

Constitutional Schizophrenia Then and Now

Exploring federalist, regionalist and unitary strands in the Australian political tradition*

A.J. Brown

‘Oh, for a Washington, or a Franklin!—But we may sigh in vain.’

Sydney Morning Herald constitutional correspondent,
26 August 1853

This year, 2004, is a fundamental year in Australian constitutional history. One hundred and fifty years ago, on 31 October 1854, Van Diemen’s Land (Tasmania) became the first Australian colony to formally accept the British offer of responsible government, consummated by royal assent in 1855 along with the British Parliament’s subsequent enactment of the New South Wales and Victorian constitutions. One hundred and fifty years ago, European Australians thus first proclaimed and achieved their effective political independence in terms of their own writing. This was the most momentous constitutional development since 1823, when Britain first legislated for the conversion of NSW from a military possession to a civilian colony, and placed Australia on the path that would see a twentieth and now twenty-first century nation governed by seven written constitutions, including the recently-celebrated federal constitution of 1901.

At the same time, we have to acknowledge deep popular scepticism, if not cynicism about what was achieved in all these constitution-making processes. Even 150 years ago, the plaintive editorial of the *Sydney Morning Herald*¹ conveyed a widespread

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¹ ‘New constitution’, *Sydney Morning Herald*, 26 August 1853: 4.

feeling that there was something lacking in the constitutional efforts of NSW, the ‘mother colony’. We can surmise that at the time, the correspondent was complaining of three things: a lack of commitment to democracy, or at least of any vibrancy in that commitment, among the conservative political elite still controlling the NSW legislature; a lack of nationalism and territorial political unity, in the failure of NSW leaders to foster a constitutional settlement that took in all the five colonies and the whole Australian continent; and overall, a lack of vision or statesmanship in the opportunity presented to ‘constitute’ a new political order, by comparison with the American founding. One does not need to have any artificial love of American politics, then or now, to recognise these as ongoing criticisms of Australian constitutional politics—sometimes in the form of wistful regrets, sometimes savage arguments.

This paper seeks to probe and better explain some of the hidden features of Australians’ self-criticism of their constitutional structure. Rarely a week goes by without major, mainstream expressions of the desirability of massive overhaul to that structure—from suggestions that the federal government take over full responsibility for all roads, schools and hospitals to arguments that the states should be entirely abolished and political control over such services massively decentralised to local or new regional governments. Or a mixture of both. For example, recently the Business Council of Australia released its ‘Aspire Australia 2025’ report, including in one of three non-exclusive scenarios that falling trust in government could lead to a push for fundamental political reform, resulting not only in Australia becoming a republic, but adopting a new two-tiered system of government in which a ‘strong but small’ central government would work with ‘regional’ governments created by the combination of present state and local governments.²

There is actually nothing new about such scenarios, yet over the last twenty years, Australian political science and constitutional theory have been at something of a loss to explain them. A federal system of *some* kind makes sense for Australia, given that the idea of one central government controlling the entirety of public life across such a vast continent seems not only impractical but disastrous. We *have* a federal system; so why do we never seem happy with it, even *after* all the successes of collaborative/cooperative federalism? This is a question only sometimes acknowledged, and rarely addressed by Australian political scientists. For example Brian Galligan, one of our foremost federalist scholars, has resigned himself to the likelihood that as long as we have a federal system, there will also probably be some of us calling for its abolition. He captures something of our ‘love-hate’ relationship with federal ideas when he describes Australians being ‘schizophrenic’, governing themselves by a federal constitution but debating their politics as if what they really have, or want, is a unitary system.³ In a unitary system, sub-national territorial units like states provinces or regions might still exist, but would have less or none of the territorial ‘sovereignty’/‘semi-sovereignty’ provided by a constitutional division of powers, enforceable in a constitutional court. National legislative power would thus be comparatively unlimited, at least in a formal sense, on all questions of governance.

² M. Steketee, ‘The shape of life to come’, *The Weekend Australian* 13–14 March 2004: 20–21.

³ B. Galligan *A Federal Republic: Australia’s Constitutional System of Government*. Cambridge University Press, 1995: 53–62.

As many people find this scenario scary as others do attractive; and often people find it terrifyingly scary and irresistibly attractive at the same time.

The best explanation for this constitutional schizophrenia, to date, has been that Australians willingly adopted a ‘dual constitutional culture’ in the 1890s, when they took six unitary colonies, each involving their own copy of British responsible government, and married these under a North American-style federal compact.⁴ Thus we have a system which has been described as a ‘Washminster mutation’, in which prime ministers continue to describe federal institutions like the Senate as havens of ‘unrepresentative swill’, and conservative and progressive governments alike seek to curtail the limited anti-majoritarian checks provided by Senate power. The problem is that Australians alone seem afflicted by this intense conflict, compared for example to the United States and Canada, close constitutional cousins who preceded us down similar, related political paths. They achieved much more settled territorial results—so what happened in Australia?

To understand this fundamental cleavage in political identity and values properly—let alone to live with it, manage it or resolve it—this paper suggests we need to substantially reappraise the history and content of our federal political traditions. If we were to ask:

- Did the Australians of the 1850s or 1890s really want *seven* constitutions setting out their rules of government?
- Or did they really want twenty or 30 or 50 constitutions, to reflect the number of states they would ideally *liked* to have had?
- Or did they only want *one* constitution, like any proper British nation?

then the true answer is probably ‘all of the above’. Over the 180 years since the ‘civilianisation’ of the Australian colonies, our constitutional choices have always involved more territorial options than often today realised, and certainly more than have been given proper expression through our constitution-making processes.

The first part of the paper sketches three major, overlapping but distinctive strands of territorial tradition: not just ‘federalist’ and ‘unitary’ ideas but a ‘pragmatic centralism’ which is the best description of the ideas underpinning our present, unsatisfactory status quo. This categorisation flows from a doctoral study of territorial ideas in Australian constitutional history,⁵ not all of which can be reproduced here. Its main lessons are that *neither* the federalist *nor* unitary strands of territorial thought introduced into Australian politics in the 1800s are as we have understood them in the last twenty years. Both contain instincts that remain alive today, and have never been given full expression in our constitutional life, because both seek fundamental political decentralisation.

Australian unitary tradition is only briefly sketched, not because it is unimportant or not still present but so it might be properly described elsewhere. Instead, the second

⁴ B. Galligan, op.cit: 46–51; J. Warden, ‘Federalism and the design of the Australian Constitution’ *Australian Journal of Political Science* vol. 27, 1992 (Special Issue): 143.

⁵ A.J. Brown, ‘The Frozen Continent: the Fall and Rise of Territory in Australian Constitutional Thought 1815–2003.’ PhD Thesis, Griffith University, 2003.

part of the paper repeats in some detail the circumstantial evidence that Australia's original federal values, though now repressed, remain quite different to those that dominate discussion of 'federalism' today. Contrary to the historical stereotype of Australia having been subdivided into colonies before the federal idea arrived, leading inevitably if slowly to a federal nation in 1901, this reappraisal suggests that federal ideas began having their impacts as early as the 1820s, *before* any territorial subdivisions were made and indeed *informing* those subdivisions in a way that assumed Australia would be a single nation. This first federalism had a previously unappreciated level of support in British policy and drew on Benjamin Franklin's model of federalism as self-subdividing: a 'commonwealth for increase'. While this entrenches federalism's logic in principle, it reveals a dynamic style of federalism which, had it continued to unfold, would have been quite different and much more decentralised than the system we call 'federal' today.

The third part of the paper seeks to explain better how this early history contributes to ongoing constitutional conflict, by emphasising the historical distinctions between our 'first' federalism and the subsequent notion of federalism based on the union of six states we have learned to love/hate since 1901. Putting aside tensions between unitary and federal traditions, we find our later (present) idea of federalism did not succeed or replace the first but has always operated in conflict with it. Indeed we can question whether what we *call* federalism today is really federalism at all, by comparison with the original tradition, because the political ideas that underpin it are so majoritarian and centralist. Many political scientists and commentators lament the centralist character of the Australian system, but usually date this trend from the Australian Labor Party's use of defence and taxation powers to centralise fiscal control in the 1940s. The paper suggests that centralist trends became embedded in the elite politics of NSW, in particular, in the 1850s—a politics that was nationalist but anti-federal. One consequence in the 1890s was a form of federation that satisfied some of Australians' long-held desires for national unity but few of their ongoing desires for a more decentralised sub-national framework—irrespective of whether it might be called 'federal' or 'unitary' and its divisions called states, provinces, 'regions' or 'greater' local governments.

