

Chapter One

The Seven Pillars of Centralism: Federalism and the *Engineers' Case*

Professor Geoffrey de Q Walker

Holding the balance: 1903 to 1920

The High Court of Australia's 1920 decision in the *Engineers' Case*¹ remains an event of capital importance in Australian history. It is crucial not so much for what it actually decided as for the way in which it switched the entire enterprise of Australian federalism onto a diverging track, that carried it to destinations far removed from those intended by the generation that had brought the Federation into being.

Holistic beginnings. How constitutional doctrine developed through the Court's decisions from 1903 to 1920 has been fully described elsewhere, including in a paper presented at the 1995 conference of this society by John Nethercote.² Briefly, the original Court comprised Chief Justice Griffith and Justices Barton and O'Connor, who had been leaders in the federation movement and authors of the Commonwealth of Australia Constitution. The starting-point of their adjudicative philosophy was the nature of the Constitution as an enduring instrument of government, not merely a British statute:

"The *Constitution Act* is not only an Act of the Imperial legislature, but it embodies a compact entered into between the six Australian colonies which formed the Commonwealth. This is recited in the Preamble to the Act itself".³

Noting that before Federation the Colonies had almost unlimited powers,⁴ the Court declared that:

"In considering the respective powers of the Commonwealth and the States it is essential to bear in mind that each is, within the ambit of its authority, a sovereign State".⁵

The founders had considered Canada's constitutional structure too centralist,⁶ and had deliberately chosen the more decentralized distribution of powers used in the Constitution of the United States.⁷

Experience had shown that under federal Constitutions, differences had continually arisen about the respective powers of State and central governments. A body to decide such controversies was needed, and in Australia's case that body was the High Court.⁸

As a constitutional court, it was the Court's duty to interpret the Constitution as a whole:

"In construing a Constitution like this it is necessary to have regard to its general provisions as well as to particular sections and to ascertain from its whole purview whether the power [in question] was intended to be withdrawn from the States, and conferred upon the Commonwealth".⁹

What we might today call a "holistic" approach was needed, one that reconciled as well as drawing distinctions:

"The Constitution must be considered as a whole, and so as to give effect, as far as possible, to all its provisions. If two provisions are in apparent conflict, a construction which will reconcile the conflict is to be preferred".¹⁰

When using that approach, a Court had to keep steadily in mind:

"... a fundamental principle applicable to the construction of instruments which purport to call into existence a new State with independent powers Such instruments are not, and never have been, drawn on the same lines as, for instance, the *Merchant Shipping Acts*,

which describe in every detail the powers and authorities to be exercised by every person dealt with by the Statutes”.

The Constitution unavoidably deals in general language, as it would be impracticable, in an instrument intended to endure for a long time, to declare the means whereby those powers would be carried into execution.¹¹ Further, certain things are taken for granted, such as the Constitutions and history of other federations and of the Commonwealth of Australia itself:

“If it is to be suggested that the Constitution is to be construed merely by the aid of a dictionary, as by an astral intelligence, and as a mere decree of the Imperial Parliament without reference to history, we answer that that argument, if relevant, is negated by the Preamble to the Act itself, [which declares that] the Constitution has been framed and agreed to by the people of the Colonies mentioned who ... had practically unlimited powers of self-government through their legislatures. How, then, can the facts known by all to be present to the minds of the parties be left out of consideration?”¹²

The whole instrument had to be construed in accordance with the recognized rules of construction for statutes and other written instruments, including those directed to ascertaining the intention of the legislature.¹³

What the people had agreed to when they adopted the Constitution, the Court said, was essentially the following:

- “(1) They rejected the Canadian [centralist] scheme:
- (2) They agreed to adopt, so far as regards the distribution of functions and powers, the scheme of the American Constitution, and in particular:
 - (a) To confer upon the Commonwealth Parliament plenary power to make laws for the peace, order, and good government of the Commonwealth with respect to the matters enumerated in sec. 51 of the Constitution, thus adopting the analogy of sec. 8 of Article 1 of the United States Constitution
 - (b) To allow the States to retain their original authority except so far as it was taken from them. This was expressed in sec. 107 of the Constitution, which is as follows:

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

For the purposes of comparison we again quote at length the 10th Amendment of the United States Constitution:

‘The powers not delegated to the United States by the Constitution, nor prohibited by it to the States, are reserved to the States respectively, or to the people’.

In the case of *D’Emden v. Pedder*, this Court referred to these respective provisions as ‘indistinguishable in substance, though varied in form’, and in *Deakin v. Webb* as ‘language not verbally identical, but synonymous’. To any one familiar with the subject the aptness of both expressions will be apparent.

Finally:

- (c) The ‘people’ agreed (sec. 71) that the judicial power of the Commonwealth should be vested in a Federal Supreme Court to be called the High Court of Australia, ...”¹⁴

This contextual approach to constitutional interpretation fits perfectly with modern views on purposive construction and, if it had survived, would in time have generated a balanced and stable body of federal constitutional doctrine.

Emerging concepts. By 1920 two guiding concepts had already emerged from the Court's perspective on the Constitution as a whole. One was the reciprocal immunity of instrumentalities doctrine, under which the Commonwealth could not subject the States to Commonwealth law, nor could the States subject the Commonwealth to State law. In developing this doctrine the Court relied on a number of United States cases, notably *McCulloch v. Maryland*¹⁵ and *Texas v. White*, with its ringing declaration that "The Constitution in all its provisions, looks to an indestructible Union, composed of indestructible States".¹⁶

The other was the doctrine of implied prohibitions, or State "reserved powers". This principle first emerged in *Peterswald*, from which is taken the passage quoted earlier in which the Court explains that regard must be had to the Constitution's general provisions as well as its particular sections. In *R. v. Barger* the Court took the idea further, declaring that the Constitution's scheme was to confer definite powers on the Commonwealth "and to reserve to the States, whose powers before the establishment of the Commonwealth were plenary, all powers not expressly conferred upon the Commonwealth".¹⁷ Specific reliance was placed on s.107, and on the effect of the almost identical U.S. Tenth Amendment (both provisions are set out in full above).

Similarly, in the *Union Label Case*, the Court held that, while s.51(i) gives the Commonwealth legislative power over interstate trade, control over intrastate trade was reserved to the States by s.107, as no clear words to the contrary appeared.¹⁸ The same result was reached in *Huddart Parker & Co v. Moorehead*, again with specific reference to s.107.¹⁹ The result of this doctrine was that Commonwealth powers were in general construed relatively narrowly (at least by subsequent standards), so as not to cover "the private or internal affairs of the States"²⁰ unless clear language to the contrary appeared.

At this point one should note an odd, but common and important, misconception about reserved powers. The two doctrines mentioned are usually described as being based on implications from the Constitution rather than on express provisions, following *McCulloch v. Maryland*.²¹ That is true enough of the immunity of instrumentalities, but much less so of reserved powers, which was mainly based on s.107. Reserved powers were discussed in *McCulloch* but, there again, the concept was seen as flowing from the Tenth Amendment.²² The reserved powers approach was not primarily an exercise in finding implications, but a normal piece of judicial construction based on the standard principle that written instruments (not least Constitutions) are to be construed as a whole, the general provisions along with the specific.

The doctrine as far as it had developed was not entirely satisfactory, because it presupposed an attempt to create a list of powers that were meant to remain with the States, on the basis of clues in s.51 and elsewhere. But by 1920 the reserved powers doctrine had not yet been comprehensively enunciated.²³ With suitable modifications it could have been developed into an even-handed contextualist approach, guided by the roles for the Commonwealth and the States that the Constitution plainly contemplated.²⁴ In that approach, s.107 would properly have played a key part as expressing an intention that the seven partners in the Federation would be in a relationship of approximate sovereign equality within their own spheres.

The reserved powers approach has been called unsupportable because s.107 does not, unlike the Tenth Amendment, use the word "reserved".²⁵ That is just an insubstantial matter of labelling. As s.107 says State powers "shall ... continue", the Court could just as easily have called it the "continuing powers" approach. If anything, s.107 is more forcefully expressed, as it saves "every" power and excepts only those powers "exclusively" vested in the Commonwealth, words of emphasis that do not appear in the American model. Chief Justice Marshall in *McCulloch v. Maryland* pointed out that the word "*expressly* [delegated to the central government]" used in the 1781 Articles of Confederation was dropped from the Constitution, probably deliberately.²⁶

Griffith remarked on this in *D'Emden v. Pedder*, pointing out that s.107 was more definite than the Tenth Amendment.²⁷

The Engineers Decision

Sources and impact

The eclipse of s.107. The actual decision in *Engineers*, delivered by a High Court that by then had different membership, was that federal industrial law could bind State government enterprises. In a joint statement of reasons authored by Justice Isaacs, the Court overturned the implied immunity of instrumentalities doctrine, though it could have reached the same result by simply holding that a business operated by the State was not a function of government, and that the doctrine therefore did not apply to it. But in a brief passage that was unnecessary for the decision and therefore not strictly authoritative, the majority went further and sidelined the reserved powers doctrine, and s.107 with it. They simply asserted that s.107 did not support a general reserved powers implication. Despite their failure to elaborate on the point, their proposition about s.107, which was mainly bluff and bluster, became instant orthodoxy that has never been questioned.

The short passage in question consists mainly of a paraphrase of s.107 which, though literally correct, gives it quite a different, indeed the opposite, ring from that which it has in the original. It seems to suggest that the section is mainly about continuing State powers that are exclusive or are protected by express reservations, when it is actually about powers that are not exclusively granted to the Commonwealth. And the overheated rhetoric about “fundamental and fatal error” is pretty obviously meant to discourage critical analysis of the Court’s reasons on this point – no lawyer likes to risk looking a fool:

“Sec 107 continues the previously existing powers of every State Parliament to legislate with respect to (1) State exclusive powers and (2) State powers which are concurrent with Commonwealth powers. But it is a fundamental and fatal error to read sec 107 as reserving any power from the Commonwealth that falls fairly within the explicit terms of an express grant in sec 51, as that grant is reasonably construed, unless that reservation is as explicitly stated”.²⁸

“This last sentence”, writes Dr Colin Howard, “is the crux of the *Engineers’ Case* and summarizes its whole importance. After nearly twenty years’ experience the ruling criterion for the construction of the Constitution was rejected and a new one put in its place”. Although the reserved powers approach has never been formally overruled, “[T]he formulation in the *Engineers’ Case* remains the guiding principle to the present time”.²⁹ In fact, the *obiter dicta* about reserved powers has proved more durable than the holding against immunity of instrumentalities, for that doctrine was later revived and still survives, in a lop-sidedly pro-Commonwealth form.³⁰

Engineers’ inordinate impact. The impact of the case was of course far greater than might appear from the decision, or even from the quite heavily qualified *dicta* about s.107 (“ ... falls *fairly* within the *explicit* terms of an *express* grant, as that grant is *reasonably* construed ...”). It lay in the radically changed approach to interpretation that came to be known as “literalism”, which involved construing the Constitution as if it were nothing more than a British statute, to be interpreted by reference to its explicit terms and without reference to history, to implications from federalism, or even those terms’ own context in the Constitution itself. As RTE Latham later wrote:

“It cut off Australian law from American precedents, a copious source of thoroughly relevant learning, in favour of the crabbed English rules of statutory interpretation, which are one of the sorriest features of English law, and are ... particularly unsuited to interpretation of a rigid Constitution”.³¹

Even that understates the case’s effect, because the “crabbed English rules” did not require

courts to ignore context, structure or history. The 1875 edition of Maxwell's standard work *On the Interpretation of Statutes*³² opened by stating that language is rarely free from ambiguity, and that the words had to be considered in their context in the statute, their history, and general principles.

Further, while the Privy Council had held that Canada's *Constitution Act* 1867 (then called the *British North America Act*) was to be interpreted like any other statute,³³ that did not prevent the Supreme Court or (until 1949) the Privy Council from construing the Act to provide for a balanced, decentralized, co-operative federal system rather than the quasi-colonial structure the High Court has imposed on Australia. That was despite the fact that Canada's Constitution was on its face of a centralist design,³⁴ while Australia's was plainly intended to be truly federal. Indeed, for the first 20 years of the Commonwealth, all the High Court Justices claimed to be applying the ordinary rules of interpretation, as Professor Leslie Zines has pointed out, and Griffith had repeatedly enunciated all the interpretative principles mentioned in *Engineers*.³⁵

The rules of statutory interpretation do not, moreover, give a legal basis for introducing methods borrowed from probate law as a way of centralizing political power, as when Chief Justice Barwick wrote that Commonwealth power:

“...will be determined by construing the words of the Constitution by which legislative power is given to the Commonwealth irrespective of what effect the construction may have upon the residue of power which the States may enjoy”.³⁶

This formulation originated with Justice Higgins (who was with the majority in *Engineers*):

“We must find what the Commonwealth powers are before we can say what the State powers are. The Federal Parliament has certain specific gifts; the States have the residue”.³⁷

The specific-grant-then-residue approach belongs in the interpretation of wills, not Constitutions. A similarly unhelpful borrowing was Justice Victor Windeyer's analogy from the law of merger in leases and mortgages. The Constitution sprang from an agreement or compact, he said, “[B]ut agreement became merged in law”.³⁸

Professor Geoffrey Sawer showed how misleading it was to compare the States to residuary legatees. To find that there is nothing left for a residuary legatee after specific bequests have been distributed is by no means absurd, he argued, so far as a testator's intention is concerned. In any case, it is impossible, in light of a residuary clause, to read down a gift of “my house” or “my piano”. It is, however, unbelievable, having regard to the attention given to the States in the Constitution, that they were (with their Parliaments, Governors and the express limitations of their powers), to be left as impotent governmental ornaments with plenty of glory and no power.³⁹

Nor do crabbed English rules explain how literalism came to stand for a permanent pro-Commonwealth bias. For in interpreting Commonwealth powers, their words were not only to be given their literal meaning, but also the *widest* literal meaning that the words could possibly bear.⁴⁰ *Engineers* signalled the start of a long-term trend of High Court decisions centralizing political power in Canberra (sometimes more than the federal government itself wished),⁴¹ and which continues at the present day.

Literalism as such cannot account for most of this trend, for an objective reading of the Commonwealth's legislative powers shows that they are expressed in cautious words, inconsistent with any intention to create an all-powerful national authority – and, after all, seeking the intention of the legislature in the words used is the principle behind literalist technique.⁴² The powers are strictly defined, and wherever the Founders thought the Commonwealth's powers might infringe those of the States, they inserted express limits, as for example in the powers related to banking, insurance, corporations, fisheries and industrial relations.⁴³

Stephen Gageler SC has pointed out that strict literalist rules of construction would be more likely to dictate a narrow reading of Commonwealth powers than a wide one. Those rules do not, he adds, explain the rejection of the reserved powers approach at all, as s.51 is expressed to be

“subject to this Constitution”, while s.107 is not so qualified.⁴⁴ So consistent and far-reaching is the post-*Engineers* centralizing trend that it can only be explained as reflecting a conscious centralist agenda on the part of a majority (often a bare majority) of the Justices.

Varieties of centralist ideology. This centralist orientation seems to come from several sources. The first could be broadly described as Marxian, incorporating Marx’s hostility to rigid Constitutions and his belief in large-scale central government control of the economy, together with Lenin’s commitment to élite rule, his disdain for the “false consciousness” of the benighted masses, and his maxim that truth is anything that advances the cause. The anti-federalist writings of the Communist academic Harold Laski also proved influential with readers in Britain and the then Empire.

