IMPLICATION AND THE CONSTITUTION. PART II.

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Since the first part of this article appeared, the High Court has heard one further case in which the new doctrine of implied prohibitions was relied on. In the *Bank Nationalisation Case*,[1] the States of Victoria, South Australia and Western Australia claimed, *inter alia*, that abolition of private banking by the Commonwealth would expose the State governments to undue interference by the Commonwealth exercised through the Commonwealth Bank, or would deprive them of banking facilities essential to the conduct of modern government. Four Justices rejected the argument[2], and since they included Starke and Dixon JJ. who helped to establish the new immunities doctrine in the *State Banking Case*,[3] their opinion supplies further evidence that the wide generalisations of the *State Banking Case* are not to be taken literally. The Attorney-General for the Commonwealth directed an argument to the Court which attacked the new immunities doctrine root and branch along the lines of the present articles. None of the Justices adverted to this attack. Those who dealt with the question were content to dismiss the argument of the States on the principle suggested by Dixon J. in the *State Banking Case*[4]: the nationalisation of the private banks would not work any formal discrimination against the State governments and would not give them any directions as to the way in which they should carry on their essential functions. Hence the trend of the decision is to confine the doctrine of the *State Banking Case* to the types of laws specially mentioned in that case, *viz.* laws which on their face discriminate against another government, and laws which on their face impose duties of obedience on governments "as such." The rest of this article will complete the discussion begun in *Res Judicatae* of May 1948.[4a]

3. *Implications and Pirrie v. McFarlane.*

The myth that the *Engineers' Case*[5] left room for implications from the general nature of federalism is frequently associated with another myth: namely that in *Pirrie v. McFarlane*[6] Isaacs J. recognised a doctrine of implied inter-governmental immunity. In that case, the majority of the Court held, applying the *Engineers' Case* conversely, that State traffic laws bind the Crown in right of the Commonwealth, and therefore Commonwealth defence personnel, when expressed to bind the Crown in general and when no Commonwealth law operates under s. 109 to exclude such State regulation. Isaacs J., dissenting, referred to[7] "the natural and fundamental principle that, where by the one Constitution separate *and exclusive*[8] governmental powers have been allotted to two

1. [1948] 2 A.L.R. 89.
2. Latham C.J., Starke, Dixon and McTiernan JJ.; Rich and Williams JJ. did not advert to it.
3. (1947) 74 C.L.R. 31.
4. 74 C.L.R. at 84.
4a. Vol. IV., No. 1, p. 15.
5. (1920) 28 C.L.R. 129.
6. (1925) 36 C.L.R. 170.
7. 36 C.L.R. at 191.
8. My italics.

distinct organisms, neither is intended, in the absence of distinct provision to the contrary, to destroy or weaken the *capacity*[9] or *functions*[9] expressly conferred on the other." The key word, here, is " exclusive." Isaacs J. was contending that the defence power of the Commonwealth, or perhaps more narrowly the Commonwealth's power of regulating the conduct of the defence forces, is exclusive to the Commonwealth, and that hence no State law can operate on that field at all. He was not relying on implied prohibitions of any description, but was construing the joint effect of ss. 51 (vi), 52, 69, 106, 107 and 114. The fallacy in the reasoning was the assumption habitually made by Sir Isaac Isaacs[10] that the exclusive executive control of the armed forces granted to the Commonwealth by the Constitution carried with it some degree of exclusive power to make defence laws, when in fact the Commonwealth's *legislative* power with respect to defence is plainly concurrent. Rich J., also dissenting, said,[11] " I am unable to see how a State law can validly dictate to the Commonwealth in what manner or under what conditions it is to perform the executive functions expressly *and exclusively*[12] committed to it by the Constitution." It does not appear that His Honour meant to endorse any different view from that of Isaacs J.

4. *The American Analogy.*

When the first High Court took over what its Justices conceived to be the doctrines of implied prohibitions developed by the Supreme Court of the U.S.A., the latter doctrines had already reached a maximum of complexity and artificiality, and a reaction had begun. Isaacs J. was always more conscious of the trend of American decisions on the subject than his senior brethren, and in 1928[13] was able to claim that the American court had made considerable progress towards the position which the High Court achieved in one step in the *Engineers' Case.* If the rules developed from *D'Emden v. Pedder*[14] and *Peterswald v. Bartley*[15] had endured in Australia, we would have had the curious spectacle of a characteristic piece of American judicial legislation surviving in Australia after it had been greatly modified by its originators. Nevertheless, such a state of affairs would have had an historical justification ; it would have been the consequence of the theory that the Australian Founders intended by implication to embody the American doctrine as it stood in 1898, not whatever doctrine the Americans might subsequently choose to adopt. The course of American decisions on this topic is summarised by Dixon J. in *Essendon v. Criterion Theatres*[16] and by Starke J. in the *State Banking Case*[17]. It is not possible to give a neat chronological account, since expansion and contraction have overlapped, and dissents indicating possible future development are by no means invariably in the direction of contraction. The following is a purely schematic arrangement of the

