Australian Law: Federal Movement

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Constitutions work. I mean, they do things in communities. They change communities, and thereby change their own relation to communities. They are always in that sense in movement. And often this movement is the hardest thing for constitutional law to grasp (and when it fails, its greatest failure of realism). The movement is more than a change in the meaning of constitutional words: it is the movement of a constitution's actual working in a community (or federal communities). If there had been no section 92 in our Constitution (and no implied one, either; that is, if the Constitution had not established an expanding Commonwealth) the decision of the High Court in *Breavington v Godleman*,[1] that Australians were for conflicts of laws purposes no longer foreign to each other, would not have been possible. The work that section 92 and the rest of the Constitution did (in making interstate trade, commerce and intercourse absolutely free) was to open the discrete colonial communities up to each other to make an actual, not merely constitutionally conceived, Australian Commonwealth (a Commonwealth where citizens are *actually* not foreign to one another).

In the first part of the essay (Constitutional Movement and the Erosion of the States) I consider the relation of this movement to recent constitutional interpretations by the High Court, particularly in relation to the corporations power. Most theorists (and recent judges) have seen that there is a progressive constitutional erosion of the states in our constitutional law, but have thought that there must be strict limits to that erosion (short, of course, of constitutional amendment). This idea however is largely specious, as I seek to show in the essay's second part (The End of the Erosion), and turns on a failure to understand the nature of the Constitution's lawful movement. The High Court in recent constitutional adjudication has asserted a respect for substance over form. This I argue (in part 3, A Problem with Substance) is a welcome development; but I point out that there is a danger of confusing true substance, which is necessarily in movement, with static substance. My fourth section concerns the recent section 92 cases (The Recent Section 92 Cases and the Problem of the Anti-States). These are obviously important in the matter of the centralising movement of the Australian Constitution (opening the states up into a common market); but I point out that the issue is not quite as simple as it seems. And in my final section (Expansion Beyond the

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1 (1988) 62 ALJR 447. I have argued for this view of *Breavington* in "Australian Law: Freedom and Identity" (1989) 12 *Syd LR* 482. The purpose of the first part of this essay is to examine the implications of the movement that *Breavington* recognised (for its own conflicts of laws purposes) in respect of the more ordinary constitutional doctrines and issues.

Nation-State) I speculate that the ultimate destiny of our constitutional movement is beyond the Commonwealth of Australia, just as it has been beyond the separate states. Movement into community, and into wider community, is a function of love; and it is in the nature of human love that it has no stopping-point. Further, the wider expansion takes the same form as the federal one: an expansion, primarily, of trade, commerce and intercourse (a section 92 for the world).

Part 1
Constitutional Movement and the Erosion of the States

The construction of the Australian Commonwealth was largely extra-constitutional. The people, the traders and so on, outside the Constitution, made the Commonwealth: the work of section 92 was done in the market. Section 92 as mere words would have been powerless if there had not been Australians intent (for purely private reasons) on expanding their outward trade. Still, the words of section 92 may be accorded an honourable part in the process. But as such, section 92 as a set of meanings frozen in 1901, is not the section 92 that worked. More to the point, the whole of the Constitution as a set of frozen 1901 meanings is not the Constitution that worked. Section 92 might have failed: the colonies (now States) might have grown further apart. The Constitution now, on that hypothesis, would look very different: *Breavington*, for example, would not have been possible, nor even *Engineers*.[2] But the two section 92s, this hypothetical one and the one that did work, would *as words* be identical. So the point of constitutional law cannot be words, but words in movement.

It has been easy enough to recognise movement after the event. Windeyer J's well-known words in *Victoria v Commonwealth* concerning the movement of our constitutional law from the states'-rights conceptions of the first High Court to a post-*Engineers* nationalism are an example of this:[3]

> I have never thought it right to regard the discarding of the doctrine of the implied immunity of the States and other results of the *Engineers' Case* as the correction of antecedent errors or as the uprooting of heresy. To return today to the discarded theories would indeed be an error and the adoption of a heresy. But that is because in 1920 the Constitution was read in a new light, a light reflected from events that had, over twenty years, led to a growing realization that Australians are now one people and Australia one country and that national laws might meet national needs.

And *Breavington*, too, may be thought to be similarly ex post facto. But the real challenge for constitutional law is not the recognition of extra-constitutional movement, and not ex post facto recognition; it is to conceive of itself as in movement. Windeyer J is saying that the early High Court decisions (for example, *Railway Servants*[4]) and the case that overruled them, *Engineers*, are both legally right (the second not the 'correction of antecedent errors'). How can this be, since they are inconsistent? One

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2 *Amalgamated Society of Engineers v Adelaide Steamship Co Ltd* (1920) 28 CLR 129.
3 (1971) 122 CLR 353 at 396-7.
4 *Federated Amalgamated Government and Tramway Service Association v NSW Traffic Employees' Association* (1906) 4 CLR 488.

interpretation is to say there intervened a large extra-constitutional event which changed the basic constitutional facts by the time of the second decision. This is a very easy but ultimately unsatisfactory interpretation; as though the law of the two cases were the same, they being only factually different (the nonsense of which can be seen in its implication that *Engineers* should have distinguished *Railway Servants*, not overruled it). The true and deeper interpretation is that the two cases are consistent because they are part of the same movement. The implications of this for constitutional adjudication are considerable. The High Court cannot see itself as separated from federal movement. Simply to sit back and wait for extra-constitutional events to occur would be to misunderstand the place of the Constitution, and of the court's own adjudication, in those events. When the constitutional law itself is seen to be in movement the relation of the present court to the words of 1901 changes radically; and it is the purpose of this section to elucidate this.

Griffith, Barton and O'Connor when compared with the *Engineers* judges are usually thought to be states'-righters. But they were federalists. They were leaders of the federal movement, not states'-righters, for states'-righters were those who opposed the Constitution. How do we explain this turning of ideas on their head? Only by thinking of Griffith's, Barton's and O'Connor's federalism as being in movement. And not a movement up to a then frozen point, the Constitution of 1901. They did not put section 92 in that document because it was a good idea. They put it in because it had work to do. They were federalists with a centralising momentum. That others (Higgins and Isaacs, say) ran to a greater momentum changes neither the direction of the original judges' movement nor the fact that constitutional essence is movement. Of course, a constitution is in no sense required to be centralizing: a unitary community might be tending to break apart and a federation might be established with centrifugal momentum. It is just a historical fact that our federation is a centralizing one. And note that the demarcation of legislative power in these two very different federations might be exactly the same (*exactly* the same words). This is a very important reflection, because it shows that it is a constitution's movement, more than its words, that give its nature. If the constitutional law of either of these federations fails to see itself in movement it identifies two opposed things and quite fundamentally misconceives itself.

Can the words make stopping-points? If the words make a federation of centralizing momentum is there any stopping-point short of total unification? It is easy to think here of the fact that there are now by virtue of our constitutional law very few limits on Commonwealth power,[5] very little scope for state financial independence,[6] very little protection of the states from Commonwealth legislative control,[7] no remaining conception of state

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5 Later, particularly in part 2 of the essay I suggest how few.

6 *The Uniform Tax* cases, *South Australia v Commonwealth* (1942) 55 CLR 373, and *Victoria v Commonwealth* (1957) 99 CLR 575. See also *Dennis Hotels Pty Ltd v Victoria* (1960)104 CLR 529 to see how strained reasoning becomes to find something for the states.

7 Protection only from discriminatory legislation *(Melbourne Corporation v Commonwealth* (1947) 74 CLR 31). In *Queensland Electricity Commission v Commonwealth* (1985) 59 ALJR 699 there were suggestions that protection might go beyond this. We later discuss this issue. But on any view it is difficult to see how the High Court's words might

courts;[8] and think also of the stopping-points that, in respect of each of these, were erected and then surpassed by the federal constitutional movement.[9] But all of these things have been done within fairly ordinary parameters of meaning and doctrine. Words cannot mean anything at all, so are there not some limits, some stopping-points? For example, could the end point of our federal movement be the end of the states in the holding by the High Court that no state legislative power is any longer valid; or does section 107 of the Constitution, which would be rejected under such a doctrine, constitute an absolute stopping-point (I say absolute stopping-point, meaning absolute stopping-point for constitutional law, saying nothing of constitutional amendment under section 128)? This is dealt with in the next section; but the nature of the question shows us something about movement itself.

If we think of section 107 as words with meaning the answer would be yes: no meaning at all allows the interpretation I have supposed. But if we think of section 107 as words doing something, the matter is very different. My point so far will have been entirely misunderstood if it is thought that I am talking about meaning in movement. The meaning of the words of section 107 might well be in movement (as meaning always is) but it would need meaning to stand on its head for its movement to justify the abolition of the states. But it is not meaning in movement that is my concern, it is words in movement, words doing things in the community. My point can be illustrated by a domestic analogy. Suppose a parent essays to teach their child about the dangers of alcohol by issuing the instruction: drink three bottles of beer. If all goes well, the child having obeyed will (a little later) see the point. All would not have gone well if the child subsequently became a drunkard. But even then the child (unless obtuse as well as a drunkard) could not say to the parent: I thought you were in favour of alcohol, look what you said! The meaning of 'drink three bottles of beer' did not change to 'don't drink three bottles of beer'. But the words had work to do, and if all had gone well, would have been measured by their work not their meaning. Section 107 had work to do, otherwise immediate unification of Australia in 1901 would have been impossible. But having done their work, they and the rest of the centralizing constitution, why should we insist on thinking of them as meaning rather than work? It is certainly the function of a court to protect the institutions of government; as Brennan J said in *Street v Queensland Bar Association*:[10]

> The necessity to preserve the institutions of government and their ability to function is an unspoken premise of all constitutional interpretation (see *The Commonwealth v Tasmania (The Tasmanian Dam Case)* for it is the necessity to preserve the Constitution itself. But that necessity does not require or authorise a qualification of the constitutional text in order to maintain what might be thought to be a convenient fund of power or a desirable distribution of power.

