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I. INTRODUCTION

In *Garcia v. San Antonio Metropolitan Transit Authority*,[1] a five-justice majority of the U.S. Supreme Court overruled *National League of Cities v. Usery*[2] and its conception of independent federalism-based constitutional restrictions on federal legislative powers. The *Garcia* majority, in an opinion authored by Justice Blackmun, held that neither the tenth amendment, nor any limitation implied from the federal constitutional scheme, denied Congress the ability to extend the Fair Labor Standards Act to state and municipal employees by means of the commerce clause. The Court concluded that the "principle and basic limit" on the commerce power is "the built-in restraints that our system provides through state participation in federal governmental actions."[3]

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1. 469 U.S. 528 (1985).
2. 426 U.S. 833 (1976).
3. *Garcia*, 469 U.S. at 556.

Garcia represents the latest major episode[4] in the Supreme Court's efforts to define what, if any, role the judiciary should play in preventing the federal government from encroaching upon state sovereignty. For Justice Blackmun, a primary rationale for rejecting *National League of Cities* was the unworkability of constitutional standards that compel courts to identify and protect areas of sacrosanct state functions.[5] Justice Blackmun's opinion in *Garcia* made this point both by referring to the considerable uncertainty generated by *National League of Cities* itself and by analyzing the Court's inability to formulate workable standards for state immunity from federal taxation originally established in the Supreme Court's 1871 decision, *Collector v. Day*.[6]

Although the U.S. Supreme Court's recent decision in *South Carolina v. Baker*[7] confirms that the Court regards *Garcia* as a watershed development, neither *Garcia* nor *Baker* is likely to signal the end of judicial enforcement of implied constitutional limitations designed to protect the states. If the *Garcia* dissenting justices fulfill their promise to secure a majority of the Court to overrule the decision, the Court could return to the *National League of Cities* doctrines or their equivalents.[8] Perhaps more importantly, however, the five justices comprising the majority in both *Garcia* and *Baker*[9] have recognized that federal legislative powers would still be confined by implied constitutional limitations in some, largely uncertain, instances of federal interference with state sovereignty.

This article addresses the question of what part courts should play in preserving the states' role in the federation by focusing upon Australia's experience in this regard. The High Court of Australia's efforts to confine federal legislative powers in order to protect areas of state sovereignty is relevant to American constitutional law in that

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4. *See also* South Carolina v. Baker, 485 U.S. 505, *reh'g denied*, 108 S. Ct. 2837 (1988) (discussed *infra* at notes 225-39 and accompanying text).

5. Justice Blackmun had voted with the majority in *National League of Cities*.

6. 78 U.S. (11 Wall.) 113 (1871). *See Garcia*, 469 U.S. at 537-549.

7. *Baker*, 485 U.S. at 505.

8. *See Garcia*, 469 U.S. at 580 (Rehnquist J. dissenting); *id.* at 589 (O'Connor J. dissenting). In *Baker*, 485 U.S. at 505, Justice Scalia suggested that he regards *Garcia* as still enabling the Court to define "affirmative limits" on federal legislative powers arising by virtue of "the constitutional structure." *Id.* at 512 (Scalia J. concurring in part and concurring in judgment). Justice Kennedy took no part in the consideration or decision of *South Carolina v. Baker*. *Id.*

9. In *Baker* 485 U.S. at 505, Justices Brennan, White, Marshall, Blackmun and Stevens concurred in the portion of the Court's opinion discussing the tenth amendment issue. Justices Scalia and Rehnquist joined the Court's judgment, but not its opinion, as to this issue. Justice O'Connor dissented.

the relationship between federal and state powers in the Australian Constitution is similar to that created by the U.S. Constitution. The influence of the American model upon the constitutional structure of the Australian federation is confirmed by evidence of the intent of the Australian constitutional framers and by early decisions of the High Court. Moreover, after the enactment of the Australian Constitution in 1901, the High Court placed itself in an analogous position to the U.S. Supreme Court at the time by adopting conceptions of federalism-based limitations on federal legislative powers approved by the U.S. Supreme Court in *Collector v. Day* and late nineteenth century American commerce clause cases.

On the basis of these similarities, this article seeks to determine what can be learned from Australian jurisprudence about the issues in *Garcia* and the many questions left open by that decision. Part one of this article describes the doctrinal developments in late nineteenth century U.S. Supreme Court decisions that influenced the High Court after the adoption of the Australian Constitution in 1901. Part two discusses the impact of the United States' federal model upon the Australian Constitution and the success of the protections to state sovereignty afforded by the analogous constitutional limitations developed in Australia. Part three examines the High Court's rejection of the intergovernmental immunities and reserved powers doctrines in 1920 and the High Court's attempts since that date to formulate constitutionally-supportable, functional protections for aspects of state sovereignty against intrusion by federal legislative powers. In parts four and five, the article concludes that the Australian experience confirms the *Garcia* majority's judgment as to the workability of implied constitutional limitations that attempt to identify and protect areas of traditional state sovereignty. In addition, recent developments in Australia suggest possible content for the residual role of the judiciary in the *Garcia* majority's conception of the American federation.

II. Constitutional Protections of State Sovereignty in Late Nineteenth Century U.S. Supreme Court Jurisprudence

Placing early High Court of Australia decisions in the context of U.S. Supreme Court jurisprudence at the time requires an examination of the U.S. Supreme Court's views on the constitutional role of the states in the federation after the American Civil War. The nationalistic forces that prevailed in the Civil War and the post-war drive for economic expansion forced the Court's first real confrontations with issues of the constitutional limitations on federal power in areas of

"traditional" state sovereignty.[10] The framers of the Australian Constitution and the first High Court justices looked to the Supreme Court's rulings from that era as the predominant conception in America of the role of the states in a constitutional federation.

In the immediate aftermath of the Civil War, the U.S. Supreme Court, under the leadership of Chief Justice Salomon Chase, was arguably the outstanding "states' rights" Court in American judicial history.[11] The Chase Court's desire to preserve the states' rights to control what the Court perceived as the states' internal affairs was reflected in the Court's protection, in the famous *Slaughterhouse Cases*,[12] of the rights of a state legislature to grant a monopoly on commercial slaughtering. Just five years after ratification of the fourteenth amendment, the *Slaughterhouse* Court effectively read the "privileges and immunities" clause[13] of the amendment out of the U.S. Constitution by finding the clause limited to a narrow set of rights secured by virtue of national citizenship[14] rather than a notion of fundamental rights associated with the privileges and immunities clause of Article IV of the U.S. Constitution.[15] The *Slaughterhouse* majority was compelled to its conclusion by the concern that a contrary construction would "fetter and degrade the State governments" by granting Congress control over matters that had been "heretofore universally conceded" to be ordinary and fundamental powers of state governments.[16]

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10. *See* L. PFEFFER, THIS HONORABLE COURT: A HISTORY OF THE UNITED STATES SUPREME COURT 197-98 (1965).

11. *See* J. SCHMIDHAUSER, THE SUPREME COURT AS FINAL ARBITER IN FEDERAL-STATE RELATIONS 1789-1957 96 (1958).

12. 83 U.S. (16 Wall.) 36 (1872).

13. Section 1 of the fourteenth amendment provides in part that: "All persons born or naturalized in the United States and subject to the jurisdiction thereof, are citizens of the United States and of the State wherein they reside. No State shall make or enforce any law which shall abridge the privileges or immunities of citizens of the United States." U.S. CONST. amend. XIV, § 1.

14. Justice Miller's majority opinion in the *Slaughterhouse Cases* defined these rights as owing their existence "to the Federal government, its national character, its Constitution, or its laws." 83 U.S. (16 Wall.) at 79. They include such things as the right to pass freely from state to state, the right to petition Congress for redress of grievances, and the right to vote for national officers. *See, e.g.*, Twining v. New Jersey, 211 U.S. 78 (1908).

15. Section 2, clause 1 of article IV provides that "[t]he Citizens of each State shall be entitled to all Privileges and Immunities of Citizens in the several States." U.S. CONST. art. IV, § 2, cl. 1. For an interpretation of the content of "privileges and immunities of citizens" in this context, *see* Corfield v. Coryell, 6 Fed. Cas. 546, 551-52 (C.C.E.D.Pa. 1823) (Washington, J., on circuit).

16. *Slaughterhouse Cases*, 83 U.S. (16 Wall.) at 78.

Although the ruling in *Slaughterhouse Cases* has had a profound impact on American constitutional law, the Chase Court's decision in *Day* proved to be the most influential American "states' rights" decision for Australia.[17] In *Day*, a majority of the Court, over Justice Bradley's lone dissent,[18] held that Congress lacked the constitutional power to tax the salary of a state court judge. The majority's analysis began from the premise that the states retained all sovereign rights not granted expressly or by necessary implication to the federal government by the U.S. Constitution.[19] This principle of "reserved" state powers, the majority found, was explicitly embodied in the tenth amendment.[20]

However, the majority's views on the means of definition and character of the reserved powers were most significant. The Court did not define the content of the states' reserved powers by reference to powers not granted to the federal government.[21] Rather, the Court suggested that the states' reserved powers are determined by an independent inquiry as to what powers are necessarily retained by the states to preserve their existence and allow them to fulfill their constitutional functions.[22] The power to maintain a judicial department was such a reserved power because "[w]ithout this power, and the exercise of it, . . . no one of the states, under the form of government guaranteed by the Constitution could long preserve its existence."[23]

With respect to these reserved powers, the Court concluded that "the state is as sovereign and independent as the general govern-

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17. However, the *Slaughterhouse Cases* decision was discussed at the 1898 Constitutional Convention in Melbourne in the context of a proposed clause for the Australian Constitution that would have prohibited states from making or enforcing any law "abridging any privilege or immunity of citizens of other states of the Commonwealth." 1 OFFICIAL RECORD OF THE DEBATES OF THE AUSTRALASIAN FEDERAL CONVENTION (THIRD SESSION) 664, 668-69 (1898). The proposed clause was defeated, but a provision paralleling article IV, section 2, clause 1 of the U.S. Constitution was ultimately adopted. *See* Commonwealth of Australia Constitution Act, § 117 (protecting subjects of the Queen, resident in any state, from being subjected in another state to "any disability or discrimination that would not be equally applicable to him" if the person were a resident of the other state).

18. Justice Bradley's dissent perceived many of the conceptual and pragmatic shortcomings of the majority's holding. He concluded that the majority's theory was "founded on a fallacy" and that "it will lead to mischievous consequences." *Day*, 78 U.S. (11 Wall.) at 129.

19. *Id.* at 124-25.

20. The tenth amendment provides that "the powers now delegated to the United States are reserved to the states respectively, or to the people." U.S. CONST. amend. X.

21. Indeed, the Court conceded that "there is no express provision in the Constitution that prohibits the general government from taxing the means and instrumentalities of the states." *Day*, 78 U.S. (11 Wall.) at 127.

22. *Id.* at 125-26.

23. *Id.* at 126.

ment."[24] On the basis of this view of the federal and state governments as co-equal sovereigns, the *Day* majority reciprocally applied Chief Justice Marshall's reasoning in *McCulloch v. Maryland*[25] and *Weston v. Charleston*,[26] in which the Court affirmed the supremacy of federal law by invalidating state laws taxing federal instrumentalities, to support two propositions: first, that the power to tax a government, its officers,[27] or its instrumentalities, includes the power to impair or destroy that government;[28] and second, that such powers to impair or destroy the government by taxation, even though not expressly prohibited in the U.S. Constitution, are unlawful by "necessary implication" of the constitutional scheme.[29] The *Day* majority utilized these principles to find a necessary implication in the U.S. Constitution that prohibits the exercise of the federal taxing power in a manner that might impair or destroy the means and instrumentalities employed by the states in the exercise of their reserved powers.[30]

The Court's willingness to protect the states from federal interference with the exercise of their reserved powers was also reflected in the Court's interpretation of the affirmative scope of the commerce clause. As early as 1837, in *City of New York v. Miln*,[31] the Court had advocated a co-equal sovereign theory of the states to limit the scope of the dormant commerce clause.[32] The Court's early expressions on reserved state powers are, however, best viewed as intended to

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24. *Id.* at 127.

25. 17 U.S. (4 Wheat.) 316 (1819).

26. 27 U.S. (2 Pet.) 449 (1829).

27. Dobbins v. Erie County, 41 U.S. (16 Pet.) 435 (1842) (the Court had held that states may not tax the salaries of federal officers).

28. *See McCulloch*, 17 U.S. (4 Wheat.) at 431.

29. *Day*, 78 U.S. (11 Wall.) at 124.

30. *See also* United States v. Baltimore & O.R.R., 84 U.S. (17 Wall.) 322 (1872) (income of municipal corporations is exempt from federal taxation because municipalities operate as agents of the states). *But see* Veazie Bank v. Fenno, 75 U.S. (8 Wall.) 533, 547 (1869) (admitting that "the reserved rights of the States, such as the right to pass laws, to give effect to laws through executive action, to administer justice through the courts, and to employ all necessary agencies for legitimate purposes of State Government" are not within federal taxing power, but nevertheless upholding federal tax on state bank notes).

31. 36 U.S. (11 Pet.) 102 (1837).

32. Justice Barbour's opinion for the Court in Miln announced several "impregnable positions" with respect to state sovereignty:

> That a State has the same undeniable and unlimited jurisdiction over all persons and things within its territorial limits, as any foreign nation, where that jurisdiction is not surrendered or restrained by the Constitution of the United States. That, by virtue of this, it is not only the right, but the bourden and solemn duty of a State, to advance the safety, happiness and prosperity of its people, and to provide for its general welfare, by any and every act of legislation which it may deem to be conducive to these ends; where the power over the particular subject, or the

be defensive of state powers only where the federal government had not acted.[33] Not until 1870 did the Court find it appropriate to apply the co-equal sovereignty views of the federation to invalidate an act of Congress as beyond its commerce clause authority. In *United States v. Dewitt*,[34] the Court held that a federal act prohibiting sales of naptha and illuminating oils inflammable at less than 110 degrees fahrenheit was "a police regulation, relating exclusively to the internal trade of the States."[35] The Court concluded that the commerce clause "has always been understood as limited by its terms; and as a virtual denial of any power to interfere with the internal trade and business of the separate States."[36]

Subsequent U.S. Supreme Court decisions in the late nineteenth and early twentieth centuries continued to invalidate federal commerce legislation that intruded into areas which the Court viewed as preserved by the U.S. Constitution for "local" regulation. *United States v. E.C. Knight Co.*[37] is the most significant example. In *Knight*, the Court held that the Sherman Act could not constitutionally apply to attempts to obtain monopoly control over manufacturing industries. The *Knight* majority viewed regulation of manufacturing and production industries as "a power originally and always belonging to the states, not surrendered by them to the general government, . . . and essentially exclusive."[38] Chief Justice Fuller's opinion for the Court therefore placed manufacturing outside the scope of the commerce clause[39] in order to preserve "the autonomy of the states as required by our dual form of government."[40]

> manner of its exercise is not surrendered or restrained in the manner just stated. That all those powers which relate to merely municipal legislation, or what may, perhaps more properly be called internal police, are not thus surrendered or restrained; and that, consequently, *in relation to these, the authority of a State is complete, unqualified and exclusive.*

Id. at 139 (emphasis added).

33. *See, e.g.*, F. FRANKFURTER, THE COMMERCE CLAUSE UNDER MARSHALL, TANEY AND WAITE 50-51 (1937); Schmidhauser, *supra* note 11, at 61-62.