9. Italics in original.
10. See *Farey v. Burvett,* (1916) 21 C.L.R. at 454 ; *Joseph v. Colonial Treasurer,* (1918) 25 C.L.R. at 46-7, Rich J. concurring.
11. 36 C.L.R. at 221.
12. My italics.
13. *Ex p. Nelson* [*No.* 1], (1928) 42 C.L.R. at 228.
14. (1904) 1 C.L.R. 91.
15. (1904) 1 C.L.R. 497.
16. (1947) 74 C.L.R. at 19-22.
17. (1947) 74 C.L.R. at 71-5.

cases. Firstly, prohibition of State laws discriminating against the Federation[18]; secondly, prohibition of State laws of general application in so far as they impose burdens on the Federation[19]; thirdly, correlative application of these prohibitions to protect the States from Federal laws[20]; fourthly, extension of the notion of "burden" so as to include very notional interferences, such as sales tax on a vendor in respect of a sale to a government[21]; fifthly, overruling of cases in which the "burden" was notional and requirement of a substantial burden[22]; sixthly, suggestions that the doctrine might be confined to discriminatory laws and to taxes directly on property and income owned or earned by governments as such.[23] The U.S. doctrines have never been applied outside the field of taxation.[24] There is no reason to suppose that the most recent decision—the *Saratoga Springs Case*[23]—represents the end-point of American development. The case was decided on the simple ground that the State function in question was trading in character, and hence not protected by any immunity, so that all the speculations on the present state of the general doctrine were *obiter*; there was not even agreement between the *dicta* of the majority, and the dissentients were prepared to begin a fresh process of expanding the scope of the implied immunity. Hence the history of the American doctrine supplies no ground for confidence that there is an essential bedrock implication logically and historically inevitable for all federations.

But even if the American doctrine were certain and final, it would still be anachronistic for the High Court to place reliance on such frankly legislative decisions of the U.S. Supreme Court. The Constitution of the U.S.A. is an ingenuous and obviously incomplete instrument, as had to be expected from the conditions under which it was drafted and the complete absence of precedents to guide its makers.[25] Such an instrument invited extensive judicial legislation under the guise of interpretation, and the intellectual climate of the U.S.A. in the first eighty years of federation was favourable to such activities. "Natural law" and "higher law" theories were widely held, so that Marshall C.J. and his brothers on the Supreme Court bench believed that the political theories of themselves and their class were objective truths which were either immanent in the rough words of the Fathers, or to be found in a transcendent Constitution to which those words approximated.[26] The character, background and circumstances of appointment of Marshall made it inevitable that he should indulge in free interpretation on the basis of strong nationalist and economic bias. Modern assessments of Marshall vary from the traditional adulatory view to sharp criticism,[27]

18. *M'Culloch v. Maryland*, (1819) 4 Wheat. 316.
19. *Dobbins v. Erie County*, (1842) 16 Peters 435.
20. *Collector v. Day*, (1870) 11 Wall. 113.
21. *Panhandle Oil Co. v. Mississipi*, (1928) 277 U.S. 218.
22. *Willcuts v. Bunn*, (1931) 282 U.S. 216; *Fox Film Corporation v. Doyal*, (1932) 286 U.S. 123.
23. *Graves v. N.Y.*, (1938) 306 U.S. 466; *N.Y. v. U.S.*, (1946) 326 U.S. 572 (*The Saratoga Springs Case*). The latter case also illustrates the distinction between "governmental" and "non-governmental" functions which cuts across the main line of development; it has never been applied to activities of the Federal government.
24. 23 Columbia L.R. 914.
25. The Philadelphia Convention of 1787 drafted the Constitution in less than five months and a very turbulent political atmosphere.
26. Haines *Revival of Natural Law Theories*, ch. 4; *Higher Law Background of American Constitutional Law*, 42 H.L.R. 149, 365.
27. Corwin, *John Marshall and the Constitution*; Lerner, *John Marshall*, in 39 Col. L.R. 396.

