# AN ANALYSIS OF JUDICIAL APPROACHES TO THE INTERPRETATION OF THE COMMERCE CLAUSE IN AUSTRALIA AND THE UNITED STATES

*P. E. NYGH**

## I PHILOSOPHY AND METHOD OF CONSTITUTIONAL INTERPRETATION

In dealing with the interpretation of a federal constitution, the courts must choose, whether deliberately or by unconscious bias, between two distinct political conceptions of the relationship between Federation and State. The courts can view this relationship either as one between two mutually independent sovereignties, each self contained and inviolate from interference by the other, or they can regard the relationship as an organic whole, as involving the distribution of powers between the distinct organs of one sovereignty. The former philosophy may be termed the "dual federalist" view, the latter, the "organic" view, of the Constitution.

Dual federalism proceeds on the assumption that the Constitution is a treaty made between the constituent States whereby these States constituted the federal government as an agency to carry out certain limited and narrowly defined functions which the individual States could not carry out themselves. If the new government was invested with an independent sovereignty, it was by a grant which derogated from the primordial sovereignty of the constituent States and which must therefore be strictly construed in favour of the grantors.

Professor Corwin, who first coined the phrase,[1] saw as its basis the assumption that the two centres of government, national and state, enjoyed an equal sovereignty.[2] Between these sovereignties the Supreme Court had to draw a line of demarcation. This was done not only by defining the federal powers as they were actually described in the Constitution, but also by implying certain definite State powers, as if the Constitution had supplied a list of them.

In some respects dual federalism goes further than its term indicates, and implies a certain primacy on the part of the States as the organs existing prior to Federation. For in postulating certain reserved State powers which cannot be touched by the exercise of any federal power, its adherents assert that the express provisions of the Constitution must be accommodated to these unwritten reservations.

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* LL.M.(Sydney), Senior Lecturer in Law, University of Sydney.

[1] *Twilight of the Supreme Court* Ch. 1.

[2] *Op. cit. supra* n. 1 at 12.

The assumption underlying the organic approach is that the primordial sovereign stands outside and above the existing framework of the constitution. In the Australian context that sovereign may be the Imperial Parliament at Westminster or the people of the Commonwealth voting at a referendum. In the American context sovereignty rests with the people of the United States. Wherever that ultimate sovereignty may lie, the organic approach assumes that there is a supreme lawgiver, which has organized the government of the Federation as a whole, subdividing it for its more efficient government into Federation and States and distributing powers to such bodies as can best exercise them.

The organic view demands that there be no gap in power except where expressly provided by the Constitution.[3] It also implies that the Constitution is adaptable to changing circumstances and that the distribution of powers itself may change in response to new challenges. Finally it assumes that the Constitution is not a compact between jealous States, but an organization of the national government imposed by the ultimate sovereign for the more efficient government of the Nation.[4]

Needless to say, the organic approach favours a strong central government, though it does not seek to destroy federalism. The dual federalist, on the other hand, sees in State autonomy the preservation of liberty. The choice between these two theories is essentially a political choice. At a time when most of the initiative still lay with the States in experimentation and innovation, it was the radical who favoured the maximum of State autonomy and the conservative who wished to strengthen federal authority. In the twentieth century the conservative generally fears too much control at the centre.

The choice between these two political philosophies goes to the root of constitutional interpretation. But in the course of interpretation another choice must be made, this time one of method. Once more there are two ways in which the interpretative process can be handled. One method is by definition and declaration of the law in the abstract, which might be called the conceptual method. The other method is by seeking to relate the law to the purposes which it was designed to serve, which might be called the purposive or pragmatic approach.

The conceptual approach is based on two major assumptions:

(a) The existence of a relevant legal principle precedes that of the facts to which it is sought to be applied.

(b) This legal principle, if not already defined by the courts, can be deduced solely by a logical process from existing (that is already clarified) legal principles as declared by the legislature or previous judicial decisions, to the exclusion of social, political or economic considerations.

Definitions have not always been as restrained as this one. Thus Professor Corwin characterises what amounts to the first assumption as the "determination to resist the inrush of fact with the besom of formula",[5] whilst Professor Stone aptly describes the second assumption as "the will to believe in the

[3] E.g., in the United States Constitution, Art. I ss. 9 and 10. *Cf.* Australian Constitution s. 92.

[4] This sovereignty is commonly ascribed to the people of the United States, *McCulloch* v. *Maryland* (1819) 4 Wh. 316, 403-405 and, in Australia, to the Imperial Parliament.

[5] "The Schechter Case — Landmark or What?" 2 *Law — A Century of Progress* (1937) 32, 54.

full immunity of the judicial mind from all extra-legal problems and especially problems of evaluation".[6]

As the term "conceptualism" indicates, it assumes that all legal problems are capable of clear definition. While this attitude is by no means peculiar to constitutional law, it is in this field that the results of such an approach are most clearly demonstrated. For it means, as former Chief Justice Dixon said on his inauguration, that ". . . the court's sole function is to interpret a constitutional description of power or a restraint upon power and say whether a given measure falls on one side of a line consequently drawn or on the other".[7]

When it comes to the interpretation of federal powers this approach has had two important results.

In the first place it has meant that in defining the extent of the power, in the sense of what can be reached thereby, the definition of the crucial concept underlying the power operates as a limitation from which the court dare not stray too far. In other words the lines drawn as a consequence of the definition by the court of the constitutional description, serve to delimit not merely the core, but also the total circumference of the power. As Marshall, C.J. said in *Brown* v. *Maryland*:[8] "The (Commerce) power is co-extensive with the subject on which it acts . . . ."

In the second place, the power, once defined, cannot logically be restricted by reference to extraneous matters.[9] This is usually explained on the ground that the court is only concerned with the direct (legal) operation of the statute and not with its indirect (economic or political) effect.[10] In this sense the conceptual approach does not necessarily have a limiting effect on the powers it is sought to interpret, provided, of course the subject matter of the power is given a liberal interpretation.

Pragmatism is the method whereby the Court, instead of using *a priori* fixed definitions ascertained by precedent or the dictionary, solves the problem by a process of avowed policy making.[11] The formula is either discarded altogether or, as is more common, is arrived at by a consideration of extra-legal material and of the facts involved, rather than on a basis of deduction from existing law. It contradicts, therefore, both of the two assumptions of conceptualism, though it does not eschew the use of formula. Thus in *Rochin* v. *California*,[12] Frankfurter, J. spoke of the due process clause in the American Constitution as "a summarized constitutional guarantee of respect for those personal immunities which . . . are so rooted in the traditions and conscience of our people as to be ranked as fundamental" or are "implicit in the concept of ordered liberty".

However, subsequently his Honour goes on to say:

> In each case "due process of law" requires an evaluation based on a disinterested inquiry pursued in the spirit of science, on a balanced

[6] "A Government of Laws and Yet of Men" (1950) 25 *N.Y.U.L.R.* 451, 456. See also the often cited dictum of Latham, C.J. in *South Australia* v. *Commonwealth* (1942) 65 C.L.R. 373, 409: "Thus the controversy before the Court is a legal controversy, not a political controversy. It is not for this or for any court to prescribe policy or to seek to give effect to any views or opinions upon policy."

[7] (1952) 26 *A.L.J.* 3 at 4. *Cf.* Roberts, J. in *U.S.* v. *Butler* (1938) 297 U.S. 1, 62.

[8] (1827) 12 Wh. 419, 446.

[9] E.g., *South Australia* v. *Commonwealth supra* n. 6 at 422-27.

[10] *Huddart Parker* v. *Commonwealth* (1931) 44 C.L.R. 492, 501 *per* Rich, J. 515 *per* Dixon, J.

[11] McWhinney, *Judicial Review in the English Speaking World* (1960) (2 ed.) 22.

[12] (1952) 342 U.S. 165, 169.

> order of facts exactly and fairly stated, on the detached consideration of conflicting claims, . . . on a judgment not *ad hoc* and episodic but duly mindful of reconciling the needs both of continuity and of change in a progressive society.[13]

This latter passage sums up the essence of the pragmatic approach. The function of the courts is seen as arbitral between conflicting claims as they appear on the facts. The legal issue is not decided in a vacuum-tight compartment away from the facts and preceding the consideration of the facts, but simultaneously with, and in a manner which is dependent upon, the facts. Moreover the arbitral approach demands that the conflicting claims be weighed not only in law, but also in moral, social and economic value.

Hence this approach can also be called the purposive approach, for in evaluating any law, be it State or federal, the Court will consider the purpose rather than the nature of the law. The difference between the conceptualist and the pragmatist approaches has been described as the question whether the problem of classification of powers should be defined in terms of essence or consequences.[14] The conceptualist will indeed ask himself "what does the law do?", but he will mean thereby: "What does the law do in the way of changing or creating or destroying duties or rights or powers?"[15] In other words the conceptualist is only concerned with placing the statute in question in a particular legal category by judging its effect solely in legal terms. In that sense he is concerned with essence and not with the effect sought to be achieved.

Contrast with this the words of Stone, C.J. of the United States Supreme Court in examining the validity of an Arizona railway safety measure:

> The decisive question is whether in the circumstances the total effect of the law as a safety measure in reducing accidents is so slight and problematical as not to outweigh the national interest in keeping interstate commerce free from interferences which seriously impede it and subject it to local regulation which does not have a uniform effect on the interstate train journey which it interrupts.[16]

Unlike dual federalism and the organic concept, conceptualism and pragmatism are techniques, not philosophies. They can be made to serve either philosophy. For, despite what Frankfurter, J. said, the pragmatic approach is not altogether "an evaluation based on a disinterested inquiry pursued in the spirit of science". The jurist who adheres to the philosophy of dual federalism will strike the balance of interests between Federation and State accordingly. His judgment as to what effects a State may legitimately aim at will be coloured by his predilections. On the other hand conceptualism, with its claim to strict legalism, is not and cannot be neutral. For the Court must still frame its definitions before it can apply the formula. In so doing it must exercise a choice and that choice will be influenced by its philosophy.[17]

The following pages contain a study of how these philosophies and techniques have been applied in the interpretation of the Commerce Clause in Australia and the United States, and of the extent to which they are responsible for the present state of the law. It will be necessary, first, to discuss the

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[13] *Id.* at 172.
[14] P. Freund, "A Supreme Court in a Federation" (1953) 53 *Columbia L.R.* 597, 613.
[15] *Per* Latham, C.J. in *South Australia* v. *Commonwealth* (1942) 65 C.L.R. 373, 424.
[16] *Southern Pacific Co.* v. *Arizona* (1945) 325 U.S. 761, 775, 776.
[17] McWhinney, *op. cit.* n. 11, gives examples of this at 69-72 in respect of Canada and at 90-93 in respect of Australia.

manner in which the courts have defined the crucial phrase "commerce among the states", which the relevant constitutional provisions share. Following this, it will be necessary to discuss the interpretation of the commerce power itself both from the dual federalist and from the organic point of view.

## II INTERPRETATION OF THE TERM "COMMERCE AMONG THE STATES"

The process by which a formula such as "commerce among the states" is defined, is of course of the essence of the conceptual approach. The courts are attempting to derive from words which have in themselves no legal significance, a standard according to which they can assign the multiform activities which take place in the "actual" world to various legal categories. In doing so the judges may presume to be objective and use nothing more than the dictionary. More likely than not, however, in framing and moulding the definition, the Court will cast the definition either widely or in narrow terms of reference, depending on its approach to federalism as a whole. Succeeding judges, impelled by similar considerations of general policy, will seek to limit or extend the definition handed on to them by their predecessors, by a redefinition of the formula so inherited. The result is a gloss upon a gloss which the founding fathers would find hard to recognize.

It is part of the submissions of this article that definitions of the subject-matters of powers, and notably that of the commerce power, should be framed in accordance with an avowed constitutional philosophy. To deal with the words of a constitutional provision in isolation or to interpret them only with the aid of a dictionary and formulae inherited from one's predecessors, amounts to a denial that the document before the Court is a constitution at all.

However, it is an unfortunate fact that a definition of the term "commerce among the States" has been arrived at without a consideration of the nature of the federal framework as a whole. It is also true that the High Court has inherited a formula which was framed in a period when State pressures were great and federal power was weak.

### *"Trade and Commerce Among the States" Defined*

The history of the interpretation of the American Commerce Clause begins with *Gibbons* v. *Ogden*.[18] In that case Marshall, C.J. had to venture forth on uncharted waters; he completed his voyage in careful stages. After setting out the terms of the Commerce Clause, his Honour concluded that "The subject to be regulated is commerce; . . . to ascertain the extent of the power it becomes necessary to settle the meaning of the word". This he proceeds to do in the following terms: "Commerce, undoubtedly, is traffic, but it is something more; it is intercourse."[19] From this the conclusion is drawn that the term "commerce" so defined, includes navigation.[20]

Having thus settled the definition of the word "commerce", the judge turned his attention to the term "commerce among the several States" and applied the same process. Partly by a process of dictionary definition, but more by a consideration of the general scheme of the Constitution, "commerce among the several States" is ultimately defined as "that commerce which concerns more States than one".[21]

[18] (1824) 9 Wh. 1.
[19] *Id.* at 189.
[20] *Id.* at 190-93.
[21] *Id.* at 194.

The above is a perfect example of the conceptual approach. In essence Marshall, C.J. defined the power in terms of its subject. However, the definition he arrived at was immeasurably broader than any other subsequently adopted by the Supreme Court. In fact, his standard, though framed in conceptual terms, could only be applied by looking at purely pragmatic considerations. For how otherwise could one determine what was "commerce which concerns more States than one"?

Marshall's successors did not share his broad view of federal power, but instead of repudiating his definition they proceeded to narrow and distort it by a close textual exegesis. Thus where Marshall had merely cited "intercourse" as being included in the concept of commerce,[22] his successors finally arrived at the conclusion that "Transportation is essential to commerce, or rather it is commerce itself".[23] "Intercourse", in the sense of movement between the States, had become "transportation" in the terminology of later judges and as such displaced "traffic" as the core of the concept. In the result, all that remained of Marshall's wide definition was the actual physical movement of goods and persons from one State to another. Despite Marshall's emphatic dicta to the contrary,[24] the "exclusive" powers of the States were thereby moved almost right up to their geographical boundaries.

It is true that later formulations did not altogether overlook the fact that Marshall had spoken of "traffic", meaning thereby dealings in commodities, as the primary meaning of "commerce". Many dutifully included the word in their definitions.[25] However, "traffic" in their sense was distinctly subsidiary to transportation. This insistence on some identifiable movement across the border led to the serious difficulties which the Supreme Court later experienced in regard to intangibles. Thus in *Paul* v. *Virginia*, insurance contracts were held to be non-commercial, since "They are not commodities to be shipped or forwarded from one State to another, and then put up for sale".[26] Although by 1910, if not earlier, it had become impossible to maintain that intangibles could not be the subject of commerce,[27] this particular heresy continued to haunt American constitutional law until 1944.[28]

At the same time, however, by emphasising the words "intercourse" and "transportation" to the exclusion of the constitutional term "commerce", the term was taken to include all types of communing across State borders, whether entered into for the purpose of gain or not. By calling the commerce power a "power over transportation among the several States"[29] the Supreme Court finally managed to uphold Congressional power to prohibit the transportation of liquor across a State border, even if the same was intended for personal consumption by the carrier.[30] Accordingly, "interstate commerce" by

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[22] The inclusion of "intercourse" in the concept of "commerce" was at the time of *Gibbons* v. *Ogden* seen as a radical innovation. Until then "commerce" was thought of as "trade and traffic". See R. L. Stern, "That Commerce which Concerns More States Than One" (1934) 47 *Harv. L.R.* 1335 at 1346.

[23] *Railroad Co.* v. *Husen* (1877) 95 U.S. 465, 470.

[24] As Marshall, C.J. said in *Gibbons* v. *Ogden supra* n. 1 at 194: the commerce power "cannot stop at the external boundary line of each State, but may be introduced into the interior".

[25] E.g., in *County of Mobile* v. *Kimball* (1880) 102 U.S. 691 at 702; *Gloucester Ferry Co.* v. *Pennsylvania* (1884) 114 U.S. 196 at 203; *Kidd* v. *Pearson* (1888) 128 U.S. 1 at 20.

[26] (1869) 8 Wall. 168, 183.

[27] See *Pensacolea Telephone Co.* v. *Western Union* (1877) 96 U.S. 1; *Champion* v. *Ames* (1902) 188 U.S. 321; *International Textbook Co.* v. *Pigg* (1910) 217 U.S. 91.

[28] *U.S.* v. *South-Eastern Underwriters Assn.* (1944) 322 U.S. 533.

[29] *Hoke* v. *U.S.* (1912) 227 U.S. 308 at 323.

[30] *U.S.* v. *Simpson* (1919) 252 U.S. 465.

the turn of the century had come to mean any transaction involving interstate transportation or directly and integrally related to such transportation.[31]

The Australian founding fathers, in the closing years of the nineteenth century, had the advantage of a hundred years of American experience. Nevertheless they framed the federal commerce power in much the same terms as those used in the American Constitution.[32] There are, of course, a few differences such as the addition of the word "trade" before "commerce" whenever used. There is also the express declaration in section 98 that the term "trade and commerce" is to include navigation and State railways. In addition, the draftsmen spelled out a number of specific commercial powers in section 51.