34. 76 U.S. (9 Wall.) 41 (1869).

35. *Id.* at 45.

36. *Id.* at 44. *See also* The Trade-Mark Cases, 100 U.S. 82, 96 (1879) (invalidating Congress' efforts to establish a universal trademark registration scheme because it attempted to regulate the "very large amount of commerce, perhaps the largest, which, being trade or traffic between citizens of the same State, is beyond the control of Congress").

37. 156 U.S. 1 (1895).

38. *Id.* at 11.

39. In the context of the dormant commerce clause, the Court had distinguished commerce from manufacturing and production industries in order to uphold state regulations in Coe v. Errol, 116 U.S. 517 (1886) and Kidd v. Pearson, 128 U.S. 1 (1888).

40. *Knight*, 156 U.S. at 13.

The *Knight* view of the need to interpret the commerce clause in a manner that will preserve state sovereignty over "local" activities set the stage for such well known decisions as *Hammer v. Dagenhart*,[41] *Schechter Poultry Corp. v. United States*[42] and *Carter v. Carter Coal Co.*[43] Although the limitations on the commerce clause erected in these decisions have now largely been abandoned in the United States, the philosophy inherent in the decisions influenced the High Court of Australia's construction of the Australian equivalent of the commerce clause. This influence, as well as Australia's adoption of the fullest implications of the *Day* doctrine of state immunities, is explored in part III.

III. Intergovernmental Immunities, Reserved Powers, and the Australian Constitution

British colonization of Australia began in the late eighteenth and early nineteenth centuries.[44] From the 1850s onward, the British Parliament began granting rights of internal self-government to the Australian colonies.[45] By 1890, the six Australian colonies[46] had received such rights and adopted written constitutions.[47] With the grants of self-government to the colonies began a federation movement[48] that culminated in the 1890s in a series of federal constitutional conventions.[49] The draft constitution that emerged was endorsed by the people of Australia in referenda in 1898 and 1899, and enacted, with only minor alterations, by the British Parliament in 1900. The *Commonwealth of Australia Constitution Act*[50] became law with the granting

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41. 247 U.S. 251 (1918).

42. 295 U.S. 495 (1935).

43. 298 U.S. 238 (1936).

44. The early settlements in New South Wales were inspired by the British need, after the loss of the American colonies, to find new overseas places to which to send convicts. *See, e.g.*, R.D. Lumb, The Constitutions of the Australian States 4 (4th ed. 1977).

45. *See* Australian Constitutions Act (No. 2) of 1850 (Imp.).

46. The six colonies, today the Australian states, are New South Wales, Victoria, South Australia, Tasmania, Queensland and Western Australia.

47. For an examination of the origins and current form of the constitutions of the Australian states, *see generally* Lumb, *supra* note 44.

48. *See* J. LaNauze, The Making of the Australian Constitution 1-2 (1972).

49. The first meeting of particular importance to the constitutional conventions was the Melbourne Conference of 1890. The actual constitutional conventions consisted of the Sydney Convention of 1891, the Adelaide Convention of 1897, the Sydney Convention of 1897, and the Melbourne Convention of 1898. For a historical discussion of the framers and the conventions, *see* LaNauze, *supra* note 48.

50. Commonwealth of Austl. Const. Act, 63 & 64 Vic. c. 12.

of the Queen of England's assent on January 1, 1901. In form, therefore, an act of the British Parliament was responsible for creating the Australian federal government, giving legal effect to the Australian Constitution, and conferring statehood upon the six Australian colonies.

In light of the British heritage of the Australian framers and the comparatively amicable circumstances by which Australia became a federation, it is hardly surprising that the constitutional scheme devised by the framers adhered in many ways to British legal traditions. Perhaps most important was the retention of the parliamentary, as distinct from the presidential, form of government.[51] The accompanying principle of parliamentary supremacy[52] led the framers to reject as unnecessary most proposals for constitutional clauses resembling portions of the United States Bill of Rights.[53] This concept of a supreme

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51. As Professor Hunt noted in his study of the influence of American precedents on the Australian federation:

> Precedents established during the colonial period, the quarrel of America with George III, and a sympathetic study of Montesquieu, resulted in a deliberate separation of the American executive and legislature; the development of responsible government in England and its extension to the colonies which were to form the Commonwealth, made such a separation extremely unlikely in Australia, and accounted for one of the major differences between the Australian and American governments.

E. HUNT, AMERICAN PRECEDENTS IN AUSTRALIAN FEDERATION 13-14 (1930). For an analysis of the English system, *see generally* W. BAGEHOT, THE ENGLISH CONSTITUTION (1872).

52. The principle of parliamentary supremacy in the English system means, generally speaking, that the Parliament, comprised of the Queen, the House of Lords, and the House of Commons, has the right to "make or unmake any law whatever" and that "no person or body is recognized by the law of England as having a right to override or set aside the legislation of Parliament." A. DICEY, INTRODUCTION TO THE STUDY OF THE LAW OF THE CONSTITUTION 39-40 (1959).

53. Many of the clauses of the American Bill of Rights were debated, but ultimately rejected, at the Australian constitutional conventions. For example, Richard O'Connor, a delegate from New South Wales and later a justice of the first High Court of Australia, proposed at the 1898 Melbourne Convention that the language of the due process clause of the fourteenth amendment to the U.S. Constitution be included in the Australian Constitution. The objections to the clause raised by South Australian Minister of Education John Cockburn reflect the confidence of the delegates in the supreme parliaments:

> Why should these words be inserted? They would be a reflection on our civilization. Have any of the colonies of Australia ever attempted to deprive any person of life, liberty, or property without due process of law? . . . People would say — "Pretty things these states of Australia; they have to be prevented by a provision in the Constitution from doing the grossest injustice."

1 OFFICIAL RECORD OF THE DEBATES OF THE AUSTRALASIAN FEDERAL CONVENTION (THIRD SESSION) 688 (1898).

and benevolent parliament is at least partially responsible for the fact that proposals to amend the Australian Constitution to provide protections of fundamental rights such as those identified in the United States Bill of Rights have, to date, yet to gain acceptance.[54] Moreover, the High Court of Australia has deferred to parliamentary supremacy by declining to take an activist role in construing existing constitutional provisions that could be viewed as protecting individual rights.[55]

Differences between the Australian and the United States constitutional schemes arising by virtue of the influence of British legal traditions on the Australian Constitution do not, however, extend to the constitutional structuring of the relationship between federal and state governments in Australia and the United States. Rather, in this respect perhaps more than any other,[56] the framers of the Australian Constitution and the early High Court looked predominantly to the U.S. Constitution as interpreted by the U.S. Supreme Court for guidance in designing the fundamental balance of federal and state powers in the Australian federation.

The relevance of the U.S. Constitution as a model for the "federal" features of the Australian Constitution was established in the early sessions of the constitutional conventions. Perhaps in response to the suggestion of the instigator of the 1890 conference, Sir Henry Parkes, that the Australian federation could follow the Canadian model,[57] sev-

54. The federal Parliament in Australia established a Constitutional Commission in 1985 to report on necessary constitutional revisions. The Constitutional Commission's Advisory Committee on Individual and Democratic Rights recommended in 1987 that referenda be held to consider amendments to the Australian Constitution to erect a variety of protections for individual rights. *See* Constitutional Commission, *Report of the Advisory Committee on Individual and Democratic Rights Under the Constitution* XV-XX (1987). Although the final outcome of most of these recommendations remains to be seen, the Constitutional Commission, in a preliminary report to the Attorney General, recommended that several individual rights protections be added to the Constitution. *See* Constitutional Commission, *First Report of the Constitutional Commission* 587-635 (1988). Referenda proposing amendments relating to rights to trial by jury and religious freedoms were overwhelmingly rejected by the people of Australia in September 1988. *Id.*

55. See the illustrations provided by the present Chief Justice of the High Court of Australia in Mason, *The Role of a Constitutional Court in a Federation: A Comparison of the Australian and United States Experience*, 16 FED. L. REV. 1, 8-11 (1986). The Chief Justice concluded that provisions in the Australian Constitution that are, or might amount to, guarantees of individual rights against majority oppression have been interpreted with a view to "preserving Parliament's freedom to enact such laws as it considers appropriate." *Id.* at 11.

56. *See, e.g.*, P. LANE, A MANUAL OF AUSTRALIAN CONSTITUTIONAL LAW 8 (3d ed. 1984) (Australia's "main borrowing" from the United States Constitution was the Madisonian allocation of specified powers to the federal government with the states retaining "residuary and inviolable sovereignty over all other objects").

57. *See* J. LANAUZE, *supra* note 48, at 14. As Professor LaNauze pointed out, the Constitution of Canada was the "most obvious model" for Australia because it was the only federal union involving contiguous groups of British colonies. *Id.* at 17.

eral of the 13 delegates at the 1890 conference seized the opportunity to express their preference for the allocation of federal and state powers in the U.S. Constitution over that established in Canada by the British North America Act.[58]

When the Constitutional Convention convened in Sydney in 1891, it approved a series of resolutions[59] drafted by Parkes that reflected the U.S. Constitution in every provision except those relating to the executive.[60] The draft bill for a constitution based upon these resolutions failed to secure passage in the colonial parliaments,[61] but the importance of the U.S. Constitution as a model for the Australian constitutional federation was firmly established.[62] As a result of this

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58. *See Official Record of the Proceedings and Debates of the Australasian Federation Conference, 1890* 71 (1890) (Sir Henry Parkes); *id.* at 73 (Thomas Playford); *id.* at 92, 252 (Alfred Deakin); *id.* at 105-07 (Andrew Inglis Clark). *But see id.* at 134-45 (John Cockburn); *id.* at 241 (Duncan Gillies). *See generally* M. HUNT, *supra* note 51, at 49-52.

59. Parkes proposed the following "principles" for establishing and securing "an enduring foundation for the structure of a federal government":

> 1. That the powers and privileges and territorial rights of the several existing colonies shall remain intact, except in respect to such surrenders as may be agreed upon as necessary and incidental to the power and authority of the National Federal Government.
>
> 2. That the trade and intercourse between the federated colonies . . . shall be absolutely free.
>
> 3. That the power and authority to impose customs duties shall be exclusively lodged in the Federal Government . . . .
>
> 4. That the military and naval defence of Australia shall be entrusted to federal forces, under one command.

See J. QUICK & R. GARRAN, THE ANNOTATED CONSTITUTION OF THE AUSTRALIAN COMMONWEALTH 125 (1901). In addition, Parkes' resolutions proposed the basic structure of the federal government under the Constitution as including:

> 1. A parliament, to consist of a senate and a house of representatives, the former consisting of an equal number of members from each province, . . . the latter to be elected by districts formed on a population basis, and to possess the sole power of originating and amending all bills appropriating revenue or imposing taxation.
>
> 2. A judiciary, consisting of a federal supreme court, which shall constitute a high court of appeal for Australia, under the direct authority of the Sovereign, whose decisions, as such, shall be final.
>
> 3. An executive, consisting of a governor-general and such persons as may from time to time be appointed as his advisers, such persons sitting in Parliament, and whose term of office shall depend upon their possessing the confidence of the house of representatives . . . .

Id. at 125. The resolutions were approved with only minor amendments.

60. *See* M. HUNT, *supra* note 51, at 58.

61. *See* J. QUICK & R. GARRAN, *supra* note 59, at 143-59.

62. Although the delegates to the Adelaide Constitutional Convention in 1897 voted against relying upon the 1891 bill as a basis from which to work, this fresh start was a procedural

precedent, when the delegates assembled for the Constitutional Conventions of 1897-98 that ultimately produced the Australian Constitution, many had familiarized themselves with the United States Constitution, decisions of the U.S. Supreme Court, and leading scholarly works on the U.S. Constitution.[63]

Historical evidence from the Australian federation movement and the constitutional conventions therefore supports the conclusion that the U.S. Constitution played an important role as a model of federal government. As the Australian Constitutional Commission recently concluded, the framers of the Australian Constitution viewed the U.S. Constitution as "the pre-eminent model of federal government," and adopted the "federal features" of the U.S. Constitution in at least five respects: (1) the establishment of a central government and state governments, each with its own governmental institutions; (2) a distribution of authority between federal and state governments that granted enumerated powers to the federal government and left the undefined residue to the states; (3) a judiciary appointed by the federal government with the power to determine whether either the federal or state governments had exceeded their constitutional powers; (4) the supremacy of federal over state laws; and (5) the entrenchment of these features into a written constitution that is difficult to alter.[64]

The result of this use of the federal features of the U.S. constitutional scheme was a balance of federal and state powers in the Australian Constitution that resembles that created by the U.S. Constitution.[65] The Australian Constitution directs that the democratically-

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fiction. *See* J. LANAUZE, *supra* note 48, at 277. The Adelaide Convention delegates approved the Parkes 1891 resolutions with only minor alterations, and the select committees began with the printed 1891 bill and proceeded to confirm, reject or modify it clause by clause. *See* M. HUNT, *supra* note 51, at 86; J. LANAUZE, *supra* note 48, at 277. Thus, the framers assembled in the Constitutional Conventions never really retreated from the fundamental design of government reflected in the resolutions of the 1891 Convention.

63. *See* J. LANAUZE, *supra* note 48, at 272-75. LaNauze pointed out that although only a few delegates could be said to be experts in American constitutional law, nearly all delegates were familiar with James Bryce's exposition of the American constitutional system in his 1888 book *The American Commonwealth.* LaNauze concluded that the Bryce book "lay 'on the table' throughout the proceedings in 1897-8 [and] was quoted or referred to more than any other single work; never criticized, it was regarded with the same awe, mingled with reverence, as the Bible would have been in an assembly of churchmen." *Id.* at 273.

64. *See* Constitutional Commission, *supra* note 54, at 61-62.

65. See for example the views of Sir Owen Dixon, Justice and Chief Justice of the High Court of Australia from 1929-1964. Chief Justice Dixon described the real innovation of the Australian Constitution as residing in the combining of the basal conceptions of the U.S. Constitution with the British parliamentary system under the Crown. With respect to the federal character of the Australian Commonwealth, however, the Australian Constitution follows the

elected[66] federal Parliament shall include a House of Representatives, with members elected largely in proportion to the respective populations of the states,[67] and a Senate, with an equal number of senators from each state.[68] The Australian Constitution also grants enumerated powers to this federal legislature with residual powers retained by the states.

Section 51 of the Australian Constitution contains a list of federal legislative powers that is, due perhaps to the fact that the Australian Constitution was drafted more than 100 years after its American counterpart, much more extensive than the federal legislative powers granted in the United States Constitution. These section 51 powers include equivalents of the commerce,[69] taxation,[70] and "necessary and proper"[71] clauses of the U.S. Constitution. Section 51 goes further, however, in provisions such as the "industrial disputes" power, which enables the federal legislature to establish tribunals to settle interstate labor disputes by conciliation and, where appropriate, by final and binding compulsory arbitration.[72] Other areas placed within the federal legislature's powers by section 51 include: banking;[73] insurance;[74]

U.S. model "with remarkable fidelity." He concluded that "[t]he [Australian] legislative powers are more numerous and perhaps more extensive; and there are additional provisions which can be ascribed to particular considerations of Australian concern. But there are few departures in principle and most of them find a reason in the course of judicial decision in the United States." O. DIXON, JESTING PILATE 167 (1965).

66. Both the federal and state parliaments in Australia are democratically elected.

67. AUSTL. CONST. § 24 (1901).

68. AUSTL. CONST. § 7. At present, the Senate is comprised of 12 senators from each of the six states with four senators from each of the two territories.

