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A COMPARISON OF THE CONSTITUTIONS OF AUSTRALIA AND THE UNITED STATES*

ZELMAN COWAN**

The Commonwealth of Australia celebrated its fiftieth birthday only three years ago. It came into existence in January 1901 under the terms of the Commonwealth of Australia Constitution Act, which was a statute of the United Kingdom Parliament. Its origin in a British Act of Parliament did not mean that the driving force for the establishment of the federation came from outside Australia. During the last decade of the nineteenth century, there had been considerable activity in Australia in support of the federal movement. A national convention met at Sydney in 1891 and approved a draft constitution. After a lapse of some years, another convention met in 1897-8, successively in Adelaide, Sydney and Melbourne. At this assembly, the earlier draft constitution was revised. After submission to popular referenda in the various States, and after minor modifications, this draft was submitted to the United Kingdom Parliament and emerged as the Commonwealth of Australia Constitution Act.

There are six States within the Australian Commonwealth: Queensland, New South Wales, Victoria, Tasmania, South Australia and Western Australia. These States had been granted parliamentary and governmental institutions on the British model during the course of the nineteenth century. During the second half of that century there had been some moves towards closer association. These earlier moves were Australasian rather than Australian, as it was contemplated that New Zealand and Fiji might participate. A loose association was established by the Federal Council of Australasia Act, 1885. The organization possessed very limited powers and was much weakened by the abstention of New South Wales, the principal State. It was a weaker counterpart of the organization established by the American Articles of Confederation. It lingered on until its existence was formally terminated on the establishment of the Commonwealth.

The Constitution of the United States was born in the aftermath of revolution and war. No comparable pressures attended

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1. Likewise, the Canadian Constitution has its legal source in a United Kingdom Act, the British North America Act, originally enacted in 1867.
2. Western Australia approved the Constitution at a later date than the other states.
the founding of the Australian Commonwealth. Various factors encouraged the federal movement. It was felt that a unified defence policy was desirable. German moves in New Guinea had caused alarm, and there was some fear of possible hostile action by other foreign powers. A British military expert had reported adversely on the state of colonial defences and had recommended greater inter-colonial cooperation and coordination. Differences between states on trade policy (as between free trade and protectionist economies) made it desirable to seek resolution on the basis of a common and nation-wide policy. The federal movement also reflected the growth of an Australian nationalism.

In devising a federal form of government the Australian founding fathers preferred the American to the Canadian model in the sense that specific powers were vested in the central and national government, while the residue of powers remained with the States. The Tenth Amendment found its counterpart in Sections 106 and 107 of the Commonwealth Constitution which provided that the Constitution of each State should, subject to the federal Constitution, continue to operate, and that every power of a State parliament should continue unless it was exclusively vested by the federal Constitution in the Commonwealth, or was withdrawn from the State parliament. The Australian founding fathers were, apart from a handful of unificationists, anxious to preserve State powers and structures as far as possible. This was reflected in what was perhaps the principal matter for debate in the constitutional conventions, the structure and powers of the Senate which was conceived as a protector of State interests. It was reflected also in other provisions of the Constitution. Section 51 (iii) authorized the Commonwealth parliament to make laws with respect to bounties on the production or export of goods, but so that such bounties should be uniform throughout the Commonwealth, Section 99 provided that the Commonwealth should not by any law or regulation of trade, commerce or revenue give preference to one State or any part thereof over another State or any part thereof. Such provisions argued a fear that Commonwealth machinery might be put to uses which would prejudice State interests. No heed was given to the consideration, obvious today, that formal equality as enjoined by such provisions might work against real or meaningful equality. It is perhaps also worth recalling that one of the catchcries which invited popular support for the proposed federal Constitution was the claim that it (the new National Government) would cost the citizens of the various states no more than the price of a dog license!

The debates in the conventions of the eighteen nineties show clearly enough that considerable attention was paid to American
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precedents, and very little if any to the form of the Canadian Constitution. The Canadian founding fathers were much more concerned with the importance of establishing a strong national government than their Australian counterparts. However, the Australian and the Canadian constitutions have some common elements, in respect of which they differ from the United States Constitution. Both Canada and Australia established their federations within the British Empire, and their British origin naturally involved institutional differences, for example, in relation to the Crown. Again, the Canadian Constitution was enacted in 1867 and the Australian in 1900, when the conduct of the external affairs of both countries was still firmly in United Kingdom hands. A comparison of treaty and treaty enforcement powers in the two British federations on the one hand and in the United States Constitution on the other reveals quite striking differences, stemming from the colonial origins of the two British federations. With the rapid change in the international status of Australia and Canada, this has given rise to problems which will be considered at a later stage. For the present, we shall be concerned with some of the more important parallels and divergencies in the American and Australian Constitutions.

II

We start with a major difference in the two Constitutions. This was stated by an eminent English lawyer in the course of the debate on the Commonwealth of Australia Constitution bill in the British House of Commons:

The difference between the Constitution which this Bill proposes to set up and the Constitution of the United States is enormous and fundamental. This Bill is permeated through and through with the spirit of the greatest institution which exists in the Empire. . . . I mean the institution of responsible government under which the Executive is directly responsible to—nay almost the creature of—the Legislature. That is not so in America . . . . Therefore what you have here is nothing akin to the Constitution of the United States except in its most superficial features.

This is overdrawn, but it does serve to point up an essential difference. Responsible government in the British sense, that is,

4. In a judgment of the Privy Council, Attorney-General for the Commonwealth of Australia v. Colonial Sugar Refining Co., Ltd., [1941] A. C. 237, 252-253, Lord Haldane spoke of the Australian and United States Constitutions as federal in "the strict sense of the term," because the residue of powers was left with the States. Since this was not the case in Canada, the conclusion drawn by the judge was that that Constitution was federal only in a "loose sense." From whence the judge derived this definition of the federal principle is nowhere explicitly stated.

5. 83 PARLIAMENTARY DEBATES (4th Series) 98, 99 (1900).
the notion of the executive as a *parliamentary* executive dependent upon the control of a parliamentary majority, was already well established in the Australian States in pre-federation days. When the founding fathers came to fashion the Commonwealth Constitution, it is not surprising that they made similar provision for the new national government. What is more remarkable is that in the 1891 draft Constitution (which was prepared by Griffith who later became Chief Justice of Queensland, and, on federation, first Chief Justice of the High Court of Australia) it was provided that Ministers of State *might, not must*, be members of either House of the legislature. 1891 was a time of instability and recurrent crisis in State governments, and this suggested to some that the new national government might possibly depart from the settled British pattern. But by 1897-8, the local political situation had become more stable. The 1891 draft was amended, and finally appeared in Section 64 of the Constitution in the form of a mandatory requirement that Ministers must be members of either house of the legislature. It is assumed though it is not expressly stated that such ministers shall be responsible to the parliament.

