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UNCONSTITUTIONALITY AND FREE TRADE IN THREE FEDERAL SYSTEMS

The notion of "states' rights" as an antidote for the threat of government is by no means peculiar to the politics of the United States. In the past few years, significant constitutional questions have arisen in the three major federal systems, the United States, Canada, and Australia, in connection with federal legislation attempting to deal with national economic problems. In all three systems important federal acts have been invalidated by the courts of last resort on grounds connected with the limits inter se of the powers of the federal and state governments. As a result of this development in the United States, various groups are now seeking a redistribution of federal and state powers, either by effecting a change in the policy of the judiciary, by further attempts

1 Such a plan would attempt to secure the overruling of such cases as Hammer v. Dagenhart, 247 U.S. 251 (1918), Bailey v. Drexel Furniture Co., 259 U.S. 20 (1922), and United States v. Butler, 297 U.S. 1 (1936), which established the doctrine of an implied prohibition against indirect influence upon the internal policies of states through the exercise of existing federal powers. Cf. Victoria v. Commonwealth of Australia, 28 C.L.R. 399 (1926) (federal govern-
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at federal legislation,2 or by constitutional amendment.3 However, a brief examination of the constitutional developments leading to the invalidation of the acts in all three countries indicates that the basic reason for their rejection is not "states' rights"; but rather that "states' rights" is a convenient means of expressing a judicial conception of governmental policy. The rejection has come as a result of the gradual enactment into law, by judicial legislation, of the economic doctrine of laissez faire. This development has been accompanied by a failure on the part of courts to distinguish some essentially personal aspects of "property" and "civil rights" from a number of economic aspects which are almost totally unrelated. Unless this basic confusion of economic with personal interests is resolved, it becomes evident that a simple redistribution of federal and state powers will accomplish either too much or too little. It is true that under the present alignment of powers there are a number of economic relations which should be regulated but which are immune to regulation. A redistribution of powers will be effective only to the extent that it makes their regulation possible. But if on the one hand an effective redistribution of powers is accomplished without making any distinction between the economic and the personal aspects of the interests which are to be regulated, an encroachment upon essentially personal interests may result. On the other hand, if this encroachment is avoided by limiting the power to regulate without reference to the distinction between the economic and personal aspects of property interests, the power will be insufficient to secure the necessary regulation of eco-

2 For example, railroad legislation following the pattern of the Webb-Kenyon act might be attempted to protect state legislation on child labor, minimum wages, and similar subjects, following the decisions in Kentucky Whip & Collar Co. v. I.C. R. Co., 57 Sup. Ct. 277 (1937), and West Coast Hotel Co. v. Parrish, 57 Sup. Ct. 578 (1937). See 25 Georgetown L.J. 671 (1937).

3 A representative proposal is that of Dean Lloyd K. Garrison, discussed in The Constitution and the Future, 85 New Repub. 328 (1936); another, that of Senator Costigan, S. J. Res. 3 (Jan. 1935). It is understood that the former is being redrafted.

In general, proposed amendments would give Congress power over matter which the states cannot control because the resulting increase in production costs would tend to drive out producers. In addition, some groups propose control over (1) matters which the states tend to regulate insufficiently—e.g., control of corporate management; relief of debtors—and (2) matters which cannot be handled by single states either because of lack of financial resources or because of the geographical extent of the projects—e.g., large public works; agricultural resettlement; conservation of natural resources.
economic interests. The problem, therefore, is that of achieving in a federal system a distribution of powers which will permit effective control of economic interests and yet require essentially personal interests to be left intact. It is a problem of destroying *laissez faire* without disturbing the basically democratic character of the federal state.

The doctrine of *laissez faire* has been made part of the basic law of Canada and the United States by including both economic and personal interests within the protection granted to "liberty," "property," and "civil rights"; and by dividing the authority to deal with economic matters transcending state lines between federal and state governments, so as to make control possible only by cooperation. In Canada and in the United States notions of "property" and "civil rights" have come to include both personal and business interests. There is a close parallel between the development of due process in the United States and the development in Canada of exclusive provincial power to deal with "property and civil rights." In both cases the development has been from a notion of "property and civil rights" meaning security of person and possessions to a notion of "property" which also includes expectations of gain from business transactions, and a notion of "liberty" or "civil rights" which includes freedom to make business arrangements. On this point, the contrast of Australia with Canada and the United States is striking, principally because an Australian constitutional provision for industrial arbitration has been liberally construed. Nevertheless in Australia, as in Canada and the United States, there are certain national economic problems with which no one government is permitted to deal. In respect to these problems, despite substantially differing constitutional provisions, the three federal governments are in closely analogous positions. In the United States, the freedom of interstate trade from local "burdens" and the freedom of local transactions from federal regulation combine with the due process clauses to prevent either state or federal control of businesses which must compete for interstate markets.4 Similarly, in Canada, the powers to regulate "trade and commerce" and "property and civil rights" are divided between the dominion and the provinces, respectively, and with the same result. In Australia, a constitutional prohibition against restriction of interstate trade and commerce has been held to apply to the federal government as well as to the states, and has been so construed as to prevent regulation of interstate marketing. These results have been brought about by two courts, the Supreme Court of the United States and the Judicial Committee of the

Privy Council in England, through the interpretation of written constitutions whose terms are capable of bearing several constructions. In contrast with these, we shall examine the development of significant parts of the constitution of Australia, insofar as its interpretation has been within the power of the High Court of Australia.

**CANADA**

The constitution of Canada is the British North America Act of 1867. The provisions most significant for this discussion are found in sections 91 and 92 which define, respectively, the powers of the Dominion Parliament and of the provincial legislatures. Section 91(2) gives the Parliament the power to make Laws for the Peace, Order, and good Government of Canada, in relation to all Matters not coming within the Classes of Subjects by this Act assigned exclusively to the Legislatures of the Provinces, and for greater Certainty, but not so as to restrict the Generality of the foregoing Terms of this Section, it is hereby declared that (notwithstanding anything in this Act) the exclusive Legislative Authority of the Parliament of Canada extends to all Matters coming within the Classes of Subjects next herein-after enumerated; that is to say,—. . . . (2) The Regulation of Trade and Commerce. . . . And any Matter coming within any of the Classes of Subjects enumerated in this Section shall not be deemed to come within the Class of Matters of a local or private Nature comprised in the Enumeration of the Classes of Subjects by this Act assigned exclusively to the Legislatures of the Provinces.

In section 92(13) and (16) it is provided that

In each Province the Legislature may exclusively make Laws in relation to Matters coming within the Classes of Subjects next herein-after enumerated; that is to say,—. . . . (13) Property and Civil Rights in the Province. . . . (16) Generally all Matters of a merely local or private Nature in the Province.

It is apparent that the manner in which these provisions are to be construed is of the greatest importance, in view of the many ambiguities of section 91. It has been said that the act is to be construed as any ordinary statute; that the fact that the act was enacted in 1867 must be borne in mind and effect given to the intent of Parliament as of that time. It has also been said that the act "planted in Canada a living tree capable of growth and expansion within its natural limits." In accordance with the former view, it might be expected

5 Final interpretation of the Canadian constitution lies with the Judicial Committee of the Privy Council, by the Judicial Committee Act, 1844, and the Colonial Laws Validity Act, 1865, 28 & 29 Vict., c. 63. Appeals on questions of federal-state relations may occur only with the consent of the High Court of Australia; all other constitutional questions, however, may be appealed to the Privy Council. See note 75 infra.

6 30 & 31 Vict., c. 3.

7 Bank of Toronto v. Lambe, 12 App. Cas. 575, 579 (1887); Kennedy, Some Aspects of Canadian and Australian Constitutional Law, 15 Corn. L. Q. 345 (1930).

that interpretation would tend to follow rather strictly the views of the framers of the act, especially if these views were adopted in the early decisions. Or, in accordance with the latter view, it might be expected that interpretation would tend to adapt the powers of government to new conditions as they arose. In fact neither course has been followed. This can be illustrated by tracing the shift of the residual power from the dominion to the provinces through a shifting interpretation of (a) the "peace, order, and good government" clause of section 91; (b) the "trade and commerce" and "property and civil rights" clauses of sections 91 and 92; and (c) the treaty power conferred by section 132. The most recent expression of all these developments is to be found in the "New Deal" cases;9 but it will be well to preface the discussion of these cases with a separate consideration of each line of development.