69. Section 51(i) of the Australian Constitution grants the federal Parliament power to make laws with respect to "trade and commerce with other countries, and among the States." AUSTL. CONST. § 51(i).

70. Section 51(ii) of the Australian Constitution grants the federal Parliament power to make laws with respect to "taxation; but so as not to discriminate between States or parts of States." AUSTL. CONST. § 51(ii).

71. Section 51(xxxix) of the Australian Constitution grants the federal Parliament power to make laws with respect to "matters incidental to the execution of any power vested by this Constitution in the Parliament or either House thereof, or in the Government of the Commonwealth, or in the Federal Judicature, or in any department or officer of the Commonwealth." AUSTL. CONST. § 51(xxxix).

72. Section 51(xxxv) of the Australian Constitution (the "industrial disputes" power) allows the federal legislature 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." AUSTL. CONST. § 51(xxxv).

73. AUSTL. CONST. § 51(xiii).

74. AUSTL. CONST. § 51(xiv).

foreign trading and financial corporations;[75] marriage and divorce;[76] health and social security payments;[77] bankruptcy;[78] copyrights, patents and trademarks;[79] immigration, naturalization and aliens;[80] and external affairs.[81]

Of the enumerated powers of the Australian federal government, a few are vested exclusively in the federal Parliament. These include the power to make laws with respect to federal employees[82] and the federal territories,[83] and the right to collect customs duties and all forms of excise taxes.[84] The remaining powers, including all the subject matters of federal legislative power in section 51,[85] may be the object of state legislation provided that the state law is not deemed to be "inconsistent," and thereby invalid "to the extent of the inconsistency," with some federal law.[86] The principle of concurrent federal and state powers is reflected in the closest Australian equivalent to the tenth amendment to the U.S. Constitution. Section 107 of the Australian Constitution states that:

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75. AUSTL. CONST. § 51(xx).
76. AUSTL. CONST. § 51(xxi) & 51(xxii).
77. AUSTL. CONST. § 51(xxiii) & 51(xxiiiA).
78. AUSTL. CONST. § 51(xvii).
79. AUSTL. CONST. § 51(xviii).
80. AUSTL. CONST. § 51(xix) & 51(xxvii).
81. AUSTL. CONST. § 51(xxix).
82. AUSTL. CONST. § 52(ii).
83. AUSTL. CONST. § 122.
84. AUSTL. CONST. § 90.
85. The defense power of the Commonwealth in § 51(vi) of the Australian Constitution might be viewed as an exception to the concurrent nature of the § 51 powers. Although the § 51(vi) power of the Commonwealth to make laws with respect to "[t]he naval and military defence of the Commonwealth and of the several States, and the control of the forces to execute and maintain the laws of the Commonwealth" is technically concurrent, it is effectively exclusive to the Commonwealth by virtue of § 114 of the Constitution. Section 114 prohibits the states from raising or maintaining any navy or military force without the consent of the Commonwealth. AUSTL. CONST. § 51(vi).
86. Section 109 of the Constitution provides that "[w]hen a law of a State is inconsistent with a law of the Commonwealth, the latter shall prevail, and the former shall, to the extent of the inconsistency, be invalid." AUSTL. CONST. § 109. Apart from the potential § 109 "inconsistency" problem that parallels the doctrine of legislative preemption in the United States, the grants of legislative power in the Australian Constitution have not been construed to preclude state laws in a manner resembling the "dormant" commerce clause of the U.S. Constitution. Section 92 of the Australian Constitution, which requires that "trade, commerce, and intercourse among the States . . . shall be absolutely free," arguably obviated the need for finding a "negative" side to the Australian trade and commerce power. Even if the state law is not inconsistent with a federal law, however, the states may not violate other provisions of the Constitution such as § 92, § 117 (requiring that states not discriminate against non-alien residents of other states), or § 118 (requiring that full faith and credit be given to the laws, public acts and judicial proceedings of every state). *See* AUSTL. CONST. §§ 92, 117 & 118.

> Every power of the Parliament of a Colony which has become a State, shall, unless it is by the Constitution exclusively vested in the Parliament of the Commonwealth or withdrawn from the Parliament of the State, continue as at the establishment of the Commonwealth, or as at the admission or establishment of the State, as the case may be.

Although the framers of the Australian Constitution followed the United States' model in failing to include a provision to indicate that the federal judiciary was to engage in constitutional review of federal and state enactments, there is little doubt that the Australian framers were aware of *Marbury v. Madison* and approved of the judicial role established by that decision.[87] The High Court of Australia is therefore now the final arbiter on all constitutional questions.[88] Unlike the United States Supreme Court, however, the Australian Constitution also grants the High Court power to hear appeals from state supreme courts on all matters of state law.[89] The High Court thus is the final authority in Australia on all constitutional questions, all matters relating to the interpretation of federal or state statutes, and all cases arising under the common law.

In light of the unmistakable similarities between the federal features of the Australian Constitution and the U.S. Constitution, the early High Court justices often found U.S. Supreme Court decisions on federalism issues to be relevant to similar questions in Australia. The early justices had unique perspectives on "original intent" of the constitutional provisions because the three members placed on the Court at the time of its creation in 1903,[90] Chief Justice Griffith and

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87. *See* Mason, *supra* note 55, at 3; O. DIXON, *supra* note 65, at 174-75.

88. Prior to 1975, the English Privy Council was the final court of appeal on all matters involving the extent of federal or state powers. *See* AUSTL. CONST. § 74. Appeals from the High Court to the Privy Council were abolished by 1975 amendments to the Judiciary Act of 1903 (Cth). *See generally* A. Blackshield, *The Abolition of Privy Council Appeals: Judicial Responsibility and "The Law for Australia"*, ADEL. L. REV. RES. PAPERS No. 1 (1978). The Australia Act of 1986 (Cth) eliminated appeals to the Privy Council from Australian state courts. *See generally* Goldring, *The Australia Act 1986 and the Formal Independence of Australia*, 1986 Pub. L. 192; Lee, *The Australia Act 1986 — Some Legal Conundrums*, 14 MONASH U.L. REV. (1988) (forthcoming).

89. *See* AUSTL. CONST. § 73.

90. The Constitution became binding upon the states when it was enacted. The Constitution did not, however, itself create the High Court or any other federal courts. Although some members of the Commonwealth Parliament argued that enforcement of the Constitution should be left to the state courts with appeals to the English Privy Council, a majority of the Parliament eventually disagreed and established the High Court by enacting the Judiciary Act 1903 (Cth) and the High Court Procedure Act 1903 (Cth). *See* G. SAWER, AUSTRALIAN FEDERALISM IN THE COURTS 20-21 (1967).

Justices Barton and O'Connor, and the two additional justices placed on the Court in 1906, Justices Isaacs and Higgins, had been involved in some manner in the drafting of the Australian Constitution.[91]

The role of U.S. Supreme Court decisions on federalism issues became evident immediately in the High Court's first major constitutional decision, *D'Emden v. Pedder*.[92] In *Pedder*, the Court held that a state act requiring affixation of a two cent stamp duty to salary receipts did not apply to Commonwealth public servants.[93] Chief Justice Griffith's opinion for the unanimous Court quoted at length from *McCulloch v. Maryland*[94] and relied upon that decision in support of the Court's ruling that states may not exercise their authority in a manner that would "fetter, control, or interfere with, the free exercise of the legislature or executive power of the Commonwealth," unless such interference is expressly authorized by the Constitution.[95] The Court justified its reliance upon *McCulloch* on the basis of the lack of any "material difference" between the relevant Australian and American constitutional principles.[96] As such, the Australian Court adhered to *McCulloch* both because of the decision's longstanding vitality[97] and because it was "not an unreasonable inference" that the

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91. Chief Justice Griffith played a major role in drafting proposals at the 1891 Constitutional Convention which became the basis for the drafting work at the 1897-98 Conventions. *See* G. SAWER, AUSTRALIAN FEDERAL POLITICS AND LAW 1901-1929 at 55, n.129 (1956). Justice Barton was a delegate to the 1891 Convention and a leader of the 1897-98 Conventions. Justice O'Connor, like Barton, had been a New South Wales delegate and member of the drafting committee at the 1897-98 Conventions. Justices Isaacs and Higgins also had been delegates to the 1897-98 Conventions. *See generally* G. FRICKE, JUDGES OF THE HIGH COURT (1986). For biographical studies of the early High Court justices, *see, e.g.*, Z. COWEN, ISAAC ISAACS (1967); R. JOYCE, SAMUEL WALKER GRIFFITH (1984); N. PALMER, HENRY BOURNES HIGGINS: A MEMOIR (1931); J. REYNOLDS, EDMUND BARTON (1948); J. RICHARD, H.B. HIGGINS: THE REBEL AS JUDGE (1984).

92. 1 C.L.R. 91 (Austl. 1904).

93. The Court deferred consideration of the statutory construction issue until after it had analyzed the constitutional issues. Having found that state taxation of Commonwealth public servants would be unconstitutional, the Court construed the statute as inapplicable to such servants in order to preserve the general validity of the state act. *See id.* at 119-20.

94. *See id.* at 113-16.

95. *Id.* at 111.

96. *Id.* at 111-12. *See also* Deakin v. Webb, 1 C.L.R. 585, 605-06 (Austl. 1904).

97. The Chief Justice noted that, although the High Court is not bound by decisions of the U.S. Supreme Court, "we all think that it would need some courage for any Judge at the present day to decline to accept the interpretation placed upon the United States Constitution by so great a Judge so long ago as 1819, and followed up to the present day by the succession of great jurists who have since adorned the Bench of the Supreme Court in Washington." *D'Emden*, 1 C.L.R. at 112.

framers of the Australian Constitution were aware of *McCulloch* and intended to create a similar constitutional rule.[98]

The High Court's agreement with U.S. Supreme Court decisions on federalism issues was not, however, confined to problems of vindicating the supremacy of federal authority. The early High Court, again utilizing U.S. Supreme Court precedent, also erected constitutional barriers designed to preserve realms of exclusive state sovereignty into which the national government could not intrude. These barriers are best viewed[99] as two related, but analytically distinct, doctrines: the intergovernmental immunities doctrine and the doctrine of reserved state powers.

The operation of both doctrines is well illustrated in the High Court's 1906 decision in *Federated Amalgamated Government Railway & Tramway Services Association v. New South Wales Railway Traffic Employees Association (Railway Servants' Case)*.[100] In the *Railway Servants' Case*, an association of employees of state-operated railroads sought to avail itself of the Commonwealth's industrial dispute resolution machinery by registering under the federal act. The employees argued that both section 51(xxxv) of the Constitution, empowering the Commonwealth Parliament to make laws with respect to conciliation and arbitration for the prevention and settlement of interstate industrial disputes,[101] and section 51(i), empowering the Commonwealth Parliament to make laws with respect to interstate trade and commerce,[102] enabled the Commonwealth to settle their disputes with their employers. Chief Justice Griffith authored an opinion for the unanimous Court rejecting both contentions.

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98. *Id.* at 112-13. *See also Deakin*, 1 C.L.R. at 613-16 (utilizing similar analysis of constitutional similarities between Australia and the U.S. to support relying upon Dobbins v. Commissioners, 41 U.S. (16 Pet.) 435 (1842) (in support of holding that states may not tax salaries of Commonwealth officials).

99. Various commentators have used several different phrases in describing the doctrines. The intergovernmental immunities doctrine, for example, is sometimes referred to as the implied immunities doctrine, the implied immunities of instrumentalities doctrine, or the implied prohibitions doctrine. the reserved powers doctrine is also occasionally referred to as the doctrine of implied prohibitions. A few commentators have found it unnecessary to distinguish between the two doctrines. *Compare* L. ZINES, THE HIGH COURT AND THE CONSTITUTION 4-5 (2d ed. 1987) *and* Saunders, *Influences of Federalism on Constitutional Interpretation in Australia*, 20 U.C.D. L. REV. 353, 362-63 (1987) *with* C. HOWARD, AUSTRALIAN FEDERAL CONSTITUTIONAL LAW 144-60 (3d ed. 1985) *and* P. LANE, A MANUAL OF AUSTRALIAN CONSTITUTIONAL LAW 464-65 (4th ed. 1987).

100. 4 C.L.R. 488 (Austl. 1906).

101. *See supra* note 72 and accompanying text.

102. *See supra* note 69.

In declining to find that interstate industrial disputes between employers and employees in state-run railroads fall within the Commonwealth's industrial disputes power, the *Railway Servants' Case* Court relied upon the U.S. Supreme Court's decision in *Day* in support of a reciprocal application of the principles of the *Pedder* case.[103] The High Court agreed with the U.S. Supreme Court in *Day* that protecting both the state and national governments from interference was a "necessary [constitutional] implication . . . upheld by the great law of self-preservation."[104] The *Railway Servants' Case* Court went significantly beyond *Day*, however, in holding that this state immunity from Commonwealth interference applied to all forms of legislative action, not merely interference by means of taxation.[105] Commonwealth regulation of industrial disputes in state-operated railways would, in the Court's view, interfere with what had traditionally been an important governmental function of the states.[106] Hence, the "doctrine of mutual freedom from interference as between the Commonwealth and State Governments" prevented the asserted application of the Commonwealth's industrial disputes power to state railways.[107]

In contrast to its use of the intergovernmental immunities doctrine to prevent the Commonwealth's industrial disputes power from reaching state railways, the *Railway Servants' Case* Court based its rejection of the employees' trade and commerce power argument upon the actual terms of that constitutional provision. Despite section 98 of the Australian Constitution, which declares that the Commonwealth's trade and commerce power extends "to railways the property of any State," the High Court accepted and relied upon late nineteenth century United States commerce clause decisions distinguishing "direct" from "indirect" effects on commerce in order to protect the states from federal interference.[108] Chief Justice Griffith's opinion for the Court summarily concluded that "general conditions of employment" in state-operated railroads fall outside the scope of the Common-

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103. The High Court found Justice Nelson's arguments in *Day* to be "incontrovertible." *Railway Servants' Case*, 4 C.L.R. at 538. For a discussion of *Day*, *see supra* notes 18-30 and accompanying text.

104. *Railway Servants' Case*, 4 C.L.R. at 538 (*quoting* Day, 78 U.S. (11 Wall.) at 127)).

105. *Id.*

106. *Id.* at 539.

107. *Id.*

108. The High Court quoted at length from Justice Peckham's opinion for the Supreme Court in Addyston Pipe & Steel Co. v. United States, 175 U.S. 111 (1899) and Hopkins v. United States, 171 U.S. 578 (1898). *Railway Servants' Case*, 4 C.L.R. at 541-43.

wealth's trade and commerce power because their effect upon commerce is not "direct, substantial and proximate."[109]

United States Supreme Court decisions erecting constitutional protections of state sovereignty therefore provided the support, if not the inspiration, for the development of two distinct "states' rights" doctrines in Australian constitutional law.[110] First, the intergovernmental immunities doctrine operated by implication from the federal nature of the Australian Constitution to prevent both the Commonwealth and the states from interfering with their respective functions. Prior to 1920, the High Court utilized this doctrine in the areas of taxation and industrial arbitration to invalidate Commonwealth and state legislation that the Court viewed as violating the principles of mutual freedom from interference articulated in the *Railway Servants' Case*.[111] Second, the reserved powers doctrine, by contrast, involved a method of constitutional interpretation by which grants of Commonwealth legislative power were narrowly construed in order to ensure that the states retained power to deal with their domestic affairs. Reserved state powers concerns were clearly evidenced in the High Court's early constructions of such Commonwealth legislative powers as the trade and commerce power, the customs power,[112] the corporations power,[113] the taxation power,[114] and the trademarks power.[115]

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109. *Id.* at 545. The Court also reasoned, as an alternative ground for its holding, that the attempted application of the Conciliation and Arbitration Act (1904) (Cth) to state railway employees was invalid because it extended to employees not themselves engaged in interstate traffic. *Id.* at 545-47.

