered’ these implied rights in the crevices and cracks of the *Constitution*, who have *given to themselves* this checking power.

The irony here has two dimensions. Firstly, there is the irony of increasing Commonwealth government power in federalism cases as opposed to decreasing (or more constrained) Commonwealth and State government power in free speech cases. Secondly, there is the irony of the same judges opting for textual literalism in federalism cases but rejecting that in favour of underlying structuralism in free speech cases. The irony of comparing the two only breaks down in so far as the judges, in both cases, seem motivated by some sort of ‘keep the *Constitution* up to date’ desire — one at odds with a ‘locking things in’ view of constitutions and constitutionalism calculated to put at least some constraints on the judges. And this, in turn, makes more likely a ratchet-up effect in both cases (the one being a series of textual-literal interpretations built upon previous such interpretations and the other being a series of implications (divorced from actually held intentions) built upon similar such implications).

Making more explicit the irony of the two different sorts of treatment might just have some sort of inhibiting effects on the judges.

## 9. *Concluding Remarks*

In any federal system where powers are distributed between the central legislature and those of the regions or states or provinces, there will be indeterminacies and uncertainties. Reasonable, well-informed people will disagree over whether the power to legislate lies here or there, with the national Parliament or not. Some disputes will fall into what the noted Oxford legal philosopher H L A Hart termed ‘the penumbra of doubt’<sup>216</sup> or ‘the penumbra of uncertainty’.<sup>217</sup> This is to be expected, and indeed is the case in Canada and the US no less than here in Australia.

What is not to be expected in a federal system is that over time the most senior judges will decide such ‘penumbra of doubt’ disputes in such a way that the central legislature, in practice, ends up free to legislate on virtually any matter it wishes or thinks will be of political benefit. Certainly that has not happened in Canada, where the provinces remain very powerful indeed.<sup>218</sup> Nor has it happened in the United States.<sup>219</sup> Yes, of course, we might well anticipate that the highest judges appointed by the central government will have a slight tendency (on average, over

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216 H L A Hart, *The Concept of Law* (1961) at 119.

217 See *id* at 131.

218 See above n13, n83.

time) to favour the centre when deciding those ‘penumbra of doubt’ cases, the ones that could go either way with good arguments on both sides and no clear outcome aligning with settled expectations.

What we would not expect, though, is for those same centrally appointed judges to favour the centre to the extent they now have in Australia. True, we acknowledge that the High Court still requires the Commonwealth to show a connection between a federal law and a head of power (witness Australian cases on the interstate commerce clause in contrast to the United States decisions).<sup>220</sup> Having conceded that, it is nonetheless clear that the individual heads of federal power, interpreted literally, have been used to extend into unexpected terrain. The external affairs power has been used to move into internal affairs. The corporations power has been used to move into industrial matters. The fact that the external affairs power is constrained because the Commonwealth still has to implement a treaty obligation and that the corporations power does not extend to non-corporate employers just gives the Commonwealth a choice of sorts, of whether to use the one or the other depending on the political state of affairs. And ultimately the High Court’s approach has enabled the Commonwealth to expand its power into all sorts of areas in a fundamentally unpredictable and in principle unlimited way.

Where a document that has clearly been aimed at setting up a federal system is read as conferring near-untrammelled legislative power for one side and not the other, then that reading stops looking like a plausible interpretation of the document. And that implausibility is no less the case just because the reading or interpretation is a function of cumulative steps taken over many years, of gradual, common law decision-making. Indeed, even were it the case that each interpretive step on its own followed more or less plausibly from what went before, with the judges never having opted for a particular step that was itself evidently beyond the Pale, that would not lessen or repair the overall implausibility of the conclusion ultimately reached.

A P Herbert would have recognised a kindred spirit in the High Court of Australia.

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219 US states may be less powerful than Canadian provinces, but they retain a great deal of autonomy in many areas (eg, education, health care, labour relations, criminal policy).

220 See the discussion of the *Shreveport Rate* cases 234 US 342 (1914), *United States v Wrightwood Dairy Co* 315 US 110 (1942), *Wickard v Filburn* 317 US 111 (1942) and others in *Airlines of New South Wales Pty Ltd v New South Wales (No 2)* (1965) 113 CLR 54 at 113–4.