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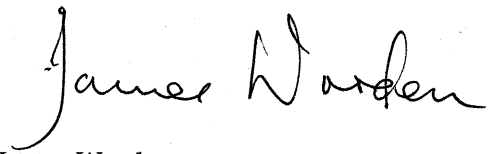
FEDERAL THEORY AND THE FORMATION OF THE AUSTRALIAN CONSTITUTION

A thesis submitted for the degree of Doctor of Philosophy of the Australian National University

JAMES WARDEN

MAY 1990

This thesis represents my own work except where due acknowledgment is made.



James Warden
20 May 1990

Abstract

Questions which this thesis has sought to address concern the origins of the Australian federal system. What were the sources which influenced the framers of the Australian Constitution? How did those sources explain the operation of federal government? What was the design and intended function of the constituent features of the Australian federal arrangement?

In their understanding of federalism the framers of the Australian Constitution were profoundly influenced by the work of James Bryce. His monumental study *The American Commonwealth* was based on a theory of federalism which had originated with the classic account of federal government - *The Federalist*. The states' rights tradition was also influential in the thinking of the framers. From these sources the Australians derived a theory of federal government which they sought to implement in the design of the Australian Constitution.

The empowerment of a new Commonwealth was considered necessary for national interests, but with the safeguard of providing for the protection of the powers and privileges of the states. The framers placed much emphasis on the role that the Senate could play in defending the states against the potential power which the large states could exert through the Commonwealth. This, combined with a division of powers between the Commonwealth and the states, the review function of the High Court, and a strict amendment provision, were considered necessary to sufficiently protect the rights of the states.

The first three chapters of the thesis deal with the influential sources of federal ideas: *The Federalist*, Bryce's *American Commonwealth* and the states' rights tradition. The remaining four chapters are concerned with the key features of the Australian federal system: The Senate, the division of powers, the High Court, and the arrangements for ratification and amendment of the Constitution.

Acknowledgments

This thesis has been written in three Universities. It was begun and finished at the University of Tasmania so it is appropriate that the people who gave me assistance first and last should be mentioned at the outset. My first supervisor, Dr Ralph Chapman and Graham Smith have given me encouragement at both ends of the task and often in between, as has Dr Bruce Davis. Of recent times invaluable assistance has been provided by Bev Brill and Rosemary Smuts in the Department of Political Science. Also Sue Mulcahey from the Computing Centre gave very timely diagnoses.

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INTRODUCTION

The Australian Constitution is commonly described as originating in a mixture of British responsible government and the American federal system.[1] If the American legacy has been such an integral part of the Australian Constitution, what then was that legacy and how did it affect the structure of the Constitution? What was the character of federal democracy in Australia as it emerged from the Federation Conventions of 1891 and 1897-98? What did the framers of the Australian Constitution understand federal government to be? The purpose of this thesis is to address these questions in order to show the influence of American ideas about federal government on the formation of the Australian Constitution and to examine the federal structure which emerged from the Federation debates of the 1890s.

The point of the thesis is to recover some of the debate from the Federal Conventions and to do so by examining initially the sources of federal ideas which were applied in Australia. There is a recognition here of the incompleteness of the constitutional project or, expressed alternatively, of the imperfect or contradictory nature of the federal settlement. This is not an attempt to show the folly of the framers, or the faultiness of the Constitution, but is a recognition of the difficulty of the framers' task, the practical limits of time and human energy and, especially, the inescapably political basis of the settlement. The argument that the document contains flaws follows, not as a normative judgement, but as a realization of the complexity of the process and of the powerful pressures which operated on those who framed the Australian Constitution. It can readily be seen in the final draft that the framing of the Constitution was undertaken with an exhaustive attention to detail and also with some apparent haste.

Some of the same questions arose in Australia as in the United States and, in looking for guidance as Sir John Downer put it in 1891 on behalf of the Australian framers, "We

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[1] E. M. Hunt, *American Precedents in Australian Federation*, (1930). This work remains the fullest and most systematic published account of the American influences on Australian Federation. The commonplace point about the mixture has been recently restated in Hugh V. Emy and Owen E. Hughes *Australian Politics: Realities in Conflict* (1988), 226-228. Also: E. V. Thompson, "The Washminster Mutation" in, P. Weller & D. Jaensch eds *Responsible Government in Australia*, (1980), 32-40. Joan Rydon "Some Problems of Combining the British and American Elements in the Australian Constitution" *The Journal of Commonwealth and Comparative Politics*, 23, 1, (1985), 67-79.

have the experience of a great republic before us".[2] So, the Australian federal system was modelled on that of the United States. Nevertheless the Australian experience was dissimilar in important respects. The surrounding historiographical traditions are quite different. Australian constitutional history has some similarities with that of the United States but it is not its *doppelganger*. Apart from those legal issues which could be considered strictly as constitutional there have been broader differences. For instance: there has not been, in Australia, an enthusiastic and orchestrated celebration of the Constitution; there have been fewer controversial interpretations of the origins of the constitutional settlement; there have been no writers like Charles Beard who inflamed the passions of conservatives by writing about the economic foundations of the Constitution.[3] Moreover, such an exploration is unlikely to elicit the response in Australia that Beard's work did in the United States where the city of Seattle banned the book, presumably in contravention of the Bill of Rights, and Warren Harding, later to be President, attacked the book as "filthy lies and rotten perversions" in an article entitled "Scavengers, Hyena-Like, Desecrate the Graves of the Dead Patriots We Revere."[4] Any reverence for the Australian Constitution clearly takes a different form.

These matters aside, why is it important that we understand how the framers of the Australian Constitution understood the federal system? Arguably there is an intrinsic historical interest in discovering from where the Constitution came and mere historical curiosity may be sufficient motivation for enquiry. A more substantive reason for understanding the intent of the framers is the need to recognize more clearly changes in constitutional interpretation and to assess critically the current modes of interpretation of the Constitution. This point is illustrated in a recent decision of the High Court in which it was decided that the question of the original intent of the framers was deemed to be relevant to current interpretation.[5] The shift in attitude by the Court to broaden the sources of admissible argument is a response to some of the issues which have been generally, if remotely, raised in philosophy and literary interpretation.

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[2] *Official Report of the National Australasian Convention Debates*, 1891, 100. Hereafter cited as (for example) 1891, 100. Similarly references to the the later debates are indicated by (place) date and page number.

[3] The Parker-Blainey debate was an exploration of the economic foundations of the popular ratification of the Constitution, but unfortunately it was all too quickly terminated with an inconclusive result. R. S. Parker "Australian Federation: the Influence of Economic Interests and Political Pressures" and G. Blainey "The Role of Economic Interests in Australian Federation" *Historical Studies: Selected Articles* (1964).

[4] Quoted by Forrest McDonald in "A New Introduction" to Charles A. Beard *An Economic Interpretation of the Constitution* (1986).

[5] *Cole v Whitfield*, 62 *A.L.J.R.*, May 1988, No. 5, 303-318.

According to recent theoretical argument, a proper understanding of the text, in this case the Australian Constitution, should involve an attempt to recover the intention of the author. The questions arise: what was in the mind of the writer and how important is knowing that mind in construing meaning? Appreciating the intent of the author is further complicated if authorship was multiple. Matters surrounding that debate have been engaging American constitutional commentators for some years and it is possible that this has been the source of the Australian High Court's recent reasoning.[6]

Perhaps the most useful reason for exploring the framing of the Constitution is to clarify the debates over contemporary political practice and events. After the Constitutional Crisis of 1975, numerous books appeared which used passages from the Federation debates to argue a case about the rights and wrongs of the dismissal. *The Makers and the Breakers,* by Richard Hall and John Iremonger, is an example from this body of literature which sought to recover the words of the framers of the Constitution in order to demonstrate the truth of the matter.[7] Hall and Iremonger assumed a plain language meaning for their evidence and did not seek to interpret actively the meaning of the text they quoted, or develop the context of the utterances. One difficulty which can follow from assuming such a methodology in the deployment of textual evidence is that the meaning of the words and the context in which they were ordered may have altered significantly over the century. An illustration of this point is the argument pursued by John Phillip Reid in his book, *The Concept of Liberty in the Age of the American Revolution.* This work is an exploration of the meaning of the concept of liberty in American history. Reid located "liberty" in its context to show how its usage had changed since 1776. Reid argued that the modern conception of liberty, as freedom from the State, misconceives the usage in the late eighteenth century when it meant both freedom from arbitrary power and a guarantee of the right to participate in the political process. Liberty meant participation. The modern reader of *The Federalist,* for instance, should appreciate this lost meaning. The meaning of such concepts, as Reid says, are not anchored in time. So this thesis is partly concerned with recovering the contemporary meaning which was attributed to ideas about federal government in the 1890s at the foundation of the Australian Constitution.

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[6] The *Harvard Law Review* has been the home of much of this debate. This matter is explored more fully in the chapter following on the High Court.

[7] Richard Hall & John Iremonger *The Makers and the Breakers,* (1976).

THE STRUCTURE OF THE THESIS

The thesis is divided into two sections. The first section is concerned with the question of the origin of Australian ideas about federal government. The sources which were most influential in ordering and inspiring the federal ideas of the framers of the Australian Constitution are explored. The second section is an analysis and exegesis of the framers' construction of the four major features of the federal structure which combine in the Australian system.

Precursors: Sources of Federal Theory

The three chapters which constitute the first section explore the three major sources of federal theory which the Australian framers drew upon. The first chapter introduces one of the main contentions of the thesis which is that American ideas of federation were hegemonic in their influence in Australia. The starting point for an examination of federal theory, as it was understood in Australia, lies in the work of James Madison, Alexander Hamilton and John Jay, who wrote *The Federalist* under the pseudonym Publius. This point is well understood in interpretations of the Australian Constitution so it is the object of the first chapter to show the lines of argument which *Publius* used to explain the federal system in order to develop later the Australian points of similarity and difference. The Swiss Constitution although mentioned occasionally in the debates was not drawn upon in any systematic way. Apart from the notional offering of the referendum as a solution to constitutional problems the Swiss model was negligible in its influence and is not discussed in this thesis.

One of the successes of *The Federalist*, and a reason for its lasting interest, is that Madison managed to tie the new Constitution to arguments about republicanism, civic virtue and liberty.[8] The debate over liberty and federal ideas were simultaneous in the United States so, as a source of argument about political theory, *The Federalist* has held an unbroken fascination. One of Madison's main arguments was that the organization of government was part of the key to protecting the liberty of individuals and it could be maintained through the separation and division of powers. Madison's

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[8] Peter S. Onuf "Reflections on the Founding: Constitutional Historiography in Bicentennial Perspective" *William and Mary Quarterly* 46, 2 (1989), 341-375. Onuf has here given a thorough account of the continuing debate over the founding.

theory of federal government, or the "compound republic" as he called it, allowed for the separation of government into spheres of operation in which the local government was responsible for local affairs and the national government for national affairs. The important questions of representation, checks and balances, and the operation of the institutions within the system, followed as a consequence but were to be resolved within the general protective strategy of dividing interests. *The Federalist* argued for the preservation of liberty, which entailed the denial of absolutist authority, and necessitated the creation of the separate spheres. Ultimately from this source, and through the work of James Bryce, the Australians firmly adopted this conception of the proper federal arrangement and therein lies its importance. It has been argued subsequently that this neat model never actually worked in the United States, nor has it worked in Australia.

The second chapter is concerned with the states' rights tradition which was of profound influence in the Australian debates, especially among the small states' delegations. Although this tradition, as it was received, did not have a particular readily identifiable textual basis, it was firmly founded in an explicit theory that the federal settlement had a contractual basis. From the time of the Philadelphia Convention the question of the possibilities and areas of autonomous state action were in dispute. The interpretation of the basis of union as a form of contract was pursued most eloquently by John C. Calhoun who argued that the states maintained a defensible realm of rights and responsibilities which were not, and could not be, alienated to the central government. Just as the Lockean contract between individuals in the state of nature allowed for the creation of the civil society, so the agreement between the states created the Union. Lincoln, at the outbreak of the Civil War, sought to destroy this interpretation by denying the theory of contractual states' rights as the basis of federation. Nonetheless, the contract as federal theory was transferred into the language of the Australian states' rights advocates even though there was not a convenient body of literature for them to adopt.

The third chapter deals with the work of James Bryce. His book, *The American Commonwealth,* is considered to be the most significant reference work and most immediately influential text used by the Australian framers. The author of the *Making of the Australian Constitution,* J.A. LaNauze, called it a "great text book"

which they used as churchmen use the Bible.[9] A later writer on Bryce has supported this view of his scriptural authority. In his recent book, *James Bryce's American Commonwealth*, Hugh Tulloch has recorded the view of Frederic Howe, a contemporary of Bryce's, who said that it was "a work of Biblical authority"; to professors and students alike, his opinions were "above and beyond question".[10] This was true for the Australian's also. Bryce's work was central to the thinking of the Australian framers and the understanding of federal government which he conveyed was singularly important to their appreciation of that system and to their attempts to structure government.

Bryce's work on federal theory was a mediated account of Publius' version of the spheres. Publius deemed that the proper arrangement of government was to divide the powers of government into discrete spheres of operation and to avoid overlap. Bryce was similarly explicit in his account of the ascribed realms of activity; the national sphere was distinct and separate from that of the states. According to Bryce (to adopt a different metaphor) there was a clear line of division between the levels of government. However, he also expressed the apparently contradictory view that states' rights were but little heard of since the Civil War, which suggests that the states were not as distinct from national powers as had previously been believed. In Bryce's work a sustained contradiction was maintained in his account of the federal system in operation which was not resolved. His work is explicable, however, because in the context in which he was working there was a political necessity for the federal system to be supported and defended. Tulloch has argued that his defence of the federal system must also be understood in the context of the Irish question in British politics. The federal arrangement offered a possible solution to the intractable problem of Home Rule and Irish nationalism and, to his mind, it should be defended vigorously on these grounds.[11] The point of this chapter on Bryce is to develop some of the tensions in his work which are of relevance to matters addressed by the Australian framers as, in their adoption of Bryce's *Federalist* notion of spheres, they were seemingly oblivious to its problems.

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[9] J.A. LaNauze *The Making of the Australian Constitution*, (1972), 273.
[10] Frederic Howe *Confessions of a Reformer*, 3, quoted in Hugh Tulloch *James Bryce's American Commonwealth* (1988), 10.
[11] Tulloch, 68-79.

Finding the Way - the Australian Federation Debates

The second section of the thesis deals with the federal structure of the Australian Constitution and the ideas received and reproduced from the important Anglo-American authorities. The organization of this section loosely follows Madison's model in *Federalist* 39 where he identified the constituent features of the federal arrangement in order to ascertain "the real character of government". Madison outlined a set of conditions which he thought were necessary and sufficient for the establishment of the new form of government. The second part of the thesis is arranged to conform to these features for which Madison accounted. They are: the division of powers; the Senate; the High Court; the process of amendment and ratification.

The federal system is maintained through a particular arrangement of structures, the central feature of which is the division of powers between the states and the national government, or what Madison referred to as "the extent of powers".[12] The division of powers, as a basic federal principle, was given only a little attention by the framers. Notably, throughout the debates there was discussion of particular powers which "ought" to be given to the Commonwealth, or left with the states, but there was no extensive debate on the overall distribution of powers. The century old American list was used as a model and, from early in the 1891 Convention, that list was largely fixed. Seemingly, the Australian framers regarded the distribution of powers into spheres as self evident.

In contrast to the scant attention given to the division of powers, the framers debated the Senate exhaustively. The Senate was considered by Madison in relation to the "sources from which ... ordinary powers are to be drawn".[13] The debate over whether to vest the Senate with a power to amend, reject or veto legislation in-detail consumed a larger proportion of the overall debate than any other issue. The "lion in the path" to federation was not the tariff, as expected, but the powers of the upper house over money bills. While the distribution of powers was largely ignored, the Senate was to be the major line of defence against the tendency of the large states to encroach on the rights of the small states. All representatives anticipated that the Senate would be organized along state lines and accordingly it was expected to vote that way. The

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[12] *The Federalist* 39, M. Beloff ed. (1948), 192-195.

[13] The other institution given authority was, of course, the House of Representatives.

federal balance was to be preserved through the Senate and it became the centre of attention in the debates. So the absence of debate on powers is explicable as the "spheres" of responsibility were to be guarded by the states' representatives in the upper house. The federal arrangement would be protected in its delicate balance by the states voting through the Senate and the problem of encroachment would not arise; the enlightened self interest of the states would prevent a change in the balance.

Together with the Senate, the High Court was to be the guardian of the Constitution. Through the process of judicial review it was to be concerned with regulating what Madison called the "operation of government" and the "trial of controversies". Most of the debate over the Court, however, was centred on the issue of whether to allow appeals to go to the Privy Council. The policy-making dimension of the Court, in determining the operation of governmental powers, was largely glossed over as the framers debated the immediate problem of legal ties to the metropolitan power. As with the debate over the division of powers, the matter of judicial review was deemed to be relatively straight-forward and of little importance when so many other issues were to be confronted. How can this underestimation of the role of the High Court be explained? The argument contained in this chapter is that if the Senate was to be the guardian of the states then contentious legislation, which would potentially damage states' rights, would not be enacted and the Court would not often be placed in a position to defend or protect the states. Thus the question of relations to the Privy Council was seen to have current importance and the risks involving judicially protected states' rights were remote because the Senate would do its job. This chapter, unlike the others in this section, is solely concerned with the Australian debate over the the Court and questions of the American parallels are not entered into. The concentration on the Australian debates is maintained for two reasons. The first derives from a wish to avoid the vastness of American constitutional case history which, although of crucial importance to the development of American federal government, is, with exceptions, largely extraneous to the Australian Federation debates for the purposes of this thesis.[14] The second reason is that the object of this chapter is to carefully detail all the stages of the debate on the High Court to clarify the argument on the role of the Senate and to throw it into relief. It is argued here that

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[14] An account of the role of the United States Supreme Court which was contemporary with the Federation debates was G.T. Curtis *Constitutional History of the United States* (1897) 2 vols. Recent accounts are C.G. Haines *The Role of the Supreme Court in American Government and Politics 1789-1835* (1960). C.G. Haines & F.H. Sherwood *The Role of the Supreme Court in American Government and Politics 1835-1864* (1957).

the relative lack of debate over the Court can be explained in terms of the concentration on the importance of the Senate.

The fourth feature of Madison's assessment of federal government was the matter of constitutional change. Change was to be carried out through the processes of ratification and amendment of the Constitution or, as he put it, "the foundation on which it is to be established" and the "authority by which future changes in the government are to be introduced". Thus the need to involve the masses in the popular adoption of the Australian Constitution was essential to it having a recognizable liberal character. Consent was necessary. The ratification campaigns were keenly contested in Australia as had been the case in the United States a century before. This chapter does not deal with the history of the campaign, nor the arguments of the protagonists as such, but with the political principles of legitimation which underpin the Australian Constitution through this event. A characteristic feature of Australian constitutional history has been the reluctance of the electorate to accede to amendments of the Constitution. One reason contributing to this may be that the ratification campaign was direct and popular and therefore the original Constitution has been, from its origination, democratically legitimate.

The legitimacy of the Australian Constitution is deeply entrenched through the democratic process. In this respect its democratic character surpasses that of both the American and British Constitutions. According to liberal constitutional theory, a constitution is legitimate if the people have contracted or agreed to its terms. In the British case there is only a notional or abstract acquiescence which is judged to be sustained through a principle of continuing recognition of the Constitution. This applies in the United States also but with the addition of a real historical agreement which was given through representatives of the people in the ratification Conventions in the states. This principle also applies in the case of Australia with the difference that there was an actual moment of popular consent in the ratification plebiscites and support is continued with adherence to the Constitution, expressed through the electoral process and occasional referenda. Referenda also allow for participation along federal lines (people counted *en masse* and as members of states) as well as providing for the exercise of majority opinion. So, sustained through liberal contract theory, the dual federal features of ratification and amendment have given powerful legitimation to the Australian Constitution. The qualification should, however, be made that the franchise was restricted to males in all colonies except South Australia.

FEDERAL THEORY

An argument of the thesis is that the federal theory which the Australians inherited and adopted was problematic and, in important respects, contradictory. *The Federalist* version of divided spheres of national and state action was thrown into question by the states' rights arguments which surrounded the Civil War. The work of Bryce encapsulates and reproduces the dual problem. Relying on this work, the framers approached the organization of the federal system by stressing the role of the Senate, at the expense of considering the other important features of the division of power and the review function of the High Court. This problem of the origins of the Constitution has not of course been fatal to its operation. The capacity of the Constitution to continue functioning has been ensured by ready alteration through judicial review and by a flexibility which is perhaps underestimated. Moreover, as already noted, the democratic foundations of the Constitution, in the provisions for ratification and amendment, have served to deeply entrench and legitimate the Constitution in liberal principles.

Overall the thesis is intended to show the legacy of nineteenth century American federal thought in the Australian Federation debates and the importance of liberal philosophical assumptions which were associated with this tradition. A premise of the thesis is that the framers endeavoured largely to anchor the settlement in the wording of the Constitution as agreed to in the debates. The great majority of the framers were cautious about potential change and were intent on arranging the Constitution in such a manner that it would not readily be amended. However, due to factors which were outside the range of their anticipation, the Constitution has been constantly changing. The intended inflexibility of the Constitution was dictated by the fears that representatives from the smaller states held about the size of population in New South Wales and Victoria. For self-protection those delegates sought to prevent constitutional change. The success of this original intention can be seen in the failure of most referenda since federation. But, importantly, failure to change the words of the Constitution has not prevented the meaning of the document from being subject to constant change.

One of the shibboleths about federal theory and history is that there is somehow a proper federal balance which is capable of being maintained or upset. This

Aristotelean assumption sustains much political rhetoric and is commonplace in popular political debate. A premise of this position is a belief that the framers balanced the system and, for cynical political reasons, others wish to upset the proper arrangement. There has, of course, never been a federal "balance" and the framers' intentions have necessarily been subverted as the Constitution is constantly being altered. The grounds of this changeability are easily seen in the notorious history of Section 92. According to Robert Garran, the secretary of the Drafting Committee of the 1897-8 Convention and the longest surviving participant of the Conventions, this section became the "most troublesome provision of the Constitution" when it was intended to be the simplest.[15] The endless debate over the words "absolutely free" is a clear example of the falsity of assuming that words have a clear, objective and unambiguous meaning. Most of the the framers (excepting perhaps Isaacs and Higgins) seemed to have made such an assumption, in this case at least.[16] The meaning of "absolutely free" could never be absolutely clear.

John Cockburn was a representative from South Australia at both of the Conventions. His speeches are among some of the most interesting and thoughtful of the debates. He was a self-confessed liberal and a defender of states' rights and, as a keen reader of *The Federalist*, tried to actively bring historical understanding and political theory to bear upon the work of the Conventions. Two of his statements exemplify the conceptual difficulty of the enterprise in which he was a participant and also help to frame the terms of this thesis. In 1891, Cockburn remarked that "history is capable of very different interpretations" and, in 1897, he said that they were trying to erect an "edifice which is to endure for all time".[17] If history is a subjective enterprise which is capable of various interpretations then the edifice created in the Federation debates is also capable of various interpretations. A Constitution cannot stand as an objective unambiguous fact, it does not endure for all time and is only understood by interpretation. So, interpretation of the Australian Constitution should begin with an examination of the foundations of the federal edifice which stand in the pages of New York newspapers in 1787 where the essays of *Publius* were first published.

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[15] J.A. LaNauze, "A Little Bit of Lawyers' Language: The History of 'Absolutely Free', 1890-1900", in A.W. Martin ed. *Essays in Australian Federation*, (1976), 58.

[16] Some framers seemed well aware of the problem of meaning in relation to s 92. Isaacs noted the need to test the section. Adelaide, 1897, 1141.

[17] 1891, 713; Adelaide 1897, 349.

CHAPTER ONE

THE HARMONY OF THE SPHERES

> Locke's little book on Government is perfect as far as it goes. Descending from theory to practice there is no better book than *The Federalist.*
>
> Thomas Jefferson, 1790[1]

> The local or municipal authorities [states] form distinct and independent portions of the supremacy, no more subject with their respective spheres, to the general authority, than the general authority is subject to them within its own sphere.
>
> *Federalist* 39

Andrew Inglis Clark was a leading protagonist in the early Federation debates and an enthusiastic student of American political history. He was anxious that the Australian framers should follow the form as well as the substance of the debates over the American federal system.[2] Clark was the Attorney-General of Tasmania and an Australian authority on the political and legal system of the United States and, like his American predecessors, he became a constitutional pamphleteer. He circulated a preliminary draft constitution amongst his colleagues in the federal movement which came to be the substantive basis of the later drafts in the Conventions. He also founded and edited a journal called *The Commonwealth* which was intended to fulfil the same task as *The Federalist* in popularizing arguments for a federal system and advancing the cause of ratification of the Constitution, once it was completed. Clark had unbounded admiration for *The Federalist* and was explicit in his editorial endeavours in wishing to follow its lead. The association with Australia, for Clark, was obvious; it was worthy of emulation:

> It will be remembered that *The Federalist*, the great American prototype which *The Commonwealth* has had before its eyes, was published at a time when the American nation was being born.[3]

Clark may also have added that it was published in late 1787 when the European settlement of Australia was about to be established; possibly he did not wish to draw attention to the coincidence of a free government being proclaimed at the same moment as a convict society was being founded.

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1 Thomas Jefferson to Thomas Mann Randolph, 30 May 1790. *The Papers of Thomas Jefferson* J.P. Boyd ed. (1961), XVI, 449.

2 J.M. Neasy, "Andrew Inglis Clark Senior and Australian Federation" *Australian Journal of Politics and History* 15, 2, (1969), 1-24. J. Reynolds, "A. I. Clark's American Sympathies and His Influence on Australian Federation" *Australian Law Journal*, 32 (1958), 62-67. Clark wanted state Conventions to ratify the draft Constitution for instance.

3 *The Commonwealth*, 7 September 1895, 1,2, 2.

The work of Madison, Hamilton and Jay was profoundly important in the formation of Clark's own ideas. Jefferson was also influential as, to a lesser extent, was the Italian nationalist Guiseppe Mazzini.[4] Clark, more than any other representative at the Australian Conventions, exemplified the influence that American federal ideas had upon the framing of the Australian Constitution. The influence of Publius on his understanding of federal system could scarcely be over-emphasized. He wrote in his book, *Studies in Australian Constitutional Law* in 1901, of the general influence of the authors of American Constitution who "may be fitly regarded as being also the primary authors of the Constitution of the Commonwealth of Australia".[5]

In the letter to Thomas Mann Randolph, quoted above, Jefferson recognized what numerous writers have since demonstrated, that *The Federalist* was both the symbolic and substantive basis of modern federal thought. As the Australian framers were direct beneficiaries of the writings of Madison, Hamilton and Jay, it is necessary to give close attention to the meaning of their work.[6] If Clark, the foremost scholar of American history in the Australian Conventions had *The Federalist* before his eyes, the question follows: what was the influence of the work on the Australian Constitution? If Jefferson was correct in his assessment that it was "the best commentary on the principles of government which ever was written", then what was the theory of the federal system which it propounded?[7] The purpose of this chapter is to explore the federal ideas of *The Federalist* as one of the main foundations upon which the framers of the Australian Constitution based their ideas.

This chapter is arranged in four parts. The first is generally concerned with the influence of *The Federalist* on the Australian federation movement and the formation of the Constitution. A contention of this thesis is to show that, despite the relative absence of reference to *The Federalist* in the Federation debates, it was profoundly important in inspiring and ordering the ideas of the framers of the Australian Constitution.

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[4] J. Reynolds, "Premiers and Political Leaders" in F.C. Green ed. *A Century of Responsible Government in Tasmania 1856-1956* (1957), 179.

[5] A. I. Clark, *Studies in Australian Constitutional Law* (1901), 358

[6] Currently authors are divided over whether to treat Publius as one author, or two, (Hamilton and Madison), or as three. Morton White has been criticised for dealing with Publius as one author, *Philosophy The Federalist and the Constitution* (1987), see Richard K. Mathews' review *American Political Science Review*, 82, 1, (1988).

[7] Thomas Jefferson to James Madison, 18 November 1788. *Jefferson Papers*, XIV, 188.

The second section shows just how pervasive the authority of Publius has been in constructing federal theory. *The Federalist* is the principal text which interprets and defends the Constitution of the United States. That Constitution is celebrated as one of the great documents of the Enlightenment and as the first Constitution which was deliberately constructed according to reasoned reflection to defend liberty. During the nineteenth century *The Federalist* became the classic text which explained federal government and it was promoted as the original source of authority on the federal system.

The third part of this chapter is an explication of the federal system as it was explained by Publius. The theory of federal government was created at a time when the older system of the Articles of Confederation were failing and a new Constitution was deemed to be necessary. To avoid the centralization of power, which was tantamount to creating a tyranny, the Americans developed a divided polity in which each level of government would occupy its own discrete sphere.

Finally, the work of American political scientist Daniel Elazar is used to demonstrate that federalism has not worked in the manner that Publius predicted. Nineteenth century historians, in reporting their observations about history and the functioning of government, relied upon a range of factual evidence to support their work which happened to sustain the predictions of Publius and which upheld the dominant *Federalist* model of the separate spheres. Elazar has challenged this argument and has shown through empirical work that the separate spheres never existed. This last section leads into the following chapters on Bryce and states' rights and is important for explaining how the Australian framers understood the federal system by demonstrating that in its "purest" and earliest form the federal system did not work according to the model which they sought consciously and deliberately to reproduce.

THE FEDERALIST AND AUSTRALIAN FEDERATION

From the outset the paradox should be recognized that there is a presence and an absence of *The Federalist* in the Australian debates. *The Federalist* is the single most important explanatory text on federal government yet it was only rarely cited. Why is this? Why is not *The Federalist*, as the source of modern federal theory, repeatedly cited by the Australians? On examination this can be explained by the depth of its influence. Discussion about federal theory was so steeped in its language and assumptions as to render it almost invisible. Similarly, the presence of responsible

government in the thinking of the framers could scarcely be doubted, yet there was little substantive debate about it in the Federal Conventions. So the factor of this absence is itself an indication of the dominance and pervasiveness of the influence of American federal thought. *The Federalist* was not cited as often as Bryce, but the very assumptions which he made, and which were made by the Australian framers, were based on the theory of federal government enunciated by Publius one hundred years before. Moreover, the relationship between *The Federalist* and the Australian colonies is perhaps given an even greater, if coincidental, historical association because at the time the First Fleet was sailing to Australia *The Federalist* Papers were actually being written.

Thus *The Federalist* seemingly presents a paradox in the writing and discussion about the foundation of the federal system in Australia. The pervasiveness of the influence of Publius on federal thought generally cannot be doubted, indeed it is ostentatiously celebrated, which makes the absence of references to *The Federalist* in the debates somewhat striking. Certainly, numerous references are made to it in passing and mention is often made of Hamilton in particular, but the Papers themselves are largely unrecognized as the original foundation of the very arguments the Australian framers were presenting.[8] Bryce was regarded as the great authoritative figure although he of course did not originate the principles of the federal system, but merely reiterated the arguments of Publius. Quick and Garran, when listing the authors to whom they owe the greatest debt, curiously do not include Madison, Hamilton and Jay.[9] But as the original source of ideas about federation their influence is hegemonic; the first ideas of the Australian framers about federalism were the ideas of Madison, Hamilton and Jay.

The absence of debate on *The Federalist* partially disguises the double difficulty the Australians had in their adoption of American ideas and in their observation of history. Firstly, the legacy of American political thought had to be disaggregated. What the Australians wanted from the foreign models which they examined was instruction on how to erect a proper federal structure. For this purpose the separation of American federal ideas from republicanism was necessary. Apart from being the explanation of the basis of the American Union, *The Federalist* was also an argument in

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[8] *The Federalist* was first mentioned in the 1890 Melbourne Conference. In Adelaide, in 1897, Bryce was repeatedly mentioned whereas only a few references appear to *The Federalist*, Cockburn, 664-5 & 944: Higgins, 666; Symon, 950 & 961.

[9] J. Quick & R. Garran *The Annotated Constitution of the Commonwealth of Australia*, 1901, wrote of the "valuable assistance" that some works had given them; they expressed their "acknowledgements and obligations" to twenty three texts and *The Federalist* was not among them. (1901) ix.

favour of republicanism and against British tyranny.[10] Most delegates were like Downer, who was, "at heart an Englishman", and they could have no truck with republican sentiments.[11] Manning Clark has called these men the "loyal sons of the Queen" and the "Australian-Britons".[12] In order to appropriate federal theory for the Australian colonies it was necessary for the loyal sons to separate it from republicanism and deny the virtue of that element of the American legacy.

The Australian framers read history and a problem they faced was reconciling some theoretical contradictions of the American experience. The writers of history had used the metaphor of the spheres to describe the development of institutions in American political history. The nation and the states were separate and had different spheres of operation. This metaphor was a convenient but misleading characterization of the federal system as the use of the "set of spheres" was in conflict with the brute fact of the Civil War. When "the spheres collided" such a neat theory, seemingly, would need to be abandoned for a more complex and problematic explanation of the system in operation. The origin of the argument of the spheres was found in the description of the federal system which was advanced in the revered *Federalist*. At the outbreak of the Civil War *The Federalist* version of the Constitution was effectively suspended as Lincoln argued for the preservation of the Union.[13] But not surprisingly this explanation was eventually maintained despite the Civil War and the cry of despair by Henry Adams, in 1861, that "Our theory of Government is a failure".[14] By the time Bryce was writing, this official version of federalism was reinstated as, necessarily, the significant icons of American history were recovered and preserved as devices of legitimation and reconstruction. *The Federalist*, importantly, was among them. In recent years a propagation of the metaphors of federalism has taken place and an enormous variety of images have been proposed to explain the complexity of the inter-relationship of state and national government.[15]

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[10] Garry Wills shows the paradox of the Americans rejecting British tyranny in order to put in place rights which had developed under British government. *Inventing America: Jefferson's Declaration of Independence* (1980), 48.

[11] Adelaide 1897, 215.

[12] C. M. H. Clark, *A History of Australia: The People Make the Laws* (1981), 34.

[13] Diggins has argued that Lincoln felt an acute estrangement from the Founders and returned to the first principles of the *Declaration of Independence* as which were "morally prior" to the Constitution. John Diggins *The Lost Soul of American Politics* (1984), 298-9 & n.b. 31, 375.