The grant of these specific powers has not, of course, been ignored by the courts. On the other hand they have not given the term "trade and commerce among the States" any wider an interpretation than its counterpart received in the United States. Thus Knox, C.J. said in *Roughley* v. *New South Wales*:[33] "The expression 'trade and commerce' is no wider in its meaning than the word 'commerce' used in the Constitution of the United States." Starke, J. in *Bank of New South Wales* v. *Commonwealth* described the two terms as "indistinguishable descriptions of the same thing".[34]

In the result, as in the United States, transportation was seen as the core of the concept. At a quite early stage "trade and commerce among the States" was defined as "All the commercial arrangements of which transportation is the direct and necessary result".[35] More recently the statement that "The conception of trade and commerce among the States is . . . quite inseparable from movement of goods and persons",[36] won the approval of most members of the High Court Bench.[37]

Unlike the United States Supreme Court, however, the High Court has not had any difficulty in envisaging the movement of intangibles across the border,[38] although, strangely enough, it has so far as insurance is concerned, arrived at much the same result as in *Paul* v. *Virginia* via a different route.[39]

The question whether the term "commerce" includes non-commercial intercourse has not yet formally come up for decision in Australia. Section

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[31] See e.g., F. H. Cooke, "Power to Regulate Commerce" (1911) 11 *Columbia L.R.* 51, 52; B. C. Gavit, *The Commerce Clause* (1932) 102-104; F. D. G. Ribble, *State and National Power over Commerce* (1937) 131; W. W. Willoughby, *Constitutional Law* (2 ed. 1929) 729, 730.

[32] The meaning of "Trade and Commerce" was never discussed directly at the Convention. However, those who discussed the clauses in which the term appeared (in the main the future Chief Justice Isaacs), proceeded on the assumption that the power to legislate with respect to "trade and commerce" would have the same extent (and rather surprisingly) the same exclusiveness as its American counterpart. *Record of Debates of the Federal Convention*, Second Session, Sydney, 1897, 1037-1065 and especially 1055. In fact the inference is strong that whatever the words used, "trade", "trade and commerce" or "trade and intercourse", the American concept of commerce as it had developed by 1897 was meant. *Ibid.* Third Session, Melbourne, 1898, 1014. See the accusation by Sir John Downer at 1966. See also the statement by Mr. Deakin at 1971.

[33] (1928) 42 C.L.R. 162 at 179.

[34] (1948) 76 C.L.R. 1 at 306, 307. See also Griffith, C.J. in *Australian Steamships Ltd.* v. *Malcolm* (1914) 19 C.L.R. 298 at 305.

[35] *McArthur* v. *Queensland* (1920) 28 C.L.R. 530 at 547.

[36] *Australian National Airways* v. *Commonwealth* (1946) 71 C.L.R. 29 at 56 *per* Latham, C.J.

[37] *Id.* at 71 *per* Rich, J.; at 76 *per* Starke, J.; at 82 *per* Dixon, J.; at 107 *per* Williams, J. See also *Bank of New South Wales* v. *Commonwealth* (1948) 76 C.L.R. 1, 234 *per* Latham, C.J.; at 309 *per* Starke, J.; at 381, 382 *per* Dixon, J. The last named's statement won the approval of the Privy Council, (1949) 79 C.L.R. 497, 632.

[38] *Bank of New South Wales* v. *Commonwealth* (1948) 76 C.L.R. 1, (H.C.); (1949) 79 C.L.R. 497 (P.C.).

[39] *Hospitals Provident Fund Pty. Ltd.* v. *Victoria* (1953) 87 C.L.R. 1.

92 provides expressly that "trade, commerce and intercourse" shall be absolutely free. Consequently there was little difficulty in holding that non-commercial movement was included within its protection.[40] However, s. 51(i) omits the word "intercourse". Commenting on this difference Dixon, J. said in *Australian National Airways* v. *Commonwealth*:

> Notwithstanding the addition, in section 92, of the word "intercourse" to the words "trade" and "commerce", I am not disposed to think that there is much covered by the word "intercourse" that falls outside the commerce power. Actual movement of persons and goods among the States will, I should imagine, be regarded as enough here as it is in America. Probably, too, it will be taken to extend to acts and transactions involving such movement.[41]

On the other hand there are recent dicta, including some made by his Honour, which seem to suggest that not all activities which involve the crossing of a State border, are to be regarded as "commerce". Notably these dicta suggest that the types of activity which Congress regulates under the police aspect of the commerce power, do not fall within the Australian concept.[42] Consequently it is doubtful how much importance should be attached to the passage from the *Airways Case* above cited.

This exposition has shown that a "reception" has taken place in Australian constitutional jurisprudence of the same highly technical interpretation of "interstate commerce" as existed in the United States at the turn of this century. It is true that the High Court has accepted some points which were not fully clarified in America until several years later, such as the inclusion in the concept of commerce, of the traffic in intangibles and more dubiously that of non-commercial intercourse. But this was merely a matter of confirming trends which were already in evidence before 1897.[43]

Thus the High Court has not taken the opportunity of redefining the commerce clause in its own terms or even of expressing its preference for Marshall's more logical and grammatical definition. If one remembers that, at the same time, the High Court has so far refused to accept the use of the "commingling" doctrine as a means of breaking out of its self-imposed limitations, it must be clear that the scope of the commerce power in Australia is very narrow indeed. But definitions are not enough; they must also be applied to concrete circumstances. It is in this area that the courts have often been compelled to put water in their doctrinal wine. In doing so, the Australian High Court has been compelled by force of constitutional circumstances to adopt a somewhat different approach to that adopted by the United States Supreme Court.

### *Problems of Application of the Definition of Interstate Commerce*

In theory, at any rate, the Court having been furnished with the conceptual standard, should apply it to the facts in question with the same rigidity in all circumstances. For it is of the essence of the conceptual approach that no heed should be given to matters of economics, politics or social values.

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[40] *R.* v. *Smithers* (1912) 16 C.L.R. 99.

[41] *Supra* n. 37 at 82.

[42] *Hospitals Provident Fund* v. *Victoria supra* n. 39 at 21 *per* McTiernan, J.; *Mansell* v. *Beck* (1956) 95 C.L.R. 550 at 566, 570.

[43] As to intangibles, see n. 18 *supra*. As far as non-commercial intercourse was concerned there were by 1897 already strong dicta in support of its inclusion. *Covington and Cincinnati Bridge Co.* v. *Kentucky* (1893) 154 U.S. 204 at 219.

Alas, life is not as easy at that. Very often the facts cannot easily be fitted into a particular legal category.

In such a case the Court may be driven to pretend that the facts bear a different quality in law from that which they appear to possess in fact. This process Mr. Gavit in his book on the *Commerce Clause*[44] has aptly described as the creation of legal fictions.

These fictions can arise in three basic circumstances: (a) Where the Court is seeking to divide in law a process which on an economic view is indivisible; (b) where the Court for unspoken policy reasons extends the application of the legal formula to facts which *prima facie* would fall outside its scope; and (c) where the Court for the same reason excludes the application of that formula in a situation which *prima facie* would fall within its scope.

*(a) Dividing the indivisible*

The very division between intrastate and interstate trade which is made by the Constitution invites such an artificial distinction. Whatever may have been the position in 1787, when methods of communication were slower, the subjects of commerce mainly tangible and State economies self-contained to a very large degree, it is undeniable today that the national economy constitutes one whole.

To that objection the conceptualist will reply: "But it is a distinction adopted by the Constitution and it must be observed however much interdependence may now exist between the two divisions of trade and commerce which the Constitution thus distinguishes."[45]

If interstate commerce is viewed as centering around movement across State borders, then the Court will have to define the beginning and end of the interstate movement and to determine the types of transaction which are so bound up with that movement as to be an integral part thereof. Obviously not every factual connection suffices; as has been remarked above, economic interdependence is not considered sufficient. Here, then, a fiction arises; the apparently purely factual standard of "a direct causal connection" can in the hands of the courts become a legal standard whereby actual cohesion in fact can be disregarded. The courts in both countries have had little trouble in classifying activities involving a physical crossing of a border, such as driving a vehicle from one State to another. Nor have they had much difficulty in holding that the scope of interstate movement includes activities which are necessary physical preliminaries or sequels to such movement, such as loading or unloading.[46]

As opposed to physical activities, the problems raised by commercial contracts are of a different order. There are two ways in which their character can be determined. The Court can either see what the parties have undertaken to do, as a matter of expressed contractual obligation, or it can look

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[44] Gavit, *The Commerce Clause* 104 *et seq.*

[45] *Per* Dixon, J. in *Wragg* v. *State of New South Wales* (1953) 88 C.L.R. 353 at 386. *Cf.* the evidence given by Owen Dixon, K.C. (as he then was) before the Royal Commission on the Constitution in 1927, *Minutes of Evidence taken before the Royal Commission on the Constitution* 777.

[46] *Joseph* v. *Carter & Weekes Stevedoring Co.* (1947) 330 U.S. 422; *Cf. Huddart Parker* v. *Commonwealth* (1931) 44 C.L.R. 492. In Australia it has been held that a detour made in order to service a vehicle after completing an interstate journey is part of the movement, *Fry* v. *Russo* (1958) S.A.S.R. 212, but that detour made to repair a vehicle damaged whilst on an interstate journey was not. *Schwerdt* v. *Telford* (1960) S.A.S.R. 41. This, of course, is a question of "fact and degree", *per* Napier, C.J. *Id.* at 43.

at the actual effect the contract will have in terms of the geographical movement of goods or persons.

The Supreme Court has judged the nature of the contract by the physical consequences which must result from its performance. The sale of goods from one State to another is itself part of the interstate movement which it has caused, for it was said by Marshall himself that "Sale . . . is an essential ingredient of that intercourse, of which importation constitutes a part".[47] The same can be said of the buying of goods for the purpose of shipping them interstate,[48] and the solicitation of orders to be fulfilled by the shipment of goods from without the State.[49] Furthermore, if it is shown that the first sale of the imported goods is to a buyer who intends to move them out of the State again, then the entire transaction, including the intermediate sale and activities connected therewith, are within the scope of interstate commerce.[50] At the other side of the movement the interstate transaction extends to include the delivery of the goods to the consignee, as was mentioned earlier.

This is not to imply that the Supreme Court has adopted a completely realistic standard and has not indulged in fictions. All too often an originally factual observation has become elevated into rigid legal dogma. Thus it might be possible to see the distinction drawn in *Kidd* v. *Pearson*[51] and *U.S.* v. *E. C. Knight & Co.*[52] between manufacture and commerce on the premise that the process of manufacture is too far removed from the act of transportation to be an integral part thereof. As a factual observation this may in general appear to be a reasonable distinction. But, once elevated into a legal dogma that manufacture, production, or agriculture can never be part of interstate commerce, however much as a matter of fact or contractual obligation they are connected with transportation across the border, the observation has become a legal fiction.[53] It then leads to such ventures in surrealism as occurred when the Supreme Court pretended to divide into production and transportation the instantaneous process of the generation and transmission of electricity.[54]

A similar process can be seen in the application of the original package doctrine to the commerce clause. Devised as a rule of thumb by Marshall in *Brown* v. *Maryland*,[55] in order to determine when the act of importation had ceased and the goods had become intermingled with the general mass of property within the State, it took on an independent life of its own as a check on State power over commerce.[56]

A constant bias towards factual observation has not prevented the Supreme Court from canonising some of its own observations into technicalities. But

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[47] *Brown* v. *Maryland* (1827) 12 Wh. 419, 447.

[48] *Dahnke Walker Co.* v. *Bondurant* (1921) 257 U.S. 282; *Lemke* v. *Farmer Grain Co.* (1921) 258 U.S. 50; *H.P. Hood & Sons* v. *Du Mond* (1949) 336 U.S. 525.

[49] *Robbins* v. *Shelby Taxing District* (1886) 120 U.S. 489; *Nippert* v. *Richmond* (1946) 327 U.S. 416.

[50] *Swift & Co.* v. *U.S.* (1905) 196 U.S. 375; *Stafford* v. *Wallace* (1922) 258 U.S. 495.

[51] (1888) 128 U.S. 1 at 20, 21.

[52] (1894) 156 U.S. 1.

[53] *American Manufacturing Co.* v. *St. Louis* (1919) 250 U.S. 459; *Oliver Iron Mining Co.* v. *Lord* (1923) 262 U.S. 172; *Utah Power and Light Co.* v. *Pfost* (1932) 286 U.S. 165; *Western Life Stock* v. *Bureau of Revenue* (1938) 303 U.S. 250.

[54] *Utah Power and Light Co.* v. *Pfost, supra* n. 53. See also *East Ohio Gas Co.* v. *Tax Commission of Ohio* (1930) 283 U.S. 465 and "State Taxation of Electric Power" (1932) 42 *Yale L.J.* 94.

[55] (1827) 12 Wh. 419. See F. Frankfurter, *The Commerce Clause* (1937) 61.

[56] *Leisy* v. *Hardin* (1890) 135 U.S. 100. Today the doctrine is of doubtful value, *Baldwin* v. *Seelig* (1934) 294 U.S. 511 at 526, 527 *per* Cardozo, J. See also Ribble, *op. cit.* n. 31, 196-200.

it has never sought to classify the nature of a transaction in terms of an expressed contractual obligation to transport goods across the border. In the one case where this distinction was sought to be made, it was rejected.[57] Primarily it has looked at the connection between the activity in question and the movement across the border as a matter of fact.

The High Court of Australia, on the other hand, has generally insisted that the contract by its own terms supply the necessary link. In other words, the contract must provide as a term that the goods are to be supplied from another State, and it is not sufficient that as an actual result of the contract the goods will move interstate. This was already established in principle by the High Court in *McArthur* v. *Queensland*.[58] More recently in *Williams* v. *Metropolitan Abattoirs*[59] a South Australian butcher, who took local orders for meat and supplied them from Victoria, was nevertheless held to be engaged in intrastate trade in the absence of evidence that his customers had specifically requested Victorian meat.

However, if there is a contract which by its terms, involves the transportation of goods interstate, the transaction from the conclusion of the contract[60] to the delivery of the goods at the storage facilities of the interstate buyer will fall within the scope of interstate trade.[61]

That transaction may include not only the transportation within the State, but may also extend (if the necessary contractual cohesion can be shown to exist) to the first domestic sale and to the storage of the goods pending further exportation.[62]

The High Court has insisted primarily upon a legal, rather than a factual, connection. Thus the doctrine of the unbroken package has never found favour with the Australian judiciary, even though that particular doctrine was a part of American juirisprudence in 1897.[63] In this manner the High Court has built itself a purely legal world in which reality needs seldom intrude.[64] By the same token, of course, they have managed to avoid the clash which occurred in the United States between the Supreme Court's standardised "reality" and the facts of actual life.

It is true to say that, as in the United States, the process of production has been regarded as being generally too remote from the process of trans-

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[57] *McGoldrick* v. *Berwind White Coal Mining Co.* (1940) 309 U.S. 33 at 53, 54; see also *Oliver Iron Mining Co.* v. *Lord, supra* n. 53 at 178, 179 *per* Van Devanter, J.

[58] "The goods offered for sale or agreed to be sold are not stated to be either by express stipulation or necessary implication supplied from New South Wales or anywhere outside Queensland. A contract of sale if effected or the delivery of goods agreed to be sold might, at the option of the vendor, for all that appears, be consummated entirely within the state of Queensland. If so, if it impossible to say these transactions are of an interstate character. . . . If the vendor elects to supply the goods from New South Wales, the actual movement of the goods from State to State would, of course, be interstate trade and commerce; . . . But the 'offer for sale' and the 'agreement for sale' would not be changed in character, and they are all we are concerned with. . . ." (1920) 28 C.L.R. 530 at 559 *per* Knox, C.J. and Isaacs and Starke, JJ.

[59] (1953) 89 C.L.R. 66.

[60] *Chapman* v. *Suttie* (1963) 110 C.L.R. 321.

[61] *Grannall* v. *Kellaway* (1955) 93 C.L.R. 36 at 51.

[62] *Wragg* v. *State of New South Wales* (1953) 88 C.L.R. 353; *Fergusson* v. *Stevenson* (1951) 84 C.L.R. 421. But not always: *Harper* v. *Victoria* (1966) 40 A.L.J.R. 49.

[63] Mr. Isaacs (as he then was), for one, had assumed at the Convention Debates at Sydney in 1897 that the doctrine would be part of Australian jurisprudence. *Record of Debates of Federal Convention* (2d. Sess. Sydney, 1897) 1055.