THE RESIDUAL POWER

It has often been said that the Canadian scheme of government differs from that of the United States in two ways: first, in that the powers not expressly granted to the provinces by section 92 are reserved to the dominion by section 91, in contrast with the provisions of the Tenth Amendment to the Constitution of the United States; and secondly, in that the powers of the dominion and of the provinces exhaust all possible powers of government, so that no act can be ultra vires both the dominion and the provinces, while in the United States some powers are reserved to the people to be exercised only by constitutional amendment.10 However, even assuming that this was once true, the cases would now be difficult to reconcile on such an assumption. The residual power of the dominion to make laws for the "peace, order, and good government of Canada" has become an instrument to be used only temporarily, and then only in times of great national emergency, the crisis in trade of 1932–35 not being such an instance. The parts of "trade and commerce" comprised by labor relations and the marketing of products have become purely matters of "property and civil rights in the provinces." Further, the power conferred by section 132 to enact legislation necessary and proper for performing the obligations of Canada or any of its provinces, as part of the British Empire, arising under treaties between the Empire and foreign countries, has lost its meaning since the Statute of Westminster, 1931.11 Canada now has national status, and treaty

not to be "persons" eligible to vote at an election under a statute of 1868. In the Edwards case, Lord Sankey said the that constitution should be liberally construed except as to the distribution of dominion and provincial powers, which should be construed strictly.

9 See p. 628, and notes 50–62 infra.


11 22 & 23 Geo. V, c. 4.
agreements are imposed upon Canada not by the Empire but by the dominion parliament.\footnote{Re Aerial Navigation, [1932] A.C. 54 (control of aviation, held, within the powers of the dominion by virtue of the convention relating to aerial navigation adopted at Paris in 1919); In re Regulation and Control of Radio in Canada, [1932] A.C. 304 (control of radio communication under a convention adopted after 1931, held, within the powers of the dominion because not within any of the enumerated powers of the provinces).}

The power of the dominion parliament to pass laws for the "peace, order, and good government of Canada" was first fully reviewed in the case of \textit{Russell v. The Queen}.\footnote{7 App. Cas. 829 (1882).} In upholding the Canada Temperance Act of 1878, the Privy Council held that laws designed for the promotion of public order, safety, or morals belonged to the subject of "public wrongs" rather than "civil rights," and consequently were not within any of the classes of subjects assigned to the provinces by section 92. After this decision, provincial liquor legislation should have been impossible. But the next year, an Ontario liquor act was upheld as within provincial powers, the Privy Council deciding that "subjects which in one aspect and for one purpose fall within section 92 .... may in another aspect and for another purpose, fall within section 91."\footnote{Hodge v. The Queen, 9 App. Cas. 117, 130 (1883).} In 1885 a dominion liquor license act was held \textit{ultra vires} without opinion;\footnote{Dominion Liquor License Acts, 1883-84, 4 Cart. 342n. (1885).} but eleven years later a provincial local option law was held valid only insofar as it did not conflict with a dominion act of 1886.\footnote{Liquor Prohibition Appeal, Att'y Gen'l for Ontario v. Att'y Gen'l for the Dominion, [1896] A.C. 348, 362 (following the Russell case on the ground of the "peace, order, and good government" clause). But cf. Brewers Ass'n v. Att'y Gen'l for Ontario, [1897] A.C. 231; Att'y Gen'l for Manitoba v. Manitoba Licence Holders Ass'n, [1902] A.C. 73 (provincial licensing and prohibition acts, held, valid).} The apparent inconsistencies of these decisions were not cleared up by a still later decision that the \textit{Russell} case stood for the proposition that the regulation of liquor traffic lay outside provincial powers.\footnote{17 Att'y Gen'l for Canada v. Att'y Gen'l for Alberta, [1916], 1 A.C. 588, 595.} At last, however, it was recognized that in the \textit{Russell} case the dominion was acknowledged to have the power of overriding provincial legislation in a field which was within the competence of the province, where treatment on a national scale was desirable for the "peace, order, and good government of Canada." Thus in the \textit{Lemieux Act} case\footnote{Toronto Electric Commissioners v. Snider, [1925] A.C. 396, 412.} the Judicial Committee had to meet the issue, and was forced to insult the Canadian people in order to avoid either overruling the \textit{Russell} case or conceding that the dominion residual power extended to the enactment of laws for the mediation of labor disputes. It was said that at the time of the first temperance act the evil of intemperance must have become such a national calamity that an emergency existed, as in the case of a plague; and that the \textit{Russell} case stood merely for an emergency power. The
same notion that the overriding power of the dominion applied only to cases of emergency had previously been put in more politic terms in a case holding invalid an act to control combines. However, the soundness of this "emergency" interpretation of the initial clause of section 91 is rendered questionable by the previously accepted construction of the remainder of the section. The classes of subjects assigned exclusively to the provinces by section 92 are described in the final clause of section 91 as comprising a "class of matters of a local or private nature." This emphasis on the local and private character of the subjects relegated to the provinces by the constitution is strengthened by the remarks of Lord Sankey in the Aeronautics case: "... the real object of the Act was to give the central government those high functions and almost sovereign powers by which uniformity of legislation might be secured on all questions which were of common concern to all the Provinces as members of a constituent whole." Thus, even accepting Lord Sankey's earlier statement in the Edwards case that the distribution of dominion and provincial powers should be strictly construed, it is difficult to see why—except for the sake of laissez faire—the distribution of powers must be construed strictly against the dominion. Yet the residual power of the dominion is now in practice nothing but a power to implement the enumerated powers of section 91 by means of ancillary legislation. It can be seen that this fate of the "peace, order, and good government" clause of the constitution of Canada parallels closely that of the "general welfare" clause in the United States, following the decision in the AAA case that the power to spend money for the general welfare is limited to the furtherance of objects which are within the scope of some other powers expressly conferred upon the federal government by the constitution.

THE COMMERCE POWER

Following a line of development similar to that of the residual power, the unqualified grant of dominion power over trade and commerce in section 91(2) has been restricted more drastically by judicial interpretation than have the commerce clauses of the American and Australian constitutions, even though


20 The phrase "class of matters of a local or private nature" was first thought to refer to § 92(16) alone. Citizens Insurance Co. v. Parsons, 7 App. Cas. 96, 108 (1882). But this interpretation would require an odd reading of the term; and it was later held that the clause refers to all the sub-heads of § 92. Att'y Gen'l for Ontario v. Att'y Gen'l for Canada, [1896] A.C. 348, 359-60.


23 See note 48 infra.

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both of the latter are in terms restricted to matters of "interstate" commerce. The result is that matters in the Canadian provinces now have greater immunity from regulation than matters in the American states. The constitutional powers of the provinces have nominally been increased, but not their actual ability to regulate economic matters transcending provincial lines, as will appear later. It has been said that the power over trade and commerce must necessarily be restricted in order to afford scope for the powers given exclusively to the provinces; since if taken in their widest sense the words "regulation of trade and commerce" would authorize legislation by the dominion on matters enumerated in section 92, and would encroach upon local matters in the provinces. The necessity for restriction of the power was found in the apparent "repugnancy" between the dominion power to regulate trade and commerce and the provincial power to regulate property and civil rights. It was said that in cases of "repugnancy" sections 91 and 92 must be read together, and the language of one interpreted, and when necessary, modified by that of the other. This doctrine is difficult to interpret in the light of the non obstante clause of section 91. This clause has been held to confer overriding power upon the dominion in respect to the regulation of banking under section 91(15); so that a dominion law relating to warehouse receipts taken by a bank was valid even though it affected "civil rights" by varying the legal effect of such receipts in the province. It has been held that dominion legislation, so long as it strictly relates in some way to the subjects enumerated in section 91, is of paramount authority even though it encroaches upon matters assigned to

25 "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, § 8, cl. 3. "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: (i) Trade and commerce with other countries, and among the states." Com. Aust. Const. Act, 63 & 64 Vict., c. 12, § 51 (i) (1900).


27 Citizens Insurance Co. v. Parsons, 7 App. Cas. 96, 107, 112 (1881). Note that in this case the final clause of § 91 was thought in its grammatical construction to refer only to § 92 (16); whereas the proper construction was decided in a later case to be different. See note 20 supra.