110. For more extensive analysis of the intergovernmental immunities and reserved powers doctrines in Australia prior to 1920, *see generally* G. SAWER, *supra* note 90, at 121-29; L. ZINES, *supra* note 99, at 1-7.

111. G. SAWER, *supra* note 90, at 127.

112. *See* Attorney-General (NSW) v. Collector of Customs, 5 C.L.R. 818 (Austl. 1908); Regina v. Sutton, 5 C.L.R. 789 (Austl. 1908). Section 51(iii) of the Australian Constitution grants the Commonwealth power to make laws with respect to "[b]ounties on the production or export of goods." AUSTL. CONST. § 51(iii).

113. *See* Huddart, Parker & Co. v. Moorehead, 8 C.L.R. 330 (Austl. 1909). Section 51(xx) of the Australian Constitution grants the Commonwealth power to make laws with respect to "[f]oreign corporations, and trading or financial corporations formed within the limits of the Commonwealth." AUSTL. CONST. § 51(xx). *See also infra* note 165.

114. *See* Peterswald v. Bartley, 1 C.L.R. 497 (Austl. 1904); Regina v. Barger, 6 C.L.R. 41 (Austl. 1908). *See also infra* note 164.

115. *See* Attorney-General (NSW) v. Brewery Employees Union, 6 C.L.R. 469 (Austl. 1908). Section 51(xviii) of the Australian Constitution grants the Commonwealth power to make laws with respect to "[c]opyrights, patents of inventions and designs, and trade marks." AUSTL. CONST. § 51(xviii).

IV. AUSTRALIA'S RETREAT FROM IMPLIED CONSTITUTIONAL PROTECTIONS OF STATE SOVEREIGNTY

The High Court's 1920 decision in *Amalgamated Society of Engineers v. Adelaide Steamship Co. (Engineers' Case)*[116] fundamentally restructured the Court's federalism doctrines. The *Engineers' Case* still marks the major turning point in the interpretation of the Australian Constitution in that the Court overruled both the intergovernmental immunities and reserved powers doctrines and, in so doing, downplayed the usefulness of United States precedents as aids to Australian constitutional interpretation.[117]

The question before the *Engineers' Case* Court was essentially the same as that decided in the *Railway Servants' Case*: whether the industrial disputes power,[118] which enables a federal agency[119] to settle interstate industrial disputes by conciliation or binding interest arbitration, could bind state government business enterprises. Justice Isaacs, joined by Chief Justice Knox and Justices Rich and Starke, delivered the majority opinion[120] overruling the *Railway Servants' Case* and answering the question in the affirmative. Justice Higgins wrote a separate concurring opinion which was more closely reasoned than the majority opinion. Accordingly, it provides the most appropriate point from which to appraise the Court's decision.

Justice Higgins argued that no implied prohibitions should be read into the industrial disputes power. He pointed out that a number of section 51 powers such as banking,[121] insurance,[122] and taxation,[123] ex-

116. 28 C.L.R. 129 (Austl. 1920).

117. For comment on this decision, *see* L. ZINES, *supra* note 99, at 7-15; R. MENZIES, CENTRAL POWER IN THE AUSTRALIAN COMMONWEALTH 26-48 (1967); G. SAWER, *supra* note 90, at 129-32; Latham, *Interpretation of the Constitution* in ESSAYS ON THE AUSTRALIAN CONSTITUTION 27-31 (Else-Mitchell 2d ed. 1961).

118. *See supra* note 72 for the text of section 51(xxxv) of the Australian Constitution.

119. The agency was originally the Commonwealth Court of Conciliation and Arbitration. From 1956 to 1989, the agency was known as the Australian Conciliation and Arbitration Commission. When the Industrial Relations Act of 1988 commenced operation on March 1, 1989, this agency became known as the Industrial Relations Commission.

120. Justice Gavan Duffy dissented.

121. Section 51(xiii) of the Australian Constitution grants the Commonwealth power to make laws with respect to "[b]anking, other than State banking; also State banking extending beyond the limits of the State concerned, the incorporation of banks, and the issue of paper money." AUSTL. CONST. § 51(xiii).

122. The Commonwealth's insurance power in section 51(xiv) of the Constitution extends to power to make laws with respect to "[i]nsurance, other than State insurance; also State insurance extending beyond the limits of the State concerned." AUSTL. CONST. § 51(xiv).

123. The Commonwealth's taxation power, set out *supra* note 70, is constrained by section 114 of the Constitution which declares that the Commonwealth may not "impose any tax on property of any kind belonging to a State." AUSTL. CONST. § 114.

pressly provide limitations on their exercise over state functions. The other section 51 powers, especially the industrial disputes power, were free from such limitations and should therefore be interpreted according to their full measure.[124] Moreover, Justice Higgins rejected implied limitations on constitutional powers because he could not discern "any discrimen" that would enable the Court to determine which subject-matters would infringe upon state sovereignty.[125] Finally, Justice Higgins justified the Court's overruling of the *Railway Servants' Case* in part by demonstrating that the rule of *Day* was irrelevant to the construction of the Australian industrial disputes power. He reasoned that the *Day* Court's assertion that the U.S. Constitution necessarily contains an implied prohibition upon federal interference with the states was invalid in Australia because section 109 of the Australian Constitution, which provides that federal laws prevail over inconsistent yet otherwise valid state laws, expressly recognizes the supremacy of federal law.[126] He concluded that,

> on the true construction of sec. 51, the State activities which are not distinctly excluded from the Federal powers by the Constitution are subject to the Federal laws, to the full extent of their meaning; and that there is no exemption from Federal Acts unless and until they pass beyond the limits of the Federal powers on their true construction.[127]

In contrast to Justice Higgins' views, the majority in an opinion authored by Justice Isaacs, was not content to interpret the federal constitutional powers to their fullest and to pass over United States

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124. *Engineers' Case*, 28 C.L.R. at 162-63.

125. Justice Higgins found that the council for the states had "failed to show any discrimen whereby this Court can distinguish the subjects as to which Parliament can apply its legislation to the States, and the subjects as to which it cannot." *Id.* at 163-64.

126. *Id.* at 168. Justice Higgins also pointed out that post-*Day* U.S. Supreme Court decisions had excluded state businesses of a private character from the taxation immunity enjoyed by governmental functions of the states. *Id.* at 170-71. Even with the limitations imparted into the state taxation immunity doctrine in the United States, however, he "desire[d] not to be understood as regarding the case of *Day* as applying to our Constitution." *Id.* at 171.

Nineteen years later, Justice Felix Frankfurter relied in part upon the *Engineers' Case* in his concurring opinion in Graves v. New York, 306 U.S. 466, 487 (1939). In rejecting the intergovernmental tax immunities doctrines as constitutionally unsupportable, Justice Frankfurter described the *Engineers' Case* as having "completely rejected the doctrine of intergovernmental immunity." *Id.* at 491. Justice Frankfurter credited Justice Higgins with being "one of the most distinguished of Australian judges." *Id.* at 491 n.8. For an account of the friendship between Justices Higgins, Frankfurter and Louis Brandeis, *see* O. DIXON, *supra* note 65, at 181-82.

127. *Engineers' Case*, 28 C.L.R. at 171.

precedents on intergovernmental immunities and reserved powers. Instead, Justice Isaacs attempted to mount an argument that use of U.S. Supreme Court decisions relating to the preservation of state autonomy was an error because of the British origins of the Australian Constitution.[128] He seized upon two differences between the Australian Constitution and the U.S. Constitution which in his mind were interlinked. These differences were: first, the concept of responsible government derived from the British Westminster parliamentary system; and second, the role of the British Monarchy.[129] In this context, both concepts require some explanation.

British responsible government, which is both expressly and impliedly enshrined in the Australian Constitution,[130] relates to the relationship between Parliament and the executive. For example, the federal Parliament[131] comprises not only the two parliamentary houses,[132] but also the British Monarchy as head of the executive. The Crown acts through the Governor-General, an agent appointed on the recommendation of the Australian government. The Governor-General is head of the executive[133] and she or he must assent to parliamentary bills before they may become law. However, the executive is tied to Parliament, since the ministers who advise the Governor-General must be elected members of Parliament.[134] True to the precepts inherent

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128. The majority concluded that:

> American authorities, however illustrious the tribunals may be, are not a secure basis upon which to build fundamentally with respect to our own Constitution. While in secondary and subsidiary matters they may, and sometimes do, afford considerable light and assistance, they cannot . . . be recognized as standards whereby to measure the respective rights of the Commonwealth and States under the Australian Constitution.

Id. at 146.

129. *Id.* at 146-48.

130. Section 64 of the Australian Constitution provides that the Governor-General may appoint Ministers of State who shall be the Queen's Ministers of State for the Commonwealth and members of the Federal Executive Council. This provision was designed to express the principles of responsible government in the Constitution. AUSTL. CONST. § 64. *See, e.g.*, J. QUICK & R. GARRAN, *supra* note 59, at 709-10. Section 64 does not, however, explicitly recognize other central tenets of responsible government such as the fact that the Ministry must have the support of a majority of the House of Representatives or that Ministries defeated at an election have a duty to resign. *See, e.g.*, R. LUMB, THE CONSTITUTION OF AUSTRALIA ANNOTATED 238-39 (4th ed. 1986).

131. Although this discussion focuses upon the Commonwealth Parliament, responsible government operates in the same manner with respect to the state parliaments.

132. As in the United States, the House of Representatives is the lower house of the federal Parliament and the Senate is the upper house. *See supra* notes 67-68 and accompanying text.

133. Section 61 of the Australian Constitution makes the Queen's representative the head of the executive. AUSTL. CONST. § 61. *See* J. QUICK & R. GARRAN, *supra* note 59, at 701-02.

134. *See* AUSTL. CONST. § 64.

in the British monarchy, which also operate in such former British colonies as Australia, Canada, and New Zealand, the Governor-General is bound to act on the advice of these ministers in most instances.[135] Nevertheless, the ministers will maintain executive control as advisers to the Governor-General only so long as their leader commands a majority in the House of Representatives.[136] Thus, these executive advising ministers are in this sense responsible to Parliament, and hence they are the nomenclature of responsible government. Although Justice Isaac's majority opinion relied upon this concept,[137] this form of government has little relevance to federalism issues raised by the doctrines of intergovernmental immunities and reserved powers and, accordingly, provides little basis for differentiating the Australian Constitution from its American counterpart with respect to these issues.

The *Engineers' Case* majority went further in arguing that, due to the indivisibility of the British Monarchy, state and federal governments are one indivisible polity rather than separate and distinct sovereigns. Justice Isaacs did, however, little more than assert this view of indivisibility which, even in 1920, was more theoretical than real.[138] After all, the Crown in right of the federal government and of each of the six state governments was only the titular head of each of the seven separate governments within the one federation. The Australian Constitution itself divides various functions between the state and federal governments and entrusts the High Court with the responsibility of enforcing the balance.

Apart from the majority opinion's unconvincing attempts to distinguish the Australian Constitution from the U.S. Constitution to justify

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135. *See generally* H. EVATT, THE KING AND HIS DOMINION GOVERNORS: A STUDY OF THE RESERVE POWERS OF THE CROWN IN GREAT BRITAIN AND THE DOMINIONS (2d ed. 1967).

136. For a discussion of the role of votes of no confidence by the House of Representatives under the Westminster parliamentary system and an appraisal of the realities of the Westminster model in Australia, *see* R. LUCY, THE AUSTRALIAN FORM OF GOVERNMENT 2-10, 132-77 (1985).

137. The majority concluded generally that:

> [I]n view of the two features of common and indivisible sovereignty and responsible government, no more profound error could be made than to endeavour to find our way through our own Constitution by the borrowed light of the decisions, and sometimes the dicta, that American institutions and circumstances have drawn from the distinguished tribunals of that country.

Engineers' Case, 28 C.L.R. at 148.

138. *See, e.g.*, L. ZINES, *supra* note 99, at 10 ("The notion of indivisibility of the Crown was far from conclusive and in fact the trend was and still is toward regarding the Commonwealth and the States as separate 'Crowns' or, at any rate, the Crown acting in separate rights.").

charting an independent course for Australia, Justice Isaacs' critique of the intergovernmental immunities and reserved powers doctrines bears a striking resemblance to Justice Blackmun's analysis for the U.S. Supreme Court in the *Garcia* decision 65 years later.[139] Justice Isaacs rejected the intergovernmental immunities doctrine on the grounds that it was improper for the Court to determine what implied prohibitions on exercises of Commonwealth power are "necessary" to protect the state's role in the federation. He concluded that

> from its nature [the intergovernmental immunities doctrine] is incapable of consistent application, because "necessity" in the sense employed — a political sense — must vary in relation to various powers and various States, and, indeed, various periods and circumstances. Not only is the judicial branch of the Government inappropriate to determine political necessities, but experience, both in Australia and America, evidenced by discordant decisions, has proved both the elusiveness and the inaccuracy of the doctrine as a legal standard.[140]

Abuses of the powers actually granted to the Commonwealth by the Australian Constitution were, in the majority's view, left for correction to the political process, rather than to the courts.[141]

The majority also rejected the reserved powers doctrine as not supported by the Constitution. Justice Isaacs believed that "where the affirmative terms of a stated power would justify an enactment, it rests upon those who rely on some limitation or restriction upon the power to indicate it in the Constitution."[142] Section 107 of the Australian Constitution indicates that the states continue to enjoy all

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139. *See* the discussion of *Garcia supra* note 1-9 and accompanying text and *infra* notes 220-39 and accompanying text.

140. *Engineers' Case*, 28 C.L.R. at 150-51.

141. Justice Isaacs reasoned that:

> The non-granting of powers, the expressed qualifications of powers granted, the expressed retention of powers, are all to be taken into account by a Court. But the extravagant use of the granted powers in the actual working of the Constitution is a matter to be guarded against by the constituencies and not by the Courts . . . . If it be conceivable that the representatives of the people of Australia as a whole would ever proceed to use their national powers to injure the people of Australia considered sectionally, it is certainly within the power of the people themselves to resent and reverse what may be done. No protection of this Court in such a case is necessary or proper.

Id. at 151-52.

142. *Id.* at 154.

their powers, held at the time of federation, that were neither vested exclusively in the Commonwealth nor withdrawn from the states by the Constitution.[143] This was not such a limiting provision because it does not reserve any power from the Commonwealth that "falls fairly within the explicit terms of an express grant in sec. 51, as that grant is reasonably construed."[144] Hence, the majority concluded that states and persons representing states are, when parties to industrial disputes, subject to Commonwealth legislation under the industrial disputes power "if such legislation on its true construction applies to them."[145]

The *Engineers' Case* decision, rendered only two years after World War I, represented an important step in Australia's emergence as a nation.[146] Despite the broad rhetoric of the decision, the High Court subsequently left little doubt that the *Engineers' Case* would not mean the end of implied constitutional limitations on Commonwealth powers. First, although the High Court has not returned to anything resembling the broad *Railway Servants' Case* view of state immunities, in two instances the Court resuscitated the doctrine in a much more limited form to invalidate Commonwealth laws that the Court perceived as discriminating against the states.[147] Second, the reserved powers doctrine persisted after the *Engineers' Case* in that the Court adhered to most pre-*Engineers' Case* narrow constructions of Commonwealth powers and developed new limits on the industrial disputes power in order to preserve a realm of regulatory power reserved to the states. The discussion that follows examines these developments.

