

Constitutional Schizophrenia Then and Now:

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

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Abstract

Over the past two centuries there has been much debate as to the best form of government for this continent. In 1901 Australians agreed on a form of federalism, yet calls persist for the abolition of the current states and their replacement either by more states, or by regional governments with responsibilities considerably greater than those possessed by present local government.

This paper explores the deep, ongoing tensions between the federalist, regionalist and unitary strands of our political tradition. It adds a new starting point for this debate by arguing that Australia has two quite distinguishable and sometimes conflicting bodies of federal ideas, with today's dominant theory of federalism being not the original but rather a latecomer. Contrary to the conventional view that Australian federal ideas commenced in the 1840s, the paper argues that the debate about federalism began in the 1820s, drawing on both British policy and American experience, *before* the continent was ever divided up into separate British colonies. This radical reappraisal of federalism's roots helps explain the long history of dissent over the territorial basis of Australian constitutionalism, and points to a possible new reconciliation of federalism and regionalism in Australian political life.

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Contents

1. **Introduction**
 2. **The Territorial Trio: Federal, Unitary and Centralised Traditions in Australian Constitutionalism**
 3. **The First Federalism: ‘Franklinesque’, Decentralised and Repressed**
 4. **The Second Federalism: Conventional, Pragmatic and Centralised**
 5. **Conclusions: Resolving the Schizophrenia?**
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1. Introduction

‘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 20th and now 21st 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 skepticism, 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* (SMH 1853b, above) conveyed a widespread 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 recognize 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 decentralized to local or new regional governments. Or a mixture of both. For example, as recently as this Monday, 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 (Steketee 2004).

There is actually nothing new about such scenarios, yet over the last 20 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 as having been “schizophrenic”, governing themselves by a federal constitution but debating their politics as if what they really have, or want, is a unitary system (Galligan 1995: 9, 53-62). In a unitary system, subnational 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. 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 (Galligan 1995: 46-51; Warden 1992: 143). 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 properly understand this fundamental cleavage in political identity and values – 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 thirty or fifty 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 realized, 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 categorization flows from a doctoral study of territorial ideas in Australian constitutional history (Brown 2003) 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 20 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 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 decentralized than the system we call 'federal' today.

The third part of the paper seeks to better explain how this early history contributes to ongoing constitutional conflict, by emphasizing 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 centralize 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 decentralized subnational framework – irrespective of whether it might be called ‘federal’ or ‘unitary’ and its divisions called states, provinces, ‘regions’ or ‘greater’ local governments.

