

## **The New Centralism and the Collapse of the Conservative Constitution<sup>\*</sup>**

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### **Introduction**

Moving rather indirectly towards my topic, it may be observed that some of the greatest epics in history have concerned the collapse of love affairs. We all remember the intense drama in the falling-out of Othello and Desdemona, Hamlet and Ophelia, Bob Hawke and Paul Keating.

There are relatively few epics in the field of Australian constitutionalism, and those that have occurred never have made it into Shakespeare. Yet it did strike me in preparing this lecture that when one does encounter an antipodean constitutional epic, it may well concern a shattered love. The reason I say this is that we are now witnessing in Australia the bitter falling-out between two of the great partners of our constitutional history—conservative liberalism on the one hand, and federal constitutionalism on the other. As we all are aware, the Howard government is in the process of leaving home to live in sin with that dreadful old tart, Canberra centralism, leaving a weeping federalism behind, and six wailing brats of states. Unappealing children, one admits, but desperately hungry.

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What I would like to do in this lecture is three things. First, I will attempt to trace the historic connection between Australian conservatism and Australian federalism. Second, I will consider the current attacks on Australian federalism, and the logical responses that may be made in its defence. Finally, I will examine in some detail the emerging rift between federalism and its traditional conservative supporters. The basic thesis of the lecture will be that, in turning their collective back upon federalism, Australia's liberals and conservatives are spurning a fundamental element of their own political philosophy and tradition.

### **Federalism and conservatism**

It is important to begin with the reality that our Constitution, for all its virtues and vices, is very much a liberal-conservative artefact. The Constitution, as a matter of simple fact, was the favoured creation of Australian conservatives. This can be seen, firstly, in its classically liberal-conservative institutions: its bicameral parliament, its responsible government, even its temporarily uncongenial constitutional monarchy. It can be seen, fundamentally, in the institution of federalism, a matter to which I will return at length. None of this can come as any surprise: our Constitution is, after all, a masterful fusion of the two great nineteenth century liberal-conservative constitutional traditions, those of the United Kingdom and the United States of America.

We also can discern the conservative lineage of the Constitution in the hands and faces of the people who wrote it. Our great Founders overwhelmingly were conservatives and liberals: Barton, Griffith, Deakin, Kingston, and Reid never attended a meeting of the Rooty Hill branch of the Australian Labor Party. Even the occasional radical delegate to the Conventions, such as Isaacs and Higgins, were hyper-liberals, not proto-socialists. Labor, for a variety of reasons centring on a disinclination to risk its strengthening position within the existing colonial structures, and a general suspicion of federalism as a form of government, effectively dealt itself out of the creation of the Constitution during the 1890s. The result is that the Australian Constitution is, in fact, the greatest public work of Australian conservatives. It hardly is surprising, therefore, that it historically has been defended by conservatives, and more or less consistently attacked by their opponents from the Labor side of politics.

Notwithstanding its self-evident conservative lineage, however, the most obvious feature of the Australian Constitution is its federalism. Indeed, the single word that most accurately describes our Constitution is that it is a "federal" constitution: the document breathes federalism. Indeed, if one compares federalism as a constitutional component with other significant conservative features of the Constitution—such as the monarchy—the comparison is between the iceberg and the penguin. Even the most hardened centralist is forced to concede that virtually every significant part of the Constitution is premised on federalism. From the composition of the Commonwealth Parliament, to the judicature chapter, through the powers of the national legislature to the existence of the States themselves, at the heart of Australia's governmental dispositions is a fundamental commitment to federalism.

This reality even is susceptible of proof by physical experiment. If one takes a Stanley knife to a copy of the Constitution and cuts out every reference to federalism and the States, one is left not with a Constitution, but confetti. The Constitution of Barton and

Deakin cannot exist without federalism, and this has specific logical consequences for Australian constitutional conservatism. Thus, it is not possible for an Australian conservative to claim to be a staunch defender of the Constitution—for example, in the context of the republican debate—but to repudiate federalism. It would be as silly as a purported conservative Catholic denying the resurrection, or a claimed Geelong supporter rejecting Gary Ablett. The conservative lineage of the Constitution is inseparable from its federal essence, and as we will see, this is entirely unsurprising. Those liberal conservative founders chose federalism as a form of government, not only as a politically convenient means of bringing the colonies together in the 1890s (which it was), but fundamentally because it reflected central aspects of their own political conservative philosophy.

I accept, of course, that the Constitution does not enjoy a current popular reputation that matches its historical credentials. Indeed, it is (quite wrongly) held in relatively low esteem. It is perceived widely as a ‘British’ document, and as such about as appealing as burnt kippers. We tend to think of it as having been cobbled together by intransigent colonial statesmen, too selfish to opt for a proper and full union, which would have abolished regrettable tendencies like Tasmania. We are sure that it is full of obscure language like ‘heretofore’ and ‘thereinafter’, and that it is utterly irrelevant to everyday life. Many of these criticisms are plain silly. I note, for example, that the Constitution is not in full of syntactical Victoriana and bad legal Latin. Indeed, any of you who have the slightest familiarity with modern legislation and who also have read the Constitution readily will testify that it is far more comprehensible than most contemporary enactments. Yet the contrast between the low popular esteem of the Australian Constitution, and that of the United States, whose citizens seem to be able to recite it on or in defiance of demand, is striking.

