A UNITED STATES GUIDE TO CONSTITUTIONAL LIMITATIONS UPON TREATIES AS A SOURCE OF AUSTRALIAN MUNICIPAL LAW

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PART TWO**

The first segment of this article examined the theoretical and historical underpinnings of the external affairs power in the Commonwealth of Australia Constitution Act. The following pages continue the development of that theme in an endeavour to ascertain and postulate constitutional limitations applicable to treaty implementing legislation of the Commonwealth Parliament.

LIMITATIONS IMPLIED IN FEDERALISM

INTRODUCTION

Federalism has often been the patient in the surgery of those who operate with pen and paper. Yet despite repeated prognoses of fatal maladies and carefully etched epitaphs,[121] federalism exists today not

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** Part One appears at (June 1977) Vol. 13 No. 1 U.W.A.L. Rev. 110-134. The numerical order of footnotes in Part Two follows on and refers to the footnotes in Part One.

121 See, e.g., "I infer, in a word, that the epoch of federalism is over, and that only a decentralised system can effectively confront the problems of a new time." Laski, "The Obsolescence of Federalism", 98 *The New Republic,* 367 (May 3, 1939); "Federalism, which began by seeking to maintain variety in unity, has ended up succumbing to the influence of giant capitalism . . . The central result of economic development has been to emphasize the obsolescence of the federal idea." H. Laski, *The American Democracy* 50 (1948); "Federalism is on the decline and this in spite of various institutionalizations in the West and the East . . . Economic planning is the DDT of federalism. Constitutions, therefore, that take their federal premises too seriously can hardly escape becoming anachronistic." Loewenstein, "The Value of Constitutions in Our Revolutionary Age", in *Constitutions and Constitutional Trends Since World War II,* 211-212 (Zurcher ed. 1951); cf. "The idea of Federalism is more alive today than at any time in the last one hunderd and fifty years."Fisher, "Prerequisites of Balance", in *Federalism, Mature and Emergent* 58 (Mcmahon ed. 1955); "No domain of continental extent has been ruled otherwise than as an autocracy or as a federal state." Pound, "Law and Federal Government", in *Federalism as a Democratic Process* 23 (1942).

merely as a concept based upon the existence of two entities, the national and states, but as a dynamic force involving the interplay of their powers and functions.[122] Incorrect assessments of the condition of federalism have emerged from a failure to perceive that changes in its complexion are symptomatic, not of demise, but rather of adaption to the various crises of human affairs. Thus, in the second half of the twentieth century it is possible to characterize both the United States and Australia as federal countries.[123] This is so even though the political and legal relationships between the national government and states differs in both countries. Indeed it may be safely said, at least for the present moment, that "[t]he Australian Union is one of dual federalism"[124] while federalism in the United States since the impact of the New Deal has tended to be more organic in nature.[125]

Much ink has been spilt and perhaps wasted in attempts to distill the essential nature of federalism. To date this effort has been to little avail, for both simple and more complex notions of federalism offer an enormous amount of variation in their component parts. By use of a functional rather than an analytical approach, it can be observed that the dynamics of federalism derive from the political process wherein the balance of power varies from decade to decade and even from day to day. Even so, in a real sense the legal system in the United States and Australia, also contributes to the moulding and shaping of governmental structure and power. Thus differing judicial interpre-

122 Cf. "Federal government means weak government . . . Federalism tends to produce conservatism . . . Federalism, lastly, means legalism." A. Dicey, *Introduction to the Study of the Law of the Constitution* 171 (9th ed. 1939).

123 United States: see e.g., Freund, "Foundations and Development of American Federalism: The Experience of an Older Federation" in *Federalism and the New Nations of Africa* 153 (Currie ed. 1964). Australia: see, e.g., G. Sawer *Australian Federalism in the Court,* Chapter I (1967; G. Sawer, *Modern Federalism* (Rev. Ed. 1976); Sawer, "The Whitlam Revolution in Australian Federalism—Promise, Possibilities and Performance" (1976) 10 Melb. U.L. Rev. 315; Sawer, "Seventy-five Years of Australian Federalism (1977) 36 *Aust. J. Pub. Adm.n.* I; Sawer, "Towards a New Federal Structure? in *Labour and the Constitution 1972-1975,* at 3-23 (G. Evans ed. 1977); Zines "The Australian Constitution 1951-1976" (1977) 7 *Fed L. Rev.* 89, 93-99.

124 Airlines of New South Wales Pty. Ltd. v State of New South Wales [No. 2], supra note 103 at 115 (Kitto, J.).

125 See, e.g., United States v Darby, (1941) 312 U.S. 100; Wickard v Filburn, (1942) 317 U.S. 111; the underpinnings of this organic view of the Constitution, that sprang full blown in the post-1937 Supreme Court decisions, are at least as old as the opinion of Chief Justice Marshall in McCulloch v Maryland, supra note 39.

tation of the Commerce Clause in the United States[126] and Australia[127] has undobutedly been a significant factor in the way federalism has developed in both countries.[128] The High Court, notwithstanding some hints of a reconsideration of the extent of the commerce power,[129] has been steadfast in its refusal to accept the "commingling theory"[130] and has continued to draw a 'legal' distinction between interstate and intrastate trade, however illogical such a distinction might be from an economic point of view.[131] Although the High Court's expressed justification of its position is the need to preserve "constitutional distinctions" and "unwavering bright lines"[132] the real, but unarticulated, reason for its doctrinal attitude towards the Commerce Clause lies in the belief that there are certain areas of governmental power onto which the Commonwealth should not be permitted to trespass.[133]

126 "The Congress shall have power: To regulate commerce with foreign nations, and among the several States, and with the Indian tribes." U.S. Const. art. I, S. 8, cl. 2.

127 "The Parliament shall, subject to this Constitution, have power to make laws for the peace, order and good government of the Commonwealth with respect to 'trade and commerce with other countries, and among the states'." Aust. Const. S. 51 (i).

128 For a comparative survey of the judicial development of the Commerce Clause in both countries, see, e.g., Nygh, "An Analysis of Judicial Approaches to the Interpretation of the Commerce Clause in Australia and the United States" (1967) 5 *Syd. L. Rev.* 352; P. H. Lane, "Trade and Commerce in Constitutional Law (United States and Australia)" (unpublished S.J.D. thesis Harvard Law School 1964).

129 O'Sullivan v Noarlunga Meat Ltd., (1954) 92 C.L.R. 565, 598 (Fullagar, J.); and also see, The King v Turner ex parte Marine Board of Hobart, (1927) 39 C.L.R. 411, 426 (Isaacs, J., dissenting), 445-446 (Higgins, J., dissenting) Minister for Justice (W.A.) v A.N.A. Commission, (1976) 12 A.L.R. 17, 45-46 (Murphy, J., dissenting).

130 The King v Burgess ex parte Henry, supra note 14 at 628, 629, 671, 672.

131 Wragg v State of New South Wales, (1953) 88 C.L.R. 353, 385, 386, 393, 398; Airlines of New South Wales Pty. Ltd. v State of New South Wales [No. 2], supra note 103 at 78, 115, 150; for examples of the High Court's reaction to the Supreme Court's "excesses" see, Huddart Parker v The Commonwealth, (1931) 44 C.L.R. 494, 499 (arguendo), 526; Swift Australian Co. (Pty.) Ltd. v Boyd Parkinson, (1962) 108 C.L.R. 189, 203; Australian Coastal Shipping Commission v O'Reilly, (1962) 107 C.L.R. 46, 66-67, 70; see also Minister for Justice (W.A.) v A.N.A. Commission, supra note 129.

132 Airlines of New South Wales Pty. Ltd. v State of New South Wales [No. 2], supra note 103 at 114-115.

133 In re Foreman & Sons Ltd., Uther v Federal Commissioner of Taxation, (1947) 74 C.L.R. 508, 598; Huddart Parker & Co. Pty. Ltd. v Moorehead, (1909) 8 C.L.R. 330, 395-396 (Isaacs, J.), 409-410 (Higgins, J.); Attorney General for the State of Victoria v The Commonwealth, supra note 112 at

And the ultimate touchstone of this belief is the theory of dual federalism. On the other hand, the Supreme Court, at least when dealing with the commerce power, has formally buried dual federalism as a gauge by which it sets the bounds of national governmental power within the federation.[134] It is for Congress to readjust "the balance of State and national authority"[135] and to set "the degree of accommodation . . . from time to time in the relations between federal and State governments."[136] As a result of the events of 1937,[137] the United States now uses its commerce power to invade deeply into "state" territory.[138] This, together with the fact that the Supreme Court has only on one occasion since 1937 invalidated federal legislation on the ground that the commerce power had been exceeded,[139] had led some commentators to conclude that in this area there is no judicially enforceable limit and to rely upon political restraints on Congress to

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582; Wagner v Gall, (1949) 79 C.L.R. 43, 91; The King v Foster ex parte Rural Bank of New South Wales, (1949) 79 C.L.R. 43, 81; for a discussion of the Australian Commerce Clause, see, Hotop, "The Federal Commerce Power and Labour Relations", (1974) 48 *A.L.J.* 169.

134 United States v Darby, supra note 125.

135 A. B. Kieschbaum Co. v Walling, (1941) 316 U.S. 517, 522 (Frankfurter, J., opinion of the Ct.).

136 Id. at 520.

137 See, e.g., R. Jackson, *The Struggle for Judicial Supremacy* (1941).

138 See, e.g., Heart of Atlanta Motel v United States, (1964) 379 U.S. 241; Katzenback v McClung, (1964) 379 U.S. 294. Note however that the Supreme Court in National League of Cities v Usery, (1976) 426 U.S. 833 overruled Maryland v Wirtz, (1968) 392 U.S. 183.

139 National League of Cities v Usery, supra note 138; for a discussion of that case and the increasing judicial solicitude for state interests; see Note, "Municipal Bankruptcy, The Tenth Amendment and the New Federalism", (1976) 89 *Harv. L. Rev.* 1871; see also, Kessler, "The Clean Air Act Amendments of 1970: A Threat to Federalism", (1976) 76 *Colum. L. Rev.* 992; Flagg, "Stone v Powell and the New Federalism: A Challenge to Congress", (1976) 14 *Harv. J. Legis.* 152; Tribe, "Intergovernmental Immunities in Litigation, Taxation, and Regulation: Separation of Powers Issues in Controversies About Federalism", (1976) 89 *Harv. L. Rev.* 682, 697 footnote 78. Note that pursuant to the congressional enforcement power, U.S. Const. Amend. XVI, s. 5, Oregon v Mitchell, (1970) 400 U.S. 112, "is the first important case since 1936 invalidating Federal Legislation for exceeding Congress' delegated powers under the Constitution" "The Supreme Court, 1970 Term," (1971) 85 *Harv. L. Rev.* 3, 152 (footnote omitted). For discussions of the Usery case see, Welch, "At Federalism's Crossroads: National League of Cities v Usery", (1977) 57 *Boston U.L. Rev.* 178; Curry, "A State Sovereignty Limitation on the Commerce Power, (1977) 37 *Louisiana L. Rev.* 933; Tribe, "Unraveling National League of Cities: The New Federalism and Affirmative Rights to Essential Government Services" (1977) 90 *Harv. L. Rev.* 1065.

preserve state autonomy.[140] The more persuasive view is, however, that there has not been complete judicial abdication and that some limit does exist despite its present lack of definition.[141]

A somewhat similar and equally difficult problem is raised by asking whether there are any constitutional limitations which can be invoked against the national government when, with the aid of its treaty powers,

140 See, e.g., N. Dowling & R. Edwards, *American Constitution Law* 156 (1954); 1 B. Schwartz, *A Commentary on the Constitution of the United States* 235-237 (1963). This is also the view of at least three Justices in National League of Cities v Usery, supra note 138. Justice Brennan argued: "It must . . . be surprising that my Brethren should choose this Bicentennial year of our independence to repudiate principles governing judicial interpretation of our Constitution settled since the time of Chief Justice John Marshall, discarding his postulate that the Constitution contemplates that restraints upon exercise by Congress of its plenary commerce power lie in the political and not in the judicial process. . . . My Brethren do not successfully obscure today's patent usurpation of the role reserved for the political process by their purported discovery in the Constitution of a restraint derived from sovereignty of the States on Congress' exercise of the commerce power. . . . It is unacceptable that the judicial process should be thought superior to the political process in this area. Under the Constitution the judiciary has no role to play beyond finding that Congress has not made an unreasonable legislative judgment respecting what is 'commerce'. . . . Judicial restraint in this area merely recognizes that the political branches of our Government are structured to protect the interests of the States, as well as the Nation as a whole, and that the States are fully able to protect their own interests in the premises. Congress is constituted of representatives in both Senate and House *elected from the States*. . . . Decisions upon the extent of federal intervention under the Commerce Clause in the affairs of the States are in that sense decisions of the States themselves. Judicial redistribution of powers granted the National Government by the terms of the Constitution violates the fundamental tenet of our federalism that the extent of federal intervention into the State's affairs in the exercise of delegated powers shall be determined by the States exercise of political power through their representatives in Congress. . . . Any realistic assessment of our federal political system, dominated as it is by representatives of the people *elected from the States,* yields the conclusion that it is highly unlikely that those representatives will ever be motivated to disregard totally the concerns of these States. Certainly this was the premise upon which the Constitution, as authoritatively explicated in Gibbons v Ogden [(1824) 22 U.S. (9 Wheat.) 1], was founded. Indeed, though the States are represented in the National Government, national interests are not similarly represented in the States' political processes. Perhaps my Brethren's concern with the judiciary's role in preserving federalism might better focus on whether Congress, not the States, is in greater need of this Court's protection." Id. at 857-878 (Brennan, J., with whom White and Marshall, J.J., join, dissenting).