28 Id. at 109.

29 "... it is hereby declared that (notwithstanding anything in this Act) the exclusive Legislative Authority of the Parliament of Canada extends to all Matters coming within the Classes of Subjects next herein-after enumerated...."

30 Tennant v. Union Bank of Canada, [1894] A.C. 31. See also Att'y Gen'l for British Columbia v. Att'y Gen'l for Canada, [1924] A.C. 222, upholding a dominion tax on whiskey brought in by the province for its public institutions. Sec. 125 of the constitution provides that no property of Canada or any province shall be subject to taxation; but § 91 (3) gives the dominion power to raise money by any mode or system of taxation.
the provincial legislatures by section 92, and even though the dominion legislation is only ancillary to legislation directly within the enumerated subjects. The overriding power of the dominion has been held to enable the dominion parliament to deal with local and private matters in cases where such legislation is necessarily incidental to the exercise of enumerated powers.

In spite of these declarations of the principles of interpretation, it was held in the *Lemieux Act* case that section 91(2) applies only to the regulation of "general" trade and commerce, and not to "local" matters like the mediation and arbitration of industrial disputes. This result may have been reached partly in reliance upon the *Board of Commerce Act* case in which it was said that the dominion could use its trade and commerce power only in support of a general power which the dominion legislature possessed independently; a notion which was repudiated several years after the decision of the *Lemieux Act* case. However, the result was also based partly on the ground that the trade and commerce power was not meant to have a wide scope, because other subheads of section 91 include matters which could also fall within a broad meaning of trade and commerce. Hence, especially since the provinces have the exclusive right to deal with property and civil rights, the trade and commerce power is to be restricted to "general" regulations. This notion that the specification of such matters as banking, bills of exchange, or navigation and shipping in other subheads of section 91 restricts the generality of the power conferred by section 91(2) is apparently based upon the rule of construction that specific statements limit the scope of general declarations. But in view of the initial language of section 91, the function of the subheads is to make specific but not to restrict the generality of the "peace, order, and good government" clause. It is straining the construction to hold that these subheads, which are coordinate, are intended to restrict the generality of one another—especially since the language of sections 91 and 92 and the declarations of the framers of the British North America Act seem to indicate that the primary distinction between the two sections is not in terms of the subject matter of the powers, which may overlap, but in terms of the local or national scope of the problems to be handled. Further, the "repugnancy" between the regulation of "trade and commerce" and of
"property and civil rights," which is the occasion of the difficulty, is not a real inconsistency. The only way in which inconsistency can be found is by identifying the transactions of *trade and commerce* with *property and civil rights*. Thus the "necessity" for restricting the power over trade and commerce to "general" trade and commerce is merely the "necessity" for achieving *laissez faire*.

It has been said that the regulation of general trade and commerce includes "political arrangements in regard to trade, . . . . regulation of trade in matters of interprovincial concern, and may perhaps include general regulations of trade affecting the whole Dominion, but it does not comprehend the power to regulate by legislation the contracts of a particular business or trade . . . . in a single province." The decisions that the dominion cannot regulate particular trades—for example, the details of the insurance business in the provinces—tend to suggest a notion of commerce comparable to the American view that "interstate commerce" includes only the instrumentalities of interstate transportation and communication and the subject matters moved interstate. This comparison is further suggested by the invalidation of attempted dominion regulation of traffic running from dominion to provincial railways, of trade combines, of industrial disputes, of the grain trade, and of laboring and social conditions; while the regulation of aeronautics and radio communication by dominion acts has been upheld. It is evident that the power to regulate trade and commerce is indeed restricted to "general" matters; and that the usually acknowledged power of the dominion to enact legislation ancillary

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40 The extent of the shift of interpretation which has recently taken place is strikingly illustrated by the statement, as late as 1913, by an authority on Canadian constitutional law, that the commerce power of the United States was not so broad as that of the dominion parliament. Lefroy, Canada's Federal System (1913). The same author, in commenting on the "peace, order, and good government" clause, was led to remark that the lack of a similar clause was the capital defect of the Constitution of the United States, as illustrated by the inability of the federal legislature to control such things as the Chicago railway strike of 1894. *Id.* at 93-94.


43 Toronto Electric Commissioners v. Snider, (1925) A.C. 396.

44 The King v. Eastern Terminal Elevator Co., (1925) Can. S.C.R. 434 (dominion, *held*, unable to acquire jurisdiction to deal with local marketing by legislating at same time with respect to provincial and inter-provincial trade).


46 *Re* Aerial Navigation, (1932) A.C. 54.

to the exercise of its enumerated powers is very closely confined when it comes to matters of trade and commerce. From this it is evident that, among all the conflicting statements of the reasons for the decisions which have created special limitations on the commerce power, the one feature which is a constant is "free trade."

**CANADIAN NEW DEAL LEGISLATION**

To overcome some of the difficulties resulting from excess of "free trade," the Canadian government in 1934 initiated a series of acts dealing with nationwide economic problems. The dominion government attempted to give effect to the International Labor Conventions by means of acts covering minimum wages, limitation of hours of labor, and weekly rest for industrial employees. An unemployment insurance act was also passed. The government further tried to encourage fair competition by means of industrial codes enforced partly by criminal penalties for unfair practices, partly through the use of a distinctive trade-mark similar in function to the Blue Eagle of the NRA. In addition, agricultural relief was attempted through the rearrangement of farm credits and through the control of the marketing of natural products. The

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48 Where legislation is in effect "necessary and proper" to carry into effect the enumerated powers, the "ancillary" power to pass such legislation may be found in the residual power of the dominion. Att'y Gen'l for Ontario v. Att'y Gen'l for the Dominion, [1896] A.C. 348, 359-60; Att'y Gen'l for Ontario v. Att'y Gen'l for Canada, [1894], A.C. 187, 200-1.


50 Minimum Wages Act, 1935, 25 & 26 Geo. V., c. 44. See note 61 infra.


55 Act to Amend the Criminal Code, 1935, 25 & 26 Geo. V., c. 56, § 9. Upheld as proper criminal legislation, on the ground that the only limitation on the dominion power to enact criminal statutes is that the statute must not be a mere guise for encroaching upon provincial powers. Att'y Gen'l for British Columbia v. Att'y Gen'l for Canada, 53 T.L.R. 340 (1937).


constitutionality of all these acts was questioned. The Privy Council, in passing on their validity, brought the development of states’ rights in Canada to a climax. By completing the reduction of the residual powers of the dominion, by still further limiting the scope of the commerce power, and by restricting the treaty power to the support of the existing dominion powers, the Committee in effect made the dominion government one of strictly limited, enumerated powers.

The government sought to sustain its enactments under the “peace, order, and good government” clause on the ground that the problems treated had “attained such dimensions as to affect the body politic” and “ceased to be merely local or personal and to have become matters of national concern.” The Privy Council decided that neither the “abnormal circumstances” nor the “extraordinary peril” necessary to justify such action by the dominion had been shown. The legislation purported to be permanent and there was no suggestion of “special emergency.” This apparent suggestion that the permanence of legislation might be an element in determining its validity under the residual power of the dominion casts some new light on the “emergency” requirement. It is possible that a problem must not only be pressing but that some “special” emergency must arise to justify dominion action, which makes the residual power analogous to a war power and renders it of little practical importance to the course of national legislation.