But if the institutions are in movement (as I claim) then their protection

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translate into real protection.

8 *Breavington*, above n1.

9 As to limits on power, *R v Barger* (1908) 6 CLR 41; limits on financial supremacy, Constitution section 87; limits on Commonwealth legislative control of states, *Railway Servants* (1906) 4 CLR 488 above n4; as to the state courts, the old doctrines of lex fori that *Breavington* collapsed.

10 (1989) 63 ALJR 715 at 733.

requires a protection of that movement. In that case protection of a static set of institutions (say, the 1901 set) would be precisely a failure to protect the real, moving, constitutional institutions: in its attachment to the beginning of movement, as palpable a rupture of the institutions' constitutional sense as any revolutionary zealot's premature anticipation of the end of movement. Both attitudes are revolutionary rather than lawful. Lawfulness lies in the movement; in the historical line. Since it is impossible actually to go back in time (except in science-fiction) we must think of both sorts of revolution (radical and conservative) as deviating to one side or the other of the lawful historical line. We sometimes distinguish radical and conservative by the terms left and right. When lawfulness is seen as a historical line, left and right thus have a more fundamental sense than is usually imagined. What we must avoid is the idea that one side (conservative or radical) against the other is lawful; or that one side against the other is "protecting the institutions of government". What we must see is that to attempt to go back to 1901 is not an act of proper judicial conservatism, but a failure to understand lawfulness. Let us assume that the words of the corporations power were intended by the Founding Fathers to exclude a general power in the Commonwealth to incorporate. This is an easy assumption to make for it is obviously true (as the High Court has recently held in *New South Wales v Commonwealth*),[11] and it is not by any means the same thing as the question of what the words of the power mean. The meaning of the words 'formed within the Commonwealth' is, for us now, as easily taken to be that of a descriptive participle temporally neutral as it is to imply prior incorporation (in fact rather more easily, the latter requiring a slightly gauche literalism). Taking it, then, that the words could mean either the inclusion or the exclusion of the power to incorporate, the question is as to the significance of the Founding Fathers' intention. The question is of considerable importance because the High Court has held in *New South Wales v Commonwealth*, with Deane J dissenting, that not only did the Founding Fathers intend the exclusion of incorporation, that exclusion was constitutional law in 1990. Why?

> The power conferred by s51(xx) to make laws with respect to artificial legal persons is not a power to bring into existence the artificial legal persons upon which laws made under the power can operate . . . Both precedent and history support this construction.[12]

First, history. The strongest, most important fact about history (as we have been arguing) is that it is in movement. If the constitutional words went into history in 1901 they went into the movement of history; and not as fixed things catching a ride, so to speak, on history, but things themselves in movement, themselves history. There are two mistakes here, at somewhat opposite extremes. The idea that the Constitution is a frozen set of words carried through time by history is, in its separation of (constitutional) words from history, a trivialisation of words. This is because history is words, and hardly anything else: events are only history in accordance with an *understanding*, necessarily in words. And the second mistake is the one that has commonly been made by Australian constitutional lawyers: a trivialisation of history by the idea that history (in this case constitutional history) occurs

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11 (1990) 64 ALJR 157.
12 Id at 159.

within a set of (constitutional) words. An example of this is the constant trotting-out in constitutional texts of *Brislan's Case*[13] to show that within the words "Postal, telegraphic, telephonic and other like services" history invented new instances. But more deeply than this there is entrenched the idea that the words of the constitution are fixed parameters within which history works. We need to see that the words themselves as much as the events outside them and the meanings inside them are history and necessarily in movement.

Word, meaning, human: meaning there looks like an intermediary settling the relation between the two primary participants, word and human. But the relation is never settled. Words make humans in the sense that they make humans think what they think; humans make words in the sense that they make words do what they want them to do; and the process is a constant mutual exchange between the two. 'Meaning' can hold office as mediator only if it is mediator in movement. Thus when the words "formed within the limits of the Commonwealth" went into history in 1901 the process of their meaning had only just begun. Deane J made the significant point against the majority in *New South Wales v Commonwealth*[14] that it was false to equate the Founding Fathers' intention with meaning in 1901; but even if that step is made meaning in 1901 is only the beginning of the process of meaning.

As to which, more shortly; but now the precedents which supported the Court's conclusion:[15]

> In *Huddart, Parker & Co Pty Ltd v Moorehead* the five members of the Court were unanimously of the opinion that the subject-matter of s51(xx) is confined to corporations already in existence and does not extend to the creation of corporations. That, they said, is the plain meaning of the words "formed within the limits of the Commonwealth".

Now, in *Huddart, Parker v Moorehead*,[16] there were at least three (but more like five) distinct attempts to make history: attaching Barton and Higgins JJ to other opinions, the three distinct positions are Griffith CJ's, O'Connor J's (far the truest of any judicial opinion before or since to the 1901 federal sense, but the most neglected and unsupported of all) and Isaacs J's. Of these three historical essays, two have disappeared and the third, Isaacs', has moved through to the rather different formulation of *Strickland v Rocla*.[17] History moved with Isaacs. The unanimity of opinion against incorporation shows only the meaning in 1909 (if it shows that: since all the 1909 judges were Founding Fathers it probably shows only the Founding Fathers' meaning). Still, history moved with Isaacs J and this included the opinion on incorporation. This history manifested itself in *Strickland v Rocla*, where the court held that the external control of (trading and financial) corporations was within Commonwealth power but with not a word on the exclusion from section 51(xx) of the power to incorporate. If we think of *Huddart Parker* (1909) and *Strickland v Rocla* (1971) as equal legal authorities on the question of incorporation in 1990 then we find the issue fairly persuasively determined: there is dicta against in the 1909 case, and nothing at all in 1971.

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13 *R v Brislan; ex parte Williams* (1935) 54 CLR 262.
14 (1990) 64 ALJR 157 at 161.
15 Id at 159.
16 *Huddart, Parker & Co Pty v Moorehead* (1909) 8 CLR 330.
17 (1971)124 CLR 468.

But this is static constitutionalism: 1909 and 1971 are not equal in the matter of the historical line as it manifests itself in 1990. More to the point than dicta-counting is: what position on incorporation best flows (lawfully) from *Strickland v Rocla?* Can we think of the words of 1971 (the words in history, that is the 1901 words taken into *Strickland v Rocla)* as excluding incorporation? Only if we think of them as excluding capacity. This is because separating incorporation from capacity makes no sense: a corporation without capacity is not a corporation; not incorporated. And if we think of them as excluding capacity we must then embark on the exercise of making sense of the distinction between:

A: A corporation shall not do X (external control, allowed by *Strickland v Rocla)*: and

B: A corporation shall not have capacity to do X,

a distinction that the (post-1901) history of corporation law (its constant attempts to ameliorate *Foss v Harbottle*)[18] has done much to subvert. So the words of 1971 do not easily exclude incorporation. Must we then choose between the two, between 1901 and 1971? Only if history is taken in frozen slices of meaning. Is there some special allegiance to 1901 or to the fact that a governing document was generated in 1901? But 1901 launched the document (and much else) into history: it is actually a betrayal of the 1901 document to deny the history that *it* generated and was intended to generate (as though you respect it by thinking of it frozen in time, by thinking of it other than in its natural historical sense). The historical document launched a set of words into history. History thereafter was a constant interchange between words and people. The Australian people (including their lawyers and courts) received the words with a certain set of meanings, and their changing conceptions of meaning read themselves back into the words. After *Engineers* it was no longer possible to read the word 'Commonwealth' in the same way. Are we to say the word was the same; that the change in meaning was and remained wholly extra-constitutional? But that notion shows no respect for the words, *which are nothing separated from their meaning:* the word 'Commonwealth' is a different word in 1920. The new word 'Commonwealth' and all the other new words became at that point (1920) no more frozen than the old words: the interchange between word and people continued, that is to say history continued. And in 1971 another new word 'corporation' had connotations of size and economic power quite different from those of 1901: this new word was read by the people (through their highest court) back into the Constitution with no reservation about incorporation. And so on. I should say at this point that I distort things by picking out main events. The little meanings as well as the big ones are in constant interchange; and the big ones in constant little change rather than in big dialectical bangs. It is of course true that the Constitution of 1901 presents a greater inherent authority than the High Court decisions of 1920 or 1971. But that means only that the Constitution's historical power is greater. I can make my point starkly. If X by history becomes not-X, you only respect the historical X by deciding not-X.

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18 (1843) 2 Hare 461.

This historicism is not a matter of width of meaning. The High Court has often said that the words of the Constitution must be given the widest possible meaning:[19]

> It is a Constitution we are interpreting, an instrument of government meant to endure, and conferring powers in general propositions wide enough to be capable of flexible application to changing circumstances.

This also is a frozen slice of meaning. It pays some regard to history ('flexible . . . changing circumstances') presumably because it sees that const- itutions are meant to operate in time; but it misunderstands history because a frozen slice of wide meaning is as unhistorical as a frozen slice of narrow meaning. Historical movement is not within the (wide) words. That would be the lawyer's ultimate pretension: the words of the Constitution, the lawyers' tools of trade, circumscribe history! Rather, *the words are in the movement.*

In *Queensland Electricity Commission v Commonwealth,* Brennan J wrote:[20]

> The independence of the States is susceptible to erosion by the exercise of Commonwealth legislative power — an inevitable phenomenon in a federation in which powers are distributed specifically to the federal legislature and by way of residue to the States — but the prohibition against the making of discriminatory laws aimed at the States is derived from the necessity of preserving so much of the independence of the States in the exercise of their powers as is consistent with the Commonwealth's exercise of the plenary powers conferred on it.