The United States Constitution, to the contrary, expressly prohibits persons holding office under the United States from being members of Congress during their tenure of office. In this sense the doctrine of the separation of powers is firmly established in the United States.

It has been aptly observed that the linking of parliamentary-executive government (responsible government) to the federal structure in the Australian Constitution has produced a unique synthesis of British and American Constitutional ideas and practice. This raises a question as to the extent to which the doctrine of the separation of powers is otherwise modified by the existence of responsible government. The doctrine held great appeal for the American draftsmen, and it appears to be enshrined in those provisions of the Constitution which separately assign legislative, executive and judicial power. In this formal respect, the Australian Constitution closely follows the American pattern.

It is interesting to note that there are only two decisions of the Supreme Court of the United States in which a purported vesting of power by Congress in the executive has been held unconstitutional on grounds of improper delegation. Both arose out of

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New Deal legislation. In Schechter Poultry Corporation v. U. S., Congress had authorized the President to promulgate codes of fair competition on a finding that a code would tend to effectuate the policy of the Act. The Supreme Court invalidated the Act on the ground that "Here . . . is an attempted delegation not confined to any single act nor to any class or group of acts identified or described by reference to a standard." The unconstitutional element in the legislation lay in its failure to prescribe a sufficient standard to which the executive might refer in exercising the powers conferred by Congress. However, subsequent delegations in wide terms have been upheld upon the footing that sufficiently clear standards have been prescribed. In U. S. v. Rock Royal Cooperative, broad delegated powers with respect to agricultural marketing were sustained on this basis over a sharp dissent by Roberts J. directed precisely to the absence of a sufficient standard. In Yakus v. U. S., powers were granted to the OPA to stabilize prices and to prevent speculative, abnormal, and unwarranted increases in prices and rents. The administrator was directed to make price regulations which in his judgment were generally fair and equitable and would effectuate the purposes of the Act. The Supreme Court found that adequate standards were prescribed by Congress and upheld the constitutionality of the delegation.

It is quite clear that there is a very wide area of permissible delegation of legislative power to the executive. On a review of the recent cases, it has been remarked by Professor Jaffe that it can "undoubtedly . . . be argued that realistically Schechter has been put in the museum of constitutional history," and Professor Corwin in his lectures on Total War and the Constitution has spoken of the doctrine of separation of powers in this context as "shattered" and as nothing more than "a smoothly transmitted platitude."

At the same time, the cases stand as authority for the proposition that, lacking a sufficient prescription of standards, a delegation will violate the Constitution. Jaffe has suggested that this is not necessarily an academic abstraction; even though the Court

12. JAFFE, supra note 8, at 581.
14. Id. at 40.
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will concede wide latitude, it may still be possible to envisage a situation in which the doctrine of the Schechter case might be successfully invoked.\textsuperscript{15}

As the Australian cases stand, it is clear that a delegation of legislative power to the executive would not be invalidated on the ground that it offends against any doctrine of the separation of powers. In \textit{Victorian Stevedoring and General Contracting Co. and Meakes v. Dignan},\textsuperscript{6} such a challenge was unsuccessfully directed against a provision in the Transport Workers' Act which authorized the executive to make regulations for the employment of transport workers. Such regulations were to have effect notwithstanding anything in any other Act. Dixon J. noted the very similar general distribution of powers in the United States and Australian constitutions as between legislature, executive and judiciary. On the assumption that the Act authorised a delegation of \textit{legislative} power, he nevertheless concluded that this was not a valid constitutional objection.

The existence in Parliament of power to authorize subordinate legislation may be ascribed to a conception of that legislative power which depends less upon juristic analysis and perhaps more upon the history and usages of British legislation and the theories of English law.\textsuperscript{17}

Evatt J. observed that responsible government was part of the Australian Constitutional structure and that this necessarily involved a close relationship between the executive and legislative branches of government.

The statesmen and lawyers concerned in the framing of the Australian Constitution, when they treated of 'legislative power' in relation to the self-governing colonies, had in view an authority which, over a limited area or subject matter, resembled that of the British Parliament. Such authority always extended beyond the issue by Parliament of such commands by any person or authority it chose to select or create. 'Legislative power' connoted the power to deposit or delegate legislative power because this was implied in the idea of parliamentary sovereignty itself.\textsuperscript{18}

A further attack on the validity of very wide delegated powers was struck down by the High Court in \textit{Wishart v. Fraser}.\textsuperscript{19} That case involved legislation enacted early in the Second World War which authorised the executive to make regulations for securing the public safety and the defence of the Commonwealth and for

\textsuperscript{15} \textit{Jaffe, supra} note 8, at 581.
\textsuperscript{16} 46 C. L. R. 73 (1931).
\textsuperscript{17} \textit{Id.} at 101-121.
\textsuperscript{18} \textit{Id.} at 117-118.
\textsuperscript{19} 64 C. L. R. 470 (1941).
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prescribing all matters which are necessary or convenient to be proscribed for the more effectual prosecution of the war. It was un unsuccessfully argued that the effect of this legislation was to turn over the whole defence power of the Commonwealth to the executive. That was the practical effect of the legislation, and this power was used extensively throughout the war to provide the substantial legislative framework within which the Commonwealth prosecuted the war.

It is to be noted that arguments based upon the unconstitutionality of such delegation were rejected \textit{in limine} on the footing that within a framework of responsible government and of British constitutional and institutional history, this particular aspect of the doctrine of the separation of powers had no place. The Court in \textit{Dignan's} Case, however, observed that excessively wide delegation might invite a declaration of unconstitutionality upon a different ground: that the scope of a delegation of power might be so wide and uncertain that the law in question could not properly be subsumed under any specific head of power vested in the Commonwealth Parliament. In view of the wide delegations upheld by the Court, it would seem that the case in which such a principle could be successfully invoked would be very unusual.

