THE POLICE POWER OF THE STATES IN THE UNITED STATES AND AUSTRALIA

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I

THE AMERICAN POSITION

It seems generally admitted that the term ' police power ' was first used in 1827 by Marshall C.J. in *Brown v. Maryland.*[1] However the concept which underlay this term was not new.[2] References to ' regulations of internal police ', ' matters of police ' *etc.* are found in the writings of such eminent eighteenth century authors as Montesquieu, Blackstone, and Vattel. These terms found an early use in newly independent America.[3]

The meaning of these terms is vague. In the main it would appear that the term ' police ' referred to the ' internal regulation and government of a kingdom or state '.[4] As such, it stood in contrast to the regulation of external affairs, including foreign commerce. Often it was given a more limited meaning; the power to tax, the power of eminent domain, and perhaps the administration of justice were all separated from it.[5] Thus the police power in a sense was regarded as a residuary power to legislate for the general welfare after the specifically identifiable powers of the States had been deducted.

Today such a residuary power might be regarded as limited only by paramount constitutional authority and the limits of territoriality. But in the eighteenth century the colonial legislatures were not viewed as local copies of the Mother of Parliaments at Westminster. In the first place, of course, the doctrine of the unlimited power of that body was as yet far from established. Indeed the colonists most strongly disputed parliamentary claims based on such doctrine,[6] and even its English protagonists showed signs of doubt.[7]

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[1] (1827) 12 Wh. 419, 433.

[2] Cook, ' What is the Police Power ? ' (1907) 7 *Columbia Law Review* 322, 326.

[3] For a full discussion of the early use of this term, Crosskey, *Politics and the Constitution in the History of the United States* (1953) i 145-155 and references there cited.

[4] Webster, *American Dictionary of the English Language* (1828).

[5] W. R. Bierly, *The Police Power—State and Federal* (1828).

[6] T. F. T. Plucknett, ' Bonham's Case and Judicial Review ' (1926) 40 *Harvard Law Review* 30, 61-68. Extra-territorial authority of Parliament, as opposed to that of the Crown was also in doubt. Kennedy, *Essays in Constitutional Law* (1934) 8-15 and *vide* 6 Geo. III, c. 12 (an Act declaring the American colonies subordinate to the Imperial Parliament).

[7] Plucknett, *op. cit.* 49-61.

More to the point, however, were the limitations imposed on the colonial legislatures themselves. The colonial charters or other documents creating a local legislature usually contained an express limitation to the effect that the enactments of the local legislature should be ' as near as conveniently may be agreeable to the forms of the laws and policies of England '.[8]

From this clause a twofold limitation could be deduced. In the first place the colonial legislatures were not to be allowed to encroach upon matters of Imperial interest, especially those embodied in the laws relating to navigation and trade. Not only were the colonists prevented from passing laws on matters clearly extra-territorial, such as the creation of Courts of Admiralty with jurisdiction over the high seas, but they were also prevented from passing legislation, which, though it had only domestic effect, nevertheless interfered with the Imperial policies underlying the trade laws. Thus the concept of ' burdens on commerce ' was not new. It was applied to British commerce and to a lesser extent to intercolonial commerce in order to protect the same from undue restraint.[9]

The other limitation was that implicit in the maintenance of the common law rights of Englishmen. Sometimes ' the Liberties and Immunities of free and natural subjects' were granted expressly to the colonists by the terms of the Charter.[10] But even without such an express guarantee it was understood that laws which unjustifiably abridged such liberties and immunities were not agreeable to the laws of England.[11]

Hence the competence of the colonial legislatures was to make such domestic regulations as were consistent with the Imperial framework in which they acted and the traditional common law rights of the settlers except in case of overriding necessity. The instrument used to keep them in line was not a judicial body, but the royal prerogative of veto and disallowance. Colonial laws were scrutinized at first instance by the Board of Trade and the decision to disallow was taken by the Committee of the Privy Council on Affairs of Trade and the Plantations. Whilst disallowance was often decided upon purely as a matter of political convenience by a primarily political authority, the Board would normally seek the advice of the Law Officers of the Crown.[12] Acting on legal advice the Board would fulfil not only a political, but also a constitutional role. The Judicial Committee of the Privy Council was a far less effective body. There are only three known constitutional appeals from the

[8] Clark, *Colonial Law* 28.

[9] Oliver M. Dickerson, *American Colonial Government 1696-1765* (1912) 234-263.

[10] Zechariah Chafee Jnr, ' Colonial Courts and the Common Law ' (1945), *68th Proceedings of the Massachusetts Historical Society* 132, 134-137. How effective these limitations were is a different matter, Crosskey, *op. cit.* n. 3, and A. M. Schlesinger, ' Colonial Appeals to the Privy Council ' (1913) *Political Science Quarterly* 279, 433.

[11] *Bowman v. Middleton* (1792) 1 Bay 252, (South Carolina).

[12] Clark, *op. cit.* n. 8, 41-43.

American colonies. The first decision, *Winthrop v. Lechmere*,[13] held a colonial statute invalid on the ground of repugnancy to the law of England. In the second case the colonial statute was upheld on the ground that it had been considered, but not disallowed, by the Crown.[14] The third case overruled *Winthrop v. Lechmere*.[15]

It could be argued that the First Empire was organized on a quasi-federal basis. On the one hand the colonies had a limited autonomy, subject to the supervisory powers of the Crown. On the other hand it was a fact that the Imperial Parliament had passed little legislation dealing with the internal affairs of the colonies, other than on the subjects of trade and navigation.[16] The colonists were used to the concept of a limited legislative power, limited not only by the existence of a superior legislature but also by a vague concept of protected rights.

The police power concept as a constitutional limitation

The independence of the colonies appears to have led to a supposition on the part of some Americans that the status and power of their legislatures were now equal to that of Parliament. But the courts rebutted this presumption by holding that the State legislatures were limited not only by express constitutional provisions but also by traditional common law rights.[17]

The basic concept of the common law rights of the subject was mediaeval in origin. It presupposed a static society in which each class had its assigned duties and rights. These notions, which had been used by Coke in his struggle against the Crown on behalf of Parliament, were in the eighteenth century revived by the American colonists in their struggle against parliamentary sovereignty.[18]

However, even if the language was archaic, the content reflected the current philosophy of that period. The archaic common law rights were identified with the natural rights of man of the eighteenth century. Blackstone, whose influence in the new Republic was enormous, had stipulated three basic rights secured by natural law : the right of personal security, the right of personal liberty and the right of private property.[19]

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[13] Decided in 1728 on appeal from Connecticut; Smith, *Appeals to the Privy Council from the American Plantations* 537-582.

[14] *Philips v. Savage* (1738); Smith, *op. cit.* n. 13, 562-572.

[15] *Clark v. Tousey* (1745); Smith, *op. cit.* n. 13, 572-582. ' Overruled ' is perhaps too strongly worded; *ibid.* 576.

[16] Clark, *op. cit.* n. 8, 74.

[17] *Bowman v. Middleton*, (1792) 1 Bay 252 (S.C.). See also *Trevett v. Weeden* discussed in Plucknett, *op. cit.* n. 6, 65-67. See also Dixon, ' The Law and the Constitution ' (1935) 51 *Law Quarterly Review* 590, 596.

[18] Plucknett, *op. cit.* n. 6, 61-65 and materials there cited.

[19] *Commentaries* i, 129-140. Corwin, ' The " Higher Law " Background of American Constitutional Law ' (1928) 42 *Harvard Law Review* 149, 365.

The function of the legislator was essentially to protect and secure these liberties, not to abridge them.

To Blackstone,[20] as later to Marshall,[21] these natural law rights, unless secured by express constitutional provision, could not prevail against the positive will of the legislator. To most American lawyers and judges however, these natural rights were sacrosanct. Hence it is not surprising that some considered the Bill of Rights a superfluity[22] and that some judges were prepared to enforce these 'fundamental rights' against legislative encroachment even without the sanction of a written constitutional guarantee. To them the social compact which underlay the system of government had not given the legislature the power to impose unreasonable restrictions upon personal liberty or vested rights. These jurists were prepared to argue that under the social compact government had only certain limited purposes: 'to establish justice, to promote the general welfare, to secure the blessings of liberty and to protect their persons and property from violence'.[23] In this they echoed Locke: 'Their [the legislature's] power, in the utmost bounds of it, is limited to the public good of society'.[24]

However it had to be admitted that at times public good had to prevail over private right. In such cases the legislature could only be permitted to interfere with the rights accrued to private citizens at common law where the common law itself would have authorized an interference with such rights or in cases of 'overwhelming necessity'.[25] The term 'police power' was used to denote sometimes the totality of the State power to pursue its legitimate ends and at other times to denote the particular instances where that power prevailed as an exception to common law rights. Implicit in the term 'police power' is a limitation upon power, since private rights can only be affected by its proper exercise. This was

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[20] Blackstone, *Commentaries* i, 91.

[21] *Gibbons v. Ogden* (1824) 9 Wh. 1, 211.

[22] Thus Hamilton, *The Federalist* (1961) No. 81, 508 suggested that there were limitations on legislative power 'on general principles of law and reason'. See also Madison in *The Federalist* (1961) No. 44, 319.

[23] *Calder v. Bull* (1798) 3 Dallas 386, 388 *per* Chase J.

[24] *Second Treatise on Civil Government*, c. II s. 135.

[25] *Soper v. Harvard College* (1822) 1 Pick. 177, 179 (Mass); *Stuyvesant v. Mayor of New York* (1827) 7 Cow. 588, 605 (New York). The idea is found in many cases dealing with the police power of the States that the legislature can only interfere with the rights of private property or personal liberty where the common law would have sanctioned public intervention, *e.g.* the right to abate nuisance. The doctrines of 'overruling necessity' and '*sic utere tuo ut alienum non laedas*' which related to the law of property and its protection from intervention by strangers and the Crown, were transferred to the legislative field. According to this doctrine the State legislatures could not override rights sanctioned by the common law except where the common law had already qualified them. *Commonwealth v. Tewksbury* (1846) 11 Met. 55 (Mass.). See R. L. Roettinger, *The Supreme Court and State Police Power* 13; W. G. Hastings, 'The Development of Law as Illustrated by the Decisions relating to the Police Power of the State' (1900) *39th Proceedings of the American Philosophical Society* 359, 410, 411.

the attitude of Tiedeman, in his *Limitations of Police Power* where the author said:

> Any law . . . which undertakes to abolish rights, the exercise of which does not involve the infringement of the rights of others, or to limit the exercise of rights beyond what is necessary to provide for the public welfare and the general security, cannot be included in the police power of the government.[26]

Needless to say, the author meant thereby that such laws would be beyond the powers of government altogether.