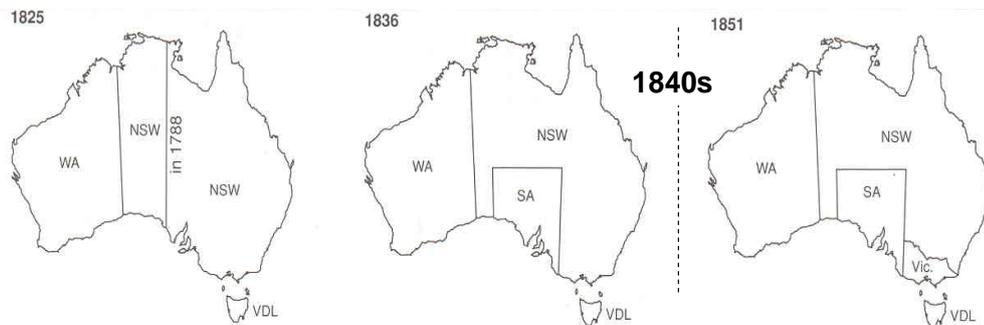
The paper concludes by suggesting that even if it is impossible to resolve the constitutional schizophrenia resulting from tensions between Australia's three main territorial traditions, it is vital to acknowledge it and better understand it. However, the perennality of debate over alternatives suggests it may be worth going further, and examining in detail the real points of conflict and convergence between these traditions, all of which continue to give voice to major demands for reform. With this knowledge we may then be able to address the vexed question of how, politically, reform might be made more possible, even without a George Washington or Benjamin Franklin.

The Territorial Trio: federal, unitary and centralised traditions in Australian constitutionalism

The existing history of Australia's constitutional structure tends to paint our political development as a linear progression. On many stereotypes, we imagine a process in which in 1788, British authorities began founding a spread of colonial settlements

according to a mixture of strategic need and environmental and economic accidents, but quickly found it impossible to manage these using ‘a single hierarchical governing structure’—a structure that however suitable for the ‘early prison administrations and Crown control of land settlement, was quickly found to be quite unsuited’ to Australian geography thereafter.⁶ As a result, somewhat inevitably, new territories ‘broke from the mother colony.’⁷ As political scientists Holmes and Sharman put it, sovereign political authority was ‘fragmented’ between ‘regional centres’ in a ‘movement away from a centralised and tightly organised society of administrative officers towards freedom and decentralization’. On this widely held view, territorial fragmentation can be seen as an inevitable reaction against an original centralised British preference and theory. By the end of the 1830s, there were four Australian colonial territories: New South Wales, founded in 1788; Diemen’s Land, separated in 1825; Western Australia, added in 1829; and South Australia, separated in 1836. Victoria’s European population was already greater than most other settlements, but the area south of the 36th parallel was still a mere ‘district’ of NSW (Figure 1).

Figure 1. Anglo-Australian boundaries 1783-1851



Source: D.N. Jeans, *An Historical Geography of New South Wales to 1901*. Sydney, Reed, 1972. See also M.H. McLelland, ‘Colonial and state boundaries in Australia’ *Australian Law Journal* vol. 45, 1971: 671–679.

Fragmentation brought other issues, however, and so from the early 1840s ideas about a more national, possibly federal constitutional structure began emerging in early colonial politics and policy. Some colonial leaders began seeking methods of rejoining the four colonies, at least for economic purposes. In 1842 the early NSW Legislative Council sought to pass a law preserving Sydney’s role as the commercial hub by ensuring duty-free trade with Tasmania and New Zealand. British authorities disallowed this local legislation as beyond power, but the idea was followed in 1846 by an official proposal by the NSW Governor, Sir Charles Fitzroy, that a ‘superior functionary’ such as a Governor-General be appointed to ensure consistency in ‘all measures ... affecting the general interests of the mother country, the Australian

⁶ J. Holmes and C. Sharman, *The Australian Federal System* Sydney, Allen & Unwin, 1977: 12–14; and C. Sharman, ‘Coping with the future’, in M. Birrell (ed.), *The Australian States: Towards a Renaissance*, Melbourne, Longman Cheshire, 1987: 42–43.

⁷ H. Irving, (ed.) *The Centenary Companion to Australian Federation* Melbourne, Cambridge University Press, 1999: 2.

colonies, or their intercolonial trade.’⁸ The originator of this proposal, NSW colonial secretary Edward Deas-Thomson, has been described by some as ‘par excellence the Father of Australian Federation’.⁹

In London in 1846, the return of a Whig government also saw firm moves towards a formal intercolonial union, combining the need for colonial constitutional development with its policy of Imperial free trade. In 1847–1850, in the New Zealand and Australian Charters and Australian Constitutions Bill (No. 2), Earl Grey’s administration twice proposed the four colonies be joined in a national or ‘general’ assembly¹⁰ However these early proposals for union failed, and we customarily assume it was because Australians were simply not yet prepared to think nationally.¹¹ Parochialism reigned, the people of Port Phillip were still intent on achieving Victoria’s separation in 1851, as were the colonists of Moreton Bay, though delayed until 1859. Responsible government was granted in 1854–1856, and the colonies became ‘quasi-sovereign bodies, politically independent of each other’,¹² to unite in a federal style only later. When the momentum for unity finally built in the 1880s–1890s, it was ‘hardly surprising, given the political history and geography of established self-governing colonies’ that the nation took the form of a federation; thereafter, agitation for the reform of the federation began.¹³

Thus runs the conventional constitutional story. However, despite its great familiarity, this story raises several questions not answered by modern political science. It is too neat and linear—in fact, it remains typical of a teleological metanarrative or ‘forced march’ of Australian history as progress towards nationhood.¹⁴ It provides little insight into the source of the federal ideas in the 1840s, much as it has never dealt with other possibilities—such as that federal ideas might have been locatable in indigenous Australia, among the continent’s ‘oldest political units’ of Aboriginal and Torres Strait Islander frontiers and boundaries.¹⁵

There are also two major veins of Australian political debate that are typically downplayed, or entirely left out of this mainstream constitutional story. The first is the fact that movements for regional autonomy such as those of the Port Phillip and

⁸ Quoted by W.C. Wentworth, ‘Responsible government in Australia: state constitutions and federal power’, *Australian Quarterly*, vol. 28, no.2, 1956: 8–9.

⁹ K.R. Cramp, *The State and Federal Constitutions of Australia*. Sydney, Angus and Robertson, 1914: 123–126. See also Irving (ed.) *The Centenary Companion to Australian Federation*, op. cit: 3–4, 24, 357–358, 430.

¹⁰ Earl Grey, *The Colonial Policy of Lord John Russell’s Administration*. London, Bentley, 1853: 317–323; 427–428; and H.E. Egerton, *A Short History of British Colonial Policy*. London, Methuen, 1893: 284.

¹¹ M. McKenna, *The Captive Republic: a History of Republicanism in Australia 1788–1996*. Melbourne, Cambridge University Press, Melbourne, 1996: 59.

¹² P.E. Joske, *Australian Federal Government*. Sydney, Butterworths, 1967: 34; and Irving, *Centenary Companion*, op. cit: 2.

¹³ B. Galligan, *A Federal Republic: Australia’s Constitutional System of Government*. Melbourne, Cambridge University Press, 1995: 52–55.

¹⁴ J.W. McCarty, ‘Australian regional history’ *Historical Studies* vol. 18. no. 70, 1978: 104.

¹⁵ S.L. Davis and J.R.V. Prescott, *Aboriginal Frontiers and Boundaries in Australia*. Carlton, Vic., Melbourne University Press, 1992: xi; compare C. Morris, ‘Constitutional Dreaming’, in C. Sampford and T. Round (eds), *Beyond the Republic: Meeting the Global Challenges to Constitutionalism*. Leichhardt, NSW, Federation Press, 2001: 293–294.

Moreton Bay separation movements were not restricted to, and did not stop at, Port Phillip and Moreton Bay. Far from being magically satisfied at the point of responsible government in the 1850s, similar movements remained virulent in New England, the Riverina, western Victoria and south-east South Australia, central and north Queensland, and later the goldfields of Western Australia.¹⁶ Separation movements had their own effects on the Federation process, as reflected in Chapter VI of the Australian Constitution dealing with 'New States', and continued to resonate through much of the twentieth century in the form of new state movements which often underpinned the very existence of the Australian Country Parties. The new state idea continues to resonate even today.¹⁷ Here is a vein of debate suggesting there was something wrong or incomplete about the territorial subdivision of Australia even by 1860, let alone by 1901 or by the standards of today.

The other forgotten element of the modern story is provided by debates suggesting there should be not more states, but no states at all. While these ideas are typically rooted to unitary political traditions, recent political science has also tended to assume that they seek an even more centralised structure than achieved under current federalism, and are thus effectively a throwback to the British policy preferences abandoned by the 1820s. Centralist Labor policies of the twentieth century, tied to constitutional reform, tended to reinforce this assumption.¹⁸ However, even if unitary, it is actually far from clear that these ideas have necessarily envisaged a more centralised structure; and their lineage is not always Labor.¹⁹ Far from having been discarded early, and only reappearing since Federation, ideas about a decentralised unitary system have also always been with us. British introduction of local government systems from the late 1830s, although vigorously and successfully resisted by the NSW legislature in the 1840s, was central to a constitutional formula aimed at preventing Australia's further separation into multiple colonies.²⁰ The tortured history of local government in Australia has been a campaign for greater political decentralization on something akin to a traditional British model, even though colonial legislatures' antipathy to strong local government is rarely recognised

¹⁶ J.M. Holmes, 'The "New States" idea and its geographic background' *Australian Quarterly*, 1932: 59–72; U.R. Ellis, *New Australian States*. Sydney, Endeavour Press, 1933; R.G. Neale, 'New States movement' *Australian Quarterly*, September 1950: 9–23; G.A. Kidd, 'New cities—an end to New States' *Australian Quarterly*, vol. 46, no. 2, June 1974: 57–68; J. Belshaw, 'Ulrich Ellis: journalist, political agitator, and theorist, public servant and historian', *Canberra Historical Journal* vol. 10, 1982: 16–22.