The second source of dominion power relied upon in support of the acts was the trade and commerce power. The relegation of this power to a minor position was confirmed by the invalidation of the marketing act, which the government had sought to sustain as a regulation of commerce. The inextricable interweaving of local and inter-provincial regulations was held fatal to the entire act. The result is that the dominion trade and commerce power is limited not only in that it does not permit federal regulation of local trade and commerce, but also in that the regulation of mixed inter-provincial and local activity is beyond the dominion powers. Of course the decision goes on the ground that the dominion should not be able deliberately to acquire jurisdiction over essentially local matters merely by legislating at the same time about local and inter-provincial matters. But in the case of marketing, arbitrary geographical lines are without genuine significance; and regulation, to be practical and fair,

59 In re Board of Commerce Act 1919, [1922] 1 A.C. 151.
63 Cf. Fort Frances Pulp & Paper Co. v. Manitoba Free Press, [1923] A.C. 695 (emergency war measure). This is the only dominion act which has dealt with provincial matters and which has been upheld by the Privy Council under the residual power. Cf. Wilson v. New, 243 U.S. 332 (1917) (emergency creates no new powers in the federal government).
must operate uniformly within any given economic area. In practice both
interstate and intrastate producers and distributors are constantly in com-
petition; and the regulation of the one but not the other, or even a differential
treatment of competitors, would introduce obvious difficulties. It is therefore
hard to see why the regulation of local marketing was not in this case "nec-
essarily ancillary" to the regulation of inter-provincial marketing relations,
which certainly must be within the trade and commerce power if it has any
meaning at all. The "free trade" situation created by the decision invalidating
the dominion act is especially interesting because of the fate of previous at-
tempts at provincial legislation. Produce marketing acts in British Columbia
and Saskatchewan were held invalid for encroaching upon federal powers.6 The
result is that neither the dominion nor the provinces can enact effective
marketing acts, aside from the dubious method of federal-state cooperation.
And even cooperation was presented with an additional hurdle by the decision
in the Marketing Act case. Here the Privy Council was informed that the
province of British Columbia had set up a local board to handle the local phases
of the marketing program in cooperation with the national board; and it was
urged that since the legislative powers of the dominion and the provinces
together exhaust all possible powers, the act should be held valid as applied to
inter-provincial trade, so as to enable the individual provinces to pass supple-
mental legislation. But it was said that while cooperation was the proper
remedy for the marketing difficulties, such legislation would have to be care-
fully planned so that neither government would leave its own sphere and en-
croach on that of the other. This is certainly an important qualification upon

64 The power of the United States government under the Interstate Commerce Com-
mission Act to regulate the rates of intrastate railways competing with interstate lines is
analogous to the dominion's "ancillary" powers.

affecting marketing beyond the province); Lower Mainland Dairy Products Committee v.
Crystal Dairy, [1933] A.C. 168 (B.C. act ultra vires as imposing an indirect tax, in conflict
with federal taxing power).


67 Id. at 332. This view is especially puzzling because the American doctrine of an implied
prohibition against encroachments by one government on the powers of the other, by means of
interference with its instrumentalities (McCulloch v. Maryland, 4 Wheat. (U.S.) 316 (1819) ),
has been held to have no application in British constitutional law. Bank of Toronto v. Lambe,
12 App. Cas. 575, 587 (1887). Thus the officers of one government are subject to uniform
taxation levied by the other. Abbott v. City of St. John, 40 Can. S.C.R. 597 (1908); Caron v.
tions created by the dominion are subject to provincial laws of general application. Citizens
Ins. Co. v. Parsons, 7 App. Cas. 96 (1881) (regulation of contracts); Colonial Bldg. and Inv.
Ass'n v. Att'y Gen'l for Quebec, 9 App. Cas. 157 (1884) (mortmain statute); Bank of Toronto
v. Lambe, 12 App. Cas. 575 (1887) (taxation); Brewers & Maltsters Ass'n v. Att'y Gen'l for
And conversely, a dominion corporation can use the provincial streets to string wires, etc.,
without permission of the province. Toronto Corp. v. Bell Tel. Co., [1905] A.C. 52. The only
the early notion that no act could possibly be *ultra vires* both the dominion and the provinces.\(^68\) As a result of these refinements of its meaning, the "trade and commerce" power of the dominion is not only limited by the specification of other commercial powers in section 91, but has become more limited than any of the others.\(^69\) Thus, with the residual power of the dominion limited to emergencies, and the commerce power limited to matters of "general" trade and commerce and denied the implementation of ancillary legislative power over local subjects, "free trade" remains unhampered. The provinces alone now have the constitutional right to deal with any "property and civil rights" involved in the regulation of trade; and by interpretation the terms "property and civil rights" have come to include practically all the important aspects of organized commercial activity.

**THE TREATY POWER**

A third possible source of dominion power, relied upon in support of the acts passed to give effect to the international labor conventions, was the treaty power conferred upon the dominion by section 132 of the constitution.\(^70\) But here it was held that the treaty obligations in question were incurred by the dominion government itself and were not imposed upon Canada under a treaty between the British Empire and foreign countries, as required by the express terms of section 132. There was said to be a difference between the legislative power of the dominion to perform treaty obligations imposed upon Canada by the imperial government, and the legislative power of the dominion to perform obligations imposed upon Canada by the dominion government under its own treaty-making power.\(^71\) No further legislative competence was obtained by

\(^{68}\) Att'y Gen'l for Ontario v. Att'y Gen'l for Canada, 1912 A.C. 571, 581.

\(^{69}\) The unusual limitation, in the case of the commerce power upon the generally conceded "ancillary" powers of the dominion, has already been noted. See p. 626 *supra*.

\(^{70}\) "The Parliament and Government of Canada shall have all Powers necessary or proper for performing the Obligations of Canada or of any Province thereof, as Part of the British Empire, toward Foreign Countries, arising under Treaties between the Empire and such Foreign Countries."

\(^{71}\) The Aeronautics case, 1932 A.C. 54, relied upon by the government, was said to have been decided upon the express ground that the obligation of the aeronautics convention was imposed upon Canada before 1931; and that the act sustained in the Radio case, 1932 A.C. 304, covered a subject-matter which was not specified in either § 91 or 92, and hence was within the residual powers of the dominion. The Privy Council held that the terms of § 132 could not be strained to meet the event, uncontemplated in 1867, of Canada's having treaty-making powers.
the dominion through its accession to national status; it could not merely by making an agreement with a foreign country to enact legislation obtain a legislative power which it would not otherwise have.\textsuperscript{72}

\textbf{AUSTRALIA}

The decision of the Judicial Committee limiting the scope of the treaty power of the Dominion of Canada completes the development up to the present time of states' rights and \textit{laissez faire} in Canada. The decision presents a sharp contrast to the view taken by the High Court of Australia on the same question last year. There, in a case holding certain air regulations invalid as inconsistent with the international aeronautics convention, two of the justices held that the commonwealth has the power under its external affairs jurisdiction\textsuperscript{73} to pass legislation which would be \textit{ultra vires} if tested by the commonwealth's specific constitutional powers.\textsuperscript{74} This instance of the contrary treatment of the same constitutional question by the Privy Council and the High Court is by no means unique. For this reason a comparison of the decisions of the High Court with the decisions of the Privy Council on similar constitutional issues throws the \textit{laissez-faire} policy of the Privy Council into sharp relief.

In reversing a High Court decision involving the freedom of interstate trade last year, the Privy Council illustrated the manner in which ambiguous provisions have become constitutional guarantees of \textit{laissez faire}. Privy Council decisions on questions of Australian federal-state relations are rare because of a constitutional provision which limits appeals except on certificate from the High Court.\textsuperscript{75} Nevertheless the High Court did grant a certificate to appeal

\textsuperscript{72}Att'y Gen'l for Canada v. Att'y Gen'l for Ontario, 53 T.L.R. 325, 330 (1937). For a discussion of the present status of the Canadian treaty power and a comparison with that of the United States, see Rice, Can Canada Ratify International Labor Conventions?, 12 Wis. L. Rev. 185 (1937).

\textsuperscript{73}"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: . . . . (xxix) External affairs." Com. Aust. Const. Act, 63 & 64 Vict., c. 12, § 51 (xxix) (1900).


\textsuperscript{75}"No appeal shall be permitted to the Queen in Council from a decision of the High Court upon any question, howsoever arising, as to the limits inter se of the Constitutional powers of the Commonwealth and those of any State or States, or as to the limits inter se of the Constitutional powers of any two or more States, unless the High Court shall certify that the question is one which ought to be determined by Her Majesty in Council. "The High Court may so certify if satisfied that for any special reason the certificate should be granted, and thereupon an appeal shall lie to Her Majesty in Council on the question without further leave.