There are various reasons for this, which I will not go into in detail. One is that our Constitution has committed the unforgivable sin of having an uninteresting history—no blood, no wars, no massacres, no guillotines or Czars—the sort of things that excite fourteen year-old boys and television producers. The other is that after one hundred years, we tend to see Federalism as having been inevitable, and therefore are profoundly unmoved by it. The reality is that when Deakin said that Federation was a miracle, he was speaking nothing more than the truth.

Yet against this lacklustre perception of our Constitution, we need to set a central, paradoxical reality: that both the Constitution and the federalism it so prominently enshrines have very genuine claims, if not to reverence, then to public respect. Central here is the character of the Australian Constitution, in the most modern sense, as a ‘Peoples’ Constitution’. This arises in three fundamental respects. First, the Constitution overwhelmingly was drafted by delegates elected by the peoples of the colonies for that purpose, and thus comprises a popular constitution in terms of formulation. Second, the Constitution was endorsed by democratically conducted referenda among the colonial populations, conferring upon it a popular legitimacy of adoption. Finally, the Constitution remains amendable only through referenda conducted under section 128, a truly popular method of alteration. No matter how down-at-heel our Constitution may be in how many respects, there is no other modern Constitution that has a comparable popular chain of title, and it is precisely that democratic ancestry that gives our Constitution its intense claim to democratic legitimacy. This is a claim which necessarily extends to the fundamental feature of

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that Constitution: federalism. Conservatives, with their intense concern for legitimacy, have valued both the Constitution and its federalism accordingly.

The traditions of Labor regarding the Constitution are significantly different, as already has been noted. Having dealt itself out of the Federation decade, Labor never has had any particular sense of ownership of the Constitution. It also has had a particular distaste for particular elements of the Constitution—such as the monarchy—but most notably for its central feature, federalism. Indeed, it is not going too far to say that at the heart of the Labor Party's traditional hostility towards the Constitution is a deep enmity towards the notion of federalism.

The straightforward reason for this hostility is that Labor historically has been philosophically opposed to federalism as a form of government. Thus, Labor traditionally has seen itself as the party of change and reform, and understood that to effect change a party requires ready access to power. The most obvious repository of pervasive power in the Australian federation is the national government. Federalism, by dividing power, inhibits the exercise of power by the national government and it therefore follows that federalism is a threat to any party in favour of rapid reform and cohesive change. To a significant extent, reality has followed theory. In the period since 1900, many Labor initiatives in such areas as price-fixing and the nationalisation of banks have been frustrated by the federal character of the Australian Constitution. The result has been that hostility to federalism has become a major article of Labor faith, and has been expressed in a variety of forms: from Gough Whitlam's flirtation with regional governments as a means of undermining the States, to Bob Hawke's Boyer lectures proposing the abolition of the States. The fundamental point is that Labor's hostility to federalism has been based on a philosophical attitude toward power and change, and toward the power to effect change.

That attitude needs to be contrasted very clearly with the historic conservative defence of federalism. Obviously, conservatives always have been inclined to defend the Constitution and its federalism as their own handiwork, but they have also have defended federalism as a matter of principle. This has been on the basis of philosophical suppositions fundamentally opposed to those of Labor. Essentially, Australian conservatives have defended federalism because it is a characteristic of conservatives to be suspicious of power, to fear its concentration and misuse, and therefore to seek to divide and balance it. Two obvious constitutional manifestations of such suspicion are to be found in bicameralism and the separation of powers, but its greatest expression in an Australian context is federalism, with its comprehensive division of power between the spheres of the Commonwealth and the States.

This is classic United States constitutional theory, of which Founders like Barton and Deakin were deeply aware, and which underlaid their adoption of federalism as a form of government. The result has been that Australia's conservatives historically have understood and accepted federalism as a means of achieving their fundamental goals of dividing power, making power accountable, separating power, and limiting power. Consequently, they have been temperamentally supportive of federalism, even when they found it irritating. This has meant that, while conservative governments might on particular occasions succumb to the political temptation to violate federalism, they would struggle against doing so, and invariably would feel dirty in the morning if they

fell. That monumental compromise between federalism and pragmatism, Sir Robert Menzies, was a good example of this tendency:

All this being said, the central conclusion of this lecture will in fact be that the historic alliance between Australian conservatism and Australian constitutional federalism apparently is over, and that after a century of ideological convergence, we now face the spectacle of an ostensibly conservative government in Canberra waging war on federalism. In suggesting this, I am not naïvely asserting that Australian federalism has been in robust good health for the past one hundred years. We all know of the progressive decline of Australian federalism and the States. We all understand the implications of vertical fiscal imbalance. We all comprehend that the Commonwealth has made constant legislative incursions into the domains of the States, and the reasons this has occurred: the substantial failure of the Senate (despite occasional flashes of regional integrity) to operate as a States' House; the utter failure of the High Court to act as a neutral constitutional arbiter; and the inability of the Founders to secure an adequate federal financial settlement within the Constitution. We all acknowledge that, as a consequence of these factors, the States for at least four decades increasingly have operated as service deliverers for the Commonwealth, although they have not collapsed as institutions, and continue to command a significant popular allegiance from their citizens.

