FORM AND SUBSTANCE: 'DISCRIMINATION' IN MODERN CONSTITUTIONAL LAW*

LESLIE ZINES*

1 THE POSITION BEFORE STREET'S CASE[1]

The concept of discrimination has been assuming a greater role in various aspects of constitutional interpretation. It has been prominent for many decades in the area of implied federal restrictions on Commonwealth power to bind the States, which received some revitalisation in the *Queensland Electricity Commission v Commonwealth*.[2] It has, more recently, become the central core of the operation of s 92 of the Constitution (*Cole v Whitfield*).[3] It has been given new life and prominence in the application of s 117 of the Constitution in *Street v Queensland Bar Association*.[4] Four judges in *Philip Morris Ltd v Commissioner of Business Franchises*[5] (Dawson, Toohey, Gaudron and McHugh JJ) suggested that there were something to be said for the view - earlier supported by Fullagar and Murphy JJ - that the test for an excise duty should be whether a tax discriminated against goods manufactured in the State in which the tax is levied. This, however, must await a complete judicial review of the operation of s 90.

Yet, up to now those provisions of the Constitution (apart from s 117) which expressly refer to discrimination or concepts that include that expression, such as "uniformity" and "preference" have, as a result of interpretation, been given a reduced role and have had, as a result, a minimal effect as a restraint on federal policies. The main provisions are in ss 51(2), 51(3), 99 and 102. While there is sometimes said to be a narrow and a broad view of those provisions, both present views fall short of the robust approach in examining discrimination that one finds in cases concerned with s 92 (such as *Castlemaine Tooheys Ltd v South Australia*[6]) and s 117 (*Street v Queensland Bar Association*[7]). The questions I wish to raise are: (i) will this change? and (ii) should it change?

In *Elliott v The Commonwealth*[8] Latham CJ reduced s 99 of the Constitution to formal significance. In that case a licensing system for the employment of waterside workers applied to some ports, such as Sydney, but not to others, such as Fremantle. Assuming there was a preference to one over the other (which Latham CJ did not accept) he held that the legislation was consistent with s 99 because, although there was a preference to a locality

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* The extended notes which follow are based on separate talks which were given by Professor Leslie Zines and Geoffrey Lindell, Reader in Law, both of the Australian National University. The talks were given to the Government Law Interest Group at the Australasian Law Teacher's Association meeting held in Canberra in September 1990.

1 The analysis in this section appears in L Zines, *The High Court and the Constitution* (3rd ed 1992), 372-5.

2 (1985) 159 CLR 192.

3 (1988) 165 CLR 360.

4 (1989) 168 CLR 461.

5 (1989) 167 CLR 399.

6 (1990) 169 CLR 436.

7 *Supra* n 4.

8 (1935) 54 CLR 657.

which was in fact part of the State over another locality which was in fact part of a different State, that was not enough. To breach s 99 one had to show that the locality was chosen not as part of Australia, but as part of a State. He considered that the application of the regulations depended upon "the selection of ports as ports and not of States or parts of States as such".[9]

There was no reference as to why the limitation was inserted in the Constitution. He did recognise that his interpretation had rendered the section "largely illusory". But he thought that any other view would lead to the same result. Chief Justice Latham seemed to think that this result was rather strange, because he said that it was "of some relief" to him that "the opposite view is open, from all practical points of view, to substantially the same objection". The opposite view he maintained would uphold preferential treatment which was based, not upon locality alone, but also upon other circumstances. The Chief Justice's view of s 99 did not find favour with the majority in *Commissioner of Taxation v Clyne*,[10] but it was unnecessary for them to decide the question. The remarks in *Clyne* were, however, directed only to whether s 99 or s 51(2) was applicable where the legislation took as its criterion localities which happened to be parts of States. They did not concern the issue of the validity of other criteria which in effect resulted in differences among localities.

In 1974 I commented on a paper by Gareth Evans, who attacked both literalism and legalism in the approach of the High Court to constitutional questions. I raised the issue whether, whatever one may think of the method, the result of a wooden legalistic approach might, from a policy viewpoint, in some cases be more desirable than that which might come from a broader examination of the issues. I instanced s 51(2) and s 99. I said that those provisions

> incorporate a policy that many regard as having little relevance to Australian conditions today. They were inserted because of the fears of the smaller States that New South Wales and Victoria would use their numbers to gain benefits for themselves at the expense of others. Today it might be regarded as inhibiting Commonwealth policy which may be aimed at encouraging growth in particular parts of the country for national reasons. It might, therefore, not be undesirable to have the Court adopt the approach of Latham CJ in *Elliott v Commonwealth* which makes it easier by careful drafting for the Commonwealth to avoid those provisions.[11]