141 See, e.g., Katzenback v McClung, supra note 138 at 303-304; United States v Five Gambling Devices, (1953) 346 U.S. 441, 448-450 (Jackson, J.); Freund, "Review and Federalism", in *Supreme Court and Supreme Law* 94 (Cahn ed. 1954); Stern, "The Scope of the Phrase 'Interstate Commerce.'" 41 *A.B.A.J.*

it moves towards a unitary form of government. Can the court, in the name of a federal system, remind the national member that there are other constituent states in the overall governmental structure which are not to be eliminated? If so, upon what foundation can the court build to justify its intervention?[142]

There may, of course, be independent political safeguards which can operate in the name of federalism to limit an exercise of the treaty power when it threatens to prevent states from continuing to exist and function as such.[143] In this regard it is interesting to note that successive Australian Governments have been reticent in undertaking treaty commitments in those areas where the legislative authority has, at least in the past, resided with the states.[144] Whether this reticence has constitutional substance or is rather a matter of internal political expediency is the question now to be examined. In regard to the first alternative, a legal basis for the existence of the states will be sought in the text of the Constitution. If that basis exists, does it suggest any limitation as to the extent of control which the federal member may exercise over the states? Lastly, possible political limitations on the treaty power will be noted.

THE CONSTITUTIONAL STRUCTURE

Before resorting to implications from the nature of federalism as a ground for restricting federal treaty powers, the court may look to see whether or not the Constitution itself expressly provides for the continued existence of the states. Taken at face value, the Constitution of the United States and that of Australia are federal. Indeed the Preamble to the latter announces that "the people of New South Wales, Victoria, South Australia, Queensland, and Tasmania . . . have agreed

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823, 873 (1955); H. Pritchett, *The American Constitution* 258 (1959). The reasons enunciated by the Justices in National League of Cities v Usery, supra note 138, where the Supreme Court divided 5 to 4, illustrate the range of views concerning this problem.

142 See generally, C. Black, Jr., *Prespectives in Constitution Law* 28-30 (2d ed. 1970).

143 In the United States the two participants in the treaty making procedure—President and the Senate—are elected by a process that historically reflects a desire to have representatives in the national political area to protect states and their interests.

144 See, e.g., International Labor Organisation Conventions; Bailey, "Australia and International Labour Conventions", 1946) 54 *International Labour Review* 285, 288; Goldring, "The 1958 United Nations Convention on Recognition and Enforcement of Foreign Arbital Awards and the Australian Constitution", (1973) 5 *Federal L. Rev.* 303.

to unite in one indissoluble Federal Commonwealth"[145] and the word 'federal' occurs fifteen times in the Act,[146] exclusive of references to the Federal Council of Australasia Act of 1885.[147] It does not, however, provide a definition of that expression. The Preamble to the Constitution of the United States of America declares that the Constitution is ordained and established "in order to form a more perfect Union." That the objective was not unitary government is clearly recognized by Chief Justice Chase.[148]

> The Union of the States never was a purely artificial and arbitrary relation . . . It . . . received definite form, and character, and sanction from the Articles of Confederation. By these the Union was solemnly declared to be "perpetual." And when these Articles were found to be inadequate to the exigencies of the country, the Constitution was ordained "to form a more perfect Union." It is difficult to convey the idea of indissoluble unity more clearly than by these words. What can be indissoluble if a perpetual Union, made more perfect, is not? But the perpetuity and indissolubility of the Union, by no means implies the loss of distinct and individual existence, or of the right of self-government by the States.

In addition each Constitution continually addresses itself to two entities: the national and the states.[149] This is particularly so with respect to the division of powers between those two entities and it is at this point that the so called federal structure of the document is

145 Commonwealth of Australia Constitution Act 1900, supra note 8; The King v Commonwealth Court of Conciliation and Arbitration ex parte State of Victoria, (1942) 66 C.L.R. 488, 506-507; Western Australia v The Commonwealth, (1976) 7 A.L.R. 159, 171 (Barwick, C.J.); The Commonwealth v Queensland, (1975) 7 A.L.R. 351, 381 (Murphy, J.); New South Wales v Commonwealth of Australia, supra note 14 at 15 (Barwick, C.J.); W. Wynes, supra note 41 at 451-452.

146 Commonwealth of Australia Constitution Act of 1900, supra note 8, Preamble, Covering Clause 3, S. 51, S. 62, S. 63, S. 64, S. 71, S. 73 (ii), S. 77 (i-iii), S. 79.

147 Supra note 62.

148 Texas v White, (1868) 74 U.S. (7 Wall.) 700, 724-725; see also, Lane County v Oregon, (1868) 74 U.S. (7 Wall.) 71, 76; for the view that the Constitution of the United States was designed to establish a unitary system; see W. Crosskey, *Politics and the Constitution in the History of the United States* (1953); and see generally, W. Anderson, *The Nation and the States, Rivals or Partners* (1955). References to a number of reviews of Croskey's volumes are provided by Hart, "Book Review" (1954) 67 *Harv. L. Rev.* 1456, 1486 footnotes 86, 87; and see Sharp, "Book Review" (1954) 54 *Colum L. Rev.* 439.

149 Note that the Commonwealth of Australia Constitution Act of 1900, supra note 8, in Covering Clause 6 defines the term states in terms of the pre-existing Australian colonies; and colonial legislatures possessed within limits circumscribed by the United Kingdom Parliament "plenary powers of legislation as large, and of the same nature, as those of the Parliament

said to arise. Again on the face of both documents the national legislature is endowed with carefully defined and enumerated powers,[150] while the states are left with general residual powers. Thus the sheer enumeration and allocation of powers seems to indicate that there are to be in fact two distinct parties possessing governmental power in the American and Australian polity. The illusion that this is no longer the case, at least in practice, has resulted from the combination of a broad interpretation of the specific national legislative powers, in conjunction with the use of the necessary and proper clause[151] and the judicial conclusion that the constitutional clauses saving residual power to the States[152] "operate by propositional subtraction, and provide no ground for antecedently restricting Commonwealth powers."[153] Indeed the Supreme Court, speaking through the pen of Justice Holmes, has specifically disposed of an "invisible radiation from the general terms of the Tenth Amendment" as a restriction on the treaty power.[154] But the denial of an enclave theory does not seek to pass judgment on whether the federal system has a core of constitutional substance that courts will enforce. Rather it postulates a method of interpretation by which courts may determine what matters are to be left to the states; that is "not by reference to some state enclave construct but rather by looking to see what is not on the

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itself." The Queen v Burah, [1877-1878] 3 A.C. 889, 904 (1878) (P.C.) (Bengal); Hodge v The Queen, [1883-1884] 9 A.C. 117 (1883) (P.C.) (Canada); Powell v Appollo Candle Co., [1884-1885] 10 A.C. 282 (1895) (P.C.) (Australia—New South Wales).

150 Attorney General for the Commonwealth v Colonial Sugar Refining Co. Ltd,. (1913) 17 C.L.R. 644, 653-654 (P.C.); Bank of New South Wales v The Commonwealth, supra note 113 at 184, 185 (Latham, C.J.); McCulloch v Maryland, supra note 39 at 405.

151 U.S. Const. art. I, S. cl. 18; McCulloch v Maryland, supra note 39 at 421; Aust. Const. S. 51 (xxxix); Attorney General for the Commonwealth v Colonial Sugar Refining Co. Ltd., supra note 150; Crowe v The Commonwealth, (1935) 54 C.L.R. 69; Australian Communist Party v The Commonwealth, (1951) 83 C.L.R. 1 at 211-212, 231, 260; Le Mesurier v Connor, (1929) 42 C.L.R. 481, 496-498.

152 U.S. Const. Amend. x; Aust. Const. S. 107.

153 Sawer, "Implication and the Constitution" (pts. 1-2), (1948) 4 *Res Judicatae* 15, 85, 18; United States v Darby, supra note 125 at 123-124; Amalgamated Society of Engineers v Adelaide Steamship Co. Ltd., supra note 11 at 150, 154; In re Richard Foreman & Sons Pty. Ltd., Uther v Federal Commissioner of Taxation, supra note 133 at 378; The Commonwealth v Cigmatic Pty. Ltd. (in Liquidation), (1962) 108 C.L.R. 372, 378; State of Victoria v The Commonwealth, (1971) 122 C.L.R. 353 at 400; Minister for Justice (W.A.) v A.N.A. Commission, supra note 129 at 45 (Murphy, J., dissenting).

154 Missouri v Holland, supra note 23 at 434.

federal checklist."[155] Apart from possible political limitations, this poses serious implications in that it may leave states constitutionally completely at the sufferance of the national legislature.

In regard to the existence of bodies politic called states, the Australian Constitution provides more express constitutional pegs from which to infer that they are to continue to exist than does its American counterpart.[156] And some judges have been prepared to elevate such provisions into a general constitutional guarantee of "the continued existence of the States."[157] Thus Justice Dixon (as he then was) has strongly maintained that "[t]he foundation of the Constitution is the conception of the central government and a number of State governments separately organised. The Constitution predicates their continued existence as independent entities."[158] Unfortunately Justice Dixon does not cite sections of the Constitution in support of his dictum and insofar as he may impliedly rely on provisions preserving state functions he may be on shaky ground.[159] Such provisions are somewhat extreme in their particularity and can hardly be said to suggest that the Australian Founding Fathers were thereby providing

155 Ely, "The Irrepressible Myth of Eire", (1974) 87 *Harv. L. Rev.* 693, 702 (footnote omitted); H. Hart & A. Sacks, *The Legal Process* 191 (tent. ed. 1958); cf. "[T]he Framers of the Constitution intended the States to keep for themselves, as provided in the Tenth Amendment, the power to regulate elections." Oregon v Mitchell, supra note 139 at 124-125 (Black, J.); "[W]hat is done here is nonetheless such a serious invasion of state sovereignty protected by the Tenth Amendment that it is in my view not consistent with our constitutional federalism." Maryland v Wirtz, supra note 138 at 201 (Douglas, J., with whom Stewart, J. concurs, dissenting); National League of Cities v Usery, supra note 138 at 842-843.

156 Australia: Aust. Const. S. 9, S. 15, S. 51 (xii), (xiv), (xxiii), (xxiv), S. 91 S. 100, S. 102, S. 104, S. 112, S. 123, S. 128. United States: U.S. Const. art III, S. 2; art. IV, S.S. 3, 4, art. V; amend. 14, S. 1.

157 Melbourne Corporation v The Commonwealth, (1947) 74 C.L.R. 31, 65 (Rich, J.).

158 Id. at 82; "The Constitution still recognizes the existence of states with indestructible powers; the Tenth Amendment was supposed to put them beyond controversy." National Labor Relations Board v Jones & Laughlin Steel Corp., (1937) 301 U.S. 1, 97 (McReynolds, J., dissenting). See generally, Western Australia v The Commonwealth, supra note 145.

159 But in an earlier case Justice Dixon remarked:

> It may be that sec. 106 provides a retraint upon the legislative power over States which differentiates it from the power over the subject and that no law of the Commonwealth can impair or affect the Constitution of a State. No doubt, sec. 106 is conditioned by the words "subject to this Constitution" but so too is sec. 51.

Australian Railways Union v Victorian Railways Commissioners, (1930) 44 C.L.P. 319, 391-392.

a general constitutional safeguard for state organisation and powers.[160] In the American context, the Guarantee Clause would seem to be one of the strongest constitutional guideposts to the continuing existence of the states, but the Supreme Court has often stayed its hand when litigation involving the clause has come before it.[161]

Despite the difficulty of pointing to an express basis in either of the two Constitutions providing legal substance for the continuing existence of states and the unclear limits of the Commerce Clause, as currently interpreted by the Supreme Court, there is no doubt that states not only have a position in the political structure of both nations[162] but also are recognized by both Constitutions.[163] Indeed the practical day to day operation of the constitutional structure is conducted upon this understanding. This view has been expressed by a number of the justices of both courts. For example, a Chief Justice of the Supreme Court has observed:[164]

> Not only . . . can there be no less of separate and independent autonomy to the States, through their union under the Constitution, but it may be not unreasonably said that the preservation of the States, and the maintenance of their governments, are as much within the design and care of the Constitution as the preservation of the Union . . . The Constitution, in all its provisions, looks to an indestructible Union, composed of indestructible States.

In a similar vein, Justice Starke as a member of the High Court has declared:[165]

160 Even the states' power over their own sources of revenue and their own money has been judicially held to be subject to Commonwealth control, see, State of New South Wales v The Commonwealth [No. 1], (1932) 46 C.L.R. 155 and, State of New South Wales v The Commonwealth [No 3], (1932) 46 C.L.R. 246.

161 See, e.g., Luther v Borden, (1949) 48 U.S. (7 How.) 1; Pacific States Telephone Co. v Oregon, (1912) 233 U.S. 118; but it does not always do so, see e.g., Coyle v Smith, (1911) 221 U.S. 559; Texas v White, supra note 148. See generally, W. Wiecek, *The Guarantee Clause of the U.S. Constitution*, (1972).

162 U.S. Const. art. I, S. 3, amend. xvii; Aust. Const. S. 7; see, e.g., H. Wechsler, "The Political Safeguards of Federalism", in *Principles, Politics, and Fundamental Law: Selected Essays* 49 (1961).

163 See, e.g., P. Brest, *Processes of Constitutional Decision Making*, chapter 5 (1975).

164 Texas v White, supra note 148 at 725; "Slaughter House Cases", (1873) 83 U.S. (16 Wall.) 36, 77-78, 81-82; Fry v United States, (1975) 421 U.S. 542, 549 (Rehnquist, J., dissenting); National League of Cities v Usery, supra note 138 at 844. But cf. id. at 867 footnote 8.