The revival of a limited form of the intergovernmental immunities doctrine began with the High Court's 1947 decision in *Melbourne Corp.*

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143. *See supra* note 87 and accompanying text.

144. *Engineers' Case*, 28 C.L.R. at 154. The majority concluded that even powers preserved for the states under section 107 are, by virtue of section 109, invalid to the extent of inconsistency with exercises of Commonwealth power. *Id.* at 154-55.

145. *Id.* at 155.

146. Justice Windeyer summarized the role of the *Engineers' Case* in Australia's nationhood in his judgment in Victoria v. Commonwealth, 122 C.L.R. 353 (Austl. 1971): [I]n 1920 the Constitution was read in a new light, a light reflected from events that had, over 20 years, led to a growing realization that Australians were now one people and Australia one country and that national laws might meet national needs." *Id.* at 396.

147. In addition to the cases involving discrimination against the states, the *Engineers' Case* Court itself arguably suggested that the intergovernmental immunities doctrine might apply in matters involving the Commonwealth's taxation powers and the prerogative powers of the Crown. *See Engineers' Case*, 28 C.L.R. at 143-44. The High Court's decision in Victoria v. Commonwealth, 122 C.L.R. 353 (Austl. 1971), however, cast serious doubt upon the existence of any such additional implied immunities. *See generally* L. ZINES, *supra* note 99, at 285-91; Zines, *Sir Owen Dixon's Theory of Federalism*, 1 FED. L. REV. 221 (1965).

v. Commonwealth (*State Banking Case*).[148] In the *State Banking Case*, the High Court invalidated the Commonwealth's attempt, through section 48 of the Banking Act 1945 (Cth),[149] to prohibit all the states and their agencies, including city governments, from conducting banking business with private trading banks. By prohibiting states from banking with private banks, the law effectively forced the states either to establish their own state trading banks or to bank with the Commonwealth bank which was owned and operated by the federal government. A majority of the High Court[150] rejected the Commonwealth's contention that the law was a valid exercise of its power under section 51(xiii) of the Australian Constitution to make laws with respect to "[b]anking, other than state banking."

Although the reasoning of the five separate majority opinions was not uniform, Justice Dixon delivered the principal judgment for the majority.[151] In Justice Dixon's view, section 48 of the Banking Act was invalid because, in restricting the powers of the states to undertake banking business, it discriminated against the states by imposing "a particular disability or burden upon an operation or activity of a State" which was not placed upon the entire community.[152] Hence, even though section 48 constituted a law with respect to banking other than state banking,[153] it was invalid because it violated an implied prohibition upon Commonwealth laws that discriminate against the states.

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148. 74 C.L.R. 31, 81 (Austl. 1947).

149. The Commonwealth government established the Commonwealth bank under the Commonwealth Bank Act (1945) (Cth) which was assented to on the same day as the Banking Act (1945) (Cth). Section 48 of the Banking Act prohibited the states and local governing authorities from conducting business with private banks without written consent from the Commonwealth treasurer. Banking Act § 48.

150. Chief Justice Latham and Justices Rich, Starke, Dixon and Williams agreed that the law was invalid. Justice McTiernan was the sole dissenter. *State Banking Case*, 74 C.L.R. at 31.

151. Justices Rich, Starke and Williams delivered separate opinion adopting similar reasoning to that expounded by Justice Dixon. Although Chief Justice Latham also held the law invalid, his judgment appeared to turn upon an alternative characterization of the law. The Chief Justice concluded that section 48 of the Banking Act of 1945 (Cth) was outside the constitutional powers of the Commonwealth, and therefore invalid, because it was a law with respect to "State governmental functions as such," rather than a law with respect to banking. *Id.* at 61.

152. *Id.* at 79.

153. All members of the Court agreed that the exclusion of "state banking" from the Commonwealth's power under section 51(xiii) of the Constitution applied only to states as *bankers* rather than states as *customers*. Given that the Banking Act did not attempt to prohibit state governments from doing business with state-operated banks, the "state banking" qualification of section 51(xiii) was not involved. *See id.* at 51-2 (Latham, C.J.), 65 (Rich, J.), 69-70 (Starke, J.), 78 (Dixon, J.), 86 (McTiernan, J.), & 97-98 (Williams, J.).

In defining the scope of this implied prohibition and differentiating it from the implied limitations rejected by the *Engineers' Case*, Justice Dixon found support in the taxation context for a distinction between laws that discriminate against the states and laws that are nondiscriminatory but arguably result in an impermissible burden upon state sovereignty.[154] Discriminatory taxation laws are those that single out a state "for taxation or for a special burden of taxation in respect of certain acts or things when others are not so taxed or are not so burdened in respect of the same acts or things."[155] He reasoned that such discriminatory taxes are unconstitutional because they are "aimed at the States and [are] an attempt to use federal power to burden or, may be, to control State action."[156] This prohibition of discriminatory laws was not limited to the taxation power, in Justice Dixon's view, because the federal system itself provided the foundation for the restraint upon use of federal powers to control the states. He concluded that he did not believe that

> either under the Constitution of the United States or The British North America Act[157] or the Commonwealth Constitution has countenance been given to the notion that the legislative powers of one government in the system can be used in order directly to deprive another government of powers or authority committed to it or restrict that government in their exercise, notwithstanding the complete overthrow of the general doctrine of reciprocal immunity of government agencies and the discrediting of the reasoning used in its

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154. The *State Banking Case* majority judgments drew support for this distinction from the U.S. Supreme Court's decision in New York v. United States, 326 U.S. 572 (1946), where a majority of the Supreme Court upheld the application of a nondiscriminatory federal sales tax to mineral water sold by a state-run facility. Although no one opinion garnered a majority support in that case, a majority of the Court, in dicta, indicated that a federal tax discriminating against a state would be unconstitutional. Justice Frankfurter, joined by Justice Rutledge, viewed the discrimination principle as a matter of federal taxation of things which are "uniquely capable of being earned by a State," such as income from taxes or ownership of a Statehouse. *Id.* at 582. Justice Rutledge indicated in his concurring opinion, however, that he viewed the limitation against discrimination as meaning that "state functions may not be singled out for taxation when others performing them are not taxed or for special burdens when they are." *Id.* at 584-85. Chief Justice Stone, joined by Justices Reed, Murphy and Burton, conceded that a federal tax discriminating against a state would be unconstitutional but he rejected Justice Frankfurter's approach to determining what taxes discriminate against states. *Id.* at 587-88.

155. *State Banking Case* 74 C.L.R. at 81.

156. *Id.*

157. The British North America Act of 1867, which contains the Canadian Constitution, has now been renamed The Canada Act.

> justification. For that reason the distinction has consistently been drawn between a law of general application and a provision singling out governments and placing special burdens upon the exercise of powers or the fulfillment of functions constitutionally belonging to them.[158]

Section 48 was therefore invalid because it isolated state governments in order to deny them the choice of the financial administration machinery that is available to the rest of the Australian community.

The new form of the intergovernmental immunity doctrine approved in the *State Banking Case* was very narrow in scope. The doctrine applied only to the direct prohibition on state utilization of private banks, as opposed to federal financial incentives encouraging the state to bank with a federal bank. Nevertheless, as recently as 1985, the High Court invalidated a federal law on the basis of this special burdens doctrine. The case arose in late 1984 from a public sector labor dispute in the State of Queensland. Owing both to the high level of trade union membership[159] and to Australia's traditional adherence to conciliation and arbitration,[160] the dispute became something of a cause celebre throughout Australia. In an effort to prevent further strike action, the Queensland State Parliament enacted special legislation to prescribe the terms and conditions of employment of certain groups of workers of the Queensland Electricity Commission, a state-owned electrical utility. Under the special legislation the workers could no longer have their working conditions determined by the state of Queensland's conciliation and arbitration machinery. To thwart the state legislation, the electricity workers sought to bring themselves within the jurisdiction of the federal conciliation and arbitration commission. The Commonwealth Parliament attempted to facilitate this transfer by enacting special legislation purporting to give the federal industrial commission exclusive authority with respect to the workers. The High Court, in *Queensland Electricity Commission v. Commonwealth*,[161] held that the federal legislation was invalid. Although each of the six justices deciding the case wrote separate opinions with varied reasoning, all agreed that the legislation violated the special

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158. *State Banking Case*, 74 C.L.R. at 81-82.

159. The Australian work force has been highly unionized throughout this century. In 1983, approximately 55% of employees were members of trade unions. *See* 2 *Report of the Committee of Inquiry into Australian Industrial Relations Law and Systems* 21 (1985) (Hancock Report).

160. The federal government and each of the six state governments have established machinery whereby industrial disputes are settled by conciliation and binding interest arbitration.

161. 159 C.L.R. 192 (Austl. 1985).

burdens principle established in the *State Banking Case*. In essence, the Court viewed the doctrine as prohibiting the Commonwealth from placing a special burden or disability[162] upon one or more states unless either of two conditions existed: the disability was also placed upon all others similarly situated;[163] or the nature of the constitutional power being utilized by the Commonwealth contemplates, and thereby authorizes, the particular form of discrimination against the states.[164]

While the *Engineers' Case* itself arguably allowed for operation of a rather truncated intergovernmental immunities doctrine such as that endorsed in the *State Banking Case*, the decision left no room for the application of any doctrine of reserved powers. Even after the *Engineers' Case*, however, pre-*Engineers' Case* reserved power constructions of several heads of federal legislative power continued to receive the High Court's approval. As a result, federal legislative powers such as the taxation,[165] corporations,[166] and external affairs[167] powers re-

162. For discussions of the ways in which the federal law burdened the state, *see id.* at 238 (Brennan, J.); *id.* at 227-28 (Wilson, J.); *id.* at 252-53 (Deane, J.); *id.* at 256-57 (Dawson, J.).

163. The Court viewed the federal legislation in the *Queensland Electricity* case as having isolated the Queensland government from the general class of employers. As Justice Mason put it, "[d]iscrimination against a particular State . . . by isolating it from the general law applicable to others, including other States, falls squarely within the principle." *Id.* at 217. Justice Deane indicated that even a law cast in general terms may have an impermissible discriminatory effect upon the states. *See id.* at 248-49.

164. The justices varied in their formulations of the proper construction of Justice Dixon's suggestion in the State Banking Case that the "content, context, or subject-matter" of particular constitutional powers might reveal an intention to authorize federal laws discriminating against the states. Justice Deane, for example, viewed the exception as extending to special burdens that have "such a real and close connection with the subject-matter of legislative power as to warrant the positive conclusion that the grant of legislative power was intended to authorize such discrimination against the States in the context of such a law." *Id.* at 250. All agreed, however, that the industrial disputes power did not contemplate imposition of the burdens involved in the *Queensland Electricity* case.

165. In Regina v. Barger, 6 C.L.R. 41 (Austl. 1908), the High Court was asked to rule upon the validity of various provisions of the Excise Tariff Act of 1906 (Cth). Under this legislative scheme, agricultural machinery manufacturers were liable for an excise tax on the machinery they produced unless they qualified for an exemption from the excise duty. In order to obtain the exemption, a manufacturer had to demonstrate that it was paying its employees fair and reasonable remuneration. The *Barger* Court relied upon the reserved powers doctrine to justify striking down the statute. The Court reasoned that the taxing power could not be used as an indirect means of controlling industry, which was the province of state governments. *Id.* at 78. In Fairfax v. Federal Comm'r, 114 C.L.R. 1 (Austl. 1965), the Court retreated from *Barger* in upholding a Commonwealth law that withdrew a tax exemption from superannuation funds unless the funds had invested a percentage of their assets in public securities. Although only Justices Kitto and Taylor expressly disapproved of the *Barger* view of reserved powers in the *Fairfax* decision, subsequent High Court decisions have regarded *Fairfax* as inconsistent with the *Barger* reserved powers construction of the taxation power. *See, e.g.*, Murphyores Inc. v. Commonwealth, 136 C.L.R. 1 (Austl. 1976).

mained confined to reserved powers constructions until recently. Although the reasoning employed by the Court to justify continuance of the reserved power restrictions in these cases despite the *Engineers' Case* varied, the Court's interpretations of the trade and commerce power and the industrial disputes power provide the best illustrations of the Court's response to federalism tensions during that period.

As noted above, the High Court, in its 1906 decision in the *Railway Servants' Case*,[168] applied the direct/indirect effects analysis of nineteenth century U.S. Supreme Court commerce clause decisions to the Australian trade and commerce power.[169] Despite the *Engineers' Case* and its rejection of the reserved powers doctrine, the High Court has continued to adhere to distinctions between interstate commerce

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166. Section 51(xx) grants the Commonwealth legislative power with respect to "[f]oreign corporations, and trading or financial corporations formed within the limits of the Commonwealth." AUSTL. CONST. § 51(xx). In 1908, the corporations power was given a restrictive meaning in Huddart-Parker v. Moorehead, 8 C.L.R. 330 (Austl. 1909), where a majority of the High Court invalidated early federal antitrust legislation as falling outside the scope of the corporations power. In the view of the majority, this power could not be used to control the trading activities of such corporations, as these activities fell within the province of state governments. After *Huddart-Parker*, the corporations power remained dormant until 1971, when in Strickland v. Rocla Concrete Pipes Ltd., 124 C.L.R. 468 (Austl. 1971), the Court overruled *Huddart-Parker* and held that the trading activities of corporations fall within the scope of this power. In Commonwealth v. Tasmania, 158 C.L.R. 1 (Austl. 1983) (*Tasmanian Dams Case*), the High Court further expanded the scope of the corporations power to enable the Commonwealth to regulate a corporation's activities performed for the purpose of its trading activities. Hence, in the *Tasmanian Dams Case*, the corporations power was a valid source of constitutional authority for the federal legislature to prohibit a trading corporation from building a dam which was eventually to be used to generate electricity for sale to consumers.

167. Unlike the taxation, corporations, and trade and commerce power, the early High Court did not have an opportunity expressly to apply the reserved powers doctrine to the Commonwealth's power to make laws with respect to "external affairs," due to the Commonwealth Parliament's reluctance to test its powers. In The King v. Burgess (*ex parte* Henry), 55 C.L.R. 608 (Austl. 1936), the Court indicated that the external affairs powers "includes the power to execute within [Australia] treaties and conventions entered into with foreign powers," but that the federal legislature might not be able to use the power as "a device to procure for the Commonwealth an additional domestic jurisdiction." *Id.* at 687 (Evatt and McTiernan, JJ.). In the early 1980s, as a result of the Court's decisions in Koowarta v. Bjelke Peterson, 153 C.L.R. 168 (Austl. 1982) and the *Tasmanian Dams Case*, 158 C.L.R. at 1, the external affairs power has emerged as a powerful means by which the Commonwealth Parliament might create any legislation reasonably adapted to implementation of an international treaty or convention on virtually any subject. As a result, comprehensive federal race and gender discrimination laws and federal environmental protection legislation have been sustained as measures reasonably adapted to implementation of Australia's commitment to certain international agreements.