It may be (although this is speculation) that Latham CJ had a similar view. To come to the conclusion that one's interpretation renders a constitutional prohibition illusory is, after all, a remarkable thing to do. As I have said, he showed some uneasiness about that. In another case, he displayed some irritation towards those who argued that the Commonwealth should not discriminate among States. In *Deputy Federal Commissioner of Taxation (NSW) v W R Moran Pty Ltd*,[12] he said that differentiation between localities in Australia might be sound policy:

> There is no general prohibition in the Constitution of some vague thing called 'discrimination'. There are the specific prohibitions or restrictions to which I have referred. The word 'discrimination' is sometimes so used as to imply an

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9 *Ibid* 675.
10 (1958) 100 CLR 246.
11 D Hambly and J G Goldring, *Australian Lawyers and Social Change* (1976) 93-4.
12 (1939) 61 CLR 735, 764.

> element of injustice. But discrimination may be just or unjust. A wise differentiation based upon relevant circumstances is a necessary element in national policy. The remedy for any abuse of the power conferred by s 96 is political and not legal in character.

The point is, of course, that Latham CJ's approach (and, he thought, the alternative approach) did not permit the Court to decide whether a differentiation was based on *relevant* circumstances. He regarded that as a political question.

Morgan v Commonwealth[13] further reduced the importance of s 99 by holding that it was limited to laws that had been made under, or possibly could have been made under, s 51(1) of the Constitution. It was inapplicable to a trading law that could be made only under the defence power. The reasoning was also applicable to s 100 which provides:

> The Commonwealth shall not, by any law or regulation of trade and commerce, abridge the right of any State of the residents therein to the reasonable use of the waters of rivers for conservation or irrigation.

In the *Franklin Dam* case,[14] all the judgments were full of policy arguments relating to the scope of the external affairs power. The reasoning concerned, on the one hand, the role of the Commonwealth in international affairs and its contribution to an evolving world order and, on the other, the requirements of a federal system that the States should have some area of exclusive legislative power. When it came to s 100, which was raised by Tasmania, the approach was very different. Section 100 was held to be inapplicable to the law under consideration. Three of the majority judges followed *Morgan*. Justice Mason said:[15]

> At first glance it may seem somewhat artificial to confine the restriction on legislative power to laws made, or capable of being made, in exercise of one power when a somewhat similar effect in relation to the use of waters of rivers by a State and its residents for conservation or irrigation might be achieved by the Commonwealth in the exercise of other legislative powers. Why, one might ask would the framers of the Constitution confine the pursuit of the objective - the protection of the State and its residents in relation to the use of waters - to some Commonwealth laws but not others?
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> The answer to this question probably lies in the importance of the Murray River to New South Wales, Victoria and South Australia and the residents of those States and the apprehensions entertained by them as to the impact of the Commonwealth's legislative powers under ss 51(1) and 98. Time does not permit an examination of this aspect of our history. And in any event the legal answer to the question is that we must give preponderant weight to the significance of the expression "law or regulation of trade and commerce" used in ss 99 and 100 which, as we have seen, confines the prohibition to laws made, or capable of being made, under ss 51(1) and 98.

We can contrast this with various statements by Mason J regarding the external affairs power. He said[16] that the framers would not have foreseen with any degree of precision, if at all, the expansion in international and regional affairs that has occurred since the turn of the century. "But it is not, and could not be, suggested that by reason of that circumstance the power should now be

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13 (1947) 74 CLR 421.
14 *The Commonwealth v Tasmania* (1983) 158 CLR 1.
15 *Ibid* 154-5.
16 *Ibid* 126-7.

given an operation which conforms to expectations held in 1900." He then went on to say, "Even then, mere expectations held in 1900 could not form a satisfactory basis for departing from the natural interpretation of words used in the Constitution".

In a book review Sir Anthony Mason said:[17]

> Overt attention to policy considerations calls for reasoning of a different order and at times it leads to an uneasy amalgam or compromise between that mode of reasoning to a conclusion and the more traditional analytical method which proceeds to a conclusion on precedent and accepted concepts. A striking illustration is provided by *Commonwealth v Tasmania* (the *Tasmanian Dams Case*). There the majority did not hesitate to base themselves on policy considerations in giving a wide interpretation to the external affairs power. At the same time, they accepted the construction placed on s 100 of the Constitution in *Morgan v Commonwealth*, a decision described by Professor Sawer as one which proceeded from the strictest legalism, without offering other additional reasons to sustain it.

His Honour did not explain why different approaches were taken. It may lie in an unexpressed view that is similar to the one that I had expressed in respect of s 99.