In the early nineteenth century the police power concept is seen then as involving a domestic limitation on the powers of State governments.[27] It anticipates the role subsequently played by the Fourteenth Amendment as a bulwark of private and corporate vested rights against social experimentation.[28]

Police power or federal authority

Looked at from the point of view of federal authority the police power of the States did not necessarily indicate the same thing. It had been the understanding at the Convention that the ' internal police of the States ' should be largely left to their own management.[29] By this was no doubt meant that the States should continue to regulate much the same matters as they had regulated as colonies.

This however, did not necessarily mean that the police power was exclusive of federal power. In colonial days it had to be conceded that Parliament prevailed over domestic legislation at least in matters of Imperial interest. In the same fashion the police power of the States was subordinate to the powers of Congress which extended into the States. The police power might be superior to the natural rights of man, it was not superior to the will of Congress. Both Marshall and Taney viewed the police power as denoting the undifferentiated mass of power which had been left to the States under the Constitution.[30] Both agreed

[26] C. G. Tiedeman, *Limitations of Police Power* (1886) 4.

[27] *Thorpe v. Rutland and Burlington B. R. Co.* (1845) 27 Vermont 140; *Beebe v. State* (1855) 6 Indiana 501, 508, 509; *Wynehammer v. People* (1856) 13 N.Y. 378, 390; *State v. Noyes* (1859) 47 Maine 189, 211-214.

[28] In *Commonwealth v. Alger* (1851) 7 Cush 53, 85 (Mass.), Shaw C.J. describes the police power as the power ' to make, ordain and establish all manner of wholesome and reasonable laws, statutes and ordinances, either with penalties or without, not repugnant to the Constitution, as they [*i.e.* the legislators] shall judge to be for the good and welfare of the Commonwealth, and of the subjects of the same '. Though Shaw C.J. was willing to leave greater discretion to the legislature than most of his brethren at the time were prepared to admit, the stipulation that such laws should be ' reasonable ' anticipates the Fourteenth Amendment. See also *Toledo, Wabash and Western Railway Co. v. City of Jacksonville* (1873) 67 Ill. 37, 40.

[29] *E.g. The Federalist* Nos. 32 and 33.

[30] *Gibbons v. Ogden* (1824) 9 Wh. 1, 203 *per* Marshall C.J. ' that immense mass of legislation, which embraces everything within the territory of a State, not surrendered to the general government '; *License Cases* (*Pierce v. New Hampshire*) (1847) 5 How. 504, 582 *per* Taney C.J. ' the powers of government inherent in every sovereignty to the extent of its dominions '.

that the commerce power and the police power could conflict and that in such a case the police power had to give way. But whereas Marshall was liberal in seeing a conflict with federal law,[31] Taney reversed the presumption and required Congress to be explicit.[32]

These justices were not concerned with the notion of the police power as it had developed in the State courts. From the federal point of view the police power was the general regulatory power of the States, subject to the overriding power of Congress in certain cases.

Later, however, a trend set in identifying this concept of the police power with the one which had developed for State constitutional purposes. In other words, the claim was made that whatever fell within the legitimate scope of the State legislature *vis-à-vis* the natural rights of the citizen, fell within the exclusive power of the State *vis-à-vis* Congress. This process is first discernible in *Mayor of New York v. Miln.*[33] To Barbour J. the police power of the State is ' complete, unqualified and exclusive '.[34] The inquiry is much the same as that under State constitutional law: is the State law directed to securing the health, safety and morality of the State and its citizens? If so, the law prevails not only over the rights of the citizen, but also against the will, explicit or implicit, of Congress.

This identification becomes more striking in the views of McLean J. as expressed in the *License Cases.*[35] Here the learned justice defines the police power of the States in the same terms as did the State courts as a power to affect private rights whether derived from social compact theories or from an extended interpretation of the federal constitution, in order to achieve a legitimate local purpose. Even more forcefully than Barbour J. does McLean J. state the proposition that the State may protect a local good at the expense of federal power, if need be.[36] Thus the inquiry into the validity of State legislation becomes not so much an inquiry into the bounds of State power under the provisions of the federal constitution, but a question whether a given enactment is within the police power of the States or not. This explains the difference between the conclusions of some of the justices in the *License Cases* and *Miln's Case* and their conclusions in the *Passenger Cases.*[37] Since a

[31] *Gibbons v. Ogden*, (1824) 9 Wh. 1, 203; *Brown v. Maryland*, (1827) 12 Wh. 419.

[32] *License Cases*, *supra* n. 30.

[33] (1837) 11 Pet. 102 sustaining a New York statute requiring the master of incoming vessels to report the name, place of birth, age, legal settlement and occupation of every passenger landing in New York. Reversed in *Henderson v. Mayor of New York* (1875) 92 U.S. 259.

[34] *Ibid.* 139.

[35] (1847) 5 How. 504, 588 sustaining State laws requiring licences for the sale of liquor including liquor brought in from outside the State. Virtually overruled in *Leisy v. Hardin* (1890) 135 U.S. 100.

[36] *Ibid.* 592, 593.

[37] *Smith v. Turner, Norris v. City of Boston* (1849) 7 How. 283 in which the Court, for a variety of reasons, held invalid State taxes upon alien passengers arriving in the State from foreign countries.

tax is not a regulation of police, a tax on interstate commerce is invalid, but a law which prohibits entry into the State of certain goods and persons for reasons of public health and morals is a police regulation and therefore valid.[38] It could be said perhaps that the Court having perceived that the right of free passage under the commerce clause is akin to a natural right, both must be subject to the State police power. Thus what the State can do to affect the one, it must be able to do to affect the other.[39]

This interpretation of the role played by the State police power fits in with the general dual federalist framework. By reference to this relatively well-established concept, as evolved primarily by the State courts, the Supreme Court in its dual federalist phase could write into the Constitution something amounting to an exclusive list of State powers. To them commerce power and police power were mutually exclusive ; the end of the one marked the beginning of the other. The line of demarcation between them marked the border between two co-existent but mutually independent sovereignties. In the period between the death of Marshall and the decision in *Cooley v. Board of Port Wardens*[40] the Supreme Court seemed more concerned with defining the extent of the State police power first. It could be argued that among the dual sovereigns the State enjoyed primacy.

The subordination of the police power

From 1852 onwards and with accelerating effect after the Civil War the Supreme Court adopted a Federal-centred approach in the interpretation of the Constitution. This manifested itself in two ways: in the first place the supremacy of federal power was reasserted and the claims to exclusive police power to that extent denied. In the second place, the restrictions which had hitherto been implicit in the police power of the States were now ' federalized ' and as such expanded in scope. Even if these developments did not alter the basic nature of the concept of the police power, they did most definitely subordinate that power to the provisions of the federal constitution.

The immediate effect of the decision in *Cooley v. Board of Port Wardens*[41] was to extend the powers of the States. From the beginning of the Union there seemed to have been some doubt of the validity of State pilotage laws after the adoption of the Constitution. In any case, Congressional validating legislation was deemed necessary. The decision of Curtis J. upholding the Pennsylvania statute requiring vessels coming from, or

[38] *Groves v. Slaughter* (1841) 15 Pet. 449, 508 *per* McLean J., 516 *per* Baldwin J. *License Cases, supra* n. 30, 632 *per* Grier J.

[39] The interchangeability of the State concept and the federal concept is illustrated by the decision in *Jones v. People* (1852) 14 Ill. 196 where the federal decisions on the police power are cited in support of a decision that the prohibition of liquor is within the police power of the State of Illinois, *i.e.* under the State Constitution.

[40] (1851) 12 How. 299.

[41] *Ibid.*

bound to, ports outside the Delaware to take on a pilot, allowed the states to extend their powers to some extent over this field. However by holding the power of the States to regulate the local aspects of interstate commerce to be concurrent, the true beneficiary of the opinion in the long run was Congress. It took some time for the Court to realize this. In *Conway's Case*[42] the Court still spoke in dual federalist language when it assigned the power of the States to regulate interstate ferries to the category of the ' reserved police power ' of the States. By the time the *Gloucester Ferry Case*[43] was decided the Court had woken up to the implications of the Curtis opinion: interstate ferries were now held to belong to the concurrent sphere as matters interstate but local in their nature.[44] As long as the commerce power lay largely dormant these shifts in characterization had little practical effect, but it had strong theoretical implications. For most of the period, however, the true antithesis lay between the police power of the States, be it subordinate or exclusive, and the guarantee of freedom of interstate trade which was implicit in the Commerce Clause.

Thus, whilst since *Cooley's Case* the police power and the congressional power over commerce were at least partially concurrent, the constitutional limitation implicit in the Commerce Clause and the police power remained mutually exclusive. It was still necessary for the Court to determine whether the impugned State legislation amounted to an invalid attempt to regulate [interstate] commerce or represented a valid exercise of the police power.[45]

The distinction between regulation of commerce and police power was summed up in the formula of direct and indirect burden on interstate commerce. However this distinction was relatively meaningless. The true distinction, despite the conceptualistic disguise, was the traditional one: is the State law directed to a reasonable and justifiable State purpose, such as health, morals *etc.* or does it fall outside the police power such as a law interfering with the external relations of the State?[46]

This tied in with the process of federalization of the restrictions which the State courts had found implicit in the police power concept. This process had commenced after the Civil War and centred on the interpretation of the Fourteenth Amendment. Already in the *Slaughter House Cases*[47] the underlying assumption of all the justices both in

[42] (1862) I Black 603.

[43] (1885) 114 U.S. 196.

[44] Ribble, *State and National Power over Commerce* (1937) 87, 88.

[45] *E.g.*: *Tennessee v. Davis* (1880) 100 U.S. 256, 300, 301; *Robbins v. Shelby County Tax District* (1887) 120 U.S. 489. See also Gavit, *The Commerce Clause* (1932) 21.

[46] Ribble, *op. cit.* n. 44 in ch. XI comes to the same conclusion. See also Gavit, *op. cit.* n. 45, 24-26 and cases there cited.