¹⁷ For example, G. Blainey, 'The centenary of Australia's federation: what should we celebrate?' *Papers on Parliament* no. 37, November 2001: 29–39; and G. Blainey, 'Time to redraw the lines on the map.' *Courier-Mail* (Brisbane), 4 September 2001: 11.

¹⁸ L.F. Crisp, *The Australian Federal Labour Party 1901–1951*. Sydney, Hale and Iremonger, 1978: 23ff; B. Galligan, *A Federal Republic*. op. cit: 91ff.

¹⁹ I. Macphee, 'Challenges for 21st century Australia: politics, economics and constitutional reform' *Griffith Law Review*, vol. 3, 1994; and 'Towards a model for a two-tier government'; *Australian Federalism: Future Directions, Structural Change*. Centre for Comparative Constitutional Studies, University of Melbourne, July 1994; and R. Hall, *Abolish the States! Australia's Future and a \$30 Billion Answer to our Tax Problem*. Sydney, Pan-Macmillan, 1998.

²⁰ A.C.V. Melbourne, *Early Constitutional Development in Australia*. Brisbane, University of Queensland Press, 1963: 181–190, 231–274, 293–346.

as a significant constitutional saga.²¹ Our constitutional history also tends to neglect the strange overlaps that have appeared between those pursuing ‘new state’ and ‘anti-state’ visions of Australian constitutional reconstruction, such as the position of Country Party founder Earle Page, who happily campaigned for both unitary and federal versions of territorial restructuring—the key goal being decentralization.²²

Australia’s Territorial Trio

	First federalism (decentralist)	Unitary traditions (decentralist)	‘Conventional’ centralised federalism
Period	From 1820s	From 1830s	From 1840s
Source and route of ideas	American federal experience, directly and via British colonial policy	‘Pure’ British unification theory boosted by Canadian experience	American federal, British unification and Canadian ‘consolidation’, via British colonial policy
Politics	British progressive	British universal	British conservative
Commencement locations	Hobart, Melbourne	Adelaide, Melbourne?	Sydney
Mobilisational orientation (King 1982)	Major decentralization followed by partial centralization	Decentralisation within centralised structure	Partial centralisation
Key manifestations	Colonial separation and new state movements; twentieth century federal reconstruction movements	Strong local government systems as alternative to territorial fragmentation; movements for state abolition	Australian federation/unification movements generally
Present at Federation?	Yes Constitution (Chapter VI)	Yes (Unification)	Yes (Simple compact)
Balance achieved?	Arguably not yet (no substantial territorial decentralization since 1859)	No (credible local/regional governments never allowed to develop)	Arguably not yet (decentralization demands remain unsatisfied by centralised surrogates)

²¹ J.M. Ward, *Earl Grey and the Australian Colonies 1846–1857*. Melbourne University Press, 1958: 41–42; F.A. Larcombe, *The Development of Local Government in New South Wales* Melbourne, F.W. Cheshire, 1961: 7–33; W.G. McMinn, *A Constitutional History of Australia*. Melbourne, Oxford University Press, 1979: 42; P. Finn, *Law and Government in Colonial Australia*. Melbourne, Oxford University Press, 1987: 79; M. Bowman, ‘Local government in Australia’, in M. Bowman and W. Hampton (eds), *Local Democracies: a Study in Comparative Local Government*. Melbourne, Longman Cheshire, 1983: 166; J. McNeill, ‘Local government in the Australian federal system’, in B. Dollery and N. Marshall (eds), *Australian Local Government: Reform and Renewal*. Melbourne, Macmillan, Melbourne, 1997: 18–19.

²² E.C.G. Page, ‘A Plea for unification: the development of Australia.’ *Daily Examiner* (Grafton), 1 September 1917:382–383; and see A.J. Brown, ‘Can’t wait for the sequel: Australian federation as unfinished business’ *Melbourne Journal of Politics* vol. 27, 2001: 49–70.

In recharting the history of these ideas, the result reached elsewhere²³ is a confluence of territorial traditions that involves not a single linear progression, but three parallel and interweaving veins of ideas whose relationships are characterised less by resolution than ongoing conflict. The table above seeks to summarise these traditions. Many departures from our stereotypical story are suggested here, which space does not permit all to be explained—particularly the early unitary story and many overlaps between decentralised unitary and decentralised federalist traditions. The clearest evidence of the deficiencies of our conventional ‘federal’ story lie in the fact that it has overlooked signals not just about the character, but even the date at which federal ideas appear to have begun impacting on Australian development. Rather than emerging in the early 1840s, and seeking only to unite existing separate colonies, federal ideas seem to have been vigorously present even before the first territorial separations and to have helped bring them about. This was not simply an earlier idea of federalism, but a different one to that which we usually associate with our contemporary federation.

The First Federalism: ‘franklinesque’, decentralised and repressed

What is the evidence that federalism arrived earlier and more forcefully in Australian constitutional history than we customarily assume? There are three major reasons for reaching this conclusion which, while at times more circumstantial than determinative, are at least enough to support a major new inquiry into when these ideas commenced. First, there is evidence of the role of federal ideas in British constitutional policy for the colonies in the 1820s, before and at the time that Australia’s first territorial subdivisions came about. Second, there is evidence about the role of the federal idea in colonial political developments within the colonies themselves, particularly the separationist desires expressed in Tasmania, Port Phillip and elsewhere. Thirdly, there is the clear sense of would-be nationalism that permeates early colonial developments, quite against our later stereotypes. Together these point to a federal idea that not only arrives earlier, but which is quite distinctly different from that previously described.

The ‘commonwealth for increase’: British policy and territorial fragmentation

First, we challenge the stereotype that British authorities were originally inclined against Australian territorial fragmentation, but at something of a loss to prevent it. In fact British policy was not so blind, particularly given its education in the spatial dimensions of American colonial politics before, during and since the 1776 Revolution. After all, the loss of so many American colonies was ‘a trauma the British could never forget’,²⁴ and Australia was part of an ongoing colonial story still overshadowed by that experience. British supporters of Australian development commonly saw Australia’s destiny as replacing the lost American opportunities, typified by Sir Joseph Banks’ vision of ‘empires and dominions which now cannot be disappointed ... who knows but that England may revive in New South Wales when

²³ A.J. Brown, ‘The Frozen Continent: the Fall and Rise of Territory in Australian Constitutional Thought 1815–2003.’ PhD Thesis, Griffith University, 2003.

²⁴ R. Hyam, *Britain’s Imperial Century 1815–1914: a Study of Empire and Expansion*. Cambridge, Palgrave Macmillan, 2002: 53.

it has sunk in Europe?’²⁵ In British policy, theories of territorial fragmentation and unity were alive and well, now that American federalism had revolutionised European concepts of nationhood with its ‘first sustained and principled counter-argument’ for local/regional ‘legal life’.²⁶

Viewed in historical perspective, it becomes unlikely that British officials charted a new constitutional course for Australia in the 1820s without reference to America. British authorities were not ‘forced’ by Australian conditions to abandon their preference for a single administration, but rather did so deliberately. The original centralist orientation in NSW administration reflected the British policy of only establishing new colonies under tight military law, circumventing questions of political representation and civilian rights.²⁷ This preference may have arisen with the Revolution, but it ended in 1817–1819 because the British government was resuming its colonial program after the Napoleonic wars, and returning to the political development of the post-Revolution possessions such as through the colonial policy inquiry of J.T. Bigge.²⁸ In 1823, the *Act for better Administration of Justice in New South Wales and Van Diemen’s Land, and for the more effectual Government thereof*, simultaneously ‘civilianised’ the Australian administration and provided for its decentralization through formal separation of Van Diemen’s Land, decisions fundamentally interlinked in the new British policy.²⁹ Against the Australian myth that Van Diemen’s Land was legally separated once discovered to be an island, or its settlements difficult to manage, it had already been known to be an island for 24 years and its settlements had grown stably for almost as long.³⁰ Territorial policy and constitutional direction changed less because of Australian circumstances than the basic reorientation of British policy.

What was the influence of federal ideas in this reorientation? Much Australian history is dominated by an assumption that Britain looked with embarrassed distaste on the United States’ post-revolutionary development—but in fact the British territorial strategy appeared to directly reflect North American experience, and particular respect for American federalism. The British authorities’ new policy of territorial subdivision was fully consistent with a federal strategy. Whereas Britain’s American colonies had emerged in a largely unplanned pattern, now divided into the federated United States and British North America, New South Wales provided opportunity to establish a new collection of civilising colonies with greater forethought and order.

²⁵ 1897, quoted in H.T. Manning, *British Colonial Government after the American Revolution 1782–1820*. Hamden, Conn., Archon, 1966: 287.