[64] There are some dicta which might suggest that the Court would treat the question of connection as "a business question". *Commonwealth Oil Refineries* v. *South Australia* (1926) 38 C.L.R. 408 at 429 *per* Isaacs, J.; *Vacuum Oil Pty. Ltd.* v. *Queensland* (1934) 51 C.L.R. 108 at 133 *per* Evatt, J. But dicta have little value if they are not applied.

portation. But it would be wrong to say that therefore production can never be part of the concept of interstate commerce. In *Grannall* v. *Marrickville Margarine Pty. Ltd.*[65] the High Court took care to avoid such a categorical statement. The late Fullagar, J. in his obiter dicta in *O'Sullivan* v. *Noarlunga Ltd.*[66] emphatically denied the existence of an unbridgeable gap between production and transportation. It may well be that, on a contractual cohesion being demonstrated to exist between a particular productive process and movement across a border, the High Court might include such production within its definition of interstate commerce. In this regard the "legalistic" approach may be wider and more flexible than the "factual" approach of the Supreme Court.[67]

One major decision of the High Court, subsequently confirmed by the Privy Council, stands as an exception to this trend. In the *Bank Nationalisation Case*,[67a] it was held that the private trading banks were engaged in interstate commerce. Whilst there is much discussion on the point whether banking is "commerce", the majority and later the Privy Council assume its "interstateness" with little or no explanation.[68] Nevertheless it is a bold assumption for the judges to make in the light of their established philosophy. This is very well illustrated by the later decision of the High Court in the *Hospitals Provident Fund Case*.[69]

In holding that the making of contracts of medical insurance was no part of interstate commerce, despite the fact that many such contracts were concluded or performed across State borders, the High Court reiterated its traditional insistence that the "interstateness" be a quality of the contract itself.[70] It could be objected that the contracts between debtor and creditor which make up the business of banking possess as little of that quality. Indeed it was this very argument which the Chief Justice had rejected in the *Bank Case* as being too analytical.[71]

In the *Hospitals Fund Case* his Honour was very much aware of this conflict. He explained the earlier decision as having arisen in a situation where the interstate elements (meaning thereby the factual elements) had grown to "such dimensions as to form an essential part of the conduct of the business although it consisted in the making and performing of intrastate contracts".[72]

The underlying theory appears to be that, in cases where the court is called upon to characterise, not a particular type of activity, but a business as a whole, it will in the first place characterise according to the nature of the transactions which make up that business, having regard to their legal essence and not to the factual consequences. However, if the factual interstate movement "forms an essential part of the conduct" of the business, then the business as a whole will take its colouring from the factual conduct although

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[65] (1955) 93 C.L.R. 55, 77, 78. However, the Court was much more dogmatic in *Beal* v. *Marrickville Margarine Pty. Ltd.* (1966) 39 A.L.J.R. 473.

[66] (1954) 92 C.L.R. 565, 596, 597.

[67] In other cases the same results is achieved. *Cf. Kansas City Structural Steel Co.* v. *Arkansas* (1925) 269 U.S. 148 with *R.* v. *Gates; ex parte Maling* (1928) 41 C.L.R. 519.

[67a] *Bank of New South Wales* v. *Commonwealth* (1948) 76 C.L.R. 1, (H.C.); (1949) 79 C.L.R. 497 (P.C.).

[68] *Id.* at 383 *per* Dixon, J.; at 632 *per* Lord Porter.

[69] (1953) 87 C.L.R. 1.

[70] *Id.* at 15. See also *Mansell* v. *Beck* (1956) 95 C.L.R. 550.

[71] *Supra* n. 67 at 383.

[72] *Supra* n. 69 at 15.

the characterisation of the contracts, viewed in isolation, must remain the same.

This admission that a business or course of trade may derive its "interstateness" from fact rather than from legal nature, is a concession to pragmatism which may have important consequences. Thus Fullagar, J. spoke in *O'Sullivan* v. *Noarlunga Meat Ltd.*[73] of "slaughter for export" as part of "commerce with other countries" on the basis that such slaughter was an objectively ascertainable course of trade. The implication from this would appear to be that, provided one can distinguish a business as an objective concept and provided that business is so much involved factually in interstate communication that one can say that the interstate factors form an essential part of that business, such a business as an entirety will be a part of the concept of interstate trade and commerce.[74]

It is to be doubted, however, whether such a piecemeal revision of the existing definition would in any substantial way relieve the situation. As long as transportation remains the crux, it would leave the High Court with the duty of dividing as a matter of law a subject which for practical purposes is an indivisible whole.

(b) *The application of the concept to activities wholly within the State.*

The courts, if they wish to bring an intrastate subject within the scope of federal power or of constitutional immunity, may have to employ the fiction that an activity which has its beginning and end wholly within one State, is nevertheless an integral part of an interstate transaction.

In essence this raises much the same type of question as has been discussed before. The problem is one of defining the necessary degree of connection with the interstate movement. The complication arises from the fact that the Court is being asked to forge two apparently separate transactions into one. It is not surprising that each constitutional court has solved the problem in much the same fashion as it solved the major issue, that is to say, the Supreme Court adopted a basically factual test and the High Court has stressed the nature of the contractual relationship.

The American approach is typified by the celebrated dictum of Holmes, J. in *Swift & Co.* v. *U.S.*:

> When cattle are sent for sale from a place in one State, with the expectation that they will end their transit, after purchase, in another, and when in effect they do so, with only the interruption necessary to find a purchaser at the stockyards, and when this is a typical, constantly recurring course, the current thus existing is a current of commerce among the States, and the purchase of the cattle is a part and incident of such commerce.[75]

Here several transactions which as a matter of contract are quite distinct and separate from one another are nevertheless connected together into one interstate whole, because as a matter of business fact they form one whole.

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[73] (1954) 92 C.L.R. 565 at 596, 597.

[74] See also *Swift (Australia) Pty. Ltd.* v. *Parkinson* (1962) 108 C.L.R. 189. However, as late as 1964 Dixon, C.J. found it necessary to say in *Redfern v. Dunlop Rubber (Aust.) Pty. Ltd.* (1964) 110 C.L.R. 194, 207: "It was alleged . . . that . . . each of the defendants was at all material times engaged in trade and commerce among the States of the Commonwealth. This allegation seems to regard the practice of interstate trade as investing a party with a status. We are, however, concerned rather with transactions which fall within the legislative power."

[75] (1904) 196 U.S. 375 at 398, 399. See also *Stafford* v. *Wallace* (1922) 258 U.S. 495.

The High Court of Australia likewise acknowledges that a local activity may be linked to a larger whole. As it was said in *McArthur Ltd.* v. *Queensland*:[76] "A given transaction which taken by itself would be domestic, as for instance, transport between two points within a State, may in a particular instance be of an interstate nature by reason of its association as part of a larger integer."

In the application of this principle the High Court has taken a different view from that of its American counterpart. In Australia the mere fact that a local carrier, moving between points within the same State, has a cargo of goods moving in interstate trade, does not render his journey a part of interstate commerce.[77] He may, of course, be entitled to the protection which s. 92 affords, if it can be shown that the interference with his journey amounts to an interference with the free passage of the goods he carries, but he personally remains outside the charmed sphere of interstate commerce.

In order to bring himself within that concept, the carrier must show a contractual link with the actual movement interstate or with the interstate transaction. Thus he can show either that he is a party to the contract for the interstate sale of goods[78] or that he joined with the carrier responsible for the actual carriage across the border as a co-contractor for the carriage of goods in one undivided journey.[79]

The degree of integrity of the local act with the interstate movement depends mainly upon the degree of contractual cohesion.[80] There have admittedly been some judicial statements to the effect that the question of continuity should be judged by commercial rather than legal connection.[81]

In contrast thereto, however, are other dicta stressing that the Court is not concerned with "business and economic notions" of what is ancillary to interstate commerce.[82] Furthermore the ingrained conceptualism of the judges makes it difficult for them to pay regard to pragmatic considerations.[83] At most they have used this principle to tie together a contract made between a producer and a wholesaler in the same State, with a second contract disposing of the same goods and made between the wholesaler and a purchaser in another State.[84]

Despite an apparent similarity with *Swift & Co.* v. *U.S.* the crucial factor is the structure of the contracts involved and not the actual course of business. They are cases in which the middleman acted as the buying agent

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[76] (1920) 28 C.L.R. 530 at 549.

[77] *Hughes* v. *Tasmania* (1955) 93 C.L.R. 113; *Deacon* v. *Mitchell* (1965) 112 C.L.R. 353; *Webb* v. *Stagg* (1965) 112 C.L.R. 374.

[78] *Simms* v. *West* (1961) 107 C.L.R. 157.

[79] *Russell* v. *Walters* (1957) 96 C.L.R. 177; *Britton Bros.* v. *Atkins* (1963) 108 C.L.R. 529.

[80] *Bell Bros. Pty. Ltd.* v. *Rathbone* (1963) 109 C.L.R. 225; *Deacon* v. *Mitchell* (1965) 112 C.L.R. 353; *Webb* v. *Stagg* (1965) 112 C.L.R. 374. And see *McNee* v. *Barrow Bros. Pty. Ltd.* (1954) V.L.R. 1 at 8, 9 *per* Sholl, J.

[81] E.g., *Clements & Marshall Pty. Ltd.* v. *Field Peas Marketing Board* (1947) 76 C.L.R. 401 at 409, 410 *per* Williams, J.; at 429 *per* Dixon, J.; *Reg.* v. *Wilkinson* (1952) 85 C.L.R. 467 at 483 *per* Williams, J., at 486 *per* Webb, J.; *Bell Bros. Pty. Ltd.* v. *Rathbone* (1963) 109 C.L.R. 225 at 239 *per* Windeyer, J. See also P. H. Lane, "Approaches to Section 92" (1959) 32 *A.L.J.* 335 at 342.

[82] *Pioneer Express Co. Pty. Ltd.* v. *Hotchkiss* (1958) 101 C.L.R. 536 at 548 *per* Dixon, C.J.; at 559 *per* Taylor, J.

[83] See R. Anderson, "Freedom of Inter-State Trade" (1959) 33 *A.L.J.* 294 at 296.

[84] *Clements & Marshall* v. *Field Peas Marketing Board supra* n. 87; *R.* v. *Wilkinson supra* n. 87; *Fergusson* v. *Stevenson* (1951) 84 C.L.R. 421. The contractual cohesion may be shown to exist by evidence of the "course of trade" rather than express contractual clauses. *Egg & Egg Pulp Marketing Board* v. *Robins* (1953) V.L.R. 15 at 21 *per* Sholl, J.

for the interstate purchaser and where the first contract envisaged that the goods should start immediately upon their interstate journey. Even if there was no agency, as understood in the law of contract, it would be a slight step for the Court to imply one for constitutional purposes.

As Windeyer, J. explained recently in *I.X.L. Timbers Pty. Ltd.* v. *Attorney-General for Tasmania.*

> . . . to have the immunity from interference that section 92 gives, the person claiming it must either be engaged in interstate trade on his own behalf or so acting on behalf of a principal that he is his principal's *alter ego*, his activities being identified, in a business sense, with his principal's interstate trade. Whether or not this is so does not depend on classifying the agent according to categories that English law has made for a different purpose. The question, it seems to me, turns rather on agency as involving a concept of representation.[85]

In these circumstances much will depend on the skill and draftsmanship of the legal adviser, since it may be within his power to give or to deny to a given transaction the desired interstate character.

Thus the High Court has stressed mainly the contractual relationship between the person carrying on the local activity and the parties engaged in the interstate movement itself. The High Court has taken the view that any contract which by its terms looks towards the movement of goods or persons across the border is itself part of interstate commerce. Just as the actual movement of the goods was not the controlling factor in characterising the contract, so the absence of an actual border crossing will not give the High Court much difficulty, provided the required contractual cohesion exists.[86] It is only in the few cases dealing with the commercial middleman acting as a go-between between producer and interstate buyer, that we see a truly "legal" fiction, amounting in effect to a constructive agency for the purposes of the constitutional doctrine.

The dicta of Fullagar, J. in the *Noarlunga Case*[87] may be the harbinger of a more pragmatic approach. But later developments have made it doubtful whether these remarks reflect a general change of heart on the part of the Court.[88] At the most, one can say that they reflect a growing awareness of the economic factors involved.

The divergence between the purely analytical test and the more pragmatic approach can be seen in the recent case of *Deacon* v. *Mitchell.*[89] In that case the respondent had been charged with operating a motor vehicle between Deloraine and Devonport, both within the State of Tasmania, without a transport licence as required by the law of that State. The truck in question had been used to transport timber from a sawmill in Deloraine to a timberyard in Devonport. The timber was moved in pursuance of an order made by a Victorian buyer. However the timber would have to be dried at the Devonport yard for 18 months before it was in a deliverable state. The timber would not be allotted to the specific order until it reached the yard. Though most of

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[85] (1963) 109 C.L.R. 574 at 578.
[86] *O'Kane* v. *Boyle* (1961) V.R. 45.
[87] *O'Sullivan* v. *Noarlunga Meat Ltd.* (1954) 92 C.L.R. 565.
[88] Its recent decisions in *Swift (Australia) Pty. Ltd.* v. *Parkinson* (1962) 108 C.L.R. 189 and *Beal* v. *Marrickville Margarine Pty. Ltd.* (1966) 39 A.L.J.R. 473 would suggest otherwise.
[89] (1965) 112 C.L.R. 353. See also its companion case *Webb* v. *Stagg* (1965) 112 C.L.R. 374.

the timber on that truck would ultimately be allotted to the Victorian order, some of it would be rejected as not meeting specifications.

The majority of the High Court held that this lack of complete identity between the load on the truck and the timber ultimately consigned was fatal to the trucker's assertion that his activity was protected by s. 92. Furthermore, in view of the majority, the lengthy delay before the timber would be exported broke the immediate chain of causation.

The Chief Justice, Sir Garfield Barwick and Windeyer, J. dissented. In the view of the latter the Court should "bear in mind the practical realities of commerce".[90] This, of course was a matter of fact and of degree in each particular case and could not be solved by the application of any particular formula. The practical realities of commerce, however, led to an appreciation of the fact that some parts of a given load would never reach their ultimate destination. They would also compel acceptance of the drying-out process as a necessary condition precedent before the timber could be moved out of the State. Consequently, in his view, the moving of the timber from the sawmill to the Devonport yard with a view to ultimately supplying it to the Victorian buyer was a necessary part of the interstate transaction.[91]

(c) *The refusal to apply the concept of interstate commerce.*

The third type of fiction is the result of a too rigid formulation. It is commonly met when the Court is concerned with the interstate commerce concept as an area of immunity. The application of a mechanical test may mean that a transaction which is, from a business point of view, essentially of an intrastate nature nevertheless is classified as interstate. At other times the Court may feel strongly that a matter which is undoubtedly of an interstate character, both from a commercial as well as a legal point of view, should be regulated by a State. In both cases the Court, as long as it adheres to the mechanical test, may be tempted to pretend that what appears to be interstate in character according to its rigid definition is actually of an intrastate character, or that what appears to be "commerce" is actually not commerce.

Many of the difficulties are, of course, caused by the rigid application of the rule that any physical movement which crosses a State border is interstate in character. Thus the courts in both countries have held, in the main, that any activity involving transportation across State lines, even though both the point of departure and the point of arrival lie within the same State, amounts to interstate commerce, no matter what the motive with which that interstate movement was entered into[92] or however unimportant the actual movement across the border in relation to the entirety of the transaction.[93]

It may appear strange at first sight that the United States Supreme Court has adhered more firmly to the mechanical test than the High Court. Thus in the case of a ship sailing over the high seas between points within the same State, the High Court denied the existence of foreign commerce,[94] while, in a similar case, the Supreme Court found it to exist.[95]

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[90] *Id.* at 369.
[91] *Id.* at 369-72.
[92] E.g., to evade the application of State law, as in *Western Union Telephone Co.* v. *Speight* (1920) 254 U.S. 17; *Narracoorte Transport Co. Pty. Ltd.* v. *Butler* (1956) 95 C.L.R. 455.
[93] *Golden* v. *Hotchkiss* (1958) 101 C.L.R. 568.
[94] *Newcastle and Hunter Steamship Co.* v. *A.-G.* (1921) 29 C.L.R. 357.
[95] *Lord* v. *Goodall* (1881) 102 U.S. 541.

Cases involving a land border have given rise to greater difficulties. There do exist a number of Supreme Court decisions where it has been held that minor crossings of State lines do not render the entire continuous activity, in the course of which the crossing was made, interstate commerce so as to take it out of the reach of State power.[96] Today, however, it would appear that despite the language used in these cases which might suggest the contrary, such activities will now be regarded as being of an interstate character. In *Greyhound Lines* v. *Mealy*,[97] Frankfurter, J. condemned this particular type of characterisation as a "needless fiction" and explained the earlier decisions on the basis of a limited concurrent power in the States to tax or regulate activities with a negligible interstate content.[98]

In the United States a more flexible interpretation of federal and State powers has enabled the Supreme Court, ever since the decision in *Cooley* v. *Board of Port Wardens*,[99] to adjust such conflicts without having to distort the definition of interstate commerce. Hence Frankfurter, J. could, with justification speak of a needless fiction.

The High Court has denied itself this flexibility. At first it took a very rigid approach. In *Narracoorte Transport Co. Pty. Ltd.* v. *Butler*[100] the parties successfully took advantage of the Court's bias towards contractual analysis. Although from a business point of view they were only concerned with moving wool from one point in Victoria to another in the same State, they had the wool moved by an elaborate detour via a town in South Australia. There were two separate contracts of carriage: one with a carrier for movement to Narracoorte, South Australia, and the other for the carriage of the same wool to its ultimate Victorian destination with the appellant corporation, which, though enjoying a separate legal personality, was in fact related to the first named carrier. The purpose of the stratagem was to gain immunity from Victorian road taxes and in this the parties succeeded, for the High Court took the mechanical approach that all they could see were two entirely separate transactions each of which involved crossing a State border. A similar mechanical approach was taken in *Golden* v. *Hotchkiss*.[101]

Since then the Court has had second thoughts which were no doubt impelled by the great impetus the first holdings had given to ingenious schemes on the part of truckers and their advisers. One method of defeating these schemes is by splitting the controverted transaction into distinct intrastate and interstate parts. Thus a transaction can be split into a number of similar transactions succeeding each other in time and place. An example of this can be seen in the judgment of Dixon, C.J. in *Harris* v. *Wagner*.[102] Dealing with a situation where a carrier had, in the course of an essentially intrastate transaction, made a detour for no purpose but to obtain the protection of s. 92, his Honour held that the journey up to the point where the carrier commenced his detour and diverged from the most direct route to his ultimate destination, could be separated from the journey which then began. The former was intrastate, the latter interstate in character. The contrast between legal fact and reality

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[96] *Lehigh Valley Railroad* v. *Pennsylvania* (1891) 145 U.S. 192; *Cornell Steamboat Co.* v. *Sohmer* (1915) 235 U.S. 549.