Noting this lengthy litany of federal woes, one might question whether yet another aggressive, predatory, hubristic Commonwealth government really was of any great significance, as opposed to constituting business as usual. Yet the ultra-centralism of the Howard Government—more correctly, its power monopolism—is in reality of enormous significance in Australia's constitutional history. This is because for the first time in that history, there is no Australian party of federalism, in the sense that there is no political party fundamentally, philosophically committed to federalism as a political ideal. Both major parties, it would appear, are psychologically opposed to the federal division of power, and this represents an extraordinarily dangerous period for Australian federalism. It is a time that requires us to think quite carefully about the sorts of arguments we traditionally bandy back and forth as to whether we should be a federation, whether federalism is a good idea, or whether its day in Australia is past.

### **Federalism: Attacks and Defences**

That brings me very briefly to the whole question of the arguments against federalism, both traditionally, and as put forward enthusiastically today under the Howard Coalition Government. These arguments are very familiar in some parts of the country, less so in others. What is correct thought in Sydmeiberra—that fashionable strip that runs from the North Shore, through the staff bar of the Australian National University, stopping a decent distance from Geelong—is social death in Perth. Certainly, such arguments reached a peak of popularity under the reign of Prime Minister Gough Whitlam, and the present incumbent seems to have inherited from his predecessor a filing cabinet full of useful material, which he is enthusiastically recycling. To live in Australia is to be familiar with most of these arguments, which usually are advanced as if there is no possible refutation. In reality, few are lay down miseres, and I will present them together with the more obvious lines of response.

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A common opening salvo is that the States are an historical necessity for which the reason has now passed: let us decently euthanise them as quickly as possible.

The obvious response is to observe, firstly, that too much is taken for granted here: there are potentially some good arguments for keeping the States that need to be examined. A second observation might be that if the federal bargain is to be dissolved, then let it be by democratic referendum, and not by creeping political thuggery. Almost invariably, centralisers have no taste for popular constitutionalism, as its results invariably are uncongenial to their cause.

Centralists next condemn federalism as complex and expensive, railing against plump State bureaucracies and obese State parliaments. A plausible response is that if federalism is complex, expensive and difficult, so is democracy. In both cases, the question is not simply how much it costs, but what you get for the money and effort you expend, which redirects the argument into a much more profitable line of inquiry. One might also politely wonder what would be more expensive: the existing governmental apparatus of the States, or the vastly inflated Commonwealth bureaucracy that would take over their functions in a unitary Australia?

On a similar tack, we constantly are told that we have too many levels of government in Australia. Yet again, the real question is not how many levels you have, but what you get for having them. Of course, in Western Australia—and occasionally in Queensland—protagonists of the States are tempted to agree with that proposition, and suggest that the dispensable tier of government resides in Canberra.

Perhaps the most popular argument of centralism, as recently reprised by the Commonwealth Minister for Health, Tony Abbott, is that federalism in Australia involves duplication and divided accountability in government. There is considerable truth in this argument. One of its dangers for centralisers, however, is that much of the difficulty in this context has occurred because the Commonwealth, through use of its financial muscle, has invaded State areas, such as education and health. Confusion of accountability and responsibility thus may be sheeted home to Commonwealth incursion, not State incompetence. In these circumstances, a reasonable State response might well be that if the Commonwealth is prepared to vacate the field and leave the cheque behind, the State would be more than happy to eliminate all elements of division and overlap.

One of the more condescending positions in the centralist Kama Sutra is that the States are entirely artificial, deriving their existence merely from marks on a colonial map. No-one claims that every detail of the State borders was writ by God. On the other hand, if you think that Broome might quite reasonably form part of Tasmania, you have serious difficulties that have nothing to do with constitutional disposition. Moreover, even if originally the States were creatures of cartography, New South Wales (for example) now has existed longer than the oldest French Republic. Is it not remotely possible that in the course of these two centuries, it may have developed some genuine element of personality, along with some degree of institutional legitimacy? A closely allied argument of centralism is that, whatever the reality of their geography, there is no real difference between the States, or at least none sufficient to justify their separate constitutional existence. This is a position extremely easy to believe in Canberra looking towards Sydney, but miserably implausible in Cairns looking towards Fremantle.

A rather more silky claim is that it is not so much that one has anything against the States, as that regional governments would be so very much better. They would be even more local, even more responsive and even more community-based. Best of all, they would have no constitutionally independent existence and therefore would be incapable of seriously resisting any incursion from Canberra. Whereas a disheartened State Premier can still say ‘No’ (or at least ‘I’d rather not’), all a regional gauleiter will be able to manage will be ‘Yes—how quickly?’

In the final analysis, therefore, the classic articulations of the arguments against federalism from Whitlam to Hawke to Howard are at best debatable. The real question is what, if any, are the counter arguments for federalism, and how persuasive are they? These arguments rarely are considered explicitly in Australia. In Canberra, their very existence is ignored, while in Brisbane and Perth, their conceptual lines often are blurred beneath the tub-thumping rhetoric of States Rights. What is most notable about the federalist case, when it is articulated, is the extreme clarity of the connection between federalism as a constitutional philosophy, and federalism as a conservative philosophy embedded in a constitution.