This erosion of the states is an inevitable consequence of the grant of specific powers, as Brennan J has said: the logic of *Fairfax v Federal Commissioner of Taxation*[21] (that a law with respect to one thing is not the less that by virtue of it also being with respect to another) takes hold to erode the states, whereas if the states had had specific powers preserved the logic would have taken hold in the opposite direction.[22] Thus an orderly erosion of the states is implicit in the words of the Constitution whether or not the Founding Fathers contemplated the logic of *Fairfax.* Brennan J's point is to explain why the states are protected from discriminatory Commonwealth legislation but not general *(Melbourne Corporation v Commonwealth).*[23] The orderly erosion is the erosion implicit in the Constitution of a Commonwealth of specific and general (*ie* non-discriminatory) powers. A discriminatory Commonwealth law, one that picks the States out for special treatment, is one that, so to speak, cheats: it steals a march on constitutional movement (ordinary erosion). We have talked of the failure of constitutional respect when a static constitutionalism sets itself against the lawful line of historical movement; but an unorderly, too radical, movement is also a failure of constitutional respect

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19 *Australian National Airways Pty Ltd v Commonwealth* (1945) 71 CLR 29 at 81 per Dixon J.

20 (1985) 59 ALJR 699 at 715.

21 (1965) 39 ALJR 308.

22 Detmold, M J, *The Australian Commonwealth* (1985) Chapter 10. *Bourke v State Bank of NSW,* (1990) 64 ALJR 406, is a recent example of applying the logic of *Fairfax* in the opposite direction in one of the few cases in the Constitution of an actual reservation of power to the states.

23 (1947) 74 CLR 31.

as well. Hence *Melbourne Corporation v Commonwealth*. Brennan J's recognition of the erosion of the states as implicit in the Constitution tends to undercut his (and the Court's) idea in the *Queensland Electricity* case that the Constitution contemplates the continued existence of the states. Can it at the one time contemplate both the erosion of the states and their continued existence? The question, of course, is a false one because it is an unhistorical (static) one: the Constitution can contemplate these two things when it contemplates a movement, the continued moving existence of the eroding states. There is still no point where we can say under the Constitution that the movement must stop; and the question is why are the judges so constantly tempted to postulate that point?

The judges themselves are in movement. This is because adjudication (including constitutional adjudication) is a practical not theoretical thing. I am using the words 'theory' and 'practice' in their strict and classical sense: theory is that which is to be known, practice is that which is to be done. Judges act. We could make nothing of a judge who at the end of a case retired before giving judgment, satisfied that the theoretical understanding of the relevant law generated by counsels' argument was the point and the conclusion of the process. They award damages, restrain defendants, punish and so forth: all these things are actions, so obviously so that we often forget that law is practical, falsely thinking it theoretical, a thing known rather than a thing done. And, particularly in constitutional adjudication, judges act on a wider scale than the one I have stated: enforce rights against abuse of power, invalidate statutes, confer or deny state immunity, interpret (indeed change) constitutions, preserve (or destroy)[24] states, and so on. These are as much actions as the narrower ones concerned with the immediate settlement of the case in hand. There is for any action a fairly wide range within which a true description can obtain: the hero Prinzip contracted a finger, pulled a trigger, fired a gun, killed the archduke, committed murder, consigned himself to damnation, started World War I . . . ; and my point is that an action is always in movement from one state to another mediated mainly by the purpose that describes the action but also by its effects. Thus the practical is quite precisely the historical: no one who claims to be in practice can avoid being in history. The Constitution is in movement, the judges are in movement. *New South Wales v Commonwealth* might be said to have concerned constitutional movement from 1971 through and beyond 1990, yet the judges looked back to 1901. Why?

When there is an uncontroversial item of theory (for example, the one under consideration, under which it is *known* that the Founding Fathers intended to exclude incorporation from the corporation's power), it is tempting to think it translates immediately into an uncontroversial item of constitutional practice (in this case, the decision in *New South Wales v Commonwealth*). The theoretical status of that item (its status as something to be known) is not in doubt; and its immediate interest to a theorist such as a biographer is not in doubt. But its practical status (part of what is to be *done)* is quite different. It is important for judges to seek the uncontroversial, for lawfulness is always uncontroversial: it attaches to deep communal (common

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24 Who killed Cock-Robin? Who decided the *Uniform Tax* cases?

law) meanings (though moving meanings) rather than the superficial clatter of day-to-day political debates. But it must be an uncontroversial (deeply communal) practice (thing necessarily in movement) that is sought not theory; and the idea that the latter simply translates into the former is a fundamental confusion.

In fact theorists and practitioners in constitutional law are often distinguished by their attitude to the Founding Fathers. This is because the Convention Debates provide an easy refuge for the certainty of theory against the responsibility of historical practice. The Founding Fathers (no founding mothers) were a pretty ordinary lot — mainly lawyers, merchants and farmers. Some were of really conspicuous intellect, virtue or achievement, but not many. It may safely be concluded that they exercise no charismatic domination over us.[25] Had they done (as heroes or prophets sometimes do), what they intended by their constitution would have practical significance; our affection would connect to their intentions rather than the words of 1901 and it would activate practical constitutional decision; and then Deane J would not have had his point against the majority in *New South Wales v Commonwealth* that the constitutional basis was words rather than intention. But either way it is practice which is in issue not theory. What the Fathers intended is an important matter of theoretical interest — to biographers, for example. But in the absence of a charismatic domination, its practical significance is limited. The text of the Constitution is what has practical force. And it has it as it moves through history marking at any point the understanding of the Australian people as to the state of their constitutional arrangements. When this understanding is violated the consequences for the Commonwealth are immense. Thus there is a very strong (practical) reason against such violation. But what reason is there to refrain from violating the previous generation's understanding? Or the 1901 generation's? Or the Founding Fathers'? All they can do is turn in their graves. These understandings are part of the historical process: they have passed into history. And in that sense, passed to the present generation, they are significant. But only in so far as they are passed (and as we saw earlier, X might pass as not-X): the practical point is still primarily the understanding of the present generation. And the practical failure is the "looking back" to 1901. Thus when judges make practical constitutional decisions on the basis of what the Founding Fathers intended or on what was understood by the Australian people to be the meaning of the text in 1901 they may demonstrate that they are good theorists, but they fail as practitioners.[26]

To summarize the argument of this part: practice is always the doing of something; and the doing of something is always (whether it be big or little) part of a historical movement. Judges failing to see themselves in practice will fail to see their part in the Constitution's movement; and therefore fail to respect the lawful historical line, a line which is neither conservative nor radical, but the true foundation of constitutionalism.

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25 Max Weber's term: *Wirtschaft und Gesellschaft* (Tubingen, 1925) Vol 2, Ch 9.

26 In note 22 above at 261-262, I seek to show how the idea of practical principles as principles of interpretation within a constitutional text leads to a fundamentally incoherent idea of practice.

Part 2
The End of the Erosion

If the historical end of our federal movement is the ultimate erosion of the states, will there not in that endstate be a void of power? The Commonwealth can take up some of the eroded states' power; but surely (it is thought) it cannot take it all up. And related to this, what part is there for section 128 (the amending power) in this process? In *Queensland Electricity Commission v Commonwealth* Deane J wrote:[27]

> The Commonwealth, unlike the States, is the creature of the Constitution. Its legislative and executive powers are limited to what the Constitution confers. Alone, those powers are inadequate to provide more than a truncated part of the functions of government. If, without constitutional amendment to fill the void, the States were to cease to exist as independent entities, an essential element of the substratum of the Federation would be gone.

But what is this void (permanent void in the sense of void short of constitutional amendment)? Section 128, the power to amend the Constitution is entirely consistent with federal movement and consistent to the point of total unification. Perhaps we tend to think that the centralizing movement of our constitutional thought is in some way illegitimate because section 128 is there as the legitimate way of centralizing, should we wish it. But the argument works in reverse. Section 128 can be thought the only legitimate way to put a brake on movement: there is no reason to think that section 128 is inconsistent with extra-constitutional movement. *Melbourne Corporation v Commonwealth*[28] is very illuminating here (and the passage from Deane J's judgment just quoted is a comment on *Melbourne Corporation)* in the way that it points to the illegitimacy of stealing a march on movement. Thus, should we wish to hasten orderly constitutional movement then the only legitimate way to do it is through section 128. Or, indeed, should we wish to reverse it. When you think about it, section 128 makes at least as much sense as an opportunity to put a brake on the centralizing momentum. Section 128 is part of what we have seen to be a centralizing constitution; it cannot be interpreted as static; but, assuredly in movement, it might be used to speed up the momentum, slow it down, or reverse it. In fact, in a constitution with centralising momentum the one thing the amendment provision cannot be is the generator of that movement: the idea of section 128 as the only legitimate generator of movement is just a version of the static constitutional idea we are arguing against. Now, there is no ground for accusing Deane J of adhering to that idea, but what is this void of power that he thinks requires constitutional amendment to fill?

For a Commonwealth that had generated virtually plenary powers beyond virtually eroded states would still be a Commonwealth where section 128 had had its place (little ongoing place, given that the Constitution had finished its work). So the void is not required in order to make sense of section 128. Where does it come from? Is it the case that Deane J, has assumed that there are limits to the sum of the Commonwealth's legislative power; (unwittingly,

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27 (1985) 59 ALJR 699 at 722.
28 Above n7.

perhaps) interpreted a Commonwealth power by reference to limit, the very idea that *Engineers* is supposed to have done away with? His reasoning then would be just like Gibbs CJ's dissenting reasoning in *Koowarta v Bjelke-Petersen*:[29]

> It is impossible to envisage any area of power which could not become the subject of Commonwealth legislation if the Commonwealth became a party to an appropriate international agreement. In other words, if s51(xxix) empowers the Parliament to legislate to give effect to every international agreement which the executive may choose to make, the Commonwealth would be able to acquire unlimited legislative power. The distribution of powers made by the Constitution could in time be completely obliterated; there would be no field of power which the Commonwealth could not invade, and the federal balance achieved by the Constitution could be entirely destroyed.