165 Melbourne Corporation v The Commonwealth, supra note 157 at 70.

> The federal character of the Australian Constitution carries implications of its own.

And:[166]

> [T]he Government of Australia is a dual system based upon a separation of organs and of powers. The maintenance of the States and their powers is as much the object of the Constitution as the maintenance of the Commonwealth and its powers. Therefore it is beyond the power of either to abolish or destroy the other.

IMPLICATIONS OF FEDERALISM IN THEORY AND PRACTICE

Questions concerning the degree of control which one party to the Federation can exercise over the other party cannot be answered by turning to the express provisions of either Constitution. Even in the Australian document the few provisions in point are exceptional and there is no general provision. Thus the courts, if they are to exercise jurisdiction over these questions, must base their decisions on implications drawn from the overall text of the two documents. Here the structure of the Constitution and the nature, function and relationships between those institutions which it recognizes may furnish guidelines for constitutional interpretation.[167] But even the High Court, which professes to adopt a necessary "legalism" in its solution of these problems of federalism,[168] uses as an underlying premise what it conceives to be desirable relations between governments in a federal system.

The influence of the Supreme Court on the reasoning and decisions of the High Court has been most noticeable in this area of intergovernmental immunity and relationships. Both courts have endeavoured to accommodate two polities in the one federation and the lines which they have drawn often run in parallel courses. In Australia the High Court's decision in *Melbourne Corporation v The Common-*

166 State of South Australia v The Commonwealth, (1942) 65 C.L.R. 373 at 442; Melbourne Corporation v The Commonwealth, supra note 157 at 66 (Rich, J.).

167 On this 'structural' method of interpretation, see, id.; C. Black, Jr., *Structure and Relationship in Constitutional Law* (1969).

168 See, e.g., the various remarks made by Sir Owen Dixon, (1952) 85 C.L.R. XIII-XIV, "Two Constitutions Compared", supra note 11; "Marshall and the Australian Constitution", supra note 39.

wealth,[169] remains the *locus classicus* on the question of dual federalism and the implications which can be drawn therefrom to limit the exercise of federal powers. Later adjudication has merely elaborated its principles.[170] Referring to the *State Banking Case*, Professor Freund has commented that "Mr. Justice Dixon, who was on a mission to America, literally carried back with him the views of the Justices in the *Saratoga Springs Case*."[171] The reasoning of their Honours in the *State Banking Case* may serve as a framework for possible approaches to be taken in this area.

(1) *A Characterization Test*:

Judgments delivered by Chief Justice Latham and Justice Williams would seem to support the proposition that Commonwealth legislation discriminating against, or aimed at, states is invalid.[172] In this regard it is interesting to note that the external affairs power is an area in which other members of the High Court have expressed a readiness to hold that the character of federal 'treaty implementation' legislation is in substance "a device to procure for the Commonwealth an additional domestic jurisdiction"[173] and not a law with respect to external affairs. And although the High Court generally ascertains the character of federal legislation by looking at its direct legal effect,[174] there have been some indications that this is one of the fountains of Commonwealth legislative power where the court may well be justified in examining the motive or ulterior objectives in

169 Supra note 157 (hereinafter cited State Banking Case), for literature on this case, see, e.g., Holmes, "Back to Dual Sovereignty", (1957) 21 *Aust L.J.* 152; Sawer, supra note 153; my comments in this area draw heavily upon G. Winterton, "The Appropriation Power of the Commonwealth", 388-405 (1968) (unpublished LL.M. thesis, Western Australian Law School, 1968).

170 See, e.g., Wenn v Attorney General for Victoria, (1948) 77 C.L.R. 84, 113; Bank of New South Wales v The Commonwealth, supra note 113 at 304, 337-338; Airlines of New South Wales Pty. Ltd. v State of New South Wales [No. 2], supra note 103 at 115, 149; State of Victoria v The Commonwealth, supra note 153.

171 Freund, supra note 1, at 615 (footnote omitted). However, it would appear that Justice Dixon had begun to develop his judicial theory on this topic before he reached the shores of the United States, see, e.g., West v Commissioner of Taxation (New South Wales), (1937) 57 C.L.R. 657, 681.

172 Melbourne Corporation v The Commonwealth, supra note 157 at 61-62, 90.

173 The King v Burgess ex parte Henry, supra note 14 at 687 (Evatt, and McTiernan, J.J.).

174 See, e.g., Fairfax v Federal Commissioner of Taxation, (1965) 114 C.L.R. 1, 7, 13, 16; Attorney General for Victoria v The Commonwealth, supra note 112 at 546, 552; cf. The King v Barger, (1908) 6 C.L.R. 41.

making[175] and domestically carrying into effect[176] a treaty. Apart from the difficulties which would be involved in proving allegations that the purpose of the Commonwealth Government was to trench on 'state' matters,[177] the charge in all probability may be refuted by alluding to the fact that not only have 'state' matters been taken over but also in the process the federal governments has taken on international obligations such as membership of an international organisation with all the duties which that entails.[178] An analogous argument has been made by one commentator[179] in support of the constitutionality

175 Australia: The King v Burgess ex parte Henry, supra note 14 at 642 ("bad faith") 687; Ffrost v Stevenson, supra note 4, at 599; cf. State Electricity Commission of Victoria v McWilliams, (1954) 90 C.L.R. 522, 569. United States: "It is, of course conceivable that, under pretense of exercising the treaty-making power, the president and senate, might attempt to make provisions regarding matters which are not proper subjects of international agreement, and which would be a colourable—not a real—exercise of the treaty-making power." Root, "Real Questions Under the Japanese Treaty and The San Francisco School Board Resolution", (1907) 1 *Am. J. Int'l L.* 273, 279; cf. Fletcher v Peck, (1810) 10 U.S. (6 Cranch.) 87. See, Ely, "Legislative and Administrative Motivation in Constitutional Law", (1970) 79 *Yale L.J.* 1203; Brest, "The Conscientious Legislator's Guide to Constitutional Interpretation", (1975) *Stan. L. Rev.* 585; Brest, supra note 163 at 1018-1032.

176 The King v Burgess ex parte Henry, supra note 14 at 674-675; Airlines of New South Wales Pty. Ltd. v State of New South Wales [No. 2], supra note 103 at 50-51 (Windeyer, J.).

177 "[A]n attempt may be made by the Courts to examine the reasons behind the treaty . . . by submitting the good faith of the government over the treaty and any pursuant legislation to a searching examination. . . . this appears to be the approach adopted by the High Court of Australia. This approach does, however, imply that the courts must take into consideration issues of a purely political nature, and rely on evidence from diplomatic sources such as is rarely used by courts outside the Supreme Court of the United States. These judicial functions might thus lead to jurisdiction over matters of which British Courts have tended to stay clear." Nettl, "The Treaty Enforcement Power in Federal Constitutions", (1950) 28 *Can. Bar Rev.* 1051, 1069-1070: "This restriction seems largely academic. In any event, it would probably be a task of remarkable difficulty to prove within the limits of the ordinary rules of evidence as applied in Australian courts that the Governor-General in Council had negotiated an international agreement *mala fide* in the sense indicated. There is strong authority for the view that the King's representative must always be presumed to have acted in good faith; see per Dixon, J. in Australian Communist Party v Commonwealth (1951) 83 C.L.R. at 179." Sawer, supra note 101 at 299; Joseph v Colonial Treasurer of New South Wales, (1918) 25 C.L.R. 32, 43 (Isaacs, Powers, and Rich, J.J.); cf. the question of motives in tax legislation, see, e.g., United States v Constantine, (1935) 296 U.S. 287.

178 The King v Burgess ex parte Henry, supra note 14 at 687.

179 An example posited by C. Howard, *Australian Federal Constitutional Law* 445-446 (2nd ed. 1972).

of hypothetical Commonwealth executive action in respect of a treaty with the United States and legislation carrying it into effect which banned the Australian Communist Party. It would not be sufficient to deny the validity of such actions on the premise that they would be a transparent device to gain internal legislative power which the Commonwealth would not, apart from such a course of action, possess[180]—at least in peace time.[181] The treaty might well not be such a device. It may merely be an integral part of a treaty seeking to increase trade with the United States, a necessary condition of which was the need to avoid a congressional embargo on trade with countries allowing the Communist Party to exist.

(2) *A Discrimination Test*

In *New York v United States*[182] Justices Frankfurter and Rutledge adopted a discrimination doctrine which the latter took "to mean that state functions may not be singled out for taxation when others performing them are not or for special burdens when they are."[183] One year later, in Australia, this principle was carried by Justice Dixon beyond taxation laws into a general implied prohibition test against discriminatory legislation. For Justice Dixon:[184]

> [T]he objection to the use of federal power to single out States and place upon them special burdens or disabilities does not spring from the nature of the power of taxation. The character of the power lends point to the objection but does not give rise to it. The federal system itself is the foundation of the restraint upon the use of the power to control the States. The same constitutional objection applies *to other powers,* if under them the States are made the objects of special burdens or disabilities.

180 Australian Communist Party v The Comomnwealth, supra note 151.

181 During war time, see, e.g., Farey v Burvett, (1916) 21 C.L.R. 433.

182 (1946) 326 U.S. 572 (hereinafter cited Saratoga Springs Case); note the dissenting opinion of Justice Douglas, id. at 590-598; this case is cited in the opinion of the court in National League of Cities v Usery, supra note 138 at 843.

183 Id. at 584 (Rutledge, J.), 582-593 (Frankfurter, J.); "Concededly a federal tax discriminating against a state would be an unconstitutional exertion of power over a coexisting sovereignty within the same framework of government." Id. at 586 (Stone, C.J.); a majority of the Supreme Court in the Saratoga Springs Case sustained a federal excise tax levied on the sales of bottled mineral waters by the State of New York and drawn from land owned by it. "That, however, is about all that can be said of the case." O. Roberts, *The Court and the Constitution* 28 (1951).

184 Melbourne Corporation v The Commonwealth, supra note 157 at 81 (emphasis added); For the Canadian position, see, e.g., Forbes v Attorney General for Manitoba, [1937] A.C. 260 (1936) (P.C.) (Canada).

Although Justice Dixon apparently held the opinion that a discriminatory law is always invalid[185] he was not supported by other members of the court in this regard. Justice Starke, for example, said "I cannot agree that the presence or absence of discrimination affords a decisive test or legal criterion of constitutional power"[186] while Justice Williams, in the same manner, commented "I would not be prepared to hold that legislation which conforms to the language of a placitum is necessarily invalid if it discriminates against a State or States."[187]

(3) *A General Implied Prohibition Against Destroying the States*:

Three justices in the *State Banking Case,* relying in part on obiter dicta in the opinions of the *Saratoga Springs Case,* expressed a willingness to hold that any law—whether discriminatory or not—which in its application tended to destroy the States or their functions is unconstitutional.[188] A passage from the judgment of Justice Starke underscores the reliance placed upon the Supreme Court's position.[189]

> [W]e may start from the proposition that neither federal nor State governments may destroy the other nor curtail in any substantial manner the exercise of its powers or "obviously interfere with one another's operations" (see *Graves v New York*) . . . I cannot agree that the presence or absence of discrimination affords a decisive test or legal criterion of constitutional power. As was pointed out in *New York v United States* by Stone C.J., Reed, Murphy and Burton, J.J., a tax which is not discriminatory "may nevertheless so affect the State, merely because it is a State that is being taxed, as to interfere unduly with the State's performance of its sovereign functions of government." It is a practical question, whether legislation or executive action thereunder on the part of the Commonwealth or of a State destroys, curtails or interferes with the operations of the other, depending upon the character and operation of the legislation and executive action thereunder. No doubt the nature and extent of the activity affected must be considered and also whether the interference is or is not discriminatory but in the end the question must be whether the legislation

185 Zines, "Sir Owen Dixon's Theory of Federalism", (1965) 1 *Federal L. Rev.* 221, 231-232.

186 Melbourne Corporation v The Commonwealth, supra note 157 at 74-75.

187 Id. at 99.

188 Id. at 66 (Rich, J.), 74-75 (Starke, J.), 98-99 (Williams, J.). Justice Dixon subsequently also took the view that non-discriminatory legislation could be unconstitutional, see Bank of New South Wales v The Commonwealth, supra note 113 at 338.

189 Melbourne Corporation v The Commonwealth, supra note 157 at 74-75 (footnote omitted).

> or the executive action curtails or interferes in a substantial manner with the exercise of constitutional power by the other.

Several points need to be made in relation to the foregoing passage. Firstly, the remarks, like those in the *Saratoga Springs Case*[190] on which reliance is placed, are obita dicta. Unlike the *Saratoga Springs Case,* Justice Starke and those members of the High Court who agreed with his view in the *State Banking Case,* a case concerning the banking rather than the taxation power, did not limit their opinion, regarding the existence of a general implied prohibition against destroying the states, to the problem of a federal government levying a tax upon the states. It would seem that for them the general implied prohibition was intended not only to impede both federal taxation and regulation but also was meant to be reciprocal in its operation. In this respect Justice Starke seems to be following an earlier dictum of the Supreme Court that "neither government may destroy the other nor curtail in any substantial manner the exercise of its powers."[191] Furthermore, although these views have subsequently been reiterated by the High Court[192] they have not played any part in an affirmative holding of unconstitutionality by the court.[193] It should also be noted that although some of the dicta cited indicate that the prohibition should be applicable only to interference with "normal and essential functions of government" or "sovereign functions of government" no meaningful distinction along those lines can be made. To say what are essential functions of government and what are not is purely a political test—one on which Herbert Spencer and Lord Keynes would reach vastly different conclusions. So far as Justice Starke is concerned "[w]hen a government acts under its constitutional power then its activities are governmental functions."[194] Justice Frankfurter has also rejected any

190 New York v United States, supra note 182 at 587-590, and note also, Douglas, J., dissenting, id. at 590, 598.

191 Metcalf & Eddy v Mitchell, (1926) 269 U.S. 514, 523, 524, quoted in New York v United States, supra note 182 at 589-590 and in National League of Cities v Usery, supra note 138 at 844.