While only a minute proportion of Australians were ever certifiably Marxist, and none of those sat on the High Court, the Marxist world-view (incorporating also Engels’s hostility to family and property) had great influence in Australian intellectual circles.⁴⁵ Together with a mishmash of Darwin, Freud, Rousseau and Foucault, it still forms the basic architecture of Australian academic thinking in the humanities and social sciences field. All lawyers are exposed to it via the education system and the official media, and one can see its influence on judges such as Evatt and Murphy. Chief Justice Mason’s unsupported assumptions about the allegedly greater efficiency of centralized government also reflect this cast of mind.⁴⁶

More important than Marx, however, is the work of AV Dicey, Vinerian Professor of Law at Oxford in the late 19th and early 20th Centuries, who taught that the legislative power of the British Parliament was absolute, unlimited by any concepts of human rights, freedom or democracy. At the same time, Dicey was obsessively opposed to Irish home rule, and this made him a violent opponent of federalism, which had been advocated in the United Kingdom as a solution to Irish and Scottish nationalism. His book *The Law of the Constitution*,⁴⁷ which made constitutional law seem simple and easy to teach, was seized upon by academics and was a standard text until the 1960s. His anti-federalist message was taught to generations of Australian law students with no pro-federalist material to balance it. Aided by the general falling back onto British institutions caused by World War I Empire propaganda, it led to Britain’s unitary, omnipotent, effectively unicameral Parliament, with no checks or balances, being presented as the ideal form of government.

While Dicey’s doctrine of parliamentary omnipotence could have no application to a legislature of limited and enumerated powers⁴⁸ such as the federal Parliament, it undoubtedly provided impetus for the principle that Commonwealth powers were to be read as broadly as possible. Its corresponding antipathy towards any limits on Parliament’s powers resulted in the reading down of constitutionally protected rights such as those in ss 41, 80, 116 and 117.⁴⁹ Chief Justice Barwick was in some ways typical of the Diceyan centralist school, though later in life he was shocked into repentance by the *Tasmanian Dams Case*.⁵⁰

The third source of centralist ideology is cosmopolitanism or globalism, which has been the major intellectual force behind the High Court’s extremist interpretation of the external affairs power. Obviously, greater international co-operation in appropriate situations must be in the public interest. But even the best of principles can be loved too much. Sir Harry Gibbs has observed with characteristic wisdom that:

“Unfortunately, it is a characteristic of many special interest groups, in Australia and elsewhere, that they tend to exaggerate a case which is not without some merit, and make claims which are distinguished neither by fairness nor moderation”.⁵¹

So it is with globalism, which has crossed the line separating ideas from ideologies. “Internationalism, or what I have elsewhere called ‘Olympianism’”, writes Professor Kenneth Minogue, “is one of the most powerful salvationist movements of our time. Internationality is for many of the educated the last best hope of a better world”.⁵² With Marxism and Diceyism in

decline, cosmopolitanism has proved a lifesaver for centralists, providing an opportunity not only for further concentration of domestic political power, but also for a higher level of centralization of power in international bodies such as the United Nations. Writes the former federal Cabinet Minister Peter Walsh:

“Later generations of centralists would go much further than Whitlam. *He* advocated national centralism, using UN Conventions to transfer power from the States to the Commonwealth. *They* want global centralism, using UN Conventions to transfer power from national governments to international bureaucracies elected by no-one and responsible to no-one”.⁵³

Sir Anthony Mason, with some misgivings, concurs. Now that the States have lost much of their role, he warns, Canberra in turn may have to yield power to international bodies.⁵⁴

Having helped the High Court to strip away one level of self-government, the cosmopolitans are now using the Court to transfer power to global institutions which can never, by any conceivable means, be made democratic. Even assuming one vote per adult and no ballot fraud, Australians in a system of global government would be permanently outvoted by billions of people who care nothing for our democracy, our culture or our national survival.

The techniques for this surreptitious and incremental power transfer are starkly demonstrated by the European Union. “Here broad general principles can be agreed by officials on their abstract merits, and then imposed on member states, who often find that the small print of implementation contains unexpected implications”, writes Professor Minogue. “Governments are then able to say, quite correctly, that their hands are tied. In many cases, rulers and their civil servants are happily conspiring in a process which removes power from the people”,⁵⁵ transferring it to international committees that are “remote from the discipline of low-level democratic repudiation”.⁵⁶

In this way the globalist project portends the centralization of power in the hands of smaller and smaller groups of people who are less and less democratically accountable. It is an élite-driven process. There is no mass support anywhere in the world for the loss of self-government, and in fact it is leading to growing alienation and feelings of powerlessness.⁵⁷ In order to move it forward, national governments have to claim there is no alternative to it, both when giving up national sovereignty and when centralizing power at the national level.⁵⁸ Cosmopolitanism is the strongest ideological force behind centralism in Australia today.

Contemporary and later criticism

The *Engineers’ Case* decision provoked widespread public opposition at the time, like the *Tasmanian Dams Case* 63 years later, and for the same reason – because it expanded the powers of the Commonwealth at the expense of the States.⁵⁹ World War I had led to a significant increase in the exercise of Commonwealth power, and the post-War period had seen popular resentment about its continued intrusion.⁶⁰

Owen Dixon disliked *Engineers*,⁶¹ and from the 1930s to the 1950s did much to wind back the approach that it stood for, especially in relation to immunity of instrumentalities, not because he was himself a federalist (he was not), but because he believed the Constitution should be read logically as a federalist document.⁶² To the extent that *Engineers* was taken to have curtailed the use of implications – especially implications from the Constitution’s federalist structure and language – he scorned it:

“Since the *Engineers’ Case* a notion seems to have gained currency that in interpreting the Constitution no implications can be made. Such a method of construction would defeat the intention of any instrument, but of all instruments a written Constitution seems the last to which it could be applied”.⁶³

Geoffrey Sawer called *Engineers* “one of the worst written and organized [judgments] in Australian judicial history”,⁶⁴ and other scholars have criticized its *non sequiturs*, irrelevancies and vitriolic, *ad hominem* tone.⁶⁵

In a paper presented at the 1997 conference of this Society, Professor Greg Craven restated the main problems with the *Engineers* approach. Its greatest deficiency, he began, is lack of any articulated theoretical justification. No reason is given for why it should be seen as so intellectually compelling. Next, it has been used for the purpose of defeating precisely that intent to which the words are supposedly the safest guide, especially through the practice of selecting, from a range of possible meanings of a grant of Commonwealth power, the widest one that the words are capable of bearing. Its ahistorical outlook, which has been used to reverse the Constitution’s intended operation, is at odds with the modern purposive approach to legal interpretation. As a practical matter, it is unable to deal with provisions that are ambiguous, or that can only be understood in light of the circumstances surrounding their inception, such as “duties of customs and of excise” in s.90. It cannot manage the concept of implications, which are increasingly understood as central to eliciting the meaning of potentially indeterminate language. Its claims to apolitical objectivity have lost whatever credibility they once had and, finally, literalism runs athwart the contemporary practice of admitting into the process of legal interpretation perspectives from disciplines other than law, such as economics, history and political science.⁶⁶

The Seven Pillars of *Engineers* Literalism

All those criticisms, and more, are well deserved. But the bankruptcy of the *Engineers* approach stands out most starkly if one considers how it has been applied in practice. The result is a tableau of what might be called tactical myopia – “myopia” because of the systematic avoidance of any insights into intention, context or history; “tactical” because it is plainly serving ends other than the rendering of impartial justice according to law, and because different legal tests are used according to which one will best serve those ends.

In the constitutional understatement of the 20th Century, Chief Justice Mason wrote that:

“[T]he operation of a Constitution may vary according to the technique of interpretation that a court adopts”.⁶⁷

As Professor Zines observes, the interpretative approach of the Court’s members varies depending on the issue involved.⁶⁸ From the key cases on federalism issues (that is, those dealing with the division of powers between Commonwealth and States) since 1920, and more especially since the 1970s, there emerges a pattern of judicial techniques and practices constituting a set of instructions for phasing out Australia’s federal structure. It can be summarized as seven principal canons or tenets. There are exceptions to the application of all these canons, but they are of minor importance. The key cases that have substantially altered the structure of Australian government are the ones that matter, and in all of those these tenets appear, though most have been abandoned in other areas of constitutional interpretation such as implied, or newly revived, human rights guarantees. They are:

1. Focus on “ordinary meaning” (if it is the broadest), disregard substance. The starting-point for the post-1920 literalist approach was the passage in *Engineers* stating that the basic rule for interpreting the Constitution was the “Golden Rule” that its express words should be given their “natural” or “ordinary” meaning.⁶⁹ Unfortunately, the Court could not even get that much right, for the “Golden Rule” is about *altering* the natural meaning of legislation where it is apparent that an error has been made and an absurdity would otherwise result.⁷⁰ Still, read in context, and without tactical myopia, the passage intends to invoke the “literal” or “plain meaning” rule.⁷¹

Yet this commitment to literalism is often contingent on the production of the desired result, namely, the expansion of the powers of the Commonwealth.⁷² The ordinary sense of a

word will be adopted if it will have that result, as with the phrase “industrial disputes” in s.51 (xxxv).⁷³ But an interpretation at odds with the ordinary meaning was adopted to make the power over individual intercommunication given by s.51 (v) (“telegraphic, telephonic, and other like services”) cover not only mass radio and television broadcasting, but also the antecedent preparation of radio and TV programs and a wide range of conditions imposed on broadcast licensees.⁷⁴ Sometimes the Court will prefer to consider the “high object” of a power,⁷⁵ or the results of empirical study,⁷⁶ or alleged practical or functional considerations where they favour the Commonwealth.⁷⁷ Thus, a literal, ordinary, arcane, technical or otherwise convenient meaning can be used as desired but, as we have seen, it must be the widest (i.e., most centralist) meaning that the words can possibly bear.⁷⁸

This broad meaning will be supplemented by the expansionary effects of the incidental power – not only the express power in s.51 (xxxix), but also an implied incidental power applying “from the necessity of the case”.⁷⁹ While no doubt legitimate, that additional power sits uneasily with the rejection of federalist implications, and specifically those founded on “necessity”, in *Engineers*.

Just as literalism has been used to legitimate one-sided interpretations of constitutional language, it has also underpinned a tendentious process of characterizing a challenged federal Act. Where the Act has a number of different purposes or subject matters, only one of them need be supported by a grant of central power for the whole Act to be upheld.⁸⁰ Indeed, even if all the different elements add up to “an obvious or even primary characterisation” that is beyond Commonwealth power, it will still be upheld.⁸¹

The High Court’s mechanistic style contrasts sharply with that of Canada’s Supreme Court (and, before 1949, the Privy Council) when interpreting Canada’s federal Constitution. The Supreme Court’s method is to uncover the “pith and substance” of a challenged law. If the law’s legal operation, viewed in light of its practical effects, reveals a predominant purpose outside Parliament’s powers, it will be characterized as unconstitutional, whatever the verbal garb in which it has been clothed. The Court’s process is finding out, “What does the law do, and why?”.⁸²

2. Disregard Constitutional Context. There is no more basic rule of legal interpretation than the one requiring that a document be read as a whole.⁸³ It is the legal version of the axiom common to all rational discourse that one must not take statements out of context. Professor Dennis Pearce puts it this way:

“The starting point to the understanding of any document is that it must be read in its entirety. A writer will not expect his audience to read only selected passages and he will therefore *make different passages dependent upon one another*. The courts have frequently said that the same approach is applicable to the interpretation of an Act: ‘... every passage in a document must be read, not as if it were entirely divorced from its context, but as part of the whole instrument’ ”.⁸⁴ (emphasis added).

Ironically, the words quoted by Professor Pearce were authored by Justice Isaacs, which shows that Isaacs knew exactly what he was doing in *Engineers* when he discouraged the use of context in construing the Constitution.

But, incredibly, the effect of the Case was to discourage reference to context, even though the Court’s reasons themselves did countenance reference to context, at least in cases of ambiguity. Nevertheless, the Case was taken to mean that the only limits on Commonwealth power were those that were explicit. So each power in a series of Commonwealth powers is read independently of all the others.⁸⁵ Restrictions in one power can be avoided by invoking a power on a different subject, which when given its widest possible meaning, as the Court requires, can be made to cover the subject matter of the other power. “Each power, then, pushes to its full parameters”, Professor Patrick Lane explains, “whatever a deliberate listing of powers implies, or an overall context suggests”.⁸⁶

In this way the power over certain corporations (s.51 (xx)) has been used to escape the limitation on the power over trade and commerce to interstate trade only,⁸⁷ and the industrial relations power's restriction to interstate disputes.⁸⁸ The restrictions in the matrimonial causes power have been evaded by relying on the marriage power in s.51 (xxi),⁸⁹ and so on. It is only when the limitation is expressed as an extraction, as in "(xiii) Banking, other than State banking", rather than as a qualification, as in "(i) Trade and commerce ... among the States", that it will be considered relevant to the scope of other powers.⁹⁰

Again, the Court takes no account of the fact that a broad reading of a power will make another enumerated power redundant or meaningless,⁹¹ even though doing so must clearly defeat the intention of the framers. Justice Dawson observed that the way in which the marriage power has swallowed up the matrimonial causes power conflicts with the accepted norms of statutory interpretation.⁹² The starkest example is, of course, the Court's interpretation of the external affairs power in *Tasmanian Dams* and later cases. That power is now subject to no significant limits, leading Sir Harry Gibbs to observe that it was as if s.51 (xxix) had been amended to delete the words "external affairs" and substitute "anything".⁹³

In his *Tasmanian Dams* dissent, Justice Dawson pointed out that giving the words granting Commonwealth powers:

"... the widest interpretation which the language bestowing them will bear, without regard to the whole of the document in which they appear and the nature of the compact which it contains, is a doctrine which finds no support in [*Engineers*] and is unprecedented as a legitimate method of construction of any instrument, let alone a Constitution".⁹⁴

To a similar effect is the Chief Justice Latham's warning in the *Bank Case* that:

"... no single power should be construed in such a way as to give to the Commonwealth Parliament a universal power of legislation which would render absurd the assignment of particular carefully defined powers to that Parliament. Each provision of the Constitution should be regarded, not as operating independently, but as intended to be construed and applied in the light of other provisions of the Constitution".⁹⁵

Yet that is not what is now done. Each power is interpreted as broadly as possible, as if it stood alone, and the enumeration of powers has indeed been rendered absurd.

