CHAPTER 4

REGULATION? – OR DISCRIMINATION?

The category of "discrimination" is yet another which may be used as a yardstick in deciding the point at which "regulation" becomes undesirable and therefore impermissible. As in the case of other dichotomies of category which we have so far considered, it has its semantic alternative which may be employed as an escape-hatch.

Thus we must initially note the distinction made between "discrimination" and "preference." The Constitutions of both Australia and the United States contain provisions as to the latter. By Section 99 of the Australian constitution, "The Commonwealth shall not by any law or regulation of trade, commerce, or revenue, give preference to one State or any part thereof over another State or any part thereof." In Crowe v. The Commonwealth,1 Dixon J. held that, "In relation to trade and commerce, as distinguished from revenue, the preference referred to by s. 99 is evidently some tangible advantage obtainable in the course of trading or commercial operations, or, at least, some material or sensible benefit of a commercial or trading character." Thus in Elliott v. The Commonwealth,2 a federal statute providing for the licensing of seamen and forbidding unlicensed seamen to be engaged at ports specified by name, was sustained. It was freely conceded that the law was therefore different in the specified ports from what it was in other ports, but this did not constitute a "preference" in terms of the formula of Crowe's case. Furthermore, it was held 3 that a State can not "be regarded as identified with its capital city or its principal port or ports" and therefore there was no preference given contrary to Section 99 of the Constitution, "to one State or any part thereof over another State or any part thereof."

1 54 Commw. L.R. 69, 92 (1935).
2 54 Commw. L.R. 657 (1935).
3 Id. at 675.
The analogous portion of the United States Constitution is Article I: 9: 6 that "No preference shall be given by any regulation of commerce or revenue to the ports of one State over those of another;" Despite this greater specificity as to ports, the United States Supreme Court nonetheless has come to a similar conclusion as the Australian High Court, and in *Louisiana Public Service Commission v. Texas & N.O.R. Co.*\(^4\) held that "The specified limitations on the power of Congress were set to prevent preference as between States in respect of their ports . . . It [sic] does not forbid such discriminations as between ports. Congress, acting under the commerce clause, causes many things to be done that greatly benefit particular ports and which incidentally result to the disadvantage of other ports in the same or neighbouring States."

A similar view was propounded in Australia by Isaacs J. dissenting in *R. v. Barger:*\(^5\) "[T]he treatment that is forbidden, discrimination or preference, is in relation to localities considered as parts of States, and not as mere Australian localities, or parts of the Commonwealth considered as a single country."

In *Barger's* case, however, the majority holding was that geographical and climatical conditions in Australia in themselves make discriminations between various portions of the Commonwealth, and these must simply be put up with; the intention of the Constitution was to prevent the federal Parliament from giving way to a temptation to try to alter these natural discriminations by discriminatory legislation seeking to bring about an "equality of sacrifice." Consequently, this view proceeds, Parliament cannot be selective as to the localities in which its legislation will operate in respect of persons or things found more or less uniformly throughout the Commonwealth.

*Barger's* case has never been overruled, and thus in *Elliott v. The Commonwealth*\(^6\) Evatt J. dissented on its authority. The basic approach of *Barger* is, however, in terms of protecting state domains of legislation "impliedly forbidden" to the federal Parliament to enter, from invasion under a too-wide interpreted taxing power. The doctrine of "implied intergovernmental immunities" was, of course, later specifically rejected in *Amalgamated Society of Engineers v. The Adelaide Steamship Co. Ltd.* (The Engineers' Case)\(^7\) and despite the possible

\(^4\) 284 U.S. 125, 131 (1931).
\(^5\) 6 Comwm. L.R. 41, 107 (1908).
\(^6\) *Supra,* note 2.
\(^7\) 28 Comwm. L.R. 129 (1920).