[97] (1947) 334 U.S. 653, 659, 660.

[98] Relying on the explanation given by Holmes, J. in *Hanley* v. *Kansas City Southern Railroad Co.* (1902) 187 U.S. 617 at 621.

[99] (1851) 12 How. 299.

[100] *Supra* n. 92.

[101] *Supra* n. 93.

[102] (1959) 103 C.L.R. 452.

is apparent in the words: "To say that before the long detour . . . the journey was indivisible, . . . is to confuse indivisibility with what happens simply to have been undivided. . . ."[103] The implication is that what is undivided in fact, the Court can divide.

The other method of splitting a transaction is by way of discerning two distinct types of transaction within what appears to be one single dealing. Thus, in *Harris* v. *Wagner*, Fullagar, J. based his concurrence partly on the theory that the carrier concerned was not only engaged in driving from one State to another, but was at the same time engaged in the "separate and distinct activity" of carrying goods on an intrastate highway from one point in the State to another, which was the activity forbidden by State law.[104] In the same manner it has been held that a carrier can be engaged, on the same journey, in interstate commerce as to part of the commerce he carries and engaged in intrastate commerce as to the remainder.[105] Nor will the mere fact that a carrier is driving across a State border suffice to give his cargo the character of interstate commerce, if such cargo is ultimately destined for reshipment to the State from which it came.[106]

Lately the Court has taken a less conceptualist view. Already in *Golden* v. *Hotchkiss* Fullagar, J. had suggested that it "might appear that the crossing of the State border and the consequent presence of the vehicle in another State were so brief and trivial incidents or accidents of the total journey that they ought not to be regarded as capable of characterising the total journey".[107]

Since then there has developed a tendency on the part of the High Court to characterise such transactions by their essential business purpose. In *Harris* v. *Wagner*[108] Fullagar, J. restated his view in the following words: ". . . the part cannot characterise the whole unless it is an essential means of achieving the whole". The Court with the exception of Dixon, C.J. and Kitto, J. seems to have agreed.[109]

Dixon, C.J. also seems to have been converted to this view in *Western Interstate Pty. Ltd.* v. *Madsen*,[110] where he judged a transaction to be interstate despite a border crossing, on the ground that the "predominant purpose of the transaction" was interstate.[111] These decisions are all the more remarkable since the High Court, in coming to this conclusion, ignored some rather involved contractual arrangements including the setting up of "sham" companies.

The issue is not yet resolved, as the recent decisions of the High Court in *Jackson* v. *Horne*[112] and *Barry* v. *Stewart*[113] illustrate. In both cases the High Court reverted to the mechanical test applied in *Narracoorte* v. *Butler*[114]

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[103] *Id.* at 458. Two other justices agreed with this reasoning: Fullagar, J. at 466, Kitto, J. at 468. The other justices preferred the more direct route of characterisation by "essence", *infra* n. 7.

[104] *Id.* at 465.

[105] *Pioneer Express Pty. Ltd.* v. *Hotchkiss* (1958) 101 C.L.R. 536.

[106] *Egg Marketing Board* v. *Bonnie Doon Trading Co. (N.S.W.) Pty. Ltd.* (1962) 107 C.L.R. 27. See also *Hospitals Provident Fund* v. *Victoria* (1953) 87 C.L.R. 1 at 43, 44.

[107] (1958) 101 C.L.R. 568. In that case, though, his Honour did not think that a 20 mile passage through Queensland on a journey which for more than 600 miles led through New South Wales was trivial, although the beginning and the end of the journey both lay in New South Wales.

[108] (1959) 103 C.L.R. 452 at 466.

[109] *Id.* at 471 *per* Taylor, J.; at 475 *per* Menzies, J.; at 477 *per* Windeyer, J.

[110] (1961) 107 C.L.R. 102 at 110.

[111] This reasoning bears comparison with that of the dissenting opinion written by Murphy, J. in *Greyhound Lines* v. *Mealey supra* n. 97 at 667.

[112] (1965) 39 A.L.J.R. 165.

[113] (1965) 39 A.L.J.R. 339.

[114] (1956) 95 C.L.R. 455.

even though the strategem employed by the carriers in both these cases, namely to set up two separate organisations, one to carry goods across the border and the other to carry them back again, was a transparent device to give interstate colour to an intrastate transaction.

The courts have also been troubled by the question whether there can be "commerce" in noxious substances. Despite the fact that American jurisprudence has been plagued by ambiguous terminology in this regard,[115] today the answer seems to be clear that the commerce power of Congress extends over all activities involving movement across State lines, whether legal or illegal,[116] moral or immoral.[117] Again the rigidity of this definition is offset by the acknowledgment that the police powers of the States can be exercised to protect the health and morals of the local population in the absence of Congressional legislation.[118] Thus it has been possible to uphold State legislation on the grounds of health or morality without denying the commercial character of such articles.[119]

It has been suggested that a State may place a commodity, which exists as a natural resource within its borders, *extra commercium*, or allow commerce in it on such conditions as it sees fit to impose.[120] Such a wide principle would appear to be untenable today.[121] Whilst it still may be true to say that a State may prohibit altogether or *sub modo* any dealings in property which is vested in it at common law as the representative of the people (such as wild game[122] or water resources[123]) this power today rests rather on the police power than on an exclusion from "commerce".

In Australia the concept of the police power as such has never been approved by the courts.[124] Nevertheless the High Court has been faced with a similar problem under s. 92, namely whether it ought to insist on the mechanical operation of the formula, or whether it could permit the States, and to a lesser extent the Commonwealth, to control anti-social activities conducted across State lines.

Partly it has avoided this dilemma by a devious process of characterisation of the State statutes involved. This process can best be described as establishing a *de facto* police power, for instead of characterising the legislation by its positive aspects (such as health and morality), the Court does in effect the same thing by holding that such legislation does not impose a direct burden upon interstate trade, though it may have the effect of prohibiting it.[125]

But the High Court has also sought to cut certain activities out of the concept of commerce. This process can be seen as early as *Duncan* v. *Queensland*,[126] which upheld the power of the State of Queensland to place any commodity within its borders *extra commercium*. However this extremely wide

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[115] See B. C. Gavit, *The Commerce Clause* (1932) 86. *Cf.* T. R. Powell, "Insurance as Commerce" (1944) 57 *Harv. L.R.* 937 at 940.

[116] *Brooks* v. *U.S.* (1925) 267 U.S. 432.

[117] *Caminetti* v. *U.S.* (1917) 242 U.S. 470.

[118] *Gibbons* v. *Ogden* (1824) 9 Wh. 1; *Cooley* v. *Board of Port Wardens* (1851) 12 How. 299; *H.P. Hood & Sons* v. *Du Mond* (1949) 336 U.S. 525 at 535.

[119] E.g., in *Plumley* v. *Massachusetts* (1894) 155 U.S. 461; *Crossman* v. *Lurman* (1903) 192 U.S. 189.

[120] *Geer* v. *Connecticut* (1895) 161 U.S. 519 at 532; *Cf. Duncan* v. *Queensland* (1916) 22 C.L.R. 556.

[121] *Oklahoma* v. *Kansas Natural Gas Co.* (1910) 221 U.S. 229; *Cf. Peanut Board* v. *Rockhampton Harbour Board* (1933) 48 C.L.R. 266.

[122] *Geer* v. *Connecticut supra* n. 21.

[123] *Hudson County Water Co.* v. *McCarter* (1908) 209 U.S. 349.

[124] *Lacoste* v. *Department of Conservation* (1923) 263 U.S. 545 at 549, 550.

[125] E.g., *Mansell* v. *Beck* (1956) 95 C.L.R. 550.

[126] *Supra* n. 120.

view did not prevail for long. *Duncan's Case* was reversed in *McArthur* v. *Queensland*.[127] It is quite clear today that a recognised subject of commerce cannot be taken out of the concept of commerce by legislation.[128]

It would appear, however, that legislation could prevent a substance, which is not yet a recognised subject of commerce, from entering into the field of commerce.[129]

What constitutes a matter which is not commercial, depends on a generally accepted understanding in Australia. There appears some judicial support for the view that lotteries are not "commercial".[130] Nor would it appear that the issue of trading stamps, while it may be an encouragement to buy more goods, is by itself "an independent commercial dealing".[131]

As opposed to the accepted doctrine in the United States, it has been suggested in Australia that activities which are illegal or immoral, such as the sale of stolen goods, of forged passports or of counterfeit money, are not proper subjects of trade and commerce.[132] This, of course, must refer to activities which are *mala in se*, since it is not open to the legislatures to remove any activity from the field of commerce. Nor is it sufficient that the goods are potentially dangerous, if they are used in general trade.[133] Thus it would be only the abuse of such goods which could be excluded as an activity from the field of commerce.

It would appear that the position in Australia differs from that in the United States to the extent that in Australia, the term "commerce" does not include "intercourse" and must be taken to refer only to such activities as can in ordinary parlance be described as commercial.

## III THE CONSTITUTION AS A COMPROMISE

It is the purpose of this Part to trace the development of the dual federalist interpretation of the Constitution from its beginnings in the writings of Madison to its demise under the impact of the New Deal. It is then proposed to investigate its influence on the interpretation of the Australian constitution and the reason for the survival of this approach in Australia to the present day.

This Part will therefore serve to explain the Australian present in the light of the American past. It is the view of the author that the dual federalist theory is misconceived, because the proper working of a modern constitution, even that of a federal State, requires an organic conception of the distribution of powers.

### *The Madisonian Theory*

Madison's views[134] on the Constitution can be summarised in two related propositions:

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[127] (1920) 28 C.L.R. 530.

[128] *Bierton* v. *Higgins* (1961) 106 C.L.R. 127.

[129] *Fergusson* v. *Stevenson* (1951) 84 C.L.R. 421 at 435.

[130] *R.* v. *Connare* (1939) 61 C.L.R. 596 at 631 *per* McTiernan, J.; *Mansell* v. *Beck* (1956) 95 C.L.R. 550 at 566 *per* Dixon, C.J. and Webb, J.; at 570 *per* McTiernan, J.; at 592 *per* Taylor, J.; at 573 *per* Williams, J. *dubitante*.

[131] *Home Benefits* v. *Crafter* (1939) 61 C.L.R. 701 at 722 *per* Dixon, J.; at 733 *per* McTiernan, J.

[132] *Mansell* v. *Beck supra* n. 130 at 594 *per* Taylor, J.

[133] *Chapman* v. *Suttie* (1963) 110 C.L.R. 321.

[134] Madison was, of course, not the only spokesman for the dual federalist view: see W. H. Mann, "The Marshall Court" (1963) 38 *Ind. L.J.* 117 esp. at 138, 139. But he was the most important.

The first proposition is that the primary sovereignty belongs to the States[135] and that the sovereignty of the Union is a derogation therefrom created by the States themselves. Accordingly the power of Congress cannot reach into the area which the States kept unto themselves. As Madison put it in *The Federalist*:

> The powers delegated by the proposed Constitution to the Federal Government, are few and defined. Those which are to remain in the State Governments are numerous and indefinite. The former will be exercised principally on external objects, as war, peace, negotiation, and foreign commerce; with which last the power of taxation will for the most part, be connected. The powers reserved to the several States will extend to all the objects, which, in the ordinary course of affairs, concern the lives, liberties and properties of the people; and the internal order, improvement and prosperity of the State.[136]

His interpretation of the Constitution is based on a clear dichotomy. The external sovereignty shall belong to the Nation, the internal sovereignty is that of the several States. The latter therefore have, in the words of an earlier essay, ". . . a residuary and inviolable sovereignty . . . ".[137] The duty of the Supreme Court must be to draw a line of division between these two sovereignties in such a manner that they do not overlap.

The second proposition flows naturally from the first. That is the view that the federal power over interstate commerce serves only a limited function and is not as broad as the power over foreign commerce. If the sovereignty of the States extends to the border, the commerce power of the Union can only commence at the border. Hence Madison believed that the commerce power in its domestic aspect was only concerned with the creation and preservation of the free trade area brought about by the Constitution. In the *Federalist*, therefore, he presented the internal commerce power as largely ancillary to the foreign commerce power so as to ensure the free flow of trade from and to foreign countries.[138] Towards the end of his life he was to state more specifically that the federal commerce power in its domestic aspect was no more than "a negative and preventive provision against injustice among the States themselves",[139] the injustice referring to the practice of the importing States before 1787 to tax the non-importing.

Thus Madison attacked federal power on two fronts, firstly by declaring a large area out-of-bounds to Congress and secondly by limiting the purpose which the interstate commerce power could serve. Madison took an extremely narrow view of the commerce power. Later judges successively widened its scope but as long as they maintained that the internal commerce power meant less than what it appeared to say, they were acting in Madison's spirit.

The Madisonian theses found little support with the Marshall Court.

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[135] In many of the cases and articles the word "sovereignty" is used to describe certain attributes of State power. In its most absolute form the term, of course, reflects the argument that the several States were fully sovereign in the international law sense after 1783 and either remained so or had only partially surrendered their sovereignty in 1789. Even at the time of the Convention it was disputed that the States were ever possessed of external sovereignty (G. Hunt, ed., *Writings of James Madison*, 1902, Vol. III, 188, 431-32) and it has been formally repudiated by the Supreme Court. *U.S. v. Curtiss Wright Corpn.* (1936) 299 U.S. 304 at 315-18.

[136] B. F. Wright (ed.), *The Federalist* (1961) No. 45, 328.

[137] *Id.* No. 39, 285.

[138] *The Federalist op. cit. supra* n. 136 No. 42, 305, 306.

[139] Letter to J. C. Cabell, February 13, 1829, 4 *Writings of James Madison*, Congressional edn., (1867) 14 at 15.

That Court, in *McCulloch* v. *Maryland*, rejected any interpretation of the Tenth Amendment which would define the extent of federal power by reference to a doctrine of powers reserved to the States.

His views on the commerce power were clearly repudiated by Marshall, C.J. in *Gibbons* v. *Ogden*, where his Honour held that the commerce power ". . . like all others vested in Congress, is complete in itself, may be exercised to its utmost extent, and acknowledges no limitations other than are prescribed in the Constitution".[140] This statement betrays the underlying conceptualism of the Chief Justice. Once the concept has been defined, it cannot be limited by reference to any constitutional theory.[141]

However, Madison's views on State sovereignty were received more sympathetically by the Supreme Court after Marshall's death. The process began almost immediately, in *City of New York* v. *Miln*.[142] In that case the majority of the Court, speaking through Mr. Justice Barbour, for the first time gave countenance to the dual sovereignty theory by suggesting a division of federal and State powers into mutually exclusive fields according to subject matter and purpose of legislation.[143] The Court held that, in relation to matters of internal policy, "the authority of a state is complete, unqualified and exclusive".[144] Another good example is the concurring opinion of McLean, J. in the *Licence Cases*.[145] According to his conception of the Constitution, both the States and the Union are sovereign within their respective fields. Since one sovereign cannot be subordinate to another, it follows that each must have reserved to it an entirely independent field of action. The picture which the Justice paints is of a vertical division between two co-equal sovereignties, much on the analogy of the border between two sovereign States in the territorial sense.[146] Furthermore McLean, J. and his brethren took the view that the States were possessed of the primary sovereignty and that the Union was a derogation from that sovereignty. Accordingly the federal powers should be strictly interpreted and their effect confined to combating the evils which the founding fathers, on behalf of the creator-States, had sought to prevent.[147]

The culmination came, ironically enough, after the Civil War had removed the political pressures for the States' Rights approach. In *Collector* v. *Day*[148] the Supreme Court used Marshall's dicta in *McCulloch* v. *Maryland* to confer sovereign immunity upon the States. With that decision the Dual Sovereignty concept had reached its apotheosis. The premise that both the Federal and State governments were independent sovereignties, each with its sphere of action immune from interference by the other, had become enshrined in the Constitution.[149]

The Supreme Court, before the Civil War, was mainly concerned with the validity of State legislation in the face of allegedly exclusive federal

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[140] (1824) 9 Wh. 1, 196. See also Johnson, J. in same case at 227-29.
[141] See Corwin, *The Commerce Power Versus State Rights* 11-13.
[142] (1837) 11 Pet. 102.
[143] *Id.* at 139.
[144] *Ibid.*
[145] *Thurlow* v. *Massachusetts* (1847) 5 How. 504.
[146] *Id.* at 588. That the learned Justice expresses not merely his own opinion is shown by a comparison of contemporary opinions: e.g., *Groves* v. *Slaughter* (1841) 15 Pet. 449 at 511 *per* Baldwin, J.; *Passenger Cases* (1849) 7 How. 283 at 399 *per* McLean J.; at 422-29 *per* Wayne, J.; at 472-73 *per* Taney, C.J.
[147] *Groves* v. *Slaughter supra* n. 146 at 506-7 *per* McLean, J.; *Passenger Cases supra* n. 146 at 428 *per* Wayne, J.; at 571 *per* Woodbury, J.
[148] (1871) 11 Wall. 113.
[149] *Id.* at 124.

power over interstate commerce.[150] Hence there is very little direct authority on the scope of federal power.

However, even freedom of trade and movement was denied, as is very well illustrated by the dissenting opinion of Taney, C.J. in the *Passenger Cases*:[151]

> For if the people of the several States of this Union reserved to themselves the power of expelling from their borders any person, or class of persons . . . then any treaty or law of Congress invading this right . . . would be a usurpation of power which this court could neither recognise nor enforce.