3. Disregard the Constitution's federalist implications. *Engineers'* stress on the express words of the Constitution, which discouraged the reference to context and had the effect of downplaying the significance of other possible meanings,⁹⁶ also deterred the drawing of implications from the federal nature of the Constitution, as being "formed on a vague, individual conception of the spirit of the compact".⁹⁷

This legacy of the case is if anything stronger than ever. Submissions based on federal balance were dismissed in *Tasmanian Dams* as mere "ritual invocations" or political rhetoric,⁹⁸ and were again rejected in the *Incorporation Case*.⁹⁹ Any argument based on federalism confronts *Engineers*, and the language used by the majority in *Tasmanian Dams* shows how it lends itself to a tactic of howling down the concept of balance rather than rationally debating it. Even some *Engineers* supporters believe it is so one-sided on this point as to be vulnerable to a more comprehensive approach.¹⁰⁰ The literalist approach has travelled so far in its anti-federalist enterprise that, according to Justice Dawson, it has stood the actual reasoning in *Engineers* on its head: instead of the pre-1920 preconceptions favouring federalism, there is now a fixed preconception favouring the widest possible reading of Commonwealth powers, regardless of context.¹⁰¹

A plainly federal polity. The federal orientation of the Constitution could hardly be clearer. Indeed, Professor Campbell Sharman argues that there is no need to find an implied theory of federalism when there is one expressed in the Constitution.¹⁰² A hard point to dispute when, as

Professor Lane points out, a federal polity appears at the very outset of the Constitution in the Preamble, and in clause III's introduction of "an indissoluble and Federal Commonwealth". From there, "[t]he federal concept appears at least 28 times throughout the document, for example ss 1, 15, 26, 51 (xiii), (xiv), (xxxiii), (xxxiv), (xxxvii), 62-64, 71, 74, 77, 79, 94, 106-109, 123, 124, 128".¹⁰³ The text insists on "federal" in key sections, such as s.1 on the "Federal" Parliament, s.62 on the "Federal" Executive Council and s.71 on the "Federal Supreme Court", the High Court. The Senate is meant to be the States' House (s.7), and the House of Representatives is elected on a State-by-State basis, with members apportioned on that basis: ss 24, 29.¹⁰⁴ Justice Victor Windeyer thought the idea went beyond mere implication, saying that:

"... the nature of federalism is made express for us ... It is on the combined effect of ss 107, 108 and 109 [also s.106] that ... the nature of Australian federalism firmly rests".¹⁰⁵

Construing the Constitution in light of its establishment of a federal nation is not the same as reviving the doctrine of reserved powers. The problem with that doctrine, as we have seen, is that it looks to a defined content of State legislative powers preserved by s.107. A modern balanced approach, as Professor Darrell Lumb explained, would not attempt to define a list of exclusive State powers. It would simply mean that grants of Commonwealth power would be read in conjunction with all other power-recognizing or power-conferring sections such as 106 and 107.¹⁰⁶

In the early 1980s the Gibbs High Court was starting to move in that direction in *Gazzo and Coldham*,¹⁰⁷ but its progress was abruptly stopped by the rise of the Murphy-Mason school of thought, which became the majority in *Tasmanian Dams*. The *Dams* minority maintained, despite Justice Murphy's insistence to the contrary, that they were not seeking to invoke reserved powers. They were right, according to Professor Zines:

"Surely you cannot say that the Commonwealth has power over everything and still say that it is a federal state".¹⁰⁸

Implications without effect. Yet even though *Engineers* itself drew upon implications from the system of responsible government and the then supposed indivisibility of the Crown, there is, as Professor Cheryl Saunders points out:

"... a curious reluctance to accept the use of implications from federalism, even though that is at least as obvious a fundamental feature of the Constitution as responsible government. The existence of certain implications based on federalism is accepted, although they are seldom applied with any effect Any suggestion that they might be expanded or developed to meet the circumstances of the current case seems to be considered rather unsavoury".¹⁰⁹

On the other hand, where there is no constitutional power to support a particular law, the Court may be prepared to imply one in the Commonwealth's favour, as in the case of the implied "nationhood" power.¹¹⁰

The observation that federalist implications are actually accepted, but are seldom applied with any effect, is a telling one. For the Court does recognize certain implied limits to the expansion of Commonwealth power at the expense of the federal division of power, but they are either easily evaded or so extreme as to be useless.¹¹¹ These exceptions to *Engineers* literalism are:¹¹²

1. The Commonwealth cannot legislate so as to place special burdens or disabilities on State governments.¹¹³
2. The States are immune from Commonwealth legislation, even if non-discriminatory, that would destroy or curtail the continued existence of the States or their capacity to function as governments.¹¹⁴

The first exception has not proved to be adequate protection against discriminatory federal laws. The Court upheld legislation aimed specifically at Tasmania in the *Lemonthyme Forest*

Case.¹¹⁵ It likewise approved the *Native Title Act* in *NTA* despite its disproportionate impact on Western Australia.¹¹⁶

The second exception is equally ineffective, as no individual Commonwealth Act that is politically imaginable is likely to satisfy the apocalyptic test on which the exception depends. Thus the Court has allowed the Commonwealth to regulate the wages and conditions of almost all State public servants, to revolutionize State land law and to hijack the natural resources industry.¹¹⁷ It is hardly an exception at all, as it countenances a step-by-step concentration of power, a kind of “salami centralism”.

A more recent suggested constraint on the growth of central power is the concept of proportionality, the idea that an enactment must be reasonably appropriate and adapted to implementing a head of Commonwealth power. Justice Deane developed a test of proportionality in *Lemonthyme*¹¹⁸ for use in connexion with the three “purposive” powers – defence, external affairs and the s.51 (xxxix) incidental power. Two Justices have extended it to cover the implied incidental power.¹¹⁹

The concept of proportionality rests on considerations of individual freedom rather than on the division of powers. Even so, it departs from the *Engineers* injunction that the possibility that a power may be abused is no concern of the Courts.¹²⁰ It can therefore be regarded as a partial revival of the reserved powers idea. But the scope of Commonwealth powers under literalism is so broad and ambulatory, Professor Michael Crommelin observes:

“... as to overwhelm any constraints upon choice of means or incidental reach. For example, the capacity of the Commonwealth to extend its powers in the wake of internationalisation is undiminished by any requirement of proportionality”.¹²¹

Federalist principles have on occasion received at least tacit recognition in recent years, as in *Davis* and *Dingjan*.¹²² But the point is that those were cases of little importance. It is as if these cases, and the other exceptions, are tokens calculated to create an illusion of even-handedness, while the cases that really matter, such as *Tasmanian Dams* and *NTA*, all go Canberra’s way.

The fate of guarantees. As was said earlier, *Engineers* proved fatal for the express guarantees of human rights in the Constitution, which might otherwise have restrained the Commonwealth legislative machine to some degree.¹²³ As late as 1981, Justice Wilson held that while a grant of power will be construed broadly, a restriction on power (in this case s.116, the free exercise of religion) should not.¹²⁴ Since then, the *Free Speech Cases*,¹²⁵ the other implied rights cases, and the reinterpretation of s.117 in *Street*,¹²⁶ have reversed that trend to some extent, but they have been offset by major cutbacks in the scope of other, express restrictions on Commonwealth power. Thus, *Cole v. Whitfield*¹²⁷ reinterpreted s.92 in such a way as to enable the Commonwealth to burden, or indeed prohibit, interstate trade as much as it wishes, while a line of cases on s.51 (xxxi) (acquisitions of property to be on just terms) has enabled the Parliament to circumvent what was previously regarded as an important human rights protection.¹²⁸ The Court’s libertarian sweep is also much less in evidence, Dr John Forbes notes, when common law liberties are in issue, such as the privilege against self-incrimination.¹²⁹ One could also add the right of self-defence, and property rights apart from s.51 (xxxi).¹³⁰

At the very least, though, a federalist might argue, *Engineers* itself recognizes that effect must be given to the Constitution’s express provisions safeguarding the States.¹³¹ Alas, no. The High Court has used contrived and artificial reasoning to restrict the scope of s.114, which prohibits federal taxes “on property of any kind belonging to a State”. A reader might think “property of any kind” to be as all-encompassing an expression in this context as one could devise, but the Court has nevertheless upheld a Commonwealth tax on the interest earned by a State’s investments. In so doing it declined to follow Canadian authority that went the other way, and added that, while there were policy reasons to support a broader reading of s.114, “the course

of judicial decisions” in the Court favoured the narrow view, and would be followed despite the conceptual difficulties it presented.¹³² The *First Fringe Benefits Case*¹³³ held valid a tax on cars and houses owned by a State because the impost was not imposed “by reason of” the State’s ownership, but because it made the property available to its employees.

Again, Commonwealth legislation has been allowed to override the protection s.106 gives to the continued operation of State Constitutions.¹³⁴ And of course *Engineers* itself, without offering reasons, virtually emptied s.107 of all meaning.

Pincer movement: s.109. The High Court’s disregard of the Constitution’s overall federalist structure and content resembles diagrammatically a kind of judicial Schlieffen Plan. One arm of the thrust is the maximalist interpretation of Commonwealth powers without regard to their federalist context. The other is the use of s.109 to annihilate whole areas of State legislative power. Together they complete an impressive double-envelopment strategy.

The Griffith High Court’s test for inconsistency under s.109 was that a federal Act made a State law inoperative to the extent that it was impossible for the citizen to obey both. That approach favoured the continued operation of State law and limited the Commonwealth’s power to oust it.¹³⁵ Next, it held that s.109 applied when a federal Act conferred a right while a State Act took it away, or *vice-versa*. Both of these criteria reflected the usual legal meaning of “inconsistency”.

After *Engineers*, however, Isaacs enunciated a sweeping new test of what has come to be called “indirect” inconsistency. If the Commonwealth law evinced a legislative intention to “cover the whole field” of the subject matter,¹³⁶ the State law would be inoperative. This new criterion, which depended solely on intention, opened the way for the broad-brush invalidation of State law even where the Commonwealth law is silent on the particular matters regulated by State law.¹³⁷ It enables the Commonwealth to do indirectly what it cannot do directly, namely, prevent the States from legislating.¹³⁸ It can also amount to a power simply to override a State law, a power the Canadian government nominally has (but which fell into disuse long ago), but which was deliberately withheld from the Commonwealth.

Most inconsistency cases use the “covering the field” test, Professor Zines notes, and the Court finds an intention to exclude State law more readily than is necessary. Further, the Court has not descended:

“... from lofty metaphor to concrete particularity and [spelt] out the way the field of Commonwealth legislation is determined, when an intention to cover that field will be found to exist, and when the State legislation can be found to invade that field”.¹³⁹

All federations need some kind of supremacy clause like s.109. But the sweeping Australian approach is in stark contrast with the Canadian handling of the same problem. “The Canadian paramountcy rule has been shaped so as to save provincial laws wherever possible”, writes Professor CD Gilbert:

“Not only have the Canadians apparently rejected the ‘covering the field’ doctrine, their version of ‘direct clash’ inconsistency is far narrower than the Australian equivalent”.¹⁴⁰

Depending as it does on intention and vague metaphor, the High Court’s s.109 case-law does not use the “literalist” approach at all. It is instead another example of the Court using the most effective weapon it can find for sabotaging the constitutional division of powers, in disregard of the federal polity that the document creates. In that sense, however, it is consistent with the centralist agenda of which *Engineers* is the lasting symbol.

4. Ignore ulterior motives and purposes

Disregarding devious devices. *Engineers* deprecated judicial vigilance against possible abuses of legislative power.¹⁴¹ That, together with its stress on express limitations as the only reason for invalidity,¹⁴² tended to make for a nonchalant attitude to parliamentary purpose. *Engineers* itself

said nothing about the relevance of legislative purpose in the construction of federal legislative powers. It was not until 1931 that the Court began to move towards the position that, if a law operates directly on a subject of power, it is irrelevant that it has little to do with that subject and really seems to be a law with respect to some other subject that is outside Commonwealth power.¹⁴³

Nevertheless, it was *Engineers* that cleared the way for such principles to develop to the full.¹⁴⁴ As long as an Act's connection with a head of power was not "insubstantial, tenuous or distant" (a test that allows the Court a very wide discretion), it would be valid, even if the power had been exercised on extraneous grounds or to achieve non-Commonwealth ends.¹⁴⁵

From the 1970s on, however, the attitude became one of total *laissez-faire*. In 1976 the Court allowed the trade and commerce power to be used to block exports and thereby prevent mining on Queensland territory.¹⁴⁶ In 1993 it went further, and approved two Acts using the taxation power to underpin an elaborate regulatory scheme for employee training which fell outside any of federal Parliament's other powers. It did so even though revenue-raising was plainly secondary to the attainment of another object and one of the two Acts did not mention the raising of revenue as a purpose at all. Yet the Court treated the scheme as a simple tax statute.¹⁴⁷

Disregarding clear ulterior motives to that extent is at odds with general legal principle, especially today when substance rather than form is the overwhelming focus of legal analysis. In the field of administrative law, the High Court has held that using a subordinate legislative or administrative power for a purpose other than that for which it was conferred is a corrupt abuse of power and contrary to law.¹⁴⁸ That principle has never been applied so as to invalidate an Act of a fully-fledged legislature, but it must surely be relevant when a court is required to choose between a broader and a narrower construction of a grant of power when an ulterior motive is plainly operating.

The part is valid, the whole an illusion. A key aspect of the Court's practice of disregarding legislative purpose and motive is its treatment of legislative schemes used by the Commonwealth to by-pass the constitutional division of powers. A common expedient is for federal Parliament to pass two or more Acts which individually might be valid, but which together bring about an unconstitutional result. Consistently with the *Engineers* tradition, the High Court has adopted an atomistic method that splits up the scheme and analyses each part separately, disregarding the purpose of the whole. This process places a premium on form over substance and avoids a realistic assessment of the scheme's constitutional impact.

The atomistic approach has been used in the two most devastatingly anti-federal cases the Court has ever decided: *First Uniform Tax* and *Tasmanian Dams*.

*First Uniform Tax*¹⁴⁹ involved four Commonwealth statutes which together were designed to drive the States out of the income tax field by means of a combination of inducements, penalties and coercion. All four Acts were passed at the same time and were consecutively numbered, but did not expressly refer to one another. The Court found each individual Act valid, and declined to take account of the obviously unconstitutional substance and purpose of the total scheme. The only situation in which the Justices indicated they would depart from the atomistic approach was where the different statutes explicitly referred to or incorporated one another, or where one Act was dependent on another Act which was itself invalid.

This exercise in *Engineers*-style literalism has been a crushing blow to decentralized self-government in Australia. In an age in which the transaction costs of income tax have been falling,¹⁵⁰ the Commonwealth's effective monopoly of this vast source of money and power has enabled Canberra to bribe its way into all areas of State policy via tied grants under s.96. By removing one of the self-limiting features of the federal system, the Commonwealth's income tax

monopoly has undermined the ability of State political communities to express their wishes against the political priorities of central government.¹⁵¹

By the time of the *Tasmanian Dams* case, arguments based on the total effect of a legislative scheme had fallen so far out of fashion that the scheme of Commonwealth statutes and regulations in issue was held valid almost solely on the basis of the individual constitutionality of the separate parts, considered piecemeal. As in *Second Uniform Tax*,¹⁵² a few token provisions were struck down in a vain attempt to create an appearance of impartiality, but with no significant effect on the overall success of the enterprise.

The selective working of the tactical myopia strategy stands in sharp relief when one considers the one significant instance in which the Court has been prepared to look to the total operation of a legislative scheme. At issue was the then national domestic monopoly of the Australian Wheat Board. In *Clark King and Uebergang*,¹⁵³ although the issues were not litigated to a conclusion, the Court was prepared to look at the whole legislative structure of the wheat industry stabilization scheme in determining validity. The crucial difference between these cases and the other schemes mentioned was that this dispute arose under s.92, which before *Cole v. Whitfield* was thought to prohibit the establishment of a national monopoly through the prohibition of interstate trade. The Court was prepared to look at the overall scheme because, in this situation, that would enable it to *uphold* the validity of the Commonwealth-backed scheme and to cut back the operation of a restriction on legislative power.

The “crabbed English rules of statutory interpretation” in no way compel the flight from reality in legislative scheme decisions such as *Uniform Tax* and *Tasmanian Dams*. In one such case in 1940, the Privy Council demurred at the High Court’s refusal to consider related Acts as a scheme, emphasizing that “pith and substance” could not be ascertained without considering the statutes’ overall interaction:

“The separate parts of a machine have little meaning if examined without reference to the function they will discharge in the machine”.¹⁵⁴

Once again, the Canadian cases show a better way. Canada’s judicial tradition of seeking “pith and substance” in constitutional adjudication has generated a non-formalistic doctrine of “schematic effect” to be applied in cases involving legislative schemes. It is not confined by Australian-type rules on conditional dependency and incorporation by reference. This method has commonly been applied to single-legislature schemes, which are inherently more likely than co-operative schemes to represent a devious ploy by a particular legislature to extend its power at the expense of another non-consenting, non-participating jurisdiction.¹⁵⁵ It has proved to be an effective tool in maintaining the constitutional demarcation lines between federal and provincial powers. The atomistic weapon used with such destructive effect in Australia, however, is unsupported by the principles of legal interpretation, and has no place in any intellectually respectable system of constitutional adjudication. That is especially so when it is only applied in favour of the Commonwealth and never against it.