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

169. *See supra* notes 108-09 and accompanying text.

and intrastate commerce even after the U.S. Supreme Court abandoned the doctrines. Justice Windeyer best summarized the High Court's attitude toward more recent United States commerce clause decisions in *Regina v. Foster*:[170]

> In our Constitution the scope of the power in respect of trade and commerce is not necessarily to be measured by the scope which modern American decisions have given to the commerce clause in the American Constitution. General statements in *Gibbons v. Ogden* may be accepted without viewing our section 51(i) through later American cases, which seem to see the horizon of the commerce power ever receding and the persons and things within it ever increasing.

Consequently, the High Court rejected the argument that intrastate activities that have a substantial economic effect on interstate and foreign commerce must fall within the trade and commerce power in *Wragg v. New South Wales*.[171] In *Wragg* the Court was unanimous in the view that the "economic" effect on interstate commerce of a New South Wales law setting maximum prices for potatoes imported from Tasmania was too "indirect" to constitute a burden on "trade, commerce, and intercourse" within the meaning of section 92 of the Australian Constitution.[172]

In addition, the High Court continued to reject the argument that the trade and commerce power coupled with the incidental power enable the Commonwealth to regulate intrastate airline transportation because such activities are "commingled" with interstate and international air transportation.[173] In *Airlines of New South Wales v. New*

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170. 103 C.L.R. 256, 310 (Austl. 1959).

171. 88 C.L.R. 353 (Austl. 1953).

172. *Wragg* arose in the context of section 92 of the Australian Constitution, which provides that "on the imposition of uniform duties of customs, trade, commerce, and intercourse among the States . . . shall be absolutely free." AUSTL. CONST. § 92. Decisions construing the phrase "trade, commerce, and intercourse" in § 92 are, however, directly relevant to the interpretation of "trade and commerce" in § 51(i) insofar as the two phrases have been declared to have essentially the same meaning. *See* James v. Commonwealth, 55 C.L.R. 1, 60 (P.C. 1936); Australian Nat'l Airways Pty. Ltd. v. Commonwealth, 71 C.L.R. 29, 82 (Austl. 1946). For a discussion of the history of section 92 of the Australian Constitution, *see generally* M. COPER, FREEDOM OF INTERSTATE TRADE UNDER THE AUSTRALIAN CONSTITUTION (1983).

173. *See also* The King v. Burgess, 55 C.L.R. 608 (Austl. 1936), where the High Court held that a regulation promulgated under the Air Navigation Act (1920) (Cth.) imposing a licensing requirement on all personnel of aircraft flying within Australia was beyond the trade and commerce power as applied to intrastate air navigation and transportation. Justices Evatt and McTiernan declared it "impossible to accept" the argument that "commingling" in air routes

South Wales,[174] Chief Justice Barwick summarized the view of the High Court:

> No so-called "integration" of inter-State and intra-State air navigation or air transport, commercial or otherwise, no intermingling or commingling of the two to any degree, however "complete," can enlarge the subject matter of Commonwealth legislative power . . . to make laws with respect to inter-State and foreign trade and commerce. This Court has never favored, in relation to Commonwealth power, the more extensive view of the commerce power under the Constitution of Congress [*sic*] which has at times found expression in decisions of the Supreme Court of the United States.[175]

Thus, although the Court's efforts to confine the trade and commerce power have on occasion forced it to draw distinctions which the Court has recognized as artificial,[176] it has refused to abandon the view that

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and airports of aircraft proceeding intrastate and those proceeding interstate required that the Commonwealth's power extend to all such aircraft. *Id.* at 677. Chief Justice Latham noted that "considerations of wisdom or expediency" were not controlling because "although foreign and inter-State trade and commerce may be closely associated with intra-State trade and commerce," he viewed the Court as having uniformly held that "the distinction drawn by the Constitution must be fully recognized, and that the power to deal with the former subject does not involve an incidental power to deal with the latter subject." *Id.* at 628-29.

174. 113 C.L.R. 54 (1965).

175. *Id.* at 77-78.

176. Justice Dixon was most candid in this regard. In Regina v. Burgess, 55 C.L.R. at 672, he referred to the U.S. Supreme Court decisions in *Schechter* and *Carter Coal* and concluded that it would be "a matter of regret" if the application of the trade and commerce and incidental powers in Australia led to "so indefinite a standard of validity as that enunciated in these passages." Rather, he viewed the limitation of the subject matter of the power to commerce with other countries and among the states as compelling a distinction "however artificial it may appear and whatever interdependence may be discovered." *Id.* Later, during his tenure as Chief Justice, Dixon again conceded that the distinction drawn by section 51(i) between interstate and intrastate trade and commerce "may well be considered artificial and unsuitable to modern times." *Wrag*, 88 C.L.R. at 385-86. Nevertheless, he again insisted that "it is a distinction adopted by the Constitution and it must be observed however much inter-dependence may now exist. . . ." *Id.*

Justice Kitto echoed these sentiments in his opinion in Airlines of New South Wales v. New South Wales, 113 C.L.R. 54 (Austl. 1965). After discussing the expansion of the American commerce clause in cases such as *Wickard v. Filburn*, he concluded that:

> This Court is entrusted with the preservation of constitutional distinctions, and it both fails in its task and exceeds its authority if it discards them, however out of touch with practical conceptions or with modern conditions they may appear to be in some or all of their applications. To import the doctrine of the American cases into the law of the Australian Constitution would in my opinion be an error.

Id. at 115. For a critique of Justice Kitto's reasoning and the Court's rejection of modern American commerce clause decisions, *see* L. ZINES, *supra* note 99, at 60-63.

the trade and commerce power contemplates a realm of intrastate commerce which is reserved exclusively for state regulation.[177]

Undoubtedly the best example of the Court's struggles with the reserved powers doctrine is, however, the industrial disputes power. Despite the *Engineers' Case* abandonment of the intergovernmental immunities and reserved powers doctrines in 1920, the industrial disputes power was not given a broad interpretation until 1983. This may appear at first glance to be surprising because the *Engineers' Case* itself was concerned with the reach of this power. Nevertheless, from 1919 to 1983, the industrial disputes power was truncated by the Court. This is explicable on the ground that the High Court during this period did not wish the federal conciliation and arbitration machinery to intrude into sensitive fields of state employment which would have ramifications for state fiscal policies.[178]

The industrial disputes power was first interpreted by the High Court in 1908 at the height of the Court's loyalty to both the intergovernmental immunities and the reserved powers doctrines. In the *Jumbunna Coal Mine No Liability v. Victorian Coal Miners Association*[179] case, which related to the federal coverage of private sector coal miners, the Court gave the industrial disputes power a broad and purposive interpretation. Chief Justice Griffith held that the industrial disputes power could be utilized to settle, through federal conciliation and arbitration, any industrial dispute "in which large numbers of persons are employed the sudden cessation of whose work might pre-

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177. Several commentators have suggested that the High Court should interpret the "trade and commerce" and "incidental" powers more liberally to allow them to assume greater importance as sources of Commonwealth legislative authority in fields such as labor relations. *See, e.g.*, L. ZINES, *supra* note 99, at 60-63; Nygh, *An Analysis of Judicial Approaches to the Interpretation of the Commerce Clause in Australia and the United States*, 5 SYDNEY L. REV. 353, 394-97 (1966); Hotop, *The Federal Commerce Power and Labour Relations*, 48 AUSTL. L.J. 169, 184-85 (1974). The High Court's success in adhering to a reserved powers construction of the trade and commerce power may be at least partially attributable to the fact that the Australian Constitution grants many more legislative powers to the federal legislature than does the Constitution of the United States. *See supra* notes 69-85 and accompanying text. Recent High Court decisions expansively interpreting Australian federal legislative powers such as the corporations, industrial disputes, and external affairs powers, have substantially reduced the need for the Commonwealth Parliament to rely upon the trade and commerce power in enacting particular legislation.

178. The most incisive account of intergovernmental immunities and the Australian industrial disputes power is Rothney, *Restoring the Frontiers of an Unruly Province: Inter-Governmental Immunities and Industrial Disputes*, 11 MONASH U.L. REV. 120 (1985). *See also* McCallum, Jones & Laughlin, *Steel Downunder: New Direction in Australian Federal Labor Law*, 6 COMP. LAB. L. 94 (1984).

179. 6 C.L.R. 309 (Austl. 1908).

judicially affect the orderly conduct of ordinary . . . civil life."[180] Justices O'Connor and Isaacs in separate judgments went further in holding that the industrial disputes power had the potential to cover virtually all forms of employment.[181]

In 1919, however, the Court commenced its truncation of this power through the application of a form of the reserved powers doctrine. In *Federated Municipal & Shire Council Employees' Union v. Melbourne Corp.* (*Municipalities Case*),[182] the High Court confronted the question of whether manual laborers employed by city governments could fall within the realm of the industrial disputes power. No doubt foreshadowing the holding in the *Engineers' Case* which appeared the following year, the majority had no difficulty in deciding that the intergovernmental immunities doctrine was inapplicable in the matter.[183] Accordingly, since it had never been doubted that the industrial disputes power was designed to cover unskilled employees and blue collar workers, these municipal employees could be covered by the power. Justice Isaacs, however, took this opportunity to reconsider his holding in *Jumbunna* and to join Justice Rich in formulating a narrower interpretation of the industrial disputes power. They stated that:

> Industrial disputes occur when, in relation to operations in which capital and labour are contributed in co-operation for the satisfaction of human wants or desires, those engaged in co-operation disputes as to the basis to be observed, by the parties engaged, respecting either a share of the product or any other terms and conditions of their co-operation.[184]

This holding, which became known as the "capital and labor" test, redirected the interpretation of the industrial disputes power in two

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180. *Id.* at 333.

181. *Id.* at 365-66 (O'Connor, J.); *id.* at 370 (Isaacs, J.). Justice O'Connor stated that:

> "Industrial dispute" was not, when the Constitution was framed, a technical or legal expression. It had not then, nor has it now, any acquired meaning. It meant just what the two English words in their ordinary meaning conveyed to ordinary persons, and the meaning of these words seems to be now much what it was then.

Id. at 365. After examining several state arbitration statutes, he concluded that "it is certainly fair to assume that the expression 'industrial disputes' was at the time of the passing of the Acts commonly used in Australia to cover every kind of dispute between master and workman in relation to any kind of labour." *Id.* at 366. Justice Barton did not comment upon the breadth of this expression.

182. 26 C.L.R. 508 (Austl. 1919).

183. *See id.* at 532-36 (Isaacs & Rich, JJ.); *id.* at 538-41 (Higgins J.); *id.* at 542 (Gavan, Duffy & Powers, JJ.). Chief J. Griffith & J. Barton dissented.

184. *Id.* at 554.

ways. First, rather than regarding the power as a means to settle industrial disputes *per se*, the test confined the power to settling disputes which occurred in an industry. Second, in the context of the "capital and labor" test, the word "industry" really meant private sector employment engaged in business for profit.

Hence, although the power covered blue collar industrial workers whether they were employed in private industry or by state governments, the adoption of the "capital and labor" test produced an inconsistent set of protections of state control over certain categories of employees. For example, clerical employees in private banks and insurance companies came within the power because they were necessary elements in the provision of private sector capital.[185] Elementary school teachers employed by state governments[186] together with state civil servants[187] were, however, beyond the reach of the industrial disputes power. This meant that throughout the period, almost all white collar employees of state and city governments, including especially those skilled employees in the health, education and welfare sectors, could not have their terms and conditions of employment governed by federal conciliation and arbitration laws.

By the mid-1970s, a number of High Court judges became discontented with this type of artificial line drawing and the illogical results that it produced.[188] For example, the Court had held in 1959 that

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185. Australian Ins. Staffs' Fed'n v. Accident Underwriters' Ass'n., 33 C.L.R. 517 (Austl. 1923). The Court also held during this period that newspaper journalists could be covered by the industrial disputes power. *See* Proprietors of the Daily News Ltd. v. Australian Journalists' Ass'n, 27 C.L.R. 532 (Austl. 1920).

186. Federated State School Teachers' Ass'n v. Victoria, 41 C.L.R. 569 (Austl. 1929). Justice Isaacs delivered a powerful dissent in this decision in which he parted company with Justice Rich, his co-author of the "capital and labor" test. Justice Rich joined the majority, which included Chief Justice Knox and Justices Gavan Duffy and Starke. *Id.* In 1982, the Court held that university and college academics also fall outside the scope of the industrial disputes power. *See* Regina v. McMahon (*ex parte* Darvall), 151 C.L.R. 57 (Austl. 1982).

187. Regina v. Commonwealth Ct. of Conciliation & Arbitration (*ex parte* Victoria), 66 C.L.R. 488 (Austl. 1942).

188. In Regina v. Marshall (*ex parte* Federated Clerks Union), 132 C.L.R. 595 (Austl. 1975), the Court held that employees of credit unions which primarily furnish capital for domestic, as distinct from industrial, consumption could bring themselves within the industrial disputes power. *Id.* Justice Mason, joined by Justices Gibbs and Jacobs, expressed his dissatisfaction with the restrictive interpretation endorsed in prior decisions. He stated:

> I should not wish it to be thought from what I have said that I am necessarily of the view that the observations of Isaacs and Rich JJ. in the *Municipalities Case* . . . now provide an acceptable definition or definitive statement of what is "industrial" for purposes of § 51 (xxxv). My own inclination would be to adopt a somewhat wider view, more akin to the opinions expressed by Chief Justice Griffith & Justice

professional engineers employed by state and city governments were industrial employees because their work was connected with manual labor.[189] Although the work of firefighters is closely akin to that of manual laborers, the Court held in 1970 that firefighters employed by state and city governments were not industrial employees.[190] In addition, the Court ruled that clerical employees in state highway departments were not industrial employees,[191] although skilled workers in state no fault auto accident insurance funds could come within the federal power.[192]

In 1983 in a single opinion authored by all seven justices, the High Court in *Regina v. Coldham (Social Welfare Union Case)*[193] overturned its restrictive approach to the industrial disputes power and held, for the first time since the *Engineers' Case*, that the power should be interpreted to cover industrial disputes *per se*. The question before the Court was whether employees of a federal community youth support program which was designed to aid unemployed teenagers could have their wages and working conditions determined by federal conciliation and arbitration. In answering this question in the affirmative, the Court examined its previous authorities and rather mildly concluded that the authorities lacked "a disclosed chain of reasoning" in support of their restrictive interpretations, which had not "resulted in a settled interpretation of the power."[194] The Court held that Austra-

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> O'Connor in the *Jumbunna Coal Mine Case*, as appropriate to the nature and scope of the power and the underlying purpose which it was designed to achieve, although I acknowledge that a more restricted view has thus far prevailed.

Id. at 608-09. For other evidence of the Court's growing discontent with the restrictive construction of the industrial disputes power, *see* Regina v. Holmes, 140 C.L.R. 63, 74 (Austl. 1977) (Gibbs J.); *id.* at 79 (Jacobs, J.); *id.* at 90 (Murphy, J.); Regina v. McMahon, 151 C.L.R. 57, 60 (Austl. 1982) (Gibbs, C.J.); *id.* at 65 (Mason, J.); *id.* at 71-72 (Murphy, J.).