192 State of Victoria v The Commonwealth, supra note 153 at 389, 393, 404, 411, 423-424.

193 See, e.g., Bank of New South Wales v The Commonwealth, supra note 113; State of Victoria v The Commonwealth (1957) 99 C.L.R. 575. It should be noted that Justice Starke's views did lead him to hold Commonwealth Statutes unconstitutional in both the State Banking Case, supra note 157 and South Australia v The Commonwealth, supra note 166.

194 Melbourne Corporation v The Commonwealth, supra note 157 at 74; see also, e.g., The Queen v The President and Certain Other Members of the Commonwealth Conciliation and Arbitration Commission ex parte Associa-

division between governmental and trading activities, as in his view such a distinction does not take account of the indivisibility of government functions.[195]

As the *State Banking Case* itself exemplifies, the Australian courts may be willing to apply this doctrine in fields other than those relating to intergovernmental taxation. Even so, the general rule enunciated in both United States and Australian judicial decisions is that states and their instrumentalities may be subjected to federal regulation.[196] In the United States this is vividly illustrated by the course of decisions on the reach of the Commerce Clause. One of the best known cases on federal regulation of state activities is the Supreme Court's decision upholding the Federal Safety Appliance Act of 1893[197] as applied to a state owned railroad in interstate commerce. In the course of its opinion the court rejected California's argument that it could not be subject to the Act since it was performing a public function in a sovereign capacity:[198]

> [W]e think it unimportant to say whether the state conducts its railroad in its 'sovereign' or in its 'private' capacity. That in operating its railroad it is acting within a power reserved to the states cannot be doubted . . . The analogy of the constitutional immunity of state instrumentalities from federal taxation, on which the respondent relies, is not illuminating. That immunity is implied from the nature of our federal system and the relationship within it of state and national governments, and is equally

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tion of Professional Engineers, Australia, (1959) 107 C.L.R. 208, 275 (Windeyer, J.); Wenn v Attorney General for the State of Victoria, supra note 170 at 234, 276.

195 New York v United States, supra note 182 at 580-581; yet in some later passages Frankfurter, J., seemingly permits the government-trading dichotomy to slip in through the rear door, id. at 582, and see, the dissenting opinion of Douglas, J., id. at 591-592. The distinction between governmental and other activities is resurrected in National League of Cities v Usery, supra note 138 at 845; see generally note, "Municipal Bankruptcy, the Tenth Amendment and the New Federalism", supra note 139 at 1881-1883.

196 Australia: Amalgamated Society of Engineers v Adelaide Steamship Co. Ltd., supra note 11. United States: California v Taylor, (1957) 353 U.S. 553; California v United States, (1944) 320 U.S. 577; Case v Bowles, (1946) 327 U.S. 92; Board of Trustees of the University of Illinois v United States, (1933) 289 U.S. 48.

197 Act of March 2, 1893, c. 196, 27 Stat. 531, 45 U.S.C. s. 2, and S. 6 of the Act as amended April 1, 1896, 29 Stat. 85, 45 U.S.C. S. 6.

198 United States v California, (1936) 175, 183-185. The Majority in National League of Cities v Usery; supra note 138 at 854-855 (footnotes omitted) said of the final two sentences of the quotation "[W]e think the dicta from United States v California simply wrong." But the dissent characterized the quotation as being "A complete refutation of today's holding". Id. at 866.

> a restriction on taxation by either of the instrumentalities of the other. . . . But there is no such limitation upon the plenary power to regulate commerce. The state can no more deny the power if its exercise had been authorized by Congress than can an individual.

The Supreme Court reaffirmed this principle in upholding the validity of an amendment to the Federal Fair Labor Standards Act of 1938.[199] Yet despite the overall tone of the court's opinion there are passages which indicate that there may be possible chinks in the armoury of the Commerce Clause.[200] In fact the court expressly "recognized that the power to regulate commerce, though broad indeed, has limits."[201] Perhaps the most articulated limitation is that the federal law purporting to derive its constitutional validity from the Commerce Clause must have a rational basis.[202] Thus the court had also, some four years earlier, maintained that "the mere fact that Congress has said when particular activity shall be deemed to affect commerce does not preclude further examination by this Court. But where we find that the legislators, in the light of the facts and testimony before them, have a rational basis for finding a chosen regulatory scheme necessary to the protection of commerce, our investigation is at an end."[203] Another limitation may be gleaned from the court's characterization of Maryland's argument on the question of federal regulation of the state's activities as "not factually accurate."[204] This seems to imply that the majority were of the opinion that the Act did not unduly interfere with the state's functions.[205] The dissent took precisely the opposite view of the federal legislation and was prepared to invoke, in this context, the principles enunciated in the various opinions in the *Saratoga Springs Case*.[206] And in a footnote to the

199 Maryland v Wirtz, supra note 138 at 197-198.

200 See, supra note 141.

201 Maryland v Wirtz, supra note 138 at 196.

202 Id. at 198.

203 Katzenbach v McClung, supra note 138 at 303-304; Wickard v Filburn, supra note 125 at 128-129; Polish Alliance v Labor Board, (1944) 322 U.S. 643, 650-651, 652.

204 Maryland v Wirtz, supra note 138 at 193.

205 "Congress has 'interfered with' these state functions *only to the extent* of providing that when a state employs people in performing such functions it is subject to the same restrictions as a wide range of other employers whose activities affect commerce, including privately operated schools and hospitals." Id at 193-194 (emphasis added).

206 Id. at 201-205 (Douglas, J., with whom Stewart, J., concurred, dissenting); see also, Employees of The Department of Public Health & Welfare v Department of Public Health & Welfare of Missouri, (1973) 411 U.S. 279.

majority opinion replying to the dissent, it is recognized that there may be some circumstances in which even a law of general application passed pursuant to the Commerce Clause may not be upheld.[207] The result was a re-emergence of judicial sensitivity to state sovereignty and federalistic limits.[208] With the passage of time and new appointments to the Supreme Court the majority position now endorses a constitutional limitation on Congress' exercise of the commerce power derived from the sovereignty of the States.[209]

There have also been suggestions in other fields of federal regulation that even though there is a substantial nexus with a delegated power the exercise of the national government's power is subject to restraint's implicit in the structure of the federal system.[210] An illustration of this is the hesitant attitude of the Supreme Court to an expansive interpretation of the Enforcement Clause of the Fourteenth Amendment[211] after the way was seemingly clear for such an approach.[212] The underlying tone of Justice Black's decisive opinion in *Oregon v Mitchell* is exemplified in the second of his three limitations upon

207 Maryland v Wirtz, supra note 138 at 196-197 n. 27.

208 Fry v United States, supra note 164, especially at 547 n. 7 (Marshall J. for the Court); (Rehnquist J. dissenting), id. at 549-559. See generally, "The Supreme Court, 1974 Term", (1975) 89 *Harv. L. Rev.* 49-50. For a discussion of these developments in the field of congressional environmental regulation, see, Finn, "The Clean Air Amendments of 1970: Can Congress compel Cooperation in Achieving National Environmental Standards?", (1976) 11 *Harv. Civ. Rights—Civ Lib. L. Rev.* 701; Salmon, "The Federalist Principle: The Interaction of the Commerce Clause and the Tenth Amendment in the Clean Air Act", (1976) 2 *Colum. J. Envt'l L.* 291. Constitutional problems concerning National No-Fault Insurance, see, Dorsen, "The National No-Fault Motor Vehicle Insurance Act: A Problem in Federalism", (1974) 49 *N.Y.U. L. Rev.* 45; Saris, "Is Federalism Dead? A Constitutional Analysis of the Federal No-Fault Insurance Bill: S. 354", 1975 12 *Harv. J. Legis.* 688; Note, "The National Standards for No-Fault Insurance Act: Good Intentions and Bad Federalism", (1976) 25 *Buffalo L. Rev.* 575.

209 National League of Cities v Usery, supra note 138. Three dissenting Justices characterized this decision as "A catastrophic judicial body blow at Congress power under the Commerce Clause" repudiating an "unbroken line of precedents" and they were unable to "recall another instance in the Court's history when the reasoning of so many decisions covering so long a span of time has been discarded roughshod." Id. at 880, 871-872.

210 "[W]e must assume that the implications and limitations of our federal system constitute a major premise of *all* Congressional legislation, though not repeatedly repeated therein." United States v Five Gambling Devices, supra note 141 at 450 (Jackson, J.) (emphasis adder).

211 Oregon v Mitchell, supra note 139; the actual decision in that case on the voting at state elections has been mooted by the passage of the Twenty Sixth Amendment.

212 Katzenbach v Morgan, (1966) 384 U.S. 641; 116 Cong. Rec. 6927-6951 (1970).

congressional power to enforce the provisions of the Civil War Amendments. Thus he states that "the power granted to Congress was not intended to strip the States of their power to govern themselves or to convert our national government of enumerated powers into a central government of unrestrained authority over every inch of the whole Nation."[213] In another area of the law through which Supreme Court decisions have traced a sinuous path[214] principles of federalism have also played a part in restraining the exercise of national power. Because of principles of federalism, equity and comity there will be no issuance of a federal injunction or declaratory relief at the suit of a federal plaintiff who at the time of filing his federal complaint is a defendant in a pending state criminal proceeding, unless bad faith or other special circumstances are shown.[215] However, where state prosecution is merely threatened rather than pending then at least with respect to federal declaratory relief these principles are not controlling.[216] Note also that there may be some room for the play of federalist implications in the problem of whether Congress may create

213 Oregon v Mitchell, supra note 139 at 128; "[T]he Constitution was also intended to preserve to the States the power that even the Colonies had to establish and maintain their own separate and independent governments, except insofar as the Constitution itself commands otherwise. My Brother Harlan has persuasively demonstrated that the Framers of the Constitution intended the States to keep for themselves, as provided in the Tenth Amendment, the power to regulate elections. . . . No function is more essential to the separate and independent existence of the States and their governmnts than the power to determine within the limits of the Constitution the qualications of their own voters for state, county and municipal offices and the nature of their own machinery for filling local public offices. . . . My Brother Brennan's opinion, if carried out to its logical conclusion, would, *under the guise of insuring equal protection, blot out all state power, leaving the 50 States little more than impotent figureheads.*" Id. at 124-126 (Black, J.) (emphasis added) ; see also, id. at 208-209 (Harlan, J. dissenting) . See, Cohen, "Congressional Power to Interpret Due Process and Equal Protection", (1975) 27 *Stan L. Rev.* 603; E. Streicher, "Federal Power to Regulate Private Discrimination: The Revival of the Enforcement Clauses of the Reconstruction Era Amendments", (1974) 74 *Colum. L. Rev.* 499.

214 Steffel v Thompson, (1974) 415 U.S. 452, 479 (Rehnquist, J.) .

215 Younger v Harris, (1971) 401 U.S. 37; Samuels v Mackell, (1971) 401 U.S. 66. See, Note, "Municipal Bankruptcy, the Tenth Amendment and the New Federalism", supra not 139 at 1874-1876; H. M. Hart & H. Wechsler *The Federal Courts and the Federal System* 1009-10050 (2nd ed. 1973) ; Id. at 163-185 (supp. 1977).

216 Steffel v Thompson, supra note 214; Zwickler v Koota, (1967) 389 U.S. 241; Roe v Wade, (1973) 409 U.S. 817; Doe v Boulton, (1973) 410 U.S. 179.

statutory rights and compel states to open the portals of their courts for enforcement proceedings.[217]

The Australian Constitution expressly provides *inter alia* that the Commonwealth "Parliament may grant financial assistance to any State on such terms and conditions as the Parliament thinks fit."[218] Congress, by relying on the Spending Power, has been able to carry out a system of federal aid to state and local governments covering a wide variety of activities. Again, the problem posed is whether there are any constitutional limitations, upon the exercise of this power by the central government, which may be raised in the name of state autonomy. The difficulty in viewing the power from the perspective of federalism lies in the fact that power to spend, like the power to tax,[219] is itself a form of regulation of the activity to which it is directed.[220] And that activity it has been held may lie outside the area embraced by the specific enumerated grants of legislative power set forth in the Constitution.[221] Thus by the use of federal grants to

217 See, e.g., ex parte In the Matter of the Commonwealth of Kentucky v Dennison, (1861) 65 U.S. (24 How.) 66; Testa v Katt, (1947) 330 U.S. 386; Note, "Utilization of State Courts to Enforce Federal Penal and Criminal Statutes: Development in Judicial Federalism", (1947) 60 *Harv. L. Rev.* 966.

218 Aust. Const. S. 96.

219 United States: "Every tax is some measure regulatory. To some extent it interposes an economic impediment to the activity to be taxed as compared with others not taxed. But a tax is not any the less a tax because it has a regulatory effect . . . and it has long been established that an Act of Congress which on its face purports to be an exercise of the taxing power is not any the less so because the tax is burdensome or tends to restrict or suppress the thing taxed." Sonzinsky v United States, (1937) 300 U.S. 506, 513. Australia: State of South Australia v The Commonwealth, supra note 166; State of Victoria v The Commonwealth, supra note 193.

220 "The power of Congress to spend is inseparable from persuasion to action over which Congress has no legislative control." United States v Butler, (1936) 297 U.S. 1, 83 (Stone, J., dissenting).