5. Disregard the federalist intentions of the founders and the voters.

The ban on the Convention debates. Until 1988, the High Court had rejected the use of the Convention Debates of the 1890s as an aid to the interpretation of the Constitution. The ban extended to the bills drafted by Inglis Clark and Charles Kingston for the 1891 Convention, but not to the historical facts surrounding Federation. Apart from excluding access to an important source of background material, this had some odd results, including the fact that in construing s.116 the Court could not refer to what the Convention delegates thought it meant, but could indirectly give weight to the opinion of Thomas Jefferson on the meaning of the similar words of the First Amendment.¹⁵⁶

The usual reason given for this rule was that there were no means of knowing whether remarks of a particular speaker commanded the majority's assent. Chief Justice Mason rightly doubted the soundness of that objection:

"The objection is not universally true and, even if it were true, it is a very slender reason One speaker may provide an unexpected insight or explain why a particular draft was not accepted. What is more, the debates are a primary source of material for commentaries by experts which the Court does not hesitate to use as an aid to interpretation".¹⁵⁷

Justice Frank McGrath agrees, pointing out that every section of the Constitution was proposed, considered by special committees, subjected to a drafting committee, and then resubmitted to the whole Convention, where it was debated again and voted upon. Not every section was debated extensively, but many of those that have since given trouble were, sometimes on more than one occasion. The debates can give a clear idea of what members understood to be the meaning and purpose of the various sections, whether they agreed with them or not. The light they can throw on the meaning and purpose of particular provisions does not rely on the opinion of a particular person, nor does it seek some impossible unanimous subjective intention on the part of the framers.¹⁵⁸

Though the ban on using the debates antedated *Engineers*, it was consistent with the blinkered literalist method and was not lifted until the Court began to retreat from literalism in *Cole v. Whitfield*. Most of the Justices in that case still declined to use the debates for the purpose of discovering the subjective intention of the founders, but references to the debates for that purpose have been made since. In the *Incorporation Case* the majority asserted the positive intention of the framers as regards the corporations power,¹⁵⁹ declining to hold that it gave the Commonwealth power to legislate for the actual incorporation of companies. In the *Hindmarsh Island Bridge Case*, Justice Gaudron referred to the meaning of the races power as understood at the constitutional Conventions, and concluded that the view of that power as being confined to the making of "beneficial laws", "cannot be maintained in the face of the constitutional debates".¹⁶⁰

This development is a potentially important encroachment into *Engineers* - style literalism by the "intentionalist" approach to interpretation. Supporters of this method argue that, as the Constitution was democratically adopted, it should be applied in accordance with the intentions of the framers and delegates, especially as literalism itself formally rests on a search for intention.¹⁶¹ The collapse of the ban on the debates has been seen as an important victory for the States,¹⁶² given that the real agenda of the *Engineers* method has been to shift the Constitution as far away as possible from the founders' intended design.

The ban lifted: possible results. Use of the debates as an aid to interpretation would not always favour the federal balance – the majority referred to them in *Ha* when striking down State taxes. But their use would point towards a narrower reading of Commonwealth powers in important areas.

The races power is one example. Professor Michael Coper has suggested that, but for *Engineers*, s.51 (xxvi) in its amended form would not have supported the *Native Title Act* 1993, with its radical impact on the title to land, a matter of State law.¹⁶³ The debates show that the paragraph was meant to deal with what were seen as problems flowing from the entry into Australia of certain ethnic groups that did not seem willing to conform with community laws and *mores*.¹⁶⁴ For example, among single Chinese men, some 90 per cent smoked opium and 80 per cent were addicted to gambling, raising concerns that such habits prevented them from saving their earnings, thereby making them unable to afford to return to their home country.¹⁶⁵

From the debates it also appears that the framers envisaged the existence of the external affairs power in the context of the Commonwealth then having no treaty-making power. That being so, it could not be expanded merely by the *de facto* acquisition of treaty-making powers with

the consent of the British government. The interpretation of s.51 (xxix) by Quick and Garran, both of whom were intimately involved with the federal movement and Conventions, comes closest to reflecting the intentions of the founders. They considered that the power applied to:

“(1) the external representation of the Commonwealth by accredited agents, (2) the conduct of the business and the promotion of the interests of the Commonwealth in outside countries, and (3) the extradition of fugitive offenders from outside countries”.¹⁶⁶

The *Incorporation Case* sparked consideration of how use of the debates might affect the interpretation of other powers, such as s.51 (xxxv), which was worded so as to cover only industrial disputes that could not be settled at the State level, but had been artificially stretched by the use of “paper disputes” and similar fictions. But when confronted in 1997 with a Queensland Government challenge to the shams of ambit claims, and the service of logs of claims on uninvolved employers in other States in order to circumvent the requirement of inter-Stateness, the Brennan Court remained locked in the *Engineers* tradition. In *Attorney-General (Qld) v. Riordan*¹⁶⁷ the Justices fell back on precedent to avoid disturbing the long-standing abuses that underlie federal industrial law.

Inverting “community values”. It is mainly since the 1970s that the High Court has brought about the most sweeping transfers of law-making power from the States to the Commonwealth. During that period the Court has also begun to claim the support of public opinion for its program of constitutional change. Chief Justice Mason wrote that the Court must act on “accepted community values”,¹⁶⁸ while Chief Justice Brennan in *Mabo* claimed to be carrying out “the contemporary values of the Australian people”.¹⁶⁹

Now the most accurate way of ascertaining community values must be by a referendum held after full and public debate, and after each voter has been sent a summary of the proposal and of the arguments for both sides – in other words, the procedure for deciding on a proposed alteration of the Constitution under s.128.

Yet that is not at all what their Honours had in mind. If it were, we would expect to see them giving great weight to the people’s rejection of all but two of the Commonwealth’s attempts to increase the powers of the federal legislature, executive or judiciary, almost all of which were defeated by an overall majority of the voters, not by s.128’s special majority clause. They would, for example, be loth to read the industrial relations or corporations powers too widely, given that the people had rejected Commonwealth attempts to broaden them five times each.

We find, on the contrary, an élitist, paternalist attitude to the community and to its values as expressed in referendums.¹⁷⁰ Chief Justice Mason rejects the criticisms of the Court’s propensity to alter the Constitution as it sees fit, lamenting that the critics overlook the fact that amendment is “so exceptional, so cumbersome and so inconvenient that governments cannot set it in motion regularly to ensure that the Constitution is regularly updated”. Besides, “the electorate has been notoriously unsympathetic to the expansion of federal powers”. (“Inconvenient” for whom? And why “notoriously”, as if the people’s “unsympathetic” preference for self-government bordered on criminality?). The Court will therefore tend, his Honour continues, apparently unaware of the contradiction, to read the Constitution in light of “the conditions, circumstances *and values* of our own time”.¹⁷¹ And the complexity of modern life and the like, he concludes without offering any evidence, require more centralized power.

Again, Mason CJ asks us to take his unsupported word for the alleged blessings of a radically expanded external affairs power. It may cause “a substantial disturbance of the balance of powers as distributed by the Constitution”, but “it is a necessary disturbance, one essential to Australia’s participation in world affairs”.¹⁷² Yet Canada, which participates in world affairs more prominently than Australia does, lacks any such power, as Justice Wilson said in his dissent in the same case.¹⁷³

Chief Justice Mason’s implicit belief that the voters’ preferences reflect the conditions of a

past age is echoed by other critics of the people's constitutional "conservatism". That is hardly a criticism, though, if one believes in democracy. But in any case, a preference for decentralized self-government is not necessarily conservative. In Britain and France, where disintegrating unitary systems are being forced to decentralize and devolve, that preference is seen as the reverse of conservative. And in Australia, as John Gava has pointed out, "the republic referendum failed because it was not *radical* enough".¹⁷⁴ Nor would a stereotypically conservative electorate have defeated the referendum to ban the Communist Party at the height of the Cold War, or carried the 1967 referendum on Aborigines by one of the largest affirmative referendum votes ever recorded in a democracy. The Court's conviction that it is somehow entitled unilaterally to amend the nation's basic law is actually just the old aristocratic belief that the people are stupid. Its unconcealed mission of saving Australia from democracy may itself contribute to the public's reluctance to vote for constitutional alterations.

6. Phase out judicial review of Commonwealth legislation.

The Court's intended role. From the start it has always been understood that the High Court's chief role was to be upholding the Constitution. In so doing it might have to declare that the Commonwealth (or a State) had exceeded its constitutional power, and that what purported to be a federal (or State) Act was a nullity,¹⁷⁵ in accordance with the principle that Chief Justice Marshall first laid down in the United States in *Marbury v. Madison*. In the *Communist Party Case*, Justice Fullagar noted that:

"... there are those, even today, who disapprove of the doctrine of *Marbury v. Madison*, and who do not see why the courts, rather than the legislature itself, should have the function of finally deciding whether an Act of a legislature in a Federal system is or is not within power. But in our system the principle of *Marbury v. Madison* is accepted as axiomatic ...".¹⁷⁶

Among the other products of *Engineers*, however, was the seed of an idea that remained dormant for decades but came to full flowering after the rise of the Murphy-Mason school of constitutional interpretation in the 1970s. This lay in the passage where the majority declared that:

"... possible abuse of powers is no reason in British law for limiting the natural force of the language creating them [T]he extravagant use of the granted powers in the actual working of the Constitution is a matter to be guarded against by the constituencies and not by the Courts No protection of this Court in such a case is necessary or proper".¹⁷⁷

The Court did not deny that the Court could and should declare that an Act beyond power was void, but its emphasis on judicial restraint could be taken too far and lead the judiciary to abdicate its function of upholding the constitutional order. That, to a great extent, appears now to have happened. "[T]he High Court", writes Stephen Gageler SC, "has displayed an increasing tendency to leave the final determination of the 'federal balance' to the political and not the legal process".¹⁷⁸

Leaving it to the Executive. One sees this tendency in *Koowarta*, where Justice Brennan, invoking *Engineers*, declined to identify any limits to the operation of the external affairs power, and left it to government to decide whether or not to legislate.¹⁷⁹ Similarly, Justice Mason in *Tasmanian Dams* said that whether the subject matter of a treaty is of international concern is a matter for the executive government and not the Court. Likewise relying on *Engineers*, he derided the possibility that the power should be construed by reference to "imaginary abuses of legislative power".¹⁸⁰

Although both Justices refer to *Engineers*, they are taking the withdrawal from judicial review much further. *Engineers* only said that, in construing a granted power, no account should

be taken of “possible” (not “imaginary”) abuses. But Justices Mason and Brennan are effectively leaving it to the government to say whether the power has been granted in the first place.

Tasmanian Dams has been described as the beginning of the end of judicial review.¹⁸¹ Putting the other side of the coin, Professor George Williams describes how “the Court’s focus and business is shifting from ... federalism to issues involving constitutional rights”, now that many of the large federalism questions have been “resolved”.¹⁸² They have been “resolved” only because the States have little left to lose, and have concluded that a majority of the Court has no interest in federalism beyond phasing it out. This is made bitterly clear by the fact that, while it has virtually abdicated judicial review over Commonwealth legislation, the Court relentlessly pursues it against legislation by the States. In *Ha* it unnecessarily stripped away much of the States’ remaining tax base, even though by so doing it could confer no benefit on the Commonwealth.¹⁸³

Political constraints: a substitute? Professor Coper contends that we should now look to political, not legal, restraints on Commonwealth power.¹⁸⁴ Stephen Gageler similarly argues that under a system of responsible government, the political process is recognized in the Constitution itself as a mechanism of constitutional constraint capable of operating in relation to issues of federalism, and that judicial review should be confined to holding the political process to fair and proper procedures.¹⁸⁵

There are problems with that. One is that the idea of a purely “political” rather than constitutional federalism contradicts every known political fact about the framing and adoption of the Constitution. The High Court’s power of judicial review was meant to be the States’ last line of defence, after the Senate and the conferral of only limited and enumerated powers on the federal Parliament.¹⁸⁶

The other major objection is one that the Court itself has implicitly acknowledged. The growing body of case-law on judicially protected human rights recognizes that a human right that cannot be enforced in a court, that cannot if necessary prevail over an Act of Parliament, is a right that does not exist. The Court has correctly rejected as false the old British saw that the common law and a sovereign Parliament are the only protection human rights could possibly need. In a world of party lines, pressure groups devoid of any sense of proportion, and of media that can whip up instant moral melodramas, the Court has had to spell out constitutional limits to the power of government. This is part of a more general reconceptualizing of polity and people, a re-emergence of a species of natural law as a response to the problem of the limits of power.¹⁸⁷ Whether one agrees with all or any of the Court’s human rights decisions is not the point. The crux is the Court’s recognition that the old view of human rights as a purely political issue has been seen to be inadequate. It is therefore fair to argue that the current view of federalism as a purely political issue is inadequate too.

The idea of “political federalism” has been promoted by some United States academics, and was gaining ground until the Supreme Court’s revival of federalism began a decade ago. But as a Canadian scholar explains:

“The need for final judicial review of the federal distribution of legislative powers has roots in the necessities of a federal system. Neither the federal Parliament nor the provincial legislatures could be permitted to act as judges of the extent of their own respective grants of power If they were, soon we would have either ten separate countries or a unitary state”.¹⁸⁸

In our case, the latter.

Power abhors a vacuum. All power calls for its use, and absolute power calls absolutely.¹⁸⁹ Allowing Canberra to be judge in its own cause will not result in a negotiated pattern of political give and take, because the Commonwealth now holds all the cards. Instead it will lead to the

indefinite expansion of Commonwealth regulation. There is no limit to the hunger of lobby groups for more wealth transfers, of parliamentarians for new portfolios, or of bureaucrats for upgraded positions, larger departments and more overseas conference travel.

Public choice research shows that bureaucracies are an independent factor in the growth in the size of government, a factor that increases in power according to its own size. Thus government growth is partly a function of the absolute size of the bureaucracy, a correlation that helps to explain the ratchet effect whereby government growth appears irreversible.¹⁹⁰ And the size factor, of course, favours the Commonwealth.

The United States Supreme Court in effect abdicated its role of upholding constitutional federalism after the “1937 revolution” in which the Court, under pressure from the Roosevelt administration, held that the interstate commerce clause could support federal legislation of almost anything.¹⁹¹ That state of affairs endured for six decades. Towards the end, Congress was enacting statutes without even considering whether it had the power to do so.

The Constitution becomes irrelevant. Some twenty years after the 1983 *coup d'état* in *Tasmanian Dams*, the Commonwealth is doing the same. A Government with an express commitment to federalism in its party platform introduces a media ownership Bill giving a government body a degree of control (limited at this stage, but readily extendable) over editorial processes in the print media (*Broadcasting Services Amendment (Media Ownership) Bill 2002*). Quite apart from the danger in any government agency having such unprecedented control, the Commonwealth has no power to make such a law – unless, perhaps, there is somewhere a treaty with Zimbabwe or North Korea on control of the news media.

The same Government puts through the *Renewable Energy (Electricity) (Charge) Act 2000*, using an Explanatory Memorandum that fails even to mention the question of constitutional power (likewise the Act itself). It offers no ground for federal legislation, other than the belief that it will be quicker and will avoid possible “inconsistencies” (as usual, the word is wrongly used to mean merely “differences”) between States in implementing the *unratified Kyoto Protocol*. But delay and diversity in implementing treaties is not, as Colin Howard reminds us, necessarily a bad thing.¹⁹² It may result in more creative and better-adapted solutions than the “one size fits all” approach.

Again, neither the *Privacy Amendment (Private Sector) Act 2000*, nor the Explanatory Memorandum prepared for it, makes any reference to the Act’s constitutional basis or attempts to define its constitutional reach. Presumably we will be told that it rests on the same foundation as the *Privacy Act 1988* – that is, the *International Convention on Civil and Political Rights*, which prohibits arbitrary or unlawful interference with a person’s privacy, home or correspondence. The *Convention* is plainly directed at acts committed by, or on behalf of, governments, and does not require states to enact privacy laws. The *Privacy Act* also calls in aid an OECD recommendation that member states adopt privacy laws, but even the Brennan Court was not prepared to hold that a recommendation, by itself, gives the Commonwealth legislative power.¹⁹³

Finally, with the Bills to implement the *Statute of the International Criminal Court*, the Commonwealth apparently feels confident enough to ignore the Constitution altogether. The *International Criminal Court Bill* will make it possible for Australians to be sent to The Hague for trial before a body which is prosecutor, judge and jury and has no separation of powers except at a bureaucratic level. There will be no jury, no right to a speedy trial, no independent appeal, and the defendant will be liable to be imprisoned in any participating country in the world. Besides delegating judicial power to a body other than a Chapter III court, the Bill also proposes to delegate domestic legislative power to the same body, which plainly it cannot do.¹⁹⁴ The High Court’s abdication of its function has brought not only the end of federalism, but also apparently the end of constitutional government itself.