²⁶ N.K. Blomley, *Law, Space and the Geographies of Power*. New York, Guilford Press, 1994: 114.

²⁷ Manning, op. cit: viii, 287–299. See also H.E. Egerton, *A Short History of British Colonial Policy*. London, Methuen, 1893: 258–260.

²⁸ Manning, op. cit.: 525–540.

²⁹ C.M.H. Clark, *A History of Australia vol. 1* Carlton, Vic., Melbourne University Press, 1962: 341, 373–374; R.D. Lumb, *The Constitutions of the Australian States*. Brisbane, University of Queensland Press, 1991: 19, 33.

³⁰ H. Melville, *The History of Van Diemen’s Land From the Year 1824 to 1835 Inclusive*. Sydney, 1835 (1965 ed.): 18; C.M.H. Clark, *A History of Australia vol. 2*. Carlton, Vic., Melbourne University Press, 1962: 122–4; G. Blainey, ‘The centenary of Australia’s federation’ op. cit: 76–77; L. Robson, ‘Settling Van Diemen’s Land’, in P. Statham (ed.), *The Origins of Australia’s Capital Cities*. Melbourne, Cambridge University Press, 1989: 84–94; A. Shaw, ‘The founding of Melbourne’, in P. Statham, *ibid*: 202–205.

British authorities were determined to prevent any more revolutions, but remained deeply interested in the ‘Great Experiment’, not only for the new republic’s political lessons but because the countries remained ‘intimately connected’ in a ‘single Atlantic economy’.³¹ This interest included rapid development of the idea of colonial nationhood or ‘dominion’ status—the idea of sub-imperial nations, federal or otherwise, reputed to have only developed later in Australia. Loyal American elites had raised dominion status as a means of preventing the Revolution, without any intelligent British response.³² British consciousness that its remnant colonial groups should be managed this way had since leapt to the fore, with British North America reconstituted as a ‘national’ group, albeit to bolster, not concede British sovereignty. Lord Dorchester, appointed as Canada’s first Governor-General in 1786, affirmed that ‘the Policy which lost those great [US] provinces can not preserve these scattered and broken Fragments which remain.’³³

Even more important than a model for retaining British territories, were the advantages demonstrated by American federalism for colonial development. Post-revolution America was booming, and the territorial pattern under the new federalism was integral. By the early 1820s, the thirteen original United States had grown in number to 24, and the number was still growing as old territory was subdivided and new territory acquired. The roll-out of new state governments assisted the colonization and population of territory. Indeed like dominion status, the theory that continental union could work in support of this kind of territorial change was well established. In 1754 Benjamin Franklin’s Albany Plan had identified the advantages of union as including a capacity to create new government administrations, thereby facilitating more efficient colonial development. Franklin wrote that whereas ‘a single old colony does not seem strong enough to extend itself otherwise than inch by inch’, an intercolonial union could work as a ‘commonwealth for increase’.³⁴ A central government could grow the national wealth by securing the territory presently unusable by individual colonies, grant the land to settlers, organise new governments and ultimately admit them to the Union under what became Article IV of the 1787 Constitution. In practice this mechanism was not established as neatly as it appeared,³⁵ but the American trend from 1781–1783 followed Franklin’s principles, making territorial dynamism, development and federalism synonymous.³⁶ British authorities recognised modern federalism’s colonial lessons as spectacular. As late as 1852 William Gladstone described America as ‘the great source of experimental instruction, so far as Colonial institutions are concerned’, while the radical politician J.A. Roebuck was one of many to admire the American federalism’s ability to self-expand by creating new states:

³¹ R. Hyam, *op. cit.*: 54.

³² M. Jensen, *The Articles of Confederation: an Interpretation of the Socio-constitutional History of the American Revolution 1774–1781* University of Wisconsin Press, 1940: 108; and C. Rossiter, *Seedtime of the Republic: the Origin of the American Tradition of Political Liberty*. New York, Harcourt, Brace and World, 1953: 306–308, 339–341.

³³ 1793, quoted in Manning, *op.cit.*: xiii, 36–37; A.B. Keith, *The Dominions as Sovereign States: Their Constitutions and Governments*. London, Macmillan, 1938.

³⁴ Quoted in S.H. Beer, *To Make A Nation: the Rediscovery of American Federalism*. Harvard University Press, 1993: 155–158, 354–355.

³⁵ Jensen, *op. cit.*

³⁶ J. Bryce, *The American Commonwealth*. London, Macmillan, 1889: 343; and M.I. Glassner, *Political Geography*. New York, John Wiley & Sons, 1993: 155.

The whole thing was like a well-made watch—it went from that moment [in the 1780s] and never ceased to go.³⁷

In Australia in the 1820s, then, it becomes more understandable why British policy makers would decide not just to support new settlement, but create new colonial territories. The 1825 separation of Van Diemen's Land from NSW, as recommended by Bigge and enabled in 1823, was a conscious first step down a constitutional path. When the island's new Lieutenant-Governor, George Arthur, was despatched for his post in late 1823, this path was foreshadowed in advice from James Stephen, the colonial office counsel of 10 years' standing, main architect of the 1823 Act, and soon to be permanent under-secretary for the colonies. Stephen told Arthur to shape the new colony as:

one branch of a great and powerful nation, which must exercise a mighty influence for good or evil over a vast region of the earth ... Christian, virtuous and enlightened.³⁸

Van Diemen's Land was to be not just another British colony, therefore, but the first of the necessary 'branches' needed to build the new nation. The intent for these branches to remain linked as a national group was confirmed by the legal form of Arthur's appointment. Though we customarily believe that Van Diemen's Land was made independent of New South Wales, and Arthur thereafter 'dealt directly with... London',³⁹ Arthur's commission was as constitutional junior to the new NSW Governor Sir Ralph Darling, who in turn retained commissions as 'Governor-in-Chief to the island of Van Diemen's Land' and 'Captain-General' of both colonies.⁴⁰ At least on paper, Darling was to Australia what Dorchester was to Canada—a Governor-General of the kind, on the orthodox story, supposedly first mooted twenty years later.

Together these features of the separation of Van Diemen's Land suggest a federal intent, because whereas an *ex post facto* nationalist grouping in Canada was elemental to retaining British North America, British Australia was a clean chart on which the first new territorial unit of a whole future nation had now been marked out. Australia was like the American west, or at least the romantic notion of the American west held by British officials—a landscape as yet undivided to British eyes, in which a territorial pattern of multiple colonies could now be established to join and grow in federal fashion. Only rarely has this possibility been canvassed in Australian political history, such as in Irving's remark that 'the idea of joining the unwieldy Australian colonies together had been in the minds of officials ... even before the division of the colonies'.⁴¹ Perhaps Irving meant only that the federal idea appeared before the

³⁷ 1849, quoted in J.W. Cell, *British Colonial Administration in the Mid-Nineteenth Century: the Policy-Making Process*. New Haven, Yale University Press, 1970.

³⁸ James Stephen 1823, quoted in C.M.H. Clark, *A History of Australia vol. 1*, op. cit: 373.

³⁹ W.A. Townsley, *Tasmania: From Colony to Statehood 1803–1945*. Hobart, St David's Park, 1991: 37.

⁴⁰ Melville, op. cit: 52; and Wentworth, op. cit: 8.

⁴¹ H. Irving, *To Constitute a Nation: a Cultural History of Australia's Constitution*. Melbourne, Cambridge University Press, 1999: 2.

process of colonial division *ceased*, in 1859–1861; but in any event we can now take these words literally, because it seems inescapable that federal ideas were influencing policy even before subdivision *began*.

Territory, federalism and colonial expectations

The second reason to see federalism as at work in Australia from this formative 1820s stage, is the evidence that in campaigning for ‘separate’ colonial territories, early Australian colonists also behaved in a consistent manner. The conventional argument that the fragmentation of territory reflected a ‘movement towards freedom and decentralisation’⁴² tends to assume that the early colonial support for subdivision was no more than parochial. Analysis of the strands of early colonial politics tends to leave this presumption untouched, noting debate over disposal of land but not over the allocation of territory.⁴³ On the conventional account, therefore, the federal idea only made its entry from the early 1840s in *response* to fragmentation, rather than being embedded in that fragmentation itself. But if American developments were naturally high in the minds of British colonists in early Van Diemen’s Land,⁴⁴ then why would the settlers see new jurisdictions purely as separations and not also as steps towards a federal nation?

In fact there is evidence they *did* see the development thus, evidence which continues through subsequent divisions and becomes particularly clear in the Port Phillip campaign. In Van Diemen’s Land, consistently with Franklin’s idea of federalism as a ‘commonwealth for increase’, the separation reflected a ‘bottom-up’ process of political and economic self-identification, as well as ‘top-down’ ideas about colonial planning. The confidence with which the colonial office set about legal separation of the island was matched by colonist confidence in this political destiny. In April 1824, apparently unaware that Arthur was already en route with instructions for the separation, ‘landholders, merchants and other inhabitants’ gathered in Hobart and petitioned the King to ‘elevate Van Diemen’s Land into a separate and independent Colony’ in the terms of the 1823 Act.⁴⁵ This ‘independence’ claim reflected the Vandiemonians’ desires for a free economic hand, but almost certainly was also made with an awareness of how the federal system was unfolding within and across American territory. As Warden indicates, from the outset the Australian settlements were linked to the United States not only through British experience, but directly in a ‘Pacific economy’ dominated by American shipping, with Hobart particularly well-known as a summer (winter) base for New England fishing fleets. Given the many indications of American influence, it seems impossible that the Vandiemonians failed to relate their separation from New South Wales, as Australia’s first new colony, to Maine’s 1820 separation from Massachusetts as America’s tenth new state.

