THE POLITICAL DIMENSION OF CONSTITUTIONAL ADJUDICATION

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In 1967, speaking at the University of Virginia, former Australian Prime Minister Robert Menzies asserted that the constitutional judgments of the High Court of Australia lacked the "political flavour" which characterized the work of the United States Supreme Court.[1] The High Court had developed, he said, "politically neutral conceptions of constitutional law".[2] He attributed this neutrality to the Commonwealth Constitution's focus on the federal distribution of government power rather than "the kind of fundamental guarantee of individual rights ... which [the United States Constitution] embodies".[3] The proposition appears to be that rules and judicial processes which attempt to balance the interests of the individual and of government are politically informed, while the rules and processes which allocate power between different government institutions are innocent of political content or purpose.

It cannot be denied that the main focus of the Commonwealth Constitution and of the constitutional work of the High Court has been on federalism, on the allocation of public power between contending levels of government, Commonwealth and State. And the view that this process of allocation is politically neutral has attracted strong support. Chief Justice Sir Owen Dixon referred to "close adherence to legal reasoning [as] the only way to maintain the confidence of all parties in Federal conflicts".[4] A similar

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1 R. Menzies, *Central Power in the Australian Commonwealth* (1967) 55.
2 *Id.*, 30.
3 *Id.*, 29.
4 "Address on being sworn in as Chief Justice" (1952) 85 CLR xi, xiv.

point was recently made by Leslie Zines, who denied that Australian constitutional decisions "imposed any political philosophy on governments", and claimed that such an imposition could "come about only by the conferral of entrenched rights ...".[5]

I. PUBLIC REGULATION OF ECONOMIC ACTIVITY – THE LEGALIZATION OF POLICY

It is the contention of this paper that this value-free conception of Australian constitutional adjudication cannot withstand closer examination. In the context of government regulation of economic activity, at least, lawyers' discourse and judicial prescription have not merely defined the relative authority of central and regional governments but have been constructed on fundamental (but not uncontroversial) political values — values which have occasionally been made explicit but more often have remained embedded in the assumptions on which lawyers' reasoning has been developed.[6] Judicial language and concepts have reflected the "appropriate" balance between public and private, between the collective and the individual and between concentrated and diffuse governmental power.

The habit of government regulation of economic activity is well established in Australia — although there have been periods of criticism of, and reaction to, that habit. Government decisions to implement regulatory systems have been made in response to a variety of influences or pressures: commodity producers have pressed for collective marketing systems (as in the State-operated, Commonwealth-supported, milk marketing schemes — the "Kerin Plan"); consumer groups have demanded product standards (leading to the passage of Part V of the Trade Practices Act 1974 (Cth)); social administrators and political party policy makers have urged the redistribution of societal resources (as in the 1975 Medibank and 1983 Medicare schemes); and capital interests have claimed protection against industrial activities (leading to the enactment of s.45D of the Trade Practices Act 1974 (Cth)). These public initiatives have rarely been uncontroversial: collective marketing schemes are challenged by the more adventurous producers; consumer protection standards are criticized as inefficient by manufacturers; redistributive schemes are criticized and undermined by service providers and affluent consumers; and the prohibition of secondary boycotts has been a prime target for trade union reform activists and their political supporters.

In Australia, public policy debates on the merits of public control of private economic activity quickly become enmeshed in questions of constitutional

5 L. Zines, "Reviewing the Constitution" (1987) 61 *ALJ* 530, 536.

6 The present Chief Justice of the High Court has referred to "undisclosed and unidentified policy values" which stand behind "strict and complete legalism": Sir A. Mason, "The Role of a Constitutional Court in a Federation" (1986) 16 *F L Rev* 1, 5.

validity. The current debate over regulation of companies and the securities market provides a neat example of this process. Immediately after Attorney-General Bowen announced a Commonwealth Government plan to replace the present cooperative scheme of securities regulation (described by the Attorney as "fragmented and inefficient") with a centralized national scheme, based on s.51(xx) of the Constitution, the Victorian Attorney-General foreshadowed a legal challenge to the constitutional validity of the proposal.[7] Within Australia's rule-dominated political forums, this question became a debate about constitutional power, centralism and States' rights. In this way, critical aspects of the debate on Australia's political economy are conducted in code, and issues of national significance are settled by lawyers in terms which apparently allow no part for social and economic policy issues. This legalization of policy questions accords to the High Court of Australia, and its reading of the Commonwealth Constitution, a vital part in Australia's political processes.