Thus, many of the most significant arguments for federalism go directly to that defining conservative obsession with the dispersion of power. Such arguments are familiar to any Beginners’ Class in American Constitutional Law, if not to the average Australian Prime Minister, and begin with simple proposition that federalism divides power, ensuring that no one government has power over everything, everywhere, at the same time. The high expression of this is that Australian federalism prevents a Sydney Napoleon. The low expression is that no Australian Prime Minister ever will have quite the degree of power he feels he deserves unless his government simultaneously controls the price of dingoes in Darwin and the incidence of post-modernism in Melbourne, and under federalism, this never will happen. In this sense, federalism has a strong analogy with the separation of powers, a term invented by the late Sir Joh Bjelke Petersen. Just as separation of powers divides power analytically, federalism divides power geographically, but to the same end: protecting liberty of action.

The second line in the defence of federalism is that it balances the powers of governments, one against the each other. This is a substantially different point to that relating to the division of power. By creating a Commonwealth and six state governments, Australia’s federal Constitution ensures seven competing policy discourses and critiques on virtually every important subject, with the result that our political system generally is programmed not to let things go through to the keeper without discussion. An obvious case in point is that whereas recent anti-terrorism legislation passed through the Federal Government, Opposition, House of Representatives and Senate virtually untroubled, and it was the exigencies of federalism and the States that forced its deeper debate and reassessment.

The third basic federal proposition is that federalism brings government closer to the people. It allows the people of the States to make decisions about what happens in their state, a right particularly valuable the further you move from Canberra and the less conditions in your backyard resemble those in Manuka. The problem with this concept is that it has something of a marketing difficulty in Australia, where it is

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marketed under the distinctly unappealing trade name of ‘States Rights’, thus conjuring up visions of red-necked Western Australians culling rare wallabies for profit. In Europe, it is sold under much more euphonic name of ‘subsidiarity’, which brings up visions of Tuscans sipping locally-drawn mineral water and eating regionally denominated olives. The principle, however, is the same, from Fremantle to Florence: so far as possible, locals should make local decisions.

The fourth proposition flows logically from this: just as federalism recognises the rightness of local decision-making, so it accepts its effectiveness. Federalists believe as an article of demonstrable faith that federalism promotes better policy decisions in divergent locations by matching local expertise to local problems. The reality again is that, in Australia, this proposition becomes markedly more apparent the further you move from the eastern seaboard and the more it dawns upon you that Australia is a vast nation with vastly different conditions applying in its widely separated states. On this basis, it is an at least plausible suggestion that decisions might be better made people who actually know something about the conditions in which they will apply. In this context, hard questions need to be asked: for example, precisely what does Canberra know about indigenous education in the Kimberly, or environmental planning for far North Queensland; and would it not be better if health planning for Adelaide was determined by someone who had once drunk its water?

A fifth proposition, very American in style, is that federalism promotes policy innovation. In other words, where one has a single national government, one necessarily has only one single national policy arena, and the opportunity for experimentation is correspondingly limited and crude. The effect is that a monolithic national policy in any given area either will get things comprehensively right (uncommon, but not impossible) or unremittingly wrong (not inevitable, but depressingly common). By way of contrast, where you have a national government and six states each experimenting with different policy possibilities, the logic is that a range of different policy possibilities will be tested: those proving effective will be generally adopted, while those which fail will be discarded. The great example of this tendency always cited is the introduction of compulsory seatbelt legislation in Victoria, an initiative which subsequently swept not only the Australian federation, but the developed world.

Policy diversity also is a potent obstacle to overall policy disaster. If an omniscient national government accidentally devastates, say, the school education system, recovery in a policy environment of nation-wide scorched earth will be slow and painful. In a federation like Australia’s, the school education system can never be comprehensively put to the torch, and if pockets of it are sacked, there always will be surviving neighbours from which lessons for recovery may be drawn.

The final proposition of federalism is this: it promotes diversity as a given good. It is a peculiarity of Australians that although we have learned to love multiculturalism, in the sense that we embrace cultural difference drawn from outside Australia, we are much more ambivalent towards difference arising within Australia. Consequently, we admire Italian cooking and the Irish sense of humour, but if one dares suggest that a Tasmanian is different in any way from than any other Australian (except in being inbred) you will be greeted with absolute incredulity. One advantage of federalism is

that it does take the different quirks, the small things that make our State populations vary from each other, and actually celebrates, rather than represses them.

Strung together like this, with its obsession for the division and balancing of power; its insistence that regional difference be recognised and preserved; its belief in local decision-making and capacity; and its contempt for centralised policy apparatus, federalism breathes the philosophy of liberal conservatism as much as our Constitution breathes federalism. It is no great wonder, then, that when a very aged Sir Robert Menzies was asked to name his greatest mistake, that sometimes chequered federalist replied that it was his creation of a plausibly national capital in Canberra. With the sordid requirements of day-to-day power past, Menzies was free to talk not as a politician, but as a liberal conservative.

One more point general point should be made about Australian federalism, before returning at greater length to its relationship with conservatism. This concerns the perplexing tendency of Australians to be ashamed that their country is a federation, as if this simply were not 'best world practice'. The reality is that federalism is not an intellectual constitutional pariah. On the contrary, federalism is a perfectly acceptable fashion accessory on the streets of places like London and Paris. To begin with, it is not an aberrant form of government: around forty per cent per cent of the world's population live under some form of federal government, and these include some of the most advanced democracies in the world, such as the United States, Canada, Germany and Switzerland. Secondly, and contrary to the view of many Australian economists and federal politicians, there is absolutely no necessary correlation between being an economic basket-case and a competition cesspool, and a federation. Again, just as countries such as the United States, Canada, Germany and Switzerland are stand-out democracies, they also are stand-out economies.