The doctrine of the separation of powers as between executive and legislature has given rise to other problems within the United States. Corwin has shown how a vague and ill-defined practice of presidential action independent of congressional authorization emerged, particularly in the period immediately preceding Pearl Harbour and in the years which followed. The constitutional theory which justified such action was obscure and not clearly articulated. It has been suggested that it may have drawn support from the commander-in-chief clause and from the presidential responsibility for the faithful execution of the law.

The Supreme Court elected to consider this question in \textit{Youngstown Steel and Tube Co. v. Sawyer}. Following the breakdown of negotiations in a steel industry dispute, President Truman without express statutory authority, directed seizure of the steel mills by the Secretary of Commerce. The presidential order recited the great importance of continued steel production to the defence program of the country and to the discharge of United States international obligations. Seizure under this order was

\begin{itemize}
  \item \textit{Youngstown Steel and Tube Co. v. Sawyer}, 343 U. S. 579 (1952).
  \item Freund, The Supreme Court, 1951 Term, 66 Harv. L. Rev. 89-95 (1952).
  \item Freund, The Supreme Court, 1951 Term, 66 Harv. L. Rev. 89-95 (1952).
\end{itemize}
contested by the steel companies, and the Supreme Court by a majority held it unconstitutional. There was considerable diversity of opinion among the majority judges but Black J. speaking for the Court, and Douglas J., were quite explicit on the point that a violation of the doctrine of the separation of powers was involved. Presidential action in this case involved an intrusion into the legislative field, for Congress alone, in these circumstances, could authorize seizure.

The question whether such executive action would be constitutional in Australia is, in a sense, a barren one. The framework of responsible government would make it very unlikely that executive action would be taken without security of legislative support or authorization. Perhaps it should be recorded here that in the events leading up to the Steel Case, the President invited Congress to take contrary action if it so desired, but received no response. As a matter of law, it appears to be the law that if the executive elected to take such action in Australia without legislative authorization, it would be unconstitutional. This raises some difficult questions about the scope of the exercise of executive power under the royal prerogative. There is some support in judicial dicta for the proposition that the prerogative would permit the Commonwealth executive in the course of military operations in time of war to seize property even without compensation.25 The broadest proposition which emerges from the cases is that in time of war, the existence of national danger vests authority in the executive to do things which would not otherwise be justifiable. The validity of such executive action depends in general upon a demonstration that the action was necessary for the national security, and that the executive acted on that basis.26

This would not provide constitutional support for the executive seizure in the Steel Case under Australian law. The apprehended emergency would not have attracted power. The limits on the exercise of independent executive power raise questions bearing upon the extent of the prerogative of the Crown. These limits have not been worked out by reference to any general or theoretical considerations involving the doctrine of separation of powers; they were hammered out rather in the great seventeenth century struggles between Crown and Parliament.

In certain respects, executive powers are, as a matter of law, wider in Australia than in the United States. Under Art. 1, Sec. 8,

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power to declare war is vested in Congress, while under the prerogative such power is vested in the Crown. Likewise under the prerogative, the treaty making power is vested in the executive, while the comparable presidential power under Art. 2, Sec. 2 is limited by the requirement of senatorial consent. It need only be observed that such exercises of executive power in Australia are conditioned by the fact that they are exercised and exercisable by a responsible executive.

In respect of judicial power, however, rather different considerations arise. Sec. 71 of the Commonwealth Constitution, like Art. 3, Sec. 1 of the United States Constitution vests judicial power in courts. In *Dignan's Case*\(^2\), the High Court in rejecting arguments based upon the alleged separation of legislative and executive powers, pointed to the fact that different considerations arose in respect of judicial power. It was observed that British constitutional history and doctrine lays heavy stress upon the importance of judicial independence.

For Australia, a constitutional obligation to separate judicial power has arisen out of the judicial interpretation of Secs. 71 and 72 of the Constitution. Sec. 71 vests judicial power in courts, while Sec. 72 provides that judges of these courts shall not be removed except by the Governor-General in Council on an address from both Houses of the Parliament in the same session, praying for such removal on the ground of proved misbehaviour or incapacity. It was held by a majority in the High Court of Australia in *Waterside Workers Federation of Australia v. J. W. Alexander, Ltd.*,\(^2\) that Sec. 72 required that judges exercising federal judicial power under Sec. 71 should be appointed for life. There was a forceful dissent and the decision was subsequently challenged on this point, but it must now be taken to be settled law.\(^2\) It has been held to follow from this that it is unconstitutional to invest a person or body, not possessing life tenure, with judicial power. This has squarely raised the very difficult problem of defining the characteristic or essence of judicial power. It is not surprising that there have been sharp differences in the courts on this point. I have discussed this problem elsewhere, and I do not propose to renew that discussion here.\(^3\)

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27. 46 C. L. R. 73 (1931).
28. 25 C. L. R. 434 (1918).
30. 26 CANADIAN B. REV. 829 (1948).

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some anomalous decisions. In *R. v. Bevan*,\(^{31}\) and *R. v. Cox*,\(^{32}\) an attack was made upon the validity of courts martial on the ground that their members were not appointed for life and that they were therefore unconstitutionally exercising judicial power. On the definitions of judicial power propounded at various times in the High Court this should have caused difficulty. However, the High Court flatly rejected the argument. The difficulty is to find a justification in principle. One of the judges drew on American authority for the proposition that courts martial do not exercise judicial power. Such cases are dubious authority in Australia. Decisions like *Dynes v. Hoover*,\(^{33}\) lay some stress on the provision in the Fifth Amendment that no person shall be held to answer for capital or other infamous crime unless on a presentment or indictment of a grand jury, *except in cases arising in the land or naval forces*. In *Kurtz v. Moffitt*,\(^{34}\) it was said that the Fifth Amendment left cases arising in the land or naval forces "subject to the rules for the government and regulation of these forces which, by the eighth section of the first article of the Constitution, Congress is empowered to make." There is no comparable provision anywhere in the Australian Constitution bearing upon the special position of the armed forces. In the Australian court martial cases, the only satisfactory explanation appears to be that the logic of an earlier position has been made to bend to the demands of an important practical problem.

To sum up thus far: the Australian Constitution departs fundamentally from the American model in requiring Ministers of State to be members of the legislature. The Australian courts have expressly rejected the doctrine that there is any constitutional prohibition against vesting legislative powers in the executive. On the other hand, there is American authority which holds that such an investiture may violate the doctrine of the separation of powers. From a practical standpoint the two Constitutions may not be too far apart; the American courts have upheld very wide delegations of power upon the footing that the legislature has prescribed sufficient standards under which the executive may exercise the power. The Australian courts have, however, suggested that an uncontrolled delegation may be unconstitutional on the ground that its breadth and uncertainty might deprive it of the character of a law properly subsumable under any specific head of Commonwealth power.