II. JUDICIAL POLITICS DECODED — SECTION 92

The most conspicuous example of this process (in the context of public control of economic activity) has been the judicial invocation of s.92 of the Constitution — the guarantee that "trade, commerce and intercourse among the States ... shall be absolutely free". The High Court's and Privy Council's destruction of the Chifley Government's bank nationalization programme is perhaps the most conspicuous of the ventures in judicial political economy founded on this provision.[8] Those decisions, which asserted that the section guaranteed the right of every individual to engage in interstate economic activity free of government-imposed burdens, laid the foundation for a remarkable growth of litigation challenging government price controls,[9] road freight taxes,[10] state receipt taxes,[11] and marketing controls.[12] In the process, s.92 has been erected by judges "into a form of constitutional guarantee of the economics of laissez-faire and the politics of 'small government'".[13] The process has been overt, although not without controversy. Barwick C.J. referred to "[t]he protection of the individual" as central to s.92,[14] and as "not required to yield to some actual or supposed public interest",[15] and Gibbs and Wilson JJ. claimed that the section required the Court "to

7 *The Age,* (1987) October 13, 31.
8 *Bank of New South Wales* v. *Commonwealth* (1948) 76 CLR 1; *Commonwealth* v. *Bank of New South Wales* (1949) 79 CLR 497.
9 For example, *Wragg* v. *New South Wales* (1953) 88 CLR 353 (hereinafter *Wragg*).
10 For example, *Hughes & Vale Pty Ltd* v. *New South Wales* (1954) 93 CLR 1.
11 *Associated Steamships Pty Ltd* v. *Western Australia* (1969) 120 CLR 92.
12 For example, *North Eastern Dairy Co. Ltd* v. *Dairy Industry Authority of New South Wales* (1975) 134 CLR 559 (hereinafter *North Eastern Dairy*).
13 *Miller* v. *TCN Channel Nine Pty Ltd* (1986) 67 ALR 321, 364 *per* Deane J.
14 Note 12 *supra,* 582.
15 *Permewan Wright Consolidated Pty Ltd* v. *Trewhitt* (1979) 145 CLR 1, 11.

preserve a balance between competing interests, a balance which favours freedom for the individual citizen in the absence of compelling considerations to the contrary".[16] On the other hand, Mason J. referred to the "predominant public character" of the section and declared that its meaning was not "to be ascertained by reference to the doctrines of political economy which prevailed in 1900 ... ".[17]

Perhaps the judges' reading of s.92 could be seen as supporting the arguments of Robert Menzies and Leslie Zines[18] that constitutional adjudication acquires a political aspect only when the judges are called on to construct and apply "entrenched rights"; and that the judicial allocation of authority between different levels of government is apolitical.[19] But is the latter process innocent of political values? Is there no political content to the debate, often conducted on the language of textual analysis, over the distribution of governmental power to regulate economic activity?

III. NATIONAL OR REGIONAL ECONOMIC REGULATION?

The general issue of government regulation of economic activity has been constructed in Australia as a debate on the question whether there should be national regulation or whether that function should be left to the State governments. In a rational political world, we might expect this debate to turn on the question whether Australia has a national economy or is no more than a collection of autonomous regional economic systems; and we might, accordingly, expect the debate to be resolved in favour of a national approach (whether interventionist or market-oriented), rather than a series of parochial responses.

But a crucial determinant has been lawyers' perception of the Commonwealth Constitution's division of regulatory power. The Constitution carries two provisions which appear to acknowledge that some government decisions about economic activity should be made at the national level. These are s.51(i), authorizing the Commonwealth Parliament to legislate on interstate and international trade and commerce, and s.51(xx), giving it power over foreign, trading and financial corporations. The High Court's reading of those two provisions has ranged from the consistently narrow construction of the trade and commerce power to the ultimately expansive construction of the corporations power. Those readings have produced an anomalous result: denied authority to regulate national economic activity under the trade and commerce power, the Commonwealth Parliament has been conceded that authority under the corporations power.