"Except as provided in this section, this Constitution shall not impair any right which the Queen may be pleased to exercise by virtue of Her Royal prerogative to grant special leave of appeal from the High Court to Her Majesty in Council. The Parliament may make laws
from its decision in *James v. Commonwealth*, a case involving the construction of section 92 of the constitution act, which provides that from the time of the federal government's taking over the collection of customs duties interstate trade "shall be absolutely free." The High Court had held that section 92 did not purport to bind the commonwealth, but that its purpose was to prevent the states from isolating themselves by means of impediments to interstate trade as such. Accordingly the court had upheld a federal marketing act restricting the proportion of the total crop which a producer could sell in interstate markets and requiring the remainder to be exported. On appeal the Privy Council reversed, on the grounds (a) that section 92 bound the commonwealth as well as the states and (b) that the Dried Fruits Act fell within the prohibition of the section.

An examination of these contrary decisions of the High Court and the Privy Council, in the light of the body of interpretations of section 92 built up by the Australian court, indicates that either decision is compatible with the democratic policy of protecting the security of person and possessions, or with the notion of a federal system as distinct from unitary or authoritarian states. The difference lies in that the one decision leaves the determination of national economic policy to the federal legislature; the other tends to leave no alternative to *laissez faire*. The *James* case involved not only the question of what governments were bound by section 92, but also what types of burdens on commerce were prohibited. However, assuming the correctness of the Privy Council's decision that the commonwealth was bound, the principal point is the scope of the "freedom" of trade required to be preserved.

Under the decisions of the High Court the prohibition of section 92 has not been limited merely to differential treatment of interstate and intrastate trade by the states, but extends to all measures whereby the states attempt to isolate

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76 52 C.L.R. 570 (1935).

77 "On the imposition of uniform duties of customs, trade, commerce, and intercourse among the States, whether by means of internal carriage or ocean navigation, shall be absolutely free.

"But notwithstanding anything in this Constitution, goods imported before the imposition of uniform duties of customs into any State . . . . , shall on thence passing into another State within two years after the imposition of such duties, be liable to any duty chargeable on the importation of such goods into the Commonwealth, less any duty paid in respect of the goods on their importation." Com. Aust. Const. Act § 92 (1900).

78 Dried Fruits Act, 1928-35 (no. 11 of 1928; no. 5 of 1935).


80 Examination of the treatment of this question by the High Court reveals the difficulty of choosing between constructions. See W. & A. McArthur v. Queensland, 28 C.L.R. 530, 556 (1920); *James v. Commonwealth*, 52 C.L.R. 570 (1935); *ibid.*, [1936] A.C. 578, 609 ff.
themselves from other states in matters of trade. Thus it has been held that a state cannot directly discriminate against commodities coming in from outside the state. 81 Although a quarantine law to prevent importation of stock from suspected areas was once upheld, 82 this decision was criticized in a later case holding a similar act invalid. 83 A tax on vendors of motor fuel has been held invalid; 84 and a motor fuel dealers' licensing act which required licensees to purchase a certain proportion of locally manufactured fuel alcohol has been invalidated because in its practical operation it could apply only to importers. 85 In dealing with the attempts by states to control marketing, the court has disallowed plans whereby the export of a commodity from the state was prohibited, 86 or the proportion to be marketed interstate was limited, 87 or whereby state ownership of commodities was undertaken in order to restrict exports, 88 on the ground that they were burdensome. A plan whereby a state set an upper bound to the prices at which commodities could be sold in the state has been held invalid as to commodities coming in from other states; 89 but a plan to control marketing in metropolitan areas, whereby all milk intended for sale in the area became the property of a board, which set a minimum price to pro-

81 Fox v. Robbins, 8 C.L.R. 115 (1908).
82 Ex parte Nelson [no. 1], 42 C.L.R. 209 (1928) (Stock Act 1901 (N.S.W.)); cf. Roughley v. New South Wales, 42 C.L.R. 162 (1928).
83 Tasmania v. Victoria, 52 C.L.R. 57 (1935) (Vegetable & Vine Diseases Act 1928 (Vict.)). Ex parte Nelson was a 3-3 decision. The existence of an apparently adequate commonwealth quarantine act may have led the High Court to suspect these acts of regulatory purposes.
84 Commonwealth Oil Refineries v. South Australia, 34 C.L.R. 408 (1926).
85 Vacuum Oil Proprietary v. Queensland, 51 C.L.R. 108 (1934). It should be noted that no petroleum products were being produced in Queensland, and that the licensing act exempted purchasers mediatly or immediately from a licensee; so tht the the effect was to aid local manufacturers by restricting imports of gasoline.
89 Profiteering Prevention Act 1920 (Q.). W. & A. McArthur v. Queensland, 28 C.L.R. 530 (1920) (overruling Duncan v. Queensland, 22 C.L.R. 556 (1916)), which had been decided on analogy to the Wheat case, 20 C.L.R. 54 (1915). See note 91 infra. This case presents the closest Australian equivalent to the "original package doctrine." But cf. note 90 infra.
NOTES

ducers, has been approved.99 Finally, marketing plans by which a state assumed ownership of commodities, abrogated all existing contracts of sale, and empowered a board to sell and account for the proceeds to the producers, have been considered proper.99 These plans for the regulation of marketing have been regarded in the same light as any other state legislation involving some degree of interference with interstate commercial activities. The "freedom" of commerce under section 92 has been said by the High Court to mean freedom from any sort of impediment or control by a state with respect to interstate trade considered "as interstate trade."99 It does not mean freedom from charges for or restrictions upon the privilege of using the state’s facilities for commercial purposes.93

In all these cases the High Court has held to the position that as long as state legislation does not have the purpose or the effect of isolating the state, the state can impose the same type of restrictions on the activities of people who market goods as it can upon people who engage in any other kind of activity: that is, the state may subject them to "police regulation," a regulation that in Australia is not hampered by anything in the nature of a "due process" clause. Thus, even assuming that section 92 binds the commonwealth equally with the states, the High Court, consistently with its prior interpretation of the kind of "freedom" which is guaranteed, could have sustained a marketing act similar to that involved in James v. Commonwealth. The interstate commerce power of the federal government is a power of police over nationwide

99 Milk Act 1931 (N.S.W.). Crothers v. Sheil, 49 C.L.R. 399 (1933) (decided on ground that the act operated only after the possibility of further interstate transportation had ceased. Lack of any tax feature held to distinguish the Crystal Dairy case, [1933] A.C. 168, note 65 supra.


93 For example, a state may require registration or licensing of users of its highways, including parties on interstate journeys and carriers doing purely interstate business. Bessell v. Dayman, 52 C.L.R. 215 (1935) (private party); Willard v. Rawson, 48 C.L.R. 316 (1933) (registration of truck); Ex parte Hill, 50 C.L.R. 30 (1933) (license fee on truck), citing Interstate Transit v. Lindsey, 283 U.S. 183, 186 (1931); Sprout v. South Bend, 277 U.S. 163, 171 (1928). A state may exact a special charge upon interstate truckers, measured by the ton-mile (O. Gilpin, Ltd. v. Commissioner, 52 C.L.R. 189 (1935)); and may refuse to license truckers who would compete with state railways, or exact a special charge measured by the length of the competing route. Duncan & Green Star Trading Co. v. Vizzard, 53 C.L.R. 493 (1935). Cf. Bradley v. P.U. Comm., 289 U.S. 92, 97 (1933).
commerce similar to the power of a state over commerce within the state. Under
the High Court's interpretation, the prohibition of section 92 was imposed to
prevent the erection of barriers to trade among the states. A regulation of
commerce by the federal government might prevent the passage of goods from
state to state to isolate the states, or might prevent passage merely as an inci-
dent of the enforcement of some policing regulation imposed upon the activities
of people engaged in nationwide commerce.

The contrast of the High Court's interpretation with that made by the
Privy Council in *James v. Cowan*94 and *James v. Commonwealth*95 is immediately
apparent. The result of the two decisions indicates clearly that the real issue
in the cases was not the limits *inter se* of the powers of the federal and state
governments; for the decision in *James v. Commonwealth* did not prevent the
federal government from taking over a function properly belonging to the
states, but from taking over a function which had been specifically denied to
the states in *James v. Cowan*. Because there is no "states' rights" issue involved,
the question is simply one of construction of an ambiguous constitutional pro-
vision. The Privy Council construction is based on a notion of freedom of
trade the effect of which is to withdraw the power of any government—federal
or state or both acting together—to deal effectively with the control of national
markets.