221 United States: See, e.g., "[T]he power of congress to authorize expenditure of public moneys for public purposes is not limited by the direct grants of legislative power found in the Constitution." United States v Butler, supra note 220 at 66; "[T]he opinion by Justice Roberts was at pains to declare that the spending power of Congress extended beyond the specifically granted powers to the broad ends of general welfare, a position which had until then been in doubt and which furnished a basis for later sustaining the Social Security Act. Hughes regarded this germinal concession in the AAA opinion as its most important feaure." Freund, "Charles Evans Hughes as Chief Justice," (1967) 81 *Harv. L. Rev.* 4, 34; Steward Machine Co. v. Davis, (1937) 301 U.S. 548; Alabama Power Co. v Ickles, (1938) 302 U.S. 464; Corwin, "The Spending Power of Congress—Apropos the Maternity Act", (1923) 36 *Harv. L. Rev.* 548.
Australia: State of Victoria v The Commonwealth, (1926) 38 C.L.R. 399; Aust. Const. S. 81; Attorney General for the State of Victoria v The Com-

individuals and states there has been a tremendous increase in federal intervention and supervision of areas once exclusively administered by the states. Yet even those liberal Supreme Court dissenters in the cases leading up to the constitutional crisis of 1937 were not prepared to put the spending power beyond constitutional limitations.[222] The Judicial Committee of the Privy Council has warned that an exercise of power pursuant to Section 96 of the Australian Constitution may be "merely colourable" in that "the real substance and purpose"[223] of Grants Legislation may be to evade a constitutional limitation, such as the requirement that laws with respect to taxation do not discriminate between states or part of states.[224] The Supreme Court, however, has the better end of the argument when it notes that "to hold that motive or temptation is equivalent to coercion is to plunge the law in endless difficulties."[225] Both jurisdictions have, however, left open the possibility that to coerce the states into abdicating their powers by use of the Grants or Spending Power will not be tolerated.[226] But the concept of coercion does not include economic inducement for the purposes of Constitutional adjudication in this area.[227] How

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monwealth, (1945) 71 C.L.R. 237; G. Winterton, supra note 169; State of Victoria v The Commonwealth, (1977) 7 A.L.R. 277; Sexton and Maher, "Competitive Public Enterprises with Federal Government Participation: Legal and Constitutional Aspects", (1976) 50 *A.L.J.* 209, 212-216; Crommelin and Evans, "Explorations and Adventures with Commonwealth Powers", in *Labour and the Constitution, 1972-1975*, at 24, 41-45, 69 (Byers), 74-75 (Dawson), (G. Evans ed. 1977).

222 "The power to tax and spend is not without constitutional restraints. One restriction is that the purpose must be truly national. Another is that *it may not be used to coerce action left to state control.* Another is the conscience and patriotism of Congress and the Executive." United States v. Butler, supra note 220 at 87 (Stone, J., with whom Brandeis, and Cardozo, J.J., join, dissenting) (emphasis added).

223 W. R. Moran Pty. Ltd. v Deputy Federal Commissioner of Taxation of New South Wales, (1940) 63 C.L.R. 338, 350 (P.C.); State of South Australia v The Commonwealth, supra note 166 at 428; cf. The King v Barger, supra note 174; but see, Murphyores Inc. Pty. Ltd. v Commonwealth of Australia, (1976) 9 A.L.R. 199, 215 (Mason J.).

224 Aust. Const. S. 51 (ii); cf. U.S. Const. art. I, S. 8, cl. 13; U.S. Const. amend. xvi.

225 Steward Machine Co. v Davis, supra note 221 at 589-590; the High Court has refused to apply the warning of the Privy Council although it has been invited by counsel to do so; State of Victoria v The Commonwealth, supra note 221 at 405 (*arguendo*); State of South Australia v The Commonwealth, supra note 166 at 387 (*arguendo*).

226 Steward Machine Co. v Davis, supra note 221 at 586, 590; State of Victoria v The Commonwealth, supra note 193 at 605, 623.

227 Id.

far, then, can the federal intervention and supervision of "state" affairs go?[228] In light of the court decisions[229] and current governmental practice[230] the answer seems to be a very long way.[231] So far indeed as to prompt a former Australian Prime Minister to resort to a moment of rhetoric:[232]

> The practical effect of all this, of course, has been that in the revenue field, the Commonwealth has established an overlordship.

What value or significance does all this hold for attempts to impose limits on the treaty power in the name of a federal system? Have words about the existence of constraints implicit in a federal system been mostly a *brutum fulmen?* Or are there still some factual and legal bases to a claim for state autonomy?

228 "In maintaining the balance of the constitutional grants and limitations, it is inevitable that we should define their applications in the gradual process of inclusion and exclusion. There is thus no point in the instant case for the drawing of a mathematical line. And what is reasonably clear in a particular application is not to be overborne by the simple and familiar dialectic of suggesting doubtful and extreme cases." Santa Cruz Fruit Packing Co. v National Labor Relations Board, (1938) 303 U.S. 453, 467.

229 See, e.g., Oklahoma v United States Civil Service Commission, (1947) 330 U.S. 127; For a critical comment, see, Linde, "Justice Douglas on Freedom in the Welfare State—Constitutional Rights in the Public Sector", (1964) 39 *Wash. L. Rev.* 4, 30-31.

230 United States: Advisory Commission on Intergovernmental Relations, *Fiscal Balance in the American Federal System* (1967). Australia: Campbell, *"The Commonwealth Grant Power"*, (1969) 3 *Federal L. Rev.* 221; Myers, "The Grants Power—Key to Commonwealth-State Relations", (1970) 7 *Melb. U.L. Rev.* 549. Comparative: A. Birch, *Federalism, Finance and Social Legislation in Canada, Australia, and the United States* (1955). See generally publications of the Centre for Research on Federal Financial Relations (Australian National University).

231 "[I]f the Commonwealth Parliament were prepared to pass such legislation [a grants Act without express conditions but with conditions covertly disclosed to the states and requiring them to implement Commonwealth policy], *all State powers would be controlled by the Commonwealth—a result which would mean the end of the political independence of the States. Such a result cannot be prevented by any legal decision.* The determination of any such policy must rest with The Commonwealth Parliament and ultimately with the people. The remedy for alleged abuse of power or for the use of power to promote what are thought to be improper objects is to be found in the political arena and not in the courts." State of South Australia v The Commonwealth, supra note 166 at 429 (LLatham, C.J.) (emphasis added). For an insight into why Chief Justice Latham espoused this view, see generally, Z. Cowen, *Sir John Latham and Other Papers,* 3-60 (1975).

232 R. Menzies, *Central Power in the Australian Commonwealth* 91 (1968).

A major problem confronting attempts to flush out possible limitations on the treaty power has been the ability of this power to be both coextensive with and evasive of the enumerated federal powers and their specified limitations. In neither country has the power to make treaties been defined by the Constitution in terms of subject matter. Thus although arguments have been made supporting the view that the enumerated legislative powers of the federal legislature curtail the scope of the treaty making power,[233] governmental practice alone seems to afford sufficient refutation.[234] Treaties dealing with foreign commerce, customs duties, taxation, copyrights, trademarks, commercial aviation, fishing and navigation rights, and naturalization have been concluded[235] and the domestic tribunals have not doubted the international validity of such treaties on the ground of their subject coverage. Secretary of State Calhoun succinctly answered arguments claiming that the treaty making power does not extend to the subject matters covered by the various federal legislative powers by his remark in 1844:[236]

> If this be true of the treaty-making power, it may be truly said that its exercise has been one continual series of habitual and uninterrupted infringements of the Constitution.

Both countries have concluded treaties whose subject matter extends beyond that which is normally thought of as falling within federal legislative competence. Therefore, in respect to the acquisition of international obligations and benefits by treaties, it may indeed be said that federalism ends at the water's edge.[237] Domestic implemen-

233 See, e.g., 5 J. B. Moore, *Digest of International Law* 165, 225, 232-233 (1906).

234 The construction put on the Constitution by the Legislature and by Executive action will not lightly be disregarded by the courts, see, e.g., Martin v Hunter's Lessee, (1816) 14 U.S. (1 Wheat.) 304, 351; Downes v Bidwell, (1901) 182 U.S. 244; Lamshed v Lake, supra note 105 at 145 (Dixon, C.J.).

235 United States: See e.g., *The United States Treaties and Other International Agreements* (U.S.T.); *Treaties and Other International Acts Series* (T.I.A.S.); *Treaties and Other International Agreements of the United States of America* 1776-1949 (C. Bevans, ed.). Australia: See, e.g., *Australian Treaty Series;* The King v Burgess ex parte Henry, supra note 14 at 640 (Latham, C.J.).

236 Quoted in 5 J. B. Moore, supra note 233 at 164.

237 "This country is divided into many distinct sovereignties. Exact enumeration is necessary to prevent the most dangerous consequences. The enumeration of legislative powers in the constitution has relation then, not to the treaty power, but to the powers of the State. In our relation to the rest of the world the position is reversed. Here the states disappear. Divided within, we present the exterior of undivided sovereignty." Calhoun, 29 *Annals of Cong.* 531 (1816) [1815-1816]; see also supra notes 17 and 18.

tation of such international obligations, however, brings them into the nation's heart-land. The allocation of power between nation and states which has found its origin and justification in internal forces thereby lies open to revision pursuant to the needs and dictates of international problems and solutions embodied in treaties. Like the treaty making power, the constitutional power whereby treaties are translated into the fabric of the law of the land is not granted in terms of any specific or general subject matter. Is it therefore a means of centralizing all governmental power or can a coherent theory of the interrelation between the treaty making and implementation powers be evolved which sacrifices neither international competence nor a viable internal federal system?

Perhaps the most vivid judicial denial of treaty implementation power to a national legislature in an effort to preserve state autonomy can be seen in the decision of the Privy Council invalidating three statutes of the Canadian Parliament passed pursuant to treaties ratified by the Canadian Government adopting conventions of the International Labor Organization of the League of Nations. In the course of delivering the judgment of the Judicial Committee of the Privy Council Lord Atkin said:[238]

> For the purposes of Sections 91 and 92, i.e. the distribution of legislative powers between the Dominion and the Provinces, there is no such thing as treaty legislation as such. The distribution is based on classes of subjects; and as a treaty deals with a particular class of subjects so will the legislative power of performing it be ascertained. No one can doubt that this distribution is one of the most essential conditions, probably the most essential condition, in the inter-provincial compact to which the British North America Act gives effect . . . It would be remarkable that while the Dominion could not initiate legislation, however desirable, which affected civil rights in the Provinces, yet its Government, not responsible to the Provinces nor controlled by Provincial Parliaments, need only agree with a foreign country to enact such

238 Attorney General for Canada v Attorney General for Ontario (Reference re weekly rest in Industrial Undertakings Act, Minimum Wages Act and Limitation of Hours of Work Act), [1937] A.C. 326, 351-352 (P.C.) (Canada); Some two decades later, Lord Wright, who sat as a member of the Judicial Committee of the Privy Council during the above Labour Conventions Case, wrote that it "seems to ignore the whole framework of the provisions, in particular the warning that the enumerated classes are without prejudice to the generality of the power of the Dominion to make laws for the peace, order and good government of Canada." Wright, "Tributes to the late Rt. Hon. Sir Lyman Poore Duff, Chief Justice of Canada", (1955) 33 *Can. Bar. Rev.* 1123, 1127.

> legislation, and its Parliament would be forthwith clothed with authority to affect Provincial rights to the full extent of such agreement. Such a result would appear to undermine the constitutional safeguards of Provincial constitutional autonomy.

Although some earlier Privy Council decisions[239] on the scope of the Canadian Parliament's treaty implementation power have been cited with apparent approval by the High Court,[240] differences in constitutional structure and provisions between the Australian and Canadian[241] Constitutions and recent indications[242] that the Supreme Court of Canada[243] is not prepared to follow the position taken by the Privy Council in *Attorney General for Canada v Attorney General for Ontario*[244] would justify an omission by Australian counsel to refer to that decision.[245]

Perhaps the best known dictum concerning limitations on the treaty power is that set forth by Justice Field in 1890:[246]

> The treaty power, as expressed in the Constitution, is in terms unlimited except by those restraints which are found in that instrument against the action of the government or of its departments, and those arising from the nature of the government itself and if that of the States. It would not be contended that it extends so far as to authorize what the constitution forbids, or a change in the character of the government or in that of one of the States, or a cession of any portion of the territory of the latter, without its consent.

Insofar as this dictum proscribes a change in the character of state governments by way of the treaty power it, like other opinions on the

239 See, e.g., In Re Regulation and Control of Aeronautics in Canada, [1932], A.C. 54 (P.C.) (Canada); In Re Regulation and Control of Radio Communication in Canada, [1932] A.C. 304 (P.C.) (Canada).

240 The King v Burgess ex parte Henry, supra note 14 at 637-638, 679, 687; cf. id. at 658.

241 British North America Act of 1867, 30 & 31 Vict., c. 3; Laskin, "Some International Legal Aspects of Federalism: The Experience of Canada", in *Federalism and the New Nations of Africa* 389 (Currie ed. 1964).

242 Reference Re Ownership of Off-Shore Rights, (1967) 65 D.L.R. (2d) 353.

243 Appeals from Canadian Courts to the Judicial Committee of the Privy Council have now been abolished, see, S. 54 of the Supreme Court Act R.S.C. 1952, c. 259 enacted by 1949 (Can. 2d sess.), c. 37 S. 3, *and* Attorney General for Ontario v Attorney General for Canada [1947] A.C. 127 (P.C.) (Canada).