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16 *Uebergang* v. *Australian Wheat Board* (1980) 145 CLR 266, 300.

17 *North Eastern Dairy*, note 12 *supra*, 615.

18 Notes 1,5 *supra*.

19 "The only provision", Zines has written, "that might be said at times to have entrenched a political philosophy to the disadvantage of one or other side of politics is s.92 ... " Note 5 *supra*, 536.

This anomaly, this apparent lack of consistent political purpose on the part of the High Court, has prompted Leslie Zines to doubt whether the Court's decisions on the commerce power were inspired by concern for preserving State authority (and, presumably, restricting Commonwealth authority).[20] However, I believe that examination of the decisions will suggest a different interpretation: that the decisions are based on political values about the relationship between government and economic activity; that these values are those of individual members of the Court, not those of the Court as an institution; and that the lack of consistent political purpose is simply a product of changes in the membership of the Court — of the appointment of new judges, or a sufficient number of new judges to re-orient the Court.

IV. THE TRADE AND COMMERCE POWER

The trade and commerce power, was seen, for almost seventy years, as containing all of the Commonwealth's broad power to regulate economic activity — until the 1971 decision in *Strickland* v. *Rocla Concrete Pipes Ltd*[21] reversed the narrow reading given to the corporations power some fifty-two years before.[22] But the High Court's narrow reading of s.51(i) ensured that it offered little room for wide-ranging national regulation of economic activity. Most members of the Court accepted the point articulated by Dixon C.J., that s.51(i) distinguishes between interstate and international economic activity, on the one hand, and intrastate economic activity, on the other:

> [t]he distinction which the Constitution makes between the two branches of trade and commerce must be maintained. Its existence makes impossible any operation of the incidental power which would obliterate the distinction.[23]

The assumption, that economic activity can be divided into "two branches", one of which lies outside the scope of Commonwealth power under s.51(i), has been a pervasive one. Within the court, it has been seriously challenged only by Murphy J.; and it remains the conventional wisdom. This distinction was used in *R.* v. *Burgess; Ex parte Henry*[24] to exclude Commonwealth regulation of civil aviation throughout Australia. "Considerations of wisdom or expediency", Latham C.J. said, could not "control the natural construction" of s.51(i), which divided responsibility over international and interstate trade and intrastate trade — "although these subjects are obviously in many respects very difficult to separate from each other".[25] In *Airlines of N.S.W. Pty Ltd* v. *New South Wales (No. 2)*[26] Commonwealth regulation of the safety aspects of intrastate air transport was

20 L. Zines, *The High Court and the Constitution* (2nd ed. 1987) 63.
21 (1971) 124 CLR 468 (hereinafter *Concrete Pipes*).
22 In *Huddart Parker Pty Ltd* v. *Moorehead* (1909) 8 CLR 330 (hereinafter *Huddart Parker*).
23 *Wragg* note 9 *supra*, 386.
24 (1936) 55 CLR 608.
25 *Id.*, 628.
26 (1965) 113 CLR 54 (hereinafter *Airlines of N.S.W. (No. 2)*)

permitted — in recognition of the physical intermingling of local, national and international air traffic. But most of the judges warned against carrying acceptance of reality too far, and rejected an argument that the interpretation and application of the trade and commerce power should take account of the economic interdependence of interstate, international and intrastate trade or commerce. Kitto J. succinctly expressed the "verbal icon" concept of constitutional adjudication:

> [t]he Australian union is one of dual federalism, and until the Parliament and the people see fit to change it, a true federation it must remain. This court is entrusted with the preservation of constitutional distinctions, and it both fails in its task and exceeds its authority if it discards them, however out of touch with practical conceptions or with modern conditions they may appear to be in some or all of their applications.[27]