Indeed, the current world movement is, if anything, towards rather than away from federalism. As we watch devolution in the United Kingdom, with the creation of Welsh and Scottish legislatures; the inexorable moves of the European Union toward becoming a quasi-federation; and the increasing federalisation of unitary states as diverse as Belgium and Spain in an attempt to accommodate diverse political pressures, we appreciate very much that federalism is a rich, world phenomenon, and that it is the crude, uncritical centralism of the sort currently being promoted by the Howard Government that is deeply outmoded.

### **The Collapse of the Conservative Constitution**

The depth of the link between federalism and conservative thought makes its current repudiation by Australian conservatives truly remarkable. That repudiation is clearly evident in at least two contexts. The first is rhetoric, where the voice of the present Commonwealth government is raucously anti-federal. Probably the best exposition of this type of rhetoric is comprised in Prime Minister Howard's speech to the Menzies' Research Centre in Melbourne earlier this year. Essentially, his argument was that federalism in Australia was to be seen as an eccentric and regrettable impediment to good government, not to be maximised, but rather determinedly to be minimised. Mr. Howard did not actually advocate the abolition of the States, although from the tone of his speech this manifestly was a matter of political and constitutional expediency, not policy desirability. Nevertheless, he made it clear that, given the unlikely opportunity,

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he certainly would consign the States to the midden heap of history. Similar comments repeatedly have been made by other members of the Howard Cabinet, such as Minister for Health, Mr. Tony Abbott.

The second expression of the conservative Howard Government's utter disdain for federalism comes in concrete form in its programs. Here, the reality quite simply is that the Commonwealth government is now pursuing the widest and most intense attack on the States and federalism since the Second World War. One merely has to consider the fronts upon which the Commonwealth is advancing: industrial relations; hospitals and health; a possible national certificate of education; Commonwealth technical colleges; possible control of universities; ports; overall infrastructure planning; uniform defamation law; and aspects of State taxation. It is a remarkable list, and one that comprises the sort of general constitutional surge that would bring a smile to the faces of those two historic proponents of unfettered centralism, Edward Gough Whitlam and Attila the Hun.

The genuine conservative critique of this mutant conservative constitutionalism is a bitter one. It begins by noting that Howard's Canberran monopolism is opposed to every principled element of the Australian liberal conservative tradition. From Deakin to Menzies, federalism uniformly has been asserted as a fundamental conservative constitutional value. That position of principle now has been discarded in favour of the transitory opportunities of power.

Secondly, as already has been suggested, Howard's disdain for federalism is deeply inconsistent with any professed devotion to the Australian Constitution. Numerous members of the Howard Cabinet are fond of professing their love for the Constitution, and proclaiming it the 'best constitution in the world', particularly in the interest of defending the monarchy. In the mouths of deeply pragmatic centralists, these testimonials are mere humbuggery and rank constitutional hypocrisy.

Thirdly, the current attack on federalism is fundamentally opposed to conservative philosophy. This is because it is aimed purely towards the aggregation and enhancement of government power, and is directly opposed to the dispersion and division of government power embodied in all real conservative philosophy. Indeed, in its determination to conglomerate, to centralise and to enhance power in Canberra, the imperatives of the Howard Government have nothing to do with the traditional conservative thought, but rather are deeply consistent with the philosophical positions of the old Labor power addicts, who must be chuckling in their political graves as they watch an ostensibly conservative party do the anti-federal work that they were never able to carry out themselves.

By way of brief digression, it may be noted that there have been some flailing attempts to re-write conservative philosophy in a manner more congenial to Howard's monopolist agenda. One of the more amusing is to be found in the suggestion, sometimes made in the context of industrial relations reforms, that it is consistent with conservative principle for a government to preside over a massive centralisation of power, so long as that power will be used for the purpose of conferring greater individual liberty. Probably the most apt response is to mourn that Benito Mussolini, that master of expediency, died without the opportunity to savour such a position. In the first place, it is never permissible to subvert fundamental constitutional principle to

attain a particular “good” result, because constitutional principle then becomes nothing more than the doormat for the “good” idea of every passing prime minister. Second, as true conservatives always have understood, once power is concentrated for a supposedly benign purpose, it can just as easily be turned to malevolent ends.

This leads on to the fourth basic inconsistency between conservative thought and Howardite monopolism, which is that while conservatism always has taken a characteristically far-sighted view both of history and the potential for the misuse of power, the latter is miserably short-sighted. Thus, the unthinkable thought that has to be kept in mind as the Howard administration amasses its vast power in such areas as industrial relations and education is that one day, like Ozymandias, even John Howard and his government will pass away. When this occurs, as inevitably it must, a Labor Government will inherit the prodigious legislative artillery created by Howard and his fellow power enthusiasts, and these great guns will be turned upon precisely those weak-minded conservatives who created them. This is the whole point of conservative philosophy. By dividing power, conservatives accept that they will not get it all their own way, but guarantee the same of their opponents. Howardite monopolism is a constitutional mug’s game of double or nothing.