244 Supra note 238.

245 But note, Ffrost v Stevenson, supra note 4 at 596-601 (Evatt, J.).

246 Geofroy v Riggs, (1890) 133 U.S. 258, 267.

same topic,[247] does not proceed to identify at what point a change becomes a change in character. This difficulty is clearly evident if it is recognized that any treaty which presses upon state power in a way that federal legislation could not, changes to some degree the character of state government. Some justices of the High Court have also expressed the opinion that the external affairs power is subject to implied limitations[248] but have left the extent of any such limitations wholly uncertain.[249]

Despite these words, the overwhelming trend of actual court decisions and governmental use of the treaty power have made the distribution of powers appear largely irrelevant in this context. Apart from some hesitancy during the incumbency of Chief Justice Taney,[250] the Supreme Court has consistently rejected challenges to the validity and supremacy of treaties as the law of the land even when they deal with what are normally thought of as "local" matters;[251] for example, inheritance of real estate[252] and the right to engage in trade and professional activities.[253] And the court has done this without inquiring into whether any other branch of the federal government could exer-

247 See, e.g., Calhoun, supra note 237 at 531-532.

248 The King v Burgess ex parte Henry, supra note 14 at 659 (Starke, J.); Airlines of New South Wales Pty. Ltd. v State of New South Wales [No. 2], supra note 103 at 85 (Barwick C.J.); New South Wales v Commonwealth of Australia, supra note 14 at 79 (Stephen, J., dissenting); cf. id. at 10 (Barwick, C.J.).

249 See, e.g., Sawer, supra note 101 at 301-302; see generally, Kidwai, "External Affairs Power and the Constitutions of British Dominions", (1976) 9 *Uni. Qld. L.J.* 167, especially 173-186. Compare, Rupp, "Judicial Review of International Agreements: Federal Republic of Germany", (1977) 25 *Am. J. Comp. L.* 286.

250 Holmes v Jennison, supra note 17 at 569; License Cases, (1847) 46 U.S. (5 How.) 504, 613; Passenger Cases, 48 U.S. (7 How.) 283, 425-426, 466, 607 (1849); Prevost v Greneaux, (1856) 60 U.S. (19 How.) 1, 7; Frederickson v Louisiana, (1860) 64 U.S. (23 How.) 445, 448; Burr, "The Treaty Making Power of the United States and the Methods of its Enforcement as Affecting the Police Powers of the States", (1912) 51 *Proc. Am. Phil. Soc.* 270.

251 The first case to reach the Supreme Court involving a potential conflict between the so called reserve powers of a state and a treaty was Georgia v Brailsford, (1794) 3 U.S. (3 Dall.) 1.

252 See, e.g., Hauenstein v Lynham, (1880) 100 U.S. 483; De Tenorio v McGowan, (1973) 364 F. Supp. 1051.

253 See, e.g., Baker v Portland, 2 Fed. Cas. 472 No. 777 (C.C.D. Ore. 1879); In re Tiburcio Parrott, 1 F. 481 (C.C.D. Cal. 1880); Asakura v City of Seattle, (1924) 265 U.S. 332.

cise control over such matters in the absence of a treaty.[254] Thus the decision in *Missouri v Holland* was really no more than an eloquent restatement of the principles which had been well established by earlier cases;[255] namely that the Tenth Amendment did not constitute a restriction on the exercise of this federal power[256] and that such an exercise may control matters that otherwise would be left for the states to govern. Justice Holmes writing for the court put it thus:[257]

> [W]hen we are dealing with words that are also a constituent act, like the Constitution of the United States, we must realize that they have called into life a being the development of which could not have been foreseen completely by the most gifted of its begetters. It was enough for them to realize or to hope that they had created an organism; it has taken a century and has cost their successors much sweat and blood to prove that they created a nation. The case before us must be considered in the light of our whole experience, and not merely in that of what was said a hundred years ago. . . . The only question is whether it is forbidden by some invisible radiation from the general terms of the 10th Amendment. We must consider what this country has become in deciding what that amendment has reserved. . . . No doubt the great body of private relations usually falls within the control of the state, but a treaty may override its power. We

254 Cf. comment of Brandeis, J., on one of Holmes', J. drafts of his opinion for the court of Missouri v Holland:

> may it not be well to suggest
> that a treaty plus an act of Congress
> may perhaps do what a treaty alone
> could not?
> It may allay fears.

This Supreme Court memorandum is part of the Holmes collection at the Harvard Law School Library.

255 The decision in Missouri v Holland is also authority for the proposition that the federal government may, pursuant to treaty implementation legislation, enlarge its powers to deal not only with foreign subjects but also with its own citizens.

256 The Tenth Amendment refers to "powers not delegated to the United States". The treaty power is itself a delegated power and therefore whatever is within it was not reserved to the States by the Tenth Amendment.

257 Missouri v Holland, supra note 23 at 433-435; "[E]ven in German legal circles when the limits of the federal (Bund) treaty-making power so far as it may trench on legislative powers otherwise reserved to the States (Länder) are discussed, Holmes's great opinion in Missouri v Holland is inevitably raised if not necessarily followed." McWhinney, "The United States Supreme Court and Foreign Courts: An Exercise in Comparative Jurisprudence", (1957) 6 *J. Pub. L.* 465 (footnote omitted). The first portion of the quotation in the text was adopted by Justice Windeyer in Spratt v Hermes, supra note 54 at 272.

do not have to invoke the later developments of constitutional law for this proposition; it was recognized as early as *Hopkirk v Bell,* 3 Cranch, 454, with regard to statutes of limitation, and even earlier, as to confiscation, in *Ware v Hylton,* 3 Dall. 199.

In conformity with this principle, courts in the United States have held that a great variety of subjects, which normally come within the jurisdiction of the states, have been transferred to the federal domain by virtue of congressional treaty implementation legislation or the self-executing nature of the treaty in conjunction with the Supremacy Clause. For example, the right of aliens to own and transfer real and personal property,[258] to inherit property,[259] to have their debts paid,[260] to exemption from escheats and statutes of limitation,[261] to participate in trade and professional enterprises[262] to set up corporations[263] and not to be improperly seized and imprisoned.[264] The foregoing are usually found in treaties of friendship, commerce, and navigation. Furthemore, regulation of fishing within the territorial waters of coastal states[265] and limitation of the usual liability for negligently caused injuries under local law[266] have been sustained. Whether the protection of human rights, labour regulations and the enactment of criminal law,[267] are matters which come within this power has not been authoritatively determined although academic opinion would

258 Fairfax's Devisee v Hunter's Lessee, (1813) 11 U.S. (7 Cranch.) 603.

259 See, supra note 252; the nearest the Supreme Court has come to lending countenance to the State Rights argument in this connection was in Frederickson v Louisiana, supra note 250 at 448.

260 Ware v Hylton, (1796) 3 U.S. (3 Dall.) 199; Clarke v Harwood, (1797) 3 U.S. (3 Dall.) 342.

261 Hopkirk v Bell, (1806) 7 U.S. (3 Cranch.) 454; Higginson v Mein, (1808) 8 U.S. (4 Cranch) 415; Chirac v Chirac, 15 U.S. (2 Wheat.) 259 (1817); Orr v Hodgson, (1819) 17 U.S. (4 Wheat.) 453; cf. United States v Oregon, (1961) 366 U.S. 463.

262 See, supra note 253.

263 Society for the Propagation of the Gospel in Foreign Parts v Town of New Haven, (1823) 21 U.S. (8 Wheat.) 464.

264 Elkinson v Deliesseline, 8 Fed. Cas. 493, No. 4366 (C.C.D.S. Car. 1823).

265 Commonwealth v Trott, (1954) 331 Mass. 491, 120 N.E. 2d 289.

266 Ross v Pan American Airways, Inc., (1949) 299 New York Reports 88; Pierre v Eastern Airlines, 152 F. Supp. 486 (D.N.J. 1957); Noel v Linea Aeropostal Venezolana, 144 F. Supp. 359 (S.D.N.Y. 1956); Komlos v Compagnie Nationale Air France, 111 F. Supp. 393 (S.D.N.Y. 1952).

267 Lower court opinions indicated that criminal sanctions do come within the federal treaty power; see with respect to the Single Conventtion on Narcotic Drugs 1967, 18 U.S.T. 1407, T.I.A.S. No. 6298, United States v Rodiguez-Camacho, 468 F. 2d. 1220, 1222 (9th Cir. 1972), *and* United States v La Froscia, 354 F. Supp, 1338, 1341 (S.D.N.Y. 1973).

seem to favour an affirmative conclusion.[268] Indeed, there is quite a discernible effort being made in the United States to promote an international uniformity of domestic law through the implementation of international agreements on multifarious subjects.[269]

In contrast to the United States' position, judicial exploration of the Australian Parliament's legislative authority with respect to the external affairs power has to date been conspicuously rare. In fact only on three occasions has the power played a significant role in decisions by a Full Bench of the High Court,[270] though it has been the subject of discussion by individual justices and the court on other occasions.[271] Although there are some points of agreement between the various judges it is by no means an area free from controversy, and despite strong support in academic writings for a wide construc-

268 Baldwin v Franks, (1887) 120 U.S. 678, 679 (1887) (Waite, C.J.); McArthur v Williams, (1936) 55 C.L.R. 324, 338-339; H. Hart & H. Wechsler, supra note 52, at chapter 9; Chafee, "Federal and State Powers under the U.S. Covenant on Human Rights" pts. 1-2), (1951) *Wis. L. Rev.* 389-473, 623-656 Henkin, "The Constitution, Treaties, and International Human Rights", (1968) 116 *U. Pa. L. Rev.* 1012; in practice the federal government does not exercise its powers to the full extent as described in cases such as Missouri v Holland, see, e.g., "Hearings on S. J. Res. 1 & 43 Before the Subcom. of the House Comm. on the Judiciary, 83d Cong., 1st Sess. 1098 (1953); International Labor Office, *Report on the Committee of Experts on the Application of Conventions and Recommendations* 186-187, 191 (1966); and it has been said that "the treaty making powers of the United States in effect has been largely limited by the many actual and potential jurisdictional competences of the States. Missouri v Holland is now little more than a ghost." Friedman, "Canadian Approaches to International Law", (1963) 19 *Int'l J.* 77, 82; But the decline in significance of the rule illustrated in Missouri v Holland is due not only to governmental reluctance but also to the vast expansion since 1937 of congressional power, especially the commerce, spending and taxing powers, so that many of these matters can be dealt with even in the absence of a treaty.

269 See, e.g., Webb, "Internationally Uniform Probate Law—A Method for Improving Administration of Multinational Estates", (1971) 4 *Vand. I. L. J.* 85.

270 The King v Burgess ex parte Henry, supra note 14; The King v Poole ex parte Henry [No. 2], supra note 27; New South Wales v Commonwealth of Australia, supra note 14.

271 See, e.g., McKelvey v Meagher, supra note 29; Robtelmes v Brenan, (1906) 4 C.L.R. 395; Roche v Kronheimer, (1921) 29 C.L.R. 329; Jolley v Mainka, (1933) 49 C.L.R. 242; Ffrost v Stevenson, supra note 4; The King v Sharkey, (1949) 79 C.L.R. 121; Airlines of New South Wales Pty. Ltd. v State of New South Wales [No. 1], supra note 114; Airlines of New South Wales Pty. Ltd. v State of New South Wales [No. 2], supra note 103; Re Judges of the Australian Industrial Court, ex parte C.L.M. Holdings Pty. Ltd. (1977) 13 A.L.R. 273.

tion of the external affairs power,[272] successive Commonwealth Governments have viewed Australia as a federal state for treaty purposes.[273] However, the last five years have witnessed an increasing reliance on this provision, amongst others, to expand Commonwealth powers and there is no doubt that it will prove to be a great constitutional battle ground in the years ahead.[274]

From the very beginning there has been debate over the meaning and extent of the words "External Affairs" in the Australian Constitution.[275] One principle which has emerged from the judicial decisions, though which has not until recently been acted upon by the federal government, is that the external affairs power authorizes the Australian Parliament to legislate so as to give domestic effect[276] to treaty[277]

272 See, e.g., Bailey, supra note 144; Connell, supra note 75.

273 See, e.g., Commonwealth of Australia, Parliamentary Debates (Hansard) House of Representatives, No. 2197, November 7, 1962; R. Menzies, supra note 232, chapter 8; Airlines of New South Wales v State of New South Wales [No. 2], supra note 103 at 63 (B. M. Sneddon, Q.C., Attorney General of the Commonwealth of Australia) (*arguendo*).

274 Cf. J. Quick & R. Garran, supra note 29 at 631.

275 "It is difficult to say what limits (if any) can be placed on the power to legislate as to external affairs. There are none expressed." Roche v Kronheimer, supra note 271 at 388 (Higgins, J.); "This is a power the extent of which is difficult to measure." W. Harrison Moore, *The Constitution of the Commonwealth of Australia* 142, 143 (1902); "This is perhaps of all powers of the Commonwealth Parliament that which is the least capable of definition." Id 2nd ed. (1910) at 460; see also, supra notes 78-83.