189. In Regina v. Commonwealth Conciliation & Arbitration Comm'n, 107 C.L.R. 208 (1959), the High Court held that professional engineers who undertook engineering, as distinct from administrative tasks, for state government departments fall within the industrial disputes power. In the Court's view, engineers operating in this capacity were, in effect, a type of high powered manual laborers. As Chief Justice Dixon put it, the engineering profession is involved in "the higher control of the construction of physical things and the higher control of the application of mechanics, electronics and chemical engineering to the creation, maintenance and operation of material structures and objects." *Id.* at 237. Hence, the Chief Justice found "no *prima facie* reason" as to why the profession "should be considered to stand apart from the wide conception of what is 'industrial'." *Id. See generally* Thomson, *Professional Engineers' Case*, 34 AUSTL. L.J. 35 (1960).

190. Pitfield v. Franki, 123 C.L.R. 448 (Austl. 1970).

191. Regina v. Holmes, 140 C.L.R. 63 (Austl. 1977).

192. Regina v. Cohen, 141 C.L.R. 577 (Austl. 1979).

193. 153 C.L.R. 297 (Austl. 1983).

194. *Id.* at 310.

lian courts would return to the broad "popular meaning" interpretation of the industrial disputes power expounded in *Jumbunna*[195] "shorn of its association with the doctrine of inter-governmental immunities."[196] Hence, the Court concluded that:

> It is, we think, beyond question that the popular meaning of "industrial disputes" includes disputes between employees and employers about the terms of employment and the conditions of work. Experience shows that disputes of this kind may lead to industrial action involving disruption or reduction in the supply of goods or services to the community.[197]

The Court's broad holding did, of course, have major implications for the states. Without the protections of the intergovernmental immunities doctrine or reserved powers constructions of the industrial disputes power, it was possible for the federal conciliation and arbitration machinery to cover virtually all state civil servants. The *Social Welfare Union Case* Court responded to this possibility in dicta indicating that the Court might still draw implications from the Australian Constitution in order to protect the states:

> It has been generally accepted, notwithstanding the *Engineers' Case*, that the power conferred by section 51(xxxv) is inapplicable to the administrative services of the States. If the reasons hitherto given for reaching that conclusion are no longer fully acceptable, it may be that the conclusion itself finds support in the prefatory words of section 51 where the power is made "subject to this Constitution."[198]

Thus, although the pre-*Engineers' Case* doctrines of intergovernmental immunities and reserved powers could no longer apply to the industrial disputes power, the Court suggested that new forms of implied protections might emerge through the "subject to this Constitution" qualification in section 51.[199]

The reach of the industrial disputes power into the administrative functions of state governments was tested in 1986 in *Re Lee*.[200] In

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195. See the discussion of the Jumbunna case *supra* notes 178-80 and accompanying text.

196. *Social Welfare Union*, 153 C.L.R. at 312.

197. *Id.*

198. *Id.* at 313.

199. Prior to its listing of specific federal legislative powers, section 51 provides that "[t]he Parliament shall, *subject to this Constitution*, have power to make laws for the peace, order, and good government of the Commonwealth . . . ." AUSTL. CONST. § 51 (emphasis added).

200. 160 C.L.R. 430 (Austl. 1986).

Lee, several trade unions comprised of state government school teachers who performed both classroom and related administrative duties attempted to obtain registration[201] in order to participate in federal conciliation and arbitration. The six High Court justices deciding the case had no difficulty finding that, after the *Social Welfare Union Case*, unions could be registered because their membership was, at the very least, mainly performing classroom duties.[202] The joint judgment of Justices Mason, Brennan and Deane, however, expressed a "preliminary view"[203] on the operation of the industrial disputes power with respect to state governmental activities. Although the remaining three justices found it unnecessary to comment upon the matter,[204] the joint judgment provides a guide to the future thinking of the present High Court on the issue.

Justices Mason, Brennan and Deane began by recognizing that exercises of federal Conciliation and Arbitration Commission power to control the terms and conditions of employment of state government employees "effects a significant subtraction from the autonomy of the State."[205] They noted, however, that at the close of the nineteenth

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201. In order to participate in federal conciliation and arbitration, trade unions must register as federal organizations pursuant to § 132 of the Conciliation and Arbitration Act 1904 (Cth).

202. Chief Justice Gibbs and Justices Mason, Brennan, Deane and Dawson, held that the trade unions could be registered because the teachers were primarily engaged in classroom duties and because their related administrative activities were not state government administrative functions. Justice Wilson, on the other hand, held that it was a matter for the Conciliation and Arbitration Commission to determine whether any teachers who were performing administrative functions should be exempted from federal coverage. He stated that:

> The critical consideration in applying [the administrative services of a state exemption] is whether the exercise by the Commission of the authority conferred on it by the Act would impair the constitutional integrity of a State or agency of a State. It will be for the Commission to undertake that consideration in the light of the evidence and if and when the resolution of the industrial dispute involving the [school teachers' trade unions] requires such an issue to be determined.

203. *Id.* at 451.

204. Chief Justice Gibbs considered it "better not to discuss" the issue "since we did not hear full argument on that question." *Id.* at 443. Justice Wilson found it inappropriate to discuss the issue in light of the importance of the question and the lack of full argument. *Id.* at 467. Justice Dawson concluded that:

> [I]t is inappropriate to express in this case any view upon the existence or extent of those limitations which, as was recognized in the [*Social Welfare Union Case*], have not been completely and precisely formulated. In offering abstract observations upon matters of high constitutional importance without full argument, there is at least a danger or prejudging issues which have yet to arise. At worst, to do so may be to substitute doctrine for decision. In my view it is something to be avoided.

Id. at 473.

205. *Id.* at 451.

century, Australian colonial governments began to adopt compulsory conciliation and arbitration as a means of settling industrial disputes.[206] This system expanded into a network of state and federal conciliation and arbitration agencies that today settles most public and private sector industrial disputes throughout Australia. When the coverage of state public servants was based upon state legislation, "the extension of the system to state employees involved no threat to the autonomy of the State or its capacity to govern."[207] They appreciated, however, that "the subjection by the Commonwealth Parliament of the relationship between a State and its employees to the authority of its agency, the [Conciliation and Arbitration] Commission, might perhaps be thought to involve such a radical subtraction from State autonomy as to attract the implied limitations on Commonwealth power."[208] Nevertheless, the special place of conciliation and arbitration in the history of Australian public and private sector labor regulation denied such a view because the "settled interpretation" of the industrial disputes power "sustains the exercise by the Commission of its authority in relation to State employees, at any rate apart from those engaged in the administrative services of a State."[209]

In the view of Justices Mason, Brennan and Deane, the same considerations that supported extending the industrial disputes power to state employees generally also apply to state employees performing administrative functions.[210] Moreover, they reasoned that drawing a distinction between state employees who perform administrative functions, and those who do not perform such functions, would "seem to resuscitate in a new form the discredited distinction between functions of government which are 'essential' or 'truly governmental' and those which are not."[211] They pointed out that this distinction between essential and non-essential governmental functions had been consistently

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206. *Id.*
207. *Id.*
208. *Id.* at 452.
209. *Id.*
210. They explained that:

> The factors which have induced the Court to so hold — the debilitating effects of interstate industrial disputes and the national importance of establishing machinery for their effective resolution, leading to the view that the object of the arbitration power is to enable the Commonwealth to establish a means of settling interstate industrial disputes which are incapable of settlement by a single State — apply with equal force to disputes involving employees engaged in the administrative services of a State.

Id. at 452.
211. *Id.*

rejected by the High Court since the *Railway Servants' Case* in 1906;[212] and that the U.S. Supreme Court, after embracing such a distinction in *National League of Cities*,[213] had abandoned the approach as unworkable in *Garcia*. Therefore, in the view of the three justices, provided that there was no discrimination against a state as in the *Queensland Electricity* case, "the exercise of the arbitration power in the ordinary course of events will not transgress the implied limitations on Commonwealth legislative power."[214] The justices then offered their formulation of the proper role of implied limitations:

> Although the purpose of the implied limitations is to impose some limit on the exercise of Commonwealth power in the interest of preserving the existence of the States as constituent elements in the federation, the implied limitations must be read subject to the express provisions of the Constitution. Where a head of Commonwealth power, on its true construction, authorizes legislation the effect of which is to interfere with the exercise by the States of their powers to regulate a particular subject-matter, there can be no room for the application of the implied limitations.
>
> On the view which we are presently inclined to take of the implied limitations, they do not protect the States from the consequences of the exercise by the Commonwealth of the powers granted to it by the Constitution which contemplate their application to the States. Nor do they protect the States from an erosion in their status occasioned by the increasing regulation of community affairs by the Commonwealth in accordance with its powers.[215]

Accordingly, some 65 years after the *Engineers' Case*, the three justices have reiterated that the industrial disputes power, along with other heads of federal power, should be interpreted to their fullest because the Australian Constitution has bestowed the powers upon the federal government. The justices imply that, at least in the field of labor relations, the use or misuse of the industrial disputes power is primarily a matter for the political arena and not for the courts. Whether this "preliminary view" will continue to hold sway with these justices and with the remainder of the High Court bench will depend

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212. *See* Federated Amalgamated Gov't Ry. & Tramway Serv. Ass'n v. New South Wales Ry. Traffic Employees' Ass'n, 4 C.L.R. 488, 538-39 (Austl. 1906).

213. National League of Cities v. Usery, 426 U.S. 833 (1976).

214. *Lee*, 160 C.L.R. at 453.

215. *Id.*

upon the type of matters which come before them coupled with the prevailing national opinion of the role and function of the states in present-day Australia.

V. The Australian High Court and Implied Constitutional Limitations in the United States after *Garcia*

From the early years of the Australian federation when the High Court found support in U.S. Supreme Court decisions for constructions of the federal features of the Australian Constitution which had been based upon the American model, the High Court has struggled to define an appropriate role for the judiciary as a guardian of state sovereignty. Less than two decades after its creation, the High Court proclaimed in the *Engineers' Case*[216] that the constitutional bounds of the Australian federation would no longer be determined by U.S. Supreme Court authorities. Rather, grants of federal power were to receive their full content, and the role of the states in the federation was to find protection in the express limitations on Commonwealth powers or in the political power of the people of Australia. Nevertheless, the High Court and the people of Australia were not yet prepared to accept the full implications of the *Engineers' Case*. Rather, the High Court pursued alternative doctrines with the objective of erecting appropriate restraints on federal legislative powers so as to protect the states from undue intrusion. After more than half a century, when it became apparent that these efforts were thoroughly unsatisfactory, the High Court returned to *Engineers' Case* principles in a series of rulings in the 1980s.

Hence, after more than 80 years of attempting to protect state sovereignty by erecting constitutionally-supportable limitations on federal legislative powers, the High Court has evolved to substantially the same position as that of the U.S. Supreme Court after *Garcia*.[217] First, both the High Court and the U.S. Supreme Court have abandoned most reserved powers construction of grants of federal legislative power as either not supportable by the text and intent of the constitutional provisions themselves, or as fundamentally untenable in modern society. The result in both countries has been a dramatic expansion in the potential scope of federal legislative powers and a concern that the powers might be used in a manner that could damage

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216. Amalgamated Soc'y of Engineers v. Adelaide Steamship Co., 28 C.L.R. 129 (Austl. 1920).

217. Garcia v. San Antonio Metro. Transit Auth., 469 U.S. 528 (1985).

the states' ability to function in the federations. Second, both the Australian High Court and the U.S. Supreme Court have rejected solutions that involve attempting to identify "traditional," "essential," or "truly governmental" aspects of state sovereignty which are immune from interference by federal legislative powers. After brief attempts to use such approaches, both courts found them essentially unworkable. The fact that both courts have evolved to these conclusions supports their validity.

As a result of their rejection of these doctrines, both the Australian High Court and the U.S. Supreme Court have returned to the position that the primary protection against undue federal intrusion into matters of state sovereignty lies in the political process, rather than in implied constitutional limitations. In *Garcia*, the U.S. Supreme Court expressly gave countenance to the view that the political process "ensures that laws that unduly burden the States will not be promulgated."[218] The Australian High Court, on the other hand, has returned to the doctrines of the *Engineers' Case* without expressly reaffirming their implications in terms of the role of the political process in protecting the Australian states.[219] However, the High Court's failure to expressly rely upon the political process[220] is of little consequence to

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218. *Id.* at 556. The *Garcia* majority observed that:

> [T]he composition of the Federal Government was designed in large part to protect the States from overreaching by Congress. The Framers thus gave the States a role in the selection both of the Executive and the Legislative Branches of the Federal Government. The States were vested with indirect influence over the House of Representatives and the Presidency by their control of electoral qualification and their role in Presidential elections. U.S. CONST. art. I, § 2 and art. II, § 1. They were given more direct influence in the Senate, where each State received equal representation and each Senator was to be selected by the legislature of his State. U.S. CONST. art. I, § 3. The significance attached to the States' equal representation in the Senate is underscored by the prohibition of any constitutional amendment divesting a State of equal representation without the State's consent. U.S. CONST. art. V.

Id. at 550-51.

219. In the *Engineers' Case* decision, Justice Isaacs viewed the political process as the principal means by which sectional interests are protected in the federation. *See supra* note 141 and accompanying text.

220. The current Chief Justice of the High Court has suggested several reasons why the High Court has not followed the *Garcia* Court in expressing confidence in the ability of the political process to protect state interests in Australia. Chief Justice Mason stated:

> So far there has been no similar expression of confidence in the existence of similar safeguards in Australia. The Senate, initially conceived as a states-house, has not fulfilled that role. The federal government, rather than the states, is responsible for determining the electorates and the electoral qualifications for voting in the House of Representatives, as well as the mode of choosing senators. The tighter discipline and the centralized control of the Anglo-Australian party system work

the realities of state powers. Its retreat from implied state immunities, along with its willingness to construe grants of federal power expansively, has left the balancing of federal and state powers primarily to the political decisionmaking processes of the federal legislature.

Nevertheless, neither Court has been willing to place complete trust in the political process by abandoning all forms of implied limitations. The Australian High Court and the U.S. Supreme Court have expressed similar, yet distinct, views on the scope and operation of the remaining implied limitations.

The U.S. Supreme Court's decision in *Garcia* leaves substantial doubt as to when the courts will use implied constitutional limitations to invalidate federal legislation in order to protect the states. The *Garcia* majority suggested that the Court would intervene in those instances where the political process had somehow malfunctioned. Justice Blackmun's majority opinion held that:

> [T]he fundamental limitation that the constitutional scheme imposes on the Commerce Clause to protect the "States as States" is one of process rather than one of result. Any substantive restraint on the exercise of Commerce Clause powers must find its justification in the procedural nature of this basic limitation, and it must be tailored to compensate for possible failings in the national political process.[221]

The Court did not, however, suggest what developments would amount to a "failing" in the national political process.[222] Moreover, the *Garcia* Court suggested that the "constitutional structure" might also impose "affirmative limits" upon the ability of Congress to affect certain aspects of state sovereignty.[223] The *Garcia* Court referred in this context

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> against effective representation of state and local interests. Moreover, the people in remoter regions, antagonistic to central government, tend to identify strongly with their state as a political unit in a way that may have no parallel in the United States.

Mason, *supra* note 55, at 21. *See also* Saunders, *supra* note 99, at 379. To date, however, these topics remain undeveloped, as no comprehensive study has examined the responsiveness of the Australian federal government to legitimate state and local interests.

221. *Garcia*, 469 U.S. at 554.

222. *Id.* at 556. Apart from the general debate regarding process theories of constitutional adjudication, commentators have differed in their interpretations of the type of process paradigm endorsed in *Garcia*. *Compare* Rapaczynski, *From Sovereignty to Process: The Jurisprudence of Federalism After Garcia*, 1985 SUP. CT. REV. 341 *with* Field, *Garcia v. San Antonio Metro. Transit Auth.: The Demise of a Misguided Doctrine*, 99 HARV. L. REV. 84 (1985) *and* Van Alystyne, *The Second Death of Federalism*, 83 MICH. L. REV. 1709 (1985).