**THE INDUSTRIAL ARBITRATION CLAUSE**

In spite of this reversal with respect to marketing control, however, the
development in Australia of methods for controlling other national economic
problems has been considerably aided by the refusal of the High Court to inter-
fere in matters of legislative policy. Perhaps the most illuminating develop-
ment, from the standpoint of this discussion, is that of the federal power to
provide for conciliation and arbitration of industrial disputes, conferred by
section 51(33v) of the constitution:
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: ....
(33v) Conciliation and arbitration for the prevention and settlement of industrial
disputes extending beyond the limits of any one State.

This provision, although much more limited in its terms than the "trade and
commerce" clause of the Canadian constitution, has in fact been developed into
a provision for the control of all the aspects of the employer-employee relation
which have any bearing on industrial peace and which are not clearly within
the range of the actual capacities of the states. The "no-man's land," where the
state has exclusive power but not the capacity to deal with important problems,
is singularly absent. Yet in the beginning of its constitutional development, the
powers of the Australian Commonwealth were far more restricted than were
those of the Dominion of Canada under the earlier interpretation of the British
North America Act.

The relations of the federal and state governments in Australia are presumably governed by section 109 of the constitution, which provides for supremacy of the federal government in respect to the powers expressly conferred upon it by the constitution.96 From 1900 until the decision of the Engineers' case in 1920, however, the general tendency of the High Court was to impose restrictions upon the paramount authority of the federal government. Thus it was held that the Court of Conciliation and Arbitration, acting within its jurisdiction over industrial disputes extending beyond any one state, could not make an award inconsistent with a state minimum wage law as determined by a state wages board.97 This decision introduced the familiar difficulties of differential treatment of wage matters by different states. However, under the changed interpretation of the constitution introduced in 1920, the earlier decision was avoided on a more restricted notion of "inconsistency," first in a case where the federal court fixed a minimum wage lower;98 then in a case where it fixed a wage higher than the state law required.99 Finally the earlier case was overruled, and it was held that a federal award would override any state law whose effect if enforced would be to alter or destroy the adjustment made by the award; and that the test of inconsistency was not merely the ability of the employer to obey both requirements.100 But on the other hand, under the changed interpretation the state industrial authorities were still protected in their jurisdiction over matters capable of being handled locally. Practically, the changed interpretation involved little change in the effective jurisdiction of the states. The jurisdiction of the federal arbitration court still extended only to disputes which could in some sense be said to be interstate in character;101 and further, the federal court's jurisdiction continued to extend only to matters within

96 "When a law of a State is inconsistent with a law of the Commonwealth, the latter shall prevail, and the former shall, to the extent of the inconsistency, be invalid." Com. Aust. Const. Act § 109 (1900).

97 Australian Boot Trade Employees' Ass'n v. Whybrow, 10 C.L.R. 266 (1910).


101 It was held in an early case that an employer doing business in two or more states was subject to the jurisdiction of the arbitration court. Ex parte Broken Hill Proprietary, 8 C.L.R. 419 (1909). An interstate dispute has been said to be one which at a given moment exists in two or more states. The Builders' Labourers' Case, 18 C.L.R. 224 (1914). A dispute was held to be within federal jurisdiction where the work done was performed outside Australia but the men resided in Australia (Merchant Service Guild v. Commonwealth S.S. Owners' Ass'n, 16 C.L.R. 664 (1913)). But a dispute over a reduction of wages in one state did not become interstate when workers in other states struck because they feared wage reductions. Caledonian Collieries v. Australasian Coal & Shale Employees Federation [no. 1], 42 C.L.R. 527 (1930). Nor did a union create an interstate dispute by means of a formal demand on employers in other states in the course of a dispute in one state. Ibid. [no. 2], 42 C.L.R. 558 (1930).
the ambit of the dispute being settled. Thus where a state branch of a union
resigned and withdrew from proceedings, the federal court could not prevent
the state authority from taking jurisdiction.102 The federal court can restrain
a state board only insofar as it is trying to deal with a matter which is before
the federal court;103 and it has been held that a state industrial commission is
not "dealing" with a dispute when it is merely inquiring into conditions with a
view to laying down a general rule irrespective of any dispute.104

These later decisions on the limits of the federal and state industrial authori-
ties represent merely the application to matters of employer-employee relation-
ships of the general doctrine that under section 109 the federal government's
power is paramount.105 This is a somewhat surprising development, however,
in view of the controversial character of policies pertaining to labor relations
and the regulation of industrial activity. The manner in which the dominion
government in Canada has been restricted in its attempts to control similar
matters has already been noted.

In order to appreciate the extent of this development in Australia, however,
it is necessary to go back and trace the alterations which have been made in
the character of federal-state relationships from the time the constitution was
adopted in 1900.

The doctrinal differences centered upon the adoption by the High Court of
American precedents, including especially the notion of implied prohibitions
upon one government's interference with the agencies and instrumentalities of
the other. The case of McCulloch v. Maryland106 was adopted as an authority
in D'Emden v. Pedder,107 one of the first cases decided under the new constitu-
tion.108 The court there said:

when a state attempts to give its legislative or executive authority an operation which,
if valid, would fetter, control, or interfere with, the free exercise of the legislative or
executive power of the Commonwealth, the attempt, unless expressly authorized
by
the Constitution, is to that extent invalid and inoperative.109

Accordingly attempts to subject federal officers to uniform taxation were re-
sisted by the High Court, the court relying upon Dobbins v. Commissioners of

102 West Australian Timber Workers' Indust. Union v. W. Aust. Sawmillers' Ass'n, 43
C.L.R. 185 (1929).
104 Ex parte Engineers Conciliation Commission, 38 C.L.R. 563 (1927).
105 Cf. Hume v. Palmer, 38 C.L.R. 441 (1926) (state navigation act inconsistent with federal
act is invalid, no matter which was passed first); Ex parte McLean, 43 C.L.R. 472 (1930) (where
same conduct was punishable differently under federal and state acts, held, state act invalid
to extent of the difference).
106 Wheat. (U.S.) 316 (1819).
107 1 C.L.R. 91 (1904) (federal officers and instrumentalities of the federal government,
held, immune from state taxation).
109 1 C.L.R. 91, 111 (1904).
and refusing to follow Bank of Toronto v. Lambe\textsuperscript{112} on the ground that the Australian constitution had been deliberately patterned after that of the United States, whereas in the Canadian constitution the pattern was avoided. The result was a set of conflicting decisions by the High Court and the Privy Council\textsuperscript{113} which were resolved only by an Australian act which in effect prevented appeals to the Privy Council on federal-state questions.\textsuperscript{143}

Following the decision in D'Emden v. Pedder, the High Court adopted the converse doctrine of The Collector v. Day\textsuperscript{114} in holding a state-operated railway immune to interference by the arbitration court of the federal government.\textsuperscript{115} The uniform taxation of state imports for the use of state agencies was permitted,\textsuperscript{6} and the immunity of state and federal agencies was held not to extend to agencies performing "non-governmental" functions,\textsuperscript{117} although the court curiously distinguished governmental from non-governmental functions on the basis of what functions the states had been performing in 1900.\textsuperscript{118}

\textsuperscript{110} 16 Pet. (U.S.) 435 (1842)

\textsuperscript{111} 12 App. Cas. 575 (1887). The rule in D'Emden v. Pedder was applied in Deakin v. Webb, 1 C.L.R. 585 (1904), which overruled the decision of the Victoria court in Wollaston's Case, 28 V.L.R. 357 (1902) (federal officer held taxable).

\textsuperscript{112} A difficulty arose in 1907 when an appeal was taken direct to the Privy Council from a state supreme court in a taxation case. The Privy Council took a position opposed to that of the High Court. Webb v. Outtrim, [1907] A.C. 81. (Cf. Abbott v. City of St. John, 40 Can. S.C.R. 397 (1908) ). The High Court, however, refused to follow the Privy Council's decision. Flint v. Webb, 4 C.L.R. 1178 (1907); Baxter v. Com'r of Taxation (N.S.W.), 4 C.L.R. 1087 (1907).