There is a further policy aspect, on a grander scale, namely the legal notion of the sovereignty of Parliament and its concomitant political notion of the electorate as the ultimate master. On this view the important policy is that matters of policy are generally for the legislature to determine. This has led possibly to the view of Mason J and some other judges that powers are to be given a broad interpretation and limitations of power a narrower interpretation. In *Attorney-General (VIC) Ex rel Black v Commonwealth* Mason J said:[18]

> Although in some circumstances it is permissible to construe a grant of legislative power so as to apply it to things and events coming into existence and unforeseen at the time of the making of the Constitution, so that the operation of the relevant grant of power in the Constitution enlarges or expands, a constitutional prohibition must be applied in accordance with the meaning which it had in 1900. As a prohibition is a restriction on the exercise of power there is no reason for enlarging its scope of operation beyond the mischief to which it was directed ascertained in accordance with the meaning of the prohibition at the time when the Constitution was enacted.

It is not clear why this should be so, except on the basis of a bias toward parliamentary supremacy. There is certainly nothing in the Constitution that obviously points in that direction. It was denied by Barwick CJ.[19] Chief Justice Gibbs[20] distinguished a limitation that was a protection of a fundamental human right and one which was not. He implied that a broad interpretation should be given to the former.

In the light of *Street v Queensland Bar Association*[21] it may be that the Court will see a purpose in the discrimination and preference provisions that requires a more policy oriented approach to their interpretation. In that case a narrow construction of s 117 was overruled in favour of a much broader and

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17 (1983) 6 UNSWLJ 234, 236.
18 (1981) 146 CLR 559, 614-5. See also 603 *per* Gibbs CJ, 652-3 *per* Wilson J.
19 *Ibid* 577.
20 *Ibid* 603.
21 (1989) 168 CLR 461.

more "realistic" approach; but s 117 is not in form a mere limitation on power as are the discrimination and preference provisions in s 51(2) and s 99.

But this brings us back to the point I made earlier. Would it be better policy to hold onto the narrower and legalistic approach adopted hitherto? If the Court sees it as its duty to uphold the objects of s 99 and the limitations in s 51(2) and s 51(3) it will be necessary for it to examine the reasons for a difference of treatment, that is to examine legislative purposes and social effects. For example, if similar principles that operate in s 92 and s 117 cases are applied, the Court would examine whether the effect of the law is different in the various States or parts of States and, if so, determine whether the legislative criteria are relevant to some important social interest.[22] The cases that come before the Court may be many, and so might be the disagreements among the judges. There is, of course, no reason in itself why a court should shirk this, and we would expect them not to do so in their interpretation of anti-discrimination legislation, of a Bill of Rights and of s 117. The question, however, is whether it is worth it in the case of s 51(2) and s 51(3) and s 99. I am not as confident about this matter as I was 17 years ago. The questions which it appears to me are relevant and rest on other policy considerations and values, are:

(i) Is it ever desirable to reduce a constitutional provision so as to make it, in a practical sense, illusory or formalistic?

(ii) Is it a judge's duty to uphold the object of constitutional limitations whether he or she thinks they are socially desirable or not? In other words should a judge be able to choose in what areas the law should be fully upheld and in what areas it should be avoided by adopting a different (and formal) method of interpretation?

(iii) Is it possible to devise a principle that would support *Street's* case and yet follow the formalistic approach taken in relation to ss 51(2) and 99? One possible distinction would be that between a limitation on power and an individual freedom. But this does not strike me as a satisfactory distinction.

2 THE POSITION AFTER STREET'S CASE

G J LINDELL

A Introduction

I wish to deal with the effect of *Street v Queensland Bar Association*[23] on the interpretation of the provisions of ss 51(2) and 99 rather than for what the case has to say about s 117 for its own sake. In particular I hope to explain in greater detail the point foreshadowed by Professor Zines, that is whether in the light of *Street's* case it may be that the High Court will see a purpose in the discrimination and preference provisions that requires a more policy oriented approach to the interpretation of those provisions.

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[22] *Cf* D J Rose, "Discrimination, Uniformity and Preference" in L Zines, *Commentaries on the Australian Constitution* (1977) 203.

[23] (1989) 168 CLR 461.

The implications of the case for the future treatment of ss 51(2) and 99 are suggested by the following remarks made by Mason CJ when referring to s 117:

> the section should be seen as a counterpart to other provisions in the Constitution which prohibit discrimination between the States in matters of taxation, trade and finance (ss 51(ii), 92 and 99).[24]

Those remarks match those made by the whole Court in *Cole v Whitfield*[25] suggesting a future need to examine the inter-relationship between ss 51(2), 90, 99 and 102.[26]

I should state at the outset that I cannot hope to answer the three questions raised by Professor Zines but I do intend to raise a fourth question of my own.