but they agree on one point: that he "refused to regard his office merely as a judicial tribunal." He was appointed to the Bench in the dying hours of a Federalist Party administration for the express purpose of defending Federalist policies from the Supreme Court Bench against the Jeffersonian Democrats, and when his decisions were criticised, he contributed anonymous articles to newspapers in defence of his work. It must be repeated that the nature of the Constitution and the nature of the times required that one or other of the main rival theories of federalism should be established by judicial decision, and Marshall's decisions contributed greatly to the preservation of the Union. But they also established a tradition of interpretation which minimises the meaning of words in a document and maximises the opportunity for judicial evaluation of the expediency of challenged laws. The U.S. Constitution is now rarely cited in Supreme Court decisions; it has been swallowed up in judicial exegesis as thoroughly as the Statute of Frauds. The historical setting of the Australian Constitution is obviously very different. The document itself is detailed and mature in style, and embodies the result of nine years reasonably quiet deliberation by men who had studied the documents and the experience of many modern federations.[28] By that time, the modern attitude to statutory interpretation was well established.[29] One would expect to find in the Australian document the ambiguities and self-contradictions due to human fallibility and the imperfections of language; but one would not expect any major principle of the system to be left to implication, when the possible necessity for such a principle was well known to the draftsmen.

5. *The Intention of the Founders.*

If the High Court had from the first been prepared to regard constitutional interpretation as a search for historically probable meaning, in which contemporary sources such as the Convention Debates could be used as evidence, it would have avoided some difficulties; for example, it could never have held that s. 92 does not bind the Commonwealth.[30] The reported Debates provide no direct guidance on the problem of implied immunities, but some inferences may be drawn from them. The American doctrine was never referred to. If the Founders had definitely contemplated the application of the American doctrine, it is incredible that they should have omitted to mention it, since so much of the time of the Conventions and of the Federation Leagues was taken up with calming the fears of suspicious state-righters. Inglis Clark made an observation at the 1891 Convention which, coming from a man so thoroughly versed in American law, might be thought to indicate a distaste for judge-made doctrines[31]: "Let us not trust to judicial remedies. Let us embody distinct remedies for injured state interests in our constitution; let us give to every State the power to protect itself." But in 1903, as a Judge of the Tasmanian Supreme Court,

28. Garran's *Coming Commonwealth* (1897) refers to the systems of Germany, Switzerland, Canada, the U.S.A., Mexico, Brazil and the Leeward Islands.
29. Hence the refusal of the High Court to refer to the Australian Convention debates; *Tasmania* v. *Commonwealth*, (1904) 1 C.L.R. 329. The U.S. Supreme Court has made extensive use of such material.
30. See 1897 Sydney debates, pp. 1053 ff.
31. 1891 Debates, pp. 251-2.

Clark delivered the dissenting opinion in *D'Emden v. Pedder*; his reasoning, adopted by the High Court on appeal[32], established the first form of the Australian immunities doctrine. Indeed, Clark J. had by then become so addicted to making implications from federalism that he considered ss. 92, 109 and 114 of the Constitution unnecessary.[33] Griffith C.J., Barton and O'Connor JJ., who introduced and upheld the American principle, were members of Convention drafting committees—(Griffith in 1891, Barton in 1891 and 1897-8, O'Connor in 1897-8)—but so were Isaacs and Higgins JJ. who led the attack on the doctrine—(1897-8). The argument in the High Court in *D'Emden* v. *Pedder* rather suggests that Griffith C.J. and O'Connor J. were not well acquainted with the American doctrine and had not previously taken it for granted that the American doctrine would apply to the Australian instrument.[34] The drafting history of the Constitution suggests that the Founders expected Federal legislation to affect the States, unless express provision was made to protect the States. Banking, insurance and railway powers were first given in general terms, and the detailed protection for States subsequently added by amendment.[35] The prohibition of inter-governmental taxes in s. 114 is another obvious case of specific provision covering a great part of the scope of the American implied prohibition. Dixon J. has suggested that the section may have been intended to avoid particular difficulties suggested by American cases[36]; for example, exclusion from tax immunity of property used for non-governmental purposes, distinctions between taxes on a *res* and taxes on a Government as such, and distinctions between uniform and discriminatory taxes. With respect, this explanation is unlikely. The American distinction between governmental and trading functions was not made explicit until 1905,[37] and is not mentioned in the standard text books that were available to the Australian Founders.[38] In every relevant American case, the tax has been on property, not on a Government as such and the doctrine current by 1891 clearly invalidated general as well as discriminatory taxes in so far as they burden other governments of the Union. But furthermore, any such attempt to explain s. 114 attributes to the Founders the unlikely drafting technique of first taking note of the generalised American implied immunity doctrine, then looking for weaknesses in the doctrine, and finally including specific provision for a weakness without expressly incorporating the general doctrine. It seems incredible that the Founders should have acted so strangely, or should have failed to mention so unusual a course in the Debates. The actual drafting history of s. 114 supports the hypothesis that the Founders started with simple powers which they assumed might be exercised against governments and then made such specific legal exceptions as they deemed necessary. The