Madison's first proposition had been adopted with such alacrity that even his second proposition gave too broad a power to Congress. The federal commerce power was at best seen as a power to assist in the effectuation of the commercial policies of the States. It was for the States alone to determine that policy to the point of exclusion if necessary. So far as the internal commerce of the United States was concerned the supremacy quite clearly belonged to the States. This early phase may well be termed that of dual sovereignty, rather than dual federalism. For it was based on the assumption that the States were sovereign and that their relationship with the Federal Government was akin to that between independent nations. It was a form of dual federalism which even Madison had not envisaged and which was part of the trend ultimately leading to the Civil War.

*Conceptualism in Aid of Dual Federalism*

After the Civil War the Supreme Court put less emphasis on the sovereignty of the States.[152] The reasons for this were twofold. In the first place the supremacy of the Union had been established by force of arms. In the immediate post war period the Court was disinclined to deny that supremacy. Thus in *Veazie Bank* v. *Fenno*[153] it made short work of the old notions of State sovereignty. In the second place increasing acceptance of the *laissez-faire* philosophy led the Court to extend the exclusive aspect of the federal commerce power deeper into the States.[154] At a time when almost all economic regulation was still the province of the States, the judges were only creating a vacuum by pushing back the powers of the States.

For these reasons the Court could hardly deny the supremacy of federal power when Congress started to fill that vacuum in the late 1880's. Thus in *Kidd* v. *Pearson*[155] Lamar, J., in words reminiscent of those of Marshall, denied the existence of an inviolable sovereignty in the States:

Sacred, however, as these reserved powers are regarded, the court is

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[150] Indeed this issue was not settled until *Cooley* v. *Board of Port Wardens* (1851) 12 How. 299. Before that the Court had vacillated between the view that the federal power was completely exclusive, favoured by Marshall, C.J. in *Gibbons* v. *Ogden* (1824) 9 Wheat. 1 at 209, and the view that it was completely concurrent advocated by Taney, C.J. as late as 1849 in the *Passenger Cases supra* n. 146 at 470-71.

[151] (1849) 7 How. 283 at 466. Even if Taney, C.J. spoke these words in a dissenting opinion, it would seem that at least two of the Justices concurring with the majority agreed with him: see at 400, 406 *per* McLean, J.; at 426 *per* Wayne, J.

[152] The decision in *Collector* v. *Day supra* n. 148 is an exception.

[153] (1869) 8 Wall. 533. It is notable that Nelson, J., who delivered the majority opinion in *Collector* v. *Day*, was a dissenter.

[154] It was this trend which led to the reversal of *City of New York* v. *Miln supra* n. 142, in *Henderson* v. *New York* (1875) 92 U.S. 259. See also *Leisy* v. *Hardie* (1890) 135 U.S. 100; *Crutcher* v. *Kentucky* (1890) 141 U.S. 47.

[155] (1888) 128 U.S. 1 at 18.

> particular to declare with emphasis the supreme and paramount authority of the Constitution and laws of the United States, relating to the regulation of commerce with foreign Nations, and among the several States; and that whenever these reserved powers, or any one of them, are so exercised as to come in conflict with the free course of the powers vested in Congress, the law of the State must yield to the supremacy of the federal authority, though such a law may have been enacted in the exercise of a power undelegated and indisputably reserved to the States.

Having thus buried the older concept of dual sovereignty, the Court proceeded to resurrect dual federalism in a new guise. Instead of proceeding from the premise of an inviolable State sovereignty, the Court commenced with a definition of the federal commerce power. In so doing it adopted Madison's second proposition: that the commerce power was intended to serve a limited purpose only.

For Lamar, J. that purpose was clear in *Kidd* v. *Pearson*: to control those activities which involved more than one State in a demonstrably physical sense, namely transportation of goods and persons across a State border.[156]

Once this definition is accepted, there is no need to refer to the reserved powers of the States. The very definition leaves the control over the economy with the States. Thus it was relatively easy for the Supreme Court to hold in *U.S.* v. *E. C. Knight & Co.*[157] that manufacture is not commerce, since it did not directly affect interstate movement. Nevertheless the Court justified this restrictive interpretation in the following words:

> It is vital that the independence of the commercial power and of the police power, and the delimitation between them, however sometimes perplexing, should always be recognised and observed, for while the one furnishes the strongest bond of union, the other is essential to the preservation of the autonomy of the States as required by our dual form of government. . . .[158]

Behind the conceptual definition stands the dual federalist justification. The conceptual definition reads: transportation between the States and matters directly (that is physically) connected therewith. But the framing of this formula had been preceded by a purposive inquiry. The formula must be chosen in such a manner as to preserve the local autonomy of the States. Hence the manufacturing process must be excluded *in toto* from the ambit of the commerce power, for this is essentially a local activity over which the States can best exercise dominion.

The essentially purposive nature of the Court's approach is illustrated by the assumption made in many of the earlier decisions that the federal commerce power is limited to the protection of commerce, that is transportation, from acts of interference by State legislatures.[159] This assumption suited the advocates of *laissez-faire* and had the additional advantage of being directly in the Madisonian tradition.

Until the last year of the nineteenth century the Supreme Court took

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[156] *Id.* at 20-26.

[157] (1894) 156 U.S. 1. But see now *Northern Securities Co.* v. *U.S.* (1904) 193 U.S. 197 and *Wickard* v. *Filburn* (1942) 317 U.S. 111.

[158] *Id.* at 13.

[159] *State Freight Tax Case* (1872) 15 Wall. 232 at 275; *Railroad Co.* v. *Richmond* (1873) 19 Wall. 584 at 589, 590; *Welton* v. *Missouri* (1875) 91 U.S. 275 at 280; *Ex parte Jackson* (1877) 96 U.S. 727 at 735; *Mobile County* v. *Kimball* (1880) 102 U.S. 691 at 697; *Kidd* v. *Pearson supra* n. 155.

the view, though not without dissents,[160] that federal and State power continued to co-exist in watertight compartments and it continued to refrain from drawing the logical consequences from the principle of federal supremacy it formally had proclaimed.[161]

*Dual Federalism in its Last American Phase*

The Supreme Court in *Addyston Pipe and Steel Co.* v. *U.S.*[162] and the *Lottery Case*[163] finally recognised that the federal commerce power had a substantive regulative content. The Court did not formally overrule *U.S.* v. *E. C. Knight.* Ironically it even used the distinction between direct and indirect affects which that decision had adapted to the federal power. But by "effect" the Court, in the later decision, meant effect on business practices in other States and not effect on interstate movement.[164] The way was now clear for a broad federal power and a number of decisions in the early part of the twentieth century encouraged that view.[165]

In the face of these decisions the adherents of the dual federalist view once more had to shift ground. They did so by returning to a modified form of the Madisonian theses. State sovereignty was no longer asserted in such sweeping terms. It is readily admitted that it is not equal to that of the United States.[166] But, it is asserted, that there is reserved to the States under the Tenth Amendment an area of inviolable State power on which the Union may not trespass.[167]

Madison's other proposition reappears in the form that while the Congress may protect interstate commerce from evils other than those flowing from State interference, such as disease or immoral conduct, that power must be exercised for the protection of commerce or rather what the Court considers to be required for the protection of commerce.[168]

This new theory found its application in *Hammer* v. *Dagenhart.*[169] In holding that Congress could not deny to goods manufactured by child labour the freedom to cross State lines, Day, J., speaking for the majority, applied both limbs. For as he said:

> . . . the Act in a twofold sense is repugnant to the Constitution. It not only transcends the authority delegated to Congress over commerce, but also exerts a power as to a purely local matter to which the federal authority does not extend.[170]

In the majority view the statute transcended the power of Congress since that power existed only to regulate "interstate transportation" and its incidents,[171] but not to destroy or prohibit such transportation except in cases where the subject matter to be regulated was harmful in itself (such

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[160] E.g., Harlan, J. in *U.S.* v. *E. C. Knight & Co. supra* n. 157.
[161] See *Hopkins* v. *U.S.* (1898) 171 U.S. 578; *Anderson* v. *U.S.* (1898) 171 U.S. 604.
[162] (1899) 175 U.S. 211 at 227, 228.
[163] *Champion* v. *Ames* (1902) 188 U.S. 321.
[164] R. L. Stern, "That Commerce which Concerns More States Than One" (1934) 47 *Harv. L.R.* 1335 at 1351.
[165] Such as *Northern Securities Co.* v. *U.S.* (1904) 193 U.S. 197; *Hoke* v. *U.S.* (1912) 227 U.S. 308; *The Shreveport Rate Case* (1914) 234 U.S. 342; *Wilson* v. *New* (1917) 243 U.S. 332.
[166] *Carter* v. *Carter Coal Co.* (1935) 298 U.S. 238 at 294.
[167] E.g., the majority opinion in *U.S.* v. *Butler* (1936) 297 U.S. 1 at 68.
[168] See the dissenting opinion of Fuller, C.J. in *Champion* v. *Ames supra* n. 163 at 373-75.
[169] (1917) 247 U.S. 251 overruled in *U.S.* v. *Darby* (1941) 312 U.S. 100.
[170] *Id.* at 276.
[171] *Id.* at 272.

as lotteries, debauchery or liquor) and the use of interstate transportation was necessary to the accomplishment of harmful results.[172] Since the evils of child labour were not spread by the transportation of the goods manufactured by it, the Act exceeded the powers of Congress.

Furthermore the majority placed its opinion on the simple ground that "the production of articles intended for interstate commerce is a matter for local regulation"[173] and that "Police regulations relating to the internal trade and affairs of the States have been uniformly recognised as within such control".[174] The word "sovereignty", though, is no longer mentioned; instead recourse is had to the general conceptions of the Constitution.[175]

The majority in *Hammer* v. *Dagenhart* assumed still that a straight line could be drawn between "interstate transportation and its incidents" on the one hand, and "local activities" on the other. This crude dichotomy was not tenable for long. Decisions rendered both before and after *Hammer* v. *Dagenhart* made its reasoning inconsistent. Cases dealing with anti-trust and similar legislation made it clear that production and other "local activities" were not *per se* out of the ambit of federal power.[176]

Hence a more sophisticated approach was called for. Without changing the basic premises, the Court did tend to concede a wider Congressional power over commerce and matters which, though local, had, in the opinion of the Court, a direct effect upon such commerce. Conversely the constitutional protection of the States was henceforth to extend only to matters which in the view of the Court were local and had only an indirect effect on interstate commerce.[177]

In *Schechter Corporation* v. *U.S.*[178] this approach found its last and most striking application. Hughes, C.J., writing for the majority, was prepared to concede that the Congressional power over interstate commerce extended to cover more than transportation or its incidents. Hence it was not sufficient to hold that the slaughter of live poultry after its importation into New York and with the intention of selling it on the local market only, was no longer within the flow or current of interstate commerce.[179] For the ". . . power of Congress extends not only to the regulation of transactions which are part of interstate commerce, but to the protection of that commerce from injury. It matters not that the injury may be due to the conduct of those engaged in intrastate operations".[180]

To restrain trade, to use defective vehicles, to undercut the rates of interstate trains, to fail to provide for adequate compensation for injuries, all do interstate trade injury and Congress may protect it from these acts and omissions. But the Government argued that differences in wages and working

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[172] *Id.* at 270, 271.
[173] *Id.* at 272.
[174] *Id.* at 274.
[175] *Id.* at 275 the majority opinion states: "The maintenance of the authority of the States over matters purely local is as essential to the preservation of our institutions as is the conservation of the supremacy of the federal power in all matters entrusted to the Nation by the Federal Constitution."
[176] *Stafford* v. *Wallace* (1922) 258 U.S. 495; *Board of Trade* v. *Olsen* (1922) 262 U.S. 1.
[177] This trend became first apparent in decisions under the Sherman Act: *United Mineworkers* v. *Coronado Coal Co.* (1921) 259 U.S. 344 at 411; *Coronado Coal Co.* v. *United Mineworkers* (1924) 268 U.S. 295 at 310; *Industrial Assn.* v. *U.S.* (1924) 268 U.S. 64 at 82.
[178] (1935) 295 U.S. 495.
[179] *Id.* at 543.
[180] *Id.* at 544.

conditions would lead to unfair competition amongst the States. Was this an injury against which Congress could provide?

The Supreme Court did not deny that such conditions had some effect upon interstate commerce and might even cause the conditions alleged by Government counsel.[181] But to admit the validity of this argument would mean that ". . . the federal authority would embrace practically all the activities of the people and the authority of the State over its domestic concerns would exist only by sufferance of the federal government".[182] In order to safeguard an inviolate and reserved field to the States in its domestic concerns it had to draw a line. This line was drawn by distinguishing between local activities which had a direct effect upon interstate commerce and those which affected it only indirectly.[183]

The majority opinion in the *Schechter Case* did not define the difference between "direct" or "indirect" effects. One can only conclude that the Court, faced with the realisation of the unity of the national economy,[184] and yet desirous of preserving some area for State autonomy, instinctively cried "halt and no further" to federal power.[185]

The antithesis between direct and indirect, has properly been described as a mere verbal device.[186] It enabled the judges to explain previous decisions and yet draw the line at measures which offended them. But it did not afford a certain legal criterion. Once the Court realised this it was bound to admit that this issue was best decided by Congress itself.

This is what finally happened. In a process which began with *National Labour Board* v. *Jones & Laughlin*[187] and culminated in *Wickard* v. *Filburn*,[188] the Court came to the conclusion that the federal commerce power can only be limited effectively by "political rather than judicial processes".[189] Hence all the old formulae were swept away. Production, mining, manufacturing, direct and indirect were all summarily dismissed. It was up to Congress rather than the courts to decide what was required to protect interstate commerce.[190]

*Dual Federalism in Australia*

To those steeped in Austinian theory it might have appeared that there was little scope for the application of the Madisonian theses to the Australian constitution. Neither the States nor the Commonwealth were, in 1901, nor ever had been sovereigns in the sense of public international law. Nor could it be argued that the new Federation had been endowed with powers surrendered to it by the States. Far from being a treaty between the States, the Constitution

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[181] *Id.* at 548-550.
[182] *Id.* at 546.
[183] *Id.* at 546.
[184] *Id.* at 554 *per* Cardozo, J.; see also *Appalachian Coals Inc.* v. *U.S.* (1933) 288 U.S. 344 at 372; *Baldwin* v. *Seelig* (1934) 294 U.S. 511.
[185] This was frankly acknowledged by the Justices themselves. See Cardozo, J. *supra* n. 184 and the dissenting opinion of the same Justice in *Carter* v. *Carter Coal Co. supra* n. 166 at 327, 328. As Hughes, C.J. said in *N.L.R.B.* v. *Jones & Laughlin Steel Corpn.* (1937) 301 U.S. 1, 37: "The question is necessarily one of degree". See also Powell, "Commerce, Pensions and Codes" (1935) 49 *Harv. L.R.* 1, 207, 213.
[186] E. S. Corwin, "The Schechter Case — Landmark or What?" (1937) 2 *Law, A Century of Progress* 32, 70.
[187] (1937) 301 U.S. 1.
[188] (1942) 317 U.S. 111.
[189] *Id.* at 120.
[190] *Id.* at 120, 124 *per* Jackson, J. The proposition was not new, it had already been made in *Board of Trade* v. *Olsen* (1923) 262 U.S. 1, 37.

could only be viewed as the creation of the Imperial Parliament at Westminster.[191]

Nevertheless, as a matter of history, it was true that the Bill which that Parliament had enacted, had been largely drawn up in Australia by a Convention of the popularly elected representatives of four of the States and approved at a referendum in all States. It is also reasonably clear that the members of the Convention saw the Constitution they had framed as a hard fought bargain creating a dual sovereign system.[192]

However, the assumptions of the Convention which drafted the Constitution were of little interest to those who took the traditional view of the sovereignty of the Imperial Parliament. If one wished to give effect to the compact which had been implicit in the proceedings of the Convention, it was necessary to ascribe an Australian origin to the Constitution despite what was then universally accepted constitutional theory.[193]

*Dual Sovereignty and the High Court*

The conflict as to the true origins of the Constitution was the first issue which the new High Court had to resolve. The State Supreme Courts[194] and the Privy Council[195] had taken the traditional view that the hopes and assumptions of the members of the Convention were irrelevant since they had not enacted the Constitution.

The High Court, composed of leading members of the constitutional conventions, resolved the issue to the contrary in *Baxter* v. *Commissioner of Taxation*.[196] Objecting to what it termed the "dictionary" approach taken by the State Courts and the Privy Council, the High Court took the view that it could consider historical reality. Accordingly they were entitled to act on the theory that the Constitution emanated from the people of the several States who had elected the delegates to the second Convention and had approved the final draft at the referendum. In that view the role of the Imperial Parliament was essentially formal, "since it was probably the only authority formally competent to establish such a law".[197] Thus the way was cleared for a compactual interpretation of the Constitution.

This interpretation ultimately won even the *imprimatur* of the Privy Council when their Lordships declared through Lord Haldane, L.C.:

> Their Lordships are called on to interpret the legislative compact made between the Commonwealth and the States, and they have to determine on the language of the statute what rights of legislation the federating Colonies declared to be reserved to themselves.[198]

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[191] Sir Owen Dixon, "Law and the Constitution" (1935) 51 *L.Q.R.* 590, 597; Sir J. Latham, "Interpretation of the Constitution" in R. Else-Mitchell (ed.), *Essays on the Australian Constitution* (2 ed.) 5.