\(^{31}\) 66 C. L. R. 452 (1942).
\(^{32}\) 71 C. L. R. 1 (1945).
\(^{33}\) 61 U. S. 65 (1857).
\(^{34}\) 115 U. S. 487, 500 (1885).
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There is a body of Australian authority which effectively separates judicial power. This results from a definition of the word "courts" in the judicature chapter of the Constitution, in requiring members of courts (who alone exercise judicial power) to have life tenure. The obligation to isolate judicial power has called forth some very pretty judicial differences and quarrels, not to mention evasion, as in the court martial cases, when unsatisfactory practical consequences would follow a logical application of previously agreed principle.

A word may be said on the linking of responsible government to a federal structure. It does not appear that this unusual mating has produced a "sport of nature". Cabinet government in Australia has developed pretty much along British lines even though the structure of power distribution is federal. An Australian commentator on the American political scene would not require uncanny gifts of observation to suggest that the path of political life might be smoother if the United States were to mate responsible government to federalism. It may perhaps be appropriate to note that at least one distinguished American authority has cast a fond and somewhat lingering glance at the cabinet system and expressed the wish that at least a pale imitation of it might be introduced into the United States. 35

III.

One of the most interesting differences in the political structure and institutions of Australia and the United States is to be found in the position and importance of the Senate in the two countries. Reference has already been made to the fact that the place of the Senate in the Australian federation was the great topic of debate in the national conventions of the eighteen nineties. It was to the Senate primarily that the founding fathers looked for the protection of State interests.

Here the United States provided a model. It was settled that each State should be equally represented in the Senate. In the draft Constitution of 1891, it was provided that the Senate should be indirectly elected. This followed the United States Constitution which was amended in this respect by the Seventeenth Amendment in 1913. The Convention of 1897-8, however, reversed the decision of 1891 and provided for direct popular election. To ensure that the Senate should be an effective protector of State interests, its powers were made coordinate with those of the Lower House, save in the matter of financial legislation where its power

35. CORWIN, OUR CONSTITUTIONAL REVOLUTION AND HOW TO ROUND IT OUT, 17-21 (Publications of Brandeis Lawyers' Society 1951).
in law was still strong.\(^{36}\) Agreement upon a provision to deal with deadlocks between the two Houses was difficult, but was finally concluded in the terms of Sec. 57 of the Constitution.\(^{37}\) Senators were to hold office for six years; members of the House of Representatives for a maximum of three. It was envisaged that the membership of the Senate should as nearly as possible be one half that of the Lower House.\(^{38}\) For many years there were 36 Senators (six from each State) and 75 members of the Lower House. A few years ago, the membership was increased to 60 Senators (ten from each State) and 123 Representatives.\(^ {39}\)

In view of the substantial similarity in structure and powers, it might have been thought that the Senates in the two countries would enjoy substantially similar positions. But while as between the two Houses of Congress, the Senate is demonstrably the more important, precisely the opposite is true in Australia. The comment of Sir John Latham, a former Chief Justice of the High Court of Australia, and previously a member of the Commonwealth legislature and executive may be quoted in this context:

The Senate was to be the States' House. This anticipation has been almost completely falsified by results. The Senate is as much a party house as the lower house. The candidates for the Senate are presented to the voters in teams selected by the political parties. The personality of the candidates is of minor importance.

The idea of the Senate as a second chamber of wise and experienced men, sitting in sober and deliberate—and largely non-party—review of possibly hasty legislation passed by the lower house has not been realized in practice.\(^ {40}\)

It would not be very profitable to compare the two Senates in terms of their protection of State interests. It is a matter of history that from the early days of federation the Australian Senate divided as a party house. On the other hand, it would surely be a misconstruction of the position and importance of the United States Senate to account it primarily a States' house. Since indirect election was replaced by direct election under the Seventeenth Amendment, it is probably even less so. But it does occupy a position of great importance in the national policy.

What explains the difference? Here I may recount an odd story. An Australian observer suggests, among others, two rea-

\(^{36}\) See §§ 53, 54 and 55 of the Constitution.


\(^{38}\) § 24.

\(^{39}\) REPRESENTATION ACT (1948).

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reasons for the decline of the Australian Senate. One is the fact that the Senators are elected from the State at large, and therefore are not personally as well known as the Representatives who come from smaller districts. The second is that their term is six years against the lower house's three; so that they are more remote from the prevailing popular will. I asked a distinguished American constitutional lawyer how he explained the predominance of the Senate in the United States Congress. He gave among other reasons the following: (1) Senators possess special authority through being elected from the State at large; they are more widely known than representatives who are elected from districts; (2) they derive greater power and influence from their longer term of office which is six against the representatives' two years!

It is not very easy to pinpoint reasons for such divergent developments in the two countries. It may be that the proportions in the two Houses have something to do with it. In the United States, the Senate is only about one-fifth the size of the House of Representatives while in Australia the proportion is roughly one to two. It is possible that the disparity in terms of office in the United States is too great; a two year term in the House of Representatives is very short indeed, while the three year term of the Australian House of Representatives may give it greater stability and importance. There are only two Senators elected from each State in the United States; and this may mean that the individual Senators are much better known than ten (formerly six) from each Australian State. Probably the difference in party structure has much to do with this problem. In the United States, this is relatively loose and fluid, while in Australia a tighter class-party system has been long established. When to this is added the factor of responsible government in Australia, in which the British tradition has for long emphasized the predominance of the lower House, it is perhaps not surprising that the Australian Senate's importance has tended to decline.