[14] Henry Adams, American historian, heir of two presidents and son of Lincoln's foreign minister, thought that the Constitution and *The Federalist* had failed. Diggins argued that Adams saw that the classical ideas of virtue in the American founding and politics had been subverted and that the powerful corporations had "eluded the mechanisms of control devised by *The Federalist*". *The Lost Soul*, 265-9.

[15] William H. Stewart "Metaphors, Models and the Development of Federal Theory" *Publius* 12, 2, (1982), 5-24.

The Australians adopted the American paradigm of the spheres from two seemingly different sources: one was a direct inheritance through their reading of *The Federalist;* the other was a justification of the system at work, found in the writings of James Bryce. Like other writers of the period, Bryce actually gave a mediated account of the Publius version in *The American Commonwealth* as if it was empirically discovered through the supposed disinterested investigation and observation of the facts. The chapters following this one will deal with the problem of the colliding spheres and with Bryce's reportage.

The next section is concerned with demonstrating the arguments which have been developed to give *The Federalist* an authoritative status. Just as Bryce's opinions were said to be never challenged, so Publius has enjoyed an unrivalled position of authority.

THE AUTHORITY OF PUBLIUS

According to the American writer Calvin Jillson, "No event in the political history of [the United States] has been more thoroughly analyzed than the Constitutional Convention of 1787".[16] If this is so then it seems probable that no book has been more analyzed by American scholars than *The Federalist.* A continuous flow of works have been brought forth recently on the origins and creation of the American federal government many of which have a discussion of *The Federalist* at their centre.[17] The argument of these works has generally involved a demonstration of the importance of *The Federalist* both in creating a distinctive American political history and as exemplifying the genius of American politics. *The Federalist* has long been given close scholarly attention and has been constantly reprinted with critical commentaries and introductory essays.

From as early as 1818 *The Federalist* has been established as a great text. In that year a new edition was published which according to the editor, "may be considered in this instance, as perfect". His claim lay on the basis that corrections to the printed text were in Madison's own hand to his personal copy of the Papers. In the "Prefatory Remarks" to the edition Jacob Gideon commented on the "solid reputation for sagacity, wisdom and patriotism" of Publius and upon the excellence, rather than the extent, of

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16 Calvin Jillson, "The Representation Question in the Federal Convention of 1781: Madison's Virginia Plan and Its Opponents" *Congressional Studies* 8, 1, (1981), 21.

17 Recent examples are: M. White, *Philosophy The Federalist and the Constitution;* (1987) D.F. Epstein, *The Political Theory of the Federalist* (1984); G. Wills, *Explaining America: The Federalist,* (1981).

the writing which "constitutes his claim upon his cotemporaries and upon posterity for the character and intellectual superiority" of the work.[18] By 1818 Hamilton was dead and, as Gideon noted, Jay and Madison had departed from public life, but,

> It is to be hoped that neither a mistaken zeal of friendship for departed worth, nor an inclination to flatter living virtue, will induce any one to disturb this growing sentiment of veneration.

The sentiment of veneration has continued to grow so that, in the most recent edition, the prefatory remarks of the editor, Isaac Kramnick, serve both as a critical essay and as a repository for the most laudatory comments yet made about *The Federalist*. Kramnick's introduction to the 1987 bicentennial edition is something of a celebration of what he says is its "endurance as a towering monument in American cultural and political history".[19]

Recent Opinion

The celebrations for the bicentenary of the United States Constitution and of *The Federalist* in 1987 have given further opportunity to admire the work of the framers and revere what they produced. While primacy is given to the Constitution, *The Federalist* is also praised, as the tributes of past authorities are repeated and endorsed by present commentators. But while Isaac Kramnick has elsewhere contributed to the burgeoning methodological debate on "texts", "contexts" and "interpretation" which is increasingly critical of the very idea of great canons, great texts or "enduring monuments" which live independently of their context, he nevertheless was tempted. Despite his recognition of the problems of uncritical celebration of great texts he only partially avoided the temptation of further contributing to the veneration of Publius by citing the words of other scholars.[20] He quoted the opinion of others on the Papers:

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[18] *The Federalist*: with an Appendix, Jacob Gideon ed. (1818), 3-7.

[19] *The Federalist Papers*, Isaac Kramnick, ed. (1987), 12. (Hereafter: Kramnick edn)

[20] The debate on texts and contexts is far too vast to engage in here in any way other than by mere gesture. The work of Leo Strauss, in particular, and also A.O. Lovejoy have been of a most significant influence in the understanding and interpretation in the United States of texts like *The Federalist*. The notion of a history of ideas - a great tradition - disconnected from the immediate context, although repeatedly repudiated, still provides a dominant strain of thought. The work of Martin Diamond is perhaps the exemplar of Straussian ideas on interpretation of *The Federalist*. See: Martin Diamond,"*The Federalist* 1787-1788" in Leo Strauss and Joseph Cropsey eds. *History of Political Philosophy* (1972); "*The Federalist's* View of Federalism" *Essays in Federalism*, (1961); "What the framers meant by Federalism", in *A Nation of States*, Robert Goldwin ed (1974); "Commentaries on *The Federalist*" *The Yale Law Journal*, 86,6, (1977), 1273-85. For an attack on the Straussian history of ideas tradition see John Gunnell, "The Myth of the Tradition", *American Political Science Review*, 72, 1, (1978), 122-34. For an alternative rendering of the federal convention see, Michael P. Zuckert, "Federalism and the Founding: Toward a Reinterpretation of the Constitutional Convention" *The Review of Politics*, 48, 2, (1986), 166-210. For a recent critical discussion of the historiography of the federal theory of the Convention, including the work of Diamond, Storing and Zuckert, see: Gordon Lloyd, "Let Justice be Our

the distinguished American scholar Clinton Rossiter would pronounce *The Federalist* "the most important work in political science that has ever been written, or is likely to be written, in the United States". It is, indeed, he concludes, "the one product of the American mind that is rightly counted among the classics of political theory."[21]

Kramnick, while adding to the what has elsewhere been called the "prescriptive veneration" of *The Federalist*, placed its reception in the context of the general adulation accorded to the Constitution.[22] Kramnick wrote that the American Constitution has endured "virtually unchanged for two hundred years" and (ignoring the British Constitution) claimed that, "No other nation's constitution had lasted that long".[23] By quoting the views of eminent people on God's intervention he managed to distance himself from an outright assertion of divine provenance.

For many who lived through those years it seemed that the American Constitution was a unique and metahistoric achievement, of flawless, wonderous, perhaps even divine, inspiration. James Wilson, one of the framers at Philadelphia, wrote: "After the lapse of 6,000 years since the creation of the world, America now presents the first instance of a people assembled to weigh deliberately and calmly, and to decide leisurely and peaceably, upon the form of government by which they will bind themselves and their posterity."[24]

Another renowned scholar of *The Federalist* was Martin Diamond. In seeking to explain the framers' conception of how federalism would work, he provided an argument about the framers intentions which has clarified many ambiguities and misconceptions but he has also added to the mystique which enshrouds *The Federalist.* As the jewel in the (republican) crown of American political thought it has been ascribed talismanic qualities by Diamond:

its political understanding was not limited to the historical period within which it was produced. Rather it speaks to perennial political issues and especially to those peculiar to the genius of American politics. Publius ... remains our most instructive political thinker.[25]

Other writers also see Publius as more than a merely pragmatic or instrumental thinker. Morton White's recent book, *Philosophy, The Federalist, and the Constitution,* is an attempt to elicit from the Papers a deliberate, whole and fully coherent philosophical construction. In the introduction to a recent collection of essays entitled *American Philosophy* the editor, Marcus Singer, chastised himself for not

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Guide: A Reconsideration of 'True Federalism' at the Constitutional Convention" *The Political Science Reviewer* 17, (1987), 139-174. Gordon S. Wood, *The Creation of the American Republic 1776-1787* (1969) stands as perhaps the fullest and most systematic treatment of the period treating the text in its context against the Straussian tradition. Isaac Kramnick, "'The Great National Discussion' The Discourse of Politics in 1787" *William and Mary Quarterly* 44, 1, (1988), 3-32.

21 Kramnick edn, 11.

22 Albert Furtwangler *The Authority of Publius* (1984)

23 Kramnick edn, 12-13.

24 Kramnick edn, 13.

25 Diamond, "Commentaries on *The Federalist*", 1285. This quotation indicates his intellectual debt to the work of Leo Strauss and his conception of a history of ideas.

being prescient enough to include a richly deserved essay on *The Federalist*.[26] If American scholars now consider *The Federalist* to be of increasing importance in the national tradition of philosophy it has nevertheless already secured an unchallenged place in American political history. Allegedly it is the Americans fourth most important document after the Constitution, the Bill of Rights and the Declaration of Independence.[27]

The views of nineteenth century commentators were no less enthusiastic than current writers. As Gideon's commentary to the 1818 edition shows, the recognition of the centrality of the Papers to political thought extends back into the early nineteenth century. The Australian framers, seemingly, received not only the Papers themselves but also the enveloping clouds of mystique. This tradition which had been established with the initial favourable reception of *The Federalist* continued to develop with the production of consolidated editions, like Gideon's, and with the widespread adulation afforded to it in legal and historical writing. This had a particular bearing on the framers of the Australian Constitution who were both anxious to learn from their American precursors and awed by them.[28] As the next section shows, the reputation that *The Federalist* had was already well established by the time that Bryce was writing; he accepted its authority and passed it onto the Australians.

The Nineteenth Century View

Kramnick quoted Washington's comment that the Constitution was "little short of a miracle" and Jefferson's view that it was drafted by "an assembly of demigods".[29] If indeed, as Madison claimed, a "finger of that Almighty hand" was responsible, then we certainly should open our understanding of federal ideas to wider theoretical

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[26] *American Philosophy* Marcus G. Singer ed. (1985). A related paper was included in this collection: Andrew J. Reck, "The Philosophical Background of the American Constitution(s)", 273-293. Reck discussed *The Federalist* in relation to the current interpretation by Gordon Wood and John Pocock that this period represented "the end of classical politics", 291-3. See Wood, *The Creation of the American Republic:* 606-615 and John Pocock, *The Machiavellian Moment: Florentine Political Thought and the Atlantic Republican Tradition* (1975), 523 ff.

[27] *The Federalist Papers* W. Kendall and G.W. Carey, eds. (1966), v.

[28] A quantitative assessment of the citation of *The Federalist* by the Supreme Court in judgements now seems so vast as to be beyond ready calculation. According to Adkinson, no index exists and only a page by page inspection of cases would provide an answer. "*The Federalist* and Original Intent" *Political Science Reviewer*, 16, (1987), 222. This task was once undertaken: Charles W. Pierson, "*The Federalist* and the Supreme Court", *Yale Law Journal*, 23 (1924).

[29] Kramnick edn, 13. Madison also wrote of the "miracle" in a letter to Jefferson: 24 October 1787, *Jefferson Papers* Boyd ed. XII, 272.

questions.[30] However, such an invocation of divine help may well have offended Hamilton's humanistic conceptions of the responsibility of people and ideas. According to Hamilton, in *Federalist* 1, people could create their own constitutions "by reflection and choice".[31]

The adulation accorded to *The Federalist* originated in contemporary comment on the utility of the Papers as a guide to the interpretation of the Constitution. Jefferson was perhaps one of the first to pay tribute to *The Federalist* and his respect for the work did not diminish. For him it was,

> an authority to which appeal is habitually made by all, and rarely declined or denied by any as evidence of the general opinion of those who framed and those who accepted the Constitution of the United States as to its genuine meaning.[32]

Madison himself was to write in 1825 that *The Federalist* was "the most authentic exposition of the text of the Federal Constitution, as understood by the Body which prepared and the authority which accepted it".[33] So began what has since been called the "prescriptive veneration" of *The Federalist* Papers. The prodigious influence of Publius on Supreme Court rulings on the meaning of the Constitution is repeatedly stressed by scholars. As one wrote: "Although not the only commentary on the Constitution appearing about the time of its adoption, it is the most extensive and is alluded to by the Supreme Court to the almost total exclusion of all others."[34] Jurists and scholars, in an attempt to find the real meaning of the Constitution, have repeatedly turned to Publius as a guide.

Kramnick's introduction to the recent edition is a panegyric for *The Federalist* as he cites the great authorities on both it and the Constitution. In the view of John Adams, the Constitution was, "if not the greatest exertion of human understanding ... the greatest single effort of national deliberation that the world has ever seen". Supreme Court Justice William Johnson wrote in 1823: "In the constitution of the United States,

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[30] *Federalist* 37, 181.

[31] *Federalist* 1, 1.

[32] S.K. Padover ed. *The Complete Jefferson* (1943), 1112.

[33] Madison to Jefferson, February 8, 1825, *The Writings of James Madison*, G. Hunt ed. (1900), 12, 218.

[34] Jacobus tenBroek, "Contemporary Exposition" *California Law Review*, 37 (1939), 158; quoted in Danny M. Adkinson, "*The Federalist* and Original Intent", 224. Adkinson's paper is an assessment of five articles by tenBroek published in the *California Law Review* in 1938-39 which were an important precursor to the current debate on original intent and the interpretation of the text. The set of articles are somewhat before their time but tenBroek's work has been revived because he was one of the first to attack the notion of the sanctity of original intent. This "judicial hokum" has been given a new impetus by conservative jurists like Robert Bork and Roaul Berger and by President Reagan's Attorney-General Edwin Meese. Adkinson is also a critic of this mode of interpretation.

the most wonderful instrument ever drawn by the hand of man, there is a comprehension and precision that is unparalleled". Another writer well known to the Australian framers was the American historian, John Fiske, who wrote in 1888 of "the wonderful Constitution ... an *Illiad*, or Parthenon, or Fifth symphony of statesmanship". In the 1891 Convention, Dibbs referred to Fiske as the "book in the hands of hon. members", while Josiah Symon read from his work in the Adelaide Session; for him it was "an admirable book with which I am sure all members of this Convention are familiar". Higgins also quoted from him in Melbourne in 1898.[35] Another figure who was well known to the Australians, William Gladstone, wrote in 1887 of the Constitution as "the most wonderful work ever struck off at a given time by the brain and purpose of man."[36] *The Federalist* benefitted from this adulation because of its symbiotic connection to the Constitution. In Kramnick's words, "the verdict of history" deemed that, in the nineteenth century, it was "put on a pedestal almost as high as the Constitution which it sought to explain and vindicate."[37]

Other writers who were well known to the Australian framers were fulsome in their praise. Lord Acton, the mentor of Bryce, recorded the view of Francois Guizot that it was the greatest work known to him on the application of elementary principles to practical administration.[38] Guizot also wrote that he "did not know in the whole compas of my reading [on politics and government] ... so able a book". The nineteenth century American constitutional lawyer, James Kent, wrote in his standard work *Commentaries on American Law* that:

> There is no work on the subject of the Constitution, and on republican and federal government generally, that deserves to be more thoroughly studied ... I know not, indeed, of any work on the principles of free government, that is to be compared, in instructive and intrinsic value, to this small and unpretending volume ... not even if we resort to Aristotle, Cicero, Machiavel, Montesquieu, Milton, Locke or Burke.[39]

Recently, the Canadian critic Albert Furtwangler has challenged this reverential attitude to *The Federalist* in his book, *The Authority of Publius*. This work attempts to show that the authority bestowed upon the text has, until recently, distorted our understanding of American history. American historians, of the nineteenth century especially, wrote history which demonstrated the correctness of the Publius version of the federal system. In a slightly different vein John Diggins has recently identified the idealism of early American historians in their seeming belief that "history", or

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[35] Dibbs, 1891, 175; Symon, Adelaide, 1897, 134; Higgins, 1898, 654-5.

[36] Quoted on the title page of Bancroft, *History of the Formation of the Constitution*, II, (1889), 6th edn.

[37] Kramnick edn, 75.

[38] Kramnick edn, 75.

[39] James Kent, *Commentaries on American Law* (1836) 1, 241. Quoted in Kramnick edn, 76.

political life, would somehow follow the prescriptions of texts like *The Federalist* because they were great books.[40] Furtwangler has contented that Publius was so authoritative that the understanding American scholars have had of federalism has been distorted. *The Federalist* had been so influential that study and interpretations of actually existing federalism have been self-fulfilling. This argument is of particular interest in an assessment of the origination of ideas behind the construction of the Australian Constitution. Perceptions of federalism in practice have been conditioned by its prescriptions. So what did *The Federalist* say about federal government? The purpose of the next section is to show the argument which was developed by Publius to explain the relationship between liberty, which was the overriding concern in legitimating the revolution, and the federal system.

THE FEDERALIST AND THE FEDERAL SYSTEM

Liberty and faction

The problems of tyranny and liberty, faction and energy, were foremost concerns in *The Federalist*.[41] The solution to problems lay in the construction of the good society which would follow from the proper construction of government. The possibility of tyranny, as a threat to freedom, necessitated an arrangement which broke up the centres of power - the factions - and allowed for the foundation of government while permitting "the people" to retain control over their rights; be they natural or civil. Power was to be divided and separated to prevent any one institution from developing otherwise inherent despotic tendencies. If a new government was necessary then, accordingly, only a few powers should be assigned to it and the remainder reserved to the states or left intact for the sovereign people in the social contract.[42]

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[40] Diggins critically noted the idealism of nineteenth century historians: "In the nineteenth century some historians did believe that men were moved by the force of ideas as convictions out of which originated moral intentions and objectives. Conceiving the Revolution to have had liberty as its glorious object, Moses Coit Tyler declared that it 'was pre-eminently a revolution caused by ideas, and pivoted on ideas.' After the turn of the century, this idealist view was challenged by Progressive historians, who saw political events as products of a changing environment of which ideas were the mere reflection." *The Lost Soul*, 25.

[41] The work of Charles Beard in particular has concentrated on the relationship of liberty to property in the Constitution and is still widely denounced as an account of the formation of the Constitution. *An Economic Interpretation of the Constitution of the United States* (1913) Diggins called Beard "the most provocative, controversial and perhaps influential of all modern American historians": *The Lost Soul*, 7.

[42] *Federalist* 10 is considered to be the classic account. Robert Dahl argued that American pluralist thought derived from this Paper. *A Preface to Democratic Theory* (1956), Chapter 1.

Publius undertook the task of explaining the reasons why a new government was necessary and how it was to be organized. *The Federalist* Papers were written to persuade the electors of New York to vote in favour of the ratification of the Constitution of the United States and this enterprise entailed dealing with a number of difficulties in legitimating the new government. The attempt to overcome these problems can be seen in the subject order in which the Papers appeared. In the initial numbers the old arrangements under the Articles of Confederation were criticized comprehensively as decayed and useless. This cleared the way for the presentation of the new compound system as a viable alternative. As a further defence of the change, Publius invoked the revolutionary sentiments of the *Declaration of Independence* which, in respect to government, allowed,

> the Right of the People to alter or to abolish it, and to institute new Government, laying the foundation on such principles, and organizing its powers in such form, as to them shall seem most likely to effect their Safety and Happiness.

Much opposition to the new Constitution, however, was also based on "the spirit of '76". There was a perceived contradiction between the revolutionary principles and the plea by Publius for an "energetic" government. "Energy" was Hamilton's euphemism for power. The opposition between the *Declaration of Independence,* which was, in part, a cry for freedom from the tyranny of government, and the attempt in *The Federalist* to legitimate the empowerment of a new government, served to motivate the group which became known as the anti-federalists.[43] There was the fear that "Tyranny" may again be abroad in the Americas. The task that Publius undertook was one of persuading New Yorkers that the public good would be served through endorsing the Constitution.[44]

The fear of tyranny has been identified as the single most important factor in all political activity in the American states from the late seventeenth to the early

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[43] Diggins, *The Lost Soul,* 29. Rebels like Patrick Henry and Samual Adams saw the spirit of '76 being abandoned at the Philadelphia Convention. Later, Lincoln thought that the Constitution had been designed to put an end to America's revolutionary ideals and he tried to wed that document to the *Declaration of Independence* to justify his defence of the Union as a recurrence of America's "first principles". The tactic which Diggins referred to was the stress that Lincoln placed on the words "all men are created equal" and "We the people". See Lincoln's *Collected Works,* IV, (1860-61), 438 and VI, 320. Lincoln also was attempting to theorize the federal system in a way other than as a Lockean contract. He argued for the revolution as a joint action within an already established relationship, the success of which only secured independence from Britain and did not create the states as entities independent of each other. He sought to cut off a conceptual dependence on the state of nature as the original condition. See Lincoln's *Collected Works* IV, 433 and the chapter here following on states' rights.

[44] John Pocock's argument about the Revolution in *The Machiavellian Moment* was that the principles of legitimation were those of civic humanism rather than the possessive individualism of Locke.

nineteenth century. This is evident in the pages of *The Federalist.*[45] The opposite of tyranny was freedom and, as Reid has argued, this meant the right and opportunity to participate in government. The absolutist power was denied by those who wanted liberty and it was eventually protected by dividing and separating power. Hamilton was the most enthusiastic proponent of strong government in Philadelphia and his plan was the most centralized of the three presented to the Convention.[46] Tyranny, as an analogue of government, was an idea that motivated opposition to the Constitution but offered Madison, as the architect of the Virginia Plan, useful opportunities to make a plea to trust the new government because of the excellence of its design.[47] The enthusiasm with which the authors of *The Federalist* tried to dispel fears of tyranny and to show the flawed logic of opponents was, nonetheless, evidence of the considerable difficulty they perceived in overcoming the popular reluctance to grant effective powers to the new government.

Publius was endeavouring to show that a closer Union was necessary to overcome the flaws inherent in the Articles of Confederation. There was a pressing need for the allocation of sufficient powers to accomplish this, as was argued in Papers 51 and 52, yet at the same time the liberty of the people was not to be endangered by the new government. In *Federalist* 10, Madison tried to show that government was a positive benefit to liberty insofar as it broke up factions and interests.[48] Jay prefigured this argument by adopting the social contract language which initially Madison had tried to distance himself from in the Convention. Jay wrote:

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[45] James H. Broussard, *The American Historical Review*, 84, 2, (1979), 544, review of, Lance Banning *The Jeffersonian Persuasion: Evolution of a Party Ideology* (1978). Broussard commented that Banning's theme was that between 1763 and 1815 "every major American political issue was tied to the question of how liberty could be preserved in popular government". Esmond Wright widened the period even more by arguing that the great debate had been in progress since the Albany plan of 1754, if not 1620. "*The Federalist Papers* and the Constitution were in a sense merely its latest expression." *The Fabric of Freedom 1763-1800* (1978), 189. For a discussion of the whole debate on the question of liberty, property, civic humanism, Locke and the ambit of American historiography see Joyce Appleby, "Republicanism and Ideology" *American Quarterly*, 37, 4, (1985).

[46] Hamilton's plan was presented to the Convention later than the other two and may have been a tactical move to enhance the reception of the Virginia plan by causing it to appear more moderate in comparison. His plan was rejected but may have served his purpose. *The Records of the Federal Convention of 1787*, M. Farrand ed. (1966) I, 283-4. (Hereafter: 1787 Farrand)

[47] Particularly in regard to the plan of representation to overcome faction.

[48] See Diamond on *Federalist* 10 and Vincent Ostrom *The Political Theory of the Compound Republic: Designing the American Experiment* (1987) See also the symposium led by Ostrom concerning a critique of Diamond's work: Vincent Ostrom "The Meaning of Federalism in *The Federalist*: A Critical Examination of the Diamond Thesis" *Publius* 15, 1, (1985) 1-22. Also Robert J. Morgan "Madison's Theory of Representation in the Tenth Federalist", *The Journal of Politics* 36, 4, (1974), 853-85.

Nothing is more certain than the indispensable necessity of government; and it is equally undeniable, that whenever and however it is instituted, the people must cede to it some of their natural rights, in order to vest it with requisite powers.[49]

Madison showed that the way to establish an energetic government, and to preserve liberty, was to divide and separate those powers which were granted to the government (under social contract reasoning) between the state and national levels and between, what Edmund Barton later called, the "three great arms" of government: the legislature the executive and the judiciary. Thus, through an elegant design, the new government was prevented from assuming more power than had been granted to it, as the architecture of the structure prevented this from occurring. The spheres were to be separate.

The new government would be "energetic" without being tyrannical because it was a compound republic. The establishment and preservation of liberty would be maintained through the empowerment of the separate states, whilst a national government would be created for certain purposes only. The originality of the compound lay in connecting the national government directly with the people rather than indirectly through their state governments.

Only a few Papers are narrowly concerned with the "compound", or what is now called the "federal" character of the new government. These Papers, according to Madison's account, were not be read in isolation as the federal issues were not to be separated from republicanism or tyranny. The Australians, however, were principally interested in an explanation of the structure of government. The spheres were integral to the American system as a method of dividing powers to deny the potential tyrant. The fears held about liberty were well expressed in *Federalist* 10. Although not needing to denounce the British, the Australians were concerned about tyranny in their own way. The fears of the small states centred on the potential of the large states to dominate the Commonwealth and possibly threaten their "rights". The concerns about dividing powers into spheres was common to the Conventions in both Australia and the United States, but the language of the Australian framers was different and less apocalyptic than that of the Americans. The language of the Australians was also less overtly liberal and they were not concerned with establishing a new foundation of government from the first sentence of the Constitution. The South Australian, Josiah Symon, made a plea for liberty which was unusual in the Australian context because he used uncommon terminology. He wanted the old constitutional settlement accepted "so long as there is nothing fatal to the liberties of the people for whom we are seeking to frame

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[49] *Federalist* 2, 5.

a Constitution."[50] This was an instance of the direct importation of the language of liberty from the American debates and was somewhat out of keeping with the established rhetoric of the Australian debates. Although by no means unique in the debates, this example is sufficiently unusual to be notable. The Australians were decidedly not interested in republicanism nor with associating the unitary British government with the denial of tyranny which was at the heart of the American enterprise.

Publius of course had an interest in blurring the distinction between federal and compound types governments for the benefit of more easily attracting the support of the potentially hostile and suspicious masses. To further their cause the supporters of the "compound" called themselves "Federalists" and in a cunning appropriation of language gave their papers the name *The Federalist*. Thankfully Madison and Hamilton did not call their papers "The Compoundist". The American framers were concerned with protecting liberty and one way of providing for this was to break up the factions and prevent a potential tyrant through the organization of government. The creation of a set of spheres of governmental authority became crucial to this enterprise. The next section deals with this part of the argument from *The Federalist* in order to establish the theoretical basis which the Australians later accepted, almost without comment.

SPHERES: FEDERAL THEORY AND *THE FEDERALIST*

The point that Madison had made was introduced by Hamilton earlier. He, more than Madison, used the language of "energy" which was a code for "power". The necessity for a Constitution "at least equally energetic with the one proposed" was a point he pursued in *Federalist* 23. He followed this by extending the inquiry into three branches. He considered:

> The objects to be provided for by a federal government. The quantity of power necessary to the accomplishment of those objects. The persons upon whom that power ought to operate.[51]

Hamilton's argument for vigour in defence was intended to empower the Union; whereas in Papers 41 and 51 the need to divide other powers was stressed. As Madison wrote, in *Federalist* 41, "The constitution proposed by the convention may be considered under two general points of view." The first point concerned the "sum or quantity of power" which was to be vested in the government "including the restraints imposed

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[50] Adelaide, 1897, 140.

[51] *Federalist* 23, 110-111.

upon the states". The second point related to the separation of powers.[52] In maintaining the case made in *Federalist* 39, Madison was attempting to deal with argument which was the most potentially dangerous to the success of the ratification campaign. He was conscious of demonstrating that the answer to the two following questions was in the negative:

1) Whether any part of the powers transferred to the general government be unnecessary or improper?
2) Whether the entire mass of them be dangerous to the portion of jurisdiction left in the several states?[53]

In order to show that the answer was "No", Madison adopted the language of the harmony of the spheres. Apart from the areas of security, trade, objects of general utility, the real objects of government were the "Maintenance of harmony and proper intercourse among the states".[54] He took up this issue in *Federalist* 42 under the rubric of the "harmony and proper intercourse among the states".[55] The "energy" or power of the new government would be sufficient to ensure that trade, coinage and weights, amongst other matters, were accounted for and these were given a "cursory review". The division of powers was alluded to in *Federalist* 37 and taken up in *Federalist* 51 where the notion of the spheres was again employed.[56]

In Philadelphia, the first delegate to try to articulate the distinction between "federal" and "national supreme" government was Gouverneur Morris from Pennsylvania, who described the differences as follows: "The former being a mere compact on the good faith of the parties; the latter having a compleat and compulsive operation."[57] Morris, like the English philosophers Hobbes, Locke and George Lawson, could not "conceive of a government in which there exist two sovereignties".[58] He

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[52] *Federalist* 41, 203.
[53] *Federalist* 41, 203.
[54] *Federalist* 41, 204.
[55] *Federalist* 42, 214.
[56] *Federalist* 37, 178.
[57] 1787 Farrand, I, 34.
[58] After 1642 there was, according to Julian Franklin, "manifold and deep confusion" over the location of sovereignty. The work of George Lawson, as a precursor to Locke, provided a resolution of these difficulties. For Lawson "Ultimate sovereignty - in the sense of constituent authority - was ... denied to Parliament and ascribed to the general community as a legal entity distinct from Parliament." Locke took up this explanation in the *Second Treatise*. Julian H. Franklin *John Locke and the Theory of Sovereignty* (1978), ix-x. The Americans were not convinced by the resolution of this problem as only republicanism was the "purest and best" system. James Wilson in the Pennsylvania State Convention said that "supreme, absolute and uncontrollable authority remains with the people" they have "supreme and sovereign power" and that "The great and penetrating mind of Locke seems to be the only one that pointed towards even the theory of this great truth." *Elliot's Debates on the Federal Constitution* II: 455-6. Quick and Garran quote this passage but referred to him as John Wilson. *The Annotated Constitution of the Commonwealth of Australia* (1901), 325.

committed himself to a supreme national government out of a fear of the consequences of maintaining a flawed system like the Articles of Confederation and he said that he preferred a national government now, rather "than a despot in twenty years". Again "Liberty" emerged as the foremost concern.[59]

Against this background, the formulation of a theory of federalism necessarily meant the denial of the concentration of power in a central authority. Power, however, had to be concentrated sufficiently to allow the prosecution of the proper functions of government and, as Madison argued, the old system was a failure. Under that system:

> in a federal government the power was exercised not on the people individually; but on the people collectively, on the states ... The other characteristic was that a federal Govt. derived its appointments not immediately from the people but from the states which they respectively composed.[60]

The federal system, as it had been known under the Articles of Confederation, was so roundly denounced in turn by Madison, Morris, Hamilton and Wilson, that the Convention had been partially prepared when the Randolph Resolutions were proposed. The Randolph Resolutions, known also as the Virginia plan, were the basis of a new form of government. The small states reacted with horror and a few days later produced the New Jersey plan as a rear-guard action.[61] In the ensuing weeks compromises were found and differences between the delegates were overcome. In the arcane usage, the "compound" system was developed which was "neither federal nor national".

The model which emerged from the compromises was not necessarily a deliberate, coherent, or fully integrated design. The success of *The Federalist* lay in its capacity to defend the Constitution and to create arguments which integrated the parts and presented the Constitution as a coherent whole. The new government which emerged has been subsequently explained by scholars as conforming to the precepts of either Lockean liberalism or those of civic humanism, or both. But the dependent relationships of the parts of Constitution were not structured according to pre-existing notions of how a polity ought to be organized. According to Benjamin Franklin, the delegates largely made it up as they went along. In his opinion the formation of the government proceeded more like a game of dice than a game of chess.[62] The compound, which later became known as the "federal system", did not spring forth from the

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[59] Appleby, "Republicanism and Ideology"*American Quarter;ly*, 461.

[60] 1787 Farrand, I, 314.

[61] 1787 Farrand, I, 214 & 312. The New Jersey plan was submitted on 15 June and rejected on 19 June.

[62] Quoted by Gordon Wood, 593. Symon, in counselling caution, quoted a similar sentiment to Ben Franklin's which stressed the imperfections of the work in Australia. Adelaide, 1897, 140.

Convention as a fully realized perfect model. This point is of importance for the later consideration of how the Australians understood the formation of the proper American Constitution to contain almost axiomatic truths about the federal structure.

If Franklin was correct in his metaphor of chance the task adopted by *The Federalist* was to show the contrary. It was to show the elegance of the design and the coherence of the rules and herein lies its importance for federal thought generally and especially for the Australian framers. *Federalist* 39, written by Madison, provided an explanation of the new federal system as well as a defence of republicanism. Madison undertook "a candid survey of the plan of government". He first asked "whether the general form and aspect of the government be strictly republican?" He duly answered in the affirmative because no other plan would be in keeping with "the genius of the people of America" and "with the fundamental principles of the revolution" and with the force with "animates every votary of freedom". Madison was here reiterating the republican language of the revolution and proceeded to test the republican nature of the new Constitution against three prerequisites. The result of his test was that he, of course, accordingly found the Constitution to be republican in nature. Madison made a further mock challenge to the Constitution with the charge levelled against it that it was not federal in nature.

> But it was not sufficient, say the adversaries of the proposed constitution, for the convention to adhere to the republican form. They ought, with equal care, to have preserved the *federal* form, which regards the union as a *confederacy* of sovereign states; instead of which, they have framed a *national* government, which regards the union as a *consolidation* of the states. [63]

He found it necessary to inquire into three aspects of the Constitution in order to respond to this criticism. He wished: firstly, to ascertain "the real character of the government in question"; secondly, to find the source of the authority of the convention to propose changes; thirdly, to enquire "how far the duty they owed to their country, could supply any defect to real authority".[64] He found authority in that the Constitution was "to be founded on the assent and ratification of the people".[65] But, since the people would give assent through the states, the act establishing the constitution would be federal not national. This was an important difference with Hamilton who had written in *Federalist* 22 that the act of ratification was to be popular:

> Sophistry may reply, that sovereigns are equal, and that a majority of the votes of the states will be a majority of confederated America. But this kind of logical legerdemain, will never counteract the plain suggestions of justice and common sense. ...

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[63] *Federalist* 39, 192, emphasis original.
[64] *Federalist* 39,192.
[65] *Federalist* 39, 193.