7. Refrain from developing a theory of constitutional interpretation.

The centralist's tale. Several commentators have drawn attention to the lack of judicial discussion of interpretative methods in Australian constitutional law, and to the High Court's failure to develop a serious theory of constitutional interpretation. In particular, it has never elaborated the role of the States in the legal structure of the federation.¹⁹⁵

Engineers literalism relieves the Court of the need to develop a coherent vision of the Constitution and allows it simply to invoke the old formulae about the broadest possible meanings, grants and residues. This void at the heart of Australian constitutional discourse is a consequence of *Engineers*, but also something more. It also feeds back into literalist dogma in a way that reinforces the centralizing force of the *Engineers* tradition.

Adjudication under the common law embodies, more than that of most other legal systems, an element of storytelling. The free, flexible structure of appeal judgments lends itself to a narrative style that gives colour and life to the facts and issues. A favourite of law students is the Lord Denning judgment in *Hinz v. Berry* that begins, "It was bluebell time in Kent". All counsel know how to relate the facts of the case from their own client's viewpoint so as to capture the narrative's favour for their side. Screenwriters and directors understand the phenomenon too, and sometimes tell a story through the wrongdoer's eyes in order to make us identify guiltily with the villain, instead of the victim or the avenger.

Literalism harnesses this dramatic effect to the centralist ends of the *Engineers* tradition. The story that unfolds in the law reports is told through the Commonwealth's eyes, for under literalism it is only the Commonwealth's role and powers that are relevant. It is the tale of a unifying, nation-building, global-conscious Commonwealth fighting its way towards a goal of rational uniformity. The States are mentioned only as the negative opposing force, against which the Commonwealth must yet again unsheath its flashing sword. They are always unruly, always wanting to do things their own way and railing against their fate. *Engineers* literalism means that they need never be humanized, never considered as having worth in their own right, never taken seriously. But if they were allowed to tell their own story, they might sometimes be seen as sturdy, self-reliant *poleis* taking a stand for their citizens' right to control their own destinies.

Different ox, different test. Surveying the present state of constitutional interpretation, Professor Zines concludes that the recent cases are:

"... a motley collection in which the Court and individual judges take varying approaches depending on the issue".¹⁹⁶

To put it another way, the legal test applied in a given case depends on whose ox is being gored.

If that is so, what has happened to the universal iron rule of *Engineers* literalism? First, the good news. The judgments in the key *Free Speech Cases* and in *Street*, Professor George Williams flatly declares, "marked the end of the reign of the *Engineers' Case*". They dropped the literalist method of interpreting constitutional guarantees, identifying an implied right of free political discussion, and they discarded the undue deference to parliamentary sovereignty that had led to the Court's near-abdication of its role. They made it clear that the people can have recourse to the Court if their basic liberties are infringed by the legislature. "This turning point", he predicts, "may prove as significant a turning point as the *Engineers' Case* itself".¹⁹⁷ Justice McHugh in *McGinty* seemed to share that assessment, while fiercely disapproving of the trend.¹⁹⁸

The separation of powers effected by Chapter III of the Constitution has also proved a rich source of implications, leading to entrenched protection against attainder-type laws and other violations of due process. In the *Hindmarsh Island Bridge Case*, Justices Gummow and Hayne hinted that the new trend might develop still further, through the elaboration of Dixon's statement that the rule of law is one of several assumptions underlying the express terms of the Constitution.¹⁹⁹

The bad news, however, is that the new age of enlightenment shows no signs of illuminating the Court's federalism doctrine. Since *Nationwide News* and *ACTV*'s inauguration of free speech and contextual interpretation in 1992, all the important federalism cases have gone Canberra's way. *Northern Suburbs* (1993), *NTA* (1995), *Australian Education Union* (in part) (1995), *Industrial Relations* (1996) and *Riordan* (1997) give no indication that federalism has been detected among the constitutional implications to which real legal effect is to be given. If anything, the cases on the key financial provisions, *Ha* and *Northern Suburbs*, suggest that the Court has stepped up its attack on what remains of the federal system. Professor Williams rightly deduces that:

"... it is unlikely that the place of the *Engineers' Case* will be affected in the short term in regards to its effect on the expansion of Commonwealth power".²⁰⁰

Nor are federalism issues being included in the other aspects of the move away from formalistic interpretation. The lifting of the ban on reference to the constitutional Convention debates has not led to their use in support of federal balance. They have only been invoked when they favour the Commonwealth or damage the States (*Ha*, *Cole v. Whitfield*), or where they give the States a purely token victory (*Incorporation*). In major cases such as those mentioned above, tactical myopia still rules. Again, reasoning based on functional or practical considerations is now employed in constitutional cases such as *Abebe* and *Eastman*,²⁰¹ but not where it might cast new light on the federal distribution of powers according to *Engineers*. Nor is the new concept of proportionality used to arrive at a more balanced interpretation of non-incidental Commonwealth powers.

The Brezhnev doctrine of constitutional interpretation. The High Court has never considered itself bound by its own previous decisions. On the other hand, it will not permit counsel to challenge an earlier decision without leave. It is also clear that case-law on the Constitution cannot replace the text. Judicial reasoning, declared Chief Justice Barwick, "may not be used as a substitute for the Constitution. Always the Constitution remains the text".²⁰² Beyond that, different Justices have expressed widely diverging views on the circumstances in which an earlier decision should be overruled.²⁰³

In fact, such overruling has not been infrequent. *Engineers* itself is an obvious example, and in recent years it appears to have become more common; for example, *Cole v. Whitfield* (which reconsidered 141 earlier cases and overruled 32 of them), *Street*, *Ha* and *Tasmanian Dams*. The protection for property rights in s.51 (xxxix) has been cut back as long-standing authorities have been circumscribed.²⁰⁴

It is striking, however, that with the only marginal exception of *Melbourne Corporation* in 1947,²⁰⁵ there does not seem to be a single major case in which the Court has overturned an earlier decision in such a way as to return an area of legislative power to the States. On the contrary, the Court has, for example, fallen back on precedent so as not to disturb an admittedly untenable decision restricting the protection of State property under s.114, or a line of cases justifying the use of transparent shams to evade the limitations on the industrial relations power.

What seems to be at work is a judicial adaptation of the 1970s Brezhnev doctrine, whereby territory annexed by the Commonwealth, however wrongfully, will never be allowed to escape. The human rights cases of the 1990s do restrict Commonwealth power with a kind of reserved power mechanism, but they do not work in favour of the States, and several of the restrictions apply to the States as well. They strengthen human rights, but not the federal balance, though the federal division of powers can itself be an excellent safeguard for human rights. This asymmetry in the working of precedent shows the tenacity of literalism's hold over the Court in federalism cases.

Tokenism instead of theory. A final feature of literalist technique is the reliance on tokenism as a substitute for a coherent and balanced theory of constitutional interpretation. Some commentators have treated decisions such as *Davis, Dingjan* and *Incorporation* as showing a partial State recovery and note that they are accumulating.²⁰⁶ *Residential Tenancies*²⁰⁷ takes a small step towards balancing the currently one-sided immunity doctrine.

But none of those cases, nor all of them together, effects any significant retrieval of power from Canberra. And in practice *Residential Tenancies* does little more than spare the Commonwealth the unexciting task of devising its own landlord and tenant law. They belong in the same category as the practice mentioned earlier in major cases that bestow new powers on the Commonwealth – that of adding restrictions, conditions or qualifications which, on examination, prove to be trivial and easily evaded. They are mere sops calculated to give the impression that the Court is fulfilling its role of even-handedly upholding the Constitution. They are no substitute for a cogent doctrine of constitutional federalism.

The *Engineers* Legacy

Centralizing instability

Pole shift. All constitutional scholars agree that *Engineers* has led to a massive centralization of power in the Australian federation. It has succeeded in reversing the polarity of a Constitution that was designed specifically to allow maximum decentralized self-government at the State level. *Engineers* literalism has transformed it into a system of near-colonial rule, demolishing its self-correcting features and paring back the accountability of government to the people.

The impact of *Engineers* was felt quite quickly, and during the 1930s nourished the secession campaign in Western Australia. Apart from tariffs, the main grievance of the secessionists was the Commonwealth's arbitration system, the coverage of which *Engineers* had greatly extended. It reduced the ability of workers and employers to form agreements that reflected local conditions and the state of the local economy. This rigidity, coupled with regional inequity, was seen as a major factor in increasing the State's cost structure. The effect of the federal arbitration system on coastal shipping also caused dismay. The Commonwealth requirements for high wages and restrictive working conditions raised the cost of goods brought from the rest of the country. Eventually federal industrial law destroyed coastal shipping itself,²⁰⁸ an industry on which the State depended heavily, and for which Australia as a whole is by nature ideally suited.²⁰⁹ At a referendum held in 1933, 68 per cent of Western Australians voted for secession. Canberra simply ignored the result.

The decline of reflexivity. A major casualty of the *Engineers* centralizing process has been what Professor Brian Galligan calls "reflexivity", a core criterion for evaluating institutions, and which has to do "with the fact that self-conscious individuals operate institutions, and can learn from their mistakes, internalise norms, manage complexity and adapt to change". The Founders put much weight on the good sense of those who would operate the system. They trusted that:

"... political actors in the Anglo-Australian tradition, like themselves, could be expected to reach a compromise rather than push the system into breakdown. Reflexivity is one of the key principles of Australian constitutional design, but probably the most neglected among Australian constitutional critics, perhaps because of the influence of a literalist legal mindset which would prefer to have everything spelt out".²¹⁰

By crippling the balancing, stabilizing effect of reflexivity, the *Engineers* tradition has pushed the federation relentlessly towards breakdown, especially since the 1970s, when the attenuating effects of Dixon's contextual and more equitable "strict legalism" approach were swept away by the advent of the Murphy-Mason school. All the while, the mask of literalism has enabled the High Court to pose as a kind of helpless bystander with no power over its own

decisions. “The inability of the courts [i.e. the High Court] to protect the States from continuing federal encroachment has been graphically illustrated [by *Tasmanian Dams*]”, wrote Chief Justice Mason. It is as if “the courts” happened to open a door marked “s.51 (xxix): external affairs”, and found a raging, devouring monster which “the courts” were quite unable to restrain, despite their best efforts. That portrait of a passive, powerless High Court is hard to square with his Honour’s vision, imparted a few pages further on, of a policy-oriented Court moving away from formalistic interpretation and boldly setting out its reasons for updating the Constitution by giving Canberra more power.²¹¹

Costs and consequences

The effects of *Engineers* have been felt in many ways throughout Australian society, but a few examples may be useful, starting with the industrial relations power that expanded enormously as a direct result of the case.

Industrial relations: abuses and rigidity. In *Riordan*, Justice Kirby said of the “paper disputes” sham used to avoid the constitutional limits of the power:

“It has enhanced the position of unions and employer organisations. It has contributed to the equalisation of costs of labour throughout Australia and hence to the growth of a national economy”.

A further result has “undoubtedly been a tendency to encourage extravagant demands”.²¹² His Honour’s assessment seems correct, except for the part about encouraging the growth of a national economy. The real effect has been to prevent the less populous States from competing with New South Wales and Victoria by applying industrial laws suited to their own conditions. This became clear early on and was, as we have seen, a major issue in Western Australia’s secession campaign. To this day it is crippling the economies of South Australia, Tasmania and regional Australia.

The “national economy” itself has suffered from the extended reach of the Commonwealth arbitration power. “Australia’s unique industrial relations system is an outdated relic from an era of inward-looking protectionism for selected industries”, writes Professor Wolfgang Kasper:

“Such industries have become rust-belt liabilities in all affluent countries. Success in the new age of globalisation and decentralised, agile service production is stifled by rigid, collective industrial relations. It requires the flexibility of certain and simple wage contracts, together with the firm and reliable common-law protection of workers against opportunistic employers”.²¹³

One of the misconceptions underlying Commonwealth industrial law is that interstate competition would inevitably lead to lower wages. In fact, wage levels are increased when there is more flexibility. The OECD, to whose opinions on other matters the Commonwealth, as we have seen, accords the force of constitutional law, consistently maintains that Australian labour law needs more flexibility. In his world-famous work *The Competitive Advantage of Nations*, the economist Michael Porter concludes that:

“Policies to retard wage growth are often misguided. Wages should be allowed to rise with or slightly ahead of productivity growth. This creates beneficial pressures to seek more advanced sources of competitive advantage and compete in more sophisticated industries and segments”.²¹⁴

The Constitution provides a limited federal power to settle interstate disputes. In *Engineers* and the cases following it, the High Court decided instead to create a general power. The Court persisted with it despite the adverse economic and social consequences it produced,²¹⁵ including a high strike rate that enabled RJ Hawke, when ACTU President, to boast that, “We [the unions] will bring Australia to its knees”. The Court’s system is one that favours the employed over the unemployed, the union leader over the independent worker, city over country, Sydney over

Adelaide and Hobart. It denies the States the right to regulate the wages and conditions of their own public servants, surely the least interstate issue imaginable, in the name of a spurious “community of interest”.²¹⁶ The labour economist Professor Helen Hughes has often said that the only thing that enables the system to work at all is massive non-compliance.

The tax monopoly. After industrial relations, the next major Commonwealth victory occurred when the *Uniform Tax Cases* gave Canberra a monopoly of income taxation. Since then, marginal tax rates on ordinary incomes have soared to previously unimaginable levels. Federal income tax legislation, which before the *First Uniform Tax Case* occupied 81 pages in the statute book, has grown to 8,500 pages, of such complexity that even the Tax Office’s assessors can understand only a small part of it – hence the shift to self-assessment.²¹⁷ A flood of amendments, case-law and rulings make reliable predictions of tax liability almost impossible. This led to the introduction in 1992 of a system of binding public and private rulings²¹⁸ embodying dispensing powers of such scope as to make a James II sob with envy.

It is questionable whether federal taxation can still be regarded as “law” in any true sense at all, rather than as purely bureaucratic rule. This compromising of the separation of powers is particularly serious if one bears in mind the historically pivotal role taxation has played in the problem of government.

The Commonwealth monopoly of direct taxation (originally *de jure* and later *de facto*), coupled with the Court’s campaign against State indirect taxes culminating in *Ha*, has forced the States to fall back on a motley collection of inefficient levies and on socially destructive gambling taxes.

The goods and services tax, the whole net proceeds of which go to the States, in practice alleviates matters significantly, assuming that some future Commonwealth government does not declare, or deliberately engineer, a “crisis” as a pretext for appropriating the revenue for itself. But legislative control remains with the Commonwealth, and this continues the distortions of interstate competition resulting from vertical fiscal imbalance.

Even under unitary systems, regions and cities will inevitably compete for new investment. Michael Porter’s study concludes that tax incentives are the best form of competition, because they force businesses to undertake projects only when they see the prospect of an economic return. The Commonwealth legislative monopoly over direct and indirect taxation forces States to resort instead to cash subsidies, which delay adjustment and innovation rather than promoting it, and are usually associated with chronic failures.²¹⁹

Races and resources. Professor Coper’s view that, apart from *Engineers*, the races power in s.51 (xxvi) would never have supported the *Native Title Act 1993 (NTA)* has already been noted. That Act was passed in the wake of Mabo,²²⁰ on the basis that returning native lands taken during the colonial period would restore and revitalize the Aboriginal people, giving them dignity, self-respect and self-reliance. The Act created a new form of title which, unlike other interests in land, the States could not control.