[47] (1873) 16 Wall. 36 holding that a Louisiana law conferring a monopoly of slaughtering upon a named corporation within a certain part of the State, did not contravene either the Thirteenth or the Fourteenth Amendment to the Constitution. But see later, *Allgeyer v. Louisiana* (1897) 165 U.S. 578.

majority and in dissent, seems to have been that whatever limitations the Fourteenth Amendment did impose were already implied in the State police power, though Miller J. did not stop when he found the legislation to be within State police power but continued to treat the federal limitation as an additional question.[48] The same approach can be discerned in *Munn v. Illinois*.[49]

Even though the Court in these cases continued to uphold State power, it did at the same time foster the notion that the Fourteenth Amendment embodied all these limitations and perhaps more, which the State courts had set to the police power.[50] In *Allgeyer v. Louisiana*[51] the process of federalization was completed. The Fourteenth Amendment had now become the primary source of protection of the natural rights of the citizen.

Though in theory this had no effect on the concept of the police power, since it would be technically correct to say that the Fourteenth Amendment only reaffirmed the protection of rights already outside the reach of the police power,[52] the incorporation of these rights as part of the paramount law of the Constitution could only result in a further narrowing of the scope of the police power. Furthermore the Supreme Court gave a radically new content to these traditional rights. The common law based liberties of the early nineteenth century had been essentially conservative, *i.e.* directed to the protection of existing rights and possessions. It had been a liberty to hold fast to what one had acquired.

The new liberty whilst it certainly was not unmindful of vested rights, was more dynamic. It was a liberty of action.[53] As the Court summed it up in *Allgeyer's Case*:

> . . . the term is deemed to embrace the right of the citizen to be free in the enjoyment of all his faculties; to be free to use them in all lawful ways; to live and work where he will; to earn his livelihood by any lawful calling; to pursue any livelihood or avocation and

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[48] *Ibid.* 66, 67.

[49] (1877) 94 U.S. 113, upholding an Illinois statute fixing the maximum rates that could be charged for the storage of grain in elevators in the Chicago area. Distinguished in *Wabash, St Louis and Pacific Ry Co. v. Illinois* (1886) 118 U.S. 557 which restricted severely the power of the States to regulate charges made by public utilities operating in several States.

[50] An intermediate stage is seen in *Cole v. La Grange* (1885) 113 U.S. 1 where a restriction is federalized as a principle derived from the nature of free governments, but without reliance upon the Fourteenth Amendment. The Court shows an awareness that infringement of what the State courts had enforced as a limitation upon the police power was an infringement of the Federal Constitution, but the justices could not yet assign that protection to its proper pigeonhole.

[51] (1897) 165 U.S. 578.

[52] In this sense Field J. was correct in saying in *Barbier v. Connolly* (1885) 113 U.S. 27, 31 that the Fourteenth Amendment did not interfere with the police power of the States.

[53] Ray A. Brown, 'Due Process of Law, Police Power, and the Supreme Court' (1927) 40 *Harvard Law Review* 943, 948-952.

> for that purpose to enter into all contracts which may be proper, necessary, and essential to his carrying out to a successful conclusion the purposes above mentioned.[54]

The Supreme Court was not solely responsible for this new development. As early as 1855 there had been noticeable in the State courts a tendency to add the right of private pursuit to the right of private property.[55] In the same manner the liberty of contract which the Supreme Court in *Lochner v. New York*[56] held to be embodied in the Fourteenth Amendment had its antecedents in the decisions of State courts.[57] However once these liberties had become a matter of federally protected right their influence on the constitutional framework became pronounced.

In consequence ' due process ' and the police power became identified as the two sides of the same coin.[58] As Freund wrote: ' The just cause of legislation is the performance of some legitimate function of government '.[59] Any legislation which had no ' just cause ' was void for lack of due process. The concept of the police power dictated what were the legitimate functions of government. What were such legitimate functions had, of course, to be viewed in the light of the new economic liberties. The maintenance of public order and the prevention of obvious physical and moral harm were included, but social or economic experimentation was definitely out of bounds.

The immunity of the Commerce Clause must be fitted into this general framework. As long as its effect was mainly negative the Commerce Clause operated as much as a guarantee of constitutional freedom as did the ' due process ' provisions of the Fourteenth Amendment. The circumstances in which State legislative power could create exceptions to this constitutional protection were the same as those under the due process clause.[60] However since the due process clause had been given the function of protecting entrepreneurial liberty in general, there was no need to spell out a specific liberty for entrepreneurs engaged in interstate trade. It could be said that the Commerce Clause embodied not so much the protection of private rights, but the interest of the nation in the free flow of commerce.[61]

The period which followed the Civil War is marked then by an expansive application of federal restrictions on State power, without, however,

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[54] (1897) 165 U.S. 578, 589 holding that Louisiana could not prohibit defendants who were cottonbrokers in New Orleans, from insuring with a New York insurance company not registered in Louisiana.

[55] *Beebe v. State* (1855) 6 Ind. 501, 505 *per* Perkins J.

[56] (1905) 198 U.S. 45.

[57] Roscoe Pound, ' Liberty of Contract ' (1908) 18 *Yale Law Journal* 454, 470 ff.

[58] Brown, *op. cit.* n. 53, 952.

[59] Ernest Freund, *The Police Power* (1904) 15.

[60] Ribble, *op. cit.* n. 44, 224, 225; Gavit, *op. cit.* n. 45, 23.

[61] Ribble, *op. cit.* n. 44, 98, 99.

a corresponding increase in federal power. In theory, though, the position had been clear since *Cooley's Case*: the police power of the States might in its proper exercise prevail over a federally protected right, but it could not prevail over the exercise of lawful congressional power. In the case of such a conflict the State power was decidedly subordinate.[62]

At the same time by expanding the constitutional rights of the citizen the scope of the State police powers had been reduced. At the beginning of the period the Court still gave considerable leeway to State legislative discretion.[63] But at the end of the century State legislation was closely scrutinized.[64] No longer was the Court prepared to assume, but it had to be convinced, that State legislation was reasonably directed towards a legitimate State purpose. Without changing its essential character the police power had changed from being the primary power in the national framework to a subordinate position.

The purpose of the police power

For Marshall and Taney to whom the police power had been the undifferentiated mass of State residual powers, the process of characterization was not very important. The Court had to classify the federal statute on which the outcome completely depended.

However, when later justices identified the State police power with the powers exclusively reserved to the States, the classification of State legislation became important. Like the State courts the Federal courts now had to weigh the purpose of the statute. Was it directed to a legitimate purpose of the State? This process appears clearly on the part of some justices in the *License Cases*.[65] Accordingly, unlike Marshall and Taney, the courts had to define, however vaguely, those purposes for which it would permit State legislation. This was often summarized in terms of ' health, morals, safety and the general welfare '.

It was for the courts to determine whether State legislation was justified. The declaration by the legislature that the statute was directed towards purposes of health and morality made little impact on the majority in the *Passenger Cases*.[66] It was for the courts to investigate what was the real purpose of the statute and whether the purpose was admissible. This was done by having regard to the effect of the statute: was it calculated to advance the legitimate interests of the State or did it do no more than hinder commerce?[67] This frequently led to a balancing of

[62] *Schollenberger v. Pennsylvania* (1898) 171 U.S. 1.

[63] *E.g. Slaughter-House Cases* (1873) 16 Wall. 36; *Munn v. Illinois* (1877) 94 U.S. 113.

[64] *Leisy v. Hardin* (1890) 135 U.S. 100; *Allgeyer v. Louisiana* (1897) 165 U.S. 578; *Schollenberger v. Pennsylvania* (1898) 171 U.S. 1.

[65] (1847) 5 How. 504, 588-593 *per* McLean J., 632 *per* Grier J. See Ribble, *op. cit.* n. 44, 90, 91.

[66] (1849) 7 How. 283.

[67] Ribble, *op. cit.* n. 44, 90-97.

interests approach. A small burden on interstate trade but with a greater local benefit would be valid whilst *vice-versa* a heavy burden on interstate trade with a doubtful local benefit would be invalid.[68] Essentially this amounted to a test of ' reasonableness '.[69] This inquiry was pragmatic in character; ' burden ' meant what it said, it was not a metaphysical concept.

After the Civil War the Supreme Court adopted a more conceptual approach. Hence the balancing approach was often disguised. Nevertheless, the quasi-conceptual test of direct and indirect burdens on interstate commerce[70] still involved the same standards of practical measurement. At the same time the conceptual formulae did lead to the mechanization of some of the earlier pragmatically derived rules.[71] Certain activities were interdicted to the State *per se* irrespective of the amount of burden or the degree of local benefit.[72]

The most remarkable development in this line was the establishment in *Welton v. Missouri*[73] of the rule that all discrimination against interstate commerce, at whatever level imposed, constituted a burden on interstate commerce. This had the effect of limiting the power of the States to protect their citizens from outside competition which had been conceded at an earlier stage, provided it was not done at the very border.

The content of the police power then was not static. There is an enormous difference between what the States were permitted to do in 1800 and what they were permitted to do in 1900. The entire philosophy which underlay the concept of the rights which the police power could not touch had changed. The emphasis on the protection of vested rights had changed to an emphasis on the freedom of contract.

However, the idea of the police power was still essentially the same. It was based on the rejection of the omnipotence of the legislature except where restrained by express constitutional provisions. It assumes that citizens enjoy certain basic rights whether derived directly by force of natural law or by necessary implication from some form of positive law such as the common law or the constitution. Domestic legislation must of necessity affect these rights. Hence all such legislation must be justified by some reference to some overriding common good. The earlier courts referred to the common law and ancient practice in order to show that legislation was justifiable. Later courts with the advent of industrial society had perforce taken a more openly balancing approach between self-found values and the practical needs of society.

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[68] *Minnesota v. Barber* (1890) 136 U.S. 313.

[69] *Railroad Co. v. Fuller* (1873) 17 Wall. 560.

[70] *Sherlock v. Alling* (1876) 93 U.S. 99, 102.

[71] *American Manufacturing Co. v. St Louis* (1919) 250 U.S. 459.

[72] *Robbins v. Shelby County Taxing District* (1887) 120 U.S. 489.

[73] (1876) 91 U.S. 275 holding invalid a Missouri statute requiring peddlers of out-of-State goods to obtain a licence as a prerequisite to carrying out their calling.