The fabric of American empire ought to rest on the solid basis of the CONSENT OF THE PEOPLE. The streams of national power ought to flow immediately from that pure original fountain of all legislative authority.[66]

The difference here between Hamilton and Madison is an indication of the problems which come from trying to consider Publius as one author rather than three because on close examination there are important differences of principle. Also Hamilton was here putting a position more purely informed with republican (democratic) virtue than was Madison's federal idea. For Madison, the Constitution must result from assent which comes from a situation where,

Each state, in ratifying the constitution, is considered as a sovereign body, independent of all others, and only to be bound by its own voluntary act. [67]

Thus the act of assent was federal in nature not national. "The next relation", Madison wrote, was that of the derivation of the powers of the legislature. "The house of representatives will derive its powers from the people of America" and they will be represented proportionally which was a mode of *national* organization. "The senate, on the other hand" was to "derive its powers from the states, as political co-equal societies".[68] Thus the federal principle was adopted. The executive power of the Presidency was a "compound source" which presented as many "*federal* as *national* features".[69] He was here developing the image of the compound or mixed government by adopting the stratagem of arguing that there was a proper "balance" between two extremes. This tactic is evident in Madison's presentation of the "*operation of the government*" and the "*extent* of its powers". The former, he conceded, was "*national*" in so far as the Union could directly implement policy upon the people.[70]

As for the extent of powers, Madison was at pains to lodge the argument in the familiar language of the social contract, in order to deny tyranny, as well as asserting the *federal* nature of the division of powers into spheres, which allowed for the states to retain "inviolable sovereignty over all other objects".

The idea of a national government involves in it, not only an authority over the individual citizens, but an indefinite supremacy over all persons and things, so far as they are objects of lawful government. Among a people consolidated into one nation, this supremacy is completely vested in the national legislature. Among communities united for particular purposes, it is vested partly in the general, and partly in the municipal legislatures. In the former case, all local authorities are subordinate to the supreme; and may be controlled, directed, or abolished by its

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[66] *Federalist* 22, 105 & 110.

[67] *Federalist* 39, 193.

[68] *Federalist* 39, 193.

[69] *Federalist* 39, 194.

[70] Madison added that it was not so "completely as has been understood" as the "trial of controversies" would be conducted against states acting in their "collective and political capacities only", *Federalist* 39, 194, emphasis original.

pleasure. In the latter, the local or municipal authorities form distinct and independent portions of the supremacy, no more subject with their respective spheres, to the general authority, than the general authority is subject to them within its own sphere. In this relation, then, the proposed government cannot be deemed a *national* one; since its jurisdiction extends to certain enumerated objects only, and leaves to the several states a residuary and inviolable sovereignty over all other objects. [71]

This statement represented the basis of the theory of federal government and contained the language which was later used by Calhoun, Bryce and the Australians, as well as more recent writing by Wheare in a standard but redundant modern formulation of the federal idea.[72] Madison had developed an argument here which was earlier prefigured by Hamilton in *Federalist* 23 which established the harmonious *spheres* of governmental operation.[73] As a rhetorical and conceptual device the allusion to spheres is persuasive and elegant. "Spheres" are complete, perfect, inviolable and necessarily separate. However, whether governmental powers can be so divided is another matter. The success of a tactical use of metaphor to illuminate and explain the problem does not equate with an achievement in the purpose of actually dividing powers. To argue that powers can be divided into spheres is, moreover, to fall victim to the problem of reification as if powers actually exist as concrete things which can be neatly divided.

The metaphor was ingenious but misleading. Publius necessarily had to convince his readers that the new government would not deny their liberty. This argument for the federal arrangement was familiar and had been employed since 1774 to prevent the tyranny of a centralized government. The most threatening aspect of the new government of 1787 was neutralized, therefore, in that the extent of powers was contained, as he wrote, because "jurisdiction extends to certain enumerated objects only". The final point made in *Federalist* 39 was that the new republic was shown to be a compound in that the mode of making amendment is "neither wholly *national*, nor wholly *federal*".[74]

Madison had thus diverted the criticisms levelled by the opponents of the Constitution by supporting what Hamilton had explained to be the case in *Federalist* 1; through "reflection and choice" the people had the opportunity to adopt a new Constitution which was formulated, in the terms of civic humanism, for the "public good". The

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[71] *Federalist* 39, 194-5.

[72] "By the federal principle I mean the method of dividing powers so that the general and regional governments are each, within a sphere, co-ordinate and independent." K.C. Wheare, *Federal Government* (1962), 11.

[73] Madison used the term "spheres" early in the Philadelphia Convention to describe the ambit of governmental power. 1787 Farrand, I, 136.

[74] *Federalist* 39, 195.

necessity of "vigor in government" was demonstrated as "essential to the security of liberty".[75] The proposed Constitution was summed up in the close of *Federalist* 39 as "in strictness, neither a national nor a federal constitution but a composition of both". The general government remains "within its own sphere", and local authorities "form *distinct* and independent portions ... within their respective spheres".

The Federalist was an argument to the electors of the state of New York to vote in favour of ratifying the Constitution. The dominant position of the Papers has allowed its arguments to be interpreted as a prediction of how the federal system was to function and as an explanation of its actual operation. Daniel Elazar, in a detailed study of intergovernmental relations in the nineteenth century United States, has shown that Publius' work was not predictive and there were no separate spheres, as Madison had contended in *Federalist* 39.

THE FEDERALIST AND NINETEENTH CENTURY FEDERALISM

The statements in *The Federalist* about the functioning of the system were prescriptive. As Furtwangler argued, the place of the Papers in American thought is so dominant that the interpretation of federalism has been distorted. His general argument is supported by the earlier work of Daniel Elazar who has shown through an empirical examination of select aspects of American federal/state intergovernmental relations in the nineteenth century that the system did not work as a set of separate spheres. The contentions of Publius were not fulfilled in the unfolding experience of federal government. Elazar's book, *The American Partnership: Intergovernmental Co-operation in the Nineteenth-Century United States,* has shown that there was, from the beginning of the Union, an overlap of administrative and political functions. The elegant device of the separate spheres was conceptually tidy but not extant in practice. Elazar's book served to clarify and reformulate the conceptions that American scholars have held about the operation of federalism. The notion of separate spheres was popularized by Bryce's work and re-enforced by Edward S. Corwin who first used the term "dual federalism". Dual federalism has of course also been adopted in the interpretation of Australian political history. Elazar's book contradicts this common understanding of the evolutionary stages of federalism.

Elazar stated that the purpose of the study was to demonstrate that relations between the levels of government had never been exclusive and had always been co-operative.

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[75] *Federalist* 1, 3.

> This volume seeks to demonstrate that the pattern of American federalism - the American partnership - has been a constant one since the early days of the Republic. The principal hypothesis developed in the following chapters is that virtually all the activities of government in the nineteenth century United States were co-operative endeavors, shared by federal and state agencies in much the same manner as government programs are shared in the twentieth century.[76]

Elazar's method was to examine the most unlikely areas of federal/state co-operation in the least likely states to demonstrate the hardest case. He did not attempt a general history of inter-governmental relations but chose selectively. He had instances which provided a range of political, geographical and chronological factors in the choice of four particular states; Virginia, New Hampshire, Minnesota and Colorado: Virginia provided the difficulty of the "ultimate states' rights doctrine"; New Hampshire represented "Yankee conservatism"; Minnesota and Colorado were isolated western "public land states". The former two states had a "high degree of separation" from the national administration while the latter two exemplified the frontier and parochial sentiment. Through an examination of records Elazar set about showing that over three generations, "often in the face of an opposition based on the theoretical formulations of dual federalism" developed by those who argued for states' rights, there had been an "American partnership".[77] The records of programmes which Elazar examined were broad and concerned a number of diverse areas: financial relations; banking; infrastructure development, including railroads and canals; public education; land grants and "special" programmes.

Elazar's substantive argument began with an exposition on the extent of the acceptance of the notion of a line of demarcation in inter-governmental relations:

> Almost every analysis of American federalism has started from this assumption that the dual sovereignties ... were to exist side by side, each virtually independent of the other in its own sphere. More important, it is widely accepted that what was desired in theory by the founding fathers was generally true in practice throughout the nineteenth century, the "classic" age of American federalism.[78]

The pronouncements of "public figures" and the Supreme Court, Elazar contended, were responsible for the propagation of this fiction which was generally adopted by political scientists in the nineteenth-century. Corwin's work further entrenched the belief.[79] The use of the notion (if not the term) "dual federalism" was given great emphasis by the authoritative work of James Bryce. This contribution is recognized by Morton Grodzins in the forward to Elazar's book. Grodzins wrote:

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[76] Daniel J. Elazar, *The American Partnership: Intergovernmental Co-operation in the Nineteenth-Century United States* (1962), 1.
[77] Elazar, 7-8.
[78] Elazar, 11.
[79] Elazar cited Edward S. Corwin, *The Twilight of the Supreme Court* (1934).

The view of separation was based on apparently solid authority. Lord Bryce in *The American Commonwealth* (1888) described the federal and state governments as "distinct and separate in their action." The American system, as Bryce saw it, was "like a great factory wherein two sets of machinery are at work, their revolving wheels apparently intermixed, their bands crossing one another, yet each set doing its own work without touching or hampering the other." Bryce's view has been widely accepted.[80]

As will be argued in the next chapter, this was indeed one of the ways that Bryce accounted for the federal system as it actually operated. According to Grodzins the statements like those of Bryce, which maintain that there was a separation, are views which "Elazar's work substantially destroys".[81] This is a persuasively developed argument and the detail of empirical work seems to show clearly that the prediction by Madison that the system would entail separate spheres, did not eventuate. Interestingly, neither Elazar nor Grodzins traced the origin of this fallacious interpretation to *The Federalist* itself: both writers identified less celebrated authors as the source.[82]

The authors of *The Federalist* can not, of course, be held culpable for not truly predicting the course of development of American government. Publius was not reporting facts about the future; he was only urging the voters of New York to vote for the Constitution. But the legacy had consequences in the work of James Bryce which was, he said, concerned with finding "facts" about the actual operation of the American federal system after the Civil War. After Elazar's study, Bryce would seem to be mistaken in his assessment of the system. The purpose of the next chapter is to closely examine the work of Bryce who was singularly the most significant influence acknowledged by the Australian framers.

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[80] Grodzins Forward to Elazar, vii.

[81] Grodzins Forward to Elazar, viii.

[82] Elazar's only reference to *The Federalist* is to Paper 46 where Madison gave a brief definition of "dual federalism": "The federal and state governments are in fact but different agents and trustees for the people, constituted with different powers, and designed for different purposes". (1962), 14.

CHAPTER TWO

THE BINDING AUTHORITY OF BRYCE

The purpose of the Australian Federal Conventions was to discover theoretical solutions to practical problems. The issues of trade, defence and immigration posed serious difficulties for intercolonial relations. These required a response through properly arranging the institutions of the State. The organization of those structures was a theoretical problem which involved questions about democratic principles and their deployment. The competing claims of citizen and subject, states and nation, nation and empire, were required to be reconciled and the result articulated, as the proposed new constitutional arrangements would necessarily need to be legitimated through being accepted by the citizens of the new Commonwealth. Many of the framers eschewed "theory"and most regarded themselves as practical men of affairs. The speeches of some of the framers reveal the belief that to be theoretical was to be impractical. This understanding which some of the framers had of their own task should not deter those who interpret the Constitution and its formation from recognizing that the making of the Australian Commonwealth was necessarily and simultaneously an exercise in political theory and a pioneering exercise in practical problem solving. The whole purpose of the Federal Conventions was to articulate and deploy political principles to create structures in order to solve political problems.

The question of the popular acceptability of the Commonwealth and of the political principles upon which it was to be based is, in its nature, empirical. Whereas, the understanding of those principles is a theoretical and historical matter as, it should be appreciated, ideas are necessarily dependant upon their context. For the Australian colonies, the solution to practical problems was to be found in a proper federal system. The particular historical situation of the colonies and their economic and geographic circumstances allowed for the imposition of the federal system as a widely acceptable regime.

The search for theory was co-existent with a search for a literature which could both order and inspire ideas. James Bryce's newly published book *The American Commonwealth* was seized upon by the Australian framers as their ideal text; it became the principal influence on their work and an unimpeachable authority. The timeliness of its publication, the handsome physical presence of the three solid, gilt embossed royal-blue volumes and the obvious breadth of experience distiled within the

work provoked boundless admiration.[1] So, the purpose of this chapter is to critically evaluate the work of James Bryce with particular reference to his presentation of the American federal system and the theory of federalism which he inherited from *The Federalist*.

This chapter is divided into four sections. After some introductory remarks on Bryce's reputation the first section of the chapter is concerned with the the scholarly method which he adopted and with an assessment of how this influenced the version of American federal life and politics which he presented. The second and third sections are concerned with the "official" and "unofficial" versions of the operation of the federal system in the period after the Civil War and through Reconstruction. The final section of the chapter draws the conclusion that there is a contradiction in Bryce's work on the nature and operation of the American federal system. Given the major influence of his work on the thought of the Australian framers this contradiction served to obscure some problems they faced in arranging the federal system, particularly the question of establishing and maintaining separate spheres of governmental operation. The constitutional issues of federalism raised by the American Civil War are of particular interest; these matters are initially explored here and developed further in the following chapter. Prior to embarking upon an evaluation of Bryce's version of federal theory an assessment is necessary of the importance of Bryce and his work in Anglo-American political thought in the period and particularly his impact on the Australian framers.

THE AUTHORITY OF BRYCE

Bryce came to stand in relation to the Australian Constitutional Conventions much as Montesquieu had done to the American Convention. According to Bryce, the Americans took Montesquieu "as a sort of Bible of political philosophy".[2] *The Federalist* said of Montesquieu that he was used "much as schoolmen cite Aristotle ... as an authority which everyone will recognize to be binding". According to La Nauze, Bryce's work had a scriptural authority for the Australian framers. E.G. Blackmore, the Clerk of the second Convention, said that the book lay upon the table of the Conventions throughout the debates and, as La Nauze, noted it "was never criticized".[3] According to Edmund Ions, a biographer of Bryce, he was one of the legendary figures of his age. A

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[1] James Bryce's, *The American Commonwealth* was published in three volumes in 1888 and subsequently in two volume editions in 1889, 1890 and 1893. As to which edition was the standard used by the Australian Framers is unclear. All references here are to the first edition of 1888.

[2] James Bryce *The American Commonwealth*, I, 376.

contemporary, Sir Arthur Slater, spoke of him as the "single typical figure of the Victorian age", while A.G. Gardner called him the "greatest living Englishman".[4]

The Australian framers accordingly venerated Bryce. Deakin, who had met him just prior to the initial Conference in Melbourne, introduced his work to the other delegates. Effusive in his praise of that "monumental work", Deakin set the tone for continuing references. It contained, said Deakin, all that any student need to learn. It has,

> almost all the lessons which the political student could hope to cull from an exhaustive impartial and fully critical examination of the institutions of that country with which we are so closely allied. As a text book for the philosophic study of the constitutional questions it takes its place in the very first rank.[5]

Other delegates may already have been familiar with Bryce's work, but Deakin displayed a special affection, as he spoke later of the "almost incalculable debt to Bryce".[6] At the first Convention in Sydney the "admirable" Bryce was already deemed to be the standard reference.[7] His views on the American system were accepted as having that Aristotelean authority.

Both Deakin and G. B. Barton (a brother of Edmund) were in private correspondence with Bryce by 1890 in an attempt to interest him in Australian federation and to induce him to travel to the colonies to observe proceedings and to write a book. Bryce, in a delayed reply to Barton, wrote that the suggestion of travelling to Australia "interested me extremely" but it was "practically impossible".[8] He thanked Barton for sending an annotated copy of the draft Bill of 1891 and noted that,

> It is a matter of great pleasure to me to be assured by you that my book on the United States had been found useful by the framers of the draft Federal Constitution; and that the selection of the name "Commonwealth" (which seems more appropriate than the word Dominion which the Canadians have taken) should have been suggested or influenced thereby.[9]

His letter of the the same period to Deakin was slightly more familiar in tone and fulsome in its discussion of the issues.

> So far as I gather, the tendency is to take the U.S. Constitution as a sort of model in a general way, but to retain for the Federal Government the British Cabinet system. Needless to say how much I appreciate what you say about my book, nor has anything been written about it given me

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[3] J.A. LaNauze *The Making of the Australian Constitution*, 273.

[4] E. Ions, *James Bryce and American Democracy 1870-1922*, 16. A. G. Gardner (1865-1946) Journalist, Author, Biographer was a leading supporter of British Liberal Governments.

[5] Melbourne 1890, 89.

[6] Adelaide 1897 288.

[7] Sydney 1897, 147, 194, 211.

[8] Bryce to Deakin, 6 March 1891, Deakin Papers, National Library of Australia, 1540/1/126-8.

[9] Bryce to Barton, 30 August 1891, Barton Papers, N.L.A., 51/1/159

so much pleasure as the idea you suggest that it may be found useful in so great a work as that of framing a federal system for Australasia.[10]

Bryce closed his letter with thanks for the report of the Melbourne Conference which Deakin had sent to him.

Led by Deakin and Barton the Australian framers placed a complete dependence upon Bryce. As LaNauze noted, he was never criticized, but more significantly his work was read uncritically. The distinction between a lack of criticism and an uncritical acceptance is, in this context, not merely an alternative formulation of the same thing. LaNauze's comment is only a partial recognition of the dependence that the Australians placed upon Bryce's work. It is the purpose of this chapter, in part, to show that there were consequences for the design of the Australian Constitution which derived from Bryce's particular formulation of federal theory. The heavy reliance which was placed upon his work by the Australian framers had consequences for their own conceptions of the American federal organization and for the task before them. This point will be further developed in later chapters.

The reason why the framers so relied upon Bryce was that their own understanding and knowledge of American federalism and federal theory was shallow. This, together with a shared but unarticulated methodology, allowed the easy transmission of particular problematic assumptions and also allowed them to accept mere anecdotes and personal impressions as evidence of comprehensive and binding proofs about the functioning of the American federal system. Bryce was a source of "facts" which, as he expressed it, "spoke for themselves". He eschewed "theory". Had the Australians held a deeper, more developed knowledge of federalism, they would have brought a more critical awareness to their reading as was the case with their appreciation of responsible government. There was no scriptural reading of Bagehot, Hearn, Dicey, Todd or May. The ambiguities of responsible government were keenly understood and the nature of its workings were acknowledged as problematic. The same critical reading was not extended to Bryce, rather he was read scripturally. In the minds of the Australian framers he had described federalism as it really worked. Again according to Deakin:

The great lesson taught by Mr Bryce in his magnificent work is that the strength of the United States Government lies in this, that although it is a Federal Government under which each State of the Union is theoretically and actually independent in respect to all concerns of local life and legislation, it has nevertheless sovereign authority in that it is gifted with powers which act directly and immediately on every citizen of the entire country.[11]

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[10] Bryce to Deakin, 6 March 1891.
[11] Melbourne 1890, 91.

The only problem with federalism, most framers believed, was to unite it, in its "true" form with responsible government.

Bryce did not present the federal system as problematic and the Australians did not generally apprehend federalism as having inherent difficulties. Bryce was concerned to show that American federalism was working as it should. Writing in the period of Reconstruction, he presented the system as a coherent, rational and proper form of government while, in contrast, his friend and American travelling partner, A. V. Dicey, wrote about the federal system as being inherently unstable.[12]

Bryce was undertaking particular work in the generation after the Civil War in trying to reconstruct the Constitution as a working and viable system. For this reason there was a necessity to write out of the story the theoretical problems that the Southern States and their writers had posed. He therefore returned to the formulations of federal theory propounded by *The Federalist*. For Bryce and *The Federalist* and for the Australians who followed this tradition, the tensions within any system would be resolved once the institutions were designed properly. The premise adhered to was, in this sense, classical; if a proper design was achieved then good government and the good society would follow. The Australian framers adopted this as their main task. But, before examining Bryce's version of federal government, an initial analysis needs to be undertaken into the methods of enquiry which he adopted. This is necessary in order to appreciate the origin of some of the difficulties which followed for the Australians in their understanding of federal government.

BRYCE'S METHODOLOGY

Bryce, in producing a comprehensive account of the United States, was conscious of following de Tocqueville, who the German philosopher Wilhelm Dilthey later called "the greatest analyst of the political world since Machiavelli and Aristotle".[13] Although Bryce acknowledged *Democracy in America* as the "natural model", it was not one which he felt he should follow. This was perhaps wise if Acton's contention had any veracity that de Tocqueville never understood federalism.[14] The dangers of a comparison with de Tocqueville, whom he called "that admirable master of style",

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12 A.V. Dicey *The Law of the Constitution* (1885).
13 Diggins, *The Lost Soul*, 231.
14 J.E.E.D. Acton *The History of Freedom and other Essays* (1907).

were too acute.[15] He set himself a different task, based on the solid rock of "self evident facts".

> I have striven to avoid the temptations of the deductive method, and to present simply the facts of the case, arranging and connecting them as best I can, but letting them speak for themselves rather than pressing upon the reader my own conclusions.[16]

The plain inductive method which Bryce embraced here was unlikely to have been queried by his Australian students. The "facts" were to be presented in their integrity uncorrupted by subjectivity or theory.[17] As Bryce had written only a couple of years earlier, in the first issue of the *English Historical Review* in 1886, "the object of history is to discover and set forth facts". Like Mr Gradgrind in *Hard Times*, Bryce and his disciples were only interested in the one thing needful - "the facts". For Gradgrind, "You can only form the minds of reasoning animals upon facts: nothing else will ever be of service to them". For Bryce facts were important and theory was extraneous and optional:

> I shall be ... pleased if readers of a philosophic turn find in the book matter on which they feel they can safely build theories for themselves, than if they take from it theories ready made.[18]

This approach accorded well with Richard Chaffey Baker who was one of the leading South Australian delegates and the most well informed states' rights advocate. Like Bryce, Baker made his own position clear. Early in the 1891 Convention, Baker said, "I prefer to take the practice - the absolute facts. Theory is all very well, but what are the facts?"[19]

In his work, Bryce alternated between providing a compendium of information to be mined by the reader, much as a statistician might provide brute information, and a self consciously subjective account of his own experiences in the United States.[20] He acknowledged that the subject of his study - the United States - was undergoing constant change and also that he himself was developing a deeper and more sophisticated understanding of the place. He wrote in the introduction that the "swarm of generalizations" that he carried with him had to be "thrown overboard" after the second trip in 1881 and more were dropped after the third visit in 1883-4.[21]

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[15] Tulloch has noted that Bryce intended to correct de Tocqueville's faulty *a priori* assumptions: *Bryce's Commonwealth*, 6 & 62-67.
[16] Bryce, I, 4-5.
[17] C. Harvie *The Lights of Liberalism* (1976) gives critical comments on this method, 44 & 100.
[18] Bryce I, 6.
[19] 1891: 115
[20] Bryce I, 2. Tulloch, 5-6.
[21] Bryce I, 5.

For a methodology which pretended to make a proper assessment of the subject and provide, as he said, a "correct" and "non-partisan" view of "true federalism", the problems of this shifting reality are manifold and unacknowledged. Bryce did not address the issue of the integrity of his own necessarily capricious set of facts, or whether they accounted for either American federalism as it really was or of "true" federalism. Purportedly his account of the federal system was based upon a set of facts which he had observed and from which he described the working of the federal system in its true form. This observation was somehow independent of a *theory* of federalism. Bryce did not establish how his set of facts was superior to another set of facts from which another true and unbiased but conflicting opinion might have been be derived. For example, Bryce presented a view of class structure in the United States as a simple and happy report based on his own experience.

> For political purposes, classes scarcely exist. No one of the questions which agitate the nation is a question between rich and poor. Instead of suspicions, jealousies and arrogance embittering the relations of classes, good feelings and kindness reign.[22]

According to Bryce's methodology, knowledge is gained from observation of the facts unmediated by the distortions of theory. Yet if two sets of facts are collected which are in contradiction then Bryce has no way of determining which set is superior, other than to reject the set which does not accord with his experiential and observational notion of what is true. So the theoretical challenge posed by the Southern States and class antagonism does not exist if it is not observed by him.

Bryce's rejection of theory was complete. According to him the two explanations of democracy were baseless: it was neither the flower of classical thought nor, as de Tocqueville thought, the achievement of the "drear pall of monotony":

> Both, so far as they are *a priori* theories are fanciful; both, in so far as they purport to rest upon the facts of history, err by regarding one set of facts only, and [ignore] a great number of concomitant conditions.[23]

Bryce was not here addressing the problem of competing and contradictory sets of facts, he was calling for an abandonment of theory in favour of an empiricism based on complete and true knowledge. Bryce was not interested in questioning and investigating his own methods and one of his failings was that he did not take his own advice and ask the right questions.

> The inquisition of the forces which move society is a high matter; and even where certainty is unattainable it is some service to science to have determined the facts, and correctly stated the

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[22] Bryce III, 345.
[23] Bryce III, 542.

problems, as Aristotle remarked long ago that the first step in investigation is to ask the right questions.[24]

If he was committed to ascertaining the facts, as he said, in order for them to speak for themselves independently of theory, he was not asking the right questions. Despite his protestations to the contrary, he was presenting a theory of federalism for which he selected particular facts to serve his argument and he then presented his findings as a report of objective truth. That is, Bryce's views about the true and proper system were dependent upon the formulation of federal theory which Madison had expressed, only he presented the theoretical model as an independently observed and verified empirical fact.

Even irrespective of the methodological nonsense of presenting the facts as being able to "speak for themselves" the selection of his set of facts drew criticism from Bryce's mentor Lord Acton. In his review of *The American Commonwealth,* Acton thought that Bryce should not have neglected to account for the Confederacy.[25] It was a serious omission from a work with pretensions of being a comprehensive account of the United States. In keeping with this specific criticism, Acton was critical of Bryce's general lack of historical perspective. Although, typically, Acton acknowledged that, "Facts not comments convey the lesson".[26]

Some recent reviewers of Bryce's work have been more alert than Bryce himself, or Acton, to the question of perspective. Edmund Ions conceded that *The American Commonwealth* was the product of a writer who was Anglo-Saxon, affluent, male and Protestant. The point should be added that he was also one who understood the United States to be embodied in the aspirations of the victorious Republican North.[27]

In an American context the historiographical problem was recognized by Charles Beard. He argued that there were three schools of American historical research. The first he identified as the Deistic school exemplified by Bancroft which was concerned with God's way of righteousness.[28] The second, the "teutonic theory" of history, could be applied well to Bryce. This, according to Beard, entailed the belief that the "free" institutions had developed as a consequence of the innate qualities of the Anglo-Saxon race and it was the school of thought which has most influenced the study of institutions. The "full fruition of their political genius", wrote Beard, "was reached in

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[24] Bryce III, 15. R.C. Baker also approvingly cited this statement attributed to Aristotle, 1891, 109.
[25] H.B. Acton, Review of *The American Commonwealth* in *History of Freedom and other Essays,* 578-9.
[26] Acton, 575.
[27] Ions, 135. See also Harvie, *The Lights of Liberalism:* 106-8 & 110 for an account of the relative scarcity of English support for the North.
[28] G. Bancroft *History of the Formation of the Constitution. of the United States of America* 1881.

the creation of the Federal Constitution". Beard's third school of thought also applied well to Bryce. It was marked by a resolute abandonment of "interpretation" in order to present "impartial facts". Whilst useful as an ordering process such a method cannot explain, for Beard, either "proximate or remote causes and relations". Furthermore, he noted, interpretive analysis originates in, and contributes to, the sort of social antagonisms which Bryce did not even see as existing in the United States. The representatives of this school "have resolutely turned aside from 'interpretation'", concentrating instead upon the documents and an "'impartial' presentation of related facts". These last two categories described by Beard can be applied to *The American Commonwealth.*

The teutonic school was, according to Beard, "scrupulously careful in the documentation of its preconceptions and thus cultivated a more critical spirit than that which characterized the older historians". Whereas the "impartial facts" school was "fruitful ... for it produced ... care in the use of historical sources and had given us many excellent and accurate surveys of outward events".[29] So, it may be observed that, in Beard's terms, Bryce had some of the vices without all of the virtues of these schools of thought.

What then was the status of the set of facts which Bryce imagined could speak for themselves independently of the vitiation of theory? The English writer Graham Wallas identified a characteristic problem in his work. Wallas argued that Bryce tended to idealize the real and then describe the real as if it were the ideal. In his book *Human Nature and Politics,* Wallas criticized the introduction that Bryce had written for Ostrogorski's massive work *Democracy and the Organization of Political Parties.* Bryce wrote:

> In the ideal democracy every citizen is intelligent, patriotic, disinterested, his sole wish is to discover the right side in each contested issue, and to fix upon the best man among competing candidates. His common sense aided by his knowledge of the Constitution of his country enables him to judge wisely between the arguments submited to him, while his own zeal is sufficient to carry him to the polling booth.[30]

Bryce, the Oxford bred liberal, who understood history to be the story of moral progress based on a discovery of the "facts" was revealed by Wallas as idealizing and inventing a rational, liberal, free actor who could know the common good and act accordingly. For Wallas, Bryce's "ideal democracy" was,

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[29] Beard, 4. Tulloch puts Bryce into the Teutonic school, 4.

[30] G. Wallas *Human Nature in Politics,* (1948) 126. Harvie, 25, however, accounts for Bryce's views in terms of his Evangelical individualism rather than his University training.

The kind of democracy which might be possible if human nature were as he himself would like it to be and as he at Oxford was taught to think it was. If so, the passage is a good instance of the effect of our traditional course of the study of politics.[31]

These criticisms of Bryce's methodological assumptions have a bearing upon the work of his keenest students - the Australian framers - who believed that his account of federalism was a true account and that his work, in Deakin's words, "carried almost all the lessons ... a student could hope to cull".

ASKING THE RIGHT QUESTIONS

Three of Bryce's Oxford associates were especially interested in his work: Lord Acton, Regius Professor of History, was his teacher and principal mentor; A.V. Dicey, a fellow student, had accompanied Bryce to the United States on his first trip in 1870; Henry Sidgwick, another Oxford colleague, also showed deep interest in the project. Dicey and Sidgwick, with Bryce, and T.H. Green amongst others, held a close personal and intellectual association throughout their careers, as Harvie has documented in his work *The Lights of Liberalism*. At Oxford they had all been members of the Old Mortality Society which had been one of a discontinuous series of societies grounded on avowedly liberal principles whose purpose was to methodically study modern literature and philosophy. It was an intellectual association which was to continue throughout their careers. In a letter to Bryce, Sidgwick offered advice on how to proceed with his task:

My general view is that we want just now an answer to these questions. How do the political institutions of America work? How far is the theory on which they were constructed realized? So far as it was not realized, what are the causes? How does the divisions of functions between federal Government and state governments work?[32]

Had Bryce taken Sidgwick's advice and addressed himself to these questions he would have produced a different work. But, as Acton stated in his review, Bryce was attempting to avoid the "temptation ... of straying off into history" and of taking up ground which was so recently covered by Holst's *Verfarsungsgeschichte*, a work which was, for Acton, "the most instructive ever written on the natural history of federal democracy".[33]

Thus *The American Commonwealth* was not intended to be a history of the United States nor was it a comprehensive account of federal government, nor, by Bryce's own

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[31] Wallas, 127.
[32] Ions, 134.
[33] Acton, *History of Freedom and other Essays*, 577.

estimation, was it a theoretical account of federalism. Rather it seems to be intended simply as an account of American life based on an assemblage of observations of the "proper facts". But, despite the disclaimers by the author himself, and his reviewer Acton, the book *was* an assessment of American history and federal government and, most importantly, it *was* theoretically informed, even if the author was unconscious of that base.

Bryce's discussion of aspects of history and politics, whilst comprehensive, was not systematic. Although, as stated, it was not intended as a history book nor as a study of the federal system his treatment of these themes was sufficiently detailed to amply satisfy his Australian readership. Bryce's attitude to theory and facts had an important effect upon the thinking of the Australian framers about federalism. The influence that Bryce extended over the work of the Australians stemmed from two features of his account. These were, firstly, the idiosyncratic and arbitrary treatment he afforded to his discussion of the philosophical bases of American federal government and, secondly, the contradictory argument he presented about the federal system as it operated and as it was likely to develop.

Bryce and the Philosophy of the American Constitution

Bryce's bald statements about the philosophical foundation of the American Constitution seem to indicate that he had only a partial understanding of that intellectual legacy. American scholars have since concentrated heavily on developing systematic arguments to show those philosophical foundations of the Republic about which Bryce had been so dismissive. Had Bryce rejected outright the philosophical basis of the Constitution as chimerical, as a mere intellectual artifact, and argued instead that Constitutions are products of political brokerage, or of the material conditions of life, or some other realist account, then he would have been presenting an internally consistent argument. What he argued instead was that there was a philosophical foundation to the Constitution but he proceeded to give only a partial account of that foundation.

Montesquieu, according to Bryce, was one of the three sources of influence on the American understanding of the English Constitution. This boldly erroneous statement was repeated by Quick and Garran which is a circumstantial indication of Bryce's

influence on the Australian framers.[34] The other two were first, the American's "experience in dealing with the mother country", and second, the "scientific text-books" on legal aspects of the English Constitution, in particular Blackstone's commentaries.[35] Of the contribution of philosophers, Bryce's declamatory comment is instructive and highly questionable. According to Bryce: "Since he was by far the most important we need look at Montesquieu alone."[36] Was he the most important and is this sufficient reason to look at Montesquieu alone? Earlier, in reference to the overall influence of European thinkers on the Americans, Bryce had written:

> Of the supposed influence of other continental authors, such as Rousseau or even of English thinkers such as Burke, there are few direct traces in the Federal Constitution or in the classical contemporaneous commentary on the defence of it [*The Federalist*] which we owe to the genius of Hamilton ... Madison and Jay.[37]

In order to make such a claim, Bryce must have either exercised the most narrow literal judgement about "direct traces" or, despite his acknowledgement of philosophy (in the influence of Montesquieu), to have understood the formation of the Constitution to have taken place somehow independently of ideas. As to the legacy of other European thinkers he did admit to the influence of "abstract theories about human nature" in both the *Declaration of Independence* and the Constitution of the State of Massachusetts. Bryce referred, in passing, to Harrington's *Oceana*, while Locke, Hume, Hobbes and Rousseau were mentioned by name only.[38] Bryce's view on the philosophical influences on the American founders are of course at odds with the work of later scholars.[39]

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[34] Quick and Garran, 315.

[35] Bryce I, 373.

[36] Bryce I, 375. Elsewhere Bryce briefly commented that "Some have said that the American Government and Constitution are based on the theology of Calvin and the Philosophy of Hobbes", but he took this no further. I, 407.

[37] Bryce I, 36.

[38] Bryce I, 37 & 46 See also I, 375 & chapter 58.