Its immediate effect was to transfer control over natural resources to the Commonwealth, which had no experience with land management. The proportion of Australian territory affected by the Act greatly exceeded original estimates. Claims actually lodged in Western Australia cover 82 per cent of the State’s area, with high concentrations in mineral - rich areas. Up to 27 conflicting claims have been made for the eastern goldfields.²²¹ The Act confers a “right to negotiate” that enables claimants – not merely owners – to obstruct land access to mineral developments and thus effectively impose a *danegeld* tax on the mining industry. That right is usually worth more than the native title itself.²²²

Before the *NTA*, the mining industry comprised a few major companies, many specialized exploration companies, and numerous smaller operations based on one or two discoveries. These

small companies were the driving force in new developments and ideas. The *NTA* has blocked the pipeline of new ventures, with some 2,500 projects held up by claimants in Western Australia alone.²²³ This has made the smaller operators unviable, as they can no longer sell their discoveries or otherwise raise finance.

The uncertainty of title created by the *NTA*, and the very expensive process of reaching access agreement through the negotiating and consulting industry, have proved fatal to all but the largest, usually British-controlled, companies.²²⁴ Only one major Australian-owned mining company now remains, and it is expected to be broken up soon. Most new minerals exploration has moved offshore, with domestic search activity mainly confined to “brown field” sites. These are existing developments (as opposed to new, or “green field” ventures) where there is some confidence of being able to secure ground access to the site.

Finally, these heavy costs have not brought the predicted improvements in Aboriginal life. The anthropologist Professor Kenneth Maddock notes that “some of the most wretched and dysfunctional Aboriginal communities sit on broad expanses of their own land”.²²⁵ Some people had predicted this, pointing out that the condition of Aboriginal peoples in Melville Island and East Arnhem Land, who had never been dispossessed of their land, was no better than that of other Aboriginal groups. Thus native title, like the takeover of the universities, is another example of the Commonwealth using the broad literalistic interpretation of its powers to assume responsibility for solving a problem and then making it worse.

The cult of uniformity. Without variation, there is stagnation; the old Soviet empire proved that. Yet one of the results of *Engineers* and its exalting of central power has been, as Professor Campbell Sharman observes, a ceaseless harping on uniformity that leads to shapeless, remote government, inefficiency, unresponsiveness and alienation.²²⁶

The States are increasingly being pressured to refrain from using their remaining powers. The Commonwealth is currently urging them to refer to Canberra their powers over *de facto* relationships. Because there is so little experience with them on anything like the present scale, *de facto* relationships are precisely the kind of area in which a federal system’s capacity for independent experimentation and diverse solutions should be allowed to operate.²²⁷ Besides, the results of Lionel Murphy’s *Family Law Act*, the most unpopular single enactment in Australian history,²²⁸ give no grounds for believing that the Commonwealth will discover the best, or even a tolerable, approach. The Canberra bureaucracy is too vulnerable to the intellectual fashions of the moment, too inclined to see itself as a kind of occupying power charged with subduing a backward and rebellious population, to perceive and give legal effect to the *mores* of ordinary Australians.

Again, a concerted political and media campaign has led to the States referring to the Commonwealth their powers over corporations, another area where, as United States experience shows, interstate competition could have led to productive innovation.²²⁹ At the very least, State-based corporation laws are likely to be simpler, if the history of federal income tax after the *Uniform Tax Cases* is any guide. As a Victorian Attorney-General has noted, the Victorian *Companies Act* 1962 was adopted by all States in Australia, as well as in Malaysia and Singapore, where it remains in force. It is not obvious that those two countries have suffered by retaining the 1962 Act, or that Australia has benefited by abandoning it.²³⁰ By the standards of modern Commonwealth legislation, it was a masterpiece of conciseness and clarity.

Bigger government, higher cost. Public choice research shows that the more direct the citizens’ influence on political outcomes, the smaller is the scale of government.²³¹ Functioning federations have an advantage here, because there are more levels of government for public opinion to affect. Thus Switzerland, which has a strongly decentralized federal structure, has the smallest public sector of any developed country, spending 30 per cent of GDP on government.²³² This is despite (or perhaps because of) having 26 cantons (States) for its population of 6.9

million.

Conversely, when government becomes more centralized, it becomes harder for the people to influence policy outcomes, though correspondingly easier for interest groups and bureaucrats, most of whom seek a larger role for government. This tendency is aided by “fiscal illusion”, which helps large central governments to hide increased tax burdens from the voters. Inflation is used by central planners to raise tax rates surreptitiously – Commonwealth policies have in this way destroyed 97 per cent of our currency’s value since 1945, most of it following Frank Crean’s inflationary federal Budgets of 1973 and 1974. Even the currently low inflation rates cause a gradual but substantial rise in the tax take. Further, the more complex the tax structure, the harder it is for voters to estimate the burden.²³³

As the centralization of government power has continued, the proportion of Australia’s GDP spent on government has grown from 21.4 per cent in 1970-71 to 32.7 per cent today.²³⁴ (The eminent Australian economist Colin Clark argued long ago that any excess over 25 per cent would be counterproductive).²³⁵ That is still a better performance than that of unitary states such as New Zealand (39.6 per cent),²³⁶ the United Kingdom (40.1 per cent, before devolution) or France (52.4 per cent). But even an improvement of one or two per cent, to something closer to Switzerland’s figure, would free enormous sums for investment in, say, education or the care of an ageing population.

Misunderstood causes. It has sometimes been said that *Engineers* and the centralist literalism for which it became the banner should best be viewed as an adjustment of the Court’s approach that was called for by changing times. RTE Latham wrote in 1949 that the Court’s view was that “the words of the Constitution permitted the view of the federal relationship which the times demanded”.²³⁷

In an equally well known passage Justice Victor Windeyer said that in *Engineers* “the Constitution was read in a new light”, that Australia was now “one country and that national laws might meet national needs”.²³⁸ The case “was a consequence of developments that had occurred outside the law courts”, and meant only that “the enunciation of constitutional principles ... may vary and develop in response to changing circumstances”.²³⁹ But, as was noted above, in 1920 there was no push for wider Commonwealth powers, quite the contrary in fact. Like the *Tasmanian Dams Case* 63 years later, it damaged the Court’s community standing.²⁴⁰ Later pro-centralist decisions of the Court handed to the Commonwealth wider powers than the federal government actually wanted.²⁴¹ But once granted, the lobby groups would see to it that they were exercised.

Canada, land of contrasts

As the Canadian-Australian academic Ian Holloway has observed, Australia and Canada have more in common than perhaps any other two countries in the world.²⁴² Further, both countries were exposed to the 20th Century pressures of world war, depression and international tension. Yet the Canadian courts did not seek to centralize their system of government. Instead, they interpreted the unpromising *British North America Act* 1867 so as progressively to develop a genuinely co-operative, decentralized federation based on “reflexivity”, such as Australia was designed to be. They categorized challenged laws according to their “pith and substance”, not by crude, myopic and one-sided rules of thumb. They did not use federal legislative supremacy to destroy whole swathes of provincial legislative power; rather, they sought to enable federal and provincial laws to stand together. They evaluated legislative schemes according to their evident substance and purpose, rather than pretending disingenuously that the overall plan did not exist.

Justice Dawson and others have argued that the main reason for Canada’s decentralization is that the Provinces, like the federal Parliament, have a list of enumerated powers that are easier to expand than the residuary power of the Australian States.²⁴³ But Canada’s central government

was given wide enumerated powers, including many that were left to our States, such as trade and commerce generally, criminal law and penitentiaries, and was envisaged as financially dominant. The enumeration of provincial powers was conceived as a way of limiting the Provinces' role. The constitutional scholar KC Wheare was so impressed by provincial subordination that he described Canada's structure as only "quasi-federal".²⁴⁴

Further, the Canadian Supreme Court's early constitutional cases were clearly *centralist* in orientation.²⁴⁵ Professor CD Gilbert's comparative study concludes that the Canadian Constitution's double enumeration:

"... is not sufficient to explain the High Court's overall preference for pro-Commonwealth solutions in areas where the Canadian courts have generally devised pro-Province doctrines and answers".²⁴⁶

Nor does the question of Quebec explain the difference, he continues, pointing out that the 1980 Quebec secession referendum (like its 1995 replay) was defeated, while Western Australia's 1933 referendum was carried by a large majority.²⁴⁷ Further, other Canadians seem just as happy with the nation's decentralized, co-operative federalism as the Quebecois. Indeed, some are given to a certain friendly condescension towards Australia's quasi-colonial structure. The "balkanization" that some observers see in Canada is an illusion created by the country's first-past-the-post (plurality) voting system, which greatly exaggerates minor differences and marginal swings.²⁴⁸

Life After Literalism

Federalism's new age. It is ironical that a majority of the High Court from the 1970s onwards carried the *Engineers* centralizing method to extremes at the very time when the rest of the world was rediscovering the advantages of federalism. Worldwide interest in federalism is greater today than at any other time in human history, stimulated by a growing conviction that a federal structure enables a nation to have the best of both worlds, those of shared rule and self-rule, coordinated national government and diversity, creative experiment and liberty.²⁴⁹ All the world's geographically large nations are now federations, although *de facto* rather than *de jure* in the case of South Africa and China. The only exception is Indonesia, which is belatedly, and intermittently, considering the federal option.

The few remaining highly centralized nation states, such as the United Kingdom, France, Spain, Italy, and Sri Lanka have all faced major crises of secession or separatism. Papua New Guinea is another case close to home, and it is not generally realized that the High Court's decision in *Teori Tau*, a piece of gross Diceyism, was the key factor in triggering the 30 years of secessionism and civil war in Bougainville.²⁵⁰

Unproved assumptions about the necessity and efficiency of centralism, such as those voiced by Chief Justice Mason,²⁵¹ have been refuted by public choice studies, new economic insights and commonsense observation – such as the fact that China did not emerge as an economic superpower until it became a *de facto* federation (in practice, China appears to be more genuinely federal than Australia today). The spread of free markets has stimulated socio-economic developments that favour federalism: the emphasis on autonomous contractual relationships, recognition of the non-centralized nature of a market economy, consumer rights consciousness, and the thriving of markets on diversity rather than uniformity. Related to this are advances in technology that are shrinking the optimum size of efficient businesses, and models of industrial organization with decentralized and flattened structures involving non-centralized interactive networks.²⁵²

Most of the ideological visions favouring centralism have waned. Marxism survives only in Western universities. Dicey's model of unitary government is obsolete. It has failed spectacularly in the United Kingdom, which has been slowly disintegrating for a century, losing a quarter of its territory in 1920, suffering three decades of civil war in Northern Ireland since the 1970s, and in

1998 temporizing with a jumble of devolutionary half-measures that are already showing signs of instability. Dicey's parliamentary omnipotence model has been discarded in New Zealand, quietly overruled in Canada, questioned in Australia and abandoned in Britain in the wake of EU supremacy.²⁵³

Cosmopolitanism remains a potent force for centralism, especially in the hands of single-issue lobbies such as the environmentalists, but it is partly offset by the centripetal aspects of globalization mentioned above. Competition in a worldwide economy gives States or Provinces an interest in controlling as many as possible of the factors that influence investment and productivity growth. Further, the discrediting of Keynesianism has removed yet another argument for centralized government.

Legal responses. These changes call to mind Justice Windeyer's remarks about *Engineers* merely reading the Constitution "in a new light", and that the enunciation of constitutional principles "may vary and develop in response to changing circumstances". Well, circumstances *have* changed. What now?

Until the last decade, the United States Supreme Court had for 60 years interpreted the Constitution to give the interstate commerce clause the same unlimited scope as we have seen in the High Court's handling of Commonwealth powers since *Tasmanian Dams*. Like the Commonwealth Parliament today, Congress had reached the point where it no longer even stopped to consider whether it had a grant of power to enact the legislation it was passing. But in recent years, notably in *United States v. Lopez*,²⁵⁴ the Court has turned its back on the 1937 revolution and returned to a more rigorous process of characterization in federalism cases. The cases since 1937, Justice Thomas observed, had been:

"... coming close to turning the Tenth Amendment [our s.107] on its head. Our case law could be read to reserve to the United States all powers not expressly *prohibited* by the Constitution".²⁵⁵

The new, pro-federalist trend is continuing.²⁵⁶

In Australia, on the other hand, no such change has occurred. Chief Justice Mason remained of the view that it was impossible to transform "general notions of the federal balance and the desire of the founders to preserve the States as strong constituent elements in the federation into a precise and practical limitation on federal power".²⁵⁷ But the Canadians have shown how it can be done, and the High Court regularly uses Canadian cases in other constitutional contexts. The Gibbs High Court was starting to develop a practical, balanced federalist approach in *Gazzo* and *Coldham*. Such an approach could make use of insights such as Professor Lumb's point that the conjunction of ss 106 and 107 shows a link between the preservation of State constitutional structure and preservation of power, including the undifferentiated power to legislate "for the peace, order [or welfare] and good government of the State". He advocated the hardly revolutionary idea of reading all power-conferring or power-recognizing sections in a total context and recognizing their interaction.²⁵⁸

The objection that it is impossible to be "precise" about limits to federal power is a mere diversion. As the US Supreme Court said of its approach in *Lopez*, "These are not precise formulations, and in the nature of things they cannot be".²⁵⁹ Nor has the High Court displayed any undue preoccupation with precision in its human rights decisions. That is not necessarily a criticism, but it does show that some Justices measure their task with a different ruler when federalism is the issue. A court that can perform the legal acrobatics needed to develop and apply the "incompatibility" principle in *Kable*²⁶⁰ should have no difficulty in devising an intelligent doctrine of federal balance.

Conclusion

Engineers inaugurated a method of one-sided interpretation that reversed the polarity of the Commonwealth Constitution in a way that contradicted the document's plain intention and ignored the first principles of legal interpretation. It has violated the wishes of the Australian people as consistently expressed in constitutional referendums, and mocked the sovereign power recognized in them by s.128. *Engineers* literalism has destroyed the Constitution's self-adjusting "reflexivity", and eroded the fundamental right of State communities to govern themselves. It has denied the people the advantages of competitive federalism and increased the burden, cost and remoteness of government. Since the 1970s especially, it has pushed the constitutional order to the brink of breakdown.

The High Court has in recent years discarded the formalistic *Engineers* approach in other constitutional contexts, such as the express human rights guarantees (s.117, for example) and s.92. In the implied rights field it has left the *Engineers* strictures against implications far behind, to the extent that it has sometimes outrun its conceptual supply lines. (Some of the implications it has discovered would not have been needed, of course, if the Court had not over-extended the Commonwealth's power grants in the first place).²⁶¹ The Court on occasion has even put aside literalism in order to give the States some small token victories.

The decline of Diceyism and the failure of the British unitary model, as well as the other social and intellectual changes mentioned above, make *Engineers* stand out more than ever as an aberration. Among other things, it conflicts, as Dr Peter Bayne observes, with the emerging ethos of civic republicanism which favours decentralized components of government.²⁶² That ethos was always there in the Commonwealth Constitution, but until the *Australia Acts* 1986 it was stifled (or thought to be) by the overriding residual suzerainty of the British Parliament. Now it is being recognized more clearly, along with the companion idea of the people as the source of all sovereignty, as part of what Justice Paul Finn calls a more general reconceptualization of the Australian polity in the common law itself. These values, he argues, provide a medium through which the judicial response is made to a long-standing set of concerns of the common law: the legitimacy, the limits, and the exercise and abuse of power in society.²⁶³

To preserve *Engineers* literalism for the sole purpose of ensuring that Canberra wins all major federalism cases cannot be defended on legal or philosophical grounds. Yet the present state of constitutional interpretation calls to mind Justice Stewart's comment in an American merger case:

"The sole consistency that I can find is that in litigation under s.7, the Government always wins".²⁶⁴

The Gleeson High Court has yet to decide any major federalism cases. But in *Sue v. Hill*,²⁶⁵ the Court's construction of s.44 (i) (parliamentarians not to be aliens) in light of the historical changes since Federation displayed no signs of enslavement to *Engineers* literalism. And while *Re Wakim*²⁶⁶ has been described as not involving any important constitutional values,²⁶⁷ the case did bring a stop, or at least a pause, to Canberra's longer-term program of marginalizing the State judiciary.²⁶⁸ On the other hand, a majority of the seven current Justices sat in *Riordan*, and three were in the majority in *Ha*.