The old reserved power reasoning tried to limit Commonwealth power by reference to a *particularised* residue, the logical fallacy of which became obvious. But it is as much a fallacy when the residue is unparticularised, for you still try to take residue as though it were grant. And it actually makes less constitutional sense. A particularised residue, where powers over X, Y and Z (say) are reserved to the states, at least has the merit of offering a substantive conception of the states (*ie*, the states as X, Y and Z); an unparticularised residue takes the states to be something but knows not what.[30] Truly, then these are constitutional ghosts which are raised: the lack of constitutional substance in the new reserved power reasoning gives added point to Murphy J's reference to pre-*Engineers* ghosts walking.[31]

It is very hard to think of any legislative provision that a skilled drafts-person could not bring within the legislative powers of a Commonwealth with the *political* will to carry the matter through. For example, the case in hand, *New South Wales v Commonwealth*,[32] looks immediately like a significant limit on Commonwealth power; but the Commonwealth could surely require Commonwealth incorporation (on its terms) as a condition of any corporation engaging in any interstate trade. Perhaps Deane J has in mind a void in respect of purely local, non-economic things, those matters which used to be rather quaintly called the police power. I shall take two examples (and leave the reader to think of others): the ordinary criminal law of murder, and soil conservation. Does the Commonwealth have legislative power in these matters? Perhaps not yet. But if the purpose of the Constitution was to create an Australian Commonwealth, was it to be one in which Australians could not by law be protected from murder? Or was it to be one whose land had to be allowed to blow away into the sea? Now, it is important to be very careful here. We cannot answer: of course not, but the states were to have those powers; because that is pure and simple reserved power reasoning. My question ignores the states and asks just of the Commonwealth which the Constitution set out to create, was it to be such as not to have those powers? Defined in that way the question has but one answer. So far, the national

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29 (1982) 56 ALJR 625 at 637.

30 For an attempt to give substance to the states see Andrew Fraser's *The Spirit of the Laws: Republicanism and the Unfinished Project of Modernity*, discussed at the end of this essay.

31 *Minister of Justice (WA) v ANA Commission*, (1976)138 CLR 493 at 530.

32 Above n11.

affairs power has received a limited interpretation. That is perfectly in order, for the implied powers could only have been the powers implicit in inchoate nationhood. After all it was not until *Breavington* in 1988 that the High Court recognised that Australians were not foreign to each other. The point is, that at the end of federal movement to nationhood what is implicit in the national affairs power is very different from what was implicit at the beginning of movement.

Part 3
A Problem with Substance

This movement of history is not simply a matter of substance over form. In *Street v Queensland Bar Association*[33] Deane J characterized the old section 92 cases (and certain other constitutional doctrines as well) as representing the triumph of form over substance. *Cole v Whitfield*,[34] the High Court's recent radical reversal of the old section 92 cases, represents the triumph of substance over form. *Street* does the same thing for section 117. The old formalism, represented by Gibbs J's words in *Henry v Boehm*:[35]

> the precise nature and extent of the constitutional guarantee which s117 affords, and of the corresponding restraint on power which it imposes, must depend not upon general theories as to the broad purposes of the provision, but upon the actual language of the section itself,

is replaced by an interpretation of the section where it has a function in the Constitution similar to that of section 92: opening up the Commonwealth by making citizens of one state citizens of all (precisely, of course, what *Breavington* did for its purposes). Now this preference for substance over form is an important transformation in our constitutional law. But if substance is static substance it is but a little advance on static form: only substance in movement will catch the true constitutional sense. And when this point is seen we may reassert form (respect for the text, respect for strict construction): we may have a triumph of form in movement over static substance. This is the reconciliation of that vast, wearisome debate in the United States between liberals and strict constructionists.[36] Liberals are wrong to think to substitute their values for the lawful ones (as Bork, and many others, so persuasively argue). But the strict constructionists are wrong in their false sense of history; in thinking that by looking back to static conceptions they are displaying a true historical sense, when it is the whole essence of history to be in movement. The reconciliation of form and substance is: lawful (strictly construed) form in movement.

Of the preclusion of residents of one state from voting in the elections of the other states and the fact that this is compatible with section 117, Deane J wrote:[37]

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33 (1989) 63 ALJR 715.
34 (1988) 62 ALJR 303.
35 (1973) 128 CLR 482 at 495.
36 See, for example, Bork, *"Neutral Principles and Some First Amendment Problems"* (1971) 47 *Indiana LJ* 1.
37 Above n33 at 740.

> The words of s117 must, of course, be construed in their context in a constitution which is founded upon the existence of the various States as distinct entities under the federation. So construed, s117 does not require that no distinction at all be drawn in a State between non-resident and resident. Section 117 only applies when a non-resident is "subject to . . . disability or discrimination". Those words, construed in their constitutional context, convey the notion of some superimposed incapacity or disadvantage in the sense that the incapacity or disadvantage, regardless of whether it be direct or indirect, does not flow naturally from the structure of the particular State, the limited scope of its legislative powers or the nature of the particular right, privilege, immunity or other advantage or power to which it relates. Thus, a provision in a State constitution conferring particular voting rights in State elections upon residents of the State as a whole or upon persons resident in particular electorates in the State will have the effect of precluding non-residents from voting. The incapacity of the non-resident to vote flows, however, not from some superimposed disqualification or qualification but from the nature of the franchise in a political system based, to significant extent, on residential divisions and representation.

One, thinking of movement rather than static (though wide) substance, might have been tempted not to think of the requirements of the states as political entities but of the requirement of equality of citizenship in the whole Australian Commonwealth. Thinking of the State Parliaments as Australian Parliaments (as the movement of section 117 suggests) we might find the idea of one (peripatetic) Australian voting in six Australian Parliaments as against another voting in only one, objectionable on ordinary, *but Australian*, democratic grounds. We shall in the next section see that this peripatetic Australian has much to answer for: he or she is (we shall see) the citizen of the anti-states — the interstate states whose protection is as inimical to the construction of the Australian Commonwealth as was the old protection of the states.

Cole v Whitfield, too, whilst it undoubtedly is a triumph of substance over form shows a certain staticness of formulation:[38]

> The difficulties which inhere in s92 flow from its origin as a rallying call for federationists who wanted to be rid of discriminatory burdens and benefits in trade and who would not suffer that call to be muffled by nice qualifications. By refraining from defining any limitation on the freedom guaranteed by s92, the Conventions and the Constitution which they framed passed to the courts the task of defining what aspects of interstate trade, commerce and intercourse were excluded from legislative or executive control or regulation.

As though the rallying call (the movement of the rally) stopped in 1901 when the serious business of meaning took over! But it would be silly to be a stickler here as to the language in which the Court has expressed itself. More to the point is to look to the Courts' subsequent decisions on section 92, both of which performed the action of invalidating legislation, and ask the practical question, what really are they the judges (and we the citizens) doing in these cases?

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38 Above n34 at 310.

Part 4
The Recent Section 92 Cases and the Problem of the Anti-States

What was the High Court doing when it decided *Bath v Alston?*[39] When the issue is conceived as the static one of what the Constitution means there is a fairly early limit to the examination of the consequences of decisions. Consequences come into meaning, but when the consequences are complex (as they were in *Bath v Alston)* meaning often looks like a safe early refuge against an examination of consequences. When, on the other hand, judges see themselves as practitioners (concerned to do something) consequences which are part of the relevant action description press rather more strongly and immediately. *Bath v Alston* is very complex. Cigarettes came from Queensland to Victoria where, since they had not been subject to the Victorian wholesale licence fee, a special discriminatory tax was imposed upon them by Victoria to bring them to a point of cost equality with Victorian cigarettes (which had paid the (Victorian) wholesale licence fee). There are various unknown factors involved here. First, whether in Queensland the cigarettes had paid an equivalent of the Victorian wholesale fee. Actually this was not unknown: they had not. But the court scrupulously avoided this fact. Perhaps this was for the good reason that to admit it into the issue would admit a series of other factors relating to relative costs between Queensland and Victoria which would be much more difficult to determine; for example, the relative costs of production prior to the tax in issue; labour costs including payroll tax, real estate prices and taxes (factory costs), transport costs, power costs and so on. Let us, just as an illustration of the problem, assume that pre-tax costs in Queensland were greater than in Victoria, and that the difference was equal to the licence fee. Now, on that assumption, what is the court doing in *Bath v Alston?*

For the majority (Mason CJ, Brennan, Deane and Gaudron JJ) the answer would be: invalidating a Victorian protection, including, even, an equalising protection. Why? Because section 92 requires it. But that is a static answer. Let us give their answer in movement: freeing trade between Queensland and Victoria. But were they really doing that? They would be freeing Queensland trade if our assumption of pre-tax inequality holds. But if it does not hold, were they not giving an advantage to Queensland trade (tending to a monopoly of Queensland trade) over Victorian trade?: a monopolistic trader is not a free trader, not even under the new regime of *Cole v Whitfield.* The minority saw this point and on its ground refused to invalidate the Victorian tax; but were they (the minority) really seeking to free Queensland/Victorian trade, for if (as we have assumed) the pre-tax costs in Queensland were greater than in Victoria, Queensland trade therefore needed the (unmentioned) Queensland relief from licence taxes to achieve competitive equality (and it might be the case that the extra pre-tax costs in Queensland were fiscal and the relief from licence tax designed in exact correspondence). So who was seeking to free trade in Australia, the majority in *Bath v Alston* or the minority? I don't know, because I don't know whether my assumption is true. I don't know what the relative pre-tax costs were in the two states. And it

39 *Bath v Alston Holdings Pty Ltd* (1988) 62 ALJR 363.

would be hard to know this; for one thing, it would be hard to know what counts. Is it the case that no one knows what either the majority or minority in *Bath v Alston* were doing? This would mean that section 92 has been taken as meaning rather than doing; that the question in the case has not been taken as a practical one.