It is certainly the case that the Senate in Australia has failed to meet the expectations of the founding fathers as a States' House. It has been said that:

A class basis of Australian party warfare was already emerging [at federation] and so long as that basis remained dominant there could be no prospect of a working 'States' House' at all. When parties came to be based broadly upon classes the interests of either class in one State were more likely to be more nearly

linked to those of the same class in other States than with the opposite class in the same State.42

But more interesting still, having regard both to the comparable structure of the United States Senate and to the seemingly large constitutional powers vested in the Australian Senate is the latter’s remarkable inferiority as a House of the legislature. Its debates are generally poor, its membership relatively insignificant in stature, and it is generally regarded in Australia as a disappointment. Various reasons have and may be suggested for its inferior status, but one can only conclude with a recent commentary on Australian institutions that its failure to measure up is “truly remarkable.”43

IV

Both the American and Australian courts have frequently been concerned with the problem of implications to be drawn from the federal character of the Constitution. This has most often arisen in the context of intergovernmental immunities. In various forms, this problem was under consideration by the Supreme Court of the United States during the greater part of the nineteenth century. There is no evidence from the debates in the constitutional conventions of the ’nineties that the Australian founding fathers had any general awareness of this problem or any disposition to deal with it.44 Certain specific provisions which bear on this matter were written into the Constitution: thus the Commonwealth Parliament’s power to legislate with respect to banking expressly excluded State banking,45 and the similar power with respect to insurance excluded State insurance.46 If a State engaged either in banking or insurance activities, its operations would not be subject to Commonwealth legislative control. So too, Sec. 114 of the Constitution provided, in part, that “A State shall not . . . impose any tax on property of any kind belonging to the Commonwealth nor shall the Commonwealth impose any tax on property of any kind belonging to a State.”

It might have been thought that the existence of specific provisions of this kind excluded the drawing of any general implications with respect to intergovernmental immunities.47 However when the problem arose very early in the history of the Commonwealth—indeed in the first volume of the Commonwealth Law Reports—in terms of State power to impose a stamp tax

42. Id. at 176.
43. Id. at 183.
44. Sawer, Implications and the Constitution, 4 RES JUDICATA 88-90 (1949).
45. § 51 (XIII).
46. § 51 (XIV).
47. See Sawer, supra note 44 at 89.
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on a Commonwealth officer's receipt for his salary, the High Court unanimously held this to be unconstitutional on the footing of a general doctrine of immunity of instrumentalities. In so deciding, the Court relied heavily on American authority, and justified this in sweeping terms:

We think that, sitting here, we are entitled to assume—what, after all, is a fact of public notoriety—that some, if not all of the framers of [the] Constitution were familiar . . . with the Constitution of the United States. . . . When, therefore, under these circumstances, we find embodied in the Constitution provisions undistinguishable in substance, though varied in form, from provisions of the Constitution of the United States which had long since been judicially interpreted by the Supreme Court of that Republic, it is not an unreasonable inference that its framers intended that like provisions should receive like interpretation.48

In this case the Australian High Court followed the United States' Supreme Court decision in McCulloch v. Maryland.49 When the issue of liability of federal salaries to State taxation was posed in Deakin v. Webb,50 the High Court followed and relied on Dobbins v. Commissioners of Erie County.51 When the converse problem of the subjection of State instrumentalities (State railways) to Commonwealth arbitration awards arose, the High Court in holding that they were not subject52 squarely rested on Collector v. Day,53 where the Supreme Court had denied the constitutionality of a federal tax on State salaries.

From 1906, there was a persistent dissent in the High Court of Australia on this point. When, by 1920, the dissent had become the majority view, the High Court held, in the most celebrated of all Australian constitutional cases, the Engineers' Case,54 that a Commonwealth Arbitration Court award bound a State instrumentality. Some of the earlier decisions were of necessity overruled, while others were reinterpreted in the sense that their basis was shifted from the doctrine of the immunity of instrumentalities. The new doctrine called, too, for a revised view of the weight of American authority in Australian constitutional interpretation.

We conceive that American authorities, however illustrious the tribunals may be, are not a secure basis on which to build fundamentally with respect to our own Constitution. While in

49. 4-Wheat. 316 (U. S. 1819).
50. 1 C. L. R. 585 (1904).
51. 16 Pet. 435 (U. S. 1842).
52. Railway Servants' Case, 4 C. L. R. 488 (1906).
53. 11 Wall. 113 (U. S. 1870).
secondary and subsidiary matters they may, and sometimes do, afford considerable light and assistance, they cannot ... be recognized as standards whereby to measure the respective rights of the Commonwealth and States under the Australian Constitution. For the proper construction of the Australian Constitution it is essential to bear in mind two cardinal features of our political system which are interwoven in its texture and, notwithstanding considerable similarity of structural design, including the depository of the residual powers, radically distinguish it from the American Constitution. Pervading the instrument, they must be taken into account in determining the meaning of its language. One is the common sovereignty of all parts of the British Empire; the other is the principle of responsible government.\footnote{55}

During the period in which the doctrine of the Engineers' Case was in the ascendant, reliance on American authority greatly lessened. However, since 1945 there has been some revival in Australia of doctrines of intergovernmental immunity. The problem was posed in *Melbourne Corporation v. Commonwealth*,\footnote{56} where the issue was the validity of legislation providing that, except with the consent of a Commonwealth officer, a bank should not conduct any banking business for a State or for any authority of a State, including a local government body. The High Court held the legislation unconstitutional. Although there were some differences of opinion in the Court, there was a great emphasis on the point that the vice in the legislation lay in the fact that it placed special burdens on the States in the exercise of their governmental functions. The "revived" doctrines of intergovernmental immunity have found expression in other cases, notably through Dixon J. (now Chief Justice of the High Court).\footnote{57} Chief Justice Dixon served as Australian Ambassador to Washington during part of the Second World War, and he, of all members of the Court, is most familiar with the course of American authority. The revival of intergovernmental immunities in Australia has, not surprisingly, brought with it a revived interest in and regard for American authorities, which have been discussed at length in the opinions.

There has also been some awareness of the shift of Australian doctrine on this point on the part of the American Supreme Court. In *Graves v. New York*,\footnote{58} the Supreme Court overruled *Collector v. Day* in holding that federal salaries were subject to State in-

\footnotesize{\begin{itemize}
\item \footnote{55}{At 146. See Latham, *Interpretation of the Constitution*, ESSAYS ON THE AUSTRALIAN CONSTITUTION, 30-31 (Else-Mitchell, ed. 1932).}
\item \footnote{56}{74 C. L. R. 31 (1947).}
\item \footnote{57}{See Essendon Corp. v. Criterion Theatres, Ltd., 74 C. L. R. 1 (1947), *Other v. Federal Commissioner of Taxation*, 74 C. L. R. 508 (1947).}
\item \footnote{58}{306 U. S. 466 (1939).}
\end{itemize}}
COMPARISON OF CONSTITUTIONS

come tax. Frankfurter J. drew attention to Canadian and Australian constitutional developments:

In view of the powerful pull of our decisions upon the courts charged with maintaining the constitutional equilibrium of the two other great English federalisms, the Canadian and the Australian courts were at first inclined to follow the earlier doctrines of this Court regarding intergovernmental immunity . . . [citing D’Enden v. Pedder]. Both the Supreme Court of Canada and the High Court of Australia on fuller consideration—and for present purposes the British North America Act . . . and the Commonwealth of Australia Constitution Act . . . raised the same legal issues as does our Constitution—have completely rejected the doctrine of intergovernmental immunity.69

The statement that the doctrine had been “completely” rejected in Australia probably overshot the mark, even as of 1939. There were suggestions in a High Court decision in 1937, West v. Commissioner of Taxation,60 that there might still be life in the doctrine. And the recent cases in the High Court, notably Melbourne Corporation v. Commonwealth, have certainly revived it. The present scope and ambit of the doctrine of intergovernmental immunities in either federation is not very clear. The most recent decision of importance in the Supreme Court of the United States is New York v. United States,61 in which a federal excise tax on the sales of bottled mineral waters sold by New York and drawn from land owned by it was sustained by a majority. It is not easy to draw a precise ratio decidendi from this case,62 and the dissenting views of Black and Douglas JJ. would have opened up a wide area of operation for intergovernmental immunity. Distinguished commentators have drawn attention to the difficulty of precisely charting the American doctrine. Justice Roberts, writing after he had retired from the Supreme Court Bench has observed that,

In no field of federal jurisprudence has there been greater variation of uncertainty. About one quarter of these decisions have been expressly or tacitly overruled, modified or ignored in later cases. Doubtless the explanation is that the Court has been called upon to exercise statesmanship in an uncharted region rather than interpretation of the text of the instrument: to implement policy rather than law.63

59. Id. at 490-491.
62. ROBERTS, THE COURT AND THE CONSTITUTION (1951) at p. 28 observes that it was held that the tax was constitutional. “That, however, is about all that can be said of the case.”
63. Id. at 8.
A former Chief Justice of the Australian High Court has likewise spoken of the "chequered career" of the American doctrine. It appears clear that the course of American authority in latter years has tended to restrict its scope, and insofar as this has involved an abandonment of earlier extravagant positions, it is to be welcomed.

The present situation in Australia is a little obscure. Reference has already been made to Melbourne Corporation v. Commonwealth in which the High Court declared invalid legislation which would have obliged the States and their instrumentalities to bank with the Commonwealth Bank. In this and other cases, there have been statements in support of a doctrine of intergovernmental immunities as a matter of logical implication from the existence of a federal structure of government. The present Chief Justice, Sir Owen Dixon, has expounded the doctrine in several cases. We have already noted that such members of the Court as favour the doctrine have not all stated their position in the same way. It is not clear whether it is the element of discrimination which is decisive, or whether what invalidates legislation on this ground is the existence of a burden upon the governmental functions of one party to the federal compact, even though that burden does not arise out of discriminatory legislation.

It is interesting to note two other decisions of the High Court. In South Australia v. Commonwealth (the Uniform Tax Case), a legislative scheme was devised to drive the States out of the income taxing field. The Commonwealth imposed a high rate of income tax, for payment of which it legislatively granted priority to itself. It undertook to make grants to the States on terms of their withdrawal from this field of taxation, and it purported to take over State income tax departments.

This legislation was held valid by a majority in the High Court. It will be apparent that the scheme effectively placed the States at the financial mercy of the Commonwealth, and if ever

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64. Melbourne Corp. v. Commonwealth, 74 C. L. R. 31, 56 (1947) per Latham C. J.

65. ROBERTS, op. cit. supra note 62 at 35 writes: "The steady progress toward the abolition of the reciprocal immunities has been beneficial. . . . Save for obvious discrimination, why is not the citizen of dual soverencias entitled to refuse confidence that neither of those sovereigns can nor will by nondiscriminatory taxation of its own citizens destroy or hamper the operations of the other?"


67. 65 C. L. R. 373 (1942).
there was a case in which intergovernmental immunity was posed as a practical problem of government, this was it. Starke J., dissenting, made this point. The Chief Justice, Sir John Latham, was well aware of the implications of upholding the legislation, but nonetheless held it valid:

Thus if the Commonwealth Parliament were prepared to pass such legislation (excluding the States from all tax fields and making grants conditional on Commonwealth satisfaction with State policies) all State powers would be controlled by the Commonwealth—a result which would mean the end of the political independence of the States. Such a result cannot be prevented by any legal decision. The determination of the propriety of any such policy must rest with the Commonwealth Parliament and ultimately with the people. The remedy for alleged abuse of power or for the use of power to promote what are thought to be improper objects is to be found in the political arena and not in the Courts.68

It is to be noted that the legislation as upheld even required the States to turn their income tax departments over to the Commonwealth.69 How the Uniform Tax Case sits with the Melbourne Corporation Case is not very clear when one looks into the heart of the two decisions.70 It is perhaps worth recording that Sir Owen Dixon was not a member of the Court which decided the Uniform Tax Case. In Bank of New South Wales v. Commonwealth,71 it was argued that the Banking Act of 1947 which purported to give the Commonwealth Bank a monopoly of all banking (except banking conducted by State banks) was unconstitutional on the ground that it denied the States the facilities of all other banks.72 The Court (of which Dixon C. J. was a member) distinguished the Melbourne Corporation Case on the ground that in the Bank case the States and their instrumentalities were not specifically singled out. As a practical matter it is to be noted that the States were subject to the same limitations in either case and under either Act.

To sum up: in enunciating a doctrine of intergovernmental immunity the first Australian High Court drew heavily upon the doctrine of the American Supreme Court at a time when the American doctrine was stated in extreme terms. From 1920 a strong reaction set in in Australia with the Engineers’ Case, and in this case the High Court drew strength for its new position from the proposition that there were fundamental differences between the United States and Australian constitutional structures

68. Id. at 429.
70. Id. at 105-107.
71. 76 C. L. R. 1 (1948).
72. The legislation was held unconstitutional on other grounds.
which denied compelling authority to American decisions on intergovernmental immunity. Since the end of the Second World War, there has been a movement back to doctrines of intergovernmental immunities based on a logical deduction from the federal structure of Australian government. This has given the American decisions fresh significance in Australia. The contemporary Australian doctrine is not easily defined either in character or scope, and it may be that it will not be held to operate beyond the area of direct discriminations against States or their agencies.