Moving briefly from the realms of principle, it is worth noting that pragmatism also looks askance at elements of the Howard centralist manifesto. Put simply, why on earth does the Commonwealth want some of these areas that it is eyeing so covetously? Why does it desire schools and hospitals? These are the Vietnams of Australian public administration, and out of their jungles no minister emerges alive, as any State incumbent will testify. The prospect of a Commonwealth government that actually has developed a taste for running schools and regulating bed-pans is one of the great and improbable marvels of a new century.

All of this naturally raises the interesting question of Labor’s position on federalism in a fallen conservative world. Perhaps unsurprisingly, Labor is showing considerable confusion at the sight of its opponents tearing up their own constitutional birthright. The pragmatics of political opposition would suggest the opportunity for an unlikely assault in defence of federalism, but long-standing inclination seems to demand grudging support for this act of conservative constitutional suicide.

In fact, there are a number of reasons why Labor might begin the arduous process of rethinking its position on federalism. One is because the entire supposition of Labor being endemically opposed to federalism was based on the notion that Labor was the party of radical change and policy innovation in Australia, and therefore needed access to unqualified repositories of power. Anyone who still believes Labor is the party of policy radicalism needs swift and effective counselling. In truth, Labor now stands for the preservation of a wide range of social features—from trades unions to a high-impact social welfare system—all of which are under serious policy assault from the genuinely feisty forces of the Right. In these circumstances, a constitutional philosophy based upon the division and balance of power, and that is protective of social consensus, starts to make solid sense.

A second factor concerns modern Labor’s professed wariness over misuse of governmental power. In such contexts as the war against Iraq and the treatment of refugees, Labor talked a great deal of late about the need for checks and balances upon

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power, the undesirable concentration of power in too few unresponsive hands, and the need for enhanced accountability in government. If any of this actually represents serious positions, as opposed to political point-scoring, it is deeply consistent with federal values. So is Labor's general obsession with 'community'. Maybe the time has come for the Labor Party to consider whether or not there might be possibilities in federalism that have hitherto been ignored. More pragmatically, a Labor approaching its second decade in opposition needs weapons platforms, and it no longer commands the Senate. The States comprise a weapons platform par excellence, and Labor needs to think hard about their place in its political thought.

Of course, there is one other player to be taken into account in this constitutional comedy, the one referred to with no sense of irony during the Federation debates as 'the keystone to the federal arch'. Much of the success of the Howard Government's strategy of power monopolisation will depend upon the attitude of the High Court. Historically, it is a truism to say that the High Court has been no friend to the States, with the Commonwealth-appointed Court basically playing undertaker to Canberra's hit-man. Yet, remarkably, the Howard government does have some little reason to worry about the anti-federal reliability of the present Court. One is that the government has worked hard to create what often is referred to as a 'capital-C conservative' High Court. The problem with capital-C conservatives is that they are not only politically conservative, but are also constitutionally conservative, and so (for all the reasons canvassed above) tend to be federalists. It will be very interesting to see how some of these judicial conservatives react when they are confronted with the most determined attack on Australian constitutionalism in half a century.

The second factor is that the High Court does not like being taken for granted. The last time the Commonwealth blithely assumed the complicity of the Court was in the early 1990s, when it was attempting to assume complete control of the corporations law. It boasted that it would have a wonderful win in the High Court, but in the event, the Commonwealth lost the *Corporations case* in a humiliating six-one decision. Now, everyone in the Howard Government is saying that the Justices are in the bag, and that this specially-crafted High Court will deliver. I wonder. It is interesting to note the latest appointment to the Court, Justice Susan Crennan: a woman of markedly independent mind; of conservative temperament, but without obvious political commitments; and possessed of a distinct acquaintance with Catholic social justice theory. This is not an obvious recipe for constitutional compliance, and Sir Humphrey Appleby might well have characterised it as a courageous appointment.

## **Conclusion**

The obvious question is: 'Where do we go from here?' The answer of the Prime Minister quite simply is that we go away from Federation, away from the liberal, conservative, federal constitution of his political ancestors, and towards an Australia unitary in thought, if not in constitutional structure.

What is beyond dispute is that we face a sea change in Australian constitutional and conservative theory. Until recently, Australian federalism from the point of view of the States had reached what might be referred to as a balance of horror. On the one hand, the States were brutalised and financially humiliated by the Commonwealth. On the other, things really could not go much further. The reason for this painful equilibrium

was that the States already had been reduced significantly to the status of convenient service delivery agents for the Commonwealth, while their prime areas of power—horrors such as schools and hospitals—were not objects that any sane Commonwealth would covet. On balance, why would Canberra fight its own grudging servants for possession of a poisoned chalice?

Today, we face a Commonwealth impatient of even its most compliant servants, and prepared to invade legislative domains never before contemplated by Canberra. This is a Commonwealth government that quite overtly has not the least interest in the preservation of federalism or the States. If you could ask a Howard power monopolist whether there was any policy area that could not be handled better by Canberra than the States, the answer would be a curt negative, although some matters—sewerage and sex offenders come to mind—presumably would be beneath the dignity of Capital Hill

What all this means is that the States are facing what used to be referred to as the “Cornwall scenario”. Cornwall is that long English peninsula jutting into the Irish Sea where every hopeless, displaced British tribe ends up before it makes the final decision either to hold or be driven into the sea. This is the decision for the Australian States, as they and the federalism they embody battle for life against a constitutional vision of power that will brook neither rivals nor dissent. It is the supreme irony of this crisis that it has been brought about, not by wicked communists or foolish socialists, not by the schemes of Jim Cairns and Gough Whitlam, but by feral conservatives who are sworn to defend precisely the federalism they are trying so assiduously to undermine.