The majority sought to take section 92 very literally. It was not on their view Australian trade that was to be free but interstate trade. Any removal of a discriminatory burden on interstate trade necessarily makes that trade freer. Even if it makes interstate trade a monopolist (as against intra-state trade) it makes it freer when *only its* freedom is in issue. This certainly removes the problem of complex and contestible economic analysis, but is it a plausible position to take in terms of what section 92 is doing? It isn't, I shall suggest. Further, just in point of meaning, it gives no sense to the fundamental idea of *Cole v Whitfield* that what section 92 removed were *protective* burdens; for if the point of the Constitution was to make interstate trade absolutely free to any point of monopoly why free it only from protective burdens? Why not free it from any burden at all? The idea of removal of protective burdens is clearly the idea of removal to a point of competitive equality for all Australian trade. Thus the point of section 92 is not the freedom of interstate trade (Queensland trade in *Bath v Alston)* but the freedom of Australian trade (Victorian as well as Queensland). Further, apart from *Cole v Whitfield*'s plausible historical ground, it is true of freedom, generally, that it has no sound philosophical sense when it is the freedom of one and not the other. Freedom in a community is the equal freedom of all. The majority's decision in *Bath v Alston* will tend either to the removal of state taxes and charges (any government charges at all) on or related to the production of goods, or else tend to the growing competitive advantage of interstate trade. The judges were concerned to say that their interpretation of section 92 was not giving a preference to interstate trade. But their reason exposes the logic of the matter:[40]

> The source of any such preference, if it exists, lies in the fact that the imposition of the wholesaler's licence fee has placed local goods at a competitive disadvantage visavis goods which have passed through the wholesale stage of distribution in some other state.

Thus (if there is a preference), either endure the preference or repeal the legislation! The states can equalise taxes; but whenever one state taxes less than the others the others will have to follow suit or else endure a competitive advantage of the interstate trade from that state. The first result, the states following suit by removing taxes to the point of the removal of all taxes and charges related even distantly to the production of goods, is consistent with section 90's removal of excise duties (consistent, then, with the constitutional sense of the federation); but hardly consistent with state budgets. Herein lies a rather bizarre twist of reasoning. The Court in *Bath v Alston* might have solved their problem entirely by overruling *Dennis Hotels*,[41] that wholly artificial piece of reasoning by which the states have been allowed to keep certain excise duties in the guise (though hardly even that) of licence fees.

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40 Id at 369.
41 Above n6.

Overruling *Dennis Hotels*, the Court would have removed the point, and the validity as well, of the (perhaps equalising) duty that caused the problem in *Bath v Alston*. *Dennis Hotels* has been kept because state budgets depend upon it.[42] So we have kept *Dennis Hotels* to protect state budgets but now the keeping of it has led to a much bigger threat to state budgets; for the competitive advantage that one state might exploit, and in respect of which the other states would have to follow suit to the detriment of their budgets, extends to charges and taxes far beyond those that any reasonable definition of excise could embrace. Cheaper, indeed subsidised, power costs, for example, would make an exploitable advantage which could not be equalised by the other states except by imitation; and power charges would come within no conceivable definition of excise. In a constitution moving to the abolition of the states and their replacement by a Commonwealth common market, this would not be such a bad thing. So if the true constitutional movement is as I have stated it in the first part of this essay, the first tendency of *Bath v Alston* is to be true to historical movement. However this cannot be said for the second *Bath v Alston* tendency: the permanent competitive advantage of interstate trade if states do not, as I have been putting it, follow suit. This is a very serious problem. A Commonwealth with the states closed off to each other by state protection is a distorted Commonwealth; but so is a Commonwealth of the opposite propensity. To see this we have to think of anti-states. The second tendency of *Bath v Alston* is the protection of the anti-states.

Let us say that the states are the sums of each set of purely intra-state transactions and relations, private or public. Then the anti-states are the sums of each set of purely interstate transactions and relations. Victoria-Queensland is one anti-state. There being six states, it would follow that there are fifteen anti-states.

To think further about the anti-states, let us suppose that the Commonwealth legislated in their favour, that is, legislated to make interstate trade compulsory by prescribing that no one was permitted to deal intra-state, but was required to find an interstate person to deal with (if they were selling something, to find an interstate buyer for whatever it is they were selling). Now, this is a ridiculously extreme law (and when you really think about it its details are quite hard to imagine). But extremity was no burden on section 92 thinking. If a state had legislated the opposite, that is, had attempted absolutely to exclude interstate trade, no-one would ever have had any difficulty with the idea that the law infringed section 92. *Fox v Robbins*,[43] the first section 92 case of all, would have been enough for this; no need of *Cole v Whitfield*. The point is that protection is usually partial, not extreme; and we may suppose that if there is a problem with our envisaged Commonwealth law that problem, too, would manifest itself in partial cases. Is there a problem?

There is no real problem regarding its initial validity. The law is a law with respect to interstate trade notwithstanding that it is also a law with respect to intra-state trade.[44] Perhaps there is some argument available from *Minister of Justice (WA) v ANA Commission*[45] to the effect that the law

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42 See *Dickenson's Arcade Pty Ltd v Tasmania* (1974)130 CLR 177.
43 (1909) 9 CLR 115.
44 Above n22, Ch 9.

cannot be valid because it deals with intra-state trade: Murphy J, after all, said of that decision that it 'set pre-*Engineers* ghosts walking',[46] but it would have to be the most robust of pre-*Engineers* ghosts to invalidate this law; nothing short of the strongest possible idea that intra-state trade is a reserved power of the states, something that the Commonwealth is prohibited from touching notwithstanding that its law is otherwise clearly valid. Our law is not like the law in *R v Burgess; Ex parte Henry*[47] where the Commonwealth sought to extend its interstate trade law into intra-state trade. Our law is one which extends to intra-state trade simply by the implication of its operation on interstate trade. You cannot have the operation without the implication. As I said, only the strongest reserved power doctrine (which we may presume the High Court will not contemplate) could invalidate it by virtue of its intra-state imposition.

Is section 92 perhaps a ground of invalidity? In the old days (pre *Cole v Whitfield)* when the word 'free' ('trade commerce and intercourse amongst the *states* shall be absolutely *free'*) was thought available for any contextually removed speculation it might have been. If something is compulsory (to wit, in our example, interstate trade) it is not free, the argument might have gone. Happily, *Cole v Whitfield* has removed from our constitutional law that context-free mischievousness which so blighted its history. Trade and commerce laws are only invalid under section 92 when they institute a protection of intra-state trade. Well, our law does not do that. In fact it does the opposite. Is it then valid?

Protection, as it has usually been conceived, closes off those parts of the Australian Commonwealth called states to the detriment of the whole. Hence, section 92. Our law making interstate trade compulsory does not do this, does it? It requires the parts to open up into the whole Commonwealth. But hold a moment. Quite precisely it does close parts off to the whole, namely those parts represented by interstate trade. If we think like physicists who, for various purposes, have been required to postulate anti-matter we shall postulate anti-states to make the point. Trade, commerce and intercourse throughout the whole Commonwealth is not in our example absolutely free because it has been legislatively confined to the anti-states: an absolutely protective law in the realm of anti-states! Are not the states (intra-state traders) as much part of the Commonwealth as the anti-states; and as much entitled to a section 92 as the anti-states were to the real one?

This question could not easily have arisen before *Cole v Whitfield.* The old interpretation of section 92 freed interstate trade to the detriment of intra-state trade. But it was not a question of the opening and closing of communities that activated the old interpretation: it was as though section 92 was a rights provision giving a right to one activity (interstate trade) beyond the rights attaching to another, and therefore by definition an advantage. The point can be made by analogy. If a constitution protects freedom of speech, say, and not freedom of conduct, an advantage is given to speech over conduct. So the protection of the anti-states was no surprise or concern under the old

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45 Above n31.
46 Above n31 at 530.
47 (1936) 55 CLR 608.

interpretation. Indeed it would have been odd if the judges responsible for the old interpretation had thought twice about it; not (in their conception of section 92) concerned essentially with the question of the protection of the states (the opening and closing of communities), why should they be concerned with the protection of the anti-states? But *Cole v Whitfield* saw section 92 very differently; and its concern with the protection of the states invites immediately the issue of the protection of the anti-states. Are not the states as communities in the Australian Commonwealth as much entitled to section 92 as the anti-states?

Or, to return to a more conventional way of expressing the point: all Australians are entitled to a section 92 which invalidates both state and interstate protection. The first, as *Cole v Whitfield* shows, is immediately implicit in section 92, freedom from state protection. The second is implicit in that implication. Since it is only freedom from protection that is guaranteed, it is only freedom to the point of competitive equality (as we saw). By these two implications section 92 is seen as working to the establishment of a single Australian community, neither states nor anti-states (thus Murphy J's insight in *Buck v Bavone* that there is a right of Australians "to move freely across *or within* state borders"[48] was a remarkable insight).

This problem is not limited to the question of taxes and charges. *Castlemaine Tooheys Ltd v South Australia*[49] concerned an exceedingly messy set of legislative provisions. The main difficulty in disentangling the issue in that case was that South Australia imposed a requirement of deposit and return on non-refillable bottles whose character was, to say the least, obscure. The broad point of the legislation was not obscure — it was against non-refillable bottles; but it seems (whatever was intended) to have charted a course between a Scylla of outright prohibition of non-refillable bottles (perhaps politically objectionable) and a Charybdis of a government charge (which, latter, would be invalid as a duty of excise). I propose to simplify the issue by considering the case as though it had been one of outright prohibition; as though the state in question had prohibited the cheaper of two methods of presenting an article of commerce (non-refillable bottles were cheaper in various ways than refillable). The advantage of this course for our argument can be seen by reference to one criticism of the legislation made by the court. South Australia exempted refillable bottles from its retail return (return to the retailer) scheme, but not non-refillable bottles. As the court said,[50] if the retail return scheme yielded significant returns (of bottles) why exempt refillable bottles; and if it did not, why impose it on non-refillable bottles? The only answer is that the legislation was (messily) against non-refillable bottles; and so I propose to simplify the issue by supposing that it prohibited them.