The political dynamics of Australian society are highly federal, in fact there is hardly a human activity of any scale that is not organized on a federal basis. The States are dominant in the delivery of services, and initiate wide areas of policy. They are highly effective in articulating strongly held feelings of dissatisfaction with the central government.²⁶⁹ But the *Engineers* complex has driven the constitutional structure itself close to breakdown.

The present federalism case-law is untenable. But the Federation is still besieged, and federalists would be unwise at present to assume that help is on the way.

Endnotes:

1. *Amalgamated Society of Engineers v. Adelaide Steamship Co. Ltd*, (1920) 28 CLR 129.
2. J Nethercote, *The Engineers' Case: Seventy Five Years On*, in *Upholding the Australian Constitution (UTAC)*, Proceedings of The Samuel Griffith Society, Volume 6 (1995) at 239; LR Zines, *The High Court and the Constitution*, 3rd edn, Butterworths, Sydney, 1992, 1-7.
3. *Federated Amalgamated Government Railway and Tramway Service Association v. NSW Rail Traffic Employees Association*, (1906) 4 CLR 488, 534.
4. *Baxter v. Commissioners of Taxation (NSW)*, (1907) 4 CLR 1087, 1093.
5. *D'Emden v. Pedder*, (1904) 1 CLR 91, 109.
6. JA La Nauze, *The Making of the Australian Constitution*, Melbourne University Press, 1972, at 17, 27-8.
7. *Deakin v. Webb*, (1904) 1 CLR 585, 606.
8. *Baxter*, *loc. cit.*, 4 CLR at 1111-12, 1125.
9. *Peterswald v. Bartley*, (1904) 1 CLR 497, 507.
10. *R. v. Barger; Commonwealth v. McKay*, (1908) 6 CLR 41, 72.
11. *Baxter*, *loc. cit.*, 4 CLR at 1105.
12. *Ibid.*, at 1109; also 1106.
13. *Ibid.*, at 1104.
14. *Ibid.*, at 1112-13.
15. (1819) 4 Wheat.316.
16. (1868) 74 US 70, 7 Wall. 700, 725.
17. *Barger*, *loc. cit.*, 6 CLR at 67.
18. *Attorney-General (NSW) v. Brewery Employees Union of NSW (Union Label Case)*, (1908) 6 CLR 469, 503.
19. *Huddart Parker & Co v. Moorehead*, (1909) 8 CLR 330, 351, 361, 370.
20. *Peterswald*, *loc. cit.*, 1 CLR at 507.
21. J Goldring, *The Path to Engineers*, in M Coper, G Williams (eds), *How Many Cheers for Engineers?*, Federation Press, Leichhardt, NSW, 1997, 1, 35; Nethercote, *loc. cit.*, 242.
22. 4 Wheat. at 406-07.
23. C Howard, *Australian Federal Constitutional Law*, 3rd edn, LBC, Sydney, 1985, 160.

24. RD Lumb, *The Franklin Dam Decision and the External Affairs Power: A Comment*, (1983) 13 *University of Queensland Law Journal*, 138 outlines such an approach.
25. Goldring, *loc. cit.*, at 35.
26. 4 Wheat. at 406.
27. 1 CLR at 105.
28. 28 CLR at 154.
29. Howard, *op. cit.*, at 160, 163.
30. Coper and Williams, *op. cit.*, xiv-xv; PH Lane, *Lane's Commentary on the Australian Constitution*, 2nd edn, LBC, Sydney, 1997, 864-876, 880, 895.
31. Coper and Williams, *op. cit.*, at 75.
32. PB Maxwell, *On the Interpretation of Statutes*, London, 1875, 1.
33. *Bank of Toronto v. Lambe*, (1887) 12 AC 575, 579.
34. PW Hogg, *Constitutional Law of Canada*, 4th edn, Carswell, Scarborough, Ontario, 1997, 116-17.
35. Zines, *op. cit.*, at 11-12.
36. *Strickland v. Rocla Concrete Pipes Ltd*, (1971) 124 CLR 468, 489.
37. Barger, *loc. cit.*, at 113.
38. *Victoria v. Commonwealth*, (1971) 122 CLR 353, 395. See also n. 240 below.
39. G Sawyer, *Australian Federalism in the Courts*, Melbourne University Press, 1967, 199.
40. *R. v. Public Vehicles Licensing Appeal Tribunal; ex parte Australian National Airways Pty Ltd*, (1964) 113 CLR 207, 225; D Dawson, *The Constitution – Major Overhaul or Simple Tune - Up?*, (1984) 14 *Melbourne University Law Review* 353, 356; *Commonwealth v. Tasmania (Tasmanian Dams Case)*, (1983) 158 CLR 1, 127-28 (Mason J).
41. Sawyer, *op. cit.*, at 201.
42. G Craven, *The High Court and the States*, (1995) 6 *UTAC* 65, 69-70; also G Craven, *The Engineers' Case: Time for a Change?*, (1997) 8 *UTAC* 81.
43. Sir Harry Gibbs, *The Constitution: 100 Years On*, (2001) 13 *UTAC* xi, xvi.
44. S Gageler, *Foundations of Australian Federalism and the Role of Judicial Review*, (1987) 17 *Federal Law Review* 162, 181.
45. See generally R Manne, *The Shadow of 1917: Cold War Conflict in Australia*, Text Publishing, Melbourne, 1994.

46. Sir Anthony Mason, *The Role of a Constitutional Court in a Federation*, (1986) 16 *Federal Law Review* 1, 23.
47. AV Dicey, *Introduction to the Study of the Law of the Constitution*, Macmillan, London, 1885.
48. Lane, *op. cit.*, at 128.
49. G Williams, *Engineers and Implied Rights*, in Coper and Williams, *op. cit.*, at 105, 107; G Williams, *Human Rights under the Australian Constitution*, Oxford University Press, Melbourne, 1999, 128.
50. G Barwick, *A View on External Affairs*, (1995) 6 *UTAC* 1.
51. Sir Harry Gibbs, Address Launching Volume 1 of *Upholding the Australian Constitution*, (1993) 3 *UTAC* 135, 140.
52. K Minogue, *Aboriginals and Australian Apologetics*, (1998) 10 *UTAC* 357, 384.
53. P Walsh, *Labor and the Constitution: Forty Years On*, (1997) 9 *UTAC* 153, 159.
54. Sir Anthony Mason, quoted in G Davis, N Sunderland, *A Federation amid Global Imperatives*, in C Sampford, T Round (eds), *Beyond the Republic*, Federation Press, Leichhardt, NSW, 2001, 146, 147-48.
55. K Minogue, *National Sovereignty versus Internationalism: The Importance of Repealability*, (2000) 12 *UTAC* 327, 344.
56. K Minogue, *Constitutional Mania: A Preliminary Diagnosis*, (1995) 6 *UTAC* 159, 165.
57. Davis and Sunderland, *loc. cit.*, at 155.
58. Sampford and Round, *op. cit.*, at 36.
59. Goldring, *loc. cit.*, at 43-44.
60. *Ibid.*.
61. Sawer, *op. cit.*, at 133.
62. P Ayres, *Federalism and Sir Owen Dixon*, (1999) 11 *UTAC* 273, 275.
63. *West v. Commissioner of Taxation (NSW)*, (1937) 56 CLR 657, 681-82.
64. Sawer, *op. cit.*, at 130.
65. Nethercote, *loc. cit.*, at 249-51.
66. Craven (1997), *loc. cit.*, at 86-91.
67. Mason, *loc. cit.*, at 2.
68. LR Zines, *The Present State of Constitutional Interpretation*, in A Stone, G Williams (eds),

- The High Court at the Crossroads*, Federation Press, Leichhardt, NSW, 2000, 224, 238.
69. *Engineers*, *loc. cit.*, 28 CLR at 148.
 70. DC Pearce, *Statutory Interpretation in Australia*, 2nd edn, Butterworths, Sydney, 1981, 16-17.
 71. *Ibid.*, 15-16.
 72. M Cooray, *The High Court – The Centralist Tendency*, (1992) 1 *UTAC* 105, 133; LR Zines, *Characterisation of Commonwealth Laws*, in H Lee, G Winterton (eds), *Australian Constitutional Perspectives*, LBC, Sydney, 1992, 33, 39-40.
 73. *Re Lee; ex parte Harper*, (1986) 160 CLR 430, 448.
 74. *R. v. Brislan; ex parte Williams*, (1935) 54 CLR 362; *Jones v. Commonwealth (No.2)*, (1965) 112 CLR 206, 218, 225-27; *Herald and Weekly Times Ltd v. Commonwealth*, (1966) 115 CLR 418, 433-34, 439-40.
 75. *R. v. Coldham; ex parte Australian Social Welfare Union*, (1983) 153 CLR 297, 314.
 76. *Australian Coarse Grains Pool Pty Ltd v. Barley Marketing Board (Qld)*, (1985) 157 CLR 605, 627-28.
 77. *Tasmanian Dams Case*, *loc. cit.*, at 269-70.
 78. *Ibid.*, 127-28.
 79. *D’Emden v. Pedder*, (1904) 1 CLR 91, 110.
 80. *Actors and Announcers Equity Association v. Fontana Films Pty Ltd*, (1982) 150 CLR 169, 192.
 81. *Alexandra Private Geriatric Hospital Pty Ltd v. Commonwealth*, (1987) 162 CLR 271, 279.
 82. CD Gilbert, *Australian and Canadian Federalism 1867-1984: A Study in Judicial Techniques*, Melbourne University Press, 1986, 27.
 83. Sir Harry Gibbs, *The Threat to Federalism*, (1993) 2 *UTAC* 183, 185.
 84. Pearce, *op. cit.*, at 31. Higgins J acknowledged this principle in his concurring judgment in *Engineers*, 28 CLR at 162.
 85. *Russell v. Russell*, (1976) 134 CLR 495, 539; Zines, n. 2 above, at 21-23.
 86. Lane, *op. cit.*, at 897.
 87. *Strickland v. Rocla Concrete Pipes Ltd*, (1971) 124 CLR 468, 510.
 88. *Victoria v. Commonwealth (Industrial Relations Act (IRA) Case)*, (1996) 187 CLR 416; G Williams, *Labour Law and the Constitution*, Federation Press, Leichhardt, NSW, 1998, 119-20.

89. *Russell, loc. cit.*
90. Zines, n. 2 above, at 21-22.
91. *Ibid.*
92. *Dawson, loc. cit.*, at 360.
93. Sir Harry Gibbs, n. 51 above, at 137.
94. *Tasmanian Dams, loc. cit.*, at 302; Colin Howard, *When External Means Internal*, (1992) 1 *UTAC* 141, 149-50; H Lee, *The High Court and the External Affairs Power*, in Lee and Winterton, *op. cit.*, at 60, 86-88.
95. *Bank of New South Wales v. Commonwealth (Bank Case)*, (1948) 76 CLR 1, 184-85.
96. Goldring, *loc. cit.*, at 53.
97. *Engineers, loc. cit.*, at 145.
98. *Tasmanian Dams, loc. cit.*, at 129, 222.
99. *New South Wales v. Commonwealth (Incorporation Case)*, (1990) 169 CLR 482, 499.
100. K Booker, A Glass, *What Makes the Engineers' Case a Classic?*, in Coper and Williams, *op. cit.*, at 70.
101. Dawson, *loc. cit.*, at 361.
102. C Sharman, *Federalism and the Liberal Party*, in J R Nethercote (ed.), *Liberalism and the Australian Federation*, Federation Press, Leichhardt, NSW, 287, 301.
103. Lane, *op. cit.*, at 10.
104. *Ibid.*
105. *R. v. Phillips*, (1970) 125 CLR 93, 118.
106. Lumb, *loc. cit.*, at 138-39.
107. *Gazzo v. Comptroller of Stamps (Vic.)*, (1981) 149 CLR 227, 240; *Coldham, loc. cit.*, at 313.
108. Zines, in Coper and Williams, *op. cit.*, at 90-91.
109. C Saunders, *The National Implied Power and Implied Restrictions on Commonwealth Power*, (1984) 14 *Federal Law Review* 267, 268.
110. *Davis v. Commonwealth*, (1988) 166 CLR 79, 93.
111. Parliament of Victoria, Federal - State Relations Committee, *Australian Federalism: The Role of the States*, Government Printer, Melbourne, 1998, 27-28; Dawson, *loc. cit.*, at 355.

112. P Hanks, *Constitutional Law in Australia*, 2nd edn, Butterworths, Sydney, 1996, 236-37.
113. *Melbourne Corporation v. Commonwealth*, (1947) 75 CLR 31.
114. *Re Australian Education Union; ex parte Victoria*, (1995) 184 CLR 188.
115. *Richardson v. Forestry Commission*, (1988) 164 CLR 261.
116. *Western Australia v. Commonwealth (Native Title Act (NTA) Case)*, (1995) 183 CLR 373.
117. As to public servants, see *Re State Public Services Federation; ex parte Attorney-General (WA)*, (1993) 178 CLR 249. As to the mining industry, see below.
118. *Richardson*, *loc. cit.*, at 308-12.
119. *Nationwide News Pty Ltd v. Wills*, (1992) 177 CLR 1, 30-31, 101.
120. F Wheeler, in Coper and Williams, *op. cit.*, at 131.
121. M Crommelin, *Federalism*, in PD Finn (ed.), *Essays in Law and Government*, Vol. 1, LBC, Sydney, 1995, 168, 180.
122. *Davis*, *loc. cit.*; *Re Dingjan, ex parte Wagner*, (1995) 183 CLR 323.
123. See above; also G Williams, in Coper and Williams, *op. cit.*, at 107-08.
124. *Attorney-General (Vic.) ex rel. Black v. Commonwealth (DOGS Case)*, 146 CLR 559, 652-53.
125. E.g., *Australian Capital Television Pty Ltd v. Commonwealth*, (1992) 177 CLR 106; *Nationwide News Pty Ltd v. Willis*, (1992) 177 CLR 1.
126. *Street v. Queensland Bar Association*, (1989) 168 CLR 461.
127. (1988) 165 CLR 360.
128. PH Lane, *Recent Trends in Constitutional Law*, (2002) 76 *Australian Law Journal* 154.
129. JR Forbes, 'Just tidying up': *Two Decades of the Federal Court*, (1998) 10 *UTAC* 143, 158.
130. *Taikato v. R*, (1996) 186 CLR 454; *Durham Holdings Pty Ltd v. New South Wales*, (2001) 75 ALJR 501.
131. *Engineers*, *loc. cit.*, 28 CLR at 154.
132. *South Australia v. Commonwealth*, (1992) 174 CLR 235, 246-47. In *SGH Ltd v. Commissioner of Taxation*, (2002) 76 ALJR 780, the Court said that s.114 should not be interpreted narrowly, at least in relation to what kind of government-owned entity should be taken to be the "State", but then proceeded to give it a relatively narrow application. The majority did so, however, in such a way as to provide a basis for a narrower reading of some Commonwealth powers in the future, as it distinguished between governmental and other functions: pp. 783-84.