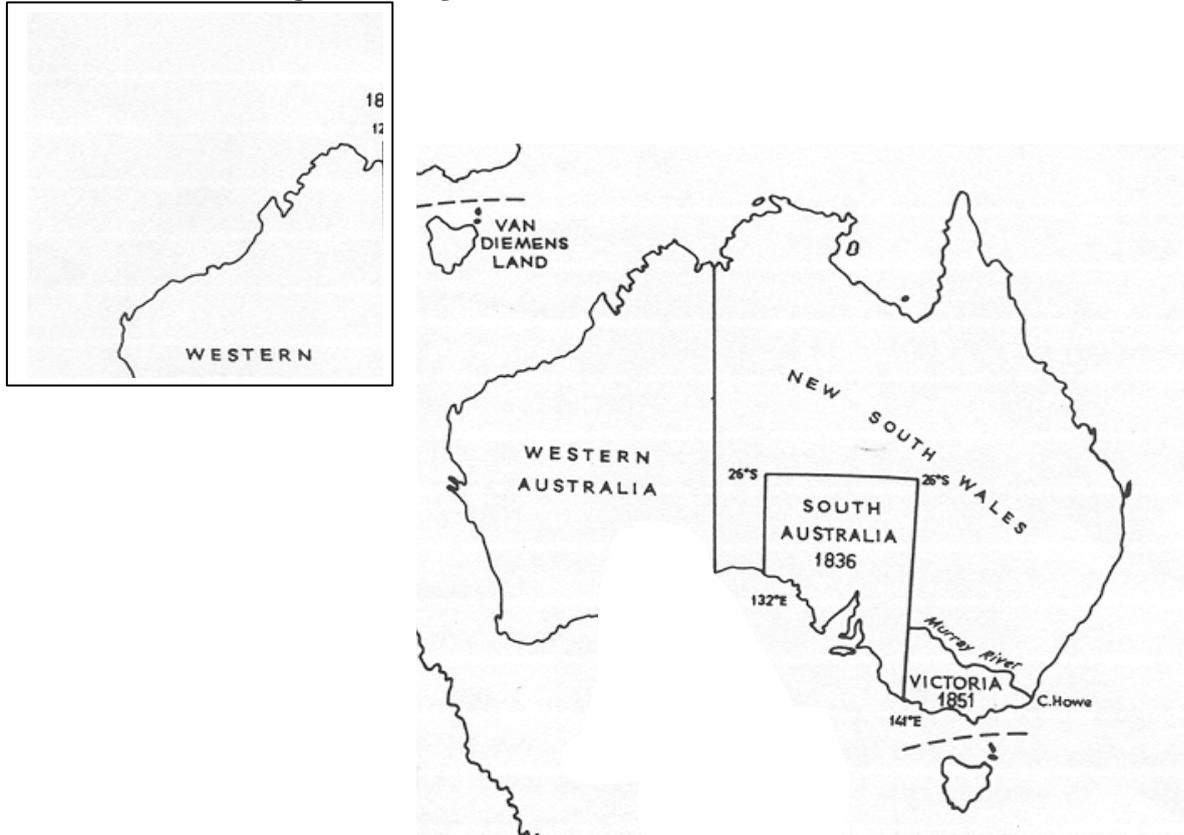
The paper concludes by suggesting that even if it is impossible to resolve the constitutional schizophrenia resulting from tensions between Australia’s three main territorial traditions, it is vital to acknowledge it and better understand it. However, the perennality of debate over alternatives suggests 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.

2. 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 (Holmes & Sharman 1977: 12-14; also Sharman 1987: 42-3). As a result, somewhat inevitably, new territories “broke from the mother colony” (Irving 1999a: 2); as put by political scientists Holmes and Sharman, 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 centralized British preference and theory. By the end of the 1830s, there were four Australian colonial territories: New South Wales, founded in 1788; Van 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: Jeans (1972: 11), see also McLelland (1971) cf Macintyre (1999: 96).

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 colonies, or their intercolonial trade” (quoted Wentworth 1956: 8-9). The originator of this proposal, NSW colonial secretary Edward Deas-Thomson, has been described by some as “par excellence the Father of Australian Federation” (Cramp 1914: 123-6; see also Irving 1999a: 3-4, 24, 357-8, 430).