The provisions of s 117 state:

> A subject of the Queen, resident in any State, shall not be subject in any other State to any disability or discrimination which would not be equally applicable to him if he were a subject of the Queen in such other State.

B The Decision in Street's Case

In *Street's* case a New South Wales barrister unsuccessfully sought reciprocal admission in Queensland based on the barrister's interstate qualifications obtained in New South Wales. The Queensland admission rules were interpreted as requiring such persons to reside in Queensland and to cease practising elsewhere. After the commencement of the proceedings in the case the same rules were amended to only require that a person practise *principally* in the State of Queensland.

It will be noticed that the same requirements would have applied to Queensland residents who sought reciprocal admission but it would of course be much easier for those persons to satisfy the requirements in question as well as being much less onerous in their application to them. The High Court held that the rules contravened s 117 both before and after those rules were amended.

In his judgment Mason CJ took the view that s 117 renders a disability or discrimination invalid if the notional fact of residence within the legislating State would effectively remove the disability or discrimination or substantially deprive it of its onerous nature.[27] I think the headnote in the Australian Law Journal Reports is correct in attributing this view to the whole Court.[28] It is in effect the approach which Stephen J had adopted in his dissenting judgment in *Henry v Boehm*,[29] namely, that s 117 invites a comparison of the actual situation of the out of State resident with what it would be if he were a resident of the legislating State.[30]

The application of this approach to the facts as regards the rules before they were amended was neatly summarised by Mason CJ:

> My conclusions are:
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> (1) Mr Street is a subject of the Queen resident in New South Wales.

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24 *Ibid* 485.
25 (1988) 165 CLR 360.
26 *Ibid* 398.
27 *Supra* n 23, 489.
28 (1989) 63 ALJR 715.
29 (1973) 128 CLR 482.
30 *Supra* n 23, 486-7 and also the passage quoted by the Chief Justice from the judgment of Stephen J at 488.

(2) The Rules subject him to a disability or discrimination, namely giving up his practice in his State of residence, which would not be equally applicable to him if he were a resident of Queensland. The Rules also subject him to a further disability or discrimination of that kind, namely giving up his residence in New South Wales.

(3) The need to ensure proper professional and ethical standards for the legal profession in Queensland does not justify the imposition of this disability or discrimination upon practitioners resident outside Queensland.[31]

As regards the rules after they were amended they were also invalid because:

> The amendments can be seen to require that a person admitted to practice as a barrister in Queensland practises principally in Queensland. No longer does a person relying upon a previous admission have to reside in Queensland. Leaving aside r.15B, the requirement that a person practise principally in Queensland is one which would be substantially deprived of its onerous nature were Mr Street to reside in Queensland.[32]

It is not intended to embark upon a detailed examination of the judgments delivered by the other members of the Court since for the purposes of this note, at least, they are substantially to the same effect as the judgment delivered by the Chief Justice. It is appropriate however to undertake a brief and general evaluation of *Street's* case and the change which it represents from the approach adopted by the High Court in the past.

C An Evaluation of Street's Case

The approach taken obviously differs from the approach adopted by the Court in relation to the interpretation of constitutional guarantees generally (leaving aside the provisions in ss 51(31) and 92 of the Constitution). The Court emphasised the need to give constitutional guarantees a real and substantial operation. The Justices stressed the need to adopt a liberal interpretation of the guarantees and to reject narrow meanings of terms contained in those guarantees, consistent with the approach the Court has long taken in relation to the interpretation of provisions which define the *scope of the Commonwealth's legislative powers*. The only difference here is that the Court is now prepared to apply the same liberality in construction when it comes to the interpretation of provisions which have the effect of *restricting or limiting legislative powers (State or Commonwealth)*. One is tempted to speculate on whether this case may even be seen as a replica of the *Engineer's* case on the importance of giving full effect to such restrictions or limitations because of their constitutional character.

As has become somewhat familiar in the fields of ss 90 and 92, the Court has rejected what may broadly be referred to as the criteria of liability or operation tests as a sole basis for testing the validity of measures alleged to infringe a guarantee. In other words it is unnecessary to show that a violation has occurred by reference to the wording of the impugned legislative provisions, and that it will suffice if the violation can be established by reference to the factual operation of the provisions. Justice Deane in his judgment in *Street's* case complained:

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31 *Ibid* 493-4.

32 *Ibid* 495.

> There was, in earlier years, a tendency in some judgments of the Court to distort the content of some of these constitutional guarantees by restrictive legalism or by recourse to artificial formalism.[33]

The ability to establish a breach of a constitutional guarantee by reference to the factual operation of impugned provisions is probably sufficiently illustrated by the breach of s 117 which was found to have occurred in *Street's* case itself, for example the differential impact of a residence requirement on interstate residents seeking admission based upon interstate legal qualifications. Unlike the resident of the State in which admission is sought the interstate resident will have to change his or her residence.