The argument in *Castlemaine Tooheys* was that the legislative action against non-refillable bottles was for environmental reasons. But its connexion to environmental protection was as obscure as its method, and I shall

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48 (1976) 50 ALJR 648 at 658. My emphasis on 'or within'; Murphy J's anticipation of the problem of the anti-states.

49 (1990) 64 ALJR 145.

50 Id at 154.

assume in the first place that there is no such justification (this is not necessarily a damaging assumption: legislation is often muddled for obscure political reasons, but, of course, not by that fact invalid.) The High Court held the legislation in *Castlemaine Tooheys* to be protective because although it applied to interstate and intra-state trade alike it protected intra-state trade in practice. The plaintiff's (proposed interstate) trade was in the cheaper article; the great majority of the internal South Australian trade was in the more expensive. To burden the former (on our assumption to prohibit it) in practice protects the latter.

Now it is not apparent that anything could possibly turn on the fact that the (proposed) interstate trader had an established business in the cheaper article: section 92 opened up the states to each other, but surely not only to established traders. Thus it would be sufficient, I shall assume, if the plaintiff in *Castlemaine Tooheys* were merely proposing interstate trade in the cheaper article (I shall shortly consider the case without making this assumption). Now, what happens when the plaintiff's interstate trade is freed by the High Court? The answer is quite obvious: the complete destruction of the intra-state trade. 'Complete' is justified here; for if the cheapness of the interstate article is sufficient to overcome the additional transport (and related) costs on a small scale it is even more sufficient on a large scale. The state in question has two options: it may repeal its legislation so as to allow intra-state traders to change to the cheaper article (in this case non-refillable bottles) and compete; or it may watch its intra-state trade destroyed. And, as in *Bath v Alston*, this has two tendencies. The first (benign) tendency is the destruction of the states' legislative power implicit in the forced repeal (the underlying centralizing movement of the Australian federation). The second (on the assumption that the states do not repeal their legislation) is the protection of the anti-states: a result as objectionable in the matter of the freedom of trade of the Commonwealth community as the protection of the states (perhaps more objectionable because the protection of the anti-states is absurd as well as protective).

The course that the High Court has taken in these two cases is a rather dangerous one because it is by no means certain that the states will simply repeal their legislation. And second, it is even less certain that the Commonwealth will or can fill any legislative vacuum. Its will is in issue for simple political reasons; and for the fact that the matter is not just one of clearcut repeal by the states (clearcut exposure of vacuum), but also of any state's failure to legislate (with an eye to *Castlemaine Tooheys)* the fact and degree of which might not be clearcut, indeed wholly obscure. The Commonwealth's constitutional ability to legislate for the whole of Australian trade is probably established by the corporations power; but it is worth noting what the situation would be if the Commonwealth had to rely upon the interstate trade and commerce power. Simply, the result would be the re-establishment of the protection of the states: the more expensive article is now required of interstate trade and intra-state trade is free to monopolize the trade with the cheaper article. But it gets curiouser. Now, with Commonwealth legislation in place, the ground of the plaintiff's case in *Castlemaine Tooheys* disappears; for they simply have no interstate trade in the cheaper article (it has been *validly* prohibited by the Commonwealth), and so no section 92 claim at all. So is the result of a case like *Castlemaine Tooheys* uniform

Commonwealth and state legislation? The purpose of federation was certainly to establish an Australian Commonwealth; but surely not an Australian Commonwealth with a tredecameral legislature. These questions, of course, are not apparent when judges think only of a static meaning of the words of section 92, rather than think of themselves (and the section) in historical practice.

Three things might seem to alleviate the implications of *Castlemaine Tooheys*. First, it concerned the legislation of only one state. But the principle would be the same if all the states had identical legislation, indeed that case would be the perfect protection of the anti-states: the interstate trade in the cheaper article would overcome all internal trade (internal trade in all states) to the point where the only trade was interstate trade. Second, the case concerned a form of trade that was already established in another state. We have already suggested that section 92 cannot be limited to the freedom of established trade. But, even if it were, establishment in one state would do; and any maverick state would qualify (as it did in *Bath v Alston).* To some extent maverick states are what section 92 was designed to empower; but surely the Australian Commonwealth is not to be Queensland writ large!

The third alleviating factor is that the purpose of the South Australian legislation in *Castlemaine Tooheys* was obscure and its form messy. If it had clearly prohibited all trade in the cheaper environmentally damaging article, and its environmental concern had been rational and, to a degree at least, apparent on the face of the legislation, the judgments suggest that it would have survived. The problem was that although it was quite obvious that the South Australian legislation was directed against the interstate threat it was not at all obvious that it was thereby protective of intra-state trade rather than protective of its refillable bottle regime. The court appears to have taken the position that unless its legislative regime were rational it would assume the worst. There are two concerns here. First, politics is messy, and often messy legislation is the result: it has hitherto been a tradition of our constitutionalism that legislation not be overly tested for its rational connexion to a purpose. Not much legislation easily survives that test. How would South Australia fare standing up before the High Court to demonstrate a rational connexion of its criminal law statutes and its penal regime to the deterrence of criminals? Perhaps in that case it would be permitted to say simply that murder (or whatever) was wrong. Why then was it not simply the case in *Castlemaine Tooheys* that the use of non-refillable bottles was wrong? Even if it were ultimately the case that they were not more wasteful of resources than refillable bottles (the collection of bottles perhaps using more energy than their manufacture), why should South Australia not say that the throwaway life (waste on the ground, so to speak) is itself wrong? Further, such an inefficient (irrational) regime may be the political condition of a later stronger and more rational one (but not after the High Court has intervened). A second concern is that what the High Court would count as proper environmental concern seems rather limited. Of South Australia's concern for finite energy resources the court said:[51]

> The facts recited in the special case, so far as they relate to this issue, are

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51 Ibid.

> extremely meagre and do little to substantiate the defendant's argument. If all beer bottles manufactured in South Australia were non-refillable bottles, the extra energy consumption in the State would be between 0.06 per cent and 0.12 per cent of the total energy consumption in the State. If all beer bottles manufactured in South Australia were non-refillable bottles, then natural gas consumption in the State would increase by about 0.24 per cent. However, as the Bond brewing companies use bottles manufactured outside the State, any increase in their market share in South Australia would reduce the use of the State's resources, including natural gas, in the manufacture of bottles.

But why is South Australia not permitted to contribute to the conservation of *world* energy resources? The argument appears to be that South Australia's interest is advanced by interstate energy consumption. It is as though South Australia is conceived as a commercial enterprise rather than political entity (it must be admitted that much conflicts of laws thinking aids this idea when it talks in terms of states having interests to protect by their legislation; against this *Breavington v Godleman*[52] reasserts the orthodoxy that the states are territorial entities and within their territories may enact legislation of any degree of pretension). The point is perhaps clearer in the second judgment (of Gaudron and McHugh JJ):[53]

> Even if the facts, meagre though they be, are accepted as establishing that non-refillable beer bottles, in some way that is different from refillable beer bottles, add to the general problem of energy conservation in the State of South Australia, the conclusion is inevitable that the different treatment of refillable and non-refillable containers in a law which deals only with beverage containers and which is not part of a general legislative scheme directed to the conservation of the State's energy resources is unlikely to result in an amelioration of that general problem other than to a trifling extent. If, on the other hand, it be suggested that the focus of consideration is the general problem of energy conservation viewed from a national or a global perspective, the legislative regime for beverage containers must be viewed as likely to have an even less significant impact.

The states are not serious contributors to the fundamental human problem of infinite expansion into a finite world. That is true. But the point is not limited to conservation of resources. We have on a very large scale taken ourselves to be masters over the world not members of it: a change here is a change in our most fundamental conceptions of human life and freedom. The states are insignificant in this whole issue, not just that part of it concerned with the conservation of resources.

But so, too, is the Commonwealth. Will the same point then be made in turn against the Commonwealth? The High Court looks anxiously at the rational connexion of external affairs power legislation and treaties. It therefore asks the same sorts of questions as were asked in *Castlemaine Tooheys*. Will the same point be made against the Commonwealth by the High Court's holding invalid a messy "insignificant" Commonwealth implementation of an environmental treaty?; by the Court's holding it to lack rational connexion to the purpose of the treaty, or to be internationally

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52 Above n1.
53 Above n50 at 155.

insignificant? It is easy to lose one's nerve in this matter of insignificance in the whole, world, environmental problem, and collapse into despair. There are two meanings of a local recognition of insignificance. 'Nothing can be done here' might simply mark despair, or it might have the positive meaning of pointing to a wider arena of action. There is no despair in the destruction of the states (we have been arguing throughout this essay) provided that its movement constitutes the construction of the Commonwealth. In the matter of the environment of the world there is no despair in the insignificance of the Commonwealth so long as the world is positively embraced; and embraced with all its imperfections and messy politics. The legislature of this world (we might say) is the treaty processes and their municipal implementations. Will we embrace it with fine test of the rational connexion between the messy politics of a treaty and the messy politics of its (Commonwealth) implementation (like some scrupulous lover making inventory of the other's charms)? Or will we learn to live with movement, and find its law? If the opening up of the states into the Australian Commonwealth has no natural stopping point within the boundaries of the continent is there also no natural stopping-point short of the whole world?