[192] E. Barton, *Debates of the Second Federal Convention*, 3rd Sess., 1016, foreshadowed the reservation of "internal trade" from federal power. See also at 2369-371. As leader of the Convention his words carry special weight. G. Sawer in *Federalism — A Jubilee Study* (1952) 219 retails the contemporary impression of Sir Robert Garran that the draftsmen of the Constitution expected the dual sovereignty theory to apply. See also G. Greenwood, *The Future of Australian Federalism* (1946) 33-50.

[193] *Supra* n. 191.

[194] *Woolaston's Case* (1902) 28 V.L.R. 357; *Pedder* v. *D'Emden* (1903) 2 *Tas. L.R.* 146; *Webb* v. *Deakin* (1903) 29 V.L.R. 748.

[195] *Webb* v. *Outtrim* (1907) A.C. 81.

[196] (1907) 4 C.L.R. 1087.

[197] *Id.* at 1115.

[198] *A.-G.* v. *Colonial Sugar Refining Co.* (1913) 17 C.L.R. 644 at 655.

There were two methods by which the High Court could justify the application of the theory of Dual Sovereignty in Australia. While the Justices could not proceed from notions of political State sovereignty, they did proceed from a similar notion which was familiar to them: the full autonomy of the self-governing colonies within the Empire. As the Privy Council had declared, colonial legislatures possessed within the limits circumscribed by the Imperial Parliament "plenary powers of legislation as large, and of the same nature, as those of Parliament itself".[199]

To this internal autonomy the Justices applied the term "sovereignty" and equated it to the State sovereignty of Madisonian theory.[200] But the concept of sovereignty requires that each side have reserved to it a field of unfettered authority, for as their Honours pointed out: ". . . a right of sovereignty subject to extrinsic control is a contradiction in terms".[201] Hence they accepted the idea of a rigid line between the two sets of powers which neither side can cross, and with only a limited area of overlapping powers in between.

The second method was to pursue the contractual analogy to the extent of implying into the written terms of the constitutional compact the necessary terms left unwritten by the draftsmen.[202] Thus the Court could imply into the document such doctrines as were considered essential to the more efficacious working of the federal Constitution.[203] In both cases the result was the same. It mattered not whether one spoke of the rigid division of powers as the result of dual sovereignty or as a necessary implication from the nature of federal government.

Like the American counterpart, the division of powers was seen almost as if it was a territorial division. Within its assigned sphere each sovereign was supreme but it was powerless beyond it. Thus in the field of customs the Commonwealth could impose a tariff on State imports as if it was a private citizen.[204] On the other hand the taxation power could not be used so as to regulate the internal affairs of the States.[205] Nor can the Commonwealth authorise an inquiry into matters which fall within the exclusive competence of the States.[206] If federal authority is admitted at all such as was the case with federal industrial tribunals, the federal body is subject to the paramount authority of the State.[207]

In between lay the area of concurrent power over which s. 109 secured supremacy to the Commonwealth. However that supremacy was held to be applicable only if the impact of the federal legislation fell within the ambit of the concurrent powers. By definition federal legislation, though enacted under a head of power expressly assigned to the Commonwealth, could have no operation within the field exclusively reserved to the States.

As in the United States the division of powers seems to have been

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[199] *Reg.* v. *Burah* (1878) 3 A.C. 889; *Hodge* v. *Reg.* (1884) 9 A.C. 117; *Powell* v. *Apollo Candle Co.* (1885) 10 A.C. 282.

[200] *D'Emden* v. *Pedder* (1904) 1 C.L.R. 91, 110.

[201] *Id.* See also *Municipality of Sydney* v. *Commonwealth* (1904) 1 C.L.R. 208 at 239 *per* O'Connor, J.; *Baxter* v. *Commissioner of Tax. supra* n. 196 at 1121-22.

[202] *Deakin* v. *Webb* (1904) 1 C.L.R. 585 at 605. This method probably represents an attempt to persuade reluctant State judges that the doctrine of "constitutional implications" was not as alien to their traditional conceptions as they might have thought.

[203] *A.-G. for Queensland* v. *A.-G. for the Commonwealth* (1915) 20 C.L.R. 148 at 163.

[204] *R.* v. *Sutton* (1908) 5 C.L.R. 789 esp. at 802-3 *per* Barton, J.; *A.-G. for New South Wales* v. *Collector of Customs* (1908) 5 C.L.R. 818 at 834 *per* Barton, J.

[205] *R.* v. *Barger* (1908) 6 C.L.R. 41.

[206] *Colonial Sugar Refining Co.* v. *A.-G.* (1912) 15 C.L.R. 183.

[207] *R.* v. *Commonwealth Court, ex parte Whybrow* (1910) 11 C.L.R. 1.

conceived as one according to which all internal matters were reserved to the States and matters external were the prerogative of the Commonwealth. In the face of express provisions it had to be admitted, however, that the Constitution had in some instances conferred power on the Commonwealth to regulate the internal affairs of the States.[208] However the presumption was to the contrary unless rebutted by express words.[209]

This reluctance appears clearly in the *Union Label Case*[210] where the trade mark power of the Commonwealth was explained as relating largely to the implementation of international conventions. It is also apparent in *Huddart Parker* v. *Moorehead*[211] where the corporation power of the Commonwealth was effectively emasculated for fear that a literal interpretation would lead to a trespass on the domestic field of the State. These cases show that where external matters were concerned, such as exports or customs, the federal powers were given a liberal interpretation, but where these powers were sought to be exercised internally, they were bent by the High Court to suit the internal autonomy of the States.

The federal power over interstate commerce received an equally restrictive interpretation. In *Federated Amalgamated Government Railway and Tramway Service Assn.* v. *New South Wales Railway Traffic Employees Assn.*[212] the High Court, applying the distinction then current in the United States, held that the commerce power could only embrace matters the effect of which upon that commerce is "direct, substantial and proximate".[213] Though both the *Hopkins*[214] and *Addyston*[215] opinions were cited in support, it is clear that the word "direct" was used in the connotation it bore in the *Sugar Trust*[216] and *Hopkins Cases*, rather than the later *Addyston Case*. In other words the Court insisted upon an immediate connection with the physical process of transportation, rather than on economic effect.

The most the High Court was prepared to concede to the Commonwealth, and even this with some reluctance, was the power "to prohibit for causes affecting interstate traffic specific persons from being employed in such traffic".[217] The reason given was, of course, the need to preserve the plenary powers of the State over everything done within the State.

In the result the Commonwealth was virtually limited to the control of the physical process of interstate transportation. All matters internal to the States, such as conditions of production and employment,[218] the licensing of businesses within the State,[219] contracts and combinations relating to domestic trade and the internal management of corporations[220] and questions affecting the right to own, trade in and dispose of property,[221] were all exclusively

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[208] *A.-G. for New South Wales* v. *Collector of Customs supra* n. 204 at 833, 842-43.

[209] *R.* v. *Barger* (1908) 6 C.L.R. 41 at 69; *A.-G. for New South Wales* v. *Brewery Employees Union of N.S.W.* (1908) 6 C.L.R. 469 at 503.

[210] *A.-G. for N.S.W.* v. *Brewery Employees Union of N.S.W. supra* n. 209.

[211] (1909) 8 C.L.R. 330.

[212] (1906) 4 C.L.R. 488.

[213] *Id.* at 545.

[214] (1898) 171 U.S. 578.

[215] (1899) 175 U.S. 211.

[216] *U.S.* v. *E. C. Knight & Co.* (1894) 1956 U.S. 1. This is admitted by Barton, J. in *Australian Steamships* v. *Malcolm* (1914) 19 C.L.R. 298 at 320 and see his application of the test at 322-23.

[217] *Supra* n. 212 at 545.

[218] *R. v. Barger supra* n. 209.

[219] *Peterswald* v. *Bartley* (1904) 1 C.L.R. 497 at 507 *per* Griffith, C.J.

[220] *Huddart Parker* v. *Moorehead* (1909) 8 C.L.R. 330 at 352.

[221] *Duncan* v. *State of Queensland* (1916) 22 C.L.R. 556. More fully this includes the acquisition of property situated within the State, the condition of the use and

reserved to the States whatever their effect on commerce without the State. It was admitted that the sovereignties could clash and that State law operating within its sphere could render federal law inoperative.[222]

*Dual Federalism after the Engineer's Case*

The definitive rejection of the compactual view of the Constitution came in *Amalgamated Society of Engineers* v. *Adelaide Steamship Co.*[223] In that case the whole framework of dual sovereignty was shortly and sharply brought to the ground.

Speaking for the majority, Isaacs, J. commenced by pointing out that the Constitution, while in a political sense a compact between the States, was in a legal sense an Act of Parliament.[224] Hence the Constitution must be interpreted as an ordinary British statute, that is, by determining the nature of a grant of power or a restriction upon power by looking at the terms of the instrument which granted it or sought to restrict it.[225] Since there was no definition in the Constitution of the reserved powers of the States, these could only be determined after defining the express grant of federal powers.[226]

For the concept of dual sovereignty the learned judge substituted that of the indivisible sovereignty of the Crown. That sovereignty in Australia must be seen as an organic whole and not as being divided into two watertight compartments. Thus the Constitution reflects a sovereign power, exercising its powers in a hierarchical manner, for some defined purposes operating through the Commonwealth and for all others operating through the States. Since the Commonwealth occupies the upper part of the pyramid, its laws prevail throughout the territories of the States. A valid federal statute must therefore prevail over one passed by a State whether it relates to an area hitherto exclusively occupied by the State or not.[227]

The decision in the *Engineer's Case* is comparable with the decisions in the United States following the Civil War which stressed the supremacy of the Union. Like those decisions it did not lead to a greatly expanded interpretation of the commerce power. The reason was the same: the end of dual sovereignty did not spell the end of dual federalism. Whilst the High Court henceforth was to spell out federal powers without first deducting therefrom reserved State powers, the Court still continued to define the scope of federal power in such a way as to preserve an area of operation to the States.

It is true that in the same year in *W. & A. McArthur Ltd.* v. *State of Queensland*[228] the High Court rejected the argument which had found favour with the old Court, that the interstate commerce power was confined to the act of transportation across the border. But the High Court did not abandon the notion of transportation as the crucial concept underlying the power. It spoke of "all the commercial arrangements of which transportation is the direct and necessary result".[229] Hence it held fast to the basic principle laid down by

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enjoyment of such property, the capacity of the possessor or any other person to dispose of it, and the right of succession to it. *Id.* at 578, 579 *per* Griffith, C.J.

[222] *Id.* 653 *per* Power, J.

[223] (1920) 28 C.L.R. 129.

[224] *Id.* at 142.

[225] *Id.* at 149.

[226] *Id.* at 154.

[227] *Id.* at 155.

[228] (1920) 28 C.L.R. 530.

[229] *Id.* at 547. As to the meaning of "direct" see *id.* at 559.

the High Court in the *Tramways Case*[230] that the interstate commerce power centres around transportation and that there must be a direct relationship between the act alleged to be within the concept and the act of transportation.

The High Court has so far maintained both its insistence on commerce as interstate movement and its test of causality on the ground that otherwise the division between State and federal power would become blurred.[231] Thus economic interdependence or the need for unified control have failed to influence the Court.[232] Despite its acknowledgment of federal supremacy it still tends to see a straight quasi-territorial line between State and federal powers. Even Isaacs, J. described that division as "a straight, undeviating, Euclidian line".[233]

For the same reason the High Court has so far maintained its conceptualist insistence that the ancillary power remain within the boundaries set by the definition of the subject of the main power. It is true, as Evatt, J. pointed out in *Huddart Parker Ltd.* v. *Commonwealth*,[234] that "Once the field is ascertained, the power of the Commonwealth Parliament to make laws within the field is plenary". This, of course, is the logical consequence of the abolition of the reserved powers doctrine. As a consequence it is now possible for the Commonwealth to control the working conditions of those who are engaged in interstate transportation whether or not those regulations are directed towards the advancement of such transportation or not.[235]

But it has been held that the Commonwealth cannot control the operations of persons who are not involved in interstate commerce themselves, however closely such commerce may be affected by their operations.[236]

Thus by a process of rigid definition of the ambit of federal power and an equally rigid insistence that the power remain within that ambit, the High Court still in effect reserves to the States, so far as the commerce power is concerned, a broad field of autonomy in economic matters. One might say that the line of division is still there, though today it is horizontal as between a superior and inferior authority, whereas in the past it seemed often to be a vertical line between co-equal sovereignties. To this extent Kitto, J. was justified in saying as recently as 1965: "The Australian Union is one of dual federalism".[237]

## IV THE INTERPRETATION OF THE COMMERCE CLAUSE ACCORDING TO THE ORGANIC VIEW OF THE CONSTITUTION

The organic interpretation of the United States Constitution did not, like Minerva, spring forth fully armed out of the collective mind of the Supreme Court in 1937. It is, in essence, as old as the opinion of Marshall, C.J. in *McCulloch* v. *Maryland*[238] where he said:

. . . the government of the Union, though limited in its powers, is supreme

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[230] *Supra* n. 212.

[231] E.g., in *Australian National Airlines* v. *Commonwealth* (1946) 71 C.L.R. 29 at 81-83 *per* Dixon, J.; *Wagner* v. *Gall* (1949) 79 C.L.R. 43 at 91; *Wragg* v. *State of New South Wales* (1953) 88 C.L.R. 353 at 385, 386 *per* Dixon, C.J.; *Grannall* v. *Marrickville Margarine* (1955) 93 C.L.R. 55 at 71-72.

[232] See *R.* v. *Turner* (1927) 39 C.L.R. 411; *R.* v. *Burgess* (1936) 55 C.L.R. 608; *Swift (Australia)* v. *Parkinson* (1962) 108 C.L.R. 529.

[233] *Ex parte Nelson (No. 1)* (1928) 42 C.L.R. 209 at 234.

[234] (1931) 44 C.L.R. 492 at 523.

[235] *Ibid.*

[236] *Supra* n. 232.

[237] *Airlines of N.S.W.* v. *N.S.W. (No. 2)* (1965) 113 C.L.R. 54 at 115.

[238] (1819) 4 Wh. 316.

> within its sphere of action. This would seem to result necessarily from its nature. It is the government of all; its powers are delegated by all; it represents all, and acts for all. Though any one State may be willing to control its operations, no State is willing to allow others to control them. The Nation, on those subjects on which it can act, must necessarily bind its component parts.[239]

On the other hand, the national government having been created by the people and not the States, the authority of the States does not extend over it. This lack of reciprocity is explained in the following words: "The difference is that which always exists, and always must exist, between the action of the whole on a part, and the action of a part on the whole."[240]

This does not mean a denial of the autonomy of the States or of the limitations on Congressional authority. It means that the distribution of powers must be interpreted in such a manner that the people of the United States ". . . are relieved . . . from clashing sovereignty; from interfering powers; from a repugnancy between a right in one government to pull down what there is an acknowledged right in another to build up; from the incompatibility of a right in one government to destroy what there is a right in another to preserve".[241]

Federal powers must therefore be defined in such a manner that they are supreme and complete to the needs of the Nation as a whole.[242] They must also be self-contained enabling the national legislature to deal with national problems without having to rely on State power. This was well appreciated by Marshall when he sought to define the federal commerce power in *Gibbons* v. *Ogden*:[243]

> The genius and character of the whole government seems to be, that its action is to be applied to all the external concerns of the nation, and to those internal concerns which affect the States generally; but not to those which are completely within a particular State, which do not affect other States, and with which it is not necessary to interfere, for the purpose of executing some of the general powers of the government.

On this basis he came to the conclusion that "commerce among the several States" meant "that commerce which concerns more States than one".[244] By this Marshall meant a broad conceptual definition, not in any sense limited to transportation between the States but extending to all commercial activities which affected more than one State. In his definition the power, therefore, would have been an extremely wide one.

The supremacy of the Nation is a supremacy of powers. It means that, whilst the sphere of some national powers may be out of the reach of the States, no subject matter is so exclusively vested in the States that it can under no circumstances be reached by the nation. However, the State as a political entity must be immune from undue federal interference, for the Constitution itself set up these entities and did not mean them to be destroyed.[245]

The judges who followed Marshall on the Supreme Court Bench did

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[239] *Id.* at 405. See also *Cohens* v. *Virginia* (1821) 6 Wh. 264 at 413-14; *Brown* v. *State of Maryland* (1827) 12 Wh. 419 at 448-49.

[240] *Id.* at 435-36.

[241] *Id.* at 430.

[242] In other words that the grant should be as extensive as the mischief. *Brown* v. *Maryland supra* n. 239 at 446 *per* Marshall, C.J.

[243] (1824) 9 Wh. 1, 195.

[244] *Id.* at 194.

[245] *Melbourne* v. *Commonwealth* (1947) 74 C.L.R. 31 at 82 *per* Dixon, J.

not share his views. They managed, as has been shown, to impose a far more restricted view of the working of the Constitution.

Yet at the very time when the approach of the Supreme Court was at its most restrictive the basis was laid by that same Court for the future expansion of federal power. The opinion of Curtis, J. in *Cooley* v. *Board of Port Wardens*[246] marked the beginning of the end of dual federalism.

In the first place the opinion stated that subjects which "are in their nature national, or admit only of one uniform system, or plan of regulation, may justly be said to be of such a nature as to require exclusive legislation by Congress".[247] Thus it formulated a test of exclusive power which was flexible and could be adapted to changing circumstances.

In the second place the opinion by necessary implication acknowledged that there was an area of concurrent commerce power which extended into the domestic affairs of the States.[248] It is this second aspect of the opinion which for many years was overlooked.