In the next territorial decision, Britain’s 1829 annexation of Western Australia, the constitutional intent is less clear. There was no pre-existing community of European settler interests, and the Swan River colonization project was ‘almost accidental and

⁴² Holmes and Sharman, op. cit: 12–14.

⁴³ L.J. Hume, ‘Foundations of populism and pluralism: Australian writings on politics to 1860’, in *Australian Political Ideas*. G. Stokes (ed.), Sydney, University of NSW Press, 1994: 28.

⁴⁴ For example, J. Warden, ‘The Colonies’ Paths to Federation: Tasmania’, in H. Irving (ed.), *The Centenary Companion to Australian Federation*, op. cit: 191–193.

⁴⁵ Melville, op. cit: 20; Ellis, op. cit: 19–20; Clark, *A History of Australia vol. 1*, op. cit: 122–124.

largely unplanned'.⁴⁶ However in the creation of Australia's fourth colonial jurisdiction, there are again signs of a federal influence. South Australia's enabling Act of 1834 for 'a British province or provinces' not only employed the same sub-colonial term used in Canada, but implied there could be more than one new territory. These were terms drafted by South Australia's ready-to-depart settler community. As with Tasmania, formal links also remained with the parent territory which have since disappeared from historical view—such as the fact that even a decade later, official British descriptions of South Australia identified the province as still 'part of Our said territory' of the colony of NSW.⁴⁷

In the foundational politics of Victoria, the character of the first federal ideas becomes clearest of all. In parallel to South Australia, the 'bottom up' political dynamic that founded Port Phillip (Melbourne) was substantially a replication of the separation of Van Diemen's Land. From the late 1820s, it was in Van Diemen's Land that pressure mounted for pastoral runs to be released on Bass Strait's northern shore, leading to the Henty family's founding of Portland in 1834 and the larger annexation of Port Phillip by John Batman's Port Phillip Association in 1835.⁴⁸ Batman's tactic of 'buying' 600 000 acres from their Aboriginal owners directly mimicked proven American frontier experience, thereby forcing an 'official' grant. Even more importantly for federal theory, the Port Phillip investors did not stop at formal recognition of their property rights, but from March 1836 also sought proclamation of a whole new colony.⁴⁹ The Port Phillip campaign for political territory was to last fifteen years, a period in which 'all other political ideas' took second place against the goal of territorial autonomy,⁵⁰ but in which it is *not* safe to assume that there was no federal instinct.

The nature of the federal idea in colonial politics at this time was twofold. Yes, colonial communities were now seeking territorial autonomy; but did so with an expectation that such autonomy accompanied the development of the nation. Like Van Diemonians and South Australians, Port Phillip leaders did not turn to ideas of intercolonial union *after* they achieved separation in 1851—rather they apparently saw colonial separation as the *path* to an Anglo-Australian nation. Awareness of America's growth remained strong in fora such as the early Melbourne Chamber of Commerce, reportedly dominated by Americans.⁵¹ By the late 1830s, de

⁴⁶ P. Statham, 'Swan River Colony 1829–1850', in C.T. Stannage (ed.), *A New History of Western Australia*. Nedlands, WA, University of Western Australia Press, 1981: 181–189; but compare S.R. Davis, 'The state of the states', in M. Birrell (ed.), *The Australian States: Towards a Renaissance*. Melbourne, Longman Cheshire, 1987.

⁴⁷ M.H. McLelland, 'Colonial and state boundaries in Australia' *Australian Law Journal* vol. 45, 1971: 673; and P.A. Howell, 'The South Australia Act 1834', in D. Jaensch (ed.), *The Flinders History of South Australia: Political History*. Adelaide, Wakefield Press, 1986.

⁴⁸ S.H. Roberts, *History of Australian Land Settlement*. Melbourne, Macmillan, 1968: 205–207; J. Greenway, *The Last Frontier: a Study of Cultural Imperatives in the Last Frontiers of America and Australia*. Melbourne, Lothian Publishing, 1972: 85–86; J. Kociumbas, *Oxford History of Australia: Possessions (volume 2: 1770–1860)*, Melbourne, Oxford University Press, 1992: 119–123, 179–190; Shaw in Statham (ed.) *op. cit.*: 207–213.

⁴⁹ Melbourne, *op. cit.*: 331–334.

⁵⁰ McMinn, *op. cit.*: 35; see also Melbourne, *op. cit.*: 283–356; D. Garden *Victoria: a History*. Melbourne, Nelson, 1984; 63–68; and S. Priestley, 'Melbourne: a Kangaroo Advance', in P. Statham (ed.), *op. cit.*

⁵¹ Hyam, *op. cit.*: 55.

Tocqueville's *Democracy in America* had appeared throughout the Empire, complete with its comparison of America's growing number of state governments to 'companies of adventurers, formed to explore in common the wastelands of the New World'.⁵² Any doubt about the currency of this federal vision at Port Phillip is dispatched by the role of its future separationist statesman, Sydney's John Dunmore Lang.⁵³ In November 1841 Lang's first fundraising visit to Port Phillip found him regaling separationist audiences with his experience of a recent ten-week trip to the eastern United States, during which he had read de Tocqueville. Though not yet republican, Lang assured the people of Melbourne that their campaign accorded with the driving force of America's progress: its spontaneous internal subdivision into small democratic states.⁵⁴ With this strong justification for territorial autonomy backed up by federal political theory, Lang's popularity at Port Phillip was sealed.

Port Phillip's would not be the last such separationist campaign in Australia, as noted. But the important feature is that the tradition established by the early 1840s was not merely separationist, but explicitly federalist in character. These territorial units were seen by aspirant citizens as the building-blocks of the new Anglo-Australian nation. In a manner strongly resonant with Franklin's concept of a 'commonwealth for increase', separation was not a stand-alone idea but rather an integral part of the federal concept, with the granting of local autonomy, capacity for economic development and national union within Empire all working together.

Early colonial nationalism

The third key feature of this alternative early federalism is the evidence that Anglo-Australian colonists were conceiving themselves as the founders of a new British nation far earlier than usually assumed. On the conventional story, it was only select leaders who began to see a nation-in-waiting in the 1840s, and not until the 1880s–1890s that such a nation came to be properly, popularly 'imagined'.⁵⁵ This view is naturally central to our idea of Australian federalism, because the union then negotiated was inevitably federal in much of its form, implying that federal ideas must therefore also have previously been weak. Yet we have already seen signs that concepts of nationhood generally, and federal nationhood specifically, were embedded in the expectations of colonists from half a century earlier. Given the history of dominion concepts, intercolonial legalism and popular federalism, it becomes unlikely that the proposals for union in the 1840s failed to take hold because Australians were unprepared to think nationally. After all, the plainest single cause for failure of the 1849–1850 proposals was their rejection by an uncooperative House of Lords as a 'rash and perilous innovation'.⁵⁶ In Australian debates about responsible government in 1850–1855, the concept of a national constitution—as opposed to

⁵² A. de Tocqueville, *Democracy in America*. New York, Vintage, 1835: 295–297, 398; N.K. Blomley, *Law, Space and the Geographies of Power*. New York, Guilford Press, 1994: 120–121; Hyam, *op. cit.*: 53; H. Patapan, 'Melancholy and amnesia: Tocqueville's influence on Australian democratic theory', *Australian Journal of Politics and History*, vol. 49, no. 1, 2003: 3, 6.

⁵³ See generally Ellis, *op. cit.*: 48, 57; and Irving, *The Centenary Companion to Australian Federation*, *op. cit.*: 391–392.

⁵⁴ D.W.A. Baker, *Days of Wrath: a Life of John Dunmore Lang*. Carlton, Vic., Melbourne University Press, 1985: 165–201, 290–343.

⁵⁵ H. Irving, *To Constitute a Nation*, *op. cit.*: 25ff.