[39] J.G. Pocock, "Between Gog and Magog: The Republican thesis and the *Ideologia Americana*" *Journal of the History of Ideas* 57,2 (1987), 325-346. The debate continues apace. Bryce is in contradiction with Louis Hartz, who claimed that Locke was the single influence on the work of the founders. This argument was subsequently challenged by John Pocock in 1975 in his book *The Machiavellian Moment: Florentine Political Thought and the Atlantic Republican Tradition.* (1975). A recent reply to Pocock by Diggins in *The Lost Soul of American Politics* reasserts the Hartz viewpoint that the American founding was based almost exclusively on Lockean individualism. Diggins asks "Whose afraid of John Locke?" Pocock (1987) replied to Diggins claim that he, Gordon S. Wood and Bernard Baylin had injected irrelevant republican values into the American political tradition.

Does this lacuna matter? Are theories about human nature and philosophical foundations relevant to the formation of constitutions? This case is clear in affirming that philosophy does matter. The importance of considerations of theory can be demonstrated in that the central conundrum of the federal system, which Bryce identified but did not resolve, is a philosophical question which has economic, political, justiciable and military implications. The idea of 'sovereignty' involves philosophical questions at the heart of the federal system. The term itself, and the uses to which it was put, were central to the American federal system and to the issues of the Civil War. Bryce failed to address this question, but wrote:

> The Constitution of 1789 was a compromise, and a compromise arrived at by allowing contradictory propositions to be represented as both true ... To every one who urged that there were thirteen States, and therefore thirteen governments, it was answered, and truly, that there was one government, because the people were one. To everyone who declared that there was one government, it was answered with no less truth that there were thirteen.[40]

Bryce here had identified the central issue but in a manner that did not resolve a paradox; he merely identified the problem. The dubious claim of allowing contradictory propositions to be true begs the question of what results when the propositions are challenged and the two spheres collide. In the United States the result was that a bloody war was fought in defence of contradictory but supposedly sound constitutional positions. As will be argued in the next chapter the problems of not reconciling contradictory propositions had an influence on the prosecution of the Civil War. Both the North and the South sought to defend the proper and true meaning of the Constitution in their particular terms; one side was protecting the Union, the other the rights of the States. Importantly both sides argued they were properly protecting the Constitution. Is it little wonder that in 1885 Dicey thought federal government to be unstable?[41]

To seek a solution in "abstract theorizing" was not in keeping with Bryce's training nor was it to his taste. His response to the attempt that was made at the 1789 Convention to resolve the philosophical problem of competing sovereignties within the federal system was one of scornful dismissal. Bryce was a representative of the British empiricist tradition which held that knowledge resided only in observable facts. Of the American framers, Bryce wrote:

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[40] Bryce II, 16. Hamilton in the Convention denied the possibility of a divided sovereignty. 1787 Farrand I, 34 & 287.

[41] For an analysis of the application of Dicey in mid-century Australia see, A.J.A. Gardner "Aspects of Dicey's Essential Condition of Federalism" *Historical Studies* , 3, 10, (1945), 95-110.

Thus counsel was darkened by words without knowledge; the question went off into metaphysics, and found no end in wandering mazes lost.[42]

Bryce's position has been identified and summarized by R.G. Collingwood whose own work centred on those difficult methodological issues involved in the writing of history of which Bryce seems entirely oblivious. He wrote in *The Idea of History:*

Those who pursued historical research in the late nineteenth century were very little interested in the theory of what they were doing. Characteristically of a positivistic age, the historians of the period were more or less openly contemptuous as a matter of professional convention of philosophy in general and the philosophy of history in particular.[43]

If Bryce was not interested in pursuing the philosophical issues at the heart of the theoretical debate, how could he determine the resolution of the problem of competing sovereignties? How did he allow for the resolution of the problem of federalism? Was there one government or thirteen? Bryce's resolution to the problem was startling in its crudity. The constitutional issues at stake during the Civil War were to be reconciled not according to principles but according to the outcome of hostilities. Quite simply, in Bryce's words, "the result decides".[44] In place of doubtful technicalities about "legal right", wrote Bryce, it is more "prudent to look where physical force resided".

"Technically", thought Bryce, the South could win its argument on a legal construction of the Constitution but "practically", the "defenders of the Union stood on firmer ground". The abandonment of philosophy and it seems of the Constitution itself, in this case, was absolute. The development of the nation since 1789 had proceeded in accordance with the federal principle. The majority could only control the minority through the reasoned construction of the Federal Constitution. "When", asked Bryce, "is a majority entitled to use force for the sake of retaining a minority in the same political body with itself?" This is not an empirical question, it is a question of political philosophy, and it is the most important question of federal theory. If, as Bryce would have it, "the result decides" then the condemnation of federal systems by Dicey, as being essentially flawed, has veracity. Doubt over sovereignty or rights will not, of itself, create political tensions or crises. Such doubt will, however, allow the maintenance of arguments of legitimation according to "constitutional principles". The consequence was that powerful arguments of moral right were able to be deployed, as Southern politicians had done in this case. Bryce's own admission of the "technical" validity of the position of the South would sustain this. If the Southern States were technically correct, that is to say they were constitutionally correct, what was the

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[42] Bryce II, 17.
[43] R.G. Collingwood *The Idea of History* (1973) 143-4.
[44] Bryce II, 17.

North's moral and constitutional justification for war? Bryce did not pursue this question.

If the result of force decides constitutional outcomes then the self interest of the majority could dictate that force is exercised under the guise of the general good. Federal systems will fail when placed under the greatest stress which is when their supposed strengths are most needed. So, the great problem for liberal democracies, of reconciling minority interests with majority rule, is not solved *in extremis* by federal arrangements. As a Ship of State the federal system is only suitable for fair weather and the practical man of affairs had no solution to the design flaws. In their own defence, both sides were claiming a fidelity to the principles upon which the Union was based. Should Bryce have not questioned the constitutional structure which allowed the development of the conditions which prefigured the Civil War? The important point here is that while the federal system did not of course create the problem, it did allow the Southern States to maintain their moral convictions as to the constitutional rightness of their position. Secession, as a constitutionally derived position, was a different matter from secession as a revolutionary position.

Bryce's resolution of the federal problem would seem to be the most unsatisfactory outcome of allowing "contradictory propositions to be represented as both true". He did not recognize this as a problem for federal theory nor as a matter requiring philosophical reflection. Had he done so he would, presumably, have been more interested in arguing the issue through to a conclusion. His penchant for avoiding abstraction, reporting the facts, and allowing readers to construct a theory for themselves is manifestly flawed, not only because of its character as crudely inductivist but practically, as in this case real political problems flow from the avoidance of theory. For the Australian framers the almost exclusive reliance upon Bryce would thus seem precarious. Deakin's remarks about Bryce seem motivated much more by enthusiasm than close analysis.

BRYCE ON FEDERAL THEORY

Even if Bryce's claim could be granted - that in the particular case of the Civil War the "result decides" - the problems for a workable federal system were not resolved as the questions of states' rights and the limits to centralism were still unanswered. The question remained: what was the status of claims for states' rights after the War and Reconstruction? According to *The Federalist*, the states were equal components of the federation with the people. If this was so then how far could the central government

invade the rights of the states? These questions were central to the concerns of the Australian framers but they were questions upon which Bryce was largely silent and he only noted in passing:

> The term 'State Sovereignty' is now but seldom heard. Even State Rights have a different meaning from that which they had thirty years ago.[45]

As to the meaning of states' rights and how it differed from "State Sovereignty", Bryce did not tell. The operational difference between the two would seem to be crucial as states were clearly not free to pursue their interests irrespective of the wishes of the greater Union; the result had decided that much at least. What was the new meaning of "states' rights"? Where was the boundary between the spheres or, in the wake of the war, was such a boundary only of rhetorical relevance? Another scholar, Wintersteen, writing in *The American Law Register* just after Bryce's book was published, wrote of the American system that, "It is the era of the centrifugal tendency".[46] Wintersteen was one of the victors and was concerned with the national interest before the state's interests but, under analysis, his declamatory statement was no clearer than Bryce's.

> The phrase "State Sovereignty" has been rescued from its friends and given its true meaning in our governmental scheme. There was needed a triumph of their [Madison's and Hamilton's] principle of 'nationality', before the principle of sovereign statehood could be broadly declared and worked out.[47]

Wintersteen did not, alas, state what that true and proper meaning of "State Sovereignty" was, nor did he say what its place was in the governmental scheme. Nor did he address the question which Sidgwick had posed for Bryce: "How does the division of functions between federal governments and state governments work?"

If it was the era of the centrifugal tendency, how did Bryce explain the federal system? On this crucial question he adopted two positions. The "official position", as it may be called, was that federalism was working in the United States in the manner which the founders had prescribed. Like his rational liberal actor, the system was behaving as it should. This may be called the 'official position' because the victorious Union deemed this explanation to be the most suitable way of avoiding the awkward questions of sovereignty which Calhoun and others had developed in debate with the North. As long as the Civil War, and the dispute about the theoretical underpinnings

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[45] Bryce II, 15.

[46] Wintersteen "The Sovereign State", *American Law Register* (March 1889), 129-140 at 140. Cases which indicate this tendency were; *The Slaughter House Cases* (1873); *U.S. v Knight* (1895). The use of the notion of "State Sovereignty" was, however, relied upon to prevent the United States from taxing a state judicial officer. *Collector v Day* (1870) I am indebted to Professor Leslie Zines for drawing may attention to these cases.

[47] Wintersteen, 134.

of the federal system, could be argued away as a mere anomaly rather than as a fatal challenge to the theory of federalism which had been propounded by the founders, then the Union could continue to function without needing an entire reorganization. The official position was articulated through the Supreme Court in cases like *Texas v White*, in which it was found that the Southern States were simply not able to secede, therefore, their actions were void and of no legal standing. The arguments which Calhoun, Taylor and others had put, to justify the right of constituent states to withdraw their consent to participate in the Union in order to avoid being unwillingly subjected to its collective will, were not addressed, they were merely ignored.

The other position which Bryce presented as the true story showed that the federal system, in its operation, was not stable or in balance as the framers would wish. He argued that in extreme cases the independence and rights of the states could be completely nullified and also that, over time, the system was changing in a departure from its original perfect and harmonious expression. Again, for the benefit of those who looked to Bryce for lessons, he had failed to work through the arguments about the desirability of change and stasis in the system. He showed that under pressure and over time it was prone to change and exposed to the risk of collapse. Yet, simultaneously, he maintained that the federal system was static and working smoothly as it was designed. There was no attempted resolution of these competing explanations of American federalism.

The Official Story

Bryce began his account of American federalism with a story about the American Protestant Episcopal Church which altered one of its prayers from "O Lord, Bless our Nation" to "O Lord bless these United States". The point Bryce was seeking to illustrate was that the United States was, as he put it,

> a Commonwealth of commonwealths, a Republic of republics, a State which, while one, is nevertheless composed of other States even more essential to its existence than it is to theirs.[48]

Unlike the various forms of European government, the central government was not designed as a mere league, nor were the states "mere subdivisions of the Union".[49] The states existed independently of the central government and the citizens of the United States were also citizens of their own state. They owed a dual loyalty. In the first of several metaphors which Bryce used to try to illustrate the federal system he

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[48] Bryce I, 17.
[49] Bryce I, 18.

described the Union as a large single building and a set of smaller buildings which although they occupied the same plot were distinct from each other.[50] Bryce urged the reader to try to understand this "double organization", as it was

> the first and indispensable step to the comprehension of American institutions: as the elaborate devices whereby the two systems of government are *kept from clashing*.[51]

Bryce would not acknowledge, indeed he denied, that such a formulation of the system was an incipient *theory* of federal structures in operation. His analogy of the buildings and his observation of the device to prevent the governments clashing was more than merely "describing American institutions as they now exist" as he claimed. He was here presenting his facts within a normative framework of what was, for him, a proper organization of American government.

According to Bryce there was a two-fold problem which those who drafted the Constitution had to solve. These were, firstly, creating a central government and, secondly, determining the dual relationship which this government had with the states and with the citizens. His analysis of how "the system actually works" was in this place deliberately informed by a theory.[52] He argued that the division of functions and powers under the American federal system was an attempt to extend the doctrine of the separation of powers and to retain fidelity with Montesquieu's strictures on government. Whereas in Montesquieu there was a horizontal separation between the legislature, the executive and the judiciary, so in federalism there was a vertical division between central and state governments. The conceptual tidiness of such a formulation of government was marred by what Bryce recognized to be two defects, both of which were created by the separation of powers. Firstly, there was necessarily an excessive amount of friction between those which check and balance each other and, secondly, there was a lack of executive rigour as power was too divided to allow for prompt action when necessary.[53]

The vertical division of power under the federal system presented no such problem. State governments were divided from the central government along clean and distinct lines. As contracting parties to the federal compact the states were intent on ceding only those powers which were properly necessary to the central government and would only allow the creation of new powers which would enhance their collective power. The two points on which the Convention of 1789 turned, according to Bryce, were derived from contractarian principles. They were, firstly, to what extent should the

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[50] Bryce I, 19.
[51] Bryce I, 20, emphasis added.
[52] Bryce I, 369.
[53] Bryce I, 402.

states be independent and separate and, secondly, what should be the "quantity and nature of the powers" to be withdrawn from the states.[54] The first of these questions, Bryce asserted, was the more difficult.

Whilst some questions were settled by the Civil War, including those of Nullification and Secession, the matter of the interpretation of central/state provisions was only subject to a "general agreement". The location of the "general agreement" was unspecified: whether it was in the Courts, between the States and the Congress, or generally as understood by "the people", was not stated. Seemingly, for Bryce, the agreement was simply there. Bryce did not indicate the place of the agreement nor tell how it was reached. He did, however, explain in general terms what the agreement meant. The agreement, in the way that Bryce phrased it, was not itself a consequence of the Civil War as this would imply that the war had resolved an otherwise doubtful constitutional question; it was rather that this pre-existing agreement was given an unambiguous meaning. Bryce was in accord here with the view adopted in Supreme Court rulings on the consistency of the federal arrangement and the aberration of the War. For Bryce, the "general agreement" was that sovereignty was renounced by every state on entering the Union whether that state was original or not. The states were "forever subject to the Federal Authority as defined by the Constitution".

The "general agreement" thus had a rhetorical import but what did "ceding sovereignty" mean? Did the states not cede powers on entering the Union anyway and did the state retain sovereignty over those powers which were not relinquished? Or was the word "sovereignty" merely to be proscribed and replaced with the less challenging phrase "states' rights"? Furthermore, what did "federal authority as defined by the Constitution" mean? This must mean federal authority as defined by the Supreme Court's interpretation of the Constitution. The arguments of Calhoun, which Bryce had acknowledged may have been "technically correct", showed that different interpretations were possible and that there was no single correct view existing as objectively real. But again, to acknowledge that alternative renderings of the Constitution were possible would undermine the agreed position that the Southern States were simply deluded in their constitutional arguments.

There were two other parts of Bryce's statement of the "general agreement".

> That the functions of the States as factors of the national government are satisfactory, i.e. sufficiently secure its strength and the dignity of these communities.[55]

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[54] Bryce I, 415.

[55] This sentence is ungrammatical yet it survived the reprint and the second edition. 1888 I, 415; 1889 I, 313; 1890 I, 306.

Despite the nonsensical reading of this sentence the meaning can be deduced as an endorsement of the continuing existence of the states. The third part of the agreement was

> That the delimitation of powers between the national government and the States, contained in the Constitution, is convenient, and needs no fundamental alteration.

Accordingly this matter is no longer a controversial, "but that of well-established law and practice".[56]

Bryce argued for this position because of his received belief about how federal systems ought to operate which was itself a normative claim derived from a theoretical construction of good government. He made assertions about federalism in its proper form which were not observations of the facts, but a restatement of Madison's classical federal theory. In denouncing *a priori* theories, Bryce unwittingly condemned himself. He did not state the facts and allow the reader to develop a theory; he stated the theory.

> The authority of the National government over the citizens of every state is direct and immediate, not exerted through the State organization. For most purposes the National government ignores the States; ... On the other hand, the State in no wise depends on the National government for its organization or its effective working

Then Bryce stated his theory of the federal system

> It [the State government] goes on its way, touching the national government at but few points. That the two should touch at the fewest possible points was the intent of those who framed the Federal Constitution, for they saw that the less contact, the less danger of collision. Their aim was to keep the two mechanisms as distinct and independent of each other as was compatible with the still higher need of subordinating, for national purposes, the State to the Central government.[57]

The two levels of government were separate and distinct, touching at but few points. This was the intention of the Constitution makers and their intentions, Bryce asserted, had been fulfilled. There was little interdependence and little positive co-operation between them. He noted the minor exceptions.[58] He continued the argument about separation by using the metaphor of the "spheres" of activity which he had taken from *The Federalist*, as argued in the previous chapter of this thesis.

> A State is, within its proper sphere, just as legally supreme, just as entitled to give effect to its own will as is the National government within its sphere.[59]

The "sphere" became a potent metaphor for the federal theorists in Australia. Even if states were to act with bad and disloyal motives, Bryce maintained, the federal

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[56] Bryce I, 415-6.
[57] Bryce I, 424-5.
[58] Bryce I, 419-423.
[59] Bryce I, 427.

government must not interfere unless and until the state government interfered with the sphere of federal authority.

> The National government, although superior whenever there is a concurrence of powers, has no more right to trespass upon the domain of a state than a state has upon the domain of federal action.

Bryce contended that it was remarkable that there was omitted from the Constitution any

> abstract or theoretic declaration regarding the nature of the federation and its government, [there is] nothing as to the ultimate supremacy of the central authority outside the particular sphere alloted to it, nothing as to the so-called sovereign rights of the States.[60]

For Bryce it was an act of wisdom by the framers to desist from "abstract enquiry" and "metaphysical dialectic". He himself eschewed such dubious work and lamented that, despite this wise action, lawyers and publicists had tied down the Constitution in "inextricable knots". These Gordian knots were, for Bryce, "cut by the sword" of the Civil War.[61]

Bryce was clearly impatient with philosophical argument about the Constitution. He made an attempt to convey the "proper" construction of the Constitution as a no-nonsense, common-sense, straight-forward account, which was to be understood according to the facts which themselves were not subject to the distorting vitiation of theory. The Civil War was therefore a good opportunity to cleanse the Constitution and free it from the brambles and briars of interpretation which had grown up around it since 1791. Inherent in this statement was the assumption that the meaning of the Constitution stood as objective truth only requiring observation for that meaning to be derived and known. A proper reading would reveal the true form of the Constitution. He reported with relief that the scholastic metaphysics which tied the inextricable knots "need concern us no longer". Returned to its proper action, as *The Federalist* prescribed, the separate functions of the two levels of government were free to continue as they should. The system,

> is like a great factory where in two sets of machinery are at work, their revolving wheels apparently intermixed, their bands crossing one another, yet each set doing its own work without touching or hampering the other.[62]

Again the "factory" served as a potent metaphor wherein the wheels operated without hampering each other. This was another analogy which obscured the need for a more rigourous and theoretically informed interpretation. But even if the wheels did not hamper each other, was this not also the era of "the centrifugal tendency"? It is on

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[60] Bryce I, 428 & 450.
[61] Bryce I, 429.

this basis that Bryce's analysis of the static and constant nature of the operation of the federal system was in conflict with his story of the United States as a dynamic and developing society. To argue that the basis of governmental organization was not subject to change whilst all other aspects of society were developing and progressing is curious. Even after the convulsions of the Civil War, Bryce maintained that the federal authority kept in view the wisest policy of "local government for local affairs and general government for general affairs only".[63] According to Bryce, those at the Philadelphia Convention believed that the evils that arose would be kept to a minimum by a "strict adherence to this policy".[64] The vital question which the Philadelphia Convention did not fully address, and which Bryce avoided, was how the line of demarcation between local and general affairs would be established especially without the growth of undesirable encrustations and knots of interpretation.

Bryce heavily emphasized the undesirability of the federal authority interfering in state affairs. Even "when mischievous laws be enacted" by the states which may countenance polygamy, homicide, the breach of contracts, and which may even allow the police to be "in league with assassins", the states were still to be sacrosanct. He asked, "Is the nation to stand by with folded arms? Is it debarred from rectifying these mischiefs? The answer, he said, was Yes! The federal government "not only ought not ... interfere but cannot interfere".[65]

Bryce, and other writers of the period, were anxious to maintain the argument that a balance existed in the federal system which was being maintained as it should.[66] In the wake of the Civil War the possibility of the central authority asserting an overwhelming centralizing power over the states was apprehended. An article in the *American Law Register*, of 1867 expressed the situation:

> Everyone is ready and forward in yielding almost everything to the National authority, which proved so competent to exercise governmental functions, in so desperate a crisis. The great danger now will be that things will rush in the opposite direction, and the central authority far from being limited and strengthened in all its powers and functions and scarcely able to

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[62] Bryce I, 432.

[63] Bryce I, 451.

[64] Bryce was quoting here from correspondence with Judge Thomas Cooley.

[65] Bryce I, 449.

[66] After the Civil War a plethora of articles appeared in American law journals concerning judicial review, state and federal jurisdiction and the nature of federal government. For instance: E.W. Burton "Federation and Pseudo Federalism" *Law Quarterly Review* 5 (1889), 170-78; Hampton P. Castle "Judicial Power and Unconstitutional Legislation" *American Law Register* 43, (1895), 796-810; Thomas Kilby Smith "The Rise of Federal Jurisdictional Supremacy in the United States" *American Law Register* 46, (1898), 621-629 & 688-696; James B. Thayer "The Origin and Scope of the American doctrine of Constitutional Law" *Harvard Law Review* , 7, 1893-4: 129-156; I.F.R. "The Proper Limits Between State and National Legislation and Jurisdiction" *The American Law Register*, (February, 1867), 193-202.

maintain a precarious balance, will be in danger of absorbing all the important functions of the governmental administration.[67]

The writer, I. F. R., continued in the same vein to warn of the possibility of the judiciary usurping all power "unless very narrowly watched".

Cooley and Bryce

Despite this warning about the potentially rapacious Bench, justices of the Supreme Court were themselves fearful of the possibility of wholesale centralization of power. Supreme Court Judge Thomas Cooley was a friend and associate of Bryce who contributed his expertise to the book.[68] In correspondence with Bryce, he maintained the fiction of the existence of a clear federal divide in a concerted attempt to maintain the traditional ideal of the federal arrangement and to deny the efficacy of the arguments which were put by the states' rights Southerners. The fabric of the Constitution was to be protected from threat and the interpretation of its workings was to remain largely unchanged.

Cooley insisted that interpretation of the Constitution during the period of Reconstruction entailed a continuation of the of the pre-war understanding of the federal system. The Civil War did not reveal irreconcilable contradictions in the application of federal principles because to admit that was to admit that a new constitutional order was necessary. Such a rupture with the past was not to be allowed. According to Paludin, Cooley reverted to a "Jeffersonian-Jacksonian ideology" which was a pre-war rendering of the Constitution.[69] The quest for stability in the era of Reconstruction was paramount and this necessitated a reliance on the myths central to federal theory. The incapacity of the federal constitutional form to control the tensions within the Union had been brutally revealed. Had one side, either the North or the South, repudiated the Constitution then Reconstruction, at least in constitutional terms, would have been a far simpler issue. In this respect it is important to note that the Southern States did not repudiate the Constitution initially as, for example, the Calhoun/ Webster debates show. The South seceded only when they were unable to enforce their claim to the proper interpretation of the Constitution and argued that such a proper interpretation had been subverted.

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[67] I.F.R. *American Law Review*, (1867), 197.

[68] According to Tulloch, Cooley made about 50 modifications to the text before publication. *Bryce's Commonwealth*, 83, note 82.

[69] P. S. Paludin "Law and the Failure of Reconstruction: The Case of Thomas Cooley" *Journal of the History of Ideas* 38, 4, (Oct 1972) 597-614.

The difficulty of the constitutional position after the war, which Cooley and others attempted to resolve, was to coherently argue that the federal principle itself was sound and could contain conflict and maintain the integrity of states in their right to do "mischievous" things. In order to pursue this strategy on the Constitution the only possibility was a reversion to earlier arguments about true interpretation.

Paludin has argued that the problem that slavery presented for Cooley was twofold. His objection to the institution of slavery was based, firstly, on a moral repugnance and, secondly, on the point that it posed a contradiction to the republican and contractarian principles which he held to be the foundation of liberty and of the Constitution. The ideological underpinning's of the American Revolution and the Constitution entailed the belief that freedom from tyranny was based upon a free and limited contract between ruled and ruler. This was contradicted by the existence, within the Union, of slavery.

Slavery represented arbitrary power maintained by the State to deny freedom to the individual: this was the antithesis of the moral foundation of the Union. The very existence of the federation, as *Federalist* 10 argued, was to prevent faction by breaking potential autocratic authority into spheres which were autonomous, with specific alloted powers. Bryce would not allow federal interference in "mischief", but for Cooley, in order to return to pre-war Constitutional norms, the abolition of slavery justified the potential threat of increased National power. Thus Cooley could maintain contradictory propositions about Reconstruction and federalism. He wrote to Bryce:

> The scope for Federal interference was considerably enlarged after the Civil War, but the general division of authority between the States and the nation was not disturbed.[70]

How can both of these propositions be true? The right of the central government to interfere in state affairs was, as a consequence of the war, undeniable - the result had decided that. To maintain that the division of authority was undisturbed was a political fiction. But in the wake of armed rebellion and Civil War it was a fiction less certain had they suspected that a military victory could possibly transform the United States effectively into a unitary state.

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[70] Bryce I, 451.

In the quest for stability, appeal was made to the authority of Publius. The arguments of *The Federalist* were invoked about federal/state divisions and spheres of activity. In acknowledging the victory, yet denying the possible consequences of the victory, Bryce and Cooley were maintaining that the most difficult question of the federal system, which was to discern and divide local and general matters, was not difficult at all. Bryce argued that, rather than the military and judicial outcomes of the war altering the "balance" that was perceived to exist in favour of the central government, the result had merely re-established the proper federal arrangements. The states were free, even after the war, to pursue their own policies in their own sphere, however obnoxious to the Nation, without federal interference. He admitted this to be a "dangerous ... application of democratic faith", yet excused it on the basis that "no [other] Nation so well understands its own business".[71]

Any difficulties that Bryce found himself in as a consequence of arguing for the integrity and continuance of a pre-existing proper federal order were simply explained away. Accordingly, the war was caused by rogue Southern States which had perverted otherwise sound and self-evident principles. Bryce wrote: "All these mischiefs, it has often been argued, are the results of the Federal structure of government."[72] The answer to this challenge, he asserted, was that the National government survived the struggle and as he said, "the result decides".

Bryce was correct in arguing that "federalism did not produce the struggle", but it did determine that the struggle took a particular course. This argument, however, does not address the systemic problems which were created out of the contradictions of the American federal system. Doubts as to the legal/constitutional correctness of the position of the Southern States (which Bryce conceded was possibly "technically" sound) created the conditions whereby matters of sovereignty and states' rights could be defended on the *moral* grounds of *legal* right. Calhoun's elaborate construction of the constitutional position of the states was an articulation of such moral and legal certainty.

The "vast economic interests", which Bryce correctly identified as being the determinate forces behind the war, were cloaked in a constitutional mantle which obscured the real terms of the conflict. Bryce explained that the "gravest reproach which Europeans have been wont to bring against federalism in America" was unfortunate in so far as it obscured the real advantages of the system.

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[71] Bryce I, 452.
[72] Bryce I, 462.

Against this danger is to be set the fact that the looser structure of a Federal government and the scope it gives for diversities of legislation in different parts of a country may avert sources of discord, or prevent local discord from growing into a conflict of national magnitude.[73]

The defence was not compelling. The contemporary critics of federalism, among them Bryce's companion A.V. Dicey, argued on precisely this point. The federal system, in their view, was an inherently unstable and incomplete form of government because the unresolved tensions between centre and component parts was bound to create, not confine, conflict.

The Unofficial Story

Bryce's main position on federalism was that, despite the War and the evolving nature of the Constitution generally, the line of demarcation between the federal authority and the states, between general and local matters, was unchanged from the time of ratification. The federal system operated as is should, according to *Federalist* 39

local or municipal authorities form distinct and independent portions of the supremacy, no more subject within their respective spheres, to the general authority, than the general authority is subject to them within its own sphere.[74]

This was a defining criterion of the federal arrangement as expressed by *The Federalist* and as it was understood by Bryce. *The Federalist* was arguing for a new kind of government - neither federal nor national - and Bryce was defending that new government from the recent criticisms of Dicey and others that it was not a stable or enduring form as it tended toward either fragmentation or unification.

The conceptual difficulty of holding conflicting propositions to be true was overcome by indirectly reformulating the federal idea. Whilst maintaining that the boundary between local and general matters was clear and unaltered by the war, Bryce also wrote about the increasing centralization of functions and powers. In considering the results of the development of the Constitution, Bryce argued that changes in the formal institutions of government had been kept to a minimum by the rigidity of the Constitution which had "maintained a sort of equilibrium" between the legislature the executive and the judiciary. However,

In the other struggle that has gone on in America, that between the National government and the States, the results have been still more considerable, though the process of change has sometimes been interrupted. During the first few decades after 1789 the States, in spite of a steady and often angry resistance, sometimes backed by threats of secession, found themselves more and more entangled in the network of Federal powers which sometimes Congress,

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[73] Bryce I, 463. This was the case put in *Federalist* 6, 20

[74] *Federalist* 39, 194-5

sometimes the President, sometimes the Judiciary, as the expounder of the Constitution, flung over them.[75]

Both those who "defended State rights and preached State sovereignty as well as ... the advocates of strong central government" put provisions in place to ensnare the states, Bryce contended. Even defenders of the states, when keen to affect some immediate objective, enforced central powers without hesitation, "forgetful or heedless of the example they were setting". Attempts to check the extension of National powers had small success as, "The expansive force of National government proved ultimately stronger than the force of states, so the centralizing tendency prevailed".[76] The war marked a change in the rate of change but not in the general direction as, "during and after the war the former tendency resumed its action swifter and more potent than before".

Bryce answered those who argued that the changes in the balance of the Constitution were due to recent amendments. Whilst he acknowledged that the amendments had some effect they were not significant. He wrote:

the dominance of the centralizing tendencies is not wholly or even mainly due to those amendments. It had begun before them. It would have come about, though less completely, without them. It had been due not only to these amendments but also -

> To the extensive interpretation by the judiciary of the powers which the Constitution vests in the National government.
>
> To the passing by Congress of statutes on topics not exclusively reserved to the States, statutes which have sensibly narrowed the field of State action.
>
> To exertions of executive power which, having been approved by the people, and not condemned by the courts, have passed into precedents.[77]

Bryce argued that these were the causes of the tendency toward centralization. A tendency which he thought was not being altered as "present appearances suggest that the centralizing tendency will continue to prevail". Despite the states enjoying the presumption of power in disputed matters against the central authority, which can only exercise powers which it can affirmatively show that it had received, Bryce believed that the states had lost their pre-eminent place since the early days of the Union, for they had lost "political importance" and had "declined relative to the central government".[78] For Bryce, the states were, "now merely a part of a far grander whole, which seems to be slowly absorbing its functions and stunting its growth". The

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[75] Bryce I, 531

[76] Bryce I, 532. Madison had expressed this fear in *The Federalist* and at the Convention, 1787 Farrand I, 153.

[77] Bryce I, 532-3

[78] Bryce II, 15 & 188.

historical development of the United States thus had caught the states between two burgeoning authorities.

> The truth is that the state has shrivelled up ... as the central government overshadows it in one direction, so the great cities encroach upon it in another.[79]

Bryce's reflections upon the place of the states, in this section, seems unequivocal. The states were in historical decline. This decline was only interrupted by the perturbations of the secessionist and nullification movements. Despite the attempts of the early Presidents to maintain the "proper" construction of the Constitution, the centralizing tendency prevailed. Jefferson made the most notable effort, according to Bryce, who observed that he "protested against all extensions of its letter, and against all the assumptions of Federal authority which such extensions could be made to justify".[80]

BRYCE'S CONTRADICTION

This account of American federalism is at odds with Bryce's earlier account of the federal system in operation. His somewhat conversational style did not allow for the production of a searching methodological analysis of the empirical or theoretical problems of federalism. Instead, Bryce ruminated on matters which he thought were important and which had come within his personal purview. Thus he gave space to diverse matters including the Universities, Religion, "Bossdom", corruption in City politics and general matters of American life, much of which was omitted from later editions.

The contradictory nature of Bryce's account of federalism was not resolved in his work. There was no attempt to explain how the division of powers (with the states supposedly sovereign in their own spheres) was affected by the decline in the relative powers of the states, as the federal authority, through diverse means, expanded its powers and functions. If the two levels of government were given metaphorical representation as buildings which occupied the same plot, as separate spheres, or as pieces of machinery which operated independently of each other, then the federal system was easy to conceptualize. If, however, the federal system was explained as inherently contradictory the conceptual simplicity was lost. If the federal principle comprised two propositions, which were both true but in contradiction, then such a

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[79] Bryce II, 189. Also II, 204.
[80] Bryce II, 326.

conceptualization could not be logically comprehended, as Bryce noted, likening the Constitution to an ancient hymn,

> the apparent contradiction has always been held to seem a contradiction only because the human intellect is unequal to the comprehension of such mysteries.[81]

As a practical man of affairs Bryce resolved this curious problem with his argument that "the result decides". The next chapter is concerned with the matters of state sovereignty and rights which were at issue during the Civil War.

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[81] Bryce II, 16.

CHAPTER THREE

STATES' RIGHTS AND THE TERMS OF DEBATE

The purpose of this chapter is to address two questions. Firstly, from where did the framers of the Constitution draw their ideas about states' rights? Secondly, what did this phrase mean? The chapter addresses the question which was posed by both Andrew Inglis Clark and Richard Chaffey Baker: "What do we mean by state rights?"[1] It is argued here that the Australians adopted states' rights arguments which had been developed in the United States prior to the Civil War and this chapter recognizes the influence of this tradition on the characteristics of the Constitution and the federal system in Australia. An understanding of the origin of states' rights and its legacy is important for appreciating the Australian Federation debates.

The organization of this chapter is as follows: firstly, it establishes the terms of the Australian and American notion of states' rights with a specific argument showing the relationship between social contract reasoning and the federal model; secondly, the origin and evolution of the doctrine in the United States is elaborated; thirdly, the legacy of this tradition in the Australian Federation debates is developed. This last issue is explored only briefly as, in a sense, the entire Federation debates were about states' rights and the whole Australian design turned on a defence or criticism of these beliefs. The second stage of the thesis (chapters four to seven) is generally concerned with the Australian response to the arguments over national forces and states' rights and the legitimation of a dual form of government. The matter of preserving rights determined the structure of the Constitution and the organization of government in the areas of the role of the Senate; the division of powers, the role of the High Court, and the process of ratification and amendment.