Towards the end of the nineteenth century, however, the original balancing test tended to become obscured by the rigid application of the mechanistic formulae. The decisions of that period seem to suggest that there is a defined or definable area of immunity on which in the absence of exceptional circumstances[74] the States may not trespass, however good and laudable their purpose. This tendency comes to the fore in the conflict between the majority opinion and the dissenting opinion in *Leisy v. Hardin*.[75] In holding a statute of the State of Iowa prohibiting the sale of liquor within that State invalid insofar as it related to the sale of liquor imported from another State, the majority disclaimed all interest in balancing the alleged dangers of alcohol against the freedom of interstate trade. The State invasion of the prohibited area was struck down automatically. The minority on the other hand took the traditional view that since ' Common experience has shown that the general and unrestricted use of intoxicating liquors tends to produce idleness, disorder, disease, pauperism and crime ',[76] the State was justified under the police power to introduce prohibition.

However the mechanical approach prevailed.[77] At the end of the nineteenth century the police power was in a sorry plight. By the operation of the Fourteenth Amendment the States had been deprived of most of their legislative discretion in social experimentation and internal economic regulation. The expansion of the immunities of the Commerce Clause had lifted a large area of commercial activity outside the competence of the State legislature altogether. It would appear that the Supreme Court no longer left any discretion to the legislatures. It had to be convinced that there was an obviously demonstrable danger before it would allow the States to act.

The term 'police ' was given an almost literal meaning; the maintenance of public peace and order so that commerce could be carried on freely in all but the most dangerous substances.

Congressional supremacy and the police power

The ousting of State authority from such a wide area, inevitably had to lead to congressional action, either by filling the vacuum by its own regulations, or by redrawing the boundaries between federal immunity and State power in favour of the latter, such as was done by the Wilson Act of 1890.

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[74] Such as the prevention of obvious physical danger, *e.g.* the importation of diseased cattle; *Morgan v. Louisiana* (1886) 118 U.S. 455; *Smith v. St Louis and S.W. Railway* (1901) 181 U.S. 248.

[75] (1890) 135 U.S. 100.

[76] *Ibid.* 159 *per* Gray, Harlan and Brewer JJ.

[77] *E.g.* in *Schollenberger v. Pennsylvania* (1898) 171 U.S. 1; *Collins v. New Hampshire* (1898) 171 U.S. 30.

By the Wilson Act and similar later legislation[78] Congress in effect restored to the States the general police power which the Supreme Court had taken away. In upholding this arrangement[79] the Court acknowledged that, so far as the relationship between the commerce power and the police power of the States was concerned, Congress was the superior arbiter. The concurrent power which Curtis J. had foreshadowed in *Cooley v. Board of Port Wardens*[80] had finally become reality.

This might logically be expected to lead to an acknowledgement that the State legislatures should be the primary judges of the extent of the police power as Congress was now the primary judge of the extent of the commerce power. In other words the Supreme Court should be more concerned with elucidating the legislative policy of Congress than with looking for justification or lack thereof for State legislation.

Yet the Court was slow to abandon its arbitral role. Indeed at first the search for a mechanical formula continued, whether such formula was expressed in the traditional antithesis between ' direct ' and ' indirect ' burden or was summed up in a new contrast between ' prohibition ' and ' regulation '.[81] But, as Stone J. pointed out in his dissent in *Di Santo v. Pennsylvania*,[82] this search for a mechanical formula was contrary to the traditional empirical approach which the Court had adopted since Marshall's death to solve the conflict between the immunities of the Commerce Clause and the powers of the States.

The ' New Court ' indeed abandoned the mechanical test as anything more than a subsidiary guide. In *Parker v. Brown* the Court had to deal with a California marketing scheme which had been imposed by the State on the producers of raisins in order to prevent economic waste in marketing. In upholding the valid application of this scheme to a producer who wished to sell his raisins interstate free from any controls, the Court stated the relevant test to be:

> When Congress has not exerted its power under the Commerce Clause, and state regulation of matters of local concern is so related to interstate commerce that it also operates as a regulation of that commerce, the reconciliation of the power thus granted with that reserved to the state is to be attained by the accommodation of the competing demands of the state and national interests involved.[83]

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[78] 26 Stat. 313; see also Webb-Kenyon Act of 1913, 37 Stat. 699; Hawes-Cooper Act of 1929, 45 Stat. 1084; Miller-Tydings Act of 1937, 50 Stat. 693; McCarran Act of 1945, 59 Stat. 33.

[79] *In re Rahrer* (1891) 140 U.S. 545; *Clark Distilling Co. v. Western Maryland Railway Co.* (1917) 242 U.S. 311; *Prudential Insurance Co. v. Benjamin* (1946) 328 U.S. 408.

[80] (1851) 12 How. 299.

[81] *Buck v. Kuykendall* (1925) 267 U.S. 307, 315 *per* Brandeis J.

[82] (1927) 273 U.S. 34, 44 where the majority held invalid a State statute requiring all persons selling steamship tickets to or from foreign countries to be licensed. Overruled in *California v. Thompson* (1941) 313 U.S. 109.

[83] (1942) 317 U.S. 341, 362.

This, in effect, resurrected the traditional concept of the police power, for the Court defined the interest of the States in terms of ' the safety, health and well-being of local communities '.[84] What remained uncertain, however, was the exact role of the Court in accommodating those interests. In *South Carolina State Highway Department v. Barnwell Bros*[85] Stone J. seemed inclined to the view that the accommodation was primarily the function of the legislatures involved. He adopted a view similar to that which the Court had adopted in relation to the congressional commerce power. When the State has purported to regulate a local matter ' fairly debatable questions as to its reasonableness, wisdom and propriety are not for the determination of courts, but for the legislative body, on which rest the duty and responsibility of decision '.[86] The role of the Court is solely ' to ascertain upon the whole record whether it is possible to say that the legislative choice is without rational basis '.[87]

Nevertheless eight years later Stone C.J. declared in *Southern Pacific Co. v. Arizona*[88] that ' this Court, and not the state legislature, is under the commerce clause the final arbiter of the competing demands of state and national interests '. The Court therefore must itself balance the local interests of the State against the need for the free flow of interstate commerce. In dealing with a purported safety measure enacted by the State of Arizona regulating the length of trains, including interstate trains, the Court said:

> The decisive question is whether in the circumstances the total effect of the law as a safety measure in reducing accidents and casualties is so slight or problematical as not to outweigh the national interest in keeping interstate commerce free from interferences which seriously impede it and subject it to local regulation which does not have a uniform effect on the interstate train journey which it interrupts.[89]

Black J. dissented. In his view ' The balancing of these probabilities, however, is not in my judgment a matter of judicial determination, but one which calls for legislative consideration'.[90]

The conflict between these justices does not centre around a different theoretical definition of the police power. All understand by the term the power to regulate local matters for the sake of the safety, health and well-being of the local community. Nor are they in conflict about the

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[84] *Ibid.*

[85] (1938) 303 U.S. 177 upholding a State statute prescribing maximum width and weight for semi-trailer trucks using State highways.

[86] *Ibid.* 191.

[87] *Ibid.* 191. For a similar approach to a problem under the Fourteenth Amendment see *Sage Stores v. Kansas* (1944) 323 U.S. 32, 35 *per* Reed J.

[88] (1945) 325 U.S. 761, 769.

[89] *Ibid.* 775, 776.

[90] *Ibid.* 794.

proposition that this essentially involves a balancing of interests. What they differ about is the approach to be taken to this process of balancing. Should one, in the words of Douglas J., proceed on the basis that the State legislation is entitled to a presumption of validity, or does the onus rest on the State to show that its legislation is ' reasonable '?

However, this difference in approach does mark an actual difference in the content of the police power. According to the first-mentioned approach an inquiry into the purpose of the State legislature becomes irrelevant. The question is whether the State law conflicts with a declared policy of Congress or with an established constitutional policy, such as non-discrimination.[91] Otherwise the police power of the States is akin to the undifferentiated mass of residual powers of Marshall and Taney. According to the second approach, however, it is still for the State to show a legitimate local purpose. The police power then is still a collection of identifiable, albeit vague, powers.

For a long time the issue remained unresolved. At first the ' activist ' approach held sway.[92] Though Black J. did formally acquiesce in the majority view in his concurring opinion in *Morgan v. Commonwealth of Virginia*,[93] he substantially maintained his belief in the maximum of local legislative choice.[94]

The attempt of the majority in *Hood v. Du Mond*[95] to find some doctrinal basis for the negative operation of the Commerce Clause, does not, as Black J. alleged in his dissent,[96] represent a return to mechanistic formulae. Rather, it seeks to clarify what is involved in the balancing process between federal and local interest, by defining the former. The federal interest is the interest in the free movement of goods and persons throughout the Union without undue discrimination against interstate operators or undue protection for local operators.[97] But the majority did not mean to deny that a sufficiently vital local interest could in special circumstances be held to prevail over the constitutional policy,[98] nor did Black J. extend his tolerance of State statutes to the point of openly avowed discrimination.[99] The true conflict between the majority

[91] *Ibid.* 795 *per* Douglas J.

[92] *Nippert v. Richmond* (1946) 327 U.S. 416; *Freeman v. Hewit* (1946) 329 U.S. 249, 253; *H. P. Hood & Sons v. Du Mond* (1949) 336 U.S. 525; *Dean Milk Co. v. City of Madison* (1951) 340 U.S. 349.

[93] (1946) 328 U.S. 373, 387, 388 declaring invalid a Virginia law requiring racial segregation in interstate transport. Distinguished in *Colorado Anti-Discrimination Commission v. Continental Airlines* (1963) 372 U.S. 714.

[94] *H. P. Hood & Sons v. Du Mond* (1949) 336 U.S. 525, 563, 564; *Dean Milk Co. v. City of Madison*, (1951) 340 U.S. 349, 358, 359.

[95] (1949) 336 U.S. 525 declaring invalid a New York scheme designed to keep milk within the State.

[96] *Ibid.* 554, 555.

[97] *Ibid.* 538, 539.

[98] *Dean Milk Co. v. City of Madison* (1951) 340 U.S. 349, 354.

[99] *H. P. Hood & Sons v. Du Mond* (1949) 336 U.S. 525, 549.

in *Hood v. Du Mond* (including the dissenting Frankfurter and Rutledge JJ.) and Black J. concerns the role of the Court itself rather than the nature of the test to be applied.