223. *Garcia*, 469 U.S. at 556.

to *Coyle v. Oklahoma*,[224] where the U.S. Supreme Court invalidated a federal law that purported to tell a state where it must locate its state capitol.

In 1988, the Court revisited the *Garcia* ruling, as well as the vestiges of the intergovernmental tax immunities doctrines, in *South Carolina v. Baker*.[225] The case involved a challenge to the constitutionality of a federal law removing the federal income tax exemption for interest earned on publicly offered long-term bonds issued by state and local governments unless those bonds were issued in registered form.[226] The Court, over Justice O'Connor's sole dissent,[227] held that the federal act did not violate the tenth amendment and that the interest on state bonds no longer enjoyed the immunity from federal taxation established by the Court's 1895 decision in *Pollock v. Farmers' Loan & Trust Co.*[228]

Justice Brennan's majority opinion in *Baker* viewed *Garcia* as having defined the scope of the tenth amendment's limits on Congress' authority to regulate state activities.[229] The State of South Carolina argued within the *Garcia* paradigm. It contended that removing the federal tax exemption for interest on unregistered state bonds amounted to a failure in the national political process.[230] Although the majority declined to attempt a "definite articulation" of the scope of the *Garcia* "possibility that some extraordinary defects in the national political process might render congressional regulation of state activities invalid," it rejected South Carolina's argument because the state had failed to demonstrate that "it was deprived of any right to participate in the national political process or that it was singled out in a way that left it politically isolated and powerless."[231] The majority then proceeded both to cast doubt upon the post-*Garcia* vitality of a

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224. 221 U.S. 559 (1911).

225. 485 U.S. 505 (1988).

226. *See* 26 U.S.C. § 103(j)(1) (1982).

227. Justice O'Connor dissented from the Court's holding on the intergovernmental tax immunities issue. She concluded that the Court had "failed to enforce the constitutional safeguards of state autonomy and self-sufficiency that may be found in the Tenth Amendment and the Guarantee Clause, as well as the principles of federalism implicit in the Constitution." *Baker*, 485 U.S. at 529 (O'Connor, J. dissenting).

228. 157 U.S. 429 (1895).

229. *Baker*, 485 U.S. at 512.

230. In support of its political process failure argument, South Carolina argued that Congress had relied upon solely anecdotal evidence that taxpayers had concealed income by using bearer bonds. Moreover, the state contended that Congress had chosen an ineffective remedy in requiring registration because beneficial ownership of registered bonds need not be recorded if a broker is used for the bond purchase. *Id.*

231. *Id.*

limitation, based upon the Court's decision in *FERC v. Mississippi*,[232] on Congress' ability to compel states to regulate on behalf of federal interests,[233] and to overrule *Pollock* as not having survived the Court's retreat from *Day* and other broad intergovernmental tax immunities doctrines.[234]

Although *Baker* affirms the importance of *Garcia*, the case did not provide much of an occasion for advancing the *Garcia* doctrines. Chief Justice Rehnquist and Justices Stevens and Scalia wrote concurring opinions suggesting that they considered *Baker* an easy case.[235] Chief Justice Rehnquist protested that the majority's discussion of the *Garcia* doctrines was unnecessary because the federal law at issue in the case would not even violate the Court's conception of the tenth amendment under *National League of Cities*.[236] Justice Scalia argued that the majority's analysis of the national political process as the states' only constitutional protection amounted to a misdescription of the *Garcia* holding because *Garcia* had recognized that "the constitutional structure" imposes affirmative limits on federal action affecting the states.[237] Hence, apart from process-reinforcing doctrines such as the clear statement rule[238] or unusual circumstances such as those involved

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232. 456 U.S. 742 (1982).

233. The National Governors' Association (NGA), as intervenor in the case, argued that effectively prohibiting states from issuing unregistered bonds amounted to a "commandeering" of state regulatory machinery which was prohibited by the *FERC* tenth amendment analysis. After noting that "[t]he extent to which the Tenth Amendment claim left open in *FERC* survives *Garcia* or poses constitutional limitations independent of those discussed in *Garcia* is far from clear," the majority held that the doctrine did not apply because "[a]ny federal regulation demands compliance" and the NGA's theory of commandeering "would not only render *Garcia* a nullity, but would restrict congressional regulation of state activities even more tightly than it was restricted under the now overruled *National League of Cities* line of cases." *Baker*, 485 U.S. at 515.

234. *Baker*, 485 U.S. at 515-16.

235. *See id.* at 527 (Stevens, J., concurring); *id.* at 528 (Scalia J. concurring in judgment); *id.* (Rehnquist, C.J., concurring in judgment).

236. *See id.* at 528 (Rehnquist, C.J., concurring in judgment).

237. *Id.* at 528 (Scalia, J., concurring in judgment).

238. The clear statement rule is a method of statutory construction by which the Court construes federal legislation as not intended to interfere with state institutional interests unless Congress has clearly stated its intent to the contrary. Use of the clear statement rule forces Congress to express clearly its intention to tread upon state sovereignty and thereby reinforces the operation of the national political process by ensuring that members of Congress may be held accountable by their constituencies. *See* L. TRIBE, AMERICAN CONSTITUTIONAL LAW 316-17, 383 (2d ed. 1988). This has been invoked to avoid difficult federalism issues in cases such as Atascadero State Hosp. v. Scanlon, 473 U.S. 234 (1985) Employees of the Dep't of Pub. Health & Welfare v. Dep't of Pub. Health & Welfare, 411 U.S. 279 (1973). *See generally* Comment, *The Tenth Amendment After* Garcia*: Process-Based Procedural Protections*, 135 U. PA. L. REV. 1657 (1987) (arguing in favor of clear statement rule).

in the *Coyle* case,[239] the future directions of implied constitutional limitations in the United States remain uncertain after *Baker*. At most, the decision indicates that a majority of the Court continues to adhere to the process failure perspective of the *Garcia* case, and that the majority views this doctrine as implicated at least in circumstances where a state either is denied rights of participation in the national process or is singled out in a manner that leaves it "politically isolated and powerless."[240]

The doctrinal developments in the Australian High Court provide an additional perspective upon the implied limitations on federal powers that are likely to survive. The Court has suggested two such limitations on federal legislative powers that retain vitality: first, the special burdens doctrine invoked in the *State Banking Case* and the *Queensland Electricity Case*; and second, a broader limitation on the ability of the Commonwealth to enact laws that inhibit or impair the continued existence of the states or their capacity to function in the federation.[241] The High Court has not, however, formulated a cohesive theory as to why the Australian courts should invoke constitutional considerations to intervene in these particular situations. Placed in the context of the process-orientation of the *Garcia* decision, these standards arguably represent the Australian High Court's assessment of what products of the federal legislative process are so skewed against the states that they are presumptively the result of a process failure.

The special burdens doctrine is certainly comprehensible from this process failure perspective. As a majority of the U.S. Supreme Court suggested in *Baker*,[242] laws that "single out" the states from imposing burdens inapplicable to others similarly situated raise an inference that the federal political process has failed in its representation of state interests. The Australian High Court has recognized that this inference will not be true in situations where the nature of the federal

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239. In addition to a state's right to choose where to locate its state capital, Professor Tribe suggests that the Court's precedent may also provide support for invalidating federal laws that: tax peculiarly governmental state activities, supplant state courts as authoritative declarers of state common and statutory law, or coopt traditional areas of state common law such as torts or contract. *See* L. TRIBE, *supra* 239, at 380.

240. *Baker*, 485 U.S. at 512-13.

241. *See, e.g.*, Victoria v. Australian Bldg. Constr. Employees' & Builders Labourers' Fed'n, 152 C.L.R. 25, 93 (Austl. 1982) (Mason, J.).

242. *Baker*, 485 U.S. at 512-13 (suggesting that a federal law that "singled out" a state "in a way that left it politically isolated and powerless" might be invalid after *Garcia*).

constitutional power comprizes special treatment for the states.[243] Although the justices have discussed this inquiry in somewhat varying terms,[244] the High Court has suggested that this determination involves a consideration of the "content, context or subject-matter" of the constitutional grant of power.[245] In the *Queensland Electricity* case, Justice Brennan formulated this inquiry most incisively as involving a form of the political questions doctrine:

> If a burden is imposed discriminatorily on a State, the law will be invalid unless the discriminatory provision is calculated to provide for particular circumstances affecting that State alone. But if the law is calculated to provide for such circumstances, there may be no real (as distinct from formal) discrimination . . . . Whether circumstances thus justifying the discriminatory law exist must be determined by the Court as best it can. In so far as these questions involve the making of a political assessment, . . . [i]t is the function of the political branch to make the assessment. It is not the function of a municipal court to decide, and there are no legal criteria available to decide, whether the political assessment is correct. The Court can go no further than determining whether the political branch acted reasonably in making its assessment.[246]

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243. *See, e.g.*, Queensland Electricity Comm. v. Commonwealth, 159 C.L.R. 192, 251 (Austl. 1985) (federal powers to acquire property on just terms from states, as well as federal defense, quarantine and medical services powers, all are examples of powers whose exercises necessarily involve distinctions between different legislative areas) (Deane, J.); Melbourne Corp. v. Commonwealth, 74 C.L.R. 31, 81 (Austl. 1947) (noting that §§ 51(xxxi), 51(xxxii), 51(xxxiv) and 51(vi) of the Australian Constitution are concerned with the states specially or contemplate some measure in particular relation to the states) (Dixon, J.).

244. In *Queensland Electricity*, 159 C.L.R. 192 (Austl. 1985), for example, Justice Mason wrote that:

> In some situations it will transpire that a provision, which on its face appears to discriminate against a particular State, ceases to have that character, when attention is given to the nature of the law and the purpose and effect which it has. The deprivation of a right, privilege or benefit, not enjoyed by others, is one illustration. And it may be that action on the part of a State or its agencies may be of such a kind as to call for a special exercise of a particular federal power in circumstances where that exercise involves no real discrimination against the State. Here, however, the provisions are so extreme in their operation that they could not be sustained on this footing.

Id. at 220.

245. *See State Banking Case*, 74 C.L.R. at 83.

246. *Queensland Electricity*, 159 C.L.R. at 240 (citations omitted).

Hence, the special burdens doctrine in Australia appears to protect the states from only those discriminatory laws that result from a failure of the national political process. The High Court has concluded that constitutional federalism principles are violated in such instances of unreasonable discrimination even without independent proof that the federal law threatens the continued role of the states in the federation.[247]

Proof of a realistic threat to the states' continued existence or their ability to function is, however, the critical component of the second limb of the implied constitutional limitations endorsed by the Australian High Court. Although the Court has reaffirmed the validity of this implied limitation in dictum in recent cases,[248] it has yet to uphold an argument that a federal law violated the principle. The Court's discussion of the limitation has suggested that the Court will look to the actual or potential operation of the particular law, and that the impairment of state functioning must impact upon the organs of state government or the processes of government, rather than merely upon the state's powers.[249] Hence, as Justice Mason summarized the doctrine, it requires "a substantial interference with the State's capacity to govern, an interference which will threaten or endanger the continued functioning of the State as an essential constituent element in the federal system."[250]

This second limb of the High Court's implied limitations seems to parallel the type of impairment of state functioning envisioned by the *Garcia* majority's reference to the "affirmative limits the constitutional

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247. In *Queensland Electricity*, for example, none of the Court's judgments found it necessary to demonstrate that the federal law which sought to settle a dispute in the Queensland electricity industry presented any real threat to Queensland's ability to perform its role in the federation. Indeed, the Court conceded that the industrial disputes power generally "extends to authorize legislation making specific provision for conciliation and arbitration for the settlement of a particular identified interstate industrial dispute." *Id.* at 251 (Deane J.). It is difficult to perceive the threat to Queensland posed by the special application of general labor laws in the *Queensland Electricity* case.

248. *See, e.g.*, Victoria v. Australian Bldg. Constr. Employees' & Builders Labourers' Fed'n, 152 C.L.R. 25 (Austl. 1982); Koowarta v. Bjelke-Peterson, 153 C.L.R. 168 (Austl. 1982); Commonwealth v. Tasmania, 158 C.L.R. 1 (Austl. 1983); Richardson v. Forestry Comm., 73 A.L.R. 589 (Austl. 1988).

249. *See* Constitutional Commission, *supra* note 54, at 70; L. ZINES, *supra* note 99, at 294. The Commission quoted Professor Zines' suggestions as to examples of areas which might be regarded as necessary to the organization and processes of state governments. These include "advice to Ministers by the Civil Service, the relationship of the Governor to Ministers and to parliament, parliamentary debate and the internal procedures of parliament, the operation of 'responsible government,' and the freedom of the State judiciary." *See* Constitutional Commission, *supra* note 54, at 70 (quoting L. ZINES, *supra* note 99, at 295-96).

250. Commonwealth v. Tasmania, 158 C.L.R. 1, 139 (Austl. 1983).

structure might impose on federal action affecting the States."[251] The doctrines in both countries consist of core remnants of the intergovernmental immunities doctrines. Although the doctrines in their present forms are unlikely to be invoked by either Court,[252] they retain symbolic significance and are a means by which the Courts might intervene if the federal legislature acts irresponsibly.[253]

VI. CONCLUSION

The Australian High Court and the U.S. Supreme Court have reached substantially similar positions in their respective efforts to define a role for the courts in protecting a constitutional balance between the powers of the federal and state governments. At present, both courts have recognized the difficulties in enforcing implied constitutional limitations on federal powers and have largely abandoned broad intergovernmental immunities and reserved powers doctrines as inappropriate and unworkable. In their place, the Courts have responded with preliminary attempts to formulate principled doctrines that will ensure that the national political process functions properly in protecting state interests.

Beyond this, however, the Courts appear to have adopted a "wait and see" attitude toward the future rather than violate Justice Frankfurter's admonition against "conjuring up horrible possibilities that never happen in the real world and devising doctrines sufficiently comprehensive in detail to cover the remotest contingency."[254] In many ways the very existence of the doctrines may serve to deter federal legislators from creating laws that intrude upon state sovereignty. Nevertheless, it remains likely that this deterrent will have its limits, and that the courts will again be forced to give additional content to the doctrines. The similarities traced in this article between these federalism issues in the United States and in Australia suggest that, when these new confrontations arise, both Courts would do well to recognize the potential benefits of studying each other's successes and failures.

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251. *Garcia*, 469 U.S. at 556. *See supra* notes 222-23 and accompanying text.

252. The United States Supreme Court's decision in *Baker*, 485 U.S. at 505, cast additional doubt on the validity of this limitation. The majority in that case indicated that "nothing in *Garcia* or the Tenth Amendment authorizes courts to second-guess the substantive basis for congressional legislation." *Id.* at 513. In his opinion concurring in the Court's judgment, Justice Scalia indicated that *Garcia* leaves room for affirmative limits on federal power arising from "the constitutional structure." *Id.* at 528 (Scalia, J., concurring in judgment).

253. *See, e.g.*, Field, *supra* note 223, at 114.

254. New York v. United States, 326 U.S. 572, 583 (1946), *quoted in Garcia*, 469 U.S. at 556. Justice Dixon also referred to Justice Frankfurter's remarks in this regard in the *State Banking Case*, 74 C.L.R. at 83.