This is, essentially, an appeal to the text of the Constitution: the text expresses a rule ("[t]he Constitution supplies its own criteria of legislative power"),[28] and the judges apply the rule, in all its immutable majesty, to the dispute at hand. The assertion here is that the Constitution has prescribed clear distinctions, that the judges' role is to do no more than apply those prescriptions to concrete problems. But this is an inadequate explanation of the process of constitutional adjudication. The language of the Constitution, as of any other document, is not a natural phenomenon, it is socially constructed — fashioned for a particular purpose in a particular social context. As the present Chief Justice recently observed, the interpretation of any instrument cannot be divorced from values.[29] The so-called natural meaning of the text of the Constitution is no more than the meaning ascribed to it by its interpreters, a choice between competing meanings — and a choice driven by the interpreters' values. In Kitto J.'s interpretation, the values are embedded in the term, "dual federalism". The concept of federalism has no inherent, inelastic meaning which would dictate a narrow reading of s.51(i).[30] However, Kitto J. used the term to express the argument that the Constitution should be read in a way which maintained the legislative autonomy of the States, so as to leave to the States the unimpeded authority to regulate a substantial range of economic activities. For Kitto J., "dual federalism" was the counterweight to the generous and expansive reading of Commonwealth authority with which the majority judgment in *Amalgamated Society of Engineers* v. *Adelaide Steamship Co. Ltd*[31] is associated.

This restrictive view of s.51(i) remained unchallenged for more than a decade — partly because successive Commonwealth governments were not

27 *Id.*, 115.
28 *Ibid.*
29 Note 6 *supra*, 5.
30 Note 20 *supra*, 61.
31 (1920) 28 CLR 129 (hereinafter *Engineers* Case). The expansive approach is outlined in the assertion that "it is a fundamental and a fatal error" to approach the interpretation of the Commonwealth's powers on the assumption that the powers of the States are intended to be reserved, "unless that reservation is as explicitly stated": *Id.*, 154 *per* Knox C.J., Isaacs, Rich and Starke JJ.

inclined to develop regulatory policies which might test the view and partly because the 1971 *Concrete Pipes* decision suggested an alternative constitutional base for regulatory programmes. However, the appointment of Lionel Murphy to the Bench in 1975 ensured that, if the limits of the trade and commerce power were raised before the Court, the judicial consensus expressed in *Airlines of N.S.W. (No.2)* would be challenged. That decision's discounting of economic arguments, its revival of the "reserved powers" doctrine,[32] and the judges' rejection of a series of United States Supreme Court decisions[33] were all calculated to arouse Murphy J.'s opposition. The opportunity to join debate came in *Attorney-General (W.A.) (ex rel. Ansett Transport Industries (Operations) Pty Ltd)* v. *Australian National Airlines Commission*.[34]

The High Court was asked to rule on the validity of legislation which authorized a Commonwealth statutory authority, the Australian National Airlines Commission, to operate within any State, "for the purposes of the efficient, competitive and profitable conduct of the business of the Commission" in carrying out its interstate and Territory operations.[35] The immediate concrete question before the Court was whether the Commission could rely on the legislation to establish a regular service between Perth and Port Hedland in Western Australia as part of a service between those two points and Darwin in the Northern Territory, because the service between Western Australia and Darwin would operate at a loss unless carried on in conjunction with the intrastate service. Through a complex combination of opinions, the Court produced a pyrrhic victory for the Commission. By a majority,[36] the Court decided that the legislation was valid in so far as it treated intrastate commerce as incidental to the profitability of the Commission's Territory operations. But, by a different majority,[37] the Court adhered to the narrow view of the trade and commerce power expressed in *Airlines of N.S.W. (No. 2)*: the legislation was invalid in so far as it treated intrastate commerce as incidental to the profitability of the Commission's interstate operations. The curious result of the shifting alliances of judges in the *Western Australian Airlines* case was the proposition, actually supported by only one of the five members of the Court,[38] that economic

32 The doctrine, emphatically thrown out by the High Court in the *Engineers* Case, *Id.*, that the legislative powers of the Commonwealth should be given a narrow reading so as to preserve the maximum range for unhindered State power.

33 These decisions, involving the application of the similarly worded commerce clause of the United States Constitution, included *Wickard* v. *Filburn* (1942) 317 US 111, which upheld national controls on a farmer's wheat production for home consumption on the ground that this production would exert "a substantial economic effect on interstate commerce . whether such effect is what might at some earlier time have been defined as 'direct' or 'indirect'": *Id.*, 125.

34 (1976) 138 CLR 492 (hereinafter *Western Australian Airlines* Case).