For the United States it may be said that the tide has for some long time past run against the extreme positions taken in *McCulloch v. Maryland*, *Collector v. Day* and similar cases. The decision in *New York v. United States* while continuing to move towards restriction of the scope of the doctrine still leaves its limits uncertain.

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An interesting comparison between the American and Australian Constitutions is revealed by their differing approaches to the problem of protection of individual rights. From the earliest days, the American Constitution has included a Bill of Rights which has been added to from time to time by amendment. Having regard to the atmosphere in which the United States Constitution was drafted and adopted, and also to subsequent crises in its history, it is not surprising that it was regarded as appropriate to place constitutional restraints on government in the interest of fundamental individual rights. The British conception is different; to a fundamental constitutional doctrine that Parliament is omnicompetent it is impossible to link the constitutional protection of individual rights. It is quite another question whether individual rights are in practice more effectively guaranteed in the United States than in England.

Australian institutions had, in general, developed on the British model, although of course, there is no place for parliamentary omnicompetence within the Australian federal structure. However, Australian federation was forged in a very different atmosphere to that of 1787. It may perhaps also be said that the American founding fathers were much more consciously influenced by and were more keenly aware of individualist and libertarian philosophical influences than were their Australian counterparts of the eighteen nineties.

In fact there are relatively few provisions in the Australian Constitution which restrain government in the interests of individual rights. The principal exceptions are to be found in Secs. 116 and 117 of the Constitution. Sec. 116 provides that
the Commonwealth shall not make any law for establishing any religion, or for establishing any religious observances, or for prohibiting the free exercise of any religion, and that no religious test shall be required as a qualification for any office or public trust under the Commonwealth. It will be noted that this clause broadly parallels the material provisions of Art. VI, Sec. 3 and the First Amendment to the United States Constitution. It is perhaps of interest to note that in the 1891 draft of the Constitution these prohibitions were directed to the States. In 1897-8 the prohibitions were also addressed to the Commonwealth and as finally adopted the clause only restrained the Commonwealth. This leave the States unfettered, except insofar as there may be any special provision in a State constitution.

The section has come up for judicial consideration. In *Krygger v. Williams*, it was held that it did not prevent Parliament from applying compulsory military service to conscientious objectors. It was discussed at some length in *Adelaide Company of Jehovah's Witnesses v. Commonwealth*, where the High Court considered regulations enacted under the defence power during the Second World War which prohibited the advocacy of Jehovah's Witnesses doctrines as prejudicial to the prosecution of the war. The Court discussed the American authorities which were cited to support the proposition that the constitutional protection of religious freedom could not be phrased in absolute terms. "This view makes it possible to accord a real measure of practical protection to religion without involving the community in anarchy." It has been suggested that the decision in the *Jehovah's Witnesses* Case probably goes further in permitting restraints than current American doctrine would allow.

Sec. 117 of the Australian Constitution provides that "a subject of the Queen resident in any State shall not be subject in any other State to any disability or discrimination which would not be equally applicable to him if he were a subject of the Queen resident in such other State." It is to be noted that the phraseology is odd: the criterion of discrimination is residence, so that it may be that a discrimination on the basis of domicile is not prohibited. This provision suggests in part the privileges and im-

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73. 15 C. L. R. 366 (1912).
74. 67 C. L. R. 116 (1943).
75. Id. at 127-131, *per* Latham C. J.
76. Id. at 131.
77. *Id.* at 131.
78. *Id.* at 127-131, *per* Latham C. J.
munities clause of Art. IV, Sec. 2 of the United States Constitution and in part the provisions of the first section of the Fourteenth Amendment. The legislative history of Sec. 117 is interesting. In the 1891 draft, the terminology was much closer to the first section of the Fourteenth Amendment although without reference to due process. In 1897-8, O'Connor, who was a principal draftsman of the Constitution and subsequently became an original member of the High Court, moved unsuccessfully to add the words of due process. That close at least did Australia come to the benisons of a due process clause! As enacted, Sec. 117 has played an insignificant role in Australian constitutional interpretation.

Two other provisions remain to be considered. There is an important limitation on the Commonwealth's power to acquire property. This appears in Sec. 51 (xxxi) which authorizes the Commonwealth Parliament to acquire property on just terms from any State or person for any purpose in respect of which the Parliament has power to make laws. The restraint on power is, of course, the requirement of provision of just terms and this finds its American parallel in the Fifth Amendment prohibition against the taking of private property for public use without just compensation. The American Constitution presumed the existence of a power of eminent domain and directed attention to restraints upon its exercise. The Australian founding fathers, doubting the safety of relying on an implied power of eminent domain in a colonial commonwealth, included a provision expressly conferring a power of acquisition on the Commonwealth legislature which at the same time limited and controlled its exercise.

It is very clear, with the hindsight of half a century, that without any such express power many of the heads of Commonwealth power would have authorized the acquisition of property for specific purposes. Most of the cases on property acquisition arose during the Second World War, and it is now quite clear that if Sec. 51 (xxxi) had not been written into the Constitution, the defence power, Sec. 51 (vi) would have authorized acquisitions for defence purposes without challenge to the terms of acquisition. It was unsuccessfully argued that acquisitions could be effected under Sec. 51 (vi) without necessary recourse to Sec. 51 (xxxi). The High Court, having regard to the clear intendment of the Constitution that provision of just terms be imported into all Commonwealth acquisitions, rejected these arguments. This means that

79. "No state shall make or enforce any law which shall abridge the privileges or immunities of citizens of the United States; nor shall any State deprive any person of life, liberty or property, without due process of law; nor deny to any person within its jurisdiction the equal protection of the laws."
Sec. 51 (xxxi) is the sole source of Commonwealth legislative power to acquire property. Moreover the Court has given the word "property" a wide meaning, so that the temporary taking of land for Commonwealth use falls within Sec. 51 (xxxi) and attracts the protection of the Section.