Perhaps a simpler example drawn from another field of discrimination law is that referred to in the judgment of Mason CJ:

> So to forbid all persons from wearing a turban is on its face a prohibition applicable to all persons without distinction, but in effect is a discrimination based upon religious grounds because its only impact will fall upon adherents of a creed or religion which requires the wearing of turbans.[34]

So far as the difference in approach regarding s 117 is concerned, the Court rejected, in effect, the following interpretations of that section.

(i) A law only offends s 117 if the disability or discrimination is based solely on residence.

(ii) Regard can only be had to the legal operation of an impugned provision and not to its factual operation.

(iii) The concept of residence to which s 117 is directed involves a degree of permanence.

In doing so it is clear that the Court overruled *Henry v Boehm*. It is by no means clear that the Court as a whole also overruled the case of *Davies and Jones v Western Australia*[35] even though the case was not followed by some of the Justices.[36] In that case the High Court upheld the validity of Western Australian statutory provisions which imposed probate duty upon the estates of deceased persons. The rates of duty payable in relation to beneficiaries who were "persons bona fide residents of and domiciled in Western Australia" were reduced in comparison with those payable generally. The beneficiary who sought to challenge the provisions was neither a resident of, nor domiciled in, Western Australia. Thus since the beneficiary was not domiciled in Western Australia, duty would not have been assessed at the lesser rate under the Act even if the beneficiary had been resident in that State.

Even if the *Davies and Jones* case was not overruled in *Street's* case it seems safe to assume that even if "domicile" is significantly different from "residence" a breach of s 117 is unlikely to be avoided if the sole reason for the operation of a disability is in any given situation only residence; for example where, as regards the provisions considered in *Davies and Jones*, a person is domiciled in Western Australia without being resident there at the relevant time.

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33 *Ibid* 523.

34 *Ibid* 488.

35 (1904) 2 CLR 29.

36 Despite what is suggested in the headnote of the report of the case in 62 ALJR 715, 716. The Justices who either overruled the case, or may have overruled the case, were Deane and Gaudron JJ, *cf* Brennan and Toohey JJ. Dawson J was not prepared to reopen the correctness of the case if it was "confined to the decision and the essential reasoning which led to it" (*supra* n 23, 549).

It is inevitable with the operation of most, if not all, constitutional guarantees, that they will be seen to be subject to some qualification and not be accorded an absolute character. This proved to be the case with the new interpretation attributed to s 117 despite the strengthened character of the guarantee which resulted from the Court's decision in *Street's* case. Amongst the most frequently quoted examples of the qualifications implicit in the guarantee was the ability of States to favour their own residents in relation to such matters as the State Parliamentary franchise and the provision of welfare benefits.

It is possible to contrast the views of Mason CJ, on the one hand, and Brennan J, on the other, in relation to the scope of such qualifications. For the Chief Justice the determination of the qualifications appeared to resemble the concept of regulation under the now discarded interpretation of s 92 before the decision in *Cole v Whitfield*. His Honour was prepared to uphold restrictions in favour of a State's own residents if the restrictions "could be justified as a proper and necessary discharge of (a) State's responsibility to the people of that State, which includes its responsibility to protect the interests of the public". In other words it is necessary on his view to weigh up the objective of s 117 with the protection of the public interest. Although he envisaged the possibility of a State insisting upon compliance with its own regulations and qualifications for participation and entry into professional activities, the residence requirement in *Street's* case was not shown to be necessary in order to ensure proper professional and ethical standards for the legal profession in Queensland.

In this context Mason CJ seemed receptive to obtaining guidance from some aspects of the approach adopted by the United States Supreme Court in the interpretation of the Privileges and Immunities Clause (Article IV, Section 2),[37] in respect of which it has been said that:

> [t]he Clause does not preclude discrimination against nonresidents where (i) there is a substantial reason for the difference in treatment; and (ii) the discrimination practiced against nonresidents bears a substantial relationship to the State's objective.... In deciding whether the discrimination bears a close or substantial relationship to the State objective, the Court has considered the availability of less restrictive means.[38]

The test appears to require the identification of essential State interests, and an inquiry into the reason for the impugned discrimination as well as whether the impugned law is proportional to the advancement of that reason.

As with the other members of the Court, Brennan J also accepted the need to recognise that some limit had to be placed upon the general application of the terms of s 117. He described the limit in terms of an exception of necessity to be derived by a process of necessary implication and one which was to be narrowly confined. An illustration of that implication was provided by the explanation for allowing States to favour their own residents in relation to the franchise. His Honour drew upon the federal implications developed as a limit upon federal legislative power, namely, the necessity to preserve the institutions of State government and their ability to function "as an unspoken premise of all constitutional interpretation".[39] Thus according to Brennan J:

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[37] *Supra* n 23, 491-2.