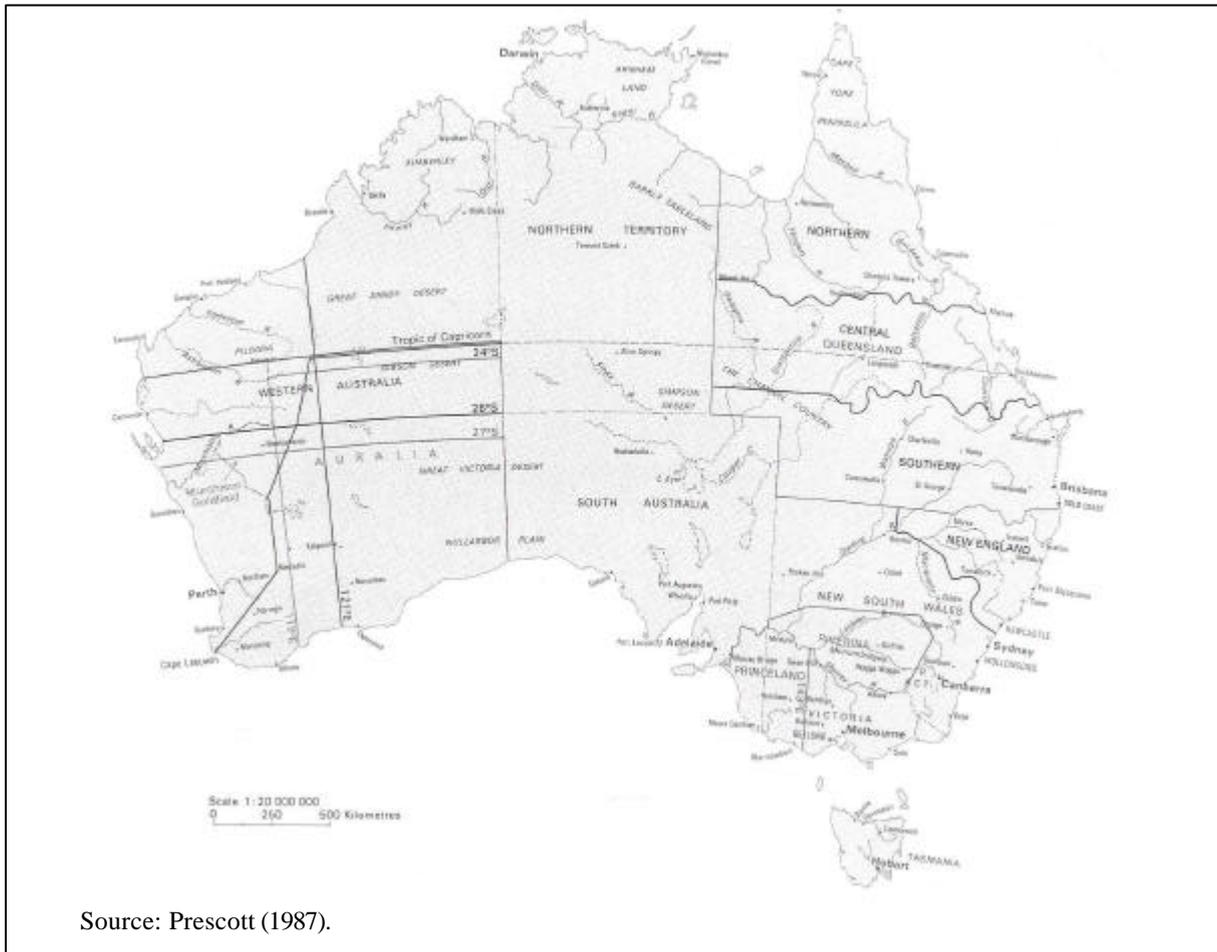
In London in 1846, the return of a Whig government also saw firm moves towards a formal intercolonial union, combining the need for colonial constitutional development with its policy of Imperial free trade. In 1847-1850, in the New Zealand and Australian Charters and *Australian Constitutions Bill (No. 2)*, Earl Grey's administration twice proposed the four colonies be joined in a national or 'general' assembly (Earl Grey 1853: 317-23, 427-8; Egerton 1893: 284; Cramp 1914: 122-7; Ward 1958: 23; Melbourne 1963: 275-351; Sawyer 1969: 6-7; McMinn 1979: 92; McKenna 1996: 110-1). However these early proposals for union failed, and we customarily assume it was because Australians were simply not yet prepared to think nationally (e.g. McKenna 1996: 59). 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" (Joske 1967: 34; also Irving 1999a: 2), 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 (Galligan 1995: 32, 52-5; see also Hirst 2000: 1; Saunders 2001: 133).

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 (McCarty 1978: 104). 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 (Davis & Prescott 1992: xi; cf Morris 2001: 293-4).