It would seem then, that while framed in terms of power, the Australian provision operates effectively as a restriction on power and therefore broadly parallels the material provision of the Fifth Amendment. However, some distinctions and differences were pointed to by Dixon J. in *Grace Brothers Pty., Ltd. v. Commonwealth.* Since the power of eminent domain operates without express constitutional authorization, and since the only express provision in the American Constitution is the limitation upon power contained in the relevant words of the Fifth Amendment, it may follow that an acquisition offending the Fifth Amendment still remains an acquisition whose terms of compensation remain to be "settled under or moulded by" the Fifth Amendment. In the Australian Constitution, on the other hand, the power and the terms of acquisition are rolled up in one provision. The possible consequence of conferring a power of acquisition-on-just-terms is that an acquisition denying just terms is not a lawful taking. Again the limits of just compensation and just terms may be different, and just terms may give greater latitude to governmental interest. The appropriate conclusion may therefore be that while American decisions on the Fifth Amendment are useful in resolving problems arising under Sec. 51 (xxxi), they cannot be compelling.

Of all the limitations on governmental power written into the Australian Constitution by far the most important is that in Sec. 92. The important words in this clause are: "trade, commerce, and intercourse among the States, whether by means of internal carriage or ocean navigation, shall be absolutely free." The interpretation of these words has caused enormous difficulty and they have been before the courts on very many occasions. From the standpoint of constitutional history, they present relatively little

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82. 72 C. L. R. 269, 285 et seq. (1946).
83. "In deciding whether any given law is within the power the Court must, of course, examine the justice of the terms provided. But it is a legislative function to provide the terms and the Constitution does not mean to deprive the legislature of all discretion in determining what is just. Nor does justice to the subject and to the State demand a disregard of the interests of the public or of the Commonwealth." *Per* Dixon J. in *Grace Bros. Pty., Ltd. v. Commonwealth,* 72 C. L. R. 269, 291 (1946).
difficulty. The intendment of the founding fathers was to ensure the economic unity of Australia. Sec. 92 was devised to do "no more than reinforce the conversion of six separate economic units into one and ensure the operation therein of the contemporary concept of free trade." The clause is set in the context of a group of provisions relating to finance and trade. However, the language of the section was unhappily broad. There were lawyers both inside and outside the constitutional conventions who warned of the dangers of such draftsmanship. The politicians, however, triumphed; it was felt that "a little bit of layman's language" might appeal to the electorate to whom the constitutional draft was to be submitted for ratification.

Sec. 92 is sui generis; it owed nothing to American precedent. American influence on Australian constitutional drafting in the field of trade and commerce was significant in the power field: Art. 1, Sec. 8 clause 3 investing Congress with power to regulate foreign and interstate commerce was paralleled by Sec. 51 (i) which authorises Commonwealth legislation with respect to foreign and interstate trade and commerce. There are also comparable provisions which operate to limit power in this field. Art. 1, Sec. 9, clause 3 prohibits the giving of preference by any regulation of commerce or revenue to the ports of one State over those of another, while the Australian Sec. 99 provides that the Commonwealth shall not by any law or regulation of trade or commerce give preference to one State or any part thereof over another State or any part thereof. It is interesting to note that while the American commerce power has become a principal instrument of the extension of federal power, the substantially similar Australian commerce power has played a relatively minor role. There are various reasons which may help to explain this interesting difference. We cannot pause to do more than footnote them here, but it is appropriate to observe that the judicial interpretation of Sec. 92 is in some measure responsible.

The great difficulties which have been experienced in the interpretation of Sec. 92 have arisen in large measure from the words "absolutely free". While it has never been assumed that these sweeping words deny any power of legislative regulation

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whatsoever, the High Court of Australia at a relatively early stage cast off the anchor which a historical interpretation limiting the scope to the provision of intra-Australian fiscal freedom would have provided. Once this step was taken it was difficult to set limits. At one stage, the High Court accorded the words "absolutely free" very wide scope. This position led to the Court's conclusion that the section did not operate upon Commonwealth legislation, since this would have rendered nugatory the Commonwealth legislative power with respect to interstate trade and commerce. On this footing, it was held that Sec. 92 operated only as a limit on State power and action. This view was rejected by the Privy Council some fifteen years later and it is now settled law that the Section binds both Commonwealth and States.

It is not surprising then that such an ill-drawn section, deprived of its historical anchor, should have caused great trouble and some very pretty quarrels in the courts. It has arisen for consideration in various contexts: among them Commonwealth and State marketing schemes principally with respect to primary products; attempted State regulation of interstate road transport, and in recent years Commonwealth legislative attempts to nationalize banking and interstate airlines. Notably in the Airlines and Bank Nationalization Cases, there is to be found a good deal of language which suggests that a purpose of the section is to ensure to individuals freedom of interstate competition. In the words of one of the judges of the Australian High Court, "the freedom guaranteed by Sec. 92 is a personal right attaching to the individual." This does not represent the view of all the judges in the recent cases, and in the opinion of the Privy Council in Bank of New South Wales v. Commonwealth (the Bank Nationalization Case), there is a teasing passage in which it is suggested that there may be circumstances in which prohibition with a view to State monopoly may be "the only practical and reasonable manner of regulation and that interstate trade, commerce and intercourse..."
thus prohibited and thus monopolised remained absolutely free." However, both in the *Airlines* and *Bank Nationalization* Cases the decision was that national monopoly as opposed to private right of trade violated the provisions of Sec. 92.

One Australian commentator, in an extended review of the authorities has concluded that

under the Australian Constitution, the 'freedom' of trade, commerce and intercourse guaranteed under Sec. 92 is coming to be interpreted to include tacitly within itself a guarantee of individual freedom of contract and choice of vocation of persons operating within the field of interstate commerce.  

He suggests that Sec. 92 in this respect comes to serve the purposes which the due process and contracts clauses served in restraining the extension of federal power under the commerce clause in the United States Constitution. This leads further to the suggestion that at a period at which the Supreme Court of the United States is interpreting the interstate commerce power in very wide terms and is restricting the scope of constitutional limitations on that power, the judicial interpretation of the Australian Constitution in this respect is following an opposite course.

The suggestion that there are elements in the interpretation of Sec. 92 which provide analogies to the employment of due process in the American Constitution is interesting and provocative. Of course, the parallels are imperfect; there is too much uncertainty and there are too many strands in the interpretation of Sec. 92 to make it possible to define its scope and operation with any dogmatic assurance. But the American lawyer may find interest (which to his Australian counterpart can only be painful interest) in the evolution and interpretation of this Section which is demonstrably the most important limitation upon governmental power in the Australian Constitution.

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96. Stone, supra note 86 at 511.
97. Stone notes that: "This difference in timing, however, may conceal a deeper similarity... In the life cycle of her economy, Australia is only just beginning to feel the full expansive pressure resulting from industrialization under a private enterprise economy." Id. at 512.