35 Australian National Airlines Act 1945 (Cth), s19B

36 Stephen, Mason and Murphy JJ.; Barwick C J. and Gibbs J. dissenting.

37 Barwick C.J., Gibbs and Stephen JJ.; Murphy J. dissenting; Mason J. not deciding.

38 Stephen J.

considerations, such as the profitability of interstate operations, were constitutionally irrelevant when it came to establishing the limits of the interstate trade and commerce power in s.51(i), but constitutionally relevant for the purposes of determining the limits of the Territories power in s.122.

Stephen J. stressed that, for the purposes of s.51(i), economic considerations were to be discounted because of the

> particular emphasis [which] has always been placed on the distinction drawn by the Constitution between those aspects of trade and commerce assigned to Commonwealth legislative competence and that which is left to the States.[39]

Murphy J. vigorously dissented from this view. The restrictive approach of the majority to the trade and commerce power, he said, "keeps the pre-*Engineers* ghosts walking";[40] and he declared that

> [i]t would be as illogical to exclude commercial considerations from the construction of the commerce power as it would be to exclude defence considerations from the defence power (s.51(6)) or industrial considerations from the industrial power (s.51(35)).[41]

Although this approach has a strong intellectual appeal,[42] it was rejected by those other members of the Court who dealt with the issue.[43] But the intrinsic merit of the narrow and broad views is not our present focus. Rather, our focus is on the political dimension of the competing views — a point to which I shall return.

Although the values which underpin the competing readings of s.51(i) are rather subtly expressed by most judges (with the clear exception of Murphy J. in the *Western Australian Airlines* case), they are by no means invisible. However, there have been few opportunities to explore that dimension of the debate over the trade and commerce power: questions relating to the scope of s.51(i) are rarely presented to the High Court for decision; and there is little prospect of an increase in the frequency of litigation raising these questions.

V. THE CORPORATIONS POWER

The disappearance of the trade and commerce power from the High Court's agenda is largely due to the revival of s.51(xx), the corporations power, as a foundation for national regulation of economic activity. Until 1971, this provision had been read restrictively;[44] but in the *Concrete Pipes* case,[45] in the course of striking down the Trade Practices Act 1965 (Cth) for

39 Note 34 *supra*, 509. See also Barwick C.J *id.*, 499; Gibbs J. *id.*, 503.

40 *Id.*, 530. The allusion is to the reserved powers doctrine, which the *Engineers* Case had rejected, see note 31 *supra*.

41 *Id.*, 530-531.

42 For an evaluation, see Zines, note 20 *supra*, 61-63.

43 That is Barwick C J., Gibbs and Stephen JJ. Mason J. did not decide whether the interstate trade and commerce power could support the extension of the Commission's authority, but, for an indication of his general sympathy with Murphy J.'s approach, see note 6 *supra*, 27.

44 As a result of the High Court's decision in *Huddart Parker*, note 22 *supra*, in which the Court opted for a narrow reading of s.51(xx) so as to reserve to the States the power to enact domestic trade and commerce law and domestic criminal law

45 Note 21 *supra*.

exceeding the trade and commerce power, the High Court indicated that the corporations power could be exploited to support quite direct Commonwealth regulation of corporate activities — at least to support laws "regulating and controlling the trading activities of trading corporations".[46] This appeared to be an invitation to the Commonwealth Government to develop national policies on economic activity, dominated in Australia by the corporate sector. However, this affirmation of Commonwealth power was somewhat equivocal:[47] Barwick C.J. had declined to define the limits of the power, warning that it did not follow that s.51(xx) would support "any law which in the range of its command or prohibition includes foreign corporations or trading or financial corporations formed within the limits of the Commonwealth ... ".[48]

One of the equivocal aspects of s.51(xx) was identified, but not resolved, in *R.* v. *Trade Practices Commission; ex parte St George County Council*[49] where the Court split over the reach of the corporations power — on the criteria by which a trading corporation was to be identified. Barwick C.J. and Stephen J. saw the predominant or characteristic activities of a corporation as critical to its identity; while two other judges, Menzies and Gibbs JJ., insisted that only a corporation formed for the purpose of trading could be a trading corporation and so subject to the Commonwealth's regulatory power under s.51(xx). This difference of opinion was more than theoretical: the latter view would have narrowed the reach of the corporations power by exempting, from the reach of Commonwealth control, corporations set up, as in the *St George County Council* case, to provide a public utility, even if those corporations carried out substantial trading activities.