Today the Court seems to occupy a middle position between the 'activist' view and that of Black J. In the first place the State exercises of the police power are entitled to a presumption of validity whether challenged under the Fourteenth Amendment or under the Commerce Clause.[1] But in case of conflict with the latter they must be measured either against 'federal regulatory measures' or 'the policy of free trade reflected in the Commerce Clause'.[2] In balancing the local interest as against this policy the absence of discrimination is not the sole factor, since a local regulation which imposes a heavy factual burden on interstate passage may also be found to be unjustified by any legitimate local interest.[3] However a State law which regulates local aspects of interstate commerce will *prima facie* be upheld unless it appears to be discriminatory or unduly burdensome. It is only then that the State will be required to justify its legislation.

The traditional police power concept still exists, for the Court still maintains a theoretically clear category of what are legitimate State objectives. Health, safety and local economic order[4] may suffice, local protectionism is outlawed.[5] Furthermore the categories of legitimate State interests are not necessarily closed. Whilst health and safety are traditional stand-bys, the Court in *Florida Avocado Growers v. Paul*[6] recognized the protection of the local consumer from deceptive trade practices as another lawful State objective. The result of this approach has been a far greater willingness to uphold State legislation even in cases where this would impose limitations and restrictions on operators engaged in interstate trade.[7]

Thus, whilst the Supreme Court has by no means abandoned its supervisory role and the balancing test,[8] it has, in the economic field at any rate, come to recognize that the legislature is the primary judge of the objective to be desired.[9]

It is interesting to reflect that the police powers of the States have at the same time as the expansion of the federal power been revived and

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[1] *Bibb v. Navajo Freight Lines* (1959) 359 U.S. 520, 529 *per* Douglas J.

[2] *Ibid.*

[3] *Ibid.* 530.

[4] *H. P. Hood & Sons v. Du Mond* (1949) 336 U.S. 525, 529-532.

[5] *Polar Ice Cream v. Andrews* (1964) 11 Law Ed. 2d. 389.

[6] (1963) 373 U.S. 132.

[7] *Huron Portland Cement Co. v. Detroit* (1960) 362 U.S. 440; *Head v. Board of Examiners* (1963) 374 U.S. 424; *Florida Avocado Growers v. Paul* (1963) 373 U.S. 132.

[8] *Colorado Anti-Discrimination Commission v. Continental Airlines* (1963) 372 U.S. 714, 719, 720, 721.

[9] *Ferguson v. Skrupa* (1963) 372 U.S. 726.

even extended. The reference to a specific local purpose today has become more a matter of form than of substance. Now all the natural law restrictions are embodied in the Federal Constitution (except where expressly declared in the State Constitutions), the restrictive aspect of the police power of the States has disappeared. The tendency now is to regard the police power as an undifferentiated mass of concurrent State power subject to federal paramountcy and the guarantees of the Constitution.[10]

II

THE AUSTRALIAN POSITION

For the American colonist, as we have seen, the outcome of the Revolution vindicated his view that the liberties of the subject were beyond the reach of any legislature, colonial or Imperial. The loyalist, however, remained perforce bound to the new doctrine of parliamentary sovereignty.

The assemblies of the First Empire were primarily the creatures of the common law. They had been called into being by, and were subordinate to, the King's prerogative rather than Parliament except in the vital matters of trade and navigation.[11] Until the colonists had legislative assemblies they were governed by the prerogative;[12] when granted a constitution it was done by the prerogative ; the creation of courts and other institutions of government was by virtue of the prerogative; and finally it was the prerogative power of the King to veto or to disallow colonial legislation which kept the colonial assemblies in check.[13]

However from 1774 onwards Parliament began to take a direct interest in the internal organization of the colonies. The Quebec Act of 1774[14] was prompted by the peculiar circumstances of that province which made it inadvisable to follow the usual practice of abrogating the foreign laws by the prerogative and substituting English law therefor, and of calling a representative assembly of local freeholders who necessarily

[10] J. E. Kallenbach, *Federal and State Cooperation* (1942) 195.

[11] Kennedy, *Constitutional Documents of Canada* (1918) 10.

[12] Clark, *Colonial Law* 10, suggested that in a ' settled ' colony the Crown has no legislative power but that this is possessed by the Imperial Parliament or the local legislature when called. However, it would appear, that in the beginnings of a settled colony the Crown has of necessity a limited power of legislation, though not of imposing taxation, until local circumstances permit the calling of an assembly. See H. V. Evatt, ' The Legal Foundations of New South Wales ' (1938) 11 *Australian Law Journal* 409, 421-423; R. D. Lumb, *The Constitutions of the Australian States* (1963) 6. But see *contra*: W. B. Campbell, ' A Note on Jeremy Bentham's " A Plea for the Constitution of New South Wales " ' (1951) 25 *Australian Law Journal* 59.

[13] Clark, *op. cit.* n. 12, 41.

[14] 14 Geo. III c. 83.

must be Protestants.[15] Nevertheless it set a precedent. When representative assemblies were finally granted to Upper and Lower Canada, it was done in the Constitutional Act of 1791.[16] In the same year the Charter Government of Sierra Leone sought and obtained parliamentary confirmation of its charter.[17] At around the same time courts of civil justice were created in Newfoundland by statute.[18]

When New South Wales was settled in 1788 the prerogative was once more relied upon.[19] As in Canada local circumstances made the calling of an assembly inadvisable and at first the Governor exercised the power to make by-laws relying on the prerogative. However considerable controversy arose and it was alleged that the arrangements for the government of New South Wales under the prerogative were unconstitutional.[20] Though in the light of seventeenth and eighteenth century practice this allegation was unfounded, it was acknowledged that the Quebec Act had set a precedent and henceforth constitutional arrangements were to be made by Parliament rather than by the Crown.[21]

There was a similar change in the authority of the colonial legislatures themselves. At first they were as much confined in their authority as their American predecessors. Thus in 1795 Lord Portland could still write to Lt Governor Simcoe of Upper Canada that a colonial assembly should not possess ' subordinate powers' beyond those that are absolutely necessary for its ' internal police '.[22]

Compliance with the fundamental principles of the laws of England and with the general mercantilist scheme of the Empire was still enforced by a politico-legal system of disallowance (and within the colony by the process of judicial certification that the colonial act agreed with the law of England).[23] But with the introduction of responsible government in the late 1840's in Canada, and in the next decade in the Australian colonies, more stress came to be laid on colonial autonomy. The attempt to hold the colonies to a common fiscal and economic policy broke down when the British Government itself abolished the last vestiges of the

[15] The Proclamation of 1763 had indeed purported to change the law of Quebec and had promised the convening of an assembly as soon as practicable.

[16] 31 Geo. III c. 31.

[17] 31 Geo. III c. 55.

[18] 32 Geo. III c. 46 (1792).

[19] The exception being 27 Geo. III c. 2 (1787) which authorized the King to create a Court of criminal jurisdiction in the colony.

[20] See Jeremy Bentham, *A Plea for the Constitution of New South Wales*, Works (1843) iv, 255-260.

[21] 4 Geo. IV, c. 96 (1823), 9 Geo. IV c. 83 (1828). These statutes made arrangements for the administration of justice and also conferred legislative powers on the Governor aided by a nominee Council. Finally after several interim measures Parliament authorized the convening of representative legislatures in the Australian colonies by the Australian Constitutions Act of 1850, 13 & 14 Vic. c. 59.

[22] Kennedy, *Constitutional Documents of Canada* (1918) 217.

[23] See Clark, *op. cit.* n. 12, *passim* for the position as at 1834.

mercantilist system in the late 1840's. A decade later it acknowledged the right of the colonies to make their own choice between free-trade and protection, including protection from British manufactures.

After Boothby J. in South Australia reduced the 'repugnancy to English law' reservation to the point of absurdity,[24] Parliament removed by section 3 of the Colonial Laws Validity Act, 1865[25] this requirement and replaced it with the stipulation only that colonial laws be not repugnant to Imperial statutes extending to the colony. In so doing the supremacy of the common law was finally abolished and only the supremacy of Parliament remained.[26] The supremacy of Parliament had given the colonial legislatures a supremacy of their own.

For the result of the acknowledgement of parliamentary supremacy was the doctrine that powers of local self-government could only be derived from Imperial statute and no longer from the prerogative.[27] Hence the limits to these powers of self-government had to be sought no longer in ancient custom or the fundamental principles of the common law, but in the practice and powers of the Imperial Parliament itself.[28] As the Privy Council said in *The Queen v. Burah*:[29]

> The Indian Legislature has powers expressly limited by the Act of the Imperial Parliament which created it, and it can, of course, do nothing beyond the limits which circumscribe these powers. But, when acting within those limits, it is not in any sense an agent or delegate of the Imperial Parliament, but has, and was intended to have, plenary powers of legislation, as large, and of the same nature, as those of Parliament itself. The established Courts of Justice, when a question arises whether the prescribed limits have been exceeded, must of necessity determine that question; and the only way in which they can properly do so, is by looking to the terms of the instrument by which, affirmatively, the legislative powers were created, and by which, negatively, they are restricted. If what has been done is legislation, within the general scope of the affirmative words which give the power, and if it violates no express condition or restriction by which that power is limited (in which category would, of course, be included any Act of the Imperial Parliament at variance with it), it is not for any Court of Justice to inquire further, or to enlarge constructively those conditions and restrictions.[30]

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[24] See for details: A. J. Hannan, *The Life of Chief Justice Way* (1960) ch. 4.

[25] 28 & 29 Vic. c. 63.

[26] The Statute of Westminster of 1931 (22 Geo. V c. 4) s. 2 abolished this supremacy so far as the Commonwealth was concerned, but not in respect of the Australian States.

[27] See Higinbotham C.J. in *Toy v. Musgrove* (1888) 14 V.L.R. 349, 379, 396.

[28] *Ibid.* 407, 408 *per* Kerferd J.

[29] (1878) 3 A.C. 889.

[30] *Ibid.* 904-905. See also *Hodge v. The Queen* (1883) 9 A.C. 117, 132; *Powell v. Appollo Candle Co.* (1885) 10 A.C. 282, 289, 290.

The Constitution, if one can call it such, of the Second Empire differs radically from that of the First. In the First Empire the common law, as a natural law, was paramount to both King and Parliament and their respective powers were circumscribed thereby.