Although Bryce was of central importance to the Australian framers they had at their disposal a substantial body of literature on American federal government.[2] The formal literature did not, however, fully encompass the range of the legacy which they inherited. The states' rights tradition had been a complex and controversial aspect of American history and although the literature which gave it expression was integral to

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[1] 1891, 112 & 172.

[2] States' rights texts do not figure in the Federation debates very significantly. Quick and Garran: ix, express "acknowledgements and obligations" to a number of works which are standard "national" accounts of American constitutionalism. Crisp gives "Some Reported Sources of the Fathers of Federation" but Calhoun, Taylor and Alexander H. Stephen *A Constitutional View of the Late War between the States*. 2 Vols (1868) for instance are absent. L.F. Crisp *The Later Australian Federation Movement 1883-1901: Outline and Bibliography* (1979), 44-48.

the debate on federal government it was ultimately considered unreliable in comparison with standard works like *The Federalist* and *The American Commonwealth.* This chapter is concerned with an analysis of the states' rights argument as it developed in the United States and with exploring its application to the arguments which the Australian framers adopted. This tradition was crucial to the development of Australian federal ideas and the structure of the Constitution.

The problem which faced colonial politicians was how to find a national solution to the contradictions of intercolonial relations without surrendering political autonomy. Lacking executive authority, and in the absence of New South Wales, the Federal Council of Australasia endured, ineffectually, in a condition of near collapse until it was finally abolished in 1900. Since its inception as a "national" decision making body in 1886 the Council had not functioned effectively. Decisions made within it were not binding as identical legislation was necessary in each colony to secure uniform "national" laws. The vagaries of local politics defeated co-ordinated action. The Federal Council had similarity to the American Articles of Confederation in that it was a weak confederal alliance in which the powers of the constituent members were preserved at the expense of coherent central authority. To counter the argument that a closer compact would necessarily entail a diminution of the independent power of the colonial assemblies, the leaders of the constitutional Conventions at Philadelphia and in Australia characterised the respective new Constitutions, cunningly, as an enlargement in the powers of self government.[3] The small Australian colonies, like their American counterparts, feared the power of the larger colonies and the potential threat that the new federal combination posed. The Australian colonies in a response to this threat drew upon the doctrine of states' rights, which had been developed in the United States since the ratification campaigns of the 1790s, in an attempt to find a reasoned theory of self defence against the centripetal force of the centre.

The states' rights doctrine was aggressively promoted throughout the decade of the federal movement in Australia, both inside the Conventions and as a populist strategy. Since that time it has endured as a virulent strain in Australian politics. "States' rights" continues to be used as a slogan to deny the assumption of authority by the central government in enforcing policy in areas of usually doubtful jurisdiction. In political disputes the doctrine is not elaborated, it is merely invoked as an incantation

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[3] Locke argued that "men" increased their freedom by entering into a contract thereby creating a structure in which desires could be fulfilled. This was not as readily possible in a state of nature which allowed for notional liberty but not actual liberty. Maurice Cranston *John Locke* (1985), 210.

against perceived encroachment.[4] When state Premiers advance arguments about the proper federal balance, or about states' rights, the inference, which is relied upon but invariably remains unstated, is that deep in the heart of federal theory lies a coherent set of principles which explain those rights and furthermore that the framers of the Constitution themselves intended these to be implemented.

STATES' RIGHTS IN THE UNITED STATES AND AUSTRALIA

States' Rights in the United States

The purpose of this section is to show the link between states' rights and the proposition that the origination of society was to be found in the social contract. The origin of the Australian arguments of states' rights lies in American political history and specifically, as argued in this section, in social contract reasoning. The common explanation of both the American Revolution and the Constitution has been that they were both justified on principles derived from an Enlightenment notion of rationality. The social order was composed of humans who were free, atomized individuals who could self-consciously act to preserve their natural rights and maintain society. Statements giving effect to this are common in the period as exemplified by the *North Carolina Declaration of Rights* which was proclaimed by the State Convention of 1788 which met to ratify the Philadelphia Constitution. The *Declaration* ensured the following:

> 1. That there are certain natural rights, of which men, when they form a social compact, cannot deprive or divest their posterity among which are the enjoyment of life and liberty, with the means of acquiring, possessing, and protecting property, and pursuing and obtaining happiness and safety.
>
> 2. That all power is naturally vested in, and consequently derived from, the people; that magistrates, therefore, are their trustees and agents, and at all times amenable to them.
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> 3. That government ought to be instituted for the common benefit, protection, and security of the people; and that the doctrine of nonresistance against arbitrary power and oppression is absurd, slavish and destructive to the good and happiness of mankind.[5]

Herein are contained the principles which were intended to be the most fundamental components of government and society. As science was looking for the elemental

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[4] Arthur Schlesinger Snr dismissed the doctrine of states' rights as merely a "fetish", a verbal ritual that concealed what was really going on. *New Viewpoints in American History* (1922), 220-224, quoted in Diggins, 133.

[5] *The Debates in the Several State Conventions of the Adoption of the Federal Constitution as Recommended by the General Convention of Philadelphia.* J. Elliot ed. (1836) 5 Vols, IV, 243. Hereafter cited as *Elliot's Debates.*

substances that were thought to constitute the universe, so philosophers sought to reduce society to its basic atomic elements or first principles. Furthermore, the Americans, as with John Locke, seemingly understood this explanation of the genesis of society to be factual, not a mere model.[6]

This *Declaration of Rights* and the earlier more celebrated *Declaration of Independence,* as well as the principles of the Constitution of the United States were, as Diggins argued, an attempt to establish what were believed to be eternal truths about Civil Society.[7] Certain beliefs were accepted as universal categorical truths when, more properly, they should be understood as politically determined. The notion that natural inalienable rights to life, liberty and property could not be surrendered in the social contract, which was framed by the association of free individuals, was a position derived from Locke and others. These rights are not transcendental but historically contingent.[8] Similarly, the republican principle that power was derived from the sovereign people who acted in consonance to vest powers in magistrates in their own service, was not a matter of objective revealed truth but an explanation which was historically appropriate in that it was conditioned by immediate political circumstances. As government was created by the people so, the American students of Lockean theory believed, their right to resist tyranny was absolute.

As will be argued here, the Americans had found an explanation of the relationships within the federal system from English social contract theory, which also provided an appropriate language. States' rights originated in the ideology of republican individualism which allowed for the free association of competent actors, with

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6 Locke provided an explanation for the true historical account of the genesis of society. *Second Treatise* #101 "That it is not at all to be wondered that history gives us but a very little account of men that lived together in a state of nature. The inconveniences of that condition, and the love and want of society, no sooner brought any number of them together but they presently united and incorporated if they designed to continue together. And if we may not suppose men ever to have been in a state of nature, because we hear not much of them in such a state, we may as well suppose the armies of Salamanasser or Xerxes were never children, because we hear little of them till they were men and embodied in armies. Government everywhere is antecedent to records".

7 Diggins has set aside three appendices in his book to discuss the intricate problem of the relationship of the history of ideas to a material context. Another interesting exploration of this is John Gunnell *Between Politics and Philosophy* (1986).

8 Gordon S. Wood argued that, "if the ancient notion of a contract was to be presented in American thinking, then it must be a Lockean contract, one formed by individuals of the society with each other, instead of a mutual arrangement between rulers and ruled ... This image of a social contract formed by isolated and hostile individuals was now the only contractual metaphor that comprehended American social reality.", 601-2. Wood should have probably added here that the the social contract as a metaphor was only an explanation and that the construction had, of course, no independent reality, it was simply the best explanation they had. This emphasis on Locke is at odds with Pocock's argument of the traditions of Civic Humanism being the hegemonic paradigm and is not easily reconciled. See also Wood, 282-292 (383 esp) and *Federalist* 64.

natural inalienable rights, coming together in a social contract to politically order society. The extension of this theory of society allowed for the theory of federalism in which states were, firstly, perceived as individual and, secondly, as free to make a compact. The social contract, and federal theory, thereby allowed competent actors and states to enter into free association in a political society for mutual benefit. Certain rights would be ceded but the right to withdraw would be retained as a final sanction against the possibility of the new government acting in breach of the terms of contract.

This argument (which is more fully developed later) began in the Philadelphia Convention in 1787. The federal system was repeatedly explained in this way which later provided the Southern States with a powerful argument to justify the secessionist movement. Lincoln, in his speech to the Congress at the outbreak of war in 1861, endeavoured to find an alternative explanation of the basis of Union in order to escape the logic which derived from this formulation. He argued that the states were creatures of the Union and that the claims the Southerners were pursuing were immoral in their own right and odious because they were merely a justification for slavery. With the victory of the Unionist forces "states' rights" became a synonym for tyranny and John C. Calhoun, the principal theorist of the doctrine, was discredited.[9]

While the principle of states' rights was discredited in the United States after the Civil War it was enthusiastically adopted in Australia in the 1890s. The framers embraced a mode of reasoning about the system and about states' rights which had been denounced by Lincoln. The American arguments of the mid-nineteenth century and Australian arguments of the 1890s were related, so it is now necessary to develop the original American position in order to understand the basis of the states' rights position which carried through to Australia.

The right of the states to preserve their powers on entering the *contract* was repeatedly stressed by the delegates to the Australian Conventions and especially by populist politicians in the small states. This theory of federal organization had been denied by Lincoln at the beginning of the war, but it persisted as, seemingly, it was not possible to entirely abandon the previous explanation. The older conception of federalism as contract was pervasive, and abandoning it was problematic because, if the states were only creatures of the Union and nonexistent without it, then the logical extension would

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[9] For criticisms of Calhoun's theories of government see, *John C. Calhoun: A Profile,* John L. Thomas ed. (1968). Hartz has put an argument against this formulation of the problem. Louis Hartz, "The Reactionary Enlightenment: Southern Political Thought Before the War", John Roche ed. *American Political Thought: From Jefferson to Progressivism* (1967), 61-89.

allow the centre to have a right to impose its will in all areas. In the wake of the Civil War the creation of a unitary state was not possible and Reconstruction necessarily would not allow the central government to absorb all power. In this period the federal theory of Publius was extolled as the proper formulation of federalism yet, somewhat awkwardly, this was where Calhoun's arguments also found their origin, based on a "proper" interpretation. As a conclusive statement of the federal principle *The Federalist* was demonstrably ambiguous because both North and South claimed it for a true interpretation. Furthermore, the authority of the Supreme Court, as interpreter of the Constitution, was still somewhat doubtful in the era of Reconstruction although paradoxically it was at this time that the right of judicial review finally became entrenched.[10]

The federal system, as it was theoretically defined in the United States, could not survive the strain imposed upon it by sustaining arguments about both national power and state sovereignty so, as Bryce wrote in 1888, "'State Sovereignty' is now but seldom heard".[11] Yet the states' rights doctrine was promoted with little reservation in the Australian debates only a generation after the end of the war and a couple of years after Bryce's first edition. The arguments for sovereignty were revived in Australia out of an anxiety that any federal union which was more than a loose confederation would devour the small states. While the momentum for a general form of states' rights was powerful, the distinction between sovereignty and rights was not fully explored by the Australians.

States' Rights in Australia

Against this contradictory and ambiguous background the Australian framers received a theoretical understanding of federal government from two principal texts; *The Federalist* and *The American Commonwealth.* However, the tension within their own debates derived from the states' rights doctrine which, as indicated, lacked the status of having a classical textual account. That body of thought had been an integral part of the federal tradition yet the works which gave it expression had been rendered peripheral to federal thought and literature. Since then, states' rights has been construed as a reactive doctrine: a device to be used against the enlightened extension of central power and authority and, in the wake of the Civil War, any defence of the

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[10] The convention of judicial review was established in the case of *Marbury v Madison* but Kutler argues that the entrenchment of judicial review came only after the Civil War. *Judicial Power and Reconstruction Politics* (1968).

[11] Bryce II, 15.

principles of states' rights was considered odious. The work of John C. Calhoun, although based upon Lockean notions of contract and meritoriously acknowledged as a sound and coherent body of thought, was fatally compromised by its association with the defence of slavery.[12] The odium of that association has consigned *A Disquisition on Government, A Discourse on the Constitution and Government of the United States* and the lesser known *South Carolina Exposition and Protest* to an ignominious "historical" interest only. The name of Calhoun was invoked in Australia but, with some exceptions, his work was not celebrated nor even widely discussed.[13] The result in the Australian debates was that the doctrine was employed without a text to lend support. Rather than deliberately invoked through an established body of literature, "States' rights" was a protean concept which was used as a defensive strategy against the potential threat of central power.

The elements of colonial politics which were combined in a justification for the retention of state sovereignty, or rights, were potent. The inhabitants of the smaller colonies were fearful of the population imbalance which favoured New South Wales and Victoria and this, when mixed with an active regional parochialism and a pervasive uncertainty about the strength of local economies, produced a climate of opinion for which there was a model solution already conveniently contained in the federal system. A form of language and an attendant set of ideas filled this need and were exploited from the earliest stages of the debates in the rhetoric of the states' rights case.

Richard Chaffey Baker and Andrew Inglis Clark were the two leading Australian proponents of states' rights as a doctrine. Both had produced detailed preliminary constitutional work for the 1891 Convention.[14] Clark's American inspired draft was

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[12] In Australia, John Cockburn recognized the connection: "I think nothing is clearer than that the parties destroyed themselves over that business, and nothing which has occured since can be traced to the old parties. There is no doubt that this confusion of thought in America, this destruction of the states' rights party by allowing themselves to be besmirched with the infamy of slavery, has been fraught with very disastrous results to the Government of America." 1891, 713.

[13] John Taylor was another advocate of states' rights whose work was influential in the American debate yet unknown in Australia. C. William Hill *The Political Theory of John Taylor of Caroline* (1977). J.M. Ward recognized the influence of Calhoun on the ideas of William Charles Wentworth and James Macarthur in the debate over the 1853 Constitution of New South Wales. J.M. Ward *James MacMacarthur: Colonial Conservative 1798-1867* (1981), 190. Recently Campbell Sharman has usefully argued that Calhoun is the missing link in Australian federal thought. "Calhoun is the epitome of all that Australia lacks in political idiom." His writing provides a "source of neglected questions for Australian federalism". C. Sharman *Calhoun: A New Perspective on Theories of Australian Federalism* (1983), 4 & 22.

[14] R. C. Baker *A Manual of Reference to Authorities for the use of the Members of the National Australasian Convention* (1891). The Clark constitution is appended to Reynold's article "A.I. Clark's American Sympathies and His influence on Australian Federation" *Australian Law Journal*, 32, 62-67.

the source of many ideas about institutional design and Baker's manual was the principal Australian reference work for the Convention. The states' rights advocates were, however, not restricted solely to the smaller colonies. In the Victorian Parliament in 1890 the name and writing of John C. Calhoun, that "celebrated American", was invoked in order to show the tendency of the general government to adopt "doubtful constructive powers" (Calhoun's words) to the disadvantage of the states. The practice had developed, claimed one member, "to substitute the positive grants of the parties themselves for the constructive powers interpolated by the agents". In other words, the assumption was made, which is here typified by the members of the Victorian Parliament (and elsewhere by Bryce) that somehow powers can be simply allocated, and facts can be known, and that these ought to exist *without* interpretation by "agents". These framers of the Australian Constitution believed that the grant of plain and clear powers was being *impaired* by the encumbrance of interpretation. In continuing this line of argument, the Hon. G. Davies said that he read from Calhoun,

> in order that honourable members may see that it will be necessary to more clearly define the powers delegated to the central government. There must be conflict between the central government and the states unless their respective rights are very clearly defined.
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> *Hon. S. Fraser:* We must not starve the federal power.
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> *Hon. G. Davies*: I see more danger in degrading the state than in starving the Federal power. Let me remind Mr Fraser - and I have no doubt his local experience will tell him the same thing - that power centralized is like a snowball as it rolls it gathers more.
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> *The Hon. N. Fitzgerald:* This is to be a written Constitution.
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> *The Hon. G. Davies*: Yes, but the interpretation placed upon a written constitution may be various ... We may have a repetition of the difficulties which beset the Federal Government of the United States. It has always appeared to me that in theory, in political justice, and political expediency, the construction placed by the Southern leaders upon the Constitution of the United States was the safest construction as compared with that adopted by the North ... there may be a repetition here of the difficulty experienced in the United States, unless we take particular care that whatever rights the minority may have shall not be roughly overridden by a decision of a final court of appeal which should not be accepted as generally satisfactory.[15]

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[15] Victorian Parliamentary Debates 1890, 512-4. See also Queensland Parliamentary Debates 1890, 186. In the South Australian Parliament, Playford said:
"The premier was wrong in saying that the United States had separate sovereign powers ... Although sovereign rights were claimed, and the civil war was begun to claim those rights the question of sovereign rights had eventually been given up. The states agreed that after the matter had been fought out they would not talk about sovereign rights, and the thing was settled ... in working out our federal Constitution we would be following no precedent* ... there were two [principles] which they [delegates to 1890 Conference] would not diverge very much. The first was that the federal powers must in their sphere be sovereign. (hear hear) Another was that they should only give to the Federal Parliament such powers as could not in the nature of things be so well exercised by the colonies separately ... let them not centralize too much."
South Australian Parliamentary Debates 1890 274. *After explaining the Civil War as a consequence of the American federal system Playford was here obliged to contradict his views expressed at the Melbourne Conference that the American model was the one to follow.

Interestingly the point that Fraser made here was also a concern that was voiced by Madison and Hamilton in 1787.

The introductory statements of principle at the first Australian Federal Convention have become known as the Parkes Resolutions. These resolutions were formulated on the basis of contractarian notions. They allowed for the retention of "powers, privileges and territorial rights except in respect to such surrenders as may be agreed upon as necessary" to the federal government.[16] The formulation of the resolutions, and the terms of debate which followed, were conducted in the language of *contract*. An articulation of the issue in terms of "such surrenders" as were "necessary" contains the conceptual presupposition that the colonies were free, under their own aegis, to dispose of their rights, or powers, as had the American states, by virtue of their Lockean "state of the nature" relationship.[17] The Australian framers did not invoke the name or explicitly adopt the language of Locke, as had the Americans, but this does not mean that there was an absence of Lockean ideas. Other authorities were more commonly used and more widely cited but, if the influence of Locke on the American framers was as profound as is generally accepted, then the indirect influence of him on the Australians would perhaps follow.

Richard Chaffey Baker, the delegate who provided a manual on federal government to the 1891 Convention, gave an early and beautifully lucid account of his understanding of federal government; this statement was from the perspective of one who was very keen to protect the states. He was responding to a challenge by Deakin who said, "Let them in the first instance define state rights, and let us see how they will be impaired".[18] As is shown in the following passage, as well as the the exposition in his book and his other speeches on the floor of the Convention, Baker's understanding of federal structure owed much to social contract theory:

> Now what is federation? Does a federal system consist in delegating to the central authority certain powers and functions, and in delegating to the legislatures of the states certain other powers and functions? I think not. I think a federation consists in a great deal more than that. A federation, as it appears to me, consists in the fact that the compact made between the constituent states who wish to enter into that federation provides that not only shall the legislatures of the different states be supreme concerning the powers which have been

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16 1891, 23.

17 See below, Lincoln's denial that the states were ever free and independent in this way.

18 1891, 82. Deakin claimed, "I will be second to no delegate in my anxiety to preserve what I understand to be state rights. So anxious am I to preserve them, that I would never dream of entrusting them to a senate." Also Barton emphasized his concern that states' rights be preserved and that those powers not given to the states should be "religiously preserved". 1891, 90.

delegated or left to them, but that they shall also have a voice as states concerning the powers which are delegated to the federal government.[19]

The contract, or compact, expressed in this way bears, by analogy, the influence of Locke's account of social formation.[20] The formulation of the federal structure in this way became the standard account which was given by the framers of the Australian Constitution and Baker's early articulation of this general understanding of the proper system was by this stage already considered axiomatic. He continued:

What do we mean by states rights? It appears to me that there are three aspects in which they may be looked upon. First of all, the aspect of the rights of the states as such states, as entities having powers free and untrammelled, not only in all matters which have not been exclusively delegated to the provincial governments, but also having the right as states by their representation in the states council [Senate with equal powers] ... to express a free and untrammelled opinion in gross matters of policy and legislation ...
No matter how we frame this constitution, concurrent jurisdiction will undoubtedly arise in some form or other, and the states by their representatives in the states council ought to have a free and untrammelled power of saying whether or not in this concurrent legislation the matters should be legislated upon by federal or state legislatures ... Then there is another aspect of the case. The words states rights, I presume, are large enough to include the interests of the states, and it is quite clear that many occasions may arise in which if the federal council of the states were not allowed to alter money bills the larger states which were represented by a numerical majority in the house of representatives might seriously imperil the interests of the other states.[21]

For Baker the interests of the states were of paramount importance and the position of the Senate should be reinforced to secure the support of the small states.

If they are limited in their powers, not only by the curtailment of these powers, but also by the fact that the best men would not seek seats in the Senate ... how could we suppose that such a body could hold its own against [the other] branch ... unless they do obtain that safeguard I am afraid that the chances of their entering upon this federal union are remote.[22]

Baker's argument for rights is underpinned by a conception of the social contract not only at the stage of formation but crucially as a *continuing* bargain.[23] The reiteration of this argument paid no heed to the immediate past history of the United States as this explanation of the federal system had been advanced in Philadelphia and since then it has been considered ambiguous. The free and independent state notionally maintained the right to veto repugnant actions and arguably preserved the right to withdraw at will from the compact. The arguments of principle, concerning the notion of a free independent state entering a compact through ceding certain rights, had been

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[19] 1891, 111.

[20] This matter is explored further in Chapter seven.

[21] 1891, 113.

[22] 1891, 114.

[23] Locke *Second Treatise* #97, "And thus every man, by consenting with others to make one body politic under one government, puts himself under an obligation to everyone of that society to submit to the determination of the majority, and to be concluded by it."

finally crushed in 1865 by military and judicial force.[24] As Bryce said, the result had decided.

Apart from Baker, other delegates at the 1891 Convention spoke about surrendering and retaining powers. The following exchange between a Tasmanian and a Victorian is exemplary as it typifies both the language which was adopted and the counterposition of large states against small.

Mr Bird: But it does seem to me that they [large Colonies] are more ready to surrender certain state rights, and privileges, and powers, than are the delegates of the smaller colonies who have spoken, and certainly they are more willing to surrender them than I, as a representative among others of the small colony of Tasmania, am prepared to do.

Mr Munro: We are not willing to surrender one state right that the hon. member is not willing to surrender![25]

Later in the debate, when the Convention was in committee debating the powers of the Senate, John Cockburn from South Australia, contributed a statement about his understanding of federal theory. In associating a divided polity with the preservation of liberty he was invoking the language and arguments both of Madison in *Federalist* 10 and American Antifederalist thought.

I would like to know since what time have centralization and democracy been associated? Those who advocate state rights advocate local government, under whose shadow alone democracy can exist.[26]

Cockburn was using language which had been deployed by the opponents of the new American federal government in 1787 and he was also relying on the argument for a division between two governments which Madison had developed. Cockburn, however, substituted "democracy" for "liberty". This argument had been used by the Americans against British tyranny and, in this original form, it was anomalous in the Australian Conventions. The "Australian-Britons" were extravagantly loyal in their sentiments and declarations. Cockburn was inadvertently entering into republican arguments which had been advanced in the American states against the British Government. Cockburn's words were an echo of criticisms of tyrannical British rule over the distant American colonies and, had this been more explicit, it would have been a position which would have been denied with vehemence by his fellow delegates. Given his

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[24] Craven correctly identified the problem of states coming together in a state of nature as different from a colonial dependence. While notionally the American states were free the Australian colonies were subject to a metropolitan power. Craven did not develop this argument or explore the conception that the Australians had of their own condition. He regards this as being a matter of jurisprudence. *Secession: The Ultimate States' Right* (1986), 62-81. See also Luther Martin in Farrand 1787, I, 329.

[25] 1891, 117.

[26] 1891, 707.

own stated views, the regular protestations of loyalty to the Crown and the understanding that delegates had of the place of the Colonies within the Empire, Cockburn could not have been referring consciously to the British Parliament when he said:

> I maintain that a central government, just inasmuch as it never can be associated with the power of the people, is inseparably associated with tyranny, arising either from ignorance or design.

The separation in the Australian debates of tyranny and liberty from federation is a crucial point and one which differentiates the Australian federal tradition from that of the American even at this early stage.[27] The theory of federal government, in the United States axiomatically entailed the separation of factions as Madison explained in *Federalist* 10. The rationale of the federal system was to ensure that tyranny was denied through structural organization as liberty was the watchword of the revolution and the Constitution. In Australia, the federal system was justified on different terms which entailed democracy and the representation of states.

Cockburn was arguing for a strong Senate and he had adopted American Anti-Federalist *and* republican rhetoric. He was anxious to defend the principles of states' rights from those delegates from New South Wales and Victoria who were majoritarian liberals. He argued that states' rights was not necessarily a conservative doctrine. On the question of slavery he stressed that "for once the states' rights men happened to be wrong".[28] Cockburn went on to erroneously associate nationalists with monarchists in the American debates but nevertheless interest in the American system shows one of the principal differences of the terms of debate. In Australia, there was a separation of federalism from republicanism and the latter was almost entirely absent, whereas in the American debate, the two were inextricably mixed as is clear in the pages of *The Federalist*. Cockburn continued:

> It was in the name of state rights, when the question of the Constitution of America was being discussed, that the most fervent appeals to liberty that ever stirred the human breast were made, and all those opposed to state rights were the conservatives, the monarchists of that time...
> I maintain that unless the state rights are in every way maintained - unless buttresses are placed to enable them to stand up against the constant drawing towards centralisation - no federation can ever take root in Australia. It will not be a federation at all. It will be from the very start a centralisation, a unification, which, instead of being a guardian of the liberty of the people, will be its most distinct tyrant, and eventually will overcome it.[29]

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[27] Madison is attributed with the brilliant strategy of linking a federal solution to republican defects in the state constitutions. "Focussing on the new regime's republican character, the federationists diverted potentially dangerous discussion from the fragile intersectional accords and complicated federal machinery on which their hopes for the union were premised". Peter S. Onuf, "Reflections on the Founding" (1989), 357.

[28] 1891, 713.

[29] 1891, 707-8.

Cockburn's "impassioned harangue", as Deakin later called it, was directed at giving the power to the Senate to veto money bills "in-detail". This was a measure which Cockburn thought would prevent the centralizing tendency of federal systems, which hitherto characterized "the whole history of federation in America".[30] Deakin, in reply, attacked Cockburn's historical judgement and gave an account of American history which was intended to show that although states' rights was an important issue its influence was wholly baleful. For Deakin, federations should be protected from such extremism.[31]

Deakin and Cockburn presented similarities and differences in their respective political positions. Both were progressively liberal, but they expressed different and opposing opinions about the meaning of states' rights because the former represented a large colony and the latter, a small one. The division of small and large colonies was the most obvious and most widely discussed line of cleavage between the delegates to the Federal Conventions and the differences between them turned most explicitly upon the meaning of states' rights. In order to understand the origins of such an important aspect of the Australian Federation debates, and the continuing tension between states' rights and federal power, the context of the influential doctrine of states' rights needs to be elaborated. The legacy of the American states' rights arguments is difficult to over-emphasize in the Australian debates so the development of the doctrine is explored here in two parts with an emphasis on the tension or contradictions that were produced in federal theory. The first part traces the origin of the doctrine in the Philadelphia Convention; the second part is concerned with the evolution of the argument from the Ratification period through to the nullification campaign of the 1820s and to the Civil War when the doctrine was discredited.

THE AMERICAN DEBATE AND THE ORIGINS OF STATES' RIGHTS

Social Contract and Federal Compact

The states' rights doctrine was derived from ideas about natural rights and the social contract. Locke's nostrum of the free and independent actor entering into political society in a contractual bond with others has profoundly influenced American theories of government and states' rights theory. The hegemonic theory of the state of nature

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[30] 1891, 707.
[31] 1891, 82.

and of the contract provided the Americans, and indirectly the Australians, with an analogy and a mode of thinking about federal systems. The "state of nature", "natural rights" and "contractual relationships" formed the basis of Locke's theories of government and they underpinned the theoretical rationale of the federal system developed in Philadelphia and transferred to Australia.[32] Although, it should be added, this inheritance was be part of that republican legacy which the Australians so despised. Nonetheless, uncoupling republicanism from federalism was not a simple case of unhooking the links, and inevitably republican arguments were carried into the formation of the Constitution as Cockburn's speech discussed above indicates. So, the ideas which Locke expressed in *The Second Treatise* have an association with Australian federal thought. Locke wrote:

> Whosoever therefore out of a state of nature unite into a community, must be understood to give up all the power necessary to the ends for which they unite into society to the majority of the community, unless they expressly agreed in any number greater than the majority.* And ... that which begins and actually constitutes any political society is nothing but the consent of any number of freemen capable of a majority to unite and incorporate into such a society. And this is that, and that only, which did or could give beginning to any lawful government in the world.[33]

The mixture of these contractarian principles melded easily into a construction of federalism. The Pennsylvania Constitution of 1776 was a precursor to the Constitution of 1787 which, as Gordon Wood's citation of sources in *The Creation of the American Republic* has shown, was steeped in social contract theory. Wood quoted from Paine and contemporary journals that:

> The Constitution seemed in fact to be the basis of society itself - "the *charter* or *compact* of the whole people, and the LIMITATION of all *legislative* and *executive* powers." There actually seemed to be in one writer's mind two distinct stages involved in the constitution-making process. First, a special delegation of the people must form a "Social Compact" which "should be unalterable in every point, except by a delegation of the same kind of that which originally framed it, appointed for that purpose." But then "what should be done after this compact is finally agreed upon?" Another charter, "a *charter* of *delegation*" was needed, which would be a "clear and full description of the quantity and degree of power and authority, with which the

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[32] Martyn P. Thompson has argued that "there was no such thing as the social contract theory to which writers made more or less adequate appeal" and certainly Locke did not at the time bestride the field as scholars have since suggested. Thompson in following the work of Pocock identifies a tradition of language which developed and argues that no single author can be attributed with originating ideas but rather languages develop. Thompson shows that there were three types of social contract theory which were developing simultaneously, he calls them: contractual, philosophic, and integrated. The type of contract which is being discussed here is closest to Thompson's contractual type. Martyn P. Thompson, *Ideas of Contract in English Political Thought in the Age of John Locke* (1987), 5. Also Thad. W Tate "The Social Contract in America" *William and Mary Quarterly* 22 (1965).

[33] Locke, *Second Treatise* #99 *The stipulation of "majority" can also of course be extended to allow for a federal majority of states and people, as well as a simple majority of eligible electors. Thus the majoritarian tradition, which was often counterposed to federal thought, does not necessarily enter at this stage.

society vests the persons intrusted with the powers of society, whether civil or military, legislative, executive or judicial."[34]

Protection from tyranny was afforded, in the first instance, by granting only limited powers to the ruler or to the state government.[35] Those powers, so granted, were to be separated, as Montesquieu ordered, between the three branches of government. By then dividing powers between levels of government, in a federal arrangement, life, liberty and property were further protected.[36] Once this was achieved, the states, like the people of the states, assumed a constitutional personality, and as such they retained rights. Lockean liberalism had provided the ideal justification for combining property with liberty in early American Federation. The American federal Constitution was thus constructed as a defence against absolutism, in the liberty of the republic, and a defence against communism, in the liberty of property. So, in their contract, the people only ceded certain powers to the ruler whilst maintaining their republican sovereignty. Through this conceptualization of the social formation an easy understanding of federal government was possible.

Just as the origin of society was found under this formulation so was the origin of the federation. The sovereign individual (or state) ceded certain limited rights to the sovereign (or central government) and retained other rights which either were not (or could not) be ceded. Those rights (which were supposedly natural) were retained by the individual (or state) and could not be trammelled by an extension of authority as that was itself an invasion, which freed the subject from the obligations of the contract, thus rendering it void.[37]

As Dunning argued in 1898, the logical extension of the theory of contract to federal government was secession.[38] Under contract reasoning, the states ceded certain rights to the general government whilst maintaining both sovereignty and the implicit right to withdraw from the compact. If Locke's argument is extended to the case of the federal compact then judgement of the line of division between rights ceded to the centre and those retained by states could be determined by the original contractor, not an

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[34] Wood, 284 This formulation of the two stages is adopted by Gough in *The Social Contract*: 1-7. For a critique of this formulation see Thompson: 8-9. See also Peters, *The Massachusetts Constitution of 1780* (1980)

[35] Madison explained this in *Federalist* 10

[36] 1787 Farrand I, 134-6.

[37] See also Madison in 1787 Farrand I, 314-5.

[38] The ambiguity of Locke on revolution is mirrored in federalism. William Dunning, the Professor of History at Columbia University at the time of the Australian Federation debates, put a sophisticated and lucid argument about the paradoxes of the American Constitution and recognized the theoretical conundrum that a "state had no right to secede and the federal government had no right to prevent it from seceding". William A. Dunning "The Constitution of the United States in Civil War" *Essays on the Civil War and Reconstruction* (1898), 4 ff.

extraneous neutral authority.[39] Thus Calhoun argued for a state Convention (in 1830) to determine the question of nullification rather than rely on the Senate or accept the jurisdiction of the Supreme Court. Likewise the intent of the Australian states' rights advocates was to deliberately establish the Senate specifically as a states' house, in order to judge the scope of legislation and patrol the line of demarcation. This point will be developed later in the chapter on the Senate

The Contract in Philadelphia

In Philadelphia, the notion of federation as a free and conditional contract was promoted by the delegates from the small states. Once they realized that the Articles of Confederation were to be overturned and that the New Jersey plan, which was promoted as a defensive strategy, would not succeed in the face of the Virginia plan, they searched for an alternative defence. The Virginia plan was a bold attempt by Madison and Randolph to force the Convention to adopt a more centralised plan of government than the Articles of Confederation. This ploy caught the delegates from the small states by surprise. The legitimacy of this action was a matter of contention as delegates from some states argued that it was outside their competence to vary the terms of the Articles of Confederation.[40] In substance, the Virginia plan was intended to supplant the confederal notion of state equality with a different *national* principle of equality. Equal representation in the national forum was to be replaced with national representation by *population* in *both* chambers of the new legislature.