276 See, The King v Poole ex parte Henry [No. 2], supra note 27.

277 Cf. "It would seem clear . . . that the legislative power of the Commonwealth over 'external affairs' certainly includes the power to execute within the Commonwealth treaties and conventions entered into with foreign powers. . . . But it is not to be assumed that the legislative power over 'external affairs' is limited to the executive of treaties or conventions . . . the Parliament may well be deemed competent to legislate for the carrying out of 'recommendations' as well as the 'draft international conventions' resolved upon by the International Labor Organisation or *of other international recommendations* or requests upon other subject matters of concern to Australia as a member of the family of nations." The King v Burgess ex parte Henry, supra note 14 at 687 (Evatt, and McTiernan, J.J.) (emphasis added); The King v Sharkey, supra note 271 at 136-137, 149, 157, 163; New South Wales v Commonwealth of Australia, supra note 14 at 5-6, 10, 15-16 (Barwick, C.J.), 19, 23 (McTiernan, J.), 28-30 (Gibbs, J.), 74-79 (Stephen, J.), 91-92 (Mason, J.), 112-113 (Jacobs, J.), 117-118 (Murphy, J.). See also, Goldsworthy, "Ownership of the Territorial Sea and Continental Shelf of Australia: An Analysis of the Seas and Submerged Lands Act Case", (1976) 50 *A.L.J.* 175, 176-178; Zines, "The Australian Constitution 1951-1976", supra note 123 at 100-105; Zines, "The Growth of Australian Nationhood and Its Effect on the Powers of the Commonwealth", in *Commentaries on the Australian Constitution,* 1, especially at 46-49 (L.

obligations or rights,[278] despite the consequence that it may thereby acquire power to enact laws on subjects which otherwise would be under state parliamentary control.[279] This indeed was the result of the decisions in *The King v Burgess ex parte Henry*[280] and *The King v Poole ex parte Henry* [No. 2][281] where the external affairs power was held to provide a constitutional basis for Commonwealth legislation which gave internal effect to the Paris International Air Convention of 1919. The Commonwealth was thereby able to regulate intra state aviation—a field into which it could not otherwise have entered.[282]

Perhaps the most illuminating course is to set forth the main elements of the various judgments in *The King v Burgess ex parte Henry* together with the later developments thereon and then look to see what guidance can be gained from United States' authorities. The various justices in *Burgess* expounded tests for gauging the scope of the external affairs power which broadly embrace three main points on the spectrum of possible approaches to constitutional interpretation. The most restrictive exegesis was that of Justices Dixon[283] and Starke.[284] Both were prepared to concede that the Commonwealth pursuant to this power could legislate on subjects not otherwise within its powers and avoid limitations inherent in the enumerated powers.[285] But the mere fact that the Commonwealth executive had subscribed to an international document was not a necessary and sufficient condition so as to bring the external affairs power into play.[286] In addition,

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Zines ed. 1977); Crommelin and Evans, "Explorations and Adventures with Commonwealth Powers", supra note 221 at 47-54.

278 See, e.g., Airlines of New South Wales Pty. Ltd. v State of New South Wales [No. 2], supra note 103 at 86 (Barwick, C.J.).

279 The King v Burgess ex parte Henry, supra note 14; The King v Poole ex parte Henry [No. 2], supra note 27.

280 Supra note 14.

281 Supra note 27.

282 Cf. Airlines of New South Wales Pty. Ltd. v State of New South Wales [No. 2], supra note 103, especially Barwick, C.J., Windeyer, and Kitto, J.J.

283 Owen Dixon, when he was counsel, argued before the High Court that the Commonwealth Treaty of Peace Act of 1919, which sought to give effect to the Versailles Treaty, was unconstitutional. Roche v Kronheimer, supra note 271 at 330-332 (*arguendo*). Cf. The King v Burgess ex parte Henry, supra note 14 at 641 (Latham, C.J.).

284 However, of all the justices in the Burgess Case, Justice Starke was prepared to give the legislature the most flexibility in adapting the treaty to domestic conditions, id. at 658.

285 See, e.g., Airlines of New South Wales Pty. Ltd. v State of New South Wales [No. 1], supra note 114 at 27 (Dixon, C.J.).

286 The King v Burgess ex parte Henry, supra note 14 at 669 (Dixon, J.).

the subject matter of the treaty needed to be of international character or significance.[287] And the problem of whether a particular subject was of that description could "only be ascertained authoritatively by a course of decision in which the application of general statements is illustrated by example."[288] This view appears to be supported by the present Chief Justice[289] although in other areas he has shown a tendency to favour a more expansive interpretation of Commonwealth legislative powers.[290] Chief Justice Latham's exposition took the middle course. Although he recogized placitum twentynine "as an independent express legislative power"[291] he was not prepared to lay down a rule concerning the limits, if any, to be placed on the range of subject matters which might be dealt with under this power.[292] It was enough, in his opinion, to observe that whatever criteria were used, the subject matter with which the legislation before the court dealt—aviation—could be subsumed under the external affairs power.[293] At the other end of the spectrum is the widest view of this power, which in the *Burgess Case* received judicial support in the joint opinion of Justices Evatt and McTiernan. They concluded that the term external affairs was "an expression of wide import"[294] and that the existence of a

287 Id. at 658 [Starke, J., quoting W. Willoughby, *Principles of Constitutional Law of the United States* 519 2nd ed. (1929)] 669 (Dixon, J.); Airlines of New South Wales Pty. Ltd. v State of New South Wales [No. 2], supra note 103, at 63 (B. M. Snedden, Q.C., Attorney-General of the Commonwealth of Australia) (*arguendo*); New South Wales v Commonwealth of Australia, supra note 14 at 30 ("at least if the treaty is in reference to some matter indisputably international in character.") (Gibbs, J.), 91 ("provided at any rate that [the treaties and conventions] are truly international in character") (Mason, J.).

288 Id. at 669 (Dixon, J.); "One of the greatest sources of strength of our law is that it adjudicates concrete cases and does not pronounce principles in the abstract." New York v United States, supra note 182 at 575 (Frankfurter, J.).

289 Airlines of New South Wales Pty. Ltd. v State of New South Wales [No. 2], supra note 103 at 85 (Barwick, C.J.), 153 (Windeyer, J.).

290 See, e.g., Worthing v Rowell and Muston Pty. Ltd., (1970) 123 C.L.R. 89; Bonser v La Macchia, supra note 18. But cf. State of Victoria v The Commonwealth, supra note 221. See generally, M. Cooper, "A Decade of Chief Justice Barwick—Crisis in Constitutional Interpretation?" (unpublished paper presented to A.U.L.S.A. Conference 1975).

291 The King v Burgess ex parte Henry, supra note 14 at 639.

292 Id. at 639-642; He has, however, extra-judicially suggested that a treaty between Australia and Costa Rica establishing certain educational requirements could not be implemented by legislation passed pursuant to the external affairs power. Latham, "Changing the Constitution", (1953) 1 *Sydney L. Rev.* 14, 35.

293 The King v Burgess ex parte Henry, supra note 14 at 641.

294 Id. at 684.

treaty *per se* provided a basis for Commonwealth legislation.[295] In reaching this conclusion they rejected the contention that there might be a limit on the range of possible subjects which could be dealt with by legislation passed pursuant to this constitutional power,[296] and also criticized the view that Australia was a federal state for treaty making purposes.[297] Thus on the Evatt-McTiernan interpretation, Australia may not only ratify draft conventions of the International Labor Office but also has constitutional power to enact legislation implementing them throughout the country.[298]

If this wide view is correct, then the external affairs power has the potential to swallow up the Constitution. Yet even Evatt and McTiernan, J.J., recognized "that . . . treaties and conventions could not be used to enable the Parliament to set at nought constitutional guarantees elsewhere contained",[299] and this is in line with the position taken by the Supreme Court. But what of the subject matter limitation postulated by Dixon and Starke, J.J., and rejected by the other members of the court? Are there some matters which are not appropriate subjects for treaties? International law sets no such limits; it regards the nation-state as being vested with complete treaty making power.[300] Yet there are those who argue that only matters of 'international concern' are permissible subjects for treaties. More is needed than matters which are merely internal affairs and do not concern any

295 Id. at 687. Professor Lane is of the view that even Evatt, and McTiernan, J.J., espouse a requirement of mutual international concern, see, Lane, "External Affairs Power", (1966) 40 *A.L.J.* 257, 261; but Connell disputes this, supra note 75 at 99-101.

296 The King v Burgess ex parte Henry, supra note 14 at 681.

297 Id. at 681-682.

298 It is not without interest that even after Justice Evatt resigned from the High Court in 1940 and became Attorney General and Minister for External Affairs in the Australian Labor Government there was not significant change in Commonwealth practice relating to International Labor Office Conventions. See also, note, "Dr. Evatt and the External Affairs Power", (1975) 49 *A.L.J.* 652.

299 The King v Burgess ex parte Henry, supra note 14 at 687.

300 "An independent State possesses the capacity to enter into international agreements that cover a vast field of action pertaining to objectives that are of infinite variety." 2 C. Hyde, *International Law Chiefly as Interpreted and Applied by the United States* 1383 (footnote omitted) (2nd ed. 1947) 1383 (footnote omitted); 1 L. Oppenheim, *International Law* S.S. 503-506 (8th ed. Lauterpacht 1955). International law itself imposes some restrictions, see, e.g., Verdoss, "Forbidden Treaties in International Law", (1937) 31 *Am. J. Int'l L.* 571; C. Hyde, id. at 1374-1383; H. Blix, *Treaty Making Power* (1960); 1 D. O'Connell, *International Law* 261-262 (1965) cf. United Nations Charter, article 103.

other country. Amongst these matters, it is sometimes claimed, are subjects within the jurisdiction of the states. The modern foundation of this argument was laid by former Chief Justice Hughes when he spoke to an annual meeting of the American Society of International Law on April 26, 1929:[301]

> [I]f there is a limitation to be implied, I should say that it might be found in the *nature* of the treaty-making power. What is the power to make a treaty? What is the object of the power? The normal scope of the power can be found in the appropriate object of the power. The power is to deal with foreign nations with regard to matters of international concern. It is not a power intended to be exercised, it may be assumed, with respect to matters that have no relation to international concerns.
>
> . . .
>
> But if we attempted to use the treaty-making power to deal with matters which did not pertain to our external relations but to control matters which normally and appropriately were within the local jurisdictions of the States, then . . . there might be ground for implying a limitation upon the treaty-making power that it is intended for the purpose of having treaties made relating to forign affairs and not to make laws for the people of the United States in their internal concerns through the exercise of the asserted treaty-making power.

Other than some dicta[302] which may be taken as supporting the Hughes' position, the Supreme Court has never authoritatively spoken on the merits of this limitation.[303] But what matters are today so purely local that the inclusion of them in a treaty would be thought to be unconstitutional? None can be categorized with any certainty for it is abundantly obvious that subjects thought to be wholly local in years gone by have become matters of international concern. The

301 Hughes, "Proceedings", (1929) 23 *Proc. Am. Soc'y Int'l L.* 194-196; Jefferson, "Manual of Parliamentary Practice", in *Senate Manual* S. Doc. No. 91-92, 92 Cong., 1st Sess. 435, 516-518 (1971); 1 W. Willoughby, supra note 287 at S. 316.

302 See, e.g., In re Ross, (1891), 140 U.S. 453, 463; Holmes v Jennison, supra note 17 at 569; Holden v Joy, (1872) 84 U.S. (17 Wall.) 211, 243; United States v 43 Gallons of Whiskey, (1876) 93 U.S. 188, 197 (1876); Geofroy v Riggs, supra note 246 at 266; Asakura v Seattle, supra note 253 at 314; Santovincernzo v Egan, (1931) 248 U.S. 30, 40; Power Authority of State of New York v Federal Power Commission, 247 F. 2d 538 (D.C. Cir. 1957) judgment vacated and remanded with directions to dismiss as moot, (1957) 355 (U.S.) 64.

303 Indeed Justice Holmes appears to have adopted a somewhat different test when he spoke of "matters of the sharpest exigency for the national well being." Missouri v Holland, supra note 23 at 433.

redundancy[304] of this implied limitation lies in its failure to keep pace with man's increasing ability to bridge the barrier of distance in both time and space. The world since 1929 has become a smaller place. Its inhabitants more than ever before are neighbours who must learn to live together. Man has for a long time ceased to be an island and today nations, too, are vitally concerned with and affected by the inner most thoughts and actions of others which occur beyond their shores.[305]

Are there any remnants of state autonomy which may still be saved from the treaty power? There are, of course, some specific constitutional guarantees given to states, such as the right under congressional discipline, to train the militia and appoint its officers;[306] for a well-regulated militia is necessary to the security of a free state.[307] Furthermore, unless it consents, a state cannot be sued in the courts of the United States by a foreign government[308] or citizens or subjects of a foreign state.[309] Despite some implied support for a negative answer from various constitutional provisions,[310] the issue of whether

304 Cf. Airlines of New South Wales Pty. Ltd. v State of New South Wales [No. 2], supra note 103 at 153 (Windeyer, J.).

305 See, The King v Burgess ex parte Henry, supra note 14 at 639-642 (Latham, C.J.).

> Matters of international concern are not confined to matters exclusively concerned with foreign relations. Usually, matters of international concern have both international and domestic effects, and the existence of the latter does not remove a matter from international concern.

Restatement (2d) of Foreign Relations Law of the United States, S. 117 (i) (1965).

Hughes would perhaps agree with the Restatement for in the speech already noted he said:

> I quite agree with the suggestion that, as it has been found in connection with interstate and intrastate commerce, there may be such an intermingling of activities that it would be necessary in order to support the supremacy of the national power to subordinate the local power with respect to a matter of intermingled local and national concern to the exercise of the national power . . . I imagine that the same doctrine would be sustained in regard to the treaty making power where concerns, which perhaps under former conditions had been entirely local, had become so related to international matters that an international regulation could not appropriately succeed without embracing local affairs as well.

Supra note 301.