Purposive inquiry, like conceptualist definition, can work both ways. Instead of asking how it can best reconcile federal power with as broad a State autonomy as is possible, the Court can approach the question on another basis and inquire what subjects require a unified national system of regulation. The Curtis opinion pointed in the latter direction.

This purposive approach remained dormant, however, until the turn of the century when in *Addyston Pipe and Steel Co.* v. *U.S.*[249] the Sherman Anti-Trust Act was held to apply to agreements which "affected" interstate trade, though the transaction itself might be domestic. The Court accepted the principle that the relationship between federal and State powers formed one organic whole. Thus the power to deal with these conspiracies must reside in one or the other.[250] Furthermore it must reside in that organ which is best suited to deal with the problem. Since State power would lead to conflict and confusion, it must reside in the Nation.[251]

It was not the intention of the majority in *Addyston* to upset the existing definition of interstate commerce. To the contrary they reaffirmed that definition.[252] Hence the only escape from the bonds of this restrictive formula lay in the purposive approach. The instrument of liberation was the ancillary power. Once it is admitted, as it was in the *Addyston Case*, that a certain restrictive agreement made an impact on national commerce, the ancillary power was available to widen the scope of interstate commerce so as to enable Congress to deal with this agreement. Through the medium of the ancillary power the restrictions of the definition of interstate transportation were transcended.

By 1913 the organic interpretation of the commerce power had been fully established. It had become clear that the commerce power extended not only over all commercial matters of national importance, but included also, as a result of the stress on interstate movement in the definition, a power to be used for the general welfare, commercial or otherwise.[253] Though the formal test was still whether the subject matter of the legislation "affected interstate

[246] (1851) 12 How. 299.
[247] *Ibid.* 319.
[248] *Id.* at 318-19.
[249] (1899) 175 U.S. 211.
[250] *Id.* at 231-32.
[251] *Id.* at 231.
[252] *Id.* at 238-243.
[253] *U.S.* v. *Hill* (1918) 248 U.S. 420; *Brooks* v. *U.S.* (1925) 267 U.S. 432.

movement", this phrase became virtually synonymous with "concerning more States than one". Thus with the greater integration of the national economy, the scope of the federal commerce power was bound to increase.

*Supreme Court Versus Congress*

The question remained, however, who was to be the ultimate judge of what the public welfare required, Congress or the Supreme Court. The early cases such as the *Lottery Case*,[254] had given the impression by judicial caution and stress on the evils of lotteries, that it was for the Court to determine this question. Hence succeeding Justices at times held Congressional legislation invalid on the ground that the alleged danger to interstate commerce was not substantial enough, or in the formula of the day that it "had only an indirect effect on interstate commerce".[255] It was this trend which finally culminated in *Hammer* v. *Dagenhart*[256] and a return to the concept of dual federalism, however modified.

The decision of the Supreme Court in *Hammer* v. *Dagenhart* was not the last word on the subject. Only three years later Taft, C.J. took a directly opposite stand in *Stafford* v. *Wallace*:[257]

> Whatever amounts to more or less constant practice, and threatens to obstruct or unduly to burden the freedom of interstate commerce, is within the regulatory power of Congress under the commerce clause, and it is primarily for Congress to consider and decide the fact of the danger and meet it. This court will certainly not substitute its judgment for that of Congress in such a matter unless the relation of the subject to interstate commerce and its effect upon it are clearly non existent.[258]

After 1937 the conflict was resolved in favour of the latter approach. The decisive case in this regard is *National Labour Relations Board* v. *Jones & Laughlin Steel Corpn.*[259] Although the majority opinion in this case still spoke in the old language of "effects", this is not as important as it may seem since the standards applied by the Court had always been very flexible.[260] Hence it was possible for the majority to make a policy switch but disguise it in traditional terms.

Though the old dichotomy between "direct" and "indirect" effects was maintained for a while,[261] it was finally repudiated by the Supreme Court in *U.S.* v. *Darby*,[262] a decision which marks the formal burial of dual federalism.

Thus the Supreme Court, in abandoning its own measuring rods, left it to Congress to judge. This assumption became explicit in the opinion of Frankfurter, J. in *Kirschbaum* v. *Walling*.[263] In his opinion the learned judge re-emphasises the "implications of our dual system of government".[264] But for him these implications do not require a search for constitutional limitations, but offer a clue to the discovery of Congressional intent. It is Congress and not the Court which draws the line between National and State interests.

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[254] *Champion* v. *Ames* (1902) 188 U.S. 321.
[255] E.g., in *Adair* v. *U.S.* (1908) 208 U.S. 161 at 178-79.
[256] (1918) 247 U.S. 251.
[257] (1922) 258 U.S. 495 at 521.
[258] See also *Chicago Board of Trade* v. *Olsen* (1922) 262 U.S. 1.
[259] (1937) 301 U.S. 1.
[260] *Id.* at 29-30.
[261] E.g., in *Santa Cruz Co.* v. *Labor Board* (1938) 303 U.S. 453, 466.
[262] (1940) 312 U.S. 100 at 116-17.
[263] (1941) 316 U.S. 517.
[264] *Id.* at 520.

It is for Congress to readjust "the balance of State and National authority" and to set "the degree of accommodation . . . from time to time in the relations between federal and State governments".[265] The function of the Court essentially is to construe the legislative declaration of Congress keeping in mind ". . . the underlying assumptions of our dual form of government and the consequent presuppositions of legislative draftsmanship which are expressive of our history and habits".[266] In other words what was once constitutional doctrine has now become a mere rule of statutory construction.[267]

Judicial opinion seems agreed that Congress primarily determines what the national interest requires and that the Supreme Court will usually accept that determination.[268] Nothing is more illustrative of this than the fact that in cases after *Kirschbaum* v. *Walling* the most common argument in attacking federal statutes has not been that Congress did not have the power to pass the statute in question, but that it did not intend to exercise the full scope of its power over commerce.

The only question is whether there are circumstances in which the Court would refuse to accept the primary determination by Congress that it has power. The point that the powers of Congress over commerce are limited can be readily admitted. The question is rather whether those limits can be set by the Supreme Court or must be left to the political process. Some writers have indeed taken the position that there is no judicially enforceable limit[269] and they gain support from the fact that since 1937 the Supreme Court has not refused to uphold legislation on the ground that the commerce power had been exceeded.[270]

On the other hand, the better view appears to be that there is a judicially enforceable limit, however ill defined.[271] Certainly no Justice has ever implied that the Court had completely abdicated its functions. Thus, Jackson, J. in *Wickard* v. *Filburn*[272] seems to have asked himself the question whether Congress could properly conclude that the subject matter to be regulated exerted a substantial economic effect on interstate commerce.[273] By "substantial", however, the learned Justice did not mean to revive the old dichotomy between "direct" and "indirect" effects.[274] Hence, as his discussion of the facts shows, the function of the Court, as he saw it, was one of checking the validity of the Congressional opinion. Or, as Frankfurter, J. expresses it in *Polish Alliance* v. *Labour Board*,[275] the function of the Court is "that of determining whether

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[265] *Id.* at 522.

[266] *Id.* at 521.

[267] It can be just as effective a barrier to federal power; see *U.S.* v. *Five Gambling Devices* (1953) 346 U.S. 441.

[268] See *U.S.* v. *South Eastern Underwriters Assn.* (1944) 322 U.S. 533 at 588 *per* Jackson, J.; *Prudential Insurance Co.* v. *Benjamin* (1945) 328 U.S. 408 at 425-26 *per* Rutledge, J.: *North American* v. *S.E.C.* (1946) 327 U.S. 686 at 705 *per* Murphy, J.

[269] N. T. Dowling and R. A. Edwards, *American Constitutional Law* (1954) 156.

[270] It has indeed refrained from applying federal provisions to certain situations on the ground that Congress could not be taken to have reached so far into the States. *U.S.* v. *Five Gambling Devices supra* n. 267. But this was a matter of statutory construction.

[271] Thus, R. L. Stern, "The Scope of the Phrase 'Interstate Commerce'" (1955) 41 *A.B.A.J.* 823 at 873 assumes there is some limit, however ill-defined. The Court must still consider "the substantiality of the relationship to interstate commerce". See also H. C. Pritchett, *The American Constitution* (1959) 258. *Contra* B. Schwarts, *Commentary. on the Constitution* (1963) 1, 235-37, who believes that Congress only should set the limits.

[272] (1942) 317 U.S. 111.

[273] *Id.* at 128-29.

[274] *Id.* at 125.

[275] (1944) 322 U.S. 643 at 650-51.

the Congress has exceeded limits allowable in reason for the judgment which it has exercised".[276]

The judgment of Congress, therefore, is not conclusively binding upon the Supreme Court.[277] It does give rise to a presumption of constitutionality, provided the judgment has been clearly and unequivocally made. Or in other words, the presumption of the constitutionality of an Act of Congress is at its greatest "when it appears that the precise point in issue here has been considered by Congress and has been explicitly and deliberately resolved".[278] In the absence of such a deliberate Congressional decision the Court will construe the legislation on the assumption that Congress did not intend to reach into areas traditionally the preserve of the States. Though sometimes the word "reserved" is still used in this connection the word describes a factual situation, that is a tradition of lack of federal interference, rather than a reservation of power as a matter of constitutional law.[279] It is by this method that limits have in fact been set to Congressional power over commerce.

However, even if Congress has raised the issue deliberately, the statute may still fail if it goes clearly beyond the needs of the general welfare and the presumption of constitutionality, which might have been the determining factor in a border line case, cannot sustain it any further. Though the exact point was avoided, this was implicit in the opinion of Jackson, J. in *U.S.* v. *Five Gambling Devices*.[280]

Subject to these limitations the commerce power of Congress is very wide indeed. It has been used not only to commercial ends but also for purposes of general welfare. The decision of the Supreme Court in *Cleveland* v. *U.S.*[281] in sustaining the convictions under the Mann Act of fundamentalist Mormons who had transported women across State lines for the purpose of living with them in a polygamous relationship, made it clear that Congress could use its power over transportation to impose its standards of public order and morality in matters not remotely connected with commerce.

However, until recently, Congressional "police" legislation took the border crossing as the discrimen of liability. Thus, it could be argued, that a distinction could be drawn between legislation serving commercial ends, including the preservation of commercial morality, for which "affectation" of interstate commerce was a sufficient nexus and "police" legislation which required actual transportation across a border as its nexus to the commerce power.

However, the Civil Rights Act of 1964 proceeded on quite a different principle. This legislation, as its very title indicates, was not concerned with commercial ends. It was intended to impose standards of public morality.

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[276] Black, Douglas and Murphy, JJ. are more cautious. They seem to reverse the process and to require "clear findings before subjecting local business to paramount federal regulation". *Id.* at 652.

[277] *Prudential Insurance Co.* v. *Benjamin* (1945) 328 U.S. 408 at 425 *per* Rutledge, J.

[278] *U.S.* v. *Five Gambling Devices supra* n. 267 at 449.

[279] References to "domains of action reserved exclusively for the States" in *Prudential Insurance* v. *Benjamin supra* n. 277 at 434, must be read in this light. There is certainly no area, however local, still *per se* reserved to the States. *Reina* v. *U.S.* (1960) 364 U.S. 507.

[280] *Supra* n. 267 at 448-49. It is submitted that the true position is stated by Clark, J. in *Katzenbach* v. *McClung* (1964) 13 L. ed. 2d. 290 at 298: "Here . . . Congress has determined for itself that refusals of service to Negroes have imposed burdens both upon the interstate flow of food and upon the movement of products generally. Of course, the mere fact that Congress has said when particular activity shall be deemed to affect commerce does not preclude further examination by this Court. But where we find that the legislators, in the light of the facts and testimony before them, have a rational basis for finding a chosen regulatory scheme necessary to the protection of commerce, our investigation is at an end."

[281] (1946) 329 U.S. 14.

Title II of the Act outlaws racial discrimination in a place of public accommodation "if its operations affect commerce".[282] A hotel or motel which caters to transient guests is by that very fact deemed to affect commerce.[283] In *Atlanta Motel* v. *U.S.*[284] the motel concerned was found to cater mainly to interstate guests, so that the exact ambit of this definition did not have to be discussed. However, by upholding the application of the Act to this establishment, the Court has made it appear that the police power of Congress is not confined to the crossing of the border, but extends over all matters which "affect" commerce.[285]

More remarkable is the decision in *Katzenbach* v. *McClung*.[286] Here the defendant operated a hamburger stand under the name of "Ollie's Barbecue", whose clientele was overwhelmingly local. However the Act defined as a place of public accommodation affecting commerce a restaurant which served food, a substantial part of which had moved in interstate commerce.[287] This indeed was the case with Ollie's Barbecue. The Court upheld the application of the Civil Rights Act to these premises also.

If the majority of the Court is correct in treating the commerce power as the major source of legislative authority for this enactment, it would mean that Congress has not merely a commerce power but also what amounts to a general welfare power. Taking advantage of the extremely wide definition of "matters affecting commerce" established by the Court in dealing with commercial legislation, Congress could move to ban prostitution or gambling in premises the operation of which "affected interstate trade" in a variety of ways. Only Congressional self-restraint would prevent the complete elimination of State autonomy.

The present position in the United States can be summed up as follows:
(a) The commerce powers of the Union and the States form one whole, covering the entire welfare of the United States both local and national. The division is drawn on a functional basis, the power of Congress being directed towards national ends and that of the States towards local ends. The determination of what is local and what is national is one of policy and therefore primarily a legislative function.
(b) The relationship between the two centres of legislative power is hierarchical. This means that the determination by Congress as to what the national interest requires prevails over that made by the legislatures of the States.
(c) Hence the federal commerce power is a power which Congress may use for the national welfare to such a degree and extent as it sees fit.
(d) Whilst the determination by Congress that it has the power is not conclusively binding on the Supreme Court, that Court will accept the Congressional judgment if, on facts objectively ascertainable, it can see a basis on which Congress could reasonably have come to the conclusion it did in fact come to.
(e) However in construing Congressional legislation, the Supreme Court will, in the absence of a declared Congressional policy to the contrary, keep in

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[282] S. 201 (b).
[283] S. 201 (c).
[284] (1964) 379 U.S. 241.
[285] There is, however, much to be said for the view expressed in the concurring opinions of Douglas, J. (*id.* 279) and Goldberg, J. (*id.* 291-93) that the primary source of the legislation is the Equal Protection Clause of the Fourteenth Amendment.
[286] (1964) 379 U.S. 294.
[287] S. 201 (c).

mind the federal nature of the Constitution and presume that Congress did not wish to interfere unnecessarily with local activities traditionally dealt with by the States.

*An Organic Interpretation of the Australian Constitution*

As has been pointed out earlier, the High Court at first tended to understate the "Imperial" origin of the Constitution and to give first place to the admittedly compactual implications of the local Federal Conventions. In so doing they departed radically from the British tradition, but were probably loyal to the assumptions of most of the delegates to the Conventions.

During Mr. Justice Isaacs' dominance on the High Court Bench there was a considerable change of emphasis. This eminent Justice shared many of the visions of Marshall, C.J. Thus in the *Engineers' Case* he stressed the supremacy of the Commonwealth in words reminiscent of *McCulloch* v. *Maryland*:[288]

> . . . the grant of legislative power to the Commonwealth Parliament as representing the will of the whole of the people of all the States of Australia should . . . bind within the geographical area of the Commonwealth and within the limits of the enumerated powers, ascertained by the ordinary processes of construction, the States and their agencies as representing separate sections of the territory.

Isaacs, J. was also true to the unitary principle in stressing the full plenary power of the Federal Parliament to deal with the subjects entrusted to its care. As early as 1908 he stated in his dissent in *R.* v. *Barger*[289] that if "the power be exercised, it may be exercised at the will of Parliament as fully and effectually as if it were the legislature of a unitary State. For purposes of federal taxation, whether customs or other taxation, Australia is one indivisible country".

Hence, in his view, it was open to the Commonwealth to legislate with effect upon a field which had not been expressly assigned to it and in that case to displace State law on that topic.[290] But contrariwise the paramountcy of the Commonwealth left it immune, in the areas exclusively assigned to it and in those assumed by it under its concurrent powers, from indirect interference by the States.[291] This was subsequently reflected in his views as to what constituted a conflict between federal and State legislation. Since the Commonwealth is entitled to undisturbed possession of the field it has assumed to itself, it can exclude any State law, from whatever source emanating, which is inconsistent with its design. The touchstone is the intent of Parliament itself, expressed or implied, to "cover the field".[292] The broad nationalism of this view is well illustrated in the well-known paraphrase by Dixon, J. in *Ex parte McLean*:[293]

> The inconsistency does not lie in the mere co-existence of two laws which are susceptible of simultaneous obedience. It depends upon the intention of the paramount legislature to express by its enactment, completely,

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[288] (1920) 28 C.L.R. 129 at 153.
[289] (1908) 6 C.L.R. 41 at 85.
[290] *Id.* at 96. See also *A.-G. for New South Wales* v. *Brewery Employees Union of New South Wales* (1908) 6 C.L.R. 469 at 584-86.
[291] *Id.* at 102.
[292] *Clyde Engineering Co. Ltd.* v. *Cowburn* (1926) 37 C.L.R. 466 at 489.
[293] (1930) 43 C.L.R. 472 at 483.

exhaustively, or exclusively, what shall be the law governing the particular conduct or matter to which its attention is directed.