In the Second Empire that paramountcy had become vested in the Imperial Parliament to which the local legislatures of the self-governing colonies were subordinate in all respects, whilst at the same time they were equally supreme within their respective jurisdictions. Here the colonial legislatures possessed in the words of Lord Portland ' subordinate powers ' going far beyond matters of ' internal police '.

The police power concept in the Conventions

At the end of the nineteenth century it was quite clear that the police power concept as it had developed in the American States out of colonial practice was totally inappropriate to the Australian colonies. However, in the sense in which that term was contemporaneously used, *i.e.*, as a reservation of essential State powers from federal supremacy or restraint, it struck a responsive chord with those members of the Convention who sought to maintain State autonomy as much as possible.

In the Convention Debates the term ' police power ' was most commonly used in the debates concerning the inter-colonial free-trade clause.[31] As in the United States it is used to describe ' the large number of powers which must remain in the hands of the States for their own protection, for the conduct of all matters in the State which relate to the health and morality of its inhabitants '.[32]

However in the absence of a Bill of Rights and the equivalent of the Fourteenth Amendment, the term ' police power ' is not exhaustive of the powers of the States. It is used to describe a number of specific powers out of the large innumerate mass of residual State power. In the debates of the Convention it was used to refer to the power of the States to derogate from the prohibition contained in what became known as section 92 of the Constitution. The concept of the police power was referred to by those who believed that the freedom of interstate commerce proclaimed by section 92 would not debar the States from protecting their citizens and their property from disease and other dangers at the very border.

On the other hand, not all delegates were so certain of its application. In Sydney in 1897 Dr Cockburn of South Australia expressed his concern

[31] See *Records of Debate of the Federal Convention* First Session, Adelaide (1897) 1141 (Deakin), 1145 (O'Connor); Second Session, Sydney (1897) 1061 (Isaacs), 1062-1063 (O'Connor).

[32] *Per* O'Connor, First Session, Adelaide (1897) 1145, *supra.*

[33] *Records of Debates of the Federal Convention* Second Session, Sydney (1897) 1059-1061.

that as a result of section 92 all State quarantine measures would be invalidated.[33] His fear that the American concept of the police power would not be applicable was shared by Higgins, later a Justice of the High Court, but then a delegate from Victoria.[34]

The cause for this doubt was the express wording of section 92 which on the accepted canons of statutory interpretation of British courts left little room for any exception. The declaration that interstate commerce should be ' absolutely free ' was, of course, a political slogan rather than a legal stipulation, but the courts were not equipped to interpret political doctrines.

Another stumbling block to judicial acceptance of the police power concept was the purposive inquiry which it of necessity entailed. To the American courts, having inherited the politico-legal approach of the Board of Trade, this was no hindrance. But the Australian judges had inherited from nineteenth century Britain the prevailing Austinian doctrines of the law and sought to apply pure legal standards, ostensibly divorced from all value judgment.[35] For these justices it was difficult enough to acknowledge limitations on legislative power let alone to evolve theories of what were permissible purposes for the exercise of such power.

The serious doubts that were felt at the Convention concerning the existence of a State police power which would modify the absolute prohibition contained in section 92 is manifested in two sections of the present Constitution, sections 112[36] and 113.[37] The latter arose out of the fear that the decision in *Leisy v. Hardin*[38] would be followed in Australia in the interpretation of section 92 and deprive the States of control over the importation of liquor. Though some delegates such as O'Connor from New South Wales (later a Justice of the High Court) argued that the police power would enable the States to bar the importation of liquor notwithstanding section 92,[39] the majority inserted section 113 for better caution. In view of the American decisions this was, of course, advisable.

A better indication of the doubts felt by the delegates is seen in the insertion of section 112. Originally this clause was a copy of the American

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[34] *Ibid.* 1063, 1064.

[35] See Isaacs J. in *Ex parte Nelson* (*No.* 1) (1928) 42 C.L.R. 209, 226.

[36] S. 112—' After uniform duties of customs have been imposed, a State may levy on imports or exports, or on goods passing into or out of the State, such charges as may be necessary for executing the inspection laws of the State; but the net produce of all charges so levied shall be for the use of the Commonwealth; and any such inspection laws may be annulled by the Parliament of the Commonwealth.'

[37] S. 113—' All fermented, distilled, or other intoxicating liquids passing into any State or remaining therein for use, consumption, sale, or storage, shall be subject to the laws of the State as if such liquids had been produced in the State.'

[38] (1890) 135 U.S. 100.

[39] *Records of Debates of the Federal Convention* First Session, Adelaide (1897) 1145.

clause (Article I, section 10) prohibiting State imposts on the export and import of goods. Like that clause it was at first expressed in negative form. During the debates in Melbourne some delegates, especially Dr Cockburn from South Australia, once more expressed their fears that section 92 would strike down State laws barring the importation of diseases and pests.[40] Mr Barton, as Leader of the Convention, admitted the reasonableness of these fears[41] and promised amendment of clause 112 to make it clear that the States would retain the power to protect themselves from disease, not in the way of prohibition, but in the way of inspection at their ports and borders. The clause was then amended to give it its present form of a positive grant of power to the States, hedged in by conditions, and this was clearly considered to be the future source of authority for the continuing of State quarantine measures.[42]

In the light of the general assumption that American doctrines would be applicable to the interpretation of the Australian commerce power, it is remarkable that despite the assurance of O'Connor and to some extent Isaacs, the majority of the Convention shared the doubts of Higgins concerning the application of the police power concept.

The express introduction of sections 112 and 113 made it all the more doubtful whether there existed a police power outside these sections. Some learned commentators took the view that there was such a power,[43] others no less eminent doubted this.[44] Indeed the inference was strong that the whole of the 'police power' of the States was summed up in sections 112 and 113 of the Constitution.[45]

The police power: Australian version

The High Court, when it was offered for the first time the opportunity to write into the Australian Constitution the concept of the police power, refused to do so.[46] In holding in *R. v. Smithers*[47] that a New South Wales

[40] *Records of Debates of the Federal Convention* Third Session, Melbourne (1898) i, 649, 650.

[41] *Ibid.* 650.

[42] *Ibid.* ii, 2366 *per* Isaacs. Quick and Garran, *Annotations on the Australian Constitution* (1901) 943 suggest that the clause was designed to enable charges to be imposed, the inspection laws themselves flowing from the exercise of the police power. However, it would appear both from the debates and from the final sentence of the clause that section 112 was intended to be the sole authority for the inspection laws as well; see Dixon J. in *Tasmania v. Victoria* (1935) 52 C.L.R. 157, 186.

[43] See Quick and Garran, *op. cit. supra* 850-853, 943. A. Inglis Clark, *Australian Constitutional Law* (2nd ed. 1905) ch. 7.

[44] See Harrison Moore, *Commonwealth of Australia* (2nd ed. 1910) 342, 344; D. Kerr, *Law of the Australian Constitution* (1925) 131-136.

[45] *Conlan v. Watts* (1911) 7 Tas. L.R. 40, 43, 44.

[46] There were some early judicial suggestions in the general context of the doctrine of State reserved powers that those powers which could be described as of 'police' were exclusively reserved to the States. *D'Emden v. Pedder* (1904) 1 C.L.R. 91, 104 *per* Griffith C.J.; *Australian Boot Trades Employes Federation v. Whybrow* (1910) 10 C.L.R. 266, 292 *per* Barton J.

[47] (1912) 16 C.L.R. 99.

statute which barred entry into the State to convicted criminals from other States, offended against the Constitution,[48] the Court adopted an approach more restrictive of State power than the contemporary Supreme Court.[49]

Although in *R. v. Smithers* the actual question was left open by the Court, the concept of the ' police powers ' of the States was not only ignored even when State legislation was upheld as against section 92,[50] it was expressly condemned by several Justices.[51] Thus did Higgins J. on the Bench vindicate his view as a delegate to the Convention that the ' absolute ' prohibition of section 92 admitted of no implied exception.

Yet, even if it seems to have been clearly understood by most justices that the American concept of the police power had no application to the Australian Constitution, few of them were prepared to give to the clause its literal interpretation. The solution for those desirous to maintain State powers analogous to police powers lay in the test evolved by the Privy Council in dealing with the mutually exclusive powers of Dominion and Province in Canada, *i.e.* by classifying State legislation by looking at its true character or ' pith and substance '.[52] According to this classification the important thing was the object which the law in question sought to achieve and not necessarily the subject dealt with. Though ostensibly this did not involve the Court in a discussion of the ' reasonableness ' or ' unreasonableness ' of the legislation, such a question was undoubtedly implied as an inarticulate premise.

This approach is well illustrated in the joint judgment of Gavan Duffy and Rich JJ. in *Duncan v. State of Queensland.*[53] Firstly these Justices declared that they would not stretch the Australian Constitution on the ' procrustean bed ' of the American police power concept. According to them the true solution lay in elucidating the ' real ' object of the legislature.[54]

Logically the only inquiry should be whether the ' real ' object of the State legislature was the restraint of interstate trade, since any other object would appear to be within State power.[55] Nevertheless the Justices found it necessary to stress in upholding the State law in issue in *Duncan*

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[48] Not so much section 92, but rather an implied ' federal right of transit '.

[49] *Cf. Railroad Co. v. Husen* (1877) 95 U.S. 465, 471.

[50] See *New South Wales v. Commonwealth* (1915) 20 C.L.R. 54, and especially 69 *per* Griffith C. J.

[51] *Duncan v. State of Queensland* (1916) 22 C.L.R. 556, 633 *per* Higgins J.; 641 *per* Gavan Duffy and Rich JJ.; *Roughley v. New South Wales* (1928) 42 C.L.R. 162, 198 *per* Higgins J.

[52] *Russell v. The Queen* (1882) 7 A.C. 829.

[53] (1916) 22 C.L.R. 556.

[54] *Ibid.* 641. See also Higgins J. in *Roughley's* case (1928) 42 C.L.R. 162, 200.

[55] *Ibid.* 641, 642.

v. Queensland that the ' object ' was one legitimately for the State to pursue.[56]

It was on the basis of this approach that the ' technical ' majority in *Ex parte Nelson (No. 1)*[57] held that New South Wales was entitled to bar entry to stock from other States suspected of disease.