The issue of representation was not here the basic point of contention, it was merely a manifestation of the principle on which the nation was to be organized. In other words, the issue in question was whether the new nation was to be constituted by states or by people. The New Jersey plan, as noted, was promoted as a protective action to defend the confederal principle of equality by maintaining equality of representation in *both* chambers. The great compromise acceded to by the large states was to allow equal representation in the Senate, thus establishing a feature of the federal principle which was later assumed by the Australian framers to be axiomatic.[41]

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[39] Locke is not clear on where the subject can withdraw from the contract as in #99 he says that they unite for the purposes of the contract. Is this binding? When is revolution possible? As Tuck wrote, "Locke's theory of obligation is notoriously loose." *Natural Rights Theories*, 169.

[40] In Australia some likewise argued this Victorian Parliamentary Debates, 1890, 326 & 510.

[41] Strong of Massachusetts said: If the two houses "should be established on different principles, contentions would prevail and there would never be a concurrence in necessary measures." 1787 Farrand I, 515.

While delegates from the small states emphatically pursued the contractarian basis of federalism, the large states' nationalists were reluctant to allow such an understanding to become entrenched. John Lansing of New York and Luther Martin of Maryland were opponents of the Constitution from early in the Convention and both developed states' rights arguments throughout the ratification campaign. For Lansing, the Virginia Plan would "distroy" (sic) the "sovereignty of the states".

N.York would never have concurred in sending deputies to the convention, if she had supposed the deliberations were to turn on a consolidation of the States and a National Government.[42]

Similarly, Luther Martin voiced opposition to the methods and possible outcome of the Convention by relying on contractarian arguments of ceded sovereignty and pre-existing rights.

Mr Martin said he considered that the separation from G.B. placed the 13 states in a state of nature towards each other; that they would have remained in that state till this time, but for the confederation; that they entered into the confederation on the footing of equality; that they met now to amend it on the same footing, and that he could never accede to a plan that would introduce an inequality and lay 10 states at the mercy of Va, Massts and Penna.[43]

While they were still committed to the Virginia plan Madison and Wilson were fearful of the likelihood, as they believed, of the states dominating the central government. They appeared to be reluctant to grant the principle that the Union was an extension of the social contract. Madison did not deny the virtue of the contractual explanation of social formation, however, he argued that to extend the principle to the organization of the Republic was not an appropriate argument as it was in the character of a compact to allow majority rule to prevail over minority interests which was undesirable. Alternatively an agreement which allowed any party to consider the treaty (compact) void, if any article were breached, was too fragile to be useful.[44]

we are not to consider the federal Union as analogous to the social compact of individuals; for if it were so, a majority would have the right to bind the rest, and even to form a new Constitution for the whole, which the Gentn from N. Jersey* would be the last to admit. If we consider the federal union as analogous not to the (social) compacts among individual men but to the conventions among individual States. What is the doctrine resulting from these conventions? Clearly, according to the Expositors of the law of Nations, that a breach of any one article, by any one party leaves all the other parties at liberty, to consider the whole convention as dissolved, unless they choose rather to compel the delinquent party to repair the breech.[45]

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[42] 1787 Farrand I, 249.

[43] 1787 Farrand I, 324 (& 437). Also IV, 215 for a statement of confederation as a compact.

[44] Madison attacked Patterson's plan which was explicitly based on the contract. 1787 Farrand, I, 314 & 318.

[45] 1787 Farrand I, 315. *The gentleman from New Jersey, William Patterson, was a small state opponent of Madison and Randolph and proposed the New Jersey plan in response to the centralized Virginia plan.

Madison argued that the Articles of Confederation failed on both counts mentioned in this quotation. The two explanations of Union, as the extension of the compact or as a treaty, were flawed. However, Madison and Wilson both failed to provide a foundational alternative rationale for the formation of the Union. After weakening the social compact argument Madison rather limply recorded his view that,

> He did not wish to draw any rigid inference from these observations. He thought it proper however that the true nature of the existing confederacy should be investigated, and he was not anxious to strengthen the foundations on which it stands.

Wilson, like Madison, was critical of the compact thesis in the Philadelphia Convention and the Pennsylvania State Convention, but he could not produce a cogent alternative to the compact theory.[46] He denied the compact:

> "The convention, no doubt, thought they were framing 'a contract'"! I cannot answer for what every member thought; but I believe it cannot be said that they thought that they were making a contract because I cannot discover the least trace of a compact in that system ... The State governments make a bargain with one another; that is the doctrine that is endeavoured to be established by gentlemen in opposition; their State sovereignties wish to be represented! But far other were the ideas of this convention, and far other are those conveyed in the system itself.[47]

Madison and Wilson endeavoured to develop alternative ideas yet, in challenging the compact theory they failed to produce another cogent explanation. A powerful argument would be needed to shift the paradigm of the contract.[48] Meanwhile, the activities of the opponents, to whom Wilson referred, were directed entirely toward maintaining arguments for the sovereignty of the states. The Anti-Federalists, led by Patrick Henry, Melancthon Smith, and the pamphleteers like *Brutus* and *Agrippa*, emphatically stressed the contractual nature of the federation, which gave a theoretical primacy to the retention of sovereignty as the states ceded certain specific powers and kept the rest. This position was also later adopted by Jefferson.

Agreement within the Convention on the wording of the Constitution was, in two senses, only a partial completion of the process of constitutional formation. The subsequent task for the states was to consider the draft in Conventions in order to propose amendments and to accord it legal sanction. Completion of the constitutional draft, in this second sense, was conceptual and problematic, as the Constitution had to be vested with *meaning*. Formulating words, which can be agreed upon in Convention did not, in this case, equate with an agreement on the meaning of the Constitution. If meaning is to be discerned then the question arises of the intention of which of the several factions of

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[46] 1787 Farrand I, 166 & III, 166.

[47] 1787 Farrand III 166, 11 Dec 1787. On 24 November, Wilson had spoken of united people "under one great political compact" III, 140.

[48] 1787 Farrand I, 180 & 356.

framers gave the *true* meaning. The assumption that the framers were an undifferentiated mob, with a common intention, is obviously faulty as the disputes and divisions are obviously apparent. So, once the draft was finished, was the interpretation of James Wilson, Alexander Hamilton or even James Madison necessarily any better than that of their opponents John Lansing or Luther Martin? The alternative interpretations which were propounded, however, have been accorded a hierarchy in American history. Madison, in Philadelphia, is preferred over Luther Martin as a reliable interpreter of the meaning of the Constitution. If Madison is accorded a more privileged position then Bryce's statement, that the result decides, which is close to the argument of Thrasymachus in *The Republic* that "justice is the will of the stronger", seems to have historical force.[49] This also accords with the dictum that the winners write history.

One who was not a winner was John C. Calhoun, the rogue constitutionalist, who argued from principles which had been developed by the Anti-Federalists in the period prior to the adoption of the Bill of Rights. Their arguments which were initially sustained by the Jeffersonians, with only a brief hiatus during the war with England, were continued more emphatically by the Southern States' advocates as exemplified by Calhoun.[50] Since the defeat of the South in 1865, a *national* interpretation of the Constitution became enforced by successive administrations, the courts, and the army. Yet, while confederal arguments and refrains about proper federal government have largely disappeared there is still a hangover of the former conception which is contained in rhetoric about "rights" and "balance".

FROM RATIFICATION TO NULLIFICATION TO CIVIL WAR

The struggle over the Constitution in the period between the ratification campaign and the Civil War was one of establishing an orthodoxy of meaning.[51] The Nationalists, in maintaining the primacy of the national power, argued that the Union, whilst composed of the states and people, was a larger entity in its own right. Whereas the states' rights advocates were fearful of the likelihood of the national authority abusing its proper powers and were committed to the idea of the Constitution as a union

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[49] Plato, *The Republic* F.M. Cornforth ed (1961), 14 ff.

[50] A. O. Spain, *The Political Theory of John C. Calhoun* (1968) 15-31.

[51] The problem of meaning was noted by Calhoun in a letter to Governor Hamilton: "the formation and adoption of the Constitution are events so recent, and all the connected facts so fully attested that it would seem impossible that there should be the least uncertainty in relation to them; and yet, judging by what is constantly heard and seen, there are few subjects on which public opinion is more confused." *John C. Calhoun* M. Coit ed. (1970), 36-37.

of states for only certain purposes. The states would be sovereign in all other matters. Or, as Calhoun argued, the people never ceded sovereignty, they only ceded powers to the government. The issue of sovereignty, and primacy of authority, were raised even prior to the close of the Philadelphia Convention once it became clear that the new model of federalism was to be adopted. The Anti-Federalists, who began their campaign during the Philadelphia Convention, were primarily responsible for forcing the adoption of the Bill of Rights, which was only necessary because of the departure from what they regarded as "true" federalism.[52] Luther Martin exemplified the opposition to the new Constitution because he argued that if the Constitution was truly federal (in the old meaning) a Bill of Rights would not be necessary.

> With respect to the bill of rights, had the government been formed upon principles truly federal, as I wished it, legislating over and acting upon the states only in their collective or political capacity and not on individuals, there would have been no need for a bill of rights, as far as related to the rights of individuals, but only as to the rights of states. But ... it renders a recognition and a stipulation in favour of the rights of both states and of men, not only proper, but in my opinion absolutely necessary ...
> The more the system advanced the more was I impressed with the necessity of not merely attempting to secure a few rights, but of digesting and forming a complete bill of rights, including those of states and of individuals, which should be assented to, and prefixed to the Constitution to serve as a barrier between the general government and the respective states and their citizens ... I devoted a part of my time to actually preparing and draughting such a bill of rights, and had it in readiness before I left the Convention ...
> I most sacredly believe their object is the total abolition and destruction of all state governments, and the erection on their ruins of one great and extensive empire.[53]

Martin's fears were echoed by many of the Anti-Federalists, including several other delegates to Philadelphia, among them Yates and Lansing (who had left the Convention in protest) as well as Elbridge Gerry, and George Mason, who withheld their signatures from the final draft. Whereas Edmund Randolph, who penned the Virginia plan (with Madison) and sponsored it in the Convention, refused to sign the draft Constitution believing that it was not national enough. Of the ten amendments to the Constitution, which comprise the Bill of Rights, only the tenth narrowly deals with federal/state relations. The remainder were within Martin's category of limitations on the tyrannical power of the general government and they owed much to the pre-existing state Bills of Rights which prescribed the limit of powers ceded in the contract. Article 10 established the reserve powers of the states, in that those powers not specifically granted to the central government were reserved to the states.[54]

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[52] See Lansing & Yates to Governor Clinton in *Elliot's Debates* I, 516-518.

[53] A.T. Mason *The States' Rights Debate: Antifederalism and the Constitution* (1964), 112-3.

[54] See Wilson's famous statehouse speech of 4 October 1787. H. Storing *The Complete Antifederalist* 7 vols (1981) I, 65. Charles A Lofgren, "The Origins of the Tenth Amendment: History, Sovereignty and the Problem of Constitutional Intention", in R. N. K. Collins ed. *Constitutional Government in America* (1980).

Article 10 states: "The powers not delegated to the United States by the Constitution, nor prohibited by it to the states are reserved to the states or the people."

The tenth amendment was adopted in the United States belatedly to try to ensure that the powers of the central government would not expand at the expense of the states. Interestingly this concern was not based on the prediction of the creep of federal power but on the expectation of unforeseen circumstances which could allow for extraneous influences to give the centre more power. This suggests that the framers of the Constitution of the United States were confident that the division of power, so arranged, would be inert. The discrete division was thus assumed.

Publius maintained that the division was not a problem but Madison's personal position markedly changed between 1787 and 1798. He was a committed nationalist on the floor of the Convention because he feared that the central government would not be able to sustain itself against the states. From this position he became, initially, a diplomatic advocate for compromise both in negotiating the final Constitution and as main author of *The Federalist*. Later he moved again to become, with Jefferson, a firm opponent of what he saw as the centralizing tendency of the federal government.

The Virginia and Kentucky Resolutions

In response to the Alien and Sedition Acts passed by the Congress, which were taken by the states to be a breach of federal principles, Madison drafted the Virginia Resolutions in 1798 and Jefferson drafted the Kentucky Resolutions in 1798-9. Madison, as a reconstructed advocate of states' rights, wrote a long treatise of explanation about the resolutions. In contrast to the confidant assertions he had made in *Federalist* 39, Madison later expressed fears not only about the end of federal government but of republicanism also.

> That the General Assembly both also express its deep regret, that a spirit has, in sundry instances, been manifested by the federal government to enlarge its powers by forced constructions of the constitutional charter which defines them; and that indications have appeared of a design to expound certain general phrases (which have been copied from a very limited grant of powers in the former Articles of Confederation, were the less liable to be misconstrued) so as to destroy the meaning and effect of the particular enumeration which necessarily explains and limits the general phrases, and so as to consolidate the states, by degrees, into one sovereignty, the obvious tendency and inevitable result of which would be, to transform the present republican system of the United States into an absolute, or at best mixed monarchy. ... [the Assembly] views the powers of the Federal Government as resulting from the compact, to which the States are parties; as limited by the plain sense and intention of the instrument constituting that compact; as no further valid than they are authorized by the grants enumerated in that compact; and that in case of a deliberate, palpable and dangerous exercise of other powers not granted by the said compact, the States who are parties thereto have the

right, and are in duty bound, to interpose for arresting the progress of evil, and for maintaining within their respective limits, the authorities, rights and liberties appertaining to them.[55]

Jefferson's resolutions were similar. He emphasized the essentially limited powers granted to the central government:

that words meant by that instrument to be subsidiary only to the execution of the limited powers, ought not to be so construed themselves to give unlimited powers, nor a part to be taken as to destroy the whole residue of the instrument.[56]

Madison and Jefferson, two of the luminaries of the early Republic, were here wrestling with the problem of maintaining a common (or correct) interpretation, in order to preserve notions of the best outcome (in terms of liberty, republicanism or federalism). Madison's shifting commitment to the federal framework is witness to this.

The Virginia and Kentucky Resolutions seem to be plans born of a sense of impotence against what had already become structural tendencies of the Congress and the Executive to alter the line of the division of power. Madison and Jefferson were concerned about the erosion of "liberty" and the concentration of power. The possibility of retaining a common view of true federalism was thus already shown to be impossible. The institutionalization of different views was a consequence of the uncertain location of final authority within the structures. The American framers were attempting to create a plurality to avoid tyranny. The result, however, meant that there was an absence of a recognized hierarchy. In searching for authority the question must arise about which of the institutions of the Republic was the final arbiter. Was it one of the three branches of government, the second tier of the states, or that abstraction - the "general will"?

To compound this problem of authority, the states were divided against themselves; east against west, north against south, large against small. While the "general will" was often invoked it was of course impossible to consult. So, all these parts of government provided for a different view of how the system should work, according to perceived interests.[57] Theoretically, it was impossible to reconcile these differences if the system was to work as an equal division between people and states. If the divided and separated polity allowed each part (the states and the nation, as well as the legislature, executive and judiciary) to be equal and "balanced" then a problem of primacy arises if the views of all or any of the constituent parts are in conflict. No

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55 *Elliot's Debates* IV: 528. See for explanation 550-554.

56 *Elliot's Debates* IV: 542.

57 J. Miller "The Ghostly Body Politic: *The Federalist* Papers and Popular Sovereignty" *Political Theory* 16, 1, (1988), 99-119.

hierarchy of interpretation can be established if all interpretations are in conflict and any one can be ordained as true. This problem can be overcome, in part, with the invention of the Convention of judicial review wherein one branch is given interpretative authority. This solution will only work if it is universally recognized.

Calhoun on Sovereignty

Calhoun was to uncover this problem later when he denied the Supreme Court the right to determine policy in the principle known as "interdiction". When all opinions were deemed to be equal, and if the Court was denied the right to decide on behalf of all parties, then the matter of valid interpretation of the Constitution was open to all. No claim to true interpretation was any more legitimate than any other and the parties so effected could decide for themselves. This occurred in the case of the South Carolina Convention which was called to determine the view held by the representatives of that state on the meaning of the Constitution. This problem is also applicable to Locke's notion of sovereignty, as the aggrieved party had the right to judge infractions and to withdraw from the contract.[58]

Whilst at the level of the separation of powers the arrangement of the three arms of government contained provisions for the reconciliation of conflict which would give a clear result; the mechanism of the veto and the overriding congressional majority allowed for that. No such mechanism, however, existed at the place where federal and state powers were to come into contact. The doctrine of the division of powers allowed for no clear determination of outcome if the Court was not recognized. In theory the clear line of demarcation which the Federalists insisted upon was supposed to be a solution to the problem. A federation based on people and states necessarily prevented the primacy of one over the other. A "gentlemen's agreement" or "Britannic good sense" assumed a coincidence of understanding, which in turn was given expression by the Court, and was taken to resolve conflict. But once the Court was challenged, as was done by Calhoun, in favour of a state Convention to interpret the meaning of the Constitution, then the federal structure as it was supposedly generally understood started to collapse.

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[58] Franklin credits George Lawson with work of "the deepest treatment of this subject in his century". He was neglected and Locke took up the theory of dissolution, popularized it and "held fast to his position". Julian H Franklin *John Locke and the Theory of Sovereignty: Mixed Monarchy and the Right of Resistance in the Political Thought of the English Revolution.* (1978), ix-x.

The Nullification campaign proceeded not by overturning or denouncing the Constitution but by interpreting it "truly". In their defence against President Jackson and the Nationalists, the Nullifiers adopted Madison as one of their champions and the Virginia Resolutions as a weapon.

> The true nature of the Federal Constitution, therefore, is (in the language of Mr Madison) "a compact to which the states are parties" - a compact by which each state, acting in its sovereign capacity, has entered into an agreement with the other states, by which they have consented that certain designated powers shall be exercised by the United States in the manner prescribed in the instrument. Nothing can be clearer than that, under which such a system, the federal government, exercising strictly delegated powers, can have no right to act beyond the pale of its authority, and that all such acts are void. A state, on the contrary retaining all powers not expressly given away, may lawfully act in all cases where she has not voluntarily imposed restriction on herself. Here, then, is a case of a compact between sovereign; and the question arises, what is the remedy for a clear resolution of the parties?[59]

Hayne has here reiterated the arguments of Calhoun and John Taylor and invoked the language of Locke and the name of Madison. The compact, or contract, was the basis of government and those rights not explicitly ceded to the general government were reserved to the contracting party - the states; they could not be infringed. The right of the contracting party to resist the encroachment follows logically and elegantly.

> And here the plain, obvious dictate of common sense is in strict conformity with the understanding of mankind and the practice of all nations in the analogous cases. - "that where resort can be had to no common superior the parties to the compact must themselves be the rightful judges whether the bargain had been pursued or violates (Madison Report p 20) ... I also for the grant of such a power. I call upon the gentleman to show me in the Constitution. It is not to be found there. But if there be no common superior, it results, from the very nature of things, that the parties must be their own judges. This is admitted to be the case where treaties are formed between independent nations, and if the same rule does not apply to the federal compact, it must be because the federal power is superior to the state government, or because the states have surrendered their sovereignty. Neither branch of this proposition can be maintained for a moment.[60]

For the states' rights advocates this was ineffable logic. Such an argument, in the service of threatened economic interests, became a deeply held moral conviction. The argument was based on the conception of federalism as a social contract, which Madison and Wilson had denied both in the Convention and in the Ratification debates. They had, however, been unable to replace it with an alternative formulation as the basis of Union. The Southern States could maintain this argument with the rectitude of moral certainty because their position was one derived from a logic of interpretation of the principles of the Constitution. They were not adopting arguments ulterior to the Constitution, nor were they trying to erect and sustain an alternative constitutional form. Part of the strength of the Southern case was that a *revolutionary* moral order

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[59] Hayne in *Elliot's Debates* IV, 509. Senator Robert Young Hayne was South Carolina's spokesman on Nullification.

[60] *Elliot's Debates* IV, 509-10.

was not invoked, rather a conservative *correct* reading was the justification. The social contract, when breached by an attempted extension of powers of the central government beyond its proper sphere, was rendered void. Thus the right of secession was guaranteed as the sovereign party to the contract withdrew support. This reasoning was based on Calhoun's argument that sovereignty was not divided but resided in the people of the states.[61]

Sovereignty, consent, and rights, when argued in these terms, were understood as as building blocks of the Constitution which, as they were put together, so could be taken apart. Secession remained not only a right but the final proof of the contractarian nature of the Union. For Calhoun, as a principal theorist for the cause of the Southern States, nullification and secession were moral and legal rights which were expressed on behalf of the states, not by him immediately, but by the champions James Madison and Thomas Jefferson.

As shown by A. O. Spain, a biographer of Calhoun, the old man Madison denied that he had sanctioned the course pursued by the Southern States. In reply to this, Calhoun argued that both sets of resolutions were much more than merely a right of remonstrance against federal powers and to sustain this position in defence of the sovereignty of states he reached deep into the Convention debates:

> It was believed, even by the most distinguished members of the national party, that the former [the federal government] had no right to enforce its measures against the latter, [the states] where they disagreed as to the extent of their respective powers - without some express provision to that effect; while the refusal of the Convention to adopt any such provision proves equally conclusively that it was opposed to the delegation of such powers to the government, or any of its departments, legislative, executive, or judicial in any form whatever.[62]

Calhoun, following Taylor and Jefferson, had developed his case by arguing the "if - then" proposition of the Aristotelean syllogism. By beginning with a premise, which was orthodox and accepted, the conclusion must logically follow. He took the proposition, in a defence of the economic interests of the Southern States, to its most extreme point - secession. This, as the unavoidable logical conclusion of the accepted initial premises, was acknowledged by Bryce in 1888 and Dunning in 1898. If Civil War necessarily followed secession then the Southerners saw that to be the unfortunate consequences of the flawed logic of their opponents. They believed that society was formed by the free association of individuals who ceded certain rights to a ruler while maintaining their own sovereignty. If national governments were formed by the people

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[61] A. Betsor "The American Civil War as Constitutional Crisis" *American History Review* 64, 2 (1964): 327-352.

[62] Spain, 204.

of the states coming together to cede limited powers for specific purposes, which entailed the right to participate in decision-making and the right to withdraw from the compact when power or trust was abused, then this formulation of association entailed, at its heart, the right of secession. Secession was not peripheral or ulterior to the compact indeed it constituted, in part, the terms of that compact.

Calhoun and others argued on behalf of the Southern states that this was the true and historical understanding of the origin of the federal compact and the theory of social formation. If federalism was based on some other notion or theory which was not explained in contractual terms and not based on the cession of certain limited powers for specific purposes, then the onus of responsibility and proof lay upon others to demonstrate this: sovereignty, they maintained, was not ceded. The defence of sovereignty in the Civil War was not, in these terms, a "heresy" but central to federal theory. Lincoln argued differently. He asserted that the Constitution was not divisible and not composed of separate sovereignties.

Lincoln on Contract and the Union

At the outbreak of war, Lincoln undertook a reinterpretation of the theory of the formation of the federation and he suggested that those who had previously joined in debate were mistaken in their "real" and "conceptual" understanding of the basis of the Union. His "Message to Congress in Special Session" of 4 July 1861 was an attempt to undermine the explanation of the federal system as a contractual relationship. Lincoln had to deny the logic of Hayne's argument which was that if the states were free to unite and to maintain control over the terms of the cession of powers to the centre then they retained state rights and, crucially, the right to withdraw. Lincoln sought to argue that this was a misunderstanding of both history and theory. The difficulty for him was that, although in the Conventions Madison and Wilson had questioned the contractual basis of Union, this had nonetheless been the almost exclusive metaphor of the federal system: the federal union was indeed understood in this way. To argue persuasively that a novel interpretation of the system was true would entail an abandonment by "the people" of this previously held paradigm. Lincoln had to legitimate the use of force to preserve the Union so he characterized the Southern States as revolutionaries when they presented themselves as conservative protectors of the true federal bond. Lincoln said:

> It might seem, at first thought to be of little difference whether the present movement at the South be called "secession" or "rebellion". The movers, however, well understand the difference. At the beginning, they knew they could never raise their treason to any respectable magnitude,

by any name which implies *violation* of law. They knew their people possessed as much of moral sense, as much devotion to law and order and as much pride in, and reverence for, the history, and government, of their common country, as any other civilized, and patriotic people. They knew they could make no advancement directly in the teeth of these strong and noble sentiments. Accordingly they commenced by an insidious debauching of the public mind. They invented an ingenious sophism, which, if conceded, was followed by perfectly logical steps, through all the incidents, to the complete destruction of the Union. The sophism itself is, that any state of the Union may, *consistently* with the national Constitution, and therefore *lawfully* and *peacefully*, withdraw from the Union, without the consent of the Union, or of any other state. The little disguise that the supposed right is to be exercised only for just cause, themselves to be the sole judge of its justice, is too thin to merit any notice.

Lincoln was here attempting to dismiss one of the key points of objection as being too slight to be worthy of discussion. The right to interpret the meaning of the constitutional settlement was central to Calhoun's argument as it was central to Locke's right of remonstrance against the tyranny of the absolutist. The rhetorical flourish with which Lincoln disposed of this was clearly a strategy to allow him to develop his argument for the pre-existence of a binding union.

With rebellion thus sugar-coated, they have been drugging the public mind of their section for more than thirty years; and, until at length, they have brought many good men to a willingness to take up arms against the government of the day *after* some assemblage of men have enacted the farcical pretence of taking their State out of the Union, who could have been brought to no such thing the day *before*.

This sophism derives much - perhaps the whole - of its currency, from the assumption, that there is some omnipotent, and sacred supremacy, pertaining to a *State* - to each State of our Federal Union. Our states have neither more nor less power, than that reserved to them, in the Union, by the Constitution - no one of them ever having been a State *out* of the Union. The original ones passed into the Union even *before* they cast off their British colonial dependence; and the new ones each came into the Union directly from a condition of dependence, excepting Texas. And even Texas, in its temporary independence, was never designated a State. The new ones only took the designation of States, on coming into the Union, while that name was first adopted for the old ones, in, and by, the Declaration of Independence. Therein the "United Colonies" were declared to be "Free and Independent States"; but, even then, the object plainly was not to declare their independence of *one another*, or even of the *Union*; but directly the contrary, as their mutual pledge, and their mutual action, before, at the time and afterwards, abundantly show. The express plighting of faith, by each and all of the original thirteen, in the Articles of Confederation, two years later, that the Union shall be perpetual is most conclusive. Having never been States, either in substance, or in *name*, outside the Union, whence this magical omnipotence of "State rights," asserting a claim of power to lawfully destroy the Union itself? Much is said about the "sovereignty" of the States; but the word, even, is not in the national Constitution; nor as is believed in any of the State constitutions.

In denying the factual and conceptual existence of the states as ever being the condition of a state of nature with each other, Lincoln was arguing for the position that they were creatures of the bigger union not anterior to it.

What is a "sovereignty", in the political sense of the term? Would it be far wrong to define it "A political community, without a political superior"? Tested by this, no one of our States, except Texas, ever was a sovereignty. And even Texas gave up the character on coming into the Union; by which act, she acknowledged the Constitution of the United States, and the laws and treaties of the United States made in pursuance of the Constitution, to be, for her, the supreme law of the land. The States have their *status* IN the Union, and they have no other *legal status*. If they break from this, they can only do so against the law, and by revolution. The Union, and not themselves separately, procured their independence and their liberty. By conquest, or purchase, the Union gave each of them, whatever independence, and liberty, it has. The Union

is older than any of the States; and, in fact, it created them as States. Originally, some dependent colonies made the Union; and, in turn, the Union threw off their old dependence, for them, and made them States, such as they are. Not one of them ever had a State constitution, independent of the Union. Of course, it is not forgotten that all the new States framed their constitutions, before they entered the Union; nevertheless, dependent upon, and preparatory to, coming into the Union.

In dismissing the pre-existence of the states as mature, fully seized political entities, he was here attempting to undermine the contract as the genesis of the Union and to install a conception of the states as creations of the nascent national Constitution.

Unquestionably the States have the powers, and rights, reserved to them in, and by the National Constitution; but among these, surely, are not included all conceivable powers, however mischievous, or destructive; but, at most, such only, as were known in the world, at the time, as governmental powers; and certainly, a power to destroy the government itself, had never been known as a governmental - as merely administrative power. This relative matter of National power, and State rights, as principle, is no other than the principle of *generality*, and *locality*. Whatever concerns the whole, should be confided to the whole - to the general government; while, whatever concerns *only* the State, should be left exclusively, to the State. This is all there is of original principle about it. Whether the National Constitution, in defining boundaries between the two, had applied the principle with exact accuracy, is not to be questioned. We are all bound by that defining, without question.
What is now combatted, is the position that *secession* is consistent with the Constitution - is *lawful*, and *peaceful*. It is not contended that there is any express law for it; and nothing should ever be implied as law, which leads to unjust, or absurd consequences.[63]

Lincoln had no objection to the division of powers, as a balance between the spheres of government, but he attempted to deny the contract as a *continuing* bargain between separate states and the Union as those governments simultaneously created each other.

STATES' RIGHTS AND THE AUSTRALIAN CONTEXT

The Australian readers of Bryce, who feared the new central power, may have been disheartened by a story that he told, which carried a perhaps unintended metaphorical tale. He related the story of a young student at Harvard University who was baptized into "Calhounism" in the time when states' rights was a "watchword" in the South. At the outbreak of the war the student left Harvard joined the Army and rose through the ranks to become a commander in the field. The cause of the Confederacy was seemingly exemplified in his fate as Brigadier-General States Rights Gist was killed fighting for the doctrine after which he had been named.[64]

Bryce and other contemporary writers identified the problem of federalism after the war as being that of limiting the rate of advance of central power in the wake of

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[63] Lincoln, *Collected Works*, R.P. Basler ed. vol 4, 421-441.
[64] Bryce II, 15.

military victory and judicial enforcement, whilst attempting a simultaneous conceptual return to a pre-war (or really pre-1830) understanding of the federal system in balance. Prior to the war the powers of the central government and those of the sovereign states had not been brought into contradiction and latent antagonisms were obscured. Re-establishing this balance after the war was a difficult political and theoretical manoeuvre. The Australian framers, with the exception of Isaacs and Higgins, largely ignored the ramifications of the Civil War or did not grasp its significance for federal theory.[65]

The entire discussion of federalism within the debates was characterized by an understanding of federalism as a compact in which conflict was to be reconciled through good institutional design and, where that failed, Britannic good sense and overriding loyalty would provide a solution.[66] Thus the Civil War was explained away as an anomaly and not as a consequence of "true" federalism which would not have allowed it to occur. Henry Adams' cry of despair in 1861 that "Our system of Government is a failure" was probably unknown to the Australians and the work of writers like Dunning may have not been widely accessible, so Bryce's interpretation stood unchallenged.

For Quick and Garran, the complexity of the compact was not at issue. In their exposition on the term "Indissoluble" they wrote:

> The omission from the Constitution of the United States of an express declaration of the permanence and indestructibility of the Union led to the promulgation of the disastrous doctrines of nullification and secession, which were not finally exploded until the Civil War ... The Kentucky and Virginia Resolutions, drafted by Jefferson (1798), and adopted by the Legislatures of those States, in protest against the Alien and Sedition Laws passed by the Federal Congress, contained the germ of the fatal and insidious contention that the Union was merely a compact among the States; that the States severally had the right to resist any breach of the compact, and to pronounce that a Legislative Act of the Federal Congress in excess of its powers, and encroaching on the rights of the States, was a nullity to be followed, if necessary, by resistance, revolution, and bloodshed.
> This political heresy was afterwards (1832-33) elaborated by Hayne and Calhoun, both in their debates with Danial Webster, and in a series of addresses formulating their views of the relations which the States and the general Government bore each other.[67]

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[65] Quick and Garran, 526-7; Victorian Parliamentary Debates, 1890, 335. See Deakin's weak reply, 514.

[66] 1891, 98. "British Communities have been in the habit of solving difficulties sometimes by anomalous means", also, 94. The belief in the innate sense of the British is at odds with what Diggins has argued became the American acceptance of Machiavelli and Hobbes; that justice and society can only be maintained through institutional design rather than human goodness. The demise of virtue is shown in *The Federalist*. The Australian veneration of British good sense is here a continuation of civic virtue with patrician notions of limited democracy and good breeding.

[67] Quick and Garran, 292.

In this passage Quick and Garran have, it seems, committed a fraudulent act of omission and a minor deception. Jefferson drafted the Kentucky Resolutions, but it was Madison, the author of the revered *Federalist*, who wrote the Virginia Resolutions. Why would Quick and Garran imply that Jefferson wrote both when he did not? This would not seem to be merely a careless omission. To write that the path of true federal development would be known by Madison in 1788, but not a few years later, was a position which was illogical and difficult to defend. That the principle author of the most influential text of federal theory also penned a tract which contained the "germ of a fatal and insidious contention" which led to a "heresy" begged questions about what was to be understood as "proper" federalism. Seemingly the safer course was to deny this authorship.

The minor deception was to dismiss the arguments of Calhoun as simply "heretical". Quick and Garran were writing not only a guide to constitutional law but also a text which was necessarily steeped in political theory. The book conveyed ideas about their preferences and assumptions about the proper modes of organization of the State. Calhoun presented something of a problem for "true" federalism so the easier course was to dismiss both Hayne and he as heretics and deny the contractual basis of Federation which was adhered to by so many of the delegates, including Baker. If compact was not the basis of federation according to Quick and Garran then they, like Madison and Wilson in 1788, did not promote an alternative persuasive formulation.

The Contract in Summary

This chapter has intended to show the connection between social contract theory of the free association of autonomous individuals and the theory of federal union. Central to this is the problem of the proper range of sovereign action and the rights of the constituent parts within the compact. If the central government over-reaches what was deemed to be its 'proper sphere' of action then, unless federalism can be theoretically justified in a way *other* than as a contract, the doctrine of states' rights is undermined. The metaphorical explanations of the federal system as a set of "spheres" or as a contrived "balance" is patently an imagined construct without force; the Presidents, Jackson and Lincoln, allegedly overrode the proper sphere and, in the Australian case, the Senate failed to act to protect the line of demarcation. In both of these cases the states could not enforce their will through the very feature of the federal design which was intended to afford them effective protection. The doctrine of states' rights therefore is exposed as merely a theoretical conceit, or fetish, rather than as a

coherent and defensible principle of action. That "states' rights" and the "federal balance" retain a currency, often potent, in Australian politics is beside the point, as these phrases are indeed commonly deployed, but if the federal structure is simply a device to *regulate* the rate of change rather than as a bulwark *against* change, then the argument advanced variously by Dicey, Laski, Greenwood and Luther Martin - that the federal system is inherently unstable and liable evolve into an effective central government with only cosmetic federal features - is persuasive.[68]

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[68] A.V. Dicey *The Law of the Constitution* (1885); G. Greenwood *The Future of Australian Federalism* (1976); H. Laski "The Obsolescence of Federalism" *New Republic* 3 May 1939, 367-369. The centralizing tendency cannot be assumed to be a general rule as Canada is recognized as moving in the opposite direction with a dispersal of central power to the provinces.