**Question** — Have you discovered any moves among the federal government to take over urban railways?

**Greg Craven** — Is this a loaded question? I do think that maybe the answer is the point that I made right at the end, about asking the federal government if there is anything you don’t think you know more about than the states, to which the answer would be no. So I don’t see why urban railways would be any different to anything else. I said in a speech somewhere else that the Commonwealth, in its present bullish mode, reminds me rather of that very obnoxious person you end up next to at a pub every now and again, and you say: ‘I’ve got a parrot that talks’ and he says: ‘I’ve got a parrot that’s an anchor for a major television show on the ABC.’ No matter what there is, we can go one better. So it’s quite possible.

**Question** — Thank you for a very interesting summation of your analysis of the current state of Australian politics from a right-wing perspective. I’m speaking as a Pom, as you may have gathered from my accent. I was a Pom up until 17 years ago and I’m now what I call a Pom Aust because I was neutralised and became a citizen of Australia 17 years ago. Your speech reminds me of a speech I heard by Anthony Wedgewood Benn, that great left-wing intellectual of the Labour Party in England, who was speaking in the House of Commons when Margaret Thatcher and her extremely right-wing government were trying to dismantle all local government in the

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UK. My question is, given that that happened 20 years ago or so, and the current Howard government is trying to emulate that, is it still true that Australia lags behind England by some 20 years or so?

**Greg Craven** — I think that's an enormously useful question because it reminds me of one of the great parables of federalism. In the early 80s when I was at Melbourne University Law School, we used to get every now and again various visiting English academics, including constitutional lawyers. The thing I remember most about them (apart from the guy who flew to Tasmania to escape the bushfires in Melbourne in 1984 because he thought he was going to be burnt, which was pretty funny) was the constitutional lawyers who would turn up and would talk to us about federalism in the most condescending terms and laugh at this as a quaint little Australian invention and gosh, you were sold a bill of goods by the Americans weren't you? When we would venture to suggest that maybe it does serve useful purposes in dividing power, they would pat us on the heads and say that's why we in Britain invented local government, and you will see that that will prevent Mrs Thatcher from doing any of these dreadful things. Two years later those same academics were coming back saying: now that 'f' thing again, how does that work? I would have thought from a left-wing, right-wing or Callithumpian perspective, that capacity of federalism to balance, and the direction that it went in England, is a potent warning against eristic governments of the right or the left. It's just that governments of the right are meant to be better at this than governments of the left, and we sadly are not seeing that.

**Question** — You say the conservatives wrote the Constitution so that certain powers couldn't happen, but in fact they did put in the corporations power, they did put in the industrial relations power. And although we've got to remember that it was done at the time of the Empire, and Australia wasn't going to have any external interests, there is an external affairs power, which is also quite reasonably being used because the states can't do it and if we didn't have that external affairs power, we couldn't belong to things like the United Nations. The third one they did put in was that the Commonwealth could make advances to the states or pay the states and so on, and obviously under those circumstances the Commonwealth has had the money power for a long time and has used it. So it's not quite straightforward that the Constitution is pure as far as federalism is concerned. The other thing is that it did lay out very definitely those areas where the states could not intrude in the things that the Commonwealth has exclusive power over.

**Greg Craven** — They are all actually very good examples. If you take the corporations power, and actually look at what Section 51 (20) says, it's the power over foreign corporations and trading or financial corporations formed within the limits of the Commonwealth. It's a narrow power. The founding fathers (and we can read this in their debates), meant that to be an incredibly narrow power, and its width comes not from the Constitution but from the High Court: a High Court appointed by the Commonwealth executive. If you take the external affairs power, that was never intended to mean that you could implement treaties in areas within the competence of the states. The Commonwealth's power to implement treaties was always going to be very narrow. And Section 96 is part of the failure of the financial settlement.

I think that the High Court may be less compliant than the Commonwealth government thinks for two reasons. I suspect the Court may be troubled by this

overwhelming direction; if this is the Cornwall scenario, then the High Court may think, gee, this really is the end. They might even think, gosh, we're out of business if this goes off. If our life has been beating up the states, we are finished if there are no states. That's one reason. The second reason is indeed the corporations power. How far is the High Court going to push that power? If you come to the view that it allows you to do really anything that roughly has anything to do with a corporation, which is pretty much the view being put by the Commonwealth, then it means you can do pretty much anything. If you read the cases of the Court on this, there is some reason to say there is pre-existing nervousness about the scope of the corporations power. The High Court has probably been signalling now for 10 years: 'We're a bit worried that we might have pushed this too far open.' I'm not saying what the High Court will do: my degree of cynicism for the High Court is matched by none. I think the last lecture I gave in this series was called *The High Court of Australia: an unfaithful servant*. So no-one can accuse me of being excessively optimistic. I just publicly wonder.