306 U.S. Const. art. I, S. 8, cl. 16; cf. Aust. Const. S. 114.

307 U.S. Const. amend. ii.

308 Monaco v Mississippi, (1934) 292 U.S. 313, 330.

309 U.S. Const. amend. xi.

310 Id. at art. I, S. 8, cl. 17; at art. IV, S. 3; cf. Aust. Const. S.S. 51 (xxxi), 111, 121, 123, 124, 125.

without a state's consent its territory can be ceded to a foreign country by means of the treaty power has not been resolved.[311] And according to often repeated dictum, the federal government could not by treaty or treaty implementing legislation change the character of state governments.[312] In such a generalized form, this test is both impractible and indefinite. Any treaty which alters the balance of power in a federation changes governmental structure in some way. *Missouri v Holland* certainly did this. Even here the Guarantee Clause may not prove to be a strong bulwark; for what is essential to a republican form of government is hardly beyond dispute, and the Supreme Court has often considered this a political question not for judicial consideration.[313]

Undoubtedly the treaty and external affairs power have to a large extent the potential to render asunder the enumerated powers theory and, if this be the *conditio sine qua non* of federalism,[314] the federal principle.[315] But there may be something left—how much cannot be stated with certainty. At least in the past, the courts have been prepared to warn federal authorities that there may be limits to these powers "arising from the nature of the government itself and of that of the States."[316] But the point at which they will be prepared in concrete situations to imprint a general federal structure on the treaty power is far from clear. In Australia, the High Court may be persuaded to use this approach if federal action trespasses onto such traditional state grounds as local government, property law, the descent and distribution of estates, and labour law. On the other hand, Supreme Court decisions implementing the principle illustrated in *Missouri v Holland* could well provide a rationale for the High Court to continue further along the path it took in the *Burgess Case*. If the High Court pursues this route, will it sustain Commonwealth legislation, implementing a bill of rights and anti racial discrimination

311 See, e.g., Geofroy v Riggs, supra note 246 at 267; Biddles v Downes, (1901) 182 U.S. 244, 316; Worcester v Georgia, (1832) 31 U.S. (6 Pet.) 515; Lessee of Margaret Lattimer v Poteet, 39 U.S. (14 Pet.) 4, 13, 14 (1840); United States v Rice, 17 U.S. (4 Wheat.) 240 (1819); T. Woolsey, *International Law* 161 (6th ed. 1889); 1 W. Willoughby, supra note 287 at 567; 5 J. B. Moore, supra note 233 at 171-175.

312 See, e.g., Geofroy v Riggs, supra note 246 at 267; The King v Burgess ex parte Henry, supra note 14 at 680, 682; U.S. Const. art. IV, S. 4; Aust. Const. S. 106.

313 See, supra note 161.

314 See, e.g., K. C. Wheare, *Federal Government*, chapter 1 (1946).

315 Nettl, supra note 177 at 1069.

316 Geofroy v Riggs, supra note 246 at 267.

measures requiring state as well as individual compliance, based upon treaties to which Australia is a party? Such legislation by virtue of Section 109[317] would render inconsistent state law invalid. This in itself would not be an unusual phenomenon. The distinctive feature of the legislation would be its across the board effect on state laws. Rather than federal pre-emption occurring in a specific area or subject matter where previously there had been state control, a general denudation of state power in all fields of its activity would ensue. States would be required to act in accordance with such federal legislation thereby losing in some degree both power and legislative independence. That this does not constitute a sufficient interference, impediment or burden on the states to justify an invocation of the *State Banking Case* doctrine could be argued by analogy to the position of the American states *vis-a-vis* the Bill of Rights in the Constitution of the United States. As a result of judicial endeavours to 'incorporate' various provisions of the first ten amendments into the fourteenth[318] and expansion of the state action concept,[319] state powers have been somewhat curtailed. Even so, it could hardly be said[320] that this has prevented them from continuing to function or has so altered the character of their government as to bring into play the previously quoted dictum in *Geofroy v Riggs*.

It has been clearly established that the residual state powers will not be applied to void exercises of the treaty power. As a consequence treaties have, with the courts' imprimatur, been able to chop away at state power. In this respect the judiciary in both countries are evidently more willing to accept such a result than infringements perpetuated on other sections of the Constitution by the same means. But notions of federalism might very well be a bar, in normal times,[321] to a treaty which attempted to annihilate state governments as such. Perhaps the clearest hypothetical is where an Australian Government concludes, and then attempts to implement, a treaty with New Zea-

317 Clyde Engineering Co. Ltd. v Cowburn, (1926) 37 C.L.R. 466.

318 See, e.g., Palko v Connecticut, (1937) 302 U.S. 319; Adamson v California, (1947) 332 U.S. 46; Williams v Florida, (1970) 399 U.S. 78.

319 See, e.g., Adickes v Kress & Co., (1970) 398 U.S. 144; cf. Moose Lodge No. 147 v Irvis, (1972) 407 U.S. 163; Elkind, "State Action: Theories for Applying Constitutional Restrictions to Private Activity", (1974) 74 *Colum. L. Rev.* 656; Thompson, "Piercing the Veil of State Action: The Revisionist Theory and a Mythical Application to Self-help Repossession" [1977]*Wisconsin L. Rev.* 1.

320 Cf. Slaughter-House Cases, supra note 164 (especially Miller, J.).

321 The result may be different in times of war—at least under the defence power, see, supra note 181.

land, a condition of which is that Australia would henceforth assume a unitary system of government. As one draws back from such an absolute destruction of the states and envisages other examples in which the position of states in the governmental structure may be undermined by the treaty power, the problem of where to draw lines is even more difficult.

Yet, there may still be other areas where courts will raise banners of federalism.[322] For example, federal treaty implementation legislation which discriminated against the states or destroyed their very substance leaving only nominal indicia of statehood intact, may well be held unconstitutional. Thus federal requirements pursuant to treaties which imposed duties on state officials,[323] altered or abolished state suffrage[324] and representative requirements, and controlled the states' non federal fiscal resources are at least *prima facie* suspect under a *State Banking Case* type of approach.[325] Other than these types of examples it is difficult to postulate that the courts will interfere at any earlier stage, especially when the trend of results of decisions in relation to the tax,[326] spending and defence[327] powers is surveyed. Any restrictive decision regarding the scope of the treaty enforcement power by the courts based on a 'logical' deduction from the structure of the Constitution will not sit squarely with the inroads on state autonomy made, with judicial approval, by use of these other

322 Even those who support a broad interpretation of the external affairs power have been willing to concede that federalism may be relevant here. See, e.g., Connell, supra note 75 at 95.

323 Cf. Kentucky v Dennison, supra note 217; Prigg v Pennsylvania, supra note 23 at 615-616; Hart, "Relations between State and Federal Law", (1954) 54 *Colum. L. Rev.* 489, 515; See, Agreement Between the United States of America and the United Nations Regarding the Headquarters of the United Nations, June 26, 1947 S.S. 3, 4 (c), 11, 14, 16, 17, 18, 25, 61 Stat. 3416 T.I.A.S. No. 1676; cf. Aust. Const. 77 (iii).

324 Cf. Oregon v Mitchell supra note 139.

325 "It needs no argument to prove that an attempt on the part of the United States, by compact or agreement with a foreign government, to qualify the right of suffrage in a state, prescribe the times and mode of elections, or to restrain the power of taxation under state authority, would transcend the limits of the treaty making power, and be entirely void; and an agreement with a foreign government, prescribing the terms on which highways should be laid out in the states, regulating the support of paupers, or the sale of goods by auctioneers, or by hawkers and peddlers, would be of the same character." Pierce v The State, (1843) 13 N.H. 536, 576, aff'd (1847) 46 U.S. (5 How.) 554.

326 See, e.g., State of Victoria v The Commonwealth, (1971) 122 C.L.R. 353.

327 See, e.g., Aust. Const. S. 51 (vi); Australian Communist Party v The Commonwealth, supra note 180; The King v Foster ex parte Rural Bank of New South Wales, supra note 181.

powers.[328] There is also the difficulty of drawing bright lines and establishing rigid criteria to govern the application and coverage of such an amorphous doctrine. This is because when judges, like other people, try to apply such concepts to 'borderline cases' they are forced to resort to their personal political theories on the nature of a federal system and ultimately what they believe to be a desirable structure or form of government.

At the bottom of any decision on whether or not federal expansion in the direction of complete centralisation of governmental power is to be restricted by judicial notions of federalism, lies the courts' perception of its role as a constitutional arbiter. Thus the touchstone of the doctrine illustrated in the *State Banking Case* is the assumption that the poltical problems arising out of federalism and abuses of power associated therewith may not only be remedied by the people in the ballot box but also by courts through the means of judicial review.[329] The antithesis of such a philosophy of judicial power is that "the extravagant use of the granted powers in the actual working of the Constitution is a matter to be guarded against by the constituencies and not by the courts."[330] In adopting this posture, a court not only admits its limited ability to assess the relative weight of all the factors involved in an argument for or against intergovernmental immunity,[331]

328 See, e.g., Anderson, "The States and Relations with the Commonwealth", in *Essays on the Australian Constitution* 93, 107 2nd ed. R. Else-Mitchell ed. 1961).

329 "In the many years of debate over the restraints to be implied against any exercise of power by Commonwealth against State and State against Commonwealth calculated to destroy or detract from the independent exercise of the functions of the one or the other, it is often said that political rather than legal considerations provide the ground of which the restraint is the consequence. The Constitution is a political instrument. It deals with government and governmental powers. The statement is, therefore, easy to make though it has a specious plausibility. But it is really meaningless. It is not a question whether the considerations are political, for nearly every consideration arising from the Constitution can be so described, but whether they are compelling." Melbourne Corporation v The Commonwealth, supra note 157 at 82 (Dixon, J.).

330 Amalgamated Society of Engineers v Adelaide Steamship Co. Ltd., supra note 11 at 151; "The remedy for alleged abuse of power or for the use of power to promote what are thought to be improper objects is to be found in the political arena and not in the Court." State of South Australia v The Commonwealth, supra note 166 at 429 (Latham, C.J.).

331 See, e.g., Heller, "The Supreme Court: Its Role in the Balance of the Federal System", (1957) 6 *J. Pub. L.* 319; Freund, "Umpiring the Federal System" in *Federalism, Mature and Emergent* 159 (Macmahon ed. 1963); For an historical account, see, J. Schmidhauser, *The Supreme Court as Final Arbiter in Federal-State Relations* 1789-1957 (1958).

but also recognizes that the fate of federalism must be determined in the political arena. Whether the political safeguards of federalism can hold back the tides of centralism which are being generated, in part by domestic application of internationally agreed standards, is a question which might well receive a different answer in the United States[332] than in Australia.[333]

CONCLUSION

While in principle the present potential for local and state affairs to be brought under federal control by use of treaty enforcement powers seems almost limitless in both the United States and Australia, neither national government has shown a disposition to convert the theory into practice. Federal authority based on the treaty or external affairs powers, like that emanating from other constitutional provisions, remains essentially interstitial in both countries. This is particularly true if attention is paid to the more detailed aspects of government and law affecting the daily life of most citizens, aliens, and even transnational businesses. Thus, in the general law of contracts, torts, property crime, and traffic, the role of the states is far more noticeable than that of the federal government. It is only when account is taken of the more obvious kinds of governmental activity such as foreign affairs, large scale development projects, the nation's economy, international trade, public expenditure and defence budgets that the role of the federal government become increasingly prominent.

Whatever role the external affairs power played in the original design of the Australian Constitution, it is evident that it was very humble and limited. Yet a comparison of the history and subsequent judicial interpretation of this power clearly indicates the extent to which, even in the 'necessary legalism' of Australian constitutional interpretation, old bottles have been found to be capable of storing new wine. In this manner, a nation originally settled as a British colony possessing internal powers of self government, has been

332 "[T]he Treaty power responds to the concerns of federalism in that the President, the principal treaty-maker, is elected by a process reflecting our origins as a union of States, and, especially, that the Senate, the other participant in the treaty process, has been particularly representative of the States and of state interests." L. Henkin, supra note 12 at 144 (footnote omitted); Freund, supra note 123 at 160-162; H. Wechsler, supra note 162; but note, Wesberry v Sanders, (1964) 376 U.S. 1; Harper v Virginia Board of Elections, (1966) 383 U.S. 663.

333 See, e.g., Cowen, supra note 11 at 165-168.

equipped with external sinews of nationhood so as to enable it to participate, as an independent member, in the international community.

Although the domestic courts in the United States and Australia could hesitate to plunge a government into international law disputes by declaring municipal treaty enforcement unconstitutional, there is no doubt that they would make such a declaration whenever an infringement of constitutional prohibitions occurs. At the other end of the scale, even assuming that evidentiary problems have been overcome, it is extremely doubtful whether the motive of the treaty making authority to use the treaty as a device for enlarging federal domestic jurisdiction would suffice to render consequential municipal law unconstitutional. There is perhaps more likelihood that the courts would implement a criterion of international concern as a test of those matters which could validly come within an exercise of the treaty power. This supposition rests more on the actual words used in court opinions than on any decisions reached, and treaty making practice does not confirm governmental acceptance of this limitation. In Australia, there is some support in constitutional theory and more in governmental practice for a limitation on legislative implementation of treaties which are thought to involve subject matters normally coming under state control. That such a limitation lacks constitutional substance can be seen not only from the point of view of other federal inroads on state legislative spheres, but also by the example of the unbroken line of Supreme Court decisions since *Georgia v Brailsford*.[334] Even if the High Court fully endorses this view and the Australian Government extensively utilizes the external affairs power, the court should be wary of erecting a judicial safety barrier around state autonomy. No standard is enunciated by the Constitution and there is still no judicial elucidation of the criteria which define a substantial interference with states or a change in the character of their governments. Furthermore, the failure of the High Court to apply the doctrine of the *State Banking Case* to invalidate Commonwealth legislation since 1947, may indicate its willingness to follow the Supreme Court which has been reluctant to resuscitate judicial inventiveness in this area of implied inter-governmental immunities. Yet there are muffled echoes in opinions of both courts to remind the ardent centralist that such a doctrine still "lies about like a loaded weapon ready for the hand of any authority that can bring forward

334 See, supra note 251.

a plausible claim of an urgent need."[335] Finally, it is suggested that the United States' experience points out the direction for the High Court to travel in construing the external affairs power and provides a compass bearing rather than a detailed map of the road ahead.

[335] Korematsu v United States, (1944) 323 U.S. 214, 246 (Jackson, J., dissenting).