In the interpretation of the individual powers given to the Commonwealth, Isaacs, J. tended to take an organic view. This is apparent in his treatment of the federal power to provide for a system of conciliation and arbitration of disputes extending beyond the limits of any one State.[294] As had Marshall in his definition of the commerce power, Isaacs, J. interpreted it as a national power extending to "such disputes as no one State could singly deal with as a whole".[295]

In *Clyde Engineering Co. Ltd.* v. *Cowburn*[296] Isaacs, J. made it clear that he believed in "the power of the Australian nation as one component organism to regulate or define, by means of conciliation and arbitration, where interstate disputes occur, the working conditions of its industries on a broad national basis, and therefore with a due regard to the general welfare of its people as a whole, free from disturbing and, in all probability, mutually opposing elements which particular States may for their own separate objects introduce into the practical working of the national scheme".

Isaacs, J. also took the view that there could be no hiatus in power. If a national problem arose there must be found a national power to deal with it. Advancing the proposition in *Farey* v. *Burvett*[297] that the war-time defence power of the Commonwealth embraced the entire economy of the nation, the learned justice said:

> The remedy suggested for such an evil is in the State powers. But though the States may, in directions not contravening express prohibitions, most advantageously act by means of their own constitutional powers in aid of the common object, yet this possibility does not ensure a remedy at all, and certainly does not ensure a remedy on broad national lines, with unity of purpose and action, even if the requisite knowledge were always possessed by the State authorities to enable them to appreciate the necessities of the entire situation.

In all these cases Isaacs, J. took an organic view of the Constitution. He did not see the division of powers as a compromise between jealous colonies, but as a grand design for effective government. However with respect to the federal commerce power he took a more ambiguous approach. True in his dissent in *R.* v. *Turner, ex parte Marine Board of Hobart*,[298] he protested the narrow interpretation adhered to by the majority as a return to the discarded doctrine of "implied prohibitions", (that is, dual federalism). But he himself relied on the express provisions of s. 98 of the Constitution which includes "navigation and shipping" in the federal commerce power, for his wider interpretation and distinguished "the more restricted direct regulation and protection of the trade and commerce power as in section 51(i)".[299]

In *McArthur* v. *Queensland*[300] he was not strictly speaking dealing with the commerce power, but with the ambit of the protection afforded by s. 92.

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[294] S. 51, pl. xxxv.

[295] *Jumbunna Coal Mine No Liability* v. *Victorian Coal Miners Assn.* (1908) 6 C.L.R. 309 at 371. Or as he said in the *Builders' Labourers Case, R.* v. *Commonwealth Court of Arbitration, ex parte Jones* (1914) 18 C.L.R. 224 at 243: ". . . it refers to disputes which are Australian and national in character."

[296] (1926) 37 C.L.R. 466 at 478-79.

[297] (1916) 21 C.L.R. 433 at 451.

[298] (1927) 39 C.L.R. 411 at 426.

[299] *Id.* at 436.

[300] (1920) 28 C.L.R. 530 at 549.

Nevertheless his words were expressed to be applicable to defining the ambit of the power as well as that of the restriction and for both purposes he maintained the narrow definition centring around transportation.

It was his brother Higgins, J. who took the organic view of the commerce power as well as of other powers. To him, as to Isaacs, J., the powers of the Commonwealth Parliament were not to be interpreted in niggardly fashion. Nor was the Court justified in restricting the legitimate scope of federal power.

Hence when power over a certain subject matter was committed to Federal Parliament, the named subject indicated only the core and not the circumference of the power. It was open to Parliament to extend, within reason, its own powers by defining for itself what was relevant to that subject matter.[301] Furthermore, as he pointed out, the express words of the Australian Constitution encouraged this interpretation far more than did the United States Constitution:

> It will also be found, I believe, ultimately, that the phrase under which powers are granted to the Federal Parliament gives to that Parliament even wider scope for its action than is given to the United States Congress by the corresponding grants of power in the United States Constitution. "Power to lay and collect taxes" is not as sweeping as our "power to make laws with respect to taxation". Power "to regulate commerce" may not be quite so wide as our power "*to make laws with respect to trade and commerce*".[302]

It was for the Court to intervene only when the legislation in question amounted to a clearly colourable attempt to deal with a subject other than one over which the Commonwealth had power.[303] Thus Higgins, J. had much the same vision in the early part of the twentieth century as that later evolved by Taft, C.J. and Frankfurter, J. in the United States. If these views had prevailed the High Court would have approached the legislation of Federal Parliament with the same deference for the judgment of the legislative branch.

It is not surprising that in his dissent in *R.* v. *Turner*[304] Higgins, J. cited with approval the dictum of Hughes, J. in the *Minnesota Rate Cases*,[305] which had stressed the power of Congress to deal with national problems even if it meant entering into the domestic preserves of the States. The great objection of Higgins, J. to the ruling of the majority in *R.* v. *Turner* which denied the application of federal navigation legislation to ships in intrastate commerce traversing interstate shipping lanes, was that it denied the existence of a unified national power to deal satisfactorily with matters of national concern. The majority view permitted the States to carve out a field in which they could affect to the point of negation federal policy with respect to interstate commerce.

The majority view, however, prevailed and was re-affirmed in *R.* v. *Burgess, ex parte Henry*,[306] where all the Justices joined in rejecting the

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[301] *A.-G. for New South Wales* v. *Brewery Employees Union of New South Wales* (1908) 6 C.L.R. 469 at 610-16.

[302] *Id.* at 614.

[303] Admittedly in *Huddart Parker* v. *Moorehead* (1909) 8 C.L.R. 330 at 409-10 his Honour seems to retreat somewhat from this position by implying the word "substantially" before "with respect to". The reason may have been an attempt to reconcile his views with those of the majority in *R.* v. *Barger supra* n. 289, and the *Union Label Case supra* n. 290.

[304] *Supra* n. 298 at 445-46.

[305] (1913) 230 U.S. 352 at 399.

[306] (1936) 55 C.L.R. 608.

"commingling theory" of the *Southern Railway*[307] and the *Minnesota Rate Cases*.[308] Thus in the interpretation of the commerce power the quasi-geographical line has been maintained virtually by universal consent. The reason lies in the fact that there survives, despite lipservice to the notion of federal supremacy, a distinct judicial belief in an inviolate, or at least preferred, area of State power. This idea can be perceived even in the judgments of Isaacs and Higgins, JJ. in *Huddard Parker* v. *Moorehead*,[309] where each reinforces the argument for a restrictive interpretation of the federal corporation power by examples *ad terrorem* of the powers the Commonwealth would otherwise possess.

Recently in *A.-G. (Victoria)* v. *Commonwealth*[310] Windeyer, J. expressed this view in the following terms:

> . . . we are not to limit the scope of any Commonwealth power by a preconception of the extent of the residual powers of the States. But that does not mean that there are no implications in the Constitution. A law which gave to the fact of marriage consequences in the field of property, contract, tort and succession is a law which would have its effect in fields which Commonwealth law cannot cover, fields which for the most part belong to the States. I do not think that I am reverting to an old heresy in thinking that this, although not decisive, is not irrelevant.

This is most notable in regard to the commerce clause, where the dual federalist approach has confined the ambit of the federal power to interstate movement and its immediate incidents. In *Wragg* v. *State of New South Wales*[311] Dixon, C.J. again stated that the Court must continue to draw a legal distinction between intrastate and interstate trade, however illogical such a distinction might be from an economic point of view. This latest statement only reflects the continued refusal of the High Court from *R.* v. *Turner* onwards to take a unitary view of the distribution of powers.

*Hopes for the Future?*

In recent years there have been hints of a reconsideration of the extent of the commerce power as opposed to the narrow definition of "commerce among the States". It is true that the High Court has from an early beginning recognised that the power was broader than the concept underlying it, by saying that the Commonwealth Parliament could control what was ancillary to the power.

The ancillary power as embodied in the "necessary and proper" clause was the instrument which finally liberated the commerce power in the United States from the *incubus* of the "transportation" definition. A similar liberation could be implicit in the words which Fullagar, J. spoke in *O'Sullivan* v. *Noarlunga Meat Ltd.*:[312]

> But it is undeniable that the power with respect to trade and commerce with other countries includes a power to make provision for the condition and quality of meat or of any other commodity to be exported. Nor can

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[307] (1911) 222 U.S. 20.
[308] (1913) 230 U.S. 352.
[309] (1908) 8 C.L.R. 330 at 395-96 *per* Isaacs, J.; at 409-10 *per* Higgins, J.
[310] (1962) 107 C.L.R. 529 at 582. See also *Wagner* v. *Gall* (1949) 79 C.L.R. 43 at 91 and *R.* v. *Sharkey* (1949) 79 C.L.R. 121, 151.
[311] (1953) 88 C.L.R. 353 at 385-86.
[312] (1954) 92 C.L.R. 565 at 598.

> the power, in my opinion, be held to stop there. By virtue of that power all matters which may affect beneficially or adversely the export trade of Australia in any commodity produced or manufactured in Australia must be the legitimate concern of the Commonwealth. Such matters include not only grade and quality of goods but packing, get-up, description, labelling, handling and anything at all that may reasonably be considered likely to affect an export market by developing it or impairing it. It seems clear enough that the objectives for which the power is conferred may be impossible of achievement by means of a mere prescription of standards for export and the institution of a system of inspection at the point of export. It may very reasonably be thought necessary to go further back, and even to enter the factory or the field or the mine. How far back the Commonwealth may constitutionally go is a question which need not now be considered, and which must in any case depend on the particular circumstances attending the production or manufacture of particular commodities. But I would think it safe to say that the power of the Commonwealth extended to the supervision and control of all acts or processes which can be identified as being done or carried out for export.

*Prima facie* this passage would appear to mark a radical change in the attitude of the High Court. It is not surprising that a commentator of the eminence of Dr. Wynes sought to minimise the effect of this statement[313] and admittedly Fullagar, J. himself hedged his remarks in with so many qualifications[314] that it is doubtful whether they have much relevance beyond the immediate situation at which they were directed.

Nevertheless the language was framed in general terms and, one may assume the words were spoken with some deliberation. Professor Sawer, at any rate, has taken them to be the harbinger of a wider approach.[315] However, since then there has been little further development. In *Reg.* v. *Foster*[316] Windeyer, J. expressed a mild disapproval of "later American cases, which seem to see the horizon of the commerce power ever receding". On the other hand the opinion of Dixon, C.J. in *Australian Shipping Commission* v. *O'Reilly*[317] indicates an appreciation of more recent American decisions on the commerce power, notably those to the effect that Congress can protect commerce and the organisations it creates to carry on commerce from undue interference.[318] The agreement of Windeyer, J., though qualified with the words that the federal commerce power in Australia "is somewhat less extensive than the commerce clause in the Constitution of the United States",[319] would seem to indicate that his Honour's disapproval expressed in *Foster's Case* was one of degree rather than of principle.

The latest decision of the High Court has shown a willingness to extend the scope of the federal commerce power without abandoning its basically dual federalist approach. The litigation in *Airlines of New South Wales* v. *New*

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[313] *Legislative, Executive and Judicial Power in Australia* (3 ed. 1962) at 303.
[314] *Supra* n. 312 at 596-97. See also R. Anderson, "Recent Trends in the Federal Commerce Power" (1955) 29 *A.L.J.* 99.
[315] G. Sawer, *Cases on the Constitution* (3 ed. 1964) 354.
[316] (1959) 103 C.L.R. 256 at 310.
[317] (1962) 107 C.L.R. 46 at 55-56.
[318] Citing the opinion of Stone, C.J. in *Pittman* v. *Home Owners' Loan Corporation* (1939) 308 U.S. 21 at 33. Note the protest of Menzies, J. in his dissent at 66-67 against this dangerous American precedent.
[319] *Id.* at 70.

*South Wales* (No. 2)[320] arose out of a power struggle between the State of New South Wales and the Commonwealth over the right to control intrastate air navigation. The High Court did hold that the Commonwealth could licence intrastate aerial operations in the interest of "the safety, regularity and efficiency of air navigation" and consequently could exclude all operations, local, interstate or international, not so licenced. Yet, at the same time their Honours held that the State could exclusively regulate local air navigation in interests other than "safety, regularity and efficiency", for example, for the sake of protecting the State-owned railway system or of protecting a small operator against a larger rival. Since all Justices, with the exception of Sir Garfield Barwick, held that the State licensing system did not for these reasons intrude into the federally preempted field, the result was constitutional deadlock. Each side had its favoured operator for the Sydney-Dubbo service and each side refused to license the other. As the majority had held that both licensing systems were valid and were immune from supersession by the other, each side could and did exercise a right of absolute veto.

This result did not worry the High Court. As Menzies, J. said:

> It was urged that a decision of this Court leaving intrastate air transport services to the veto of both Commonwealth and State would create a situation of stalemate or deadlock. This argument is irrelevant. A constitutional division of legislative power may sometimes mean that those who are subject to both Commonwealth and State control have two sets of restrictions to surmount before they can do that which they want to do. . . . The answer to stalemate or deadlock in such circumstances is cooperation.[321]

It is not surprising that Kitto, J. said that "the Australian Union is one of dual federalism".[322] In this, as in another recent instance,[323] the Court left the two "clashing sovereignties" to their own devices. Yet by curious paradox the conflict was partly caused by the acknowledgement on the part of the Court that the interests of safety in air navigation required a unified control of necessity vested in the Commonwealth.

This acknowledgement was given in rather curious reasoning. For their Honours all agreed with the insistence of Dixon, C.J., that, despite economic interdependence, the legal distinction between interstate and intrastate must be maintained.[324] Furthermore they all agreed in the continued rejection of the "commingling" doctrine and, *a fortiori*, the American developments of the last three decades.[325]

The Chief Justice spoke for all his brethren when he said that:

> No so-called "integration" of interstate and intrastate 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 in the relevant field. It remains

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[320] (1965) 113 C.L.R. 54.
[321] *Id.* at 144.
[322] *Id.* at 115.
[323] *Swift (Australia) Pty. Ltd.* v. *Parkinson* (1962) 108 C.L.R. 189 at 213 *per* Taylor, J.
[324] (1965) 113 C.L.R. 54 at 77 *per* Barwick, C.J.; at 106 *per* McTiernan, J.; at 115 *per* Kitto, J.; at 128 *per* Taylor, J.; at 143 *per* Menzies, J.; at 151 *per* Windeyer, J.; at 166 *per* Owen, J.
[325] Kitto, J. *id.* at 114, seems to imply that the United States Supreme Court is now regretful of its own handiwork citing in support of his contention statements to the effect that the Supreme Court has abandoned conceptual rubrics for pragmatic criteria. Such a statement may have been intended by way of praise rather than criticism!

> a power to make laws with respect to inter-state and foreign trade and commerce. This Court has never favoured, in relation to Commonwealth power, the more extensive view of the commerce power under the Constitution of Congress which has at times found expression in decisions of the Supreme Court of the United States.[326]

Yet, despite this rejection of the commingling theory, the Justices all agreed that the Commonwealth could impose safety controls on intrastate navigation as well as interstate and overseas operations. The reasoning underlying this is once more best explained in the words of the Chief Justice:[327]

> . . . there are occasions — and the safety procedures designed to make inter-state and foreign trade and commerce, as carried on by air transport, secure, are a ready instance — when it can be no objection to the validity of the Commonwealth law that it operates to include in its sweep intra-state activities, occasions when, for example, the particular subject-matter of the law and the circumstances surrounding its operation require that if the Commonwealth law is to be effective as to inter-state or foreign trade and commerce that law must operate indifferently over the whole area of the relevant activity, whether it be intra-state or inter-state. But this involves no change in the subject-matter of Commonwealth power.[328]

How far this type of reasoning differs from that in *Southern Railway Co.* v. *U.S.*[329] may be a matter for theological dispute, but it would seem that the High Court, having forcibly rejected the "commingling" theory through the front door, has quietly admitted something very similar to it at the rear entrance.[330]

What his Honour seems to indicate is that the Commonwealth Parliament may not exercise control over intrastate commerce as such but that it may legislate in order to protect and advance interstate and overseas commerce.[331] In so doing it is no objection that intrastate activities are also being regulated. With this proposition the United States Supreme Court would agree, as the Chief Justice points out.[332] Seen in this light the sweeping statements of the late Fullagar, J. in *O'Sullivan* v. *Noarlunga Meat Ltd.*[333] become clear and obvious. The High Court is obviously still the final arbiter on what is necessary for the protection and advancement of interstate trade, as is shown by its rejection of the Commonwealth regulation purporting to confer upon its licensee a statutory right to be free from State licensing. But it has set its first steps on the slippery slope that ultimately led to virtual abdication of judicial control in the United States.

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[326] *Id.* at 77.

[327] Though the Chief Justice was the only dissenter, his dissent was based solely on his interpretation of the New South Wales statute as infringing the field of safety in air navigation validly preempted by the Commonwealth. His brethren held that the statute was not concerned with safety and hence no conflict arose. On matters of basic principle the Bench was virtually unanimous.

[328] *Id.* at 78.

[329] (1911) 222 U.S. 20.

[330] This is very much apparent in the reasoning of Kitto, J. (1965) 113 C.L.R. 54 at 115 which is strongly reminiscent of the reasoning in the early American cases extending the commerce power over local activities physically impinging on interstate commerce. See for a criticism of this inconsistency in reasoning P. H. Lane, "The Airlines' Case" (1965) 39 *A.L.J.* 17 esp. at 20.

[331] See also *Logan Downs Pty. Ltd.* v. *Commissioner of Taxation* (1965) 112 C.L.R. 177 at 188 *per* Barwick, C.J.

[332] (1965) 113 C.L.R. 54 at 77.

[333] (1954) 92 C.L.R. 565.