32. (1904) 1 C.L.R. at 111.
33. *Australian Constitutional Law*, 2nd ed., at 186.
34. 1 C.L.R. at 95-6.
35. On banking and insurance, see 1891 Draft ch. 1, s. 52 (xiv); 1897 Adelaide debates, pp. 778-9, 1897 Draft, s. 52 (xvi); 1898 Draft, s. 51 (xiii); (xiv). On railways, 1891 Draft, ch. 1, s. 52 (29); 1898 Draft, s. 51 (xxxii.), (xxxiii.), (xxxiv.).
36. *Essendon v. Criterion Theatres*, (1947) 74 C.L.R. at 18. His Honour does not refer to the American experience, but the Founders could not have encountered the difficulties he mentions elsewhere.
37. *S. Carolina v. U.S.*, 199 U.S. 437.
38. e.g. Baker; Black, 1st ed.; Cooley's *Principles*, 2nd ed., *Limitations*, 6th ed.

first draft of s. 114[39] applied only to State taxes on Federal " land or other property," and it was subsequently amended to the present mutual prohibition of taxes on property of any kind. Section 114 is very close to the form in which the American implied prohibition now operates. Perhaps we should admire the Australian Founders for their prescience in picking out and explicitly stating the most important practical aspect of the American immunities doctrine, instead of treating s. 114 as surplusage or as a gloss on some more general doctrine left to implication.

The Founders, indeed, devoted little discussion to the general principles which would govern legal relations between the unit governments of the system. The reason is clear enough. They expected the Senate to protect the States, and the Commonwealth to protect itself. The greater part of the time of the Conventions was taken up with the question of the Senate : its composition, its mode of election, its powers in general and particularly its financial powers. This was the great battle-ground between the confederalists and the unificationists. It was to the Senate, not to the Courts, that the upholders of State sovereignty looked for protection. The observation in the *Engineers' Case*,[40] that the people rather than the Courts should resent and correct abuse of express powers, could have been made more specific ; it is for the Senate to resent the use of Commonwealth powers for the purpose of weakening the States as governments. The Senate has failed to perform this function, and the extraordinary expansion of Commonwealth power has been partly due to this failure. If the Constitution were a living organism, one would say that the creation of a new constitutional prohibition by the High Court is a case of compensatory hypertrophy of the judical organ following atrophy of the Senate.

6. *Conclusion.*

This survey suggests four objections to the implied prohibition on Commonwealth and State legislative power established by the majority decision in the *State Banking Case*.[41] Firstly, the doctrine is not an implication from the propositions of the Constitution itself. As a matter of form, the effect of the decision on Federal powers could be expressed by adding a series of provisos to s. 51 and perhaps to some other sections, but the effect on State powers could only be expressed by drafting a new section, and this would also be the most convenient method for expressing the impact of the prohibition on the Commonwealth. It is suggested that one way of distinguishing between legislative interpretation which a Court cannot avoid, and legislative interpretation going beyond the judicial function, is to ask whether a decision explains the meaning of an existing section of the Constitution or whether it can only be expressed as adding a section. Secondly, this type of implication is not consistent with the *Engineers' Case*,[42] nor did that case make any special reservation which would allow it. Thirdly, American authorities are an unsatisfactory guide when there is no question of establishing the meaning of a

39. [1891] Ch. V., s. 14.
40. (1920) 28 C.L.R. at 151.
41. (1947) 74 C.L.R. 31.
42. (1920) 28 C.L.R. 129.

specific section of the Constitution. Lastly, the historical evidence as to the intention of the Founders is inconclusive, but is consistent with the view that they did not contemplate any general implied restriction on powers. The historical point is not relevant on present interpretative methods, but one would nevertheless dearly love to know whether the doctrine of implied immunities was ever mentioned at gatherings of the Constitution Committees. There is now only one man alive who could satisfy this curiosity, but unfortunately he is more interested in the humanities than in satisfying the curiosity of constitutional students. Perhaps we shall have to wait for his memoirs.