[38] *Supreme Court of New Hampshire v Piper* (1985) 470 US 274, 284; 84 LEd 2d 205, 213.

[39] *Supra* n 23, 513 and see generally at 512-4.

"[t]he necessity to preserve the institutions of government or their ability to function demands that electoral laws providing for a franchise based on residence in a State be given full effect".[40]

It is tempting to question whether the desire to justify the narrowly confined exception of necessity as a "necessary implication from the Constitution itself" - as if the scope of the implication can somehow be derived from the contemplation of the Constitution, recalls the same kind of faith - some may argue a misplaced faith - which previously attended the judicial interpretation of s 92.

D The Implications for Sections 51(2) and 99

The potential relevance of the Court's approach to the interpretation of s 117, in relation to the restrictions on legislative power created by ss 51(2) and 99, seems difficult to deny. This is especially so given the current invocations of the need to ensure that substance triumphs over form not only in relation to s 117 but also other provisions such as ss 90 and 92. It will be necessary to establish that there is something special about the restrictions on legislative power contained in ss 51(2) and 99 if they are to escape the force of the Court's rhetoric.

On a more specific level the kind of device adopted in the *Davies and Jones* case may be ineffective in this area as well. The device referred to here is that of making a disability or discrimination operate by reference to *residence* and *some other factor or circumstance*. Professor Zines has adverted to Latham CJ's understanding that the wider and opposite view of discrimination and preference provisions would uphold preferential treatment which was not based upon locality alone but also upon other circumstances, that is a law which differentiated between localities might be compatible with s 99 if its operation was conditional on some fact or circumstance beyond mere connection with a locality.

Even if the other factor or circumstance is to be effective as a ground for a disability or discrimination the Court will doubtless closely scrutinise its character to determine whether it is really different to "residence" in s 117. The same tendency can be expected with the application of ss 51(2) and 99 if the prohibitions contained in those sections are to be given a real and substantial operation.

A further possible source of relevance is likely to lie in the corresponding need to accept that the prohibitions created by ss 51(2) and 99 are not absolute but are also subject to implied limitations. The methodology adopted for ascertaining their scope may well be similar to that adopted for ascertaining the scope of the implied qualifications to s 117. Both Professor Zines and Mr Rose have, I think, adverted to the difficulties which are likely to attend the performance of such a task.[41] Perhaps, however, these difficulties will elicit the following response which was once given by the Privy Council in the long and complicated history of the judicial interpretation of s 92:

> In the application of these general propositions [in determining whether an enactment is regulatory or something more or whether a restriction is direct or

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[40] *Ibid* 513.

[41] *Supra* text at n 22 and D J Rose, "Discrimination and Preference" in G Brennan (ed), *Constitutional Reform and Fiscal Federalism* (1987) (Centre for Research on Federal Financial Relations, ANU Occasional Paper No 42, 1987) at 61-81.

> only remote or incidental] there cannot fail to be differences of opinion. The problem to be solved will often be not so much legal as political, social or economic. Yet it must be solved by a court of law.[42]

The problem will only arise, of course, if the Court will be prepared to give the restrictions on legislative power created by ss 51(2) and 99 a real and substantial operation.

Professor Zines has asked in his third question whether it is possible to devise a principle that would support *Street's* case and yet follow the formalistic approach taken in relation to ss 51(2) and 99? It is, I think, interesting to observe that the High Court failed to address essentially the same issue during the hey-day of the individual rights theory of s 92. This was so despite the fact, as another writer once indicated, that "the words of s.92 and s.99 are both general in expression and both alike originated in the realm of politics and economics rather than that of individual juristic rights". The same writer had adverted to the "tendency to water down the force of the constitutional inhibition contained in s.99" as surely reflecting "an underlying conviction that no serious danger to the federal order may be anticipated from legislation containing preferential elements generally". He also thought that it was "implicit ... that the interpretation of general constitutional provisions such as s.99 and s.92 cannot be explained entirely as a process of linguistic exegesis" even if the process is "broadened by the traditional reference to 'to the document as a whole' and qualified by references to 'the context in which they are to be found'".[43]

E A Fourth Question

Certain remarks of Toohey J in *Street's* case draw attention to a further issue which concerns the possible existence of implied restrictions against discrimination. His Honour referred to the principle that "Australia was to be a commonwealth in which the law was to apply equally to all its citizens".[44] It is not entirely clear whether Toohey J meant to suggest that the principle in question operates generally or whether it operates only to the extent to which it is given explicit recognition in provisions such as s 117. If the former was intended it recalls the reference made by Deane J to an "implication of the underlying equality of the people of the Commonwealth under the law of the Constitution" as being arguably implicit in the written words of the Constitution.[45]

There is a strong theme of equality which runs through the judgments of Deane J on constitutional interpretation. It is noticeable that whereas the majority refer to s 117 as one of the few guarantees of individual rights, his Honour begins his judgment by providing a catalogue or provisions which are supposed to show that it is superficial and potentially misleading to state that the Constitution does not contain a Bill of Rights.[46]

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42 *The Commonwealth v Bank of New South Wales* (1949) 79 CLR 497, 639.