The Court regularly confronted this question over the next decade. The sharp differences of approach which emerged in the *St George County Council* case persisted — although the terms in which they were expressed varied. The constant theme during this period was the conflict between the judges who attributed a wide reach to the s.51(xx) categories and the judges who sought to contain that reach. In *R.* v. *Federal Court of Australia; ex parte Western Australian National Football League (Inc.)*[50] the former group included Barwick C.J., Mason, Jacobs and Murphy JJ., each of whom regarded the activities of a corporation as determining the question whether it was a "trading corporation" — although their approaches were by no means uniform;[51] and the latter group included Gibbs, Aickin and Stephen

46 *Id.*, 490 *per* Barwick C.J.

47 The decision left open the question of what corporations might fall within the reach of the power and the question of the type of regulatory controls which might be imposed on corporations.

48 Note 21 *supra*, 489.

49 (1974) 130 CLR 533 (hereinafter *St. George County Council* Case).

50 (1979) 143 CLR 190 (hereinafter *Western Australian Football League* Case).

51 Barwick C.J. spoke of "a substantial corporate activity": *id.*, 208; Mason and Jacobs JJ. of "a sufficiently significant proportion of its overall activities": *id.*, 233; and Murphy J. of "not insubstantial" trading activity: *id.*, 239.

JJ., who regarded the corporation's purpose or intended functions as crucial. In *State Superannuation Board* v. *Trade Practices Commission,*[52] Mason, Murphy and Deane JJ. opted for the expansive reading of the s.51(xx) categories: the character of a corporation for the purposes of s.51(xx) was not determined by the corporation's purpose or by its predominant activity; and that a corporation could have more than one character; so long as its trading or financial activities were significant, then it could be classified as a trading or financial corporation for the purposes of s.51(xx).[53] The restrictive view was expressed by Gibbs C.J. and Wilson J. — not in the terms advanced by Gibbs J. in the *St George County Council* and the *Western Australian Football League* cases, but (in a judicial tactical retreat) in terms which the two judges claimed to derive from the judgments of Barwick C.J., Mason and Jacobs JJ. in the latter case: a financial corporation, they said, was one whose "principal activity"[54] or "predominant and characteristic activity"[55] was financial. In *Fencott* v. *Muller*[56] the groups showed their tactical flexibility and strategic consistency. Mason, Murphy, Brennan and Deane JJ. declared that the s.51(xx) power would reach a corporation which had no activities (a "shelf company"), where its objects, as spelt out in its constitution, included trade or finance.[57] Gibbs C.J., Wilson and Dawson JJ., would have held the company in question outside the reach of s.51(xx) because "the whole of the evidence as to the intended operations of the corporation" showed that it was neither a trading nor a financial corporation.[58] Finally, in *Commonwealth* v. *Tasmania*[59] Mason, Murphy, Brennan and Deane JJ. characterized a statutory corporation, established for the purpose of producing and distributing electric power, as a trading corporation (and therefore subject to direct Commonwealth control) because trading was a substantial or not insignificant aspect of its activities.[60] Gibbs C.J. argued that the corporation would be a trading corporation only if trading was a "characteristic" activity — that it was a "substantial" activity was not enough.[61]

As this extended debate on the reach of the corporations power was conducted at an abstract level, it is important to grasp that it has an immediate political relevance: the expansive view of the power's reach, ultimately endorsed by a majority of the Court, not only allows the Commonwealth to develop national policies at the expense of local State initiatives or inertia, but it lays the foundation for more comprehensive public regulation of private

52 (1982) 44 ALR 1.
53 *Id.*, 15.
54 *Id.*, 8.
55 *Id.*, 3.
56 (1983) 46 ALR 41.
57 *Id.*, 62-63.
58 *Id.*, 53 *per* Gibbs C.J.
59 (1983) 46 ALR 625 (hereinafter *Tasmanian Dams* Case).
60 *Id.*, 717 *per* Mason J.; 789 *per* Brennan J.
61 *Id.*, 683.