133. *Queensland v. Commonwealth*, (1987) 162 CLR 74.
134. *Port McDonnell Professional Fishermen's Association Inc. v. South Australia*, (1989) 168 CLR 340, 381.
135. *R. v. Licensing Court of Brisbane; ex parte Daniell*, (1920) 28 CLR 23; *Oxford Companion to the High Court of Australia*, Oxford University Press, South Melbourne, Vic, 2001, 337.
136. *Clyde Engineering Co. Ltd v. Cowburn*, (1926) 37 CLR 466.
137. *Oxford Companion*, *op. cit.*, at 337.
138. *Ibid.*, at 338; *NTA Case*, *loc. cit.*, at 468.
139. *Oxford Companion*, *op. cit.*, at 338.
140. Gilbert, *op. cit.*, at 153.
141. *Engineers*, *loc. cit.*, at 151.
142. *Ibid.*, at 154.
143. *Huddart Parker Ltd v. Commonwealth*, (1931) 44 CLR 492.
144. Zines, in Coper and Williams, *op. cit.*, at 83.
145. *Melbourne Corporation v. Commonwealth*, (1947) 74 CLR 31, 79; Lane, n. 30 above, at 133.
146. *Murphyores Inc. Pty Ltd v. Commonwealth*, (1976) 136 CLR 1.
147. *Northern Suburbs General Cemetery Reserve Trust v. Commonwealth*, (1993) 176 CLR 555.
148. *Arthur Yates and Co. Pty Ltd v. Vegetable Seeds Committee*, (1946) 72 CLR 37, 73, 77; *Bailey v. Conole*, (1931) 34 WALR 18, 23.
149. *South Australia v. Commonwealth*, (1942) 65 CLR 373.
150. DC Mueller, *Public Choice II*, Cambridge University Press, New York, 1991, 331.
151. Sharman, *loc. cit.*, at 296; Dawson, *loc. cit.*, at 356.
152. *Victoria v. Commonwealth*, (1957) 99 CLR 575. The *First Uniform Tax Case* expressly contemplated this result.
153. *Clark King & Co. Pty Ltd v. Australian Wheat Board*, (1978) 140 CLR 120; *Uebergang v. Australian Wheat Board*, (1980) 145 CLR 266.
154. *WR Moran Pty Ltd v. Deputy Commissioner of Taxation (NSW)*, [1940] AC 838, 849.
155. Gilbert, *op. cit.*, at 98, 104, 117.
156. FR McGrath, *Today's High Court and the Convention Debates*, (2001) 13 *UTAC* 1, 2, 5.

157. *Ibid.*, at 6.
158. *Ibid.*, at 8.
159. *New South Wales v. Commonwealth*, (1990) 169 CLR 482.
160. *Kartinyeri v. Commonwealth*, (1998) 195 CLR 337, 364.
161. Pearce, *op. cit.*, at 15.
162. G Craven, *The Crisis of Constitutional Literalism in Australia*, in H Lee, G Winterton (eds), *op. cit.*, at 1, 22.
163. M Coper, *The Proper Scope of the External Affairs Power*, (1995) 5 *UTAC* 47, 50-51.
164. F McGrath, *loc. cit.*, at 20.
165. McGrath, *The Intentions of the Framers of the Commonwealth of Australia Constitution in the Context of the Debates at the Australasian Federation Conference of 1890, and the Australasian Federal Conventions of 1891 and 1897-8*, PhD thesis, University of Sydney, 2000, 189-90 and Appendix. In view of the current pressure for drug legalization, it is useful to note that the rampant opium use among the Chinese at that time resulted from the Chinese government's 1860 attempt to control drug use by legalizing it. At the time about 10 per cent of the population used opium regularly, and critics argued, as they still do, that the drug was no worse than alcohol or tobacco and that prohibition was causing official corruption. By 1906 regular users had soared to 40 per cent of the population, and the drug was causing such damage that the government was forced to revive the ban. This move was successful until the 1912 revolution resulted in general social breakdown: G de Q Walker, *Drug Legalisation and the China Syndrome*, in *Australia and World Affairs*, Spring, 1994, 46.
166. J Quick, R Garran, *The Annotated Constitution of the Australian Commonwealth*, (1901)reprinted by Legal Books, Sydney, 1976, 632.
167. (1997) 192 CLR 1.
168. Sir Anthony Mason, *loc. cit.*, at 5.
169. *Mabo v. Queensland (No. 2)*, (1992) 175 CLR 1, 42.
170. Dawson J has criticized this élitist attitude to s.128: *loc. cit.*, at 366.
171. Sir Anthony Mason, *loc. cit.*, at 22-23 (emphasis added).
172. *Koowarta v. Bjelke-Petersen*, (1982) 153 CLR 168, 229.
173. *Ibid.*, at 250-51.
174. J Gava, *The Rise of the Hero Judge*, (2001) 24 *University of New South Wales Law Journal* 747, 755.
175. Craven (1995), *loc. cit.*, at 70.

176. *Australian Communist Party v. Commonwealth*, (1951) 83 CLR 1, 262-63.
177. *Engineers*, *loc. cit.*, at 151-52.
178. Gageler, *loc. cit.*, at 163.
179. *Koowarta*, *loc. cit.*, at 255.
180. *Tasmanian Dams*, *loc. cit.*, at 125, 128.
181. B Galligan, *Politics of the High Court*, University of Queensland Press, St Lucia, 1987, 242.
182. G Williams, *Judicial Activism and Judicial Review in the High Court of Australia*, in T Campbell, J Goldsworthy (eds), *Judicial Power, Democracy and Legal Positivism*, Ashgate, Dartmouth, UK, 2000, 413, 416.
183. Sir Harry Gibbs, 'A Hateful Tax'? *Section 90 of the Constitution*, (1995) 5 *UTAC* 121, 122, 125; Craven (1995), *loc. cit.*, at 86-87.
184. Coper (1995), *loc. cit.*, at 57-58.
185. Gageler, *loc. cit.*.
186. Craven (1995), *loc. cit.*, at 70; Craven, *Reforming the High Court*, (1996) 7 *UTAC* 21, 23-24.
187. Finn, *op. cit.*, at 6-8.
188. WR Ledermann, *Continuing Canadian Constitutional Dilemmas*, Butterworths, Toronto, 1981, 281.
189. SEK Hulme, *The External Affairs Power: The State of the Debate*, (1995) 6 *UTAC* 9, 30.
190. Mueller, *op. cit.*, at 337-39, 346-47.
191. The process began with *National Labor Relations Board v. Jones and Laughlin Steel Corp.*, (1937) 301 US 1; *United States v. Darby*, (1941) 312 US 100; and *Wickard v. Filburn*, (1942) 317 US 111.
192. C Howard, *The Proposed External Affairs Referendum*, (1996) 7 *UTAC* 1, 5.
193. *Victoria v. Commonwealth (IRA Case)*, (1996) 187 CLR 416, 509.
194. *NTA*, *loc. cit.*. As to the vesting of judicial power in a body other than a Chapter III court, see, e.g., *Re Tracey; ex parte Ryan*, (1989) 166 CLR 518, 580; *Lim v. Minister for Immigration*, (1992) 176 CLR 1, 27-29.
195. Booker and Glass, *loc. cit.*, at 69; Craven (1992), n. 162 above, at 10; Crommelin, *loc. cit.*, at 180.
196. Zines (2000), n. 68 above, at 238.
197. Williams (1997), n. 49 above, at 105-110.

198. *McGinty v. Western Australia*, (1996) 186 CLR 140, 230-34.
199. *Kartinyeri v. Commonwealth*, (1998) 195 CLR 337, 381.
200. Williams (1997), n. 49 above, at 110-11; F Wheeler, in Coper and Williams, *op. cit.*, at 130.
201. *Abebe v. Commonwealth*, (1999) 162 ALR 1; *Ex parte Eastman; re Governor, Goulburn Correctional Centre*, (1999) 165 ALR 171.
202. *Damjanovic & Sons Pty Ltd v. Commonwealth*, (1968) 117 CLR 390, 396.
203. G Moens, J Trone, *Lumb and Moens's Constitution of the Commonwealth of Australia Annotated*, 6th edn, Butterworths, Chatswood, NSW, 2001, 24-25.
204. Lane (2002), n. 128 above.
205. *Melbourne Corporation v. Commonwealth*, (1947) 74 CLR 31.
206. Lane (1997), *op. cit.*, at 899; C Saunders, *Dividing Power in an Age of Globalisation*, in Sampford and Round, *op. cit.*, at 129, 138-39.
207. *Re Residential Tenancies Tribunal of New South Wales; ex parte Defence Housing Authority*, (1997) 190 CLR 410.
208. G Bolton, *The Civil War we Never Had*, (1993) 3 *UTAC* 83, 88-9, 100-01.
209. Australia's colonial-era variation of railway gauges does not seem quite so absurd when one realizes that coastal shipping was expected to remain the chief method of long-distance transport within Australia, with rail serving only a feeder role, carrying freight and passengers to and from the ports: AJ Rose, *Dissent from Down Under: Metropolitan Primacy as the Normal State*, (1966) 7 *Pacific Viewpoint* 1, 27. See also Walker (2001), n. 227 below, at 49-50.
210. B. Galligan, *Federal Renewal, Tax Reform and the States*, (1998) 10 *UTAC* 221, 237-38.
211. Sir Anthony Mason, *loc. cit.*, at 18, 22-23, 28.
212. *Attorney-General (Qld) v. Riordan*, (1997) 192 CLR 1, 41, 42.
213. W Kasper, *Economic Freedom Watch Report No. 1*, Centre for Independent Studies, February, 2002, 8.
214. ME Porter, *The Competitive Advantage of Nations*, Macmillan, London, 1998, 642. As to the OECD's view, see D Moore, *Judicial Intervention: The Old Province for Law and Order*, (2001) 13 *UTAC* 133, at 139.
215. *Ibid.* (Moore), at 133, 134-37.
216. *Re Australian Education Union; ex parte Victoria*, (1995) 184 CLR 188, 232-33, 237-38; *Re State Public Services Federation; ex parte Attorney-General (WA)*, (1993) 178 CLR 249, 294.

217. M Inglis, *Is Self-assessment working? The Decline and Fall of the Australian Income Tax System*, (2002) 31 *Australian Tax Review* 46.
218. E.g., *Income Tax Assessment Act 1936*, ss 14 ZAAA-AAM, 14ZAA-ZAZC.
219. Porter, *op. cit.*, at 640.
220. *Mabo v. Queensland (No 2)*, (1992) 175 CLR 1.
221. R Court, *Returning Power to the States: Risky or Responsible?*, (1997) 9 *UTAC* xi, xiii.
222. JR Forbes, *The Prime Minister's Ten Point Plan*, (1997) 9 *UTAC* 29, 43-48.
223. JR Forbes, *Native Title Now*, (2001) 13 *UTAC* 61, 99-100.
224. Minerals Council of Australia, *Annual Report 2000*, 18.
225. K Maddock, *After the Rapture, Unreality Set in*, in *The Australian*, June 3, 2002.
226. C Sharman, *Secession and Federalism*, (1993) 3 *UTAC* 97, 111.
227. G de Q Walker, *Ten Advantages of a Federal Constitution and how to Make the Most of Them*, Centre for Independent Studies, St Leonards, NSW, 2001, 9-13. Earlier, shorter versions under the title *Ten Advantages of a Federal Constitution* were published in (1998) 10 *UTAC* 283 and (1999) 73 *Australian Law Journal* 634.
228. Even the Chief Justice of the Family Court, Hon Alistair Nicholson, concedes that most of the complaints received by federal parliamentarians relate to Family Court or child support matters: *Re Colina; ex parte Torney*, (1999) 73 ALJR 1576, 1579; Walker (2001), *loc. cit.*, at 11-12, 68-69.
229. Walker (2001), *loc. cit.*, at 13, 46-47, 70.
230. Jan Wade, MLA, *The Future of the Federation*, (1995) 6 *UTAC* ix, xx.
231. Mueller, *op. cit.*, at 345-46.
232. *Ibid.*, at 321, 346.
233. *Ibid.*, at 342-43.
234. W Kasper, *Building Prosperity: Australia's Future as a Global Player*, Centre for Independent Studies, St Leonards, NSW, 2000, 93.
235. *Ibid.*.
236. Walker (2001), *loc. cit.*, at 41.
237. RTE Latham, in Coper and Williams, *op. cit.*, at 74, 76.
238. *Victoria v. Commonwealth (Payroll Tax Case)*, (1971) 122 CLR 353, 396-97.
239. *Ibid.*.

240. G Sawyer, *Australian Federal Politics and Law 1901-1929*, Melbourne University Press, 1956, 41, 329, 243; Federal - State Relations Committee, *loc. cit.*, at 31; Sawyer, *Australian Federalism in the Courts*, *op. cit.*, at 201.
241. Federal – State Relations Committee, *loc. cit.*, at 31; Sawyer, n. 39 above, at 201.
242. I Holloway, *Australia, the Republic and the Perils of Constitutionalism*, (1998) 10 *UTAC* 95, 98.
243. Dawson, *loc. cit.*, at 365; C Saunders, n. 206 above, at 129, 135; *Huddart Parker v. Commonwealth*, (1931) 44 CLR 492, 526-27 (Evatt J).
244. Hogg, *op. cit.*, at 118.
245. RCB Risk, *Constitutional Scholarship in the late Nineteenth Century: Making Federalism Work*, (1996) 46 *University of Toronto Law Journal* 427, 435-7; FR Scott, *Centralization and Decentralization in the Canadian Federation*, (1951) 29 *Canadian Bar Review* 1093.
246. Gilbert, *op. cit.*, at 6, 152.
247. *Ibid.*, at 156.
248. B Smith, *Electoral Reform and Tensions in the Canadian Federation, 2 Federations* (Forum of Federations, Ottawa), March, 2002.
249. Walker (2001), *loc. cit.*, at 1-5.
250. *Teori Tau v. Commonwealth*, (1969) 119 CLR 564. Overruling prior authority, the Court upheld a law expropriating mineral rights without compensation, virtually without discussion. See D Oliver, *Black Islanders: A Personal Perspective of Bougainville 1937-1991*, (1991), esp. 125, 126, 130-31, 186-87, 201-02. The case is referred to, though not by name, at 125; J Goldring, *The Constitution of Papua New Guinea*, (1978) 31-32; S Dorney, *Papua New Guinea: People Politics and History since 1975*, (1998), e.g., 124-25; P. Sack (ed.), *Problem of Choice: Land in Papua New Guinea's Future*, (1974) 131-32; J Griffin, *The Bougainville Rebellion*, in D Anderson (ed.), *The Papua New Guinea - Australia Relationship: Problems and Prospects*, (1990) 70-74.
251. Sir Anthony Mason, *loc. cit.*, at 23.
252. Walker (2001), *loc. cit.*, at 3.
253. G de Q Walker, *The Unwritten Constitution*, (2002) 27 *Australian Journal of Legal Philosophy*, 142, 150.
254. (1995) 514 US 549.
255. *Ibid.*, at 589.
256. *United States v. Morrison*, (2000) 529 US 598; Walker (2001), *loc. cit.*, at 57, 86.
257. Sir Anthony Mason, *loc. cit.*, at 21.

258. Lumb, *loc. cit.*, at 138-39.
259. 514 US at 567.
260. *Kable v. Director of Public Prosecutions (NSW)*, (1997) 189 CLR 51. The result in *Kable* could have been reached on the simpler and sounder ground, for which there is legal and historical support, that British colonial legislatures had never been invested with judicial power, and attainder-type laws are predominantly judicial. This would have meant overruling *Clyne v. East*, (1967) 68 SR (NSW) 385, a Supreme Court decision from Diceyism's heyday that would not have been missed.
261. Thus, *ACTV*, n. 125 above, would not have been necessary if the posts and telegraphs power had not been extended beyond recognition in previous cases, to the extent that it could be considered to support a law restricting political advertising, paid or unpaid. Cf. *Nationwide News*, n. 125 above.
262. P Bayne, in Coper and Williams, *op. cit.*, at 136-37.
263. Finn, *op. cit.*, at 8-9.
264. *United States v. Von's Grocery Co.*, (1966) 384 US 270, 301.
265. (1999) 199 CLR 462.
266. *Re Wakim; ex parte McNally*, (1999) 198 CLR 511.
267. Zines, n. 68 above, at 234-35.
268. See generally Forbes, n. 129 above.
269. Sharman, n. 102 above, at 301.