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 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 (Holmes 1932; Ellis 1933; Neale 1950; Kidd 1974; Belshaw 1982; *Figure 2*). Separation movements had their own effects on the Federation

Figure 2. Proposed new states of Australia 1850s-1960s



process, as reflected in Chapter VI of the Australian Constitution dealing with ‘New States’, and continued to resonate through much of the 20th century in the form of new state movements which often underpinned the very existence of the Australian Country Parties (Parkes 1892: 580-613; Wood 1933: 232-3; Nicholas 1951; 1952: 95ff; Bolton & Waterson 1999; de Garis 1999; Irving 1999b: 141-2,191,197; Brown 2001a). The new state idea continues to resonate even today (e.g. Blainey 2000; 2001). 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 centralized 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 20th century, tied to constitutional reform, tended to reinforce this assumption (see Crisp 1978: 23ff; Galligan 1995: 91ff). However, even if unitary, it is actually far from clear that these ideas have necessarily envisaged a more centralized structure; and their lineage is not always Labor (see Macphée 1994a; 1994b; Hall 1998). Far from having been discarded early, and only reappearing since Federation, ideas about a decentralized 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 (Melbourne 1963: 181-90, 231-74, 293-346). 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 recognized as a significant constitutional saga (Ward 1958: 41-2; Larcombe 1961: 7-33; McMinn 1979: 42; Finn 1987: 79; cf Bowman 1983: 166; McNeill 1997: 18-9). 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 (Page 1917; 1963: 382-3; see Brown 2001b).

In recharting the history of these ideas, the result reached elsewhere (Brown 2003) is a confluence of territorial traditions that involves not a single linear progression, but three parallel and interweaving veins of ideas whose relationships are characterized less by resolution than ongoing conflict. Figure 3 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 decentralized unitary and decentralized 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.

Figure 3. 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 centralized structure.	Partial centralisation.
Key manifestations	Colonial separation and new state movements; 20 th C 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 (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 centralized surrogates).

3. 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” (Hyam 2002: 53), 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 it has sunk in Europe?” (1797, quoted Manning 1966: 287). In British policy, theories of territorial fragmentation and unity were alive and well, now that American federalism had revolutionized European concepts of nationhood with its “first sustained and principled counter-argument” for local/regional “legal life” (Blomley 1994: 114).

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 (Manning 1966: viii, 287-99; see also Egerton 1893: 258-60). 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 (Manning 1966: 539, 525-40). 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 (Clark 1962a: 341, 373-4;

Lumb 1991: 19, 33). 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 (Melville 1835: 18; Clark 1962b: 122-4; Blainey 1966: 76-7; Robson 1989: 84-94; Shaw 1989: 202-5). 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 civilizing colonies with greater forethought and order. 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" (Hyam 2002: 54). 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 (Jensen 1940: 108; Rossiter 1953: 306-8, 339-41). 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" (1793, quoted Manning 1966: xiii, 36-7; Keith 1938).

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" (quoted Beer 1993: 155-8, 354-5). 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 (Jensen 1940), but the American trend from 1781-1783 followed Franklin's principles, making territorial dynamism, development and federalism synonymous (Bryce 1889: 343; Glassner 1993: 155). British authorities recognized 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:

The whole thing was like a well-made watch – it went from that moment [in the 1780s] and never ceased to go (Roebuck 1849, quoted Cell 1970: 89-90; Hyam 2002: 54).

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 (see Crowley 1955: 49-50; Pike 1957: 35; Ward 1958: 22-9; Manning 1966: 77; Cell 1970: 9-15). 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 (James Stephen 1823, quoted Clark 1962a: 373).

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" (Townesley 1991: 37), 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 (see Melville 1835: 52; Wentworth 1956: 8). 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 20 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 (1999b: 2) 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". Perhaps Irving meant only that the federal idea appeared before the 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" (Holmes & Sharman 1977: 12-14) 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 (Hume 1994: 28). 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 (e.g. Warden 1999: 191-3), 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 (see Melville 1835: 20; Ellis 1933: 19-20; Clark 1962b: 122-4). This 'independence' claim reflected the Vandemonians' 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 (Hyam 2002: 55; see also Melville 1835: 7, 160; Greenway 1972: 77-8; Robson 1989: 87, 93). Given the many indications of American influence, it seems impossible that the Vandemonians failed to relate their separation from NSW, as Australia's first new colony, to Maine's 1820 separation from Massachusetts as America's tenth new state (see generally Banks 1973).