\textsuperscript{113} Federal Act No. 8, 1907, providing that cases involving a federal-state question were \textit{ipso facto} removable to the High Court. Sec. 74 of the constitution prohibits appeals on such questions from federal courts without permission of the High Court. The act was upheld. Jones v. Commonwealth Court of Concil. & Arb., [1917] A.C. 528; Minister for Trading Concern for W.A. v. Amalg. Soc. of Engrs., [1923] A.C. 170. See also Commonwealth v. Limerick S.S. Co., 35 C.L.R. 69 (1924) (state court exercising federal jurisdiction cannot grant leave to appeal to the Privy Council).

A statute making the salaries of federal officers taxable was upheld. Chaplin v. Com'r of Taxes (S.A.), 12 C.L.R. 375 (1911).

\textsuperscript{114} 11 Wall. (U.S.) 113 (1870).

\textsuperscript{115} Federated Amalg. Gov't Ry. & Tramway Service Ass'n v. N.S.W. Ry. Traffic Employees' Ass'n (The Railway Servants' Case), 4 C.L.R. 488 (1906).


\textsuperscript{117} State: Jumbunna Coal Mine v. Victorian Coal Miners' Ass'n, 6 C.L.R. 309 (1908) (mining); Federated Engine-Drivers' & Firemen's Ass'n v. Broken Hill Proprietary [no. 1], 12 C.L.R. 398, 426, 442 (1911) (electricity); \textit{ibid.} [no. 2], 16 C.L.R. 245 (1913); Australian Workers' Union v. Adelaide Milling Co., 26 C.L.R. 460 (1919) (wheat handling under marketing-act).


\textsuperscript{118} Railway Servants' Case, 4 C.L.R. 488, 538-39 (1908).
In 1920, following several changes in the personnel of the High Court, the involved distinctions and contradictions of the "implied prohibitions" doctrine were cleared away by the decision in the Engineers' case. This case involved the immunity of a steamship line operated by one of the states of Australia from the jurisdiction of the federal arbitration court. In holding the steamship line subject to an award of the arbitration court, the High Court reaffirmed the rule of D'Emden v. Pedder, but only on the ground of the federal supremacy conferred by section 109 of the constitution. The doctrine of implied prohibitions was repudiated as applied to state immunity from interference by the federal government acting within the scope of its own powers. It was held that the proper rules for construction of the constitution were those laid down by the Privy Council, and that if by those rules a power was found to be conferred on the commonwealth, no implied prohibition against the exercise of the power could arise. It was held further that the proper distinction between "strictly governmental" and non-governmental functions must be made in terms of the things without which a government cannot exist or function. After this decision, special immunities of state and federal agencies or officers were no longer a bar to the uniform operation of laws which were themselves intra vires.

Up to this point the judicial history of Australia has divided itself into two fairly distinct periods, the differences in the treatment of federal-state relations being occasioned by differences in the individual views of the judges of the High Court on what was the proper manner of reading the constitution. But there is another development which is equally interesting in its bearing on the present attempts to revise the constitution of the United States. Over the whole period from 1900 to the present, the Court of Conciliation and Arbitration, aided by occasional amendments to the Conciliation and Arbitration Act of 1904, has been developing machinery for the attainment of many economic

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adjustments which have been the objects of unsuccessful attempts at legislation in the United States and Canada.

The practical operation of the plan adopted by the Australian parliament to give effect to section 5T (xxxv) of the constitution is committed largely to an administrative tribunal, the Court of Conciliation and Arbitration. The general plan of the present arbitration act is to provide for registration of national organizations of employers and employees in given industries or trades. Such organizations can voluntarily bargain with one another, or with other interested parties, for the purpose of settling difficulties. Any agreement reached may be registered with the arbitration court and thereupon have the same effect as an award made by the court.\textsuperscript{225} If an organization disagrees with parties in two or more states, it may file a "plaint" with the court, naming all interested parties and asking an award in accordance with certain conditions set forth in a "log." The adverse parties may also file logs setting forth rival plans. The court thereupon will examine evidence and make an investigation.

The function of the court is to determine in the first instance whether the grievances of the parties constitute an actual or probable "dispute," and whether such a dispute "extends beyond any one state." If these facts are found, the court may proceed to make any award which it considers proper to effect a settlement,\textsuperscript{226} subject only to a determination of its reasonableness by the High Court. Once an award has been made, the arbitration act provides suitable remedies for its enforcement, including, if necessary, an order "in the nature of injunction or mandamus" from the High Court.\textsuperscript{227}

\textsuperscript{225}It was once held that an agreement made by an association before it was entitled to register as a national organization became binding upon the passage of a statute entitling the union to register (J. C. Williamson v. Musicians' Union, 15 C.L.R. 636 (1912)); but this decision was later overruled. Australian Agricultural Co. v. Federated Engine-Drivers' &c. Ass'n, 17 C.L.R. 261 (1913).

\textsuperscript{226}The chief requirement is that the matter settled must have been within the class of matters in dispute. The arbitration court can re-examine previous agreements. Federated Engine-Drivers' & Firemen's Ass'n v. Broken Hill Proprietary [no. 3], 16 C.L.R. 715 (1913). Upon application for reconsideration, the court may lower the minimum wage below its previous figure (Federated Engine-Drivers' and Firemen's Ass'n v. A1 Amalgamated, 35 C.L.R. 349 (1924)); but it may not set a figure outside the range determined by the demands of the parties. Australian Ins. Staffs' Federation v. Atlas Ins. Co., 45 C.L.R. 409 (1931). However, where the employer's log does not promise a definite sum, the award may be lower than any amount specified. Federated Millers &c. Ass'n v. Butcher, 47 C.L.R. 246 (1932) ("adjustment clause" in employer's log); Australian Workers' Union v. Graziers' Ass'n, 47 C.L.R. 22 (1932) (offer to pay so much "or as much lower as may seem just"). The court may, if necessary, adopt a plan different from that of either party. Australian Tramway Employees Ass'n v. Com'r for Road Transp. & T., 53 C.L.R. 90 (1935). But the court may not impose a closed shop requirement in the absence of unusual circumstances. Anthony Hordem & Sons v. Amalg. Clothing &c. Union, 47 C.L.R. 1 (1932).

\textsuperscript{227}Whittaker Bros. v. Aust. Timb. Workers' Union, 37 C.L.R. 564 (1922). Once an award has been made, to run for a definite period, its terms cannot be changed. Federated Gas Employees' Indus. Union v. Metropolitan Gas Co., 27 C.L.R. 72 (1919). The compulsory
The possibility of abuse of its function by the arbitration court is minimized by the power of the High Court to issue writs of prohibition, if necessary, to stop proceedings in respect to matters over which the arbitration court lacks jurisdiction. Any party to a dispute may apply at any time, before or after an award, for a determination of the question of jurisdiction—whether a dispute exists or is probable, is an “industrial” dispute, and extends beyond the limits of any one state—or for a determination of any question of law arising in the proceeding.


A statute depriving the High Court of the power to issue prohibition was held ultra vires. The Tramways Case [no. 1], 18 C.L.R. 54 (1914). It was held also that the High Court could issue prohibition after an award had been made. The Builders’ Labourers’ Case, 18 C.L.R. 224 (1914).

This review is provided by § 21AA of the arbitration act. The High Court may not issue prohibition where the ground on which it is asked could be used defensively in the arbitration court (Ex parte Australian Agricultural Co., 22 C.L.R. 265 (1916)); but an application under § 21AA may be made. Ex parte Motions and Prohibitions, 21 C.L.R. 669 (1916). However, the power of the High Court to issue prohibition was not destroyed by the passage of § 21AA. Waterside Workers’ Federation v. Gilchrist, Watt & Sanderson, 34 C.L.R. 482 (1924).