Part 5
Expansion Beyond the Nation-State

The conventional theory that international instruments have no status in Australia unless they are legislatively implemented was expressed in *Bradley v Commonwealth*.[54] We might in the first place wonder just how well-founded this doctrine now is. Can we not now argue that state statutes inconsistent with a Commonwealth treaty are invalid? They are of course invalid under section 109 if inconsistent with valid Commonwealth legislation implementing a treaty. But I mean to ask whether the treaty itself short of Commonwealth implementing legislation might override state legislation. That would be a strong form of Australian constitutionalism extending itself into the world. Originally, the ordinary common law position obtained in Australia whereby the international executive power could not override municipal law without Parliamentary sanction. Griffith CJ's way of putting the point in *Brown v Lizars*[55]shows clearly the foundation of this doctrine.

> It is impossible to hold that the liberty of individuals can now be interfered with without sanction of municipal law.[56]

But the liberty of the subject in their Parliament against executive power (the liberty fought for and won in the seventeenth century revolution) expressed itself also in the common law doctrine that statutes (the liberty of the subject in Parliament) bound the Crown when expressed to do so; and that, too, at one time translated into our constitutional law in the form that Commonwealth executive power was subject to state legislative power *(Uther v Federal Commissioner of Taxation*[57]). *Cigamatic*[58] reversed this holding

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54 (1973) 47 ALJR 504.
55 (1905) 2 CLR 837.
56 Id at 851.
57 (1947) 74 CLR 508.
58 *Commonwealth v Cigamatic Pty Ltd* (1962) 108 CLR 372. For the interpretation of

when the advance of the Commonwealth had reached a point where it was illegitimate to hold the executive power of all the Australian people subject to the legislative power of some (the people of the state in question). Now the question is, does that principle of Commonwealth democratic legitimacy not now apply to the treatymaking power of the Commonwealth? Can the will of some of the Australian people in their state legislatures still block the will of all in their treaties?

In *Cigamatic* two lines of constitutional history crossed. From Magna Carta through the English Revolution, the Reform Acts and universal suffrage, the liberty of the subject in Parliament supplanted the royal prerogative; and spread across the world to become the liberty of the subject in any of the Empire's parliaments. But on a second line of (more recent) history the Australian Commonwealth was growing; and by the time of *Cigamatic* had reached the point where the court was able to pull the first line into the second so that our fundamental liberty became our liberty in the Commonwealth Parliament. This was, of course, a difficult choice, the consigning of liberty to a Parliament of a growing but not yet complete nation; but it was a crossroads, and a choice had to be made with some faith in the future. What further future is in store? There are no new crossroads in the issue between state legislation and Commonwealth treaties: only a small boldness of imagination is necessary to see that issue as flowing from *Cigamatic*. But a new crossroads certainly awaits as the Commonwealth expands into the world and we have to ask whether we wish our liberty to lie in our Commonwealth Parliament and Constitution or in the world.

This is a very big question. But it can become a smaller one when we see that our big categories are outdated. There is a revolution underway in our legal categories, generally. But outside our little world of big ideas, the liberty of the subject in Parliament, the idea of Constitution and treaty, the very distinction between municipal and international law are all surpassed by the collapse of the distance of the world into the micro-technology of information transmission and its global systems (for which global capitalism is much too cramped a term). The issue is, precisely as it was in *Cigamatic*, an issue of faith in history: is our liberty to go backward or forward? I shall conclude the essay with a series of reflections on the nature of love and its relevance to this issue.

Thought of as history, *Cigamatic* was the crossroads I have stated. But thought of as love it represents the essential human paradox: love both concentrates the attention (eros) and expands it (agape). Westminster liberty (our first line of history) was a work of democratic concentration in certain communities, and therefore of loving concentration;[59] *Cigamatic* of expansion. And the paradox is that the greater the concentration (the greater the democratic respect for all in a certain community) the more outward-looking the community becomes. It is simply: the more I love one the more I love their humanness, and the more I love humanness the more I love humans.

Cigamatic stated in the text, see above n1 at 48-56.

59 The way a loving concentration is the foundation of the constitutional law (and rights) of communities I have attempted to show in my *Courts and Administrators* (1989), particularly chapter 7.

Take the example of racism in a community. Racism in its usual manifestations is obviously a failure of love and at the same time a failure of democratic respect. But racism is overcome when the racist oppressors see the humanness[60] of others beneath the colour of their skin. Then communal love (or respect) becomes an openness to the whole world.

Any human relation or transaction is governed by the law of love. The law of love is: treat the other as yourself. I, myself, am end in self. I am in charge of my life, and ultimately cannot think otherwise of myself (it would contradict the fact of *my* thinking anything). Therefore under the law of love, you are end in self as well as I. When a relation is instrumental (the other being means to my end rather than being end in self) the law of love is broken. The other is object, not (free) subject. We have tended to overlook the fact that any human relation is governed by the law of love, and to limit the word 'love' to our grander relations, particularly the well-known hormonal ones. But, as Lord Atkin showed,[61] as simple a commercial transaction as the sale of a bottle of ginger-beer is a relation of love; and the law of love, treat the other as yourself,[62] applies as surely in that relation as it does in the profoundest marriage. The relation is more limited in the former case (limited to a bottle of ginger-beer) than in the latter (which is a relation over the whole of the lovers' lives); but the law of love 'take that care for the other (in respect of the relation) which you would take for yourself' applies as certainly in the limited relation as it does in the profound. So we do not need, so to speak, to marry the world: selling ginger-beer to it (trade, commerce and intercourse with the world) is sufficient for the expansion of love. We should never forget that the fundamental insight of the Australian Constitution was 'trade, commerce and intercourse among the states . . .'. It is these transactions, big and little, the whole multitude of them, that carried the line of moving history which constructed the Australian Commonwealth. And it is the fundamental insight of the expansion beyond these shores that it will be in trade, commerce and intercourse. Of course the law of love often needs to be asserted by courts, as *Donoghue v Stevenson* showed. Stevenson no doubt thought to expand his trade, but the loving attention in that expansion whereby he took that care for the others (affected by his act) which he would take for himself was lacking and needed to be asserted as law by the House of Lords. And it will need to be asserted in international transactions, as well.

What is the constitutional meaning of all this? Simply, that constitutional marriages (constitutions) are inflated things; not necessary for love, nor for the law of love. Thus a formal end of the states in our law (constitutional divorce, so to speak) is no more a condition of the continued expansion of our trade commerce and intercourse than is a formal beginning of a new constitutional law (a constitution of the world). We made this point earlier in terms of history and practicality, constitutions (words) circumscribing neither; but now the point is that love, too, has no need of formality, and will not be

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60 See above n59, chapters 1 and 7 for this conception of humanness.

61 In *Donoghue v Stevenson* [19321 AC 562.

62 The law of love is the fundamental principle of all our laws. In "Australian Law: Freedom and Identity" (1990) 12 *Syd LR* 482 I suggested that freedom was the fundamental category of the common law. Love is freedom plus goodness (the latter a resting place for freedom). See my *The Law of Love* (in preparation).

circumscribed. In *Commonwealth v Tasmania* Murphy J said:

> The preservation of the world's heritage must not be looked at in isolation but as part of the co-operation between nations which is calculated to achieve intellectual and moral solidarity of mankind and so reinforce the bonds between people which promote peace and displace those of narrow nationalism and alienation which promote war. The United Nations came into being because of the Second World War. In its constitutive documents, proceedings and evolution over forty years, there has been a continuing emphasis on removing the causes of war — the denial of human rights and intense nationalism. Thus the preamble to the United Nations Charter (1945) states:[63]
>
> > "We the Peoples of the United Nations determined to save succeeding generations from the scourge of war, which twice in our lifetime has brought untold sorrow to mankind . . . and for these ends to practice tolerance and live together in peace with one another as good neighbours . . . have resolved to combine our efforts to accomplish these aims."

So, is the love that expanded the Australian colonies into the Australian Commonwealth (the movement of that love) to keep growing? Is Murphy J's judgment in that case that the World Heritage Acts were valid to be read more as an exercise in supra-national constitutionalism than national (though preserving the form of the national, just as the federation-transcending movement, the subject of the first part of this essay, still preserves the form of the federal)?

Love never owns anything. Isolated in a stolen land, and one that we have not begun to understand (Europeans out of place), is the expansion of love our means of rejoining the world, whereby the world becomes our place, Australia dying with its true peoples? I cannot see how we can understand Australian aboriginality (a nonowning relation to land) until it is too late; but that does not preclude us from a world as place. Our outward movement is a movement in history. History is never static (we have been arguing), but nor is it static for any given now. The point, as we put it earlier in relation to *Engineers* and Windeyer J's recognition of it as in movement, is not (static) ex post facto recognition, but a recognition of that movement at its actual time: for the *Engineers case* its time, and for us, our time. The point is to understand ourselves in movement now, and this means to understand history as both behind *and in front of* any given now. This point requires a little thought. Some might correctly reject the idea of history as the static past, embracing instead the idea of history now. But history as the future cannot be so dismissed; for any 'now' is, before I have finished this sentence, the static past. Therefore history is movement, future as well as past. History as that which is just behind is never history in movement; and therefore not history. Our historical neighbours, then, include the future generations.[64] In respect of them, too, the law of love is clear: the law, love the other as yourself, translates into the conservation of the world to give those generations the same opportunities as our own. Not exactly a love of place, this may still do: at least it precludes our thinking of ourselves as owners (conquerors) of place.

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63 (1983) 57 ALJR 450 at 508.

64 This too is a real relation, for time is no less a real dimension than space.

The only thing we need here is to understand the law of love; for there is nothing in love except the law of love. We have thought of love as some sort of inter-personal force (the personification of eros is perhaps at fault); as some magical thing that comes over us (falling in love, and other such romantic drivel). But it is not. Love is the hardest, most lawful thing in the world. It obtains (as we have been arguing) in the most trivial relation as strongly as in the most important (though not as extensively, in the sense only that the relation in its own terms is not as extensive: buying a bottle of ginger-beer is not as extensive a transaction as marriage). And we have thought that spatial contiguity rather than temporal is the field of love (no doubt the idea of force is at fault here, too); but there is no justification for limiting neighbourdom to the spatial. Eros is real, but the temporal is as real a dimension as the spatial. And so it is an interesting fact that the most recent and most important external affairs cases in Australian constitutional law have been environmental: that the expansion of love implicit in them is both spatial and temporal.