**Question** — Thank you for the lecture. It was enormously important and useful to have all those things said about the current political landscape. I've got a question for you concerning some of the reasons why the Commonwealth is advancing on all fronts and it relates to the regional level you mentioned. I'm wondering whether one of the reasons why this has been an issue in recent times is dissatisfaction with the highly centralised nature of state government, particularly in NSW. Health and education, and another big area that you could add to your list would be environmental management, natural resource management, water for example, are all areas where the Commonwealth is also making a big push. I'm wondering whether you could give us some sense of whether you think there is answer to that, whether that's a pressure that is ever going to go away, given the spatial configuration of the states. Is there a long-term constitutional solution beyond just the question of whether the High Court would draw the line next time and whether the push-me pull-you will continue? Is there an evolution in the federal system which could see federal principles reinvigorated, re-institutionalised in a way which deals with the highly centralised nature of the state; for example constitutional recognition of local government, or other ways of fixing the effects of vertical fiscal imbalance in a way which achieves some decentralisation, meaning that the Commonwealth doesn't become subject to these political pressures to interfere in lower level of government activity?

**Greg Craven** — There are a number of ways of answering. I think the general point would be that I don't see of any way of solving it for the simple reason that to solve it would require co-operation of the Commonwealth and I don't see why a Commonwealth government would ever co-operate in a solution because the problem is so very very congenial. The reality is that the Commonwealth has, what's the old quote from Kipling: 'power without responsibility, the prerogative of the harlot throughout the ages'. If the Commonwealth wants to take something over it can, if it wants to leave something it can, if it wants to make political capital out of the trains in Sydney it can, if it wants to sheet the trains in Sydney back home to Bob Carr or whoever the other man running NSW happens to be, it can. Why on earth would you give up a job like that? So I don't see the slightest chance of that.

Underneath that there is another thing you are saying, which is: do the states in have clean hands in their own houses? They are always talking about subsidiarity and responsibility. What are they like with local government? I think that is a real issue. I

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think that in a way the states have talked divided power accountability rhetoric when they've wanted to but haven't applied it to local government. I have to say I'm a new convert to this position. I've always looked at local government and found horrible things that I don't really want to contemplate. The reality is, you can take the rhetoric further and we should be looking at that, but arguably you could say that the existence of the federal system is terribly destructive of local government because where you have three layers of government, one of them is going to lose out. Where you've got a fight going between states and Commonwealth, the reality is that local government is going to be shunted aside.

What I wouldn't accept is that the Commonwealth present mood is prompted by noble sentiments of wishing to solve dreadful problems in the interests of the citizen. I don't discount decent altruistic policy motives, but there's an awful lot of politics going on in this type of debate. I wouldn't analyse it that the only reason the states are in trouble is because they can't get their house in order, and therefore the Commonwealth needs to send in constitutional peace keeping troops. I think that would be excessively generous.

**Question** — What, if any, constitutional philosophy do you detect in the words and actions of Senator Joyce, and what's your assessment of that philosophy?

**Greg Craven** — I think Senator Joyce is running a somewhat crude—that's not a pejorative term, I mean crude as in hewn roughly—version of federal theory. I think that he sees himself as a senator for Queensland and I think there's something in that. I think that he sees himself as being accountable to a constituency in the state that elected him and that in doing that, he is acting in a way that would not have surprised a lot of people who wrote the Constitution. You could ask whether Senator Joyce also saw the necessary national elements of his role, and there are national elements of the role of a senator as well as state elements. I mean, the presentation I've made is not a state's rights presentation—I am not a states' righter and that might be the difference between the line that I have sketched and Senator Joyce's. The philosophy that I've sketched is a conservative philosophy of federalism. It works for conservative federalists. It doesn't work for states' righters—they're on a completely different power trip at one end of the spectrum, the same way that the federal government is at a power trip at the other end of the spectrum. So that's probably where I would see Senator Joyce.

**Question** — Are you perhaps being a bit romantic about what's possible for federalism these days? I'm thinking of the anti-terror laws and the way in which the state premiers managed to combine with the federal parties so that they never got to a situation where they were balancing different approaches to things. They could perhaps get local or state benefits out of going along with the Prime Minister, so that we've had no real debate about the substance of those issues. We won't get it in the Senate by the sound of what's going to happen. At least in the UK there are elements in the Labour Party over the last few years that have been prepared to cross the floor or at least work very hard to ameliorate things. So federalism hasn't worked very well in that regard.

**Greg Craven** — I think that's a fair point, although admittedly I was out of the country when a lot of these things were happening. I think the question is probably

worth asking: will you get more or less debate because you're a federation? And I think that the inevitable reality will be that with seven parliaments passing legislation, there will be much more debate than there would be if there was only one parliament. It might not be enough, but it will be significantly more. As time goes on, it's much harder to control seven parliaments in relation to legislation than to control one. I would expect that debate to resurface, and when it does, I think the federalism element will be significant. We have to remember that Australia has had many potential disasters in its history. Two great disasters we can look back in retrospect and say were averted. One was the nationalisation of the banks. Let's face it, that would have been a disaster. The other one was the attempted dissolution of the Communist Party by the Menzies Government. Both of those things substantially were stopped by Australia's federal structure. Not a bill of rights, not any other glories of our wonderful politics, but the fact that the federal structure made it virtually impossible for those two things to happen either directly or indirectly. So I think it does operate. I don't think I'm romantic, but I do take your point about it.