43 P D Phillips, "Trade, Commerce and Intercourse" in R Else-Mitchell (ed), *Essays on the Australian Constitution* (lst ed 1952), 241-242.

44 *Supra* n 23, 554 where reference is made to M Detmold, *The Australian Commonwealth* (1985), 77. Reference to the same principle is repeated *ibid* 559-60.

45 *Queensland Electricity Commission v The Commonwealth* (1985) 159 CLR 192, 247.

46 *Supra* n 23, 521-2.

This leads to the fourth question I foreshadowed earlier. What justification, if any, is there for judges to imply a requirement of equality or an equal protection clause, as it were, in the face of:

(i) express provisions which deal with uniformity, discrimination and preference; and

(ii) the conscious decision of the Framers of the Constitution to reject a Bill of Rights?

Any attempt to treat the express provisions as *mere instances* or *examples* of a more *general* guarantee of equality calls to mind the somewhat divisive kind of debate generated in the United States in relation to the implied right to privacy being justified by reference to the penumbras cast by the various specific rights entrenched in the Bill of Rights.[47]

For some, perhaps, the justification is to be found in the opening words of ss 51 and 52 of the Constitution namely the power of the Parliament "to make laws for the peace, order, and good government of the Commonwealth".[48] Such a justification would seem to conflict however with the rejection by the High Court of the view that the quoted words import justiciable legal limitations on State legislative powers unconnected with the question of the extra-territorial operation of legislation.[49] The rejection was of course fully consistent with the British traditions of Parliamentary Supremacy.

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[47] *Griswold v Connecticut* (1965) 381 US 479, 483; 14 LEd 2d 510, 514.

[48] Query whether Howard meant to suggest that the words quoted in the text recognise the existence of a uniformity requirement in *Australian Federal Constitutional Law* (3rd ed 1985), 18, 37-8. Early textbooks on the Australian Constitution discussed the question whether legislation by the Commonwealth for purely local or State purposes would be *intra vires* and also the power of the Commonwealth to make local laws applicable to part only of its territory, and not applying generally throughout the whole Commonwealth. The discussion was prompted by certain cases decided by the Privy Council on the Canadian Constitution which appeared to suggest that the Dominion Parliament did not have the power to pass only local laws when exercising the general residual power of legislation under s 91 of the Canadian Constitution. Harrison Moore questioned whether the Commonwealth Parliament could, for example, pass an Insolvency Act for the State of Victoria, or a Divorce Act for New South Wales, or an Act establishing old-age pensions in South Australia, and not elsewhere. He concluded that legislation by the Commonwealth Parliament for purely local or State purposes would "not be *intra vires*" except in the case of the exclusive powers of the Commonwealth, but that Commonwealth legislation could in general be directed to a particular State or States if it appears to be part of a scheme for effecting an object of common interest: see W Harrison Moore, *The Constitution of The Commonwealth of Australia* (2nd ed, 1910), 283-6. The correctness of that view was rejected by Kerr apparently on the grounds that in the Canadian Constitution exclusive legislative powers are granted to the Provincial Legislatures in matters of a local or private nature (under s 92 (16)), and also because the existence of express prohibitions on discrimination in the Australian Constitution attracted the operation of the principle *expressum facit cessare tacitum* ("when there is express mention of certain things, then anything not mentioned is excluded"): *The Law of the Australian Constitution* (1925), 70-1. The same issue was discussed in J Quick and R Garran, *The Annotated Constitution of the Australian Commonwealth* (1901) 512-5, who also adverted to the unsuccessful attempt made by Inglis Clark to delete the words "peace, order, and good government of the Commonwealth" from the opening part of s 51. The present writer supports the view expressed by Kerr. For the modern position in Canada and also a modern treatment of some of the Privy Council cases referred to by Harrison Moore see P Hogg, *Constitutional Law of Canada* (2nd ed, 1985), 305 n 100 and chapter 17 especially at 375-83 including n 53, 379.