economic activity; while the narrower view, for which Gibbs C.J. consistently argued (although shifting his ground from one case to the next), would enlarge the area within which the States might frustrate national policies and within which economic activity might remain immune from public regulation. If the judges who pressed for the wide or narrow conception of "trading" and "financial" corporations were alive to these considerations, they did not articulate them. There is no suggestion, in any of the judgments in the *Western Australian Football League* case, *Fencott* v. *Muller* or the *Tasmanian Dams* case, of concern for effective national regulatory policies or for preserving the autonomy of State regulatory regimes. However, those considerations were raised in the course of the Court's discussions of the other fundamental question raised by s.51(xx) — what aspects of economic activity can be regulated under the corporations power?

Although the High Court had accepted, in the *Concrete Pipes* case,[62] that s.51(xx) would support a law which regulated "the trading activities of trading corporations", it had left open the scope of the activities which the Commonwealth could control under the provision.[63] The High Court did not return to this question until 1982, in *Actors and Announcers Equity Association of Australia* v. *Fontana Films Pty Ltd*[64] which raised the validity of s.45D of the Trade Practices Act 1974 (Cth), prohibiting "secondary boycotts" likely to cause loss or damage to a foreign, trading or financial corporation. In the result, all members of the Court held that this prohibition was supported by the corporations power, but a majority[65] found that a critical sub-section (prescribing a reverse onus of proof for trade unions) exceeded the power. The approach adopted by the judges to the issues presented by the case showed a sharp split over the type of legislation which could be enacted under s.51(xx). Gibbs C.J., in an approach which echoed the concerns expressed in the *Western Australian Airlines* case,[66] argued for a narrow reading of the scope of s.51(xx) because of "the federal nature of the Constitution" and the "extraordinary consequences" which would follow "if the Parliament had power to make any kind of law on any subject affecting [foreign, trading and financial] corporations".[67] He would, it seems, have limited the Commonwealth to the regulation or, as in the present case, protection of limited aspects of corporate activity — for example, the trading activities of trading corporations. The Chief Justice did not fully develop this complex restriction: he did not, for example, explain which of the activities of a foreign corporation the Commonwealth might deal with under s.51(xx). On the other hand, Mason J. (with whom Aickin J. agreed) declared that "the subject of the power is corporations — of the kind described" and not

62 Note 21 *supra*.
63 *Id.*, 489-490.
64 (1982) 40 ALR 609 (hereinafter *Actors Equity* Case).
65 Stephen, Mason, Aickin, Murphy and Brennan JJ., Gibbs C.J. and Wilson J. dissenting on this point.
66 Note 34 *supra*.
67 *Actors Equity* case note 64 *supra*, 616.

activities of corporations, "let alone activities of a particular kind ...".[68] He emphasized "the accepted approach to the construction of a legislative power in the Constitution" –

> that it was intended to confer comprehensive power with respect to the subject matter so as to ensure that all conceivable matters of national concern would be comprehended.[69]

A similarly expansive approach was adopted by Murphy J.;[70] while Stephen and Brennan JJ. declined to commit themselves beyond the view expressed in the *Concrete Pipes* case: the protection of the business of a trading corporation from secondary boycotts clearly focussed on the corporation's trading activities, they said.[71]

The debate over the scope of the Commonwealth's regulatory power resumed in the *Tasmanian Dams* case,[72] where a majority of the Court[73] held that the Commonwealth Parliament could legislate under s.51(xx) to protect an environmentally sensitive area from the activities of a statutory (trading) corporation. The distinction between the majority and the minority judges was expressed in the same terms as in the *Actors Equity* case, and justified by reference to the same broad political factors. For example, Mason J. described the relatively narrow view of the scope of s.51(xx) as "unduly restrictive"[74] and as inconsistent with "the principle that a legislative power conferred by the Constitution should be liberally construed".[75] Deane J. asserted that trading and non-trading activities of trading corporations were equally "appropriate to be placed under the legislative control of a national government ...".[76] The minority supported their narrower view of the scope of s.51(xx) by reference to the arguments of Gibbs C.J. in the *Actors Equity* case.[77]

As with the competing judicial views on the scope of s.51(i) our focus is not on the intrinsic merit of the opposing views on the reach and scope of s.51(xx) but on the political values which underpin those views.