⁵⁶ Quoted in W.G. McMinn, *op. cit.*: 46–47.

simply separate colonial ones—was routinely supported in principle, and popularly in substance. Continuing faith in nationhood was evident in Van Diemen’s Land, where the *Hobart Town Courier* saw the Australian colonies as already ‘States confederated’⁵⁷ and there was public support for a single constitution for this Australian ‘confederation’.⁵⁸ The NSW Legislative Council maintained its call for a general assembly of the colonies.⁵⁹ As we saw at the outset, the *Sydney Morning Herald* was openly supportive of something substantially more, and went on to openly condemn responsible government for producing separate constitutions which simply encouraged ‘huckstering notions of statesmanship’, and ensured the colonies would legislate against each other ‘like rival tradesmen competing for custom’.⁶⁰

Against the noble standard of British constitutional norms, to have such a group of colonies *not* grouped as a nation already appeared strange to many, even in the 1850s. For example a group of Shoalhaven landowners also stated the obvious when they petitioned the NSW legislature for an intercolonial conference ‘to prepare one Constitution for Australasia’:

[I]t appears to your Petitioners strange and unstatesmanlike, as well as a most unseemly and untoward system of patchwork legislation, that Australasia, comprising but four Colonies, Dependencies, not far distant from each other, peopled by the same race, British subjects too... shall be doomed to have no less than four Constitutions. The great study and aim of all practical British Statesmen is not only to have and preserve one British Constitution, but also to assimilate the local laws of England, Ireland, Scotland, and Wales, as being most conducive to [inter alia] the social and political harmony of the people.⁶¹

On some analyses,⁶² the Shoalhaven residents were seeking a unitary system: a territorial unification. In fact what they sought could also easily have been a federation, almost half-a-century earlier than the one eventually achieved. The key point is that even if neither unification nor federation proved achievable in the 1840s–1850s, this does not mean that the nationalist prerequisites for a strong Australian federal consciousness did not exist. Even later, it is not necessarily accurate to assume that Australian nationalism had to be created or recreated over a short period. For the colonial legislators whose own power and interests were closely aligned with their jurisdictions, nationalism was clearly often a secondary consideration, and had to be negotiated into existence. However, later federalist leaders like Sir Samuel Griffith seemed to remain conscious that the only real role for the early subdivisions was as sub national units, for example when telling constituents that no individual colony could honestly claim its own permanent ‘feeling of Patriotism’ or expect to

⁵⁷ 1853; see McKenna, op. cit.: 73.

⁵⁸ ‘Constitution: summary of proposals.’ *Sydney Morning Herald*, 6 Dec 1853: 4

⁵⁹ ‘Report from the Select Committee on the New Constitution’ *New South Wales Legislative Council Papers* vol. 2, 1853: 121–122; and Wentworth, op. cit: 7, 10.

⁶⁰ *Sydney Morning Herald*, 1857, quoted in Ward, op. cit: 465.

⁶¹ ‘Constitution Bill: Petition from Shoalhaven’ *New South Wales Legislative Council Papers* vol. 2, 1853: 726; *Sydney Morning Herald* 7 December 1853: 3.

⁶² For example, Cramp, op. cit: 128–129.

stand ‘permanently distinct in the eyes of the rest of the world’.⁶³ The lack of excitement around Federation even in the 1890s perhaps had much to do with the fact that this idea was already well established in the public psyche. It took until the 1880s–1890s for formal territorial unity to be restored, but it seems the unifying as well as separating principles of federal sentiment had already been entrenched much earlier in colonial society.

The Second Federalism: conventional, pragmatic and centralised

Even if we accept that federalism may have had an earlier and more forceful entry into Australian politics, what is the evidence that this first federalism was somehow qualitatively *different* to that which emerged not long after? Here we have a question of great importance today, because a simple adjustment of dates is not in itself that significant. More important are the signs that we seem to have neglected our ‘first’ federalism because it operated in conflict with the other ideas of a federated or united nation that then quickly followed. As we have seen, and emphasised in Figure 3, these ideas gained prominence not just at different times, but in different places and different circles. Our first federalism apparently dominated in Tasmania and Victoria, and the second emerged in Sydney and London. If we continue to contrast and compare the new story with the old, we rapidly identify other distinct differences. From a theoretical perspective, we can quickly identify that the first, ‘Franklinesque’ federalism was much more dynamic and decentralist than our customary assumptions about federalism as purely a unifying process; and if we continue this analysis we also find reason to doubt the extent to which Australia’s second ‘federalism’ should even be considered ‘federal’.

Australian federalisms’ differing mobilisational orientations

To take the theoretical contrast first, it is not difficult to find avenues of comparative constitutional analysis that stress the difference of these federal ideas by analysing their different ‘mobilisational orientations’.⁶⁴ On King’s analysis orientation typically refers to intended levels of decentralization, centralization or ‘balance’. Using this approach, Australia’s conventional federal story is based—like many federal stories—on an orientation of partial centralization: from 1842, political leaders began to suggest that separate territorial units should unite while also preserving existing identities. This ‘classic’ orientation was present in American federalism, but also predated it, in concepts of territorial compacts often traced by Europeans back to Ancient Greece.⁶⁵ It is embedded in the standard definitions of federalism derived from the Latin terms *foedus* (treaty, agreement or compact) or *fidere* (trust) with

⁶³ S.W. Griffith, ‘Political geography of Australia’ *Royal Geographical Society of Australasia Queensland Branch Journal* vol. 6, 1891: 72, 76.

⁶⁴ P. King, *Federalism and Federation*. London, Croom Helm, 1982; R Watts, *Comparing Federal Systems in the 1990s*, Kingston, Institute of Intergovernmental Relations, Queen’s University, 1996.

⁶⁵ For example, E.A. Freeman, *History of Federal Government [In Greece and Italy]*. London, Macmillan, 1863: 72; and B. Galligan, ‘Federalism’s ideological dimension and the Australian Labor Party’ *Australian Quarterly*, vol. 53 no. 2, Winter 1981: 130; and S.H. Beer, op. cit: 223; and D.J. Elazar, ‘Contrasting unitary and federal systems.’ *International Political Science Review* vol. 18 no. 3, 1997: 249.

which separate communities share their power under joint constitutions.⁶⁶ The orientation is one of partial centralization because the focus at federation is on the nature and extent of powers to be relinquished by constituent governments to the central one.

However, a different mobilisational orientation can also be seen in the federalism imported into early colonial Australia, in Franklin's idea of the 'commonwealth for increase'. Franklin's theory saw union also concerned with structural decentralization, based on the principle that both mobilisational orientations—centralization *and* decentralization—could and should work together. Australian colonists who saw territorial separation and national union as one and the same, clearly adopted this principle. Examples include not just Lang, but the famous declaration by Queensland's colonial secretary, John Macrossan, to the Melbourne Federation Conference that 'the strongest separationists are the most ardent of federationists.'⁶⁷ The Central Queensland separationist, George Curtis, accurately summarised America's federal dynamic as a process of 'separating and federating the whole time'.⁶⁸ Indeed the full significance of the first federalism conceived pre-1842 becomes clear when appreciating the variation entailed by the transfer of the model. Franklin's combination of orientations involved a sequence of territorial centralization in order to then immediately begin a process of territorial decentralisation. But in Australia, the reception of federal ideas involved a slightly different orientation again: *decentralizing* first on the understanding that a federal union would naturally follow *later*. For the first time in European history, the Australian sequence tended towards the division of territory not to create new 'colonies' as in previous experience, but deliberate propagation of subnational units for a future nation. Never had Europeans tried this 'Franklinesque' idea of federalism from scratch. The fundamentally decentralist Australian orientation is therefore historically important in its own right—an experiment on an experiment, more significant than previously realised in the world history of federalism.

By contrast, while the ideas that emerged in the 1840s also envisaged a compact between existing territories, they did not recognise further or ongoing territorial decentralization as an objective. The Sydney and London ideas reverted to a singular mobilisational orientation of partial centralization. A significant historical tension thus arises from the fact that many colonial and regional communities always continued to see federalism as capable of jointly fulfilling both orientations, as testified by 'new state' activism.

Reviewing Australia's second federalism: how 'federal' is it?

Finally, the differences between Australia's first decentralist federalism and a second, more centralist 'compact' federalism suggests some need to re-evaluate the latter. When these ideas coincided in the 1840s–1850s, did their adherents even recognise each other as 'federal' and if so, with what associations and implications?

⁶⁶ D.A. Kidd, *Latin-English English-Latin Dictionary*. London, Collins, 1957; and W.H. Riker, 'Federalism', in *Handbook of Political Science*, F.E. Greenstein and N.W. Polsby (eds), Reading, Addison-Wesley, 1975.

⁶⁷ *Official Record of the Proceedings and Debates of the Australasian Federation Conference, 1890*, 12 February 1890: 72.

⁶⁸ *Queensland Parliament Debates: Special Session—Federation Enabling Bill*, vol. 81, 1899: 35.

Despite the conventional assumption that official 1840s proposals for intercolonial reunion were necessarily ‘federal’, it is important that rarely—if ever—did the major Sydney and London adherents of national union use the term ‘federal’ itself. Deas-Thomson’s proposal for an intercolonial ‘superior functionary’ was directed not to the federal but ‘general’ interests of the colonies, and as a centralizing administrative strategy—without counterbalancing political institutions—it was scarcely federal by later standards. When Earl Grey suggested an intercolonial parliamentary body in 1847–1850, this too was styled a ‘general’, not ‘federal’ assembly, and was quite un-American in proposing the four provinces send delegates only in proportion to population.