In the next territorial decision, Britain's 1829 annexation of Western Australia, the constitutional intent is less clear. There was no preexisting community of European settler interests, and the Swan River colonization project was "almost accidental and largely unplanned" (Statham 1981: 181-9; cf Davis 1987). 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 subcolonial 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 (see McLelland 1971: 673; Howell 1986; Lumb 1991: 30).

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 (Roberts 1924: 205-7; Greenway 1972: 85-6; Kociumbas 1992: 119-23, 179-90; Shaw 1989: 207-13). 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 (Melbourne 1963: 331-4). The Port Phillip campaign for political territory was to last 15 years, a period in which “all other political ideas” took second place against the goal of territorial autonomy (McMinn 1979: 35; see also Melbourne 1963: 283-356; Garden 1984: 63-8; Priestley 1989), 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 (Hyam 2002: 55). By the late 1830s, de 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” (de Tocqueville 1835: 295-7, 398; see Blomley 1994: 120-1; Hyam 2002: 53; Patapan 2003: 3, 6). 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 (see generally Ellis 1933: 48, 57; McKenna 1996; Irving 1999a: 391-2). In November 1841 Lang's first fundraising visit to Port Phillip found him regaling separationist audiences with his experience of a recent 10-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 (Baker 1985: 165-201, 290-343). 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" (Irving 1999b: 25ff). 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" (quoted McMinn 1979: 46-7). In Australian debates about responsible government in 1850-1855, the concept of a national

constitution – as opposed to 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” (1853; see McKenna 1996: 73) and there was public support for a single constitution for this Australian “confederation” (see SMH 1853a). The NSW Legislative Council maintained its call for a general assembly of the colonies (NSW Legislative Council 1853a: 121-2; Wentworth 1956: 7, 10). 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” (SMH 1857 quoted Ward 1958: 465).

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 (see NSW Legislative Council 1853b).

On some analyses (e.g. Cramp 1914: 128-9) 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 subnational units, for

example when telling constituents that no individual colony could honestly claim its own permanent "feeling of Patriotism" or expect to stand "permanently distinct in the eyes of the rest of the world" (Griffith 1891: 72, 76). 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.

4. 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' (King 1982; Watts 1996). 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 (e.g. Freeman 1863: 72; Galligan 1981: 130; 1995: 39; Beer 1993: 223; Elazar 1997: 249). It is embedded in the standard definitions of federalism derived from the Latin terms *foedus* (treaty, agreement or compact) or *fidere* (trust) with which separate communities share their power under joint constitutions (Kidd 1957; Riker 1975: 99; Holmes & Sharman 1977: 21; Walter & Huebsch 1978; Davis 1978; Harman 1992: 337). 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” (Melbourne Conference 1890: 12 February 1890, 72). The Central Queensland separationist, George Curtis, accurately summarized America’s federal dynamic as a process of “separating and federating the whole time” (QPD 1899: 35). 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 realized 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 recognize 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 reevaluate the latter. When these ideas coincided in the 1840s-1850s, did their adherents even recognize each other as ‘federal’ and if so, with what associations and implications?

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 1847-1850 (Pike 1957: 414-6; Ward 1958: 113-37, 179-82; McMinn 1979: 46-7). 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 1842-1850 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 1851-1855 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 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? (SMH 1853c; cf Ellis 1933: 54; Fitzgerald 1982: 112)

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 (Abbott 2003). 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? (Irving 2002)

5. 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 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 reclashing 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 recognized, 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 theorizing and little apparent need for it" (Galligan 1995: 46; see also Warden 1992: 143). In fact ours is a more interesting story in which theory and ideas have been important, dynamic and contested (cf Williams 1999; 2001; Patapan 2003). 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 (Brown 2002a, b). 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.

6. References

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