CHAPTER FOUR

THE SENATE AND STATE PROTECTION

This chapter is concerned with elucidating the arguments which the Australian framers used in creating the Senate and with demonstrating the manifest influence of American federal ideas on the framing of that feature of the Australian Constitution. This chapter is not intended to be a close study of the minutia and changing details of the debate over the provisions governing the Senate; the procedure of that debate was convoluted, intricate and very extensive. The concern here is with the general principles which were involved with the creation of the Senate and the intentions of the framers in regard to its place within the federal system. As the major issue of debate over federation there was an exhausting argument and much repetition about the Senate. The involved negotiations over powers and modes of organization show how carefully and how stubbornly the contending parties dealt with the issues. The unfolding of that debate is of course crucial to the final outcome, but it is the intention of this chapter to show the conflicting conceptions of federation and democracy and how the perceived self interest of the various delegations shaped the outcome. It is not the foremost intention of the chapter to paraphrase or delineate the particular stages of development, nor is it a study of that problematic relationship between responsible government and federalism which is at the centre of the Australian Constitution.[1]

The chapter is organized as follows: some initial remarks introduce the general background to the Senate; then the question of the Upper House, as it was dealt with in the Philadelphia Convention, is considered; following this section is an account of the development of the Senate in the Australian debates in 1891 and 1897-8, with particular attention to the financial powers, democratic forms and the problem of the resolution of deadlocks between the houses. The broad purpose of the chapter is to show that the Australian framers understood the Senate to be an active and powerful defender of states' rights.

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[1] B. Galligan, "The Founders' Design and Intentions Regarding Responsible Government" in Weller and Jaensch eds *Responsible Government in Australia* (1980). B. Galligan & J. Warden, "The Design of the Senate" in G. Craven, ed. *The Convention Debates 1891-1898 Commentaries, Indices and Guide*, VI, (1986), 89-112.

THE SENATE IN THE UNITED STATES AND AUSTRALIA

Those who framed the Australian Constitution were concerned with what Madison called "the sources from which the ordinary powers of government are to be derived".[2] He posed a basic political question: how was government legitimated? In the American states, as in Australia, the justification provided for the organization of the legislature and for its exercise of power was democratic. The right to empower government was expressed in the language of consent and on the implicit basis that the acquiescence of the masses had been secured through the contract. The new polity was based on a combination of popular democracy and federal democracy which allowed for the creation of two houses organized on different principles. Madison explained that the Constitution of the United States was a combination; the House of Representatives derived its powers from the people of the nation as a whole which gave the Constitution a national character, whereas, the Senate allowed for the equal representation of states and provided a federal character. He explained that the Senate "will derive its powers from the states, as political and co-equal societies; and these will be represented on the principle of equality".[3]

The Australian framers constructed the Senate, or "states' house" as it was initially called, as the central institution of the federal arrangement. The design was based on the American legislature. Delegations from the small states in particular expressed fears about the potential power of the central government and the Senate was intended to be the institution which would provide protection and representation for the states. Argument over the powers and composition of the Senate came to dominate the debates from early in 1891 and it is contended in this chapter that the other controversial issues which the Conventions confronted were considered in relation to this general question. This proposition can be supported by recognizing that, with relative ease, the framers deliberately left some of the more vexatious issues to be decided by the the new Parliament. The small states were secure in the knowledge that the Senate would prevent the large states in the House of Representatives from impinging upon their perceived rights. Important questions concerning the High Court, rivers, the franchise, railways, and the original lion in the path, the tariff, were troublesome, but representatives of the colonies were sufficiently confident in the power that had been

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[2] *Federalist* 39: 193.
[3] *Federalist* 39: 193-4.

vested in their states' house to allow these matters to be left to be fully resolved after federation.[4]

According to the Parkes Resolutions, in "order to establish and secure an enduring foundation for the structure of a federal government" a second chamber was imperative. The majority of delegates from the small states combined with conservatives from the large states to create a house which was in keeping with their understanding of federal theory; it was to be equal in power with the House of Representatives, or at least nearly equal. The question over just what constituted equality was, however, disputed throughout the decade.

The Australian framers were faced with conditions similar to their American counterparts and, following their debates, resorted to almost identical arguments. The Australians held assumptions about what were persistently referred to as "true" or "proper" federal arrangements and they attributed these essential truths to that American legacy.[5] While the arguments which were used in the Australian Conventions were prefigured in Philadelphia there were significant differences in the ideas behind the Senate and its attributed role. For the Americans, the explicit basis of a defence of the states was to be through the division of powers. The other matters of equality of representation and the powers of the Senate were only established as hard fought compromises. These characteristics of the Senate were not spoken of in Philadelphia as the fundamental devices of protection which the Australian framers perceived to be the case. The federal features, which Australian framers took to be axiomatic, were fiercely disputed and often unhappily accepted in the American debates. In the United States, the line of protection was understood to be the division of powers whereas in Australia the Senate was thought of as the primary line of defence against federal encroachment.[6]

The development of the Senate from the first conference in 1890 to the final settlement showed that the arguments over the defence of its mode of organization shifted from Westminster orthodoxies, about a check on hasty legislation, to more sophisticated arguments about the federal role of state representation as a different, but legitimate, democratic form. Accompanying the shifting argument was a change in the

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[4] Restrictions concerning important issues were written into the Constitution such as s 100 on Rivers and ss 101-4 on Railways. Limitations on the taxation power s 51 (ii) & (iii) and s 99 indicate that not all issues were left to the protection of the Senate.

[5] Gordon Lloyd, "Let Justice be our Guide: A Reconsideration of 'True Federalism' at the Constitutional Convention", *Political Science Reviewer*, 17 (1987), 139-174.

[6] Deakin was again in a minority when he said in 1891 that, "most states' rights ... can be guarded by the division of powers between the central government and, the local government." 1891, 383.

organization of the Senate from an indirectly elected, but effectively nominated chamber on the existing American model, to a much stronger democratic house with direct election. The democratic basis gave a legitimacy which an indirectly elected or nominated chamber could not enjoy, even if vested with considerable formal constitutional powers. While upper houses often won disputes with the popular house, over time, the authority of the undemocratic chamber was eroded. When the Federation debates were taking place it was still the case that the United States Senate was elected by the legislatures of the states. The United States Senate was not to became directly elected until 1914. As this institution was the key to federation, and the American Senate was the model they agreed was proper, it is necessary to begin in Philadelphia in order to identify important features of the Australian Senate.

THE SENATE AND THE PHILADELPHIA CONVENTION.

This section is concerned with the arguments and plans which were deployed in the Philadelphia Convention to shape the American Senate. The Australian Senate was based on the design of the American Senate so an exploration of the formation of that institution provides an insight into the origins of the Australian Parliament. The argument pursued here is that the American framers were relying upon the division of powers as the line of protection for the states whereas the Australian framers assumed that the American Senate was specifically designed to protect the states according to the principle of equal state representation. This principle was not axiomatic to the American Union and was only adopted as a compromise over the grant of powers to other institutions, notably the office of the Executive. Out of the arguments used to defend the Virginia plan and the New Jersey plan emerged a set of compromises which established the Senate.

The Senate in Philadelphia

The perceived failures of the American confederal system caused the delegations from the several states to meet in Philadelphia to alter the Articles of Confederation. According to Edmund Randolph, of the Virginia delegation, they were meeting in a crisis and out of the "necessity of preventing the fulfilment of the prophecies of the American downfal" (sic).[7] Randolph was about to introduce to the Convention a plan for a new Constitution which was a radical transformation of the existing American

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[7] 1787 Farrand I, 18.

system. In revising the federal system, which was supposedly the purpose of the Convention, Randolph introduced the Virginia plan.[8] The plan provided *inter alia* for a national legislature to consist of two branches chosen by proportional representation. The right of suffrage in both branches of "the National Legislature ought to be proportioned to the Quotas of contribution, or to the number of free inhabitants".[9] The members of the first branch should be elected by the people, and the members of the second branch ought to be elected by the members of the first branch from a list of nominations provided by the state legislatures. Each branch would have the right to originate acts and the national legislature would be empowered to negative those acts of the state legislatures which contravened the articles of Union. Furthermore it could "call forth force" against any member which failed to "fulfil its duty".[10]

The Virginia plan was a major departure from the Articles of Confederation and some delegates argued that such a revision was outside the competence of the Convention.[11] Patterson from New Jersey, who led the counter-attack to the Virginia Plan, said of the Articles of Confederation that, "We ought to keep within its limits, or we should be charged by our constituents with usurpation ... We have no power to go beyond the federal scheme, and if we had the people are not ripe for any other."[12] Patterson, among other small states delegates, had deep concerns about the alteration of the form of representation. It was a departure from that which they understood to be a federal form to a national form; from equal to proportional representation. The prospect of proportional representation was, for Patterson, a strike at "the existence of the lesser states".[13] According to him, the states should be represented equally. He made what was to be an oft heard claim, that the small states would never agree to the new arrangement. He argued by analogy that if the rates on the property of A were 40 times that of B, then should A have 40 times as many votes? For Patterson, "such a principle would never be admitted". The consequences of such an arrangement would be that "the small states would have every thing to fear". He instead remained committed to the existing federal system whereby the people chose their state representatives who in turn chose the federal representatives.

By the following week Patterson prepared and presented a number of resolutions to the Convention which became known as the New Jersey plan. As the leader of an informal

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[8] The Virginia plan was actually drafted by Madison.
[9] 1787 Farrand I, 20.
[10] 1787 Farrand I, 21.
[11] The delegates from Delaware according to their instructions were "prohibited from changing the Articles of Confederation". 1787 Farrand, I, 4
[12] 1787 Farrand I, 178.
[13] 1787 Farrand I, 177.

By the following week Patterson prepared and presented a number of resolutions to the Convention which became known as the New Jersey plan. As the leader of an informal faction of small states delegations, Patterson sought to wrest the initiative from the Virginia delegation and reinstate "federal" principles. He told the Convention that several delegations wished this plan to be "substituted in place of that proposed by Mr Randolph".[14] The New Jersey plan allowed for the revision, correction and enlargement of the Articles of Confederation including the empowerment of the United States in a Congress, the creation of an executive and a judiciary and it also allowed for the power to raise revenue. As the plan did not specify a mode of creating a legislature it thereby allowed the perpetuation of the existing arrangements of equal representation; this was Patterson's primary intention on behalf of the small state delegations.

So the provisions of the respective plans concerning the creation of the legislature were contradictory. The large states, led by Virginia, were advocating proportional representation in the two houses and the small state delegations favoured the continuation of the existing arrangement of one house in which states were equally represented.[15] In the outcome, the New Jersey plan was rejected after four days debate and the Virginia plan was recommitted which, however, still left the Convention in deadlock over the matter of representation.[16]

Madison summarized the problem facing the Convention. For him, "The great difficulty lies in the affair of Representation; and if this could be adjusted, all others would be surmountable".[17] As was the experience in the Australian debates a century later, some problems were taken to be of crucial importance and they absorbed a large proportion of the debates. Much time was spent in reiterating the same points as different speakers sought to sway the Convention by argument or by apparent weight of numbers. To satisfy the contending large state and small state delegations the "Grand Committee" was convened to find an acceptable solution. The Grand Committee proposed the "Great Compromise" which allowed for representation in the first branch to be calculated in terms of one member for each 40,000 inhabitants of each original state.[18] Each state containing less than that number was to be allowed one member.[19]

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[14] 1787 Farrand I, 242.

[15] 1787 Farrand I, 251.

[16] 1787 Farrand I, 313.

[17] 1787 Farrand I, 321.

[18] Max Farrand noted that "the great compromise had been claimed by different men". Bancroft in his *History of the Formation of the Constitution* (1881), I, ch 9, gave credit to the Connecticut delegation, but Farrand thought that no single delegate or particular group was responsible other than the small states in general. *The Framing of the Constitution of the United States* (1913), 106-7. The calculation for the number of inhabitants of the states was

The composition of the second branch was provided for by allowing each state to have an equal vote.[20] Furthermore, provision was made for the financial powers of each branch. Bills raising and appropriating revenue and for fixing salaries of officers of the Government of the United States were to originate in the House of Representatives and were not to be amended by the Senate. Monies could only be drawn from the treasury through appropriations which originated in the lower house.[21]

The framers were trying to find their way through problematic arguments. The state delegations understood themselves to be meeting as equals to debate their relationship. In Patterson's words, "A confederacy supposes sovereignty in the members composing it and sovereignty supposes equality."[22] The new arrangements threatened that formulation and according to the small states delegates the integrity of the states themselves was at stake. Through an acceptance of the combination the contracting parties (the states and the people of the states) were considered of equal importance and on this understanding it should follow that the houses would be of *equal* power. An inequality was, however, admitted as the Convention voted to give the House of Representatives sole authority over financial matters.

The Senate and Finance

The draft Constitution which was presented to the Convention contained the same financial provisions as recommended to the drafting committee which was known as the "committee of detail". Article IV Section 5 allowed for the House of Representatives only to originate and amend financial bills. The United States Constitution, however, as it was finally adopted by the Convention was different in that it allowed for the amendment of all bills; this was a power ultimately denied to the Australian Senate. Article 1 Section 7 of the United States Constitution provides that:

> All Bills for raising Revenue shall originate in the House of Representatives; but the Senate may propose or concur with Amendments as on other Bills.

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according to the number of free men (not women) plus the so called "Federal ratio" by which slaves were to be calculated as three-fifths of a free man.

[19] 1787 Farrand, I, 524.

[20] Farrand has pointed out that the compromise was the agreement to allow equal representation; it was not to allow equal representation in return for proportional representation. He stresses that the large states relented. (1913), 91-112.

[21] 1787 Farrand I, 524.

[22] 1787 Farrand I, 178.

The change is significant as the United States Senate was given a potent spoiling power and a century later the Australian framers argued persistently over just this point.

Why was this change made in Philadelphia? When the provision was debated in the Convention as a "committee of the whole" the delegates were divided over whether the House of Representatives should have exclusive power over finance. Mason argued that the provision was part of the compromise and should be left intact. Madison "was for striking it out".[23] At this time he considered it of no advantage to larger states as well as being a fetter on the government and as a "source of injurious altercations between the two houses". By seven votes to four the clause was struck out, but the next day Randolph gave notice of his intention to move to reconsider the vote and return the sole power of financial control to the House of Representatives.[24] The following week Randolph moved to reinstate Article IV section 5 but lost again by four votes to seven.

Wilson, Elseworth and Madison said that the power to originate money bills was of no advantage to the larger states and reiterated the point that: "It might be a dangerous source of contention between the two houses".[25] Benjamin Franklin agreed with Randolph in thinking that the power to originate money bills was connected to the compromise over equal representation. Wilson defended the honour of the large states in their intentions by pointing out that two of the large states, Pennsylvania and Virginia, had uniformly voted against the sole empowerment of the House of Representatives concerning money bills.[26] This issue which divided state delegations was, with numerous others, referred for determination to the "committee of eleven" (one representative from each state). The committee reported on 5 September but the section referring to power over money bills was immediately postponed by the Convention. Three days later the clause was taken up and without much apparent dispute was amended with the form of words used in the Constitution of Massachusetts.[27] The final form of words was settled upon which gave the House of Representatives the sole power of origination, "but the senate may propose or concur with amendments as in other bills".

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[23] 1787 Farrand II, 224.
[24] 1787 Farrand II, 230.
[25] 1787 Farrand II, 233.
[26] 1787 Farrand II, 234.
[27] 1787 Farrand II, 552. Paul C. Reardon, "The Massachusetts Constitution Marks a Milestone" *Publius* 12, 1, (1982), 45-56.

The settlement on money bills was arrived at seemingly for two reasons: firstly, because of a dispute between large and small states over a matter of "right" and, secondly, out of concern that the objective of creating a proper balance would served by giving to the Senate some control over finance.

Balance and the Senate

The Americans, more than their Australian counterparts, were intent upon creating a model of government which was an harmonious balance wherein the powerful institutions could check each other in the interests of protecting "Liberty". The division and separation of power was, as indicated earlier, necessary to prevent "Tyranny". Thus the alteration to the Senate's power of amendment was made not only because of the dispute over national or federal representation but also over a compromise on the mode of electing the President. This last condition was of course one which could not apply in the Australian situation once the responsible government system was adopted.

The perpetual concern over tyranny led delegates to wish to balance all features of the Constitution and prevent factions aligning. Pinckney argued that the mode of electing the President potentially gave the Senate power to make the President a "mere creature of that body".[28] Rutledge similarly was much opposed to the plan as, "It would throw the whole power into the Senate".[29] Debate ensued over the next two days as many methods of overcoming this problem were proposed. The issue was settled as a compromise was reached to give the House of Representatives the right to vote for the President if the popular votes failed to produce a majority and, seemingly, in order to retain the intricate notional balance it allowed the Senate to retain the right to amend money bills.[30] As the Americans were intent on "balance" the empowerment of the Senate should thus be seen in the context of its relationship to other features of the American settlement and not as an objective proper arrangement, but part of an entire mechanism. So this crucial power, which was of such concern to the Australian framers, was not granted to the Senate out of a perceived need to create a powerful states' house, but as part of the response to establishing a clear division of powers between the levels of government and to create a balance between the three

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[28] 1787 Farrand II, 500-1 & 497-8. Madison argued that the arrangement to select the President would allow the Senate to choose 19 times out of 20. The arrangement was that if no candidate achieved an outright majority of votes from the members of the House of Representatives then the Senate would be empowered to make the selection.

[29] 1787 Farrand II, 511. Also see Mason at, 512.

[30] 1787 Farrand II, 528-9. Also see Madison's defence of Senate power, III, 148, 266 & 317-8.

great arms. The objective powers of the Senate were not essential to a preconceived notion of a proper federal system. The Australians who later mistakenly argued this were separating the debate over the Senate from the intellectual context within which the Americans were working and which was so important to their central concern with Liberty and Tyranny.

THE AUSTRALIAN DEBATES

The Australian framers in copying the American federal arrangements, argued that proportional representation in the House of Representatives and equal representation in the Senate, together with the powers over money bills, were axiomatic to a true federal system (Higgins again excepted). The Canadian model which did not conform in these respects, amongst others, was not a true or proper federation. Argument over the arrangement of the houses was the great central issue of the Australian Federation debates and, as Madison said of the American experience, it was the subject of "tedious and reiterated discussion" as the delegates tried to work through the all issues and possible implications.

The discussion in the Conventions over the organization of the houses was a rare instance in Australia of a set piece debate directly focussed on democratic formations. The movement for the universal franchise, the removal of property qualifications for candidates, the payment of representatives and the representation of working class interests in Parliament coincided, in Australia, with the decade of the Federation debates. Liberal principles were sometimes in stark contrast with conservative ideals when those who were the radicals of the Conventions were arguing for liberal-democratic rights.

Long standing disputes between the houses of the Colonial Parliaments, over money in particular, had provided familiar modes of argument about their relationship.[31] While the respective Legislative Councils had been defended on the basis of propertied right and with an open hostility to democracy, the Senate could be defended ostensibly on another set of principles, but with the same variety of

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[31] The Victorian delegates were seen by others as being particularly sensitive about the democratic question of money bills because of the experience in that colony. Deakin had written a tract on the disputes of 1879-81. A. Deakin *The Crisis in Victorian Politics 1879-81: A Personal Retrospect* (1957). The Tasmanians were seen as defending the power of upper houses because of the similar experience in that colony. The South Australians had worked out the problem in the so called 'Compromise of 1858' which was an instructive model for the Convention and for state parliaments which were later reformed.

for majority rule. Benthamite, Chartist and Fabian principles of democratic form were argued against patrician landed interest.[32]

The Senate was of crucial importance to the framers. Its role was central to the assumptions which were held about the way the federal system was going to work. The Senate was intended to work as a states' house. The delegates who were worried about the power of the new Commonwealth had sat through the Convention debates alert to any major, or minor, or even possible threat to the integrity of the states and most delegates believed that senators would behave similarly after federation. Its importance was such that other features of the federal system were mainly constructed around the projected powers and expected behaviour of the Senate. The relative brevity of debate over the particular terms of the division of powers and over the judicial review function of the High Court can be explained in this context. The self protection of the states could be guaranteed because any legislation which compromised their interests would be emphatically defeated by senators voting together to protect those interests.

The next two sections of this chapter concern the general arguments about the federal system with reference to the central place of the Senate in the Australian debates. The first section deals with the very substantial discussion which took place in the 1891 Convention over the general role of the states' house. The next section then focuses on the different issues which were raised in the second Convention. The discussion which took place in 1897-8 was similar in broad terms to the earlier debate, but with important differences. These new concerns were manifested in the organization of the Senate which was finally settled upon in 1898. Questions of the democratic base of the Senate and provisions to deal with deadlock were departures from the earlier determination on that chamber which was intended to be the protector of the states.

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[32] A selection of the arguments against federation which show elements of these traditions are contained in H. Anderson ed. *Tocsin: Radical Arguments against Federation 1897-1900* (1977). The influence of Bentham in Australian political thought has been alluded to in many works. This tradition has been elaborated most fully by Hugh Collins, "Political Ideology in Australia: The Distinctiveness of a Benthamite Society" *Australia; The Daedalus Symposium* S. Graubard ed. (1985).

THE SENATE IN 1891

The structure and role of the Senate

The first Convention was dominated by debate over the Senate rather than debate over the tariff which was expected to be the "lion in the path". The question concerning powers to be granted to the Senate over money supplies was troubling. The Sydney Convention of 1891 produced a draft Constitution which provided for a Senate which was to be composed of eight members from each state who were to be "directly chosen by the Houses of Parliament of the several states". Each senator was to have one vote and serve for a term of six years. While the Commonwealth would be empowered to prescribe "a uniform manner of choosing the Senators" it was left to the state legislatures to determine the time, place and manner of choosing senators. The Senate was to be divided into two classes so that half may be chosen every third year. Eligibility for the Senate was fixed at the minimum of thirty years of age.[33] The House of Representatives would have sole power to impose taxation and raise revenue. Section 55 of the draft Constitution provided that the Senate "shall have equal power with the House of Representatives in respect of all proposed laws except laws imposing taxation" and appropriating revenue; these measures were to be referred to as "supplies for the ordinary annual services of Government". The Senate could affirm or reject, but not amend, such measures, however, "at any stage" a Bill could be returned "to the House of Representatives with a message requesting the omission or amendment of any items or provisions therein".[34] This message system became a major source of dispute.

So the main features of the Senate, as constructed by the 1891 Convention were; firstly, that it was not directly elected by the people but by the parliaments of the states and, secondly, that it would have equal power with the House of Representatives over all legislation except money bills to which it could, however, suggest amendments by message. There was no provision made for the dissolution of the Senate or the resolution of deadlocks, nor was a nexus established between the size of the houses.

That the formation of the Senate was one of the most keenly contested issues of the Federation debates is belied somewhat by the relative fixity of opinion throughout the debates on its role. This was the case notwithstanding the widely differing organizational arrangements which were proposed. As suggested earlier, the arguments in defence of the Senate changed from the well known Westminster

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[33] The report of Proceedings of the 1891 Convention carries a copy of the draft Constitution, 946.
[34] Draft Constitution, (1891), 954.

justification of, "mature second opinion" and "time for deliberation", to the federal arguments, proposed initially by Madison, which allowed for a different sort of democratic principle. These arguments altered the justification propounded for the Senate but not the opinion of what would be its role.

In 1891, Parkes opened the debate on the Senate with an orthodox statement about the need for mature judgement:

> What I mean is an upper chamber, call it what you may, which shall have within itself the only conservatism possible in a democracy - the conservatism of maturity of judgement, of distinction of service, of length of experience, and weight of character - which are the only qualities we can expect to collect and bring into one body in a community young and inexperienced as Australia is.[35]

Parkes was here making a claim about the expected character of the Senate which was reminiscent of de Tocqueville's report of the American Senate. For de Tocqueville, the Senate of the United States was a place of sober mature judgement where the very best men met. Compared with the rabble who occupied the House of Representatives it was a place of wise men.[36] Implicit in Parkes' comments was the contemporary and commonly expressed opinion that somehow upper houses (whether the United States Senate, the House of Lords or Colonial Legislative Councils) had an essential quality which gave them distinction and wisdom. They were emblematic of proper behaviour and were devoid of the crass self-interest and materialism of the ordinary popular chambers.

This patrician sentiment pervaded the debates over the Senate and, when combined with the claims for federal representation, it provided a potent argument against the liberal democrats who favoured majoritarian democratic forms. In his brief introductory remark on the houses of parliament, Parkes acknowledged the irresistible force of democratic claims. By 1891 the foundation of the Senate had to be justified on a democratic basis even if the mode of election was not to be directly democratic. The Senate, as a place of distinction, maturity and character, allowed the maintenance of the essential characteristics of conservatism through content rather than form. The chamber was to be elected by whatever means were appropriate and, unlike the Canadian Senate, it was not to be a nominated body; even if the distinction between indirect election and nomination was indeed slight. The conventional arguments that the chamber was to act as a brake on haste, ill considered legislation, and passion,

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[35] 1891, 26.

[36] Alexis deTocqueville, *Democracy in America*, (1848) Henry Reeve ed, (1945). In chapter 15, deTocqueville developed the argument about the consequences of majority rule and the check which ought to be imposed on this form.

were deployed and its integrity and effectiveness was to be sustained through the democratic source from which it derived its power.

Sir Samuel Griffith identified the essentials of federation. He stressed for all hon. gentlemen the need to appreciate the proposition which was "the key to the whole of what follows". Griffith used the,

> language of one of the writers of those admirable papers which we have all read, written for the purpose of inducing the American States and the state of New York in particular, to adopt the federal constitution of America - that every law submitted to the federal parliament shall receive the assent of the majority of the people, and also the assent of the majority of the states.[37]

He said that the Senate ought to have equal representation, that members should retire periodically, and that it should be incapable of dissolution. With his usual perspicacity Griffith identified the problem of the contradiction between the supposedly co-ordinate houses possessing different powers. Griffith's argument was identical to that pursued in Philadelphia a century before, but there was a problem. If *The Federalist* version of the formulation of the federal system was correct and true, how then was a difference of opinion between the houses to be resolved? If a proposed law was to have the assent of the people and the states then which should take primacy in a dispute?

The Senate and Money Bills

Griffith acknowledged that the people's house should have the right to originate bills to appropriate revenue. Certainly, in the case of the House of Lords and colonial Legislative Councils, there was no question that they should control over revenue as those houses only represented part of the people. In a federal system, Griffith argued, although one house was to have primacy in the origination of money bills, the other house should have the right of veto. But what did that right of veto entail? Griffith said,

> the least you can give to the house representing the states as states, is an absolute power of veto upon anything that the majority of the states think ought not to be adopted.[38]

He argued that they must have a power of refusing assent. The Senate "representing the states" must have the power to veto those items of expenditure of which they disapproved. Griffith argued that "uncontrolled authority over of expenditure" was

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[37] 1891, 31.
[38] 1891, 32.

inimical to a proper federal arrangement.[39] The best solution to his mind was to follow the American system of giving the houses nearly equal powers. The "history of America for 100 years" showed that to be the "best plan that could be derived".

Griffith had set the terms of debate, in this as is other areas, for those who followed. All delegates who addressed the plenary session of the 1891 Convention spoke about the need for the Senate to represent the views of the states and to protect them. Opinion was, however, divided on the powers which ought to be granted to the Senate over money bills and this became the major contentious issue of the Convention.

Philip Fysh, from Tasmania, was the first delegate to respond to Parkes and Griffith. Like many who followed he emphatically stated that the "great principle which must be established" was that there should be equal representation of the states in the Senate. At such an early stage when the great principles of the federal scheme were still unfamiliar. Delegates like Fysh sought to illustrate their arguments and justify the empowerment of the Senate through recourse to local and familiar examples rather than using those involving the federal principles developed in the American debate. Fysh, who had been a member of the Tasmanian Parliament for many years, was well acquainted with the activity and powers of the respective colonial Legislative Councils. He said that he would have great concerns about the prospect of denying the power of veto to the Senate either over ordinary bills or money bills. Allowing the upper houses to control financial legislation was not, for him, a grievous right as it was beneficial to the "people as a whole" because such decisions were usually taken for reasons of "prudence".[40]

Other Tasmanians, like B. S. Bird, said that the basis of the federation should be on terms "just to all the colonies".[41] He stressed his fear of the possibility of denying the Senate power over money bills or taxation. "Now, I ask with all seriousness, would a parliament formed on those lines be just to all the colonies."[42] What protection, Bird asked, would the states have?

> I take it that justice to the smaller states - and that is the thing we have to keep in mind in framing our constitution - as well as to the larger ones will necessitate that the power of veto in detail, as Sir Samuel Griffith put it, the power of veto in regard to all bills that deal with the raising or appropriation of money, shall be vested in the second chamber.[43]

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[39] 1891, 33.
[40] 1891, 44.
[41] 1891, 116.
[42] 1891, 120.
[43] 1891, 120.

Bird did not believe that the smaller states would consent to a surrender of that power.[44] He disagreed with Deakin's view that the House of Representatives should be singularly vested with the money power. He did not know why there was a fear of giving "the senate - or state council - the power to deal with money bills."[45] Brown, from Tasmania, said nothing new was likely to be said on the Senate and so said nothing. Andrew Inglis Clark spoke late and drew out some of the more difficult issues that Griffith had raised. Clark identified the most crucial problem that the Convention faced:

> The question of responsible government in connection with our federal constitution only becomes of chief importance to us in connection with the question of the distribution of powers between the two branches of the legislature.[46]

Clark agreed with Griffith that the Senate ought to have a veto-in-detail and not the power of initiation.[47] He further made the point, which so often became lost, that "deadlocks with regard to finance are more serious and more injurious than deadlocks with regard to any other subject".[48] Clark said that Wrixon and Munro from Victoria had promoted strong arguments against the proposals of jointly giving the Senate equal representation and the power of veto-in-detail. He couched his answer to them in terms of a denial of the claim that either responsible government or the British Constitution itself was founded on the principle of majority rule. Clark, the republican federalist, tried to place Munro and Wrixon, who favoured majority rule and responsible government, in a contradictory position. He argued against their majoritarian views by showing that the electoral districts both in the Australian colonies and in England remained very unequal in numbers and in the amount of representation assigned to them. For Clark, the federal system was superior and the argument that minorities could dominate the majority had no veracity. He said: "The absolute rule of the majority has never been accepted as the principle of the British constitution, nor is it the principle of representative government".[49]

Clark, like Griffith, advanced the merits of the American system which had worked well for 100 years and, he said, no case could be found in which the dispute between the houses could be traced to financial arrangements. Following Clark, another Tasmanian Ayde Douglas, summarized to his satisfaction the view that the Convention had

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[44] See below the disingenuous admission by Dobson and Henry, the hardest states' rights conservatives, that the small states would consent to the majority views of the Convention. Adelaide 1897, 168.
[45] 1891, 121.
[46] 1891, 245.
[47] 1891, 246.
[48] 1891, 246.
[49] 1891, 247.

shown that the Senate must have the same power of dealing with finance as the House of Representatives.[50] So the Tasmanian delegation, representing one of the smallest colonies, were united in their view of the role and powers of the Senate. The Western Australian delegation was united also. Other delegations were divided, however, which was an early intimation of the unlikelihood of state representatives voting together under the motivation of a supposed sole regard for their own states' interests.

The South Australians, Playford and Downer, were on opposite sides. For Playford, the need to give the Senate the power of veto-in-detail contained troubling problems for the legislature. He denied that the American system was an instructive model as it was not a responsible government system:

> You cannot carry on responsible government and give to the senate the powers it possesses in America at the present time. You cannot give the senate such powers and have at the same time a responsible executive.[51]

Downer took up Deakin's argument against the Senate and stated that the rights of the states were not to be diminished and principles would be contradicted if the Senate was not to be given the power of veto.[52] He said that the two houses should have "practically co-ordinate" jurisdiction and that the Philadelphia Convention went further than Griffith had proposed.[53] The American Senate, Downer told the Convention, did not only have the power to veto bills in-detail but it could also amend all bills including money bills. This was an instance where Downer was presenting the powers of the United States Senate as being complete and absolute in themselves rather than as derived from compromises over other features of the federal arrangement. He did not say that this was a partial compromise over the mode of appointing the Executive, which would not apply in Australia. Without such power, he assured the Convention, "the United States would not have been constituted". Furthermore: "No objection has ever been very seriously made by any large body of people . . . to the co-ordinate authority reposed in the senate".[54] Downer thought it "absolutely impossible to preserve the rights and privileges of the house representing the colonies, if the government is solely responsible to the house representing the individual electors".[55]

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[50] 1891, 296.
[51] 1891, 58.
[52] 1891, 100.
[53] 1891, 101.
[54] 1891, 101.
[55] 1891, 102.

Veto and Powers

Deakin was one of the Victorian delegation who opposed the powers granted to the Senate and he challenged the method of election.[56] "Until we have the method of election of the Senate distinctly before us we cannot tell exactly with what degree of authority it should be entrusted." He added that if it were to be elected then it would be possible and desirable to invest it with "very large authority". He did not want a replica of the Canadian upper house:

> It would be a chamber speaking with weight, and acting with authority, able to amend or reject all measures other than financial - able to absolutely reject financial measures, though not to amend them.[57]

He was concerned with trying to reconcile the contradiction of allowing both houses a veto on the other. How was a resolution to be achieved under such an arrangement? Deakin could not accept the proposition of Sir Samuel Griffith and others that the second chamber could have "the power of absolute and continuous veto upon the proposals sanctioned by the popular chamber, and sanctioned by the people".[58] As Madison asked in *Federalist* 39, so Deakin asked of the Senate: "from whom does it derive its authority?" Through a carefully constructed argument Deakin led the delegates to an important point. By repeating and following the argument of Griffith and MacIlwraith, Deakin said:

> Therefore, the whole case is narrowed down to one point ... they contend that this departure is justified because the several states are to have equal representation in the second chamber, which is to be the custodian of state rights. The second chamber is to be intrusted with a power of absolute veto, and with the power of amending all bills, because there is to be equal representation in the senate from each colony, and because the several colonies will assist to form the federal government.
>
> *Mr Fitzgerald*: And because of the weaker states, of which this will be the chief protection![59]

Deakin delivered a thoughtful and skilled argument and denounced states' rights as a false justification. His argument that the central government was only to be given limited powers was felicitous, but the soundness of this statement was not to be appreciated for several years. By the second Convention in 1897 his arguments were widely adopted and he occupied a moderate position that was closer to the centre occupied by Barton. By the second Convention Deakin was no longer seen as a radical.