These facts, combined with the proposed sweeping reach of (Sydney-controlled) ‘general’ powers over trade, tariffs, and control and sale of all public lands, make it understandable why the South Australian and aspirant Victorians were nervous in 1847–50.⁶⁹ Their nervousness lay not in inability to think nationally, but more probably in the fact that there was little ‘federalism’ in the proposals. Despite being conventionally regarded as comparable to later ideas of union, the 1842–50 reforms would almost certainly have entailed massive recentralisation of legislative and administrative control in Sydney, with the aim of a more politically and economically consolidated colony. British officials at home and abroad, it seemed, no longer wanted a federation as much as almost total territorial reunification.

What then of the colonial discussion about union that promptly followed, in the 1851–55 debates over responsible government? More historical light may be supplied by the current 150th anniversary of those debates, but there were significant differences in the way that union ideas were perceived in Sydney as opposed to the original ‘federalists’ in Tasmania and Victoria. Sydney legislators’ aspirations appear to have been nakedly aimed at reversing their loss of political and economic control, and did not describe their ideal as ‘federal’ but rather associated that term with the trend to subdivision recently satisfied for Victoria, and still underway elsewhere. As much is indicated by a dramatic speech by W.C. Wentworth—lead parliamentary supporter of union on Earl Grey’s model—in response to a Moreton Bay petition just as the new constitutions were being debated:

[The northern representatives] assumed that the separation of the northern districts was a right, but he (Mr Wentworth) protested against the colony being split up into as many separate governments as people chose to imagine would suit their convenience. ... [He] thought they had too many separations already. The only result of this miserable policy would be that a series of petty, paltry, insignificant, states would be created which would necessitate the creation of a federal Government and end inevitably in the overthrow of the British throne. ... If he had had his way, that brilliant province of Victoria, which was growing up so democratic, would never have been separated at all. ... Was this colony

⁶⁹ D. Pike, *Paradise of Dissent: South Australia 1829–1857*. Melbourne University Press, 1957: 414–416; Ward, *op. cit.*: 113–137, 179–182; McMinn, *op. cit.*: 46–47.

merely to be a sucking nurse to these young states till they could toddle alone, and take care of themselves, and then to part with them?⁷⁰

Far from seeing his own idea as ‘federal’, Wentworth reserved that term for those following Australia’s first federal tradition, and emphatically opposed it. Yet conventional political science and history have always assumed that the early Sydney notions of union provide the direct antecedents of the federal ideas that spawned the nation. If so, then the conventional notions on which present Australian constitutionalism remain based appear to have had their genesis in explicitly anti-federal soil. Wentworth’s important ‘sucking nurse’ question recognised but vehemently rejected Australia’s first and ‘true’ federalism. On the principles of Franklin’s ‘commonwealth for increase’, continuing to play out on the Australian frontier, the correct answer to that question was ‘yes’, but Wentworth and his central district colleagues presumed it to be ‘no’.

Even by the 1850s, the dominant conception of intercolonial union held by the Sydney political elite was opposed to the decentralist orientation embedded in federalist ideas elsewhere in the country. This tension was not merely tangential or transitory, but a deep schism that still demands careful scholarly and political attention. Moreover we do not have to go far today to find similar views of how national politics should work, inconsistent with the notion that centralist trends in federal thinking—so centralist that they basically become unitary—have somehow chiefly been the province of Labor governments or bureaucratic planners in Canberra. Indeed Wentworth would recognise these sentiments still, lying just across the Harbour. Consider the views of Tony Abbott MP, current minister for health, in his laments on ‘feral federalism’, the desirability of a centralised industrial relations system and recognition of the unitary system as something of an ideal, even if unachievable.⁷¹ Or Irving’s analysis of the attitudes implicit in the prime minister’s decision to reside at Kirribili House for the past eight years:

Although he had years to imagine himself in the [Canberra] Lodge, Howard has insisted on living in Sydney since he became Prime Minister. This choice simply disregards the significance of our constitution’s requirement for there to be a neutral federal territory (and its prohibition on Sydney as the capital). Oh, Canberra? It is the ‘national capital’, Howard has said of his decision, but not ‘the centre of Australia’. Sydney is, then?⁷²

Conclusions: Resolving the Schizophrenia?

This paper has sought to throw light on only *some* of the conflicts that pervade Australia’s constitutional traditions, and in a manner that tends to raise as many questions as it answers. We live under a dominant view of federalism that continues to be so antitheoretical in content and centralist in basic disposition that it remains hard to recognise it as ‘federal’ at all. Yet we deny the presence or wisdom of the

⁷⁰ ‘Legislative Council Debate: Moreton Bay.’ *Sydney Morning Herald*, 27 August 1853: 3; but compare Ellis, *op. cit.*: 54; and R. Fitzgerald, *From the Dreaming to 1915: a History of Queensland*. Brisbane, University of Queensland Press, 1982: 112.

⁷¹ T. Abbott, ‘Responsible federalism’, *AQ*, 2003: 754.

⁷² H. Irving, ‘The buck stops elsewhere.’ *Sydney Morning Herald*, 23–24 November 2002: 8.

unitary ideas that so clearly continue to run prominently through our constitutional values, in a territorial sense, even when they appear equally necessary to explaining our politics. Even without unpacking our alternative history of decentralised unitary ideas, by focusing on the earlier and different receipt of a uniquely decentralist trend of federalism in Australia, we can see that there is a lot more to be studied and understood about why so many Australians remain deeply convinced that there should be significant evolution in constitutional structure. Our basic ideas have been clashing and re-clashing for almost the entirety of Australia's European history, locked in conflict around a frozen territorial structure which is widely regarded as delivering *neither* the level of national unity *nor* the serious political decentralization which many Australians have long desired.

Understanding the unresolved conflicts between constitutional traditions is one thing—another question is whether we can ever hope for more, such as some actual resolution or reconciliation. The scope is enhanced simply by the evidence that there is more than one federalism in Australians' own political experience, and more than one version of unitary ideas, forcing us to acknowledge that federalism and unitary values are not ideologically fixed but that rather, *either* can give rise to systems that might be either centralised or decentralised. Our first federalism retains a significant political potency should its dual orientation again be recognised, or should it ever be discovered—as I hope to do elsewhere—that decentralist federalism has frequently enjoyed a strong synergy with other non-federal theories of territorial reform. The uniqueness and diversity of constitutional traditions also challenges the convenient assumption that Australian politics has always only been fundamentally pragmatic, utilitarian and materialistic, typified by a federal Constitution drafted by leaders with 'little inclination for political theorising and little apparent need for it'.⁷³ In fact ours is a more interesting story in which theory and ideas have been important, dynamic and contested. The distinction between Australia's first and second federalisms offers a new point of departure for some vexed debates. Continuing tensions and overlaps between veins of regional political dissent become more complex, but more potentially rewarding to unpack and reconcile.⁷⁴ The fact that British colonial policy and Australian communities were dealing with coherent theoretical options for national constitutional development earlier than assumed, challenges us to revive and continue such traditions. From these lessons, we might hold out hope for our capacity to imagine continued evolution in our constitutional systems, rather than always assuming that the *status quo* represents the natural endpoint of the federal story.



⁷³ B. Galligan, *A Federal Republic*, op. cit: 46; and see also Warden, 'Federalism and the design of the Australian Constitution', op. cit: 143.

⁷⁴ A.J. Brown, 'After the party: public attitudes to Australian federalism, regionalism and reform in the 21st century' *Public Law Review* vol. 13, no. 3, 2002: 171–190; and A.J. Brown, 'Subsidiarity or subterfuge? Resolving the future of local government in the Australian federal system' *Australian Journal of Public Administration* vol. 61, no. 4, 2002: 24–42.

Question — In your survey, I don't think you got the answer to your first question: 'What do we think the system will be in one hundred years?' Do the majority think the system will be same in one hundred years as it is today?

A.J. Brown — OK, we can go back to that question with the audience here. What do you think the system will look like in one hundred years from now? How many think it will be same system as today? And how many think that there will be a three-tiered system and more states? Those who think there will be a two-tiered system with regional governments replacing the states? Those who believe that there will be a four-tiered system? And those who believe it will be completely different? So the answer is that it seems to be pretty evenly split, I think.

Question — Surely the problem is not theoretical, or it may become *only* theoretical, but is based on the difficulty of constitutional change? And on another point, I think that most people who tend to favour regional government think of that as a local government which is simply expanded, like in New South Wales at the moment.

A.J. Brown — Both of those points are practical political issues, and problems. The question then in terms of the feasibility of change depends on why you believe there have been so few changes to the Constitution put to the people through the twentieth century. It depends on why you believe those changes have not come about, and there is a lot of debate about that. In this discussion we are not talking about a change that is likely to happen overnight, although I notice that on Monday the Business Council of Australia released three scenarios for 2025, called *Aspire Australia 2025*, which is well worth looking at and is on their website. They are not exclusive scenarios, but one of them is that in 2021 there will be a referendum where Australia becomes not just a republic, but also basically votes to introduce a two tier system of government, such as most of you would presumably vote for. A particularly good reason for having a look at this scenario is the Business Council's description of the factors that would bring it about—the economic circumstances, and a combination of historical, economic and political developments that would be required for there to be a feeling that there was a significant enough body of change that everybody had to come to grips with and embrace and figure out a solution to, and then do it.