[49] *Union Steamship Co of Australia Pty Ltd v King* (1988) 166 CLR 1. See also *Polyukhovich v The Commonwealth* (1991) 172 CLR 501, 529, 605-6, 635-6, 695 and 714 where McHugh J said: "The words 'peace, order, and good government' are a recognition of the fact that, for the purposes of constitutional theory, 'the purpose and design of every law is to promote the

Although the High Court rejected the attempt to import such limitations it nevertheless left open for future consideration:

> Whether the exercise of that legislative power is subject to some restraints by reference to rights deeply rooted in our democratic system of government and the common law ....[50]

I have thought for some time that there is an increasing trend which shows that the Court is increasingly becoming preoccupied with the question of fairness and justice as a ground for impugning the validity of legislation. The suggested existence of an implication of "underlying equality", although clearly yet to be adopted by the whole Court, certainly illustrates this trend so far as certain individual members of the Court are concerned.

Before leaving the question I have raised I should make it clear that there is a very significant difference between the Court's democratic mandate to give a real and substantial operation to the express restrictions on legislative power and the Court implying the existence of such restrictions. This is not to deny the legitimacy of implications altogether but to point to the fragile basis upon which they rest and the danger of judges leaving themselves open to the objection that their decisions are based upon an

> implication drawn from what is called the principle of 'necessity', that being itself referable to no more definite standard than the personal opinion of the Judge who declares it.[51]

F Summary

In conclusion Professor Zines has drawn attention to old cases which adopt narrow and restrictive judicial techniques in the interpretation of the prohibitions against discrimination and preference in ss 51(2) and 99. The Court has now discarded old cases which embody similar techniques in relation to s 117 ostensibly because of the need to give full effect to constitutional guarantees and "the triumph of substance over form". But are the provisions of ss 51(2) and 99 different because:

(i) those provisions do not provide for constitutional guarantees to individuals but only operate as restrictions on legislative power; and

(ii) to give those provisions a substantial operation would defeat the ability of the Commonwealth to assist the States which those prohibitions were meant to assist?

What kind of qualifications will be recognised if the restrictions are given a real and substantial operation? Finally I have raised a further question to be added to the list of questions raised by Professor Zines: what justification is there for judges to imply a general requirement of equality and thus prohibit discrimination in the operation of *all* Commonwealth laws notwithstanding the deliberate decision of the Founders to provide for the existence of express provisions which prohibit discrimination in only *certain* kinds of Commonwealth laws?

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welfare of the community': Harrison Moore, *The Constitution of the Commonwealth of Australia* (2nd ed 1910), 274-5, cited in *Reg v Foster per* Windeyer J ((1959) 103 CLR 256), at p.308."

50 *Union Steamship Co of Australia Pty Ltd v King* (1988) 166 CLR 1, 10.

51 *Amalgamated Society of Engineers v The Adelaide Steamship Co Ltd (The Engineers' case)* (1920) 28 CLR 129, 142.

G Postscript

After this note was written the High Court heard and dismissed a challenge to the validity of s 4(1) of the Commonwealth Prisoners Act 1967 (Cth) in *Leeth v The Commonwealth*.[52] The provisions of that sub-section provided in effect that the minimum terms of imprisonment in respect of federal offenders serving sentences in a State or Territory should be fixed by reference to the minimum term of imprisonment applicable for like offences imposed by the laws of those States or Territories. There were marked differences in the minimum terms of imprisonment provided for between the various States and Territories. The validity of the provisions in question was challenged on the ground that the substantial differences between the State or Territory laws required or permitted the unequal treatment of offenders, and thus were discriminatory and repugnant to the Constitution.

In dismissing the challenge, Mason CJ Dawson and McHugh JJ rejected the existence of a general implication from the Constitution which required Commonwealth laws not to discriminate or to operate uniformly. The remaining justice in the majority, Brennan J, observed that it "would be offensive to the constitutional unity of the Australian people 'in one indissoluble Federal Commonwealth,' recited in the first preamble to the Commonwealth of Australia Constitution Act 1900, to expose offenders against the same law of the Commonwealth to different maximum penalties dependent on the locality of the court by which the offender is convicted and sentenced".[53] Justices Deane and Toohey thought the provisions under challenge were invalid because they violated the doctrine of legal equality which was implicit in the Constitution. The remaining justice in the minority, Gaudron J, thought the same provisions violated s 71 of the Constitution since their discriminatory nature had the effect of conferring upon courts the exercise of powers which were inconsistent with the judicial process.

The case leaves unresolved the existence of an *implied* constitutional requirement of equality before the law.

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[52] (1992) 66 ALJR 529 (*per* Mason CJ, Brennan, Dawson and McHugh JJ; Deane, Toohey and Gaudron JJ dissenting.)

[53] *Ibid* 537.