VI. ISOLATING THE POLITICAL DIMENSION

The competing judicial views about the constitutional capacity of the Commonwealth Parliament to regulate economic activity can be presented as no more than disputes over the meaning of words – the terminology of s.51(i) and s.51(xx) of the Constitution. But such a representation is superficial and quite misleading. The competing views are advanced by the

68 *Id.*, 636.
69 *Id.*, 637.
70 *Id.*, 640-641.
71 *Id.*, 646 *per* Brennan J.
72 Note 59 *supra*.
73 Mason, Murphy, Brennan and Deane JJ., Gibbs C.J., Dawson and Wilson JJ. dissenting.
74 *Id.*, 710.
75 *Id.*, 711.
76 *Id.*, 814.
77 *Id.*, 684 *per* Gibbs C.J.

judges as a means of justifying particular approaches to the problems before the Court, problems about the boundaries of competing public and private interests (in *Airlines of N.S.W. (No. 2),* the interests of two private enterprises; in the *Western Australian Airlines* case, the interests of public and private enterprises; in the *Tasmanian Dams* case, the interests of public enterprise and community values) and a problem about the boundaries of competing public authority (in the first case, the regulatory and patronage interests of the Commonwealth and New South Wales Governments; in the second case, the enterprise interests of the Commonwealth Government and the regulatory and patronage interests of the Western Australian Government; and in the third case, the enterprise interests of the Tasmanian Government and the regulatory interests of the Commonwealth Government).

To maintain that the competing views have no political content is disingenuous: they not only have political consequences (of the types described immediately above), but they are justified in political terms (for example, Kitto J.'s reference to "dual federalism";[78] Murphy J.'s reference to "pre-*Engineers* ghosts";[79] Gibbs C.J.'s reference to "the federal nature of the Constitution";[80] and Mason J.'s emphasis on the need for "comprehensive power... [over] all conceivable matters of national concern ...").[81]

It should be obvious that what is involved here is not an institutional political line — despite the homogeneity of its membership, the High Court is not a political monolith. Rather, it is the individual political values of individual judges which underpin their judgments; these values are by no means uniform, and the Court's judgments reveal an underlying tension in those values. The resolution of the tension — the Court's decision in any particular case — depends largely on the current composition of the Bench: so that, at one time, the Court will appear to endorse a narrow view of national regulatory power (as in *Airlines of N.S.W. (No. 2),* the *St George County Council* case and the *Western Australian Airlines* case); but, on other occasions (with a change in membership or in the assignment of justices), the Court appears to endorse national authority (as in almost all of the decisions on the corporations power). But, on each occasion, the notion that there is an institutional view, that the Court is deciding and acting as a unit, is a simplistic view of the dialectic: within the institution, different judges contend for their competing readings of the Constitution. What emerges from that contention may be presented as the Court's view, the received wisdom, "the law" — but experience should have taught us that this is no more than the current synthesis, a brief pause in the process of political dialogue within (and around) the Court.

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78 *Airlines of N.S.W. (No. 2)* note 26 *supra,* 115.
79 *Western Australian Airlines* Case note 34 *supra,* 530.
80 *Actors Equity* Case note 64 *supra,* 616.
81 *Id.,* 637.

To argue that the competing approaches to s.51(i) and s.51(xx) reflect political choices by the judges about the way in which public authority should be organized and contained is by no means a criticism. Constitutional adjudication, in my submission, cannot escape its political dimension: that dimension should be frankly recognized, so that the political values which underpin the adjudication can be articulated and their relative merits debated. To deny the existence of those values, to assert that constitutional decisions are dictated by the text of the Constitution (to insist on "strict and complete legalism")[82] is to shield those values from the scrutiny and criticism which is crucial to the legitimacy of the adjudicatory process. The comments of the present Chief Justice of the High Court Sir Anthony Mason, are directly in point:

> [w]hen judges fail to discuss the underlying values influencing a judgment, it is difficult to debate the appropriateness of those values. As judges who are unaware of the original underlying values, subsequently apply that precedent in accordance with the doctrine of *stare decisis,* those hidden values are reproduced in the new judgment — even though community values may have changed.[83]

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82 See note 4 *supra.*
83 Note 6 *supra,* 5.