I think this is a very salutary description of the fact that, even if we all agreed that this should happen, it's not going to happen tomorrow. But I guess one of the values of sketching out some of the history of these ideas and the fact that they are with us and have been with us for so long, is that it becomes much easier to figure out (a) that they are all valid, and (b) that they are not going to go away, and (c) they are all based on real political and economic concerns and desires and instincts, all of which need to be accommodated in any system that is going work really well.

So, whether or not we will get onto the path that the Business Council described for 2025, all of those ideas that are embedded in our history and in the current attitudes we have towards our system are going to be relevant to figuring out what the best system is, whenever those opportunities for change eventuate.

Question — If we are talking about a two-tier system, what sort of two-tier system do we mean? Are we talking about one which is a regional government similar to a local government, which means that their power comes from the central government

and can be overridden, in the way that Kennett in Victoria totally changed the local government system? Or are we talking about a federal system, where the existence and powers of the second tier would be guaranteed by the Constitution? Because I think they are two completely different options. I note that the Whitlam regional system was the first thought, where the federal government would have all the overriding power. So what options did you have in mind?

A.J. Brown — The answer is: either, both or none of the above. I am a lawyer as well as a political scientist, as you may have realised. The key thing about the questions we asked in the survey was that we presumed that the system, whatever it was, would still be a federation—which implies that whatever the roles and the rights and the autonomy were of those regional units, they would effectively be locked in by a constitution in something that would be technically described as federal. We assumed that in order to see how people would respond to the question, and basically I don't think people care whether their system is called 'federal' or 'unitary' most of the time, depending on what the reality of how it works is going to be—which is the basis of your question. I think this is a debate that can, and should, go on and on, about the degree of constitutional security or protection or permanence the powers and the finances and the territorial autonomy of local or regional governing units should have. That is running through the whole New South Wales amalgamation debate, and any local government amalgamation debate. Those questions are vitally important.

We have just applied—with the support, I am happy to say, of the Australian Local Government Association—for some major Australian Research Council funding in order to do some more Australia-wide in-depth surveying on what people have in mind when they answer questions like this.

Question — You would be aware that over the last four years the *Australian* newspaper has been making in-depth analysis and research into structures of Australian governments and constitutional arrangements into the future. More particularly last Saturday, in the *Weekend Australian*, Mike Steketee was the senior writer of an article on scenarios. That was the *Aspire Australia 2025* Business Council article that you referred to earlier. As an extension of that, did you think that the prediction that Australia would be a regionalised republic, in that we would have a two-tier system of governance by 2015, was a plausible scenario?

A.J. Brown — It wouldn't be there if it wasn't plausible. The people who put those scenarios, like most Queenslanders, weren't necessarily incredibly radical and weren't about to turn Australia into a union of soviet socialist republics—this is the Business Council of Australia.

I think the interesting thing about the scenario is the description of the circumstances that those people perceive to be necessary to create the required groundswell for change. One of the reasons in the Business Council work for having those three scenarios was to indicate that a whole variety of things could happen. So the question is, how confident are we that any particular model is necessarily going to be the answer, given all the different things that could potentially happen and the variety of possible options for doing government business in a different way, that might lead to other options being available?

The whole idea of collaborative federalism or cooperative federalism in the 1990s—when there were heaps of ministerial councils all agreeing on what to do and a big focus on uniform legislation on whatever issue people could get their hands on, all being negotiated cooperatively between the federal government and the states—is that we can do it without having to go through this whole constitutional reform process. But the conclusion I draw—based on my growing understanding of basic Australian political values—is that Australians don't want stop-gap measures. They would like a system that they identify with and which they can have confidence in without worrying about it in the middle of the night, and without have to become a legal expert or an expert in government relations. A system in which they have confidence basically relates to the spatial dimensions of their communities and their interests, which they don't have at the moment. That doesn't really answer your question, but I don't think that those basic political instincts are going to go away, because they haven't gone away for the last 150 or 180 years.

Question — You chose America as an example of the creation of multiple new states. Most American states were actually made from territory acquired or conquered or annexed from Indians or Spaniards or whatever. Also, a lot of American state-making was driven by the need to match slave and free states in admission to the Union. There have only really been four American states which have been carved from existing mother-states, as opposed to overlapping territorial claims. Two of these were against the wishes of the mother-states—that is, Vermont and West Virginia. In Vermont's case they bought their way out of an unhappy union: in West Virginia, they used a civil war. Can you think of any precedents for the creation of Australian states either on the Vermont model or, more interestingly, on the West Virginia model?

A.J. Brown — Comparative constitutional history is great, because you get to deal with other places a long way away and you get to really indulge your imagination about what was happening in 1776 and 1780.

What you described there is not quite correct. In relation to the American west, it was a case of new territory so it could just be sub-divided. The fact that they wanted to do that as a means of creating a political structure was in itself significant. But Vermont is a very good example. West Virginia was created in the American Civil War and is a bit of a constitutional anomaly.

Vermont was effectively a region which was born because there was a regional independence claim there which was outstanding since before the American Revolution. The claim wasn't going to go away, and the area was contested between New York and New Hampshire. Basically it became easier to recognise Vermont's claim to be a state of its own rather than to fight it, particularly because they were on the frontier with British North America. And if you didn't keep everyone on the frontier happy, they had the option of jumping back to the British and becoming part of Canada. So there was a lot of pressure along that frontier to keep that from happening. Vermont was part of that.

Maine is a really interesting example. Maine was still part of Massachusetts, even though it was territorially separate from it right up until 1820, but they had been

agitating from the 1600s. Massachusetts only agreed to give it up as part of what were called the Mason Dixon Line deals. There were slave states below the Mason Dixon Line that were seeking statehood, and to keep the political balance in the Senate so that it wasn't controlled by slave states, everybody leaned on Massachusetts to let Maine go so that there was then an additional non-slave state. That was the key that finally got Maine its separation, even though Maine people didn't need to be told that they should have separation, they had been campaigning for it without interruption for 40 or 50 years at that stage.

But a lot of the other territories basically followed the model of what were called the Ohio River Territories, which were the north-west territories. The key event during the American Revolution was that Virginia claimed all those territories. There were landless states, like Maryland, that refused to sign the Articles of Confederation during the Revolution, because they didn't have any land and they thought the deal they were going to get in the Union was bad, so they refused to sign unless they got access to some of the land out west. Eventually New York rolled over and agreed to relinquish claims to territories to the west, in order to get states like Maryland to join the Union and help fight off the British, and to help stop the French from hassling and threatening to pull out of the fight against the British.

Virginia agreed to relinquish the territories to the west, not only to Maryland and other states, they also gave some of the territories to the federal government to deal with in the best possible way, on the condition that the federal government divided it up into new states, rather than just keeping it. Virginia, at that point, was the New South Wales of American federalism—populous, oppressive, threw its weight around, centralist, and looked after itself. So Virginia accepted that New York had shown the way, and agreed to give up their claims, but only provided—and this was locked in by law—that the federal government had to divide those territories into states when they reached a certain population.

That precedent having been set—and Benjamin Franklin's Commonwealth for Increase idea having finally, through political force, made it into the constitutional deal in the 1780s—other states like North Carolina, South Carolina and Georgia, who had similar problems with territory out west that they couldn't manage, then thought that it was good idea to have the federal government take over those territories, to develop and divide them up as well. So this idea of federalism as a decentralising force was really very central to American federation and to the American idea of union and constitution-making. However it had very specific and very dire political factors involved, like the American Revolution.

This is all a history which has never been told properly in an Australian context—for example it is a history that was largely unknown or misunderstood or ignored by Australia's constitutional draftsmen in the 1890s. They thought that they knew something about this history, but in fact—based on the federation transcripts—most of them were in fact quite wrong in their interpretation of this history and didn't really know what the American new state provisions would do in an Australian context. So all of these things are the reasons why it has become so complex to unpack it. But all of these things basically continue to me to point to a need to really take things back to first principles and say that all these ideas are still relevant, they haven't necessarily ever been given a proper run in what is actually a very short

constitutional history in Australia. It is really only yesterday that most of these things happened.

Question — I think you have shown from your research and illustrated again today that the political structure that we have in this country is not what most of the people would like to see. How much of the reason for this do you attribute to the fact that, although our founding fathers gave the people, and only the people, the right to change the Constitution by voting at a referendum, they didn't give the people the right to initiate such a referendum.

A.J. Brown — I think that if the founding fathers were around today, and if they had realised how the Constitution was actually going to work and how difficult it was going to be to change it, then they probably would have put in something that enabled the people to initiate changes to the Constitution. The bulk of expectation at the time, and the whole idea of even having a referendum and asking the people how the Constitution should be changed, let alone requiring that to happen, was actually still a very radical concept in the 1890s. In 1891 it got no guernsey in the first Constitution drafting sessions because it was too democratic and too radical. By the late 1890s people thought that it was the only way they were actually going to get a federation, by getting people to vote for it, because the politicians were so hopeless. But I draw from that that most of the constitution-makers expected constitutional change to be much easier than it proved to be, and they were simply inaccurate in their predictions, because nobody could have known. I think that some mechanism for citizens-initiated referenda is fully consistent with what most of the constitutional drafters would have had in mind at the time.