Although absence of preconcert among employers in different states was originally held not conclusive, it was held evidence of the non-existence of a real dispute. Federated Sawmill &c Employees’ Ass’n v. James Moore & Son, 8 C.L.R. 463 (1909). Later decisions defined the nature of a “dispute.” Rex v. Comm. Ct. of Concil. and Arbitration, and Merchant Service Guild, 15 C.L.R. 586 (1912) (must have some element of persistence likely to endanger industrial peace); Merchant Service Guild v. Newcastle & Hunter River S.S. Co. [no. 1], 16 C.L.R. 705 (1913) (dispute may be only “probable”); ibid. [no. 2], 16 C.L.R. 705 (1913) (previous dissatisfaction known to employer not necessary), but Cf. Caledonian Collieries v. Australasian Coal & Shale Employees’ Federation [no. 2], 42 C.L.R. 558 (1930) (stopping work without demand not a dispute); The Tramways Case [no. 2], 19 C.L.R. 43 (1914) (demand made for purpose of coming within jurisdiction of arbitration court not a dispute).
“interstate dispute,” and of an “industrial dispute”; and by means of an increasingly comprehensive notion of the number of parties who are directly concerned in achieving a settlement. Although at an early date the High Court disallowed a statute which would have permitted the arbitration court to declare a common rule in any given industry, the latitude of the powers of the court has become such that if necessary the court can make an award which is binding on all the employers in a given industry, whether they employ any union members or not, and on all the employees in a given industry, whether they are union members or not. A party to an award may be bound in respect of some subject-matter — e.g., employment of minors — in relation to all other persons, whether or not such persons were themselves parties to the award.

The High Court has by its present interpretation of the constitution achieved an adjustment between federal and state governments, the result of which is to give the governments of Australia the power to govern economic conflicts.

132 See note 101 supra.

133 Amalg. Soc. of Engineers v. Australasian Inst. of Marine Engineers, 9 C.L.R. 48 (1909) (marine engineers are part of shipping industry); Federated Engine-Drivers' & Firemen's Ass'n v. Broken Hill Proprietary [no. 1], 12 C.L.R. 398 (1911) (steam engine operators not a subsection of a definite industry), but cf. ibid. [no. 2], 16 C.L.R. 245 (1913) (arbitration act amendment of 1911 permitted engineers' union to register); Australian Ins. Staff's Fed. v. Accident Underwriters' Ass'n, 53 C.L.R. 517 (1924) (banking and insurance employees held "industrial"); Australian Workers' Union v. Pastoralists' Federal Council, 23 C.L.R. 22 (1917) (agriculture); J. C. Williamson v. Musicians' Union, 15 C.L.R. 636 (1912) (musicians); Federated State School Teachers' Ass'n v. Victoria, 41 C.L.R. 569 (1929) (school teachers held not industrial employees); Merchant Service Guild v. Commonwealth S.S. Owners' Ass'n [no. 2], 28 C.L.R. 436 (1920) (operations need not be carried on for profit to be industrial).

134 Ex parte William Holyman & Sons, 18 C.L.R. 273 (1914) (award held not binding on employees who claimed they had no dispute with employer); Australian Workers' Union v. Pastoralists' Federal Council, 23 C.L.R. 22 (1917) (held not necessary to show employees in dispute with employer; dispute between employer and union); Australian Timb. Workers' Union v. John Sharp & Sons, 26 C.L.R. 302 (1919) (union may have dispute with employer who employs no union members); Burwood Cinema v. Australian Theatrical & Amus. Employees' Ass'n, 35 C.L.R. 528 (1925) (demand by union on employers, some not employing members of union, held dispute involving all employers. Ex parte William Holyman & Sons overruled in part); In re Metropolitan Gas Co., 41 C.L.R. 402 (1928) (second union got a more favorable award than the first; held only members of second union entitled to benefit); In re American Dry Cleaning Co., 43 C.L.R. 29 (1929) (award purporting to bind employer as to all employees held applicable only to union employees); Analg. Engineering Union v. Metal Trades Employers' Ass'n, 53 C.L.R. 658 (1935) (award held binding on all members of employers' association, present and future, as to all union members employed by them).


and to leave the determinations of policy involved in the use of the power to the legislative branches. This development presents a marked contrast to the *laissez faire* policy which has accompanied the constitutional interpretation adopted in all three countries insofar as it has been controlled—directly or indirectly—by the decisions of the United States Supreme Court and the Judicial Committee of the Privy Council.

**Laissez Faire and Free Trade**

The adoption of *laissez faire* as an essential element of governmental policy is subject to criticism for at least two reasons. In the first place, the kind of economic freedom which has resulted from the judicial prohibition of government "interference" with trade lacks the features which have been urged in defense of *laissez faire* as an economic doctrine. The economic doctrine of *laissez faire* assumes unrestricted trade and a market made by free competition among approximately equal bargaining agents. The objection which the advocates of free trade advance against government interference is an objection to the government's introducing inequalities by helping one economic group as against the others by means of tariffs or other forms of preference which would in effect destroy the "freedom" of trade. Yet the present constitutional doctrine of *laissez faire* has included among those rights of person and property which are entitled to the protection of government both expectations of gain from trade and the freedom to make bargains, without distinguishing between gains and bargains arising from a mutual conferring of benefits among free agents, and those accruing fortuitously to one party in an "unfree" trade situation—from a superiority of bargaining position secured through accidents of time, place, or circumstance.

In the second place, there is a more serious objection to the adoption of *laissez faire*. Even by its chief proponents, the doctrine is advocated merely as an economic expedient for achieving a maximum of national wealth, and not as a final determinant of public policy. While an economist might properly consider the maximization of national wealth his goal, and leave the question of the use of his discoveries to statesmen, still for a statesman the final determinant of policy must be the peace and security of the people. The security of person and possessions which is a constitutional guarantee in a democratic state is an expression of this ultimate policy. It has been observed, however,

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139 For example, see the discussion of "monopolies" in Adam Smith, Wealth of Nations, Bk. IV, chs. 7, 8: especially vol. 2, pp. 126 ff. (Everyman ed. 1910). Cf. discussion of James v. Commonwealth, p. 633 supra.

140 For example, it is scarcely through the pure merit of their service that a group of employment bureaus in a given area, charging uniform rates, is able to command high prices. Cf. Ribnik v. McBride, 277 U.S. 350 (1928) (held a deprivation of liberty and property for a state to regulate the rates charged by employment bureaus). This constitutional guarantee of "property rights" contrasts with the development in common law and equity courts of a tendency to disallow "property rights" secured fortuitously. See Woodward, Quasi Contracts §§ 8, 21–31 (1913).
that the judiciary has included certain liberties in respect to commercial activity—whether or not they promote ultimate peace and security—among the rights whose claims to protection from interference are absolute; and has introduced further obstructions to the control of nationwide economic activities through a geographical conception of "local" matters. The result of the latter conception has been the notion of "states' rights" which some groups in the United States are now seeking to change by means of a redistribution of state and federal powers.

It seems evident, however, from the fact that widely differing constitutional provisions have been uniformly construed in such a way as to achieve laissez faire—whether on grounds of "states' rights" or "freedom of trade" or "deprivation of 'property'"—that the notion of "states' rights" is only one of the difficulties to be overcome; and that a separation of personal from economic interests is almost a condition precedent to an effective attack on laissez faire.

It should be evident that any attempt to control economic matters, by redefinition of states' rights or by any other method, is likely to meet with strong opposition based on the desire for security of personal interests. Whether this resistance be encountered in the form of opposition to the adoption of the proposal or in the form of judicial misconstruction after it is adopted, the ultimate result is the same.

SCALING-DOWN OF ARREARAGES ON CUMULATIVE PREFERRED STOCK

Ever since cumulative preferred stock came into fashion, common shareholders have been faced with the dismal prospect produced by accumulations of unpaid dividends so large that normal earnings cannot be expected to make up past arrearages for many years. In such situations, unless some settlement can be made with preferred shareholders, the value of the common shares as income-yielding securities is very small. This problem is most acute at the end of a period of business depression when common shareholders, actuated by a desire to share in the profits of the more hopeful future, seek to effect a reorganization of the capital structure of the corporation so as to reduce or eliminate the prior

141 See p. 627 supra.
142 See p. 629 supra.
143 Thus a successful drive against the proposed child labor amendment proceeded by convincing many farmers that their children would be unable to help on the farm if the amendment were adopted. The Child Labor Amendment, 9 Social Serv. R. 107 (1935). The possibility of such confusion arises in the ambiguity of the term "labor," which has both economic and personal significations. It can represent (1) a "commodity" which is sold and purchased; or (2) any expenditure of energy in everyday activity. The experience of Australia with § 51 (xxxv) suggests an alternative to a grant of power over some subject-matter, such as "conditions of labor," "production," etc. If, instead, an amendment should grant power to govern the relations of certain classes of persons, and if the relations chosen to define these classes were economic—e.g., "employers and employees" or "vendors and purchasers"—the ambiguity of the principal terms might be partially eliminated.