Financial deregulation and the pulling-down of trade barriers opens us out into a world in which size and distance have collapsed into the micro-technology of information transmission. But these are real events, not states created by law; just as the making of the Australian Commonwealth was a real event not a state created by the law of the Constitution. Love is real: in love the other is particular and therefore real. If the other is ideal (a set of qualities, for example) then the relation is not a loving one: it is a relation to the ideas and their images not to the reality of the irreducibly particular other. This is a relation of the law of love. I am myself real and particular, not an idea or image of myself. Therefore the other, too, is particular not a set of ideas or images that I have of the other. So it is not enough to think that the 'moral solidarity of mankind' (as Murphy J put it) is a good idea: there have got to be real relations for the real law of love to apply. In *Re Limbo* Brennan J made this point:[65]

> But when one comes to a court of law it is necessary always to ensure that lofty aspirations are not mistaken for the rules of law which courts are capable and fitted to enforce. It is essential that there be no mistake between the functions that are performed by the respective branches of government. It is essential to understand that courts perform one function and the political branches of government perform another. One can readily understand that there may be disappointment in the performance by one branch or another of government of the functions which are allocated to it under our division of powers. But it would be a mistake for one branch of government to assume the functions of another in the hope that thereby what is perceived to be an injustice can be corrected. Unless one observes the separation of powers and unless the courts are restricted to the application of the domestic law of this country, there would be a state of confusion and chaos which would be antipathetic not only to the aspirations of peace but to the aspirations of the enforcement of any human rights.

The reality of our particular constitutional arrangements is here set against the chaos of ideas gone mad. Brennan J's point (and the argument that we

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65 (1989) 64 ALJR 241 at 242.

have been making about reality) is Plato's argument that the way to agape (universal love) is through the reality of erotic love: only on the wings of eros, as it used to be put, can we eventually cast off "the base and mean-spirited devotion to a particular example of beauty";[66] in plain terms, the more truly I love one the more truly I love all. But the paradox of this should again be emphasised. Love is both concentrating of attention and expanding. Love is bold, confident and trusting, never hiding itself from the world. If the Australian colonists had been suspicious of their immediate neighbours they would have been even more suspicious of their intercolonial ones. Had they been secretive and untrusting no section 92 would have made them otherwise. Brennan J's erotic concern with the local is thus true to the paradox of love. But it can define no permanent local; no stopping-point for the expansion of true local love.

We may on this point compare the dissent of Deane J in *Richardson v Forestry Commission*,[67] and the suggestion it makes for one of the futures of Australian constitutional law. Deane J held that the Commonwealth statutory regime protecting certain areas in Tasmania for world heritage purposes went beyond what was proportionate to the purposes:[68]

> When that question is fairly faced, the material before the Court leads inevitably to the conclusion that there has been no real effort made to confine the prohibitions of the overall protective regime, with the overriding of the ordinary rights of citizens and the ordinary jurisdiction of the State of Tasmania which it would involve, to activities which it might reasonably be thought represented some real actual or potential threat to what might properly be seen, for the purposes of the Convention, as natural or cultural heritage.

Now, the ordinary jurisdiction of Tasmania as a limit on Commonwealth power is a reserved power argument. A provision is not the less with respect to a matter of federal power because it is also with respect to the ordinary jurisdiction of Tasmania; and nor is it this because it fails to take into account the ordinary jurisdiction of Tasmania (a Commonwealth provision does not cease to be A because it is also X; and nor does it cease to be A because it is also not-X). State reserved powers, unless history is to be stood on its head, are not the future. But the other restriction in Deane J's holding, 'the ordinary rights of citizens', may be. And for this line of thought there is a much stronger recent pointer to be found.

Davis v Commonwealth[69] concerned the power of the Australian Bicentennial Authority to prevent the use of symbols and expressions connected with Australia's (European) bicentennial celebration in 1988. Certain groups associated with the Aboriginal cause sought to use bicentennial expressions to make point against the celebration (for example: "200 years of suppression and depression"). Now, the power of the Commonwealth Parliament to legislate for the bicentennial, a national affair, was clear enough. Nor could it be doubted that if the Commonwealth could run a bicentennial celebration it could also on the ordinary doctrine of incidental power *(Burton v Honan)*[70]

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66 *Symposium*, 210C.
67 (1988) 62 ALJR 158.
68 Id at 175.
69 (1988) 63 ALJR 35.

do what is instrumental to the efficacy of the celebration. Thus on ordinary principles it could hardly be doubted that the Commonwealth had power to prevent any disruption of the celebration occasioned by the injection of unsympathetic comment. Nevertheless, the High Court found, in the words of Mason CJ:[71]

> This extraordinary intrusion into freedom of expression is not reasonably and appropriately adapted to achieve the ends that lie within the limits of constitutional power.

A thing is not less instrumental in achieving a purpose because it is a denial of freedom of speech. In fact the reverse is the case, as any tyrant knows. In our constitutional forms, a law is not the less with respect to a certain subject matter or purpose of power because it is also with respect to X (in this case freedom of speech). Only if X is positively reserved from power is this logic (this logic which has naturally 'eroded' the states) reversed. And why should it not be reserved? We come here to the most fundamental point of constitutional thought. What the states are, or are reserved to be, is as our constitutional history has shown and continues to show, a controversial, speculative and illogical thing. Nor is any content at all to the conception of states necessarily required by the historical Constitution (as we have put it in the first part, X might by history become, and be intended to become, not-X). But what history can never reverse is the fact that it is itself human history. The more specific version of this fact for our purposes is that the Constitution (and its history) is a human enterprise; so a positive reservation in favour of humanness (human constitutional relations and the rights they entail) can without the logical error of reserved powers be taken to be one of its fundamental postulates. On this view of the matter *Davis*, though it escapes the illogicality of reserved powers, might seem to represent a positive limitation on the expansion of Commonwealth power. But this would be a mistaken view. *Davis* is a continuation of the expansion of human love which constituted the Commonwealth. Under the paradox of love the recognition of the rights of another human is no real limit on expansion: the more Australians respect the true rights of each other the more we respect the true rights of all. Rights, like love (of which they are an aspect), define no permanent local.

In *The Spirit of the Laws: Republicanism and the Unfinished Project of Modernity*,[72] Andrew Fraser makes a radical defence of the local and finds Australian constitutional discourse to have:[73]

> simply ignored, repressed, forgotten, or denied the existence of rival understandings of the federal polity grounded in the texts of republican political theory or in the institutional architecture of the classical *polis*. The inevitable result of that hermeneutic closure has been to impoverish constitutional discourse within the British dominions.

Fraser argues for a return to a conception of the states as expressions of

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70 (1952) 86 CLR 169.
71 Above n69 at 41.
72 Fraser, A, *The Spirit of the Laws: Republicanism and the Unfinished Project of Modernity* (1990)
73 Id at 352.

mature, local, civic virtue; whose place in the federation has a certain final sense, not as I have argued and am here further arguing, a sense losing itself organically in an expanding Commonwealth. "The political theology of sovereignty", Fraser writes[74] (and he includes in that idea the teleological sovereignty of an expanding Commonwealth) "seems to have become infected with a deepening and potentially fatal incoherence as the global reach of capitalist development exposes the obsolescence of the nation-state". A return to the civic virtue of a confederal polity is for him the institutional precondition of a good and just life.[75]

But I believe it is a mistake to see any civic forms as uniquely constitutive of the good life. It is a mistake rather like that which we have made in thinking love to be something which occurs only in our big relations (such as marriage). When we see that the law of love (love the other as yourself) obtains as fully in the sale of a bottle of ginger-beer (for its purposes and nothing more: I mean, love the other as yourself for nothing more than the purposes of the sale of the ginger-beer) as it does in a marriage or a republic (for their rather more extensive purposes); and when we get rid of our romantic delusions and see that there is nothing in love except the law of love; then state and civil society, constitutions, commonwealths, municipal law, republics big and little, and philosophies of the good and just life, all collapse into the law of love.[76] And so the expansion of the Australian Commonwealth beyond the continent is simply the expansion of its trade, commerce and intercourse (just as the expansion of the Australian states was the expansion of their trade, commerce and intercourse). No new constitution of the world is necessary or relevant; nor (for us) the termination of the old one. The place of constitutional law will simply be to assert and enforce the law of love in that expansion. Fraser is certainly right to think of the global reach of capitalist development and the obsolescence of the nation-state. But we have hardly begun to think of a constitutional law within capitalism. We will need to find the law of love within global, corporate capitalism; and the first step will be to stop thinking of corporations as persons, as though it is they that have relations of love rather than the humans in and around them. We will see corporations and the whole interrelated economic system as forms for human (loving) relations, just as in the old constitutional mode we saw governments and governmental systems (and constitutions) as these forms. It is of course possible that global, corporate capitalism is a tyrant; and that in the new public law we begin again the slow march to democracy (the opposite of *Cigamatic:* here we would pull the historical line of communal expansion into the line of democracy).[77] However that may be, corporation law and international trade commerce and intercourse law will be the new public law. To conclude: There is no stopping-point in the expansion of love (no limit to trade, commerce and intercourse), but the condition of the expansion (the public law of that expansion) is the lawful condition of all human relations, whether they are big or little, or in space or time: love the other as yourself. And this is the lawful line of human history.

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74 Id at 374.
75 Id at 375.
76 And lawyers will have much work to do.
77 See the earlier discussion of *Cigamatic* and its cross-roads of historical lines.