> The seeming conflict may be resolved, in our opinion, by considering the true nature and character of the legislation in the particular instance under discussion. The grounds and design of the legislation, and the primary matter dealt with, its object and scope, must always be determined in order to ascertain the class of subject to which it really belongs; and any merely incidental effect it may have over other matters does not alter the character of the law. The Stock Act of New South Wales is not in itself a regulation of inter-State commerce, though it controls in some degree the conduct and liability of those engaged in the commerce. In truth, the object and scope of the provisions are to protect the large flocks and herds of New South Wales against contagious and infectious diseases, such as tick and Texas fever: looked at in their true light they are aids to and not restrictions upon the freedom of inter-State commerce. They are a lawful exercise of the constitutional power of the State.[58]

This passage shows clearly the convergence between the ' pith and substance ' test and the American concept of the police power. The only difference is in the avoidance of the term itself. Like the American concept its Australian counterpart assumed that the States had a right to protect themselves from certain dangers at the expense of the constitutionally guaranteed freedom of commerce and intercourse. This convergence was admitted by the majority for in final justification their Honours said that ' it is satisfactory to know that the learned justices of the Supreme Court of the United States have in a long series of decisions upheld the validity of the State quarantine laws under the American Constitution '.[59]

For a long time the majority of the High Court seems to have accepted the existence of this disguised ' police power '.[60] It obtained the approval of the Privy Council in *James v. Cowan*.[61] The shift to Evatt's economic

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[56] *Ibid.* See also Griffith C.J. 576: ' In my judgment a law having for its object to make the stock bred in Queensland available for the food of the Imperial Forces is a law conducive to the good government of that State as part of the Empire '.

[57] (1928) 42 C.L.R. 209 (Knox C.J., Gavan Duffy and Starke JJ. prevailing on the casting vote of the Chief Justice, Isaacs, Higgins and Powers JJ. dissenting).

[58] *Ibid.* 218-219.

[59] *Ibid.* 219.

[60] See *Peanut Board v. Rockhampton Harbour Board* (1933) 48 C.L.R. 266, 284 *per* Starke J. where his Honour states that State powers exercised ' for the public safety, necessity, convenience or welfare ' do not offend against section 92. Indeed his Honour was a most consistent advocate of the ' pith and substance ' test, see *R. v. Connare*; *Ex parte Wawn* (1939) 61 C.L.R. 596, 616. See also *Willard v. Rawson* (1933) 48 C.L.R. 316, 337, 338 *per* McTiernan J.

[61] (1932) 47 C.L.R. 386.

interpretation of section 92 which was confirmed by the Privy Council in *James v. Commonwealth*[62] made the justification of State police powers much simpler. In view of Lord Wright's concession that the States (and, of course, the Commonwealth) could consistently with section 92 'canalize' interstate trade,[63] *i.e.* regulate it for its more efficient and proper conduct, it followed *a fortiori* that regulations designed for reasons of health and safety fell within the category of permissible regulation and not into that of 'undue restriction' of interstate trade.[64] This approach led to a greater approximation to the current American concept of the police power and especially to an open evaluation of the 'reasonableness' of the regulations in question.[65]

Indeed it was at this time that approximation to the American commercial arrangements was at its greatest.[66] Evatt J. in particular, took the view that all State legislation not motivated by local protectionism should be upheld and perhaps, unlike his dissenting brethren in *R. v. Connare*,[67] he was prepared to allow the States unlimited plenary powers and discretion in their exercise provided they did not seek to isolate themselves economically from the rest of the Commonwealth.[68] Had Evatt's views prevailed the position of the Australian States in this respect would not have differed much today from that of the American States. The search for a legitimate State purpose would have been a matter of form and stress would have been laid on the plenitude of State power.

State powers and the mechanical test

However the majority approach had not escaped criticism. As early as *Duncan v. Queensland*[69] Isaacs J. had pointed out the distinction between the Canadian Constitution with its mutually exclusive lists and the Australian Constitution with only a Federal list of powers. For him the only proper rule of construction was the traditional British principle of statutory interpretation according to which the only questions for the Court were the interpretation of section 92 and the classification of the State statute according to what it 'in substance enacts'.[70]

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[62] (1936) 55 C.L.R. 1.

[63] *Ibid.* 54.

[64] *Per* Latham C.J. in *Hartley v. Walsh* (1937) 57 C.L.R. 372, 382, 383.

[65] See *Hartley v. Walsh* (1937) 57 C.L.R. 372 and *R. v. Connare* (1939) 61 C.L.R. 596, 627, 628 *per* Evatt J.

[66] *Cf. Baldwin v. Seelig* (1934) 294 U.S. 511 with *Milk Board of New South Wales v. Metropolitan Cream Pty Ltd* (1939) 62 C.L.R. 116, where State marketing legislation was upheld in the absence of evidence of local protectionism.

[67] Latham C.J. and Rich J.

[68] See *Home Benefits Pty Ltd v. Crafter* (1939) 61 C.L.R. 701, 730, 731.

[69] (1916) 22 C.L.R. 556, 623-625.

[70] *Ibid.* 623.

Thus Isaacs J. protested against all attempts to determine the interrelationship of State power and federal restraint by any method other than strict legalism.[71] To him any inquiry into object or policy was out of place.[72] The application of section 92 depended on an analytical formula. Any purposive inquiry was utterly irrelevant.

During the 1930's Dixon J. was the only upholder of Isaacs' strict legalism. In *Tasmania v. Victoria*[73] his Honour doubted the validity of the majority view in *Ex parte Nelson (No. 1)*.[74] Not only did Dixon J. repeat the objections of his predecessor, for the first time since the Convention Debates he suggested that the sole authority for dealing with the introduction of contagious disease should be found in section 112.[75] To him the prohibition of section 92 was absolute and unqualified and any exception to that prohibition had to be sought in the express words of the Constitution. Nor did he accept the theory that there was a power in the States to 'canalize' trade in the interests of health and safety.[76]

The triumph of the Dixonian formula as the test for the application of section 92 should logically have rendered the whole police power argument obsolete. The sole question should be whether the law before the Court made a direct impact on an activity in interstate commerce according to the formula. If the answer was in the affirmative no amount of reasonableness should save it however admirable its purpose. Indeed the High Court has struck down a number of State laws which even before 1937 the Supreme Court would have upheld as exercises of the police power, such as laws relating to the conservation of fauna,[77] grading of produce[78] and police licensing of firearms.[79]

Yet, the same year in which he had made his view clear in *Tasmania v. Victoria* Dixon J. set out his analytical formula defining those circumstances in which a law 'burdened' interstate commerce in *O. Gilpin Ltd v. Commissioner for Road Transport (N.S.W.)*.[80] To that formula, however, he added a qualification:

> Further, it is not every regulation of commerce or of movement that involves a restriction or burden constituting an impairment of freedom. Traffic regulations affecting the lighting and speed of

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[71] *Ex parte Nelson (No. 1)* (1928) 42 C.L.R. 209, 226, 229, 235.

[72] *Ibid.* 235.

[73] (1935) 52 C.L.R. 157, 180-183.

[74] (1928) 42 C.L.R. 209.

[75] (1935) 52 C.L.R. 157, 186.

[76] *Hartley v. Walsh* (1937) 57 C.L.R. 372, 389.

[77] *Fergusson v. Stevenson* (1951) 84 C.L.R. 421 and especially 434, 435.

[78] *Bierton v. Higgins* (1961) 106 C.L.R. 127 virtually overruling *Hartley v. Walsh* (1937) 57 C.L.R. 372. But see now—*Egg and Egg Pulp Marketing Board v. Rogers* [1965] V.R. 723.

[79] *Chapman v. Suttie* (1963) 110 C.L.R. 321.

[80] (1935) 52 C.L.R. 189, 205.

> vehicles, tolls for the use of a bridge, prohibitions of fraudulent descriptions upon goods, and provisions for the safe carriage of dangerous things, supply examples.[81]

On the face of it this passage purports to do no more than give examples of circumstances in which a burden is ' minimal '. It does not purport to authorize an inquiry into the object of the legislation. Yet inevitably the only criterion which can be applied in upholding traffic laws and prohibitions of fraudulent descriptions is the reasonableness of such legislation. In other words, what his Honour is saying is that there are certain things which a State can lawfully do though such measures might encroach upon the absolute freedom of activities in interstate commerce. His Honour clearly would not subscribe to the sweeping qualifications which were made to that freedom in *Ex parte Nelson* (*No.* 1).[82] His qualifications are much narrower in scope. But from the nature of his examples it is quite clear that his Honour is relying on something analogous to the police power concept.

Indeed this was made even more explicit in *Hughes & Vale Pty Ltd v. New South Wales* (*No.* 2)[83] where Dixon C.J. said:

> . . . no real detraction from the freedom of inter-State trade can be suffered by submitting to directions for the orderly and proper conduct of commercial dealings or other transactions or activities, at all events if the directions are both relevant and reasonable and place inter-State transactions under no greater disadvantage than that borne by transactions confined to the State.[84]

An attempt was made in the same judgment to fit this in with the analytical formula by drawing a distinction between

> . . . the features of the transaction or activity in virtue of which it falls within the category of trade commerce and intercourse among the States and on the other hand those features which are not essential to the conception even if in some form or other they are found invariably to occur in such a transaction or activity.[85]

At first this may seem a logical distinction. It can be readily understood that regulations for the safety of vehicles used in interstate commerce deal with incidentals and not with the essence of such commerce. But where is the line to be drawn? Why, for instance, is the acceptance of money to be sent interstate for the purchase of a ticket in an out-of-State lottery a mere incident, and not of the essence of the interstate transaction in the lottery ticket?[86]

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[81] *Ibid.* 206.

[82] (1928) 42 C.L.R. 209.

[83] (1955) 93 C.L.R. 126.

[84] *Ibid.* 160. Kitto J., *ibid.* 218 speaks of ' the reasonable enjoyment by each . . . of his own position in . . . society '.

[85] *Ibid.* 162. For a fuller explanation—P. H. Lane ' Present Test for Invalidity under Section 92 of the Constitution ' (1958) 31 *Australian Law Journal* 715.

[86] *Mansell v. Beck* (1956) 95 C.L.R. 550, 568 *per* Dixon C.J. and Webb J. ; *Jackson v. McLeer* [1964] V.R. 374; R. Anderson ' Freedom of Interstate Trade: Essence, Incidence and Device under Section 92 of the Constitution ' (1959) 33 *Australian Law Journal* 294, 298.

The distinction is, as Fullagar J. suggested in *Hughes & Vale Pty Ltd v. New South Wales (No. 2)*,[87] ' a matter of common sense ', *i.e.* of ' reasonableness '. Thus the first explanation by Dixon C.J. is nearer to the truth than the second. This was impliedly acknowledged by his Honour in *Greutner v. Everard*[88] where in upholding the validity of State traffic regulations he expressly cited the words of Fullagar J. and made no mention of ' incidents ' and ' essence '.

The true reason, it is submitted, why the New South Wales legislation which in effect established a monopoly for the local State-run lottery was upheld in *Mansell v. Beck*[89] was that the legislation was ' of a traditional kind directed against lotteries as such ', and that lotteries traditionally had been run by governments to the exclusion of all others.[90] Here the ' reasonableness ' of the legislation flowed from the fact that the function was one traditionally exercised by the government.

The fact that our forefathers saw fit to restrain a particular activity may be good evidence of the ' reasonableness ' of such restraint. This may justify the continuation of legislation against obscenity,[91] and legislation imposing standards of health and safety in commerce.[92] But tradition of course is not the only guide. In new circumstances arising out of the complexities of modern life to determine what is ' reasonable ' becomes essentially a question of fact and degree.[93] Thus the banning of vehicles on certain roads may be reasonable,[94] as may be the requirement of a medical prescription for the supply of drugs[95] or the need for a permit for the possession of firearms.[96]

The basis for this qualification on the ' absolute ' freedom proclaimed by section 92 is the fact that section 92 presupposes the framework of an ordered society.[97] This ordered liberty is subject not only to the

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[87] (1955) 93 C.L.R. 127, 205, 206. And see the same Justice in *McCarter v. Brodie* (1950) 80 C.L.R. 432, 496, 497.

[88] (1960) 103 C.L.R. 177, 183-185.

[89] (1956) 95 C.L.R. 550. It is interesting to recall that in his evidence before the Royal Commission on the Constitution in 1927 Mr Dixon K.C. (as he then was) expressed the opinion that section 92 prevented New South Wales from forbidding its citizens to send money out of the State for the purchase of a lottery ticket. *Minutes of Evidence* 791.

[90] *Ibid.* 566-568 *per* Dixon C.J. and Webb J. ; 594-596 *per* Taylor J. and compare the more direct approach of Williams J. 573, 574.

[91] *The Literature Board of Review v. Transport Publishing Co. Pty Ltd* [1955] St.R.Qd 466; *O'Sullivan v. Truth* [1956] S.A.S.R. 58.

[92] *Ex parte Topco Pty Ltd; Re Eldershaw* (1960) 60 S.R. (N.S.W.) 532.

[93] *Chapman v. Suttie* (1963) 110 C.L.R. 321, 344, 345 *per* Windeyer J.

[94] *Coombe v. Cheston* [1960] S.A.S.R. 161; *Greutner v. Everard* (1960) 103 C.L.R. 177.

[95] *Stock Health Service Pty Ltd v. Brebner* (1964) 38 A.L.J.R. 227, 229 *per* Windeyer J.

[96] *Chapman v. Suttie* (1963) 110 C.L.R. 321.

[97] *Hughes & Vale Pty Ltd v. New South Wales (No. 2)* (1955) 93 C.L.R. 127, 159. *Cf.* the ' ordered liberty ' of Frankfurter J. in *Rochin v. California* (1952) 342 U.S. 165, 169.

general criminal laws of the State but also to necessary commercial regulation. It is, as Taylor J. pointed out in *Mansell v. Beck*[98] only a matter of semantics whether one says that these regulations do not deal with the ' essentials ' of interstate commerce or that they constitute an exercise of the police powers of the States.

What constitutes ' reasonable regulation ' is of course hard to define. However there do exist certain groundrules. In the first place the onus of showing that its legislation is ' reasonable ' rests upon the State once it is found that its laws fall within the scope of the analytical formula. The State must show that its regulations are directed towards some obvious or ' traditional ' danger. The regulations must also have some relevance to the State. Thus the prohibition of possessing kangaroo skins, if in fact they were imported from another State and intended for export abroad, has no relevance on those particular facts to the interests of the State.[99] On the other hand if the protected fauna is intended for local sale,[1] or if the State seeks to protect local natural resources from depletion without discriminating against interstate operators,[2] the situation may be entirely different. The seeking of local economic advantage is, of course, strictly forbidden, however beneficial to the State. The legislation must be directed toward some objectively ascertainable object of local health and safety and mere economic regulation for the sake of some unspecified benefit will not suffice as the State of Queensland learnt in *Bierton v. Higgins*.[3] The reason *Hartley v. Walsh*[4] was disapproved of in that case was that the onus had shifted in the meantime. In *Hartley v. Walsh* State autonomy was respected until otherwise shown. In *Bierton v. Higgins* freedom of interstate commerce was insisted upon until and unless interference could be justified.[5]

The manner in which the onus is to be discharged is left vague. It seems clear that the State need not prove the ' reasonableness ' of the law in question in the exact circumstances before the Court.[6] The Court must be satisfied that the law before it is a law which in general terms is reasonably required for the purposes of the State. Its details are a matter for the legislature.[7]

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[98] (1956) 95 C.L.R. 550, 594.

[99] *Fergusson v. Stevenson* (1951) 84 C.L.R. 421.

[1] *Garvey v. Filippini* [1961] V.R. 569.

[2] *Challenger v. Rae* (1929) 24 Tas. L.R. 53.

[3] (1961) 106 C.L.R. 127.

[4] (1937) 57 C.L.R. 372.

[5] Sawer, *Cases on the Constitution* (3rd ed.) 317.

[6] *Breen v. Snedden* (1961) 106 C.L.R. 406.

[7] *Greutner v. Everard* (1960) 103 C.L.R. 177, 187 *per* Dixon C.J. Kitto J. suggests that the only question for the Court in such a case is which type of legislation can be categorized as ' reasonable ', *e.g.* traffic regulations, without going into the question of impact, *ibid.* 188, but this is going too far, see Dixon C.J. 184, 185.

In the second place the legislation in question must on no account impose a heavier burden on interstate commerce than it imposes on intra-State commerce. Thus legislation such as was upheld in *Ex parte Nelson (No. 1)*[8] would be held invalid today unless it could be justified under section 112 of the Constitution. The border or interstateness cannot be made the criterion of application of restraints.[9]

In the third place the regulation must lay down explicit standards and not leave matters to be decided by an unfettered administrative discretion.[10] It is on this ground and on the ground of greater burden on out-of-State buyers that the Victorian firearms regulations were held to offend against section 92 in *Chapman v. Suttie*.[11]

Finally, though total prohibition is not precluded in certain circumstances[12] the bias of the Court is in favour of individual freedom, in other words the regulations are to be examined from the point of view of every individual engaged in interstate commerce.[13] This means that the regulations must leave it open to the normal individual to meet the standards prescribed and to engage in interstate trade on the terms set out.

Does a police power exist in Australia?

Technically it may be correct to say that the Australian States do not have a police power.[14] However, the statement that section 92 operates within the framework of an ordered society must of necessity imply something very like such a power. Like the police power concept the 'framework' argument supposes that (a) there are certain purposes which are the legitimate concern of the States even in the face of apparent constitutional prohibition and (b) that the pursuance of these objects within the area of prohibition must be 'reasonable'.

This was perceived by Dixon C.J. as early as 1927. In giving evidence before the Royal Commission on the Constitution, Mr Dixon K.C. (as he then was) said after referring to the United States concept of the police power:

> It may be that if it were stated in different terms and from a different point of view much the same position might be arrived at. If police powers were treated as merely guides to interpretation perhaps English [sic] lawyers would admit them, but as a separate body of law forming definite principles it seems difficult to do so.[15]

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[8] (1928) 42 C.L.R. 209.

[9] *Chapman v. Suttie* (1963) 110 C.L.R. 321, 345 *per* Windeyer J.

[10] *Hughes & Vale Pty Ltd v. New South Wales (No. 2)* (1955) 93 C.L.R. 127; *Chapman v. Suttie* (1963) 110 C.L.R. 321, 341 *per* Menzies J.

[11] (1963) 110 C.L.R. 321.

[12] *Bank of New South Wales v. Commonwealth* (1949) 79 C.L.R. 497, 641 (P.C.).

[13] *McCarter v. Brodie* (1950) 80 C.L.R. 432, 497 *per* Fullagar J.

[14] Wynes, *Legislative, Executive and Judicial Powers in Australia* (3rd ed. 1962) 15, 16.

[15] *Minutes of Evidence* 791.

The position is that, whilst the use of the term ' police power ' is avoided for fear of confusion with the much broader and much more indefinite American concept, it is true to say that there operates in Australia an analogous principle, though more confined in scope and more strictly limited.

The police power concept in Australia then is analogous to that which prevailed in the United States before the legal revolution which gave to both Congress and the State legislatures *prima facie* plenary powers. In the forbidden zone of interstate commerce the States (and the Commonwealth) are to enjoy no presumption of validity. Any intrusion must be justified to the satisfaction of the High Court.

Though the Court will give the legislatures some leeway, it looks for more than a ' rational basis ' for the legislation. It seeks a justification either on the basis of traditional practice or in some obvious danger to the health, or safety of the inhabitants of the State. The connection and relevance of the legislation must be demonstrable either by the operation of ' common sense ' or by facts of which the Court can take judicial notice or which are demonstrable on ordinary evidence.

Nevertheless the Court has admitted that strict legalism does not work, the attempt of Dixon C.J. to distinguish between ' incident ' and ' essence ' has been quietly abandoned and the attempt of Kitto J.,[16] to categorize the type of legislation which is compatible with an ordered society without evaluating the impact of the particular legislation, has not found favour with his brethren.

The States then (as does the Commonwealth) have a ' police power '. The term is inappropriate if one considers early American tradition, for it implies no limitation on State power, to the contrary it is an extension thereof. But it is akin to the police power of the American States as the term came to be used in the late nineteenth century, the crucial period for Australian constitutional formation. It denotes the power of the States to encroach upon an area otherwise forbidden to them by the Constitution, for the sake of that necessary regulation which makes the difference between ordered liberty and anarchy.

[16] As evidenced by his dissents in *Mansell v. Beck* (1956) 95 C.L.R. 550, 582 and in *Armstrong v. Victoria* (*No.* 2) (1957) 99 C.L.R. 28, 84.