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[56] 1891, 74.
[57] 1891, 75.
[58] 1891, 76.
[59] 1891, 79.

Meanwhile, in 1891, Barton delivered a speech which was ameliorative of Deakin's argument. His response to the "very brilliant speech" of Deakin was indicative of his position as a moderator of conflicting claims within both the first and second Conventions.

I take it that a senate founded upon some such basis as the Senate of the United States, not only really conserves the representation of the people, but is part of the organ by which the will of the people is expressed.

Barton's treatment of the representative principle was faithful to Madison's *Federalist* argument in that if the Senate did represent the people of the states then it should not be denied the powers over money and taxation.

If you are forming a federal constitution, and upon federal principles, you cannot kick the principle of representation out of the doors of the second chamber ... it will be, obviously as unwise as impossible at the same time to maintain a constitution resting upon goodwill, and during that time to deprive the second chamber of a veto, even in detail, upon propositions which may affect the rights, and possibly the existence of the states ... All of us are accustomed to legislative propositions in which questions of policy, questions affecting local or state interests, are so inextricably interwoven with questions of money, that to deny the power of veto in detail upon these is to prohibit the exercise of state right at all.[60]

In pursuing such an argument Barton was greatly assisting the small states and the conservatives in establishing the view that any other arrangements were anathema to proper federal government.

If you once admit the principles of the custody of state interests in a representative chamber, resting not upon mere locality, but upon the individualism of the states - representing through the states their people ... you can no more deny the right of veto in detail on questions of money and taxation than you can deny it in respect of anything else. It is clearly upon reasons of that kind that the framers of the Constitution of the United States saw they must give the power of amendment to the senate.[61]

Barton was arguing from a strong position. The view he was advancing was one with which most delegates to the Convention had sympathy. He was invoking the great authoritative American model as a defence of the Griffith proposal and implying that the Australians were going further in empowering the popular house than the Americans had done. However, Barton's interpretation of the American framers' actions is dubious. The great compromise in Philadelphia had *not* been made to explicitly vest the Senate with custody of states' rights or interests. The American framers had not argued that this was their intention. Nor was the right of amendment explicitly granted to the Senate in order to protect state interests. Rather, the division of powers was institutionalized in order to protect state interests as only those powers necessary to the national interest were to be ceded to the national government. The power of amendment was, in part, granted to the Senate as a compromise for the mode

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[60] 1891, 91.
[61] 1891, 91-2.

of electing the executive. Barton and the others, however, proposed that the Senate was created as a states' house and modelled the Australian Senate accordingly.

Richard Chaffey Baker, unlike some of the other small states delegates, was emphatic in his assertion that the Senate was not to be likened to a Legislative Council. "It is in no shape analogous to an upper house."[62] "This federation has been defined as a compound" said Baker, adopting Madison's usage which denoted a combination of federal and national features. Baker argued that senators have as much right to represent the people as members of the popular house. Again, perhaps unwittingly, paraphrasing deTocqueville:

> As a matter of fact, if you go to America, if you judge either by American writers, or by the opinions of the American people, you will find that the senate is the popular estate ... the people of the United States look up to, revere, and respect the senate more than they do the house of representatives.[63]

Mr Deakin's view, according to Baker, was "unwarranted by facts, and contradicted by experience of America". Baker was very committed to a strong Senate and not necessarily committed to responsible government. By adopting a Tocquevillian argument, about the special qualities found in the Senate, he was relying upon a tradition of reverence for elite institutions to bolster support. Baker argued trenchantly for a power of veto-in-detail. He used the example of a debate over the budget to illustrate his point. A line in the estimates, Baker claimed, could allow monopolization of postal communication by mandating that ocean steamers only berth is one or two ports; "Thus controlling trade and commerce".[64] In such a situation the Senate would be obliged to "dislocate the whole financial system by throwing out the appropriation bill, or they would have to submit to injustice". Baker then placed the Senate into the context of the framers' general understanding of the federal system.

> If they are limited in their powers, not only by the curtailment of those powers, but also by the fact that the best men would not seek seats in the senate if it were merely a recording and revising house, how could we suppose that such a body could hold its own against the branch of the legislature which has all the power, and which, if we have a responsible ministry, would also contain the ministers? I maintain that if the senate is to be constituted in the way which the hon. member, Mr Deakin, suggests, it will be a very unsafe guardian of the interests of the smaller states; but I assert that if it has equal and co-ordinate power with the house of representatives, it will not only be a safeguard, but the only safeguard which the smaller states can obtain; and unless they do obtain that safeguard, I am afraid that the chances of their entering upon this federal union are remote.[65]

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[62] 1891, 111.
[63] 1891, 112.
[64] 1891, 113.
[65] 1891, 114.

The plenary debate closed with a speech in reply by Parkes. The Convention then formed itself into a committee of the whole to debate the resolutions and to propose amendments in order to formulate instructions for the drafting committees. The resolution concerning the construction of the parliament dominated debate. This resolution was debated for longer than the remainder of the resolutions together.[66] The name of the houses fostered an initial discussion, but it was the Victorian, Henry Wrixon, who brought the committee to the substantive issues by stating that it was necessary and more important to "determine the powers of the bodies". Deakin took up the point and argued against the states' rights advocates by saying that the Senate should not be vested with with substantial powers because the states were protected by the division of powers.

> While the colonies declared most distinctly and with an emphatic voice, which has found its echo in the first resolution moved by the hon. member Sir Henry Parkes, that they would not part with their powers of local self-government on all matters with which local self-government was competent to deal. But they were prepared to part with their powers in relation to certain subjects on which they believed that the interests of each were the interests of all ... They believed that on certain special subjects there were no longer two interests - that there were no longer state interests but only national interests. They believed that on those special subjects it would be possible to safeguard all state interests, and to commit to a new parliament ... the power of dealing with particular subjects within certain lines ... The argument which I have endeavoured to maintain from the beginning of this debate has been that, while there are certain state rights to be guarded, most of those rights, if not all of them, can be guarded by the division of powers between the central government and the local governments.[67]

Deakin tried to argue that the states would be protected by the division and that to erect a powerful Senate would place state rights in a superior position against national interests. He asked: "Are we now, in the very inception of our undertaking, to endeavour to create on the one side an irresistible force, and on the other side an immovable object?"[68]

Munro thought that to give Western Australia with 45,000 persons, and Tasmania with 150,000, twice the voting power of New South Wales on the question of taxation was unconscionable. "Such a monstrous proposition as that was never before submitted to a free people."[69] Baker took the opposite view, but from a position of strength. He acted as a conciliator by suggesting to the Convention that it adopt the same course as had been taken in the Philadelphia Convention and appoint a committee comprising a member from each state in order to endeavour to reconcile the "antagonisms of the two parties".[70]

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[66] The debate on the Parliament covers approximately 93 pages of the transcript while all the other resolutions cover only 81.
[67] 1891, 383.
[68] 1891, 383.
[69] 1981, 390.
[70] 1891, 393.

Barton's next speech, toward the end of the plenary debate, was important in settling the antagonisms of the delegates and, coming from one of the leaders of the large states, his intervention was accepted by both sides as an act of arbitration. He played the role of moderator throughout both Conventions in bringing contending sides together. He stressed that all parties recognized the need for the House of Representatives to have ultimate control of legislation over money.[71] He said that the Senate was a representative body like the House and should have "a modicum of power" over finance. Playford as a small state delegate supported the large state conciliator Barton and argued for a moderately empowered Senate.[72]

The Queenslander John Murtagh Macrossan was distinguished, firstly, by being the first of the delegates to make a comment about the role that parties would play in determining the voting behaviour of the houses and secondly, by dying a few days after making this prediction in the middle of the Convention. He preceded Deakin in stating his anticipation of party activity and on these grounds he deserves recognition. Macrossan said in regard to control of the Senate:

> In this matter we have forgotten entirely the action of party. It will act as a powerful solvent to prevent unfairness either in the house of representatives by the more populous colonies, or in the senate by the less populous colonies, and I hope hon. members will not forget that.[73]

So, in the first Convention, the Senate was one of the lions in the path and this obstruction was to remain to be dealt with in the second Convention. Macrossan had recognized one of the unexpected features which was to quickly become entrenched in the new Commonwealth government. While the second Convention debated crucial points about the second chamber others matters were ignored.

THE SENATE IN THE SECOND CONVENTION

The terms of debate over the Senate were slightly different in 1897 from 1891. Important arguments remained identical to those of 1891 and the same positions were repeatedly put by opposing forces, but some new questions were confronted. The issues of the federal balance, the rights of the states, the need for equal state representation, and the powers of the Senate in relation to the people's house, were restated at great length. An important difference from the earlier debate was that new assumptions were made about legitimating the powers of the Senate and, crucially, in working out

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[71] 1891, 411-412.
[72] 1891, 426.
[73] 1891, 435.

its constitutional powers. The two main areas of difference from 1891 were: firstly, the establishment of the states' house on the democratic foundation of direct election rather than by appointment or indirect election; and secondly, allowance was made for the amendment of taxation bills while the need to establish a mechanism to resolve deadlocks between the houses was also recognized.

Democratic Principles

By the second Convention a number of assumptions about the proper organization of government had changed from those which previously had been accepted. An alteration to the principles underlying the new government had occurred in the years between the Conventions, to the extent that only a fully democratic upper house was acceptable. Moreover, such a change was essential to the success of the new Constitution. Prior to the formalization of his position as leader, Barton addressed the Convention and put a qualified proposition about the 1891 Bill. He supported it but could not recommend its adoption by the new Convention.

> I am one of the strongest supporters of the Convention Bill of 1891. I believe that, with certain alternatives in the financial provisions, that Bill is a measure under which the colonies could even now safely federate.[74]

Barton believed that the new Convention had a legitimacy which the earlier Convention had lacked, in that it was popularly elected. He took up the same themes which dominated the 1891 Convention.

> The individualism of the States after the Federation is as of much interest to each colony as the free exercise of national powers is essential to that aggregation of colonies which we express in the term Federation.[75]

Barton assumed that there must be two houses, one of which was to be constituted in "such a way as to have the basic principles of Federation conserved in that Chamber which is representative of the rights of the States".[76] He said that contrary to some opinion held within the Convention, he was definitely in favour of equal representation.[77]

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[74] Adelaide 1897, 10.
[75] Adelaide 1897, 21.
[76] Adelaide 1897, 21.
[77] See also O'Connor's endorsement, Adelaide 1897, 50 & 52.

According to Barton, the mode of electing senators was to be "thrashed out in the committee". As an indication of both the growing influence of popular democratic claims and, paradoxically, the attempt to defend the Senate against such changes, Barton with most of the other delegates, was in favour of an elective Senate.

> There are some of us who think the only way to preserve definite responsibility is to have the election by the people of the quota of each State to the Senate. (Hear, Hear)[78]

Barton's general opinion of the powers to be vested in the Senate was opposed by the states' rights group. This group was mainly composed of the delegates from the small states and some large states conservatives including William McMillan from New South Wales and Sir William Zeal from Victoria. They were in favour of empowering the states' house with equal powers which they justified by explaining the need to prefer federal principles to majoritarian or responsible government principles. The liberal-nationalists, Isaacs and Higgins from Victoria and Kingston from South Australia, were also opposed to Barton's moderate federationist position. Higgins saw the matter of representation differently from Barton. For him there was no possibility of proceeding in erecting a proper government based on sound principles if they were not correctly grounded,

> I think we are in danger of being ready to acquiesce in a false principle as if it were a right principle, apart from its being a question upon which there may be a compromise; and if we start by acquiescing in a false position we will be led to a ridiculous result.[79]

Higgins cited Canada and Germany as examples of working federations in which there was not equal representation in the upper house, thereby showing that equal representation was not essential to federal systems. He again employed Bryce's words to show that the fears of the small states representatives were not valid. Bryce had written that: "There never has been, in fact any division of interest or consequent contest between great states and the small ones."[80]

Higgins in using the words of Bryce, the unofficial patron of the debates, was trying to induce support and provide legitimation for his own view. Higgins used this unimpeachable authority to support his general argument.[81] He trenchantly opposed the equal representation of all states in the Senate. He argued, as Deakin had done in 1891, that the true protection of the states did not lie in the Senate but in the division of powers.

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[78] Adelaide 1897, 22.

[79] Adelaide 1897, 99.

[80] Adelaide 1897, 100. The quote is taken from Bryce's two volume 1889 edition, I, 94.

[81] Adelaide 1897, 98. For fully developed arguments in support of his position see H.B. Higgins *Essays and Addresses on the Australian Constitution Bill* (1900).

Money Bills, Messages and Deadlocks.

The great debate of the Conventions was the issue of the power of the Senate over money and this was an argument about democratic formations. The issue of 1891 had been whether the Senate should have a veto-in-detail over items in money bills while in 1897, the issue was the right of the Senate to amend taxation bills. Barton's view, which ultimately prevailed, was that the House of Representatives should possess the sole power of "originating all Bills appropriating revenue or imposing taxation".

> I believe there will be scarcely a member of this Convention who thinks that the power of amendment should be left to the Senate who will deny, if we are to have responsible government carried on, that the ultimate control of taxation and expenditure must be in the hands of the National Assembly.[82]

The Australian framers decided to mix two systems of government. As has been written many times, especially since 1975, the conflict between responsible government and federalism remains unresolved. This is often expressed in Hackett's now too famous phrase that either federation will kill responsible government or responsible government will kill federation.[83] Although this comment was made in 1891, a mechanism to resolve deadlocks was not put in place until 1897. The problem derived from trying to determine which of the two governmental systems was to have primacy in the event of a persisting impasse. Alternatively, would the people, or the people of the states, have the final right to finally decide a dispute. Responsible government was understood to mean that the people were represented as a whole in the lower house and the government was responsible for its actions to that assembly. That the popular house should always have authority over an upper house was even accepted by the most conservative representatives as a basic democratic principle of representative government. Federalism, however, meant that the polity was composed of people and states in an equal balance and that the houses representing the two parts of the nation were equally empowered, or as equally as possible. Sir George Turner, the Premier of Victoria, was one among many who, knowingly or otherwise, paraphrased James Madison. He said:

> So ... whatever laws may be hereafter passed by the Federal Parliament will require assent by two bodies - one as representing the States, and the other as representing the people.[84]

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[82] Adelaide 1897, 22.
[83] 1891, 280. Also Baker, Adelaide 1897, 28.
[84] Adelaide 1897, 38.

With these two principles overlain in the Australian Parliament, the powers of the Senate were finally decided in Adelaide. The next question was how disagreements between the houses were to be resolved?

The events of 1975 revealed the contradiction in these two legitimating principles of the Australian system. The Senate is justified in principle, and by the written word of the Constitution, in denying the passage of legislation; an action based on the right of the states to combine to defeat or delay any act inimical to the national interest. The government, created out of the House of Representatives, can claim a popular mandate to act in the national interest. As O'Connor had said, the absence of a deadlock provision only mattered when money was at issue as otherwise the blocking of contentious legislation was not urgent, merely frustrating for the government. O'Connor thought that the essential principle of the system should be to give the states "the fullest possible representation", but it must be "consistent with responsible government".[85] The problem, as O'Connor identified it, followed from giving equal representation to the states as this necessarily involved the question of vesting the Senate with co-equal powers.[86] If the question came to deadlock then one house must have sway. That house must be the popular house "in which the people are directly represented" and it should be "the House which has control of the purse".

> For this reason the business of Government must be carried on by an Executive which must have control of the purse and initiate legislation of a financial character; and as the existence of the Government depends upon the will of the Representative House, it follows that the other House cannot be given equal powers with regard to those matters which affect the existence of the Government. Sir George Turner in his address spoke of the limitation of the power in regard to Money Bills. Before I go any further in a statement of my views upon that point I would like to make a reference to his views on regard to Money Bills.[87]

> Suppose you get to a point where the Senate refuses to carry out the wishes of the other House in regard to some matter of appropriation. Care is taken in the draft Bill to provide that the Bill appropriating revenue shall contain nothing else, so that there will be but one subject dealt with in the Appropriation Bill. Let us assume that in the Senate, by reason of some combination amongst particular States interested, the Appropriation Bill for the year's supplies is continually rejected. There you will have a deadlock in the ordinary processes of government; and I will draw a very strong distinction between a deadlock which affects the carrying out of the daily business of Government - indeed its actual existence - and a deadlock which does not affect these matters. ... but where the Appropriation Bill for the ordinary annual services of Government is thrown out by the Senate you have *a deadlock of a dangerous character.*[88]

> With reference to the ordinary deadlocks or disputes between the two Houses, there can be no question that they ought to be left to be settled by a spirit of compromise of the two Houses and the public opinion of Australia. (Cheers). On questions of appropriation for the ordinary annual services of government, or questions which affect the turning round of the machinery of the

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[85] Adelaide 1897, 51.
[86] Adelaide 1897, 52.
[87] Adelaide 1897, 52-3.
[88] Adelaide 1897, 54 Emphasis added.

government day by day, it would be unwise to trust to matters of that sort being settled by the public opinion of the people of Australia.[89]

O'Connor suggested that the mechanism to resolve disagreements over money bills, in particular, should be put in place to allow an immediate resolution. His suggestion was that there should be a provision to allow for the the Senate and the House of Representatives to meet jointly to pass the legislation if it has already been rejected in one session and been sent up in the next. "If the majority decide that it is not to pass, well and good", but he thought that the probability was that the majority would pass the legislation.[90]

O'Connor's well reasoned point was forgotten in the final outcome as the second Convention became involved in one of the most complex, repetitive and convoluted arguments of the debates. "Deadlocks" became the dominant issue of the Sydney and Melbourne sessions after the compromise over the Senate's powers over money bills was resolved in Adelaide. The compromise on the message system presaged an even more congested argument about relations between the houses. Quick's claim that the resolution of deadlocks was one of the three basic tenets without which federation would not be possible was acknowledged, but O'Connor's doubts were not satisfied as the distinction between the types of bills and their relative urgency was lost.[91]

Two classes of bills were identified by O'Connor for the purposes of working out the relationship between the two houses. Higgins saw the significance of this problem also.[92] Higgins and Isaacs were the most articulate, persuasive and forceful opponents of the small states advocates and the moderate federationists, like Barton. Higgins cunningly took up the arguments of the Tasmanian Premier Braddon to argue his own case against the Senate. "Money Bills will not wait", so there must be a structure which prevented such problems from arising.

You have to pay your creditors and your servants, and if you have a Senate that can block, block, block, that Senate can block, block, block until the Ministry is forced to bring down a measure that suits the Senate.[93]

Higgins and O'Connor identified the crux of the problem of money bills and deadlock but through the long and involved debate the urgency of their appeal was lost and the special provisions to resolve the most crucial problem of contending authority was lost. The debate contained many suggestions for a resolution of the general problem of

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[89] Adelaide 1897, 55.
[90] Adelaide 1897, 52-55.
[91] Sydney 1897, 551.
[92] Adelaide 1897, 53-4.
[93] Adelaide 1897, 97.

disagreement between the houses and finally the dissolution of both of the houses followed by a joint sitting was settled upon. Although the problem of the general deadlock was resolved, the potential crisis identified by O'Connor and Higgins was seemingly just forgotten. O'Connor was to comment that no portion of the Constitution exercised his mind more than the question of resolution of deadlocks, but in the outcome no distinction was made between types of bills.[94]

THE ROLE OF THE SENATE

The general expectation for the Senate was that it was to be the guardian of the states and protector of the balance which had been struck at the Federal Convention. No legislation could be passed by the representatives of New South Wales and Victoria which could effect the small states without their positive agreement. Thus no acts inimical to the interests of the states could even pass through the Parliament. The High Court was later spoken of as the "keystone of the federal arch", but the main structure was shaped by the powers vested in the states' house. The Court could only act on legislation brought before it which had already passed through the primary line of defence which was the Senate. The powers of the Commonwealth could not be exercised against the states because in their house they could, in the first instance, prevent an expansion of the central powers. Madison, at the immediate conclusion of the Philadelphia Convention, was mistaken in his well-reasoned belief that the great threat to the new polity was the survival of the national power. Similarly, in Australia, the Senate was mistakenly believed to be both able and determined to limit the action of the Commonwealth.

The Senate, according to the framers, would be the primary defence of state interests. However, as Deakin was to anonymously tell his London readers in *The Morning Post* in 1906: "The Senate has been the surprise of our politics from the first days of the union." Not only had the Labor party and the radicals nearly won control of what they regarded as a "haughty, aristocratic body", but the chamber was not acting in the expected manner. "A second surprise has been the subordinate position into which the Senate is drifting." Sir Richard Baker, "sleepless in his vigilance", could not prevent the Senate from "subsiding into the second place instead of occupying the position of equality which our written law in terms undoubtedly confers upon it."[95] The evolution of federal politics (especially involving the division of powers) the development of

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[94] Sydney 1897, 573.

[95] *Morning Post*, London, 8 October, 20 November 1906. Alfred Deakin, *Federated Australia: Selections from letters to the Morning Post 1900-1910*, J.A. LaNauze, ed. (1968).

the party system and the imperatives of national power, combined to ensure that the intended role of the Senate would be obviated before it could even be properly formed. The division of powers, so clear to the framers as an abstraction, could not be determined in the actually existing federal system. Much of the difficulty which the states had in exploiting the potential equality of power in the Senate was derived from the impossibility of retaining the distinction between state and national responsibilities. The differences between the spheres of authority, which Publius and the Australian framers had believed was the basis of a compound republic, could not be maintained. The division of powers was not immutable but continually reformulated and reconstructed. It is the division of powers which is the subject of the next chapter.

CHAPTER FIVE

THE DIVISION OF POWERS

The purpose of this chapter is to explore the debate over the division of powers which is the key feature of federal government. The Australians adopted the American model of the division from the original determination of the Philadelphia Convention, but they failed to fully appreciate the difficulties in interpreting the list of powers once granted. The Australians made the same assumptions about the division of powers that Beloff has identified in the approach of the American Supreme Court. His statement can be equally applied to the framers of the Australian Constitution.

> The Court for a long time acted upon the assumption that there was set out in the Constitution a general pattern for the relationships between the Federal Government and the states - a pattern of which the Court was in some sense a guardian. This is sometimes described as the idea of "dual federalism". It means that ideally all the powers of government are divided between the two kinds of authority - state and federal, and that the demarcation line between them is visible and can be maintained.1

The task of establishing a set of national powers was seemingly not profoundly understood by the Australians. In the overall debates they were far more concerned with the institution which would protect the contrived division than with determining what were the objects to be granted to the federal sphere.2 The lessons which may have been observed from the United States, and the utterances of their American precursors, passed unheeded in this respect. Even the Civil War which was so fresh in their minds, having been fought during the living memory of all the delegates, was not discussed in terms of a clash between states' rights and national powers. The war was understood by most delegates to have been about slavery and somehow unconnected with the Constitution. It was not discussed within the Australian Conventions as a problem of legal or constitutional interpretation of the rights and powers of the respective levels of government. It was not discussed as a problem of the invasion of spheres. The Australian framers did not pursue the problems which had been experienced in the United States with this particular theory of the federal organization. The question arose that if member states could freely associate did they retain a right of secession under a federal system? Another immediate problem was how, under a *true* federation, would the integrity of the spheres be maintained.

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1 M. Beloff, *The American Federal Government* (1959), 55.
2 Sawer has commented on the absence of debate on the division of powers, *Australian Federalism in the Courts*, 126.

The lineage of ideas about modern federal government is to be found in the convergence of social contract theory and republican ideology. The "contract" explained the origin of government as a pact which free individuals made with each other for mutual benefit and self protection. Republican ideology is nominally democratic and secular. The divine right of Kings was supplanted by the right of free individuals to confer and withdraw consent to be ruled. Accordingly, as Jefferson wrote in the *Declaration of Independence*, "in the course of human events" it may become "necessary for one people to dissolve the political bands which have connected them with another". Governments derived "their powers from the consent of the governed" and that "whenever any form of government becomes destructive of these ends, it is the right of the people to alter or abolish it, and to institute new government". Thus the location of sovereignty was shifted from an individual - the monarch - to the collective mass of the people. Prior to the contract, under this reasoning, the natural rights of each individual were unqualified but humans were placed in a perilous condition because of the war of all against all. On entering the contract certain rights were ceded in return for societal advantages and protection.

The collective of individuals thus created a government by vesting an authority with certain limited powers, but the people retained final sovereignty. The principles of federal government follow logically as an extension of this construction. The states, which themselves were composed of free individuals, came together to cede certain limited powers to the new government for mutual advantage and protection. The individual people who initially conferred powers upon the state then gave their consent to the creation of the larger federal entity while still retaining sovereignty. Formulated in this way the origins of modern federalism can largely be found in seventeenth and eighteenth century English political theory and the federal idea seems less of a departure from English political institutions than may be otherwise supposed.

Central to this conception of federal government, whether tracing its lineage or in defining institutional arrangements, is the division of powers between levels of government. If the federal government was created by sovereign states acting on their own behalf then the question arose as to what powers ought to be conferred on the new government. This was the basic problem of the federal arrangement. In *Federalist* 39 Madison gave a lengthy explanation of the two types of government - national and federal - and argued that the type of government which the Philadelphia Convention had established was a combination of both; it was a compound. Yet, crucially, the

division of powers would be still determined according to the commonly understood older federal principle.

> The difference between a federal and national government, as it relates to the *operation of the government*, is, by the adversaries of the plan of the convention, supposed to consist in this, that in the former, the powers operate on the political bodies composing the confederacy, in their political capacities; in the latter, on the individual citizens composing the nation, in their individual capacities ...
> But if the government be national, with regard to the *operation* of its powers, it changes its aspect again, when we contemplate it in relation to the *extent* of its powers. The idea of a national government involves in it, not only an authority over individual citizens, but an indefinite supremacy over all persons and things, so far as they are objects of lawful government. Among a people consolidated into one nation, this supremacy is completely vested in the national legislature. Among communities united for particular purposes, it is vested partly in the general, and partly in the municipal legislatures. In the former case, all local authorities are subordinate to the supreme; and may be controlled, directed, or abolished by it at its pleasure. In the latter, the local or municipal authorities form distinct and independent portions of the supremacy, no more subject within their respective spheres, to the general authority, than the general authority is subject to them within its own sphere. In this relation, then, the proposed government cannot be deemed a *national* one; since its jurisdiction extends to certain enumerated objects only, and leaves to the several states a residuary and inviolable sovereignty over all other objects.[3]

For the Australians, as for the Americans, this was the key to the federal government and all other matters were consequential, including the need for the powers of the Senate. Powers over individuals, insofar as they were "objects of lawful government", were to be divided into *spheres*. The national government extended its power over only certain enumerated objects while the states retained inviolable sovereignty over all other objects ceded by the people. Conceptually this was an elegant and clear plan. Once accepted in principle the task before the respective Conventions in America and in Australia was twofold. Firstly, according to the mataphor of the spheres, the notional line of demarcation between national and residual state objects needed to be established. Secondly, institutions must be designed to protect that division so created. Encroachment by either party was to be prevented. The matter of concurrent powers was of developing importance as the debates continued, but initially this category of powers was not discussed.

MELBOURNE 1890.

At the Melbourne Conference the first utterances on the federal system were tentative. Nevertheless, delegates were ready to be seen to speak their minds on the issue although none asked the question of what was meant by Federation. The absence of a clear statement of purpose other than "an early union under the crown" allowed for what, in hindsight, is a series of somewhat inchoate assertions. Delegates were either

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[3] *Federalist* 39, 194-5. Emphasis original.

for or *against* "full", "complete", "partial" or "true" federation without explaining the meaning. What is clear from the early speeches is that none of the delegates shared Parkes' preference for the Canadian model.

In opening the Conference, Parkes vowed for a union "under one legislative and executive Government, on principles just to the several colonies".[4] This entailed, Parkes said, a "complete form of government" in which the legislature would have "full power to make laws for the whole country".[5] In this respect the American Articles of Confederation were a "disastrous" warning against allowing the states to remain independent and secure in "their separate rights and separate sovereignty".[6] Parkes told the Conference that it would be "playing at federation" if there was any attempt to create a constitution with "anything less than full powers of a Federal Government".[7] He then claimed to be as anxious to "preserve the proper rights and privileges" of New South Wales as any other delegate and feared to go home if he did not do his utmost to preserve her independence consistent with federal government. Parkes recognized his duty and that of all delegates to have a "jealous regard" for the "rights and just privileges" of their colony.

Whilst Parkes' statement may seem to be somewhat confused and contradictory (insofar as he recognized that independent states would ruin the federal project yet he was committed to protecting the independence of New South Wales) his speech in the overall context of the debate was astute. Like Madison and Randolph in Philadelphia, it seems that Parkes was mindful of the need to develop a momentum within the Conference for unity. While not alarming the delegates from the small states with the prospect of centralized power, Parkes argued that the "federal government must be a government of power", especially over defence and all other "functions pertaining to a National government".[8] Hamilton had called this Energy. Due to time-constraints he had earlier excused himself from the task of enumerating the subjects directly in the province of the federal legislature. He possibly did not wish to become involved in specific arguments at an early juncture.[9] Given that he was introducing the debate to an audience not necessarily committed to his federal idea and largely concerned with protecting sovereignty, Parkes' apparent contradiction is explicable as he "was not anxious to excite sectional politics".[10] In this context a bold

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[4] 1890, 33.
[5] 1890, 44.
[6] 1890, 45.
[7] 1890, 46.
[8] 1890, 46-7.
[9] 1890, 42.
[10] 1890, 33.

statement in favour of a federal power and an equally bold defence of state interests was a clever tactical opening.

As he was to do at the Convention the next year, Samuel Griffith followed Parkes and gave a more penetrating and challenging assessment of the problems of the federal project. He was mindful of those who, in the abstract, were favourable to the idea of federation yet would "hesitate to give up any of these rights which we have been in the habit of exercising".[11] For Griffith, this was an obvious point for which there was a need to develop empirical examples rather than merely an agreement in principle. Whilst there was no intention to transfer to the central government anything which "could be as well done by the separate governments of the colonies" it was nevertheless advantageous to confer upon the federal Government the list of powers in the *British North America Act*.[12] This Act enumerated subjects which Griffith thought ought appropriately to belong in the federal sphere.[13]

> These are subjects in respect of which there is so little difference of opinion amongst intelligent men throughout Australia, that they could certainly be dealt with much better by one parliament.[14]

However, intelligent men did demur as Canada was not only identified as the most undesirable form of federation but was deemed not to be a federation at all![15] The United States was championed as the only true and proper federation and from this early stage a vociferous attack was launched by Playford and Clark which permanently disposed of the *British North America Act* as a model. Throughout the decade which followed, the Canadian example was never again to be seriously considered as a viable federal proposition. These men argued that under the Canadian system far too much power was given to the centre and too little to the provinces. They were, it was believed, virtually stripped of their powers. The Canadian arrangement with the division of powers ostensibly tipped heavily in favour of the central government was a consequence of the American Civil War. The Australians' literal reading of the British North Act convinced them that the list of powers granted to the provinces caused them to be fatally weakened in relation to the centre. There was no discussion and seemingly no cognizance of the matter of interpretation of the powers and the meaning with which they were vested. The Australians looked at the list of powers rather than interpreting Canadian federation in operation. In this case the facts spoke for themselves, or so thought Clark, Playford and the rest.

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[11] 1890, 53.
[12] 1890, 55.
[13] 1890, 57.
[14] 1890, 57-8.
[15] One of the few voices for Canada was Fraser who was born there. Adelaide, 1897, 80.

The Australian Federal debates were pervaded by this literalist approach to Constitution making. Recognition of the idea that the Constitution had to be interpreted - that it had to be vested with meaning - was slow to develop as was an appreciation of the role of the High Court as the institution which would create that understanding. During the early debates it was sufficient, seemingly, merely to state the powers to be given to the respective levels of government. This approach was consistent with the framers' belief in the metaphor of the spheres as an operative device, and with the assumptions by which their work was determined. Their objection to Canada's status as a true federation lay in a two-sided argument: either the relative size of the spheres was disproportionate and therefore not proper; or possibly, that presence of the veto power over provincial legislation, which lay with the central government, meant that the spheres did not even exist and Canada was therefore really a consolidated government.

Playford was, he said, disappointed that the resolutions were so bold and that the "power and functions proposed to be vested in the general parliament" were not detailed.[16] "I am quite certain", Playford said, "that if we are to build up a Federation on the Canadian lines, the colony of South Australia will never agree to it". The local legislature must have more powers. In Canada local parliaments, he thought, were "a little bit above municipalities". All local parliaments were to get were control of education, police, the destitute and lunatics. Furthermore the central government had the right of veto over provincial law.[17] Playford was certain of his own position:

> We do not require a great dominion parliament, such as exists in Canada, relating, as it does, all local legislatures into mere parish vestries. We require something in the shape of the government of the United States, where clearly defined powers are given to the senate and the house of representatives,* and where all other powers not specified are left to be exercised by the local State and constituencies.[18]

Playford was emphatic that federation would be lost completely if the Canadian model was pursued.[19] Others, like Lee Steere, were to echo this warning. He was "quite certain" that Western Australia would not join a federation based on the Constitution of Canada.[20]

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[16] 1890, 61.
[17] 1890, 71-2.
[18] 1890, 73. *Playford's reference here is not to the relative powers of the houses but to the grant of powers to Congress (or to the parliament) comprised of those houses.
[19] 1890, 74.
[20] 1890, 121.

Andrew Inglis Clark called upon each delegate to state "more or less precisely what kind of confederation we would individually advocate" and the kind of confederation which would satisfy each colony.[21] At such an early stage of proceedings this request was probably asking too much from all but a few of the delegates. Other than Parkes, who had often spoken about a Canadian style federation, most delegates had not previously been obliged to voice a coherent detailed opinion. Clark was himself committed to the United States system and Deakin had studied Bryce, but most other delegates were new to the task. Asking them to state precisely their position in this respect seemed to be premature. Clark's request for a statement of views was followed by his vitriolic attack upon the Canadian Confederation. In the course of time, said Clark, local legislatures will be reduced to municipalities and "Canada will have ceased to be, strictly speaking, a Federation at all".[22] The American system was the answer for Clark and he assured the Conference that the Civil War was a controversy which was not about the Constitution but a matter of good and evil - it was about slavery. Australia would not be cursed with such a problem.

Clark was the best informed delegate in the Conventions on American history. He was an apologist for the federal system and he would have understood the problem of slavery and the Constitution in a more sophisticated manner than he here suggested. The characterization of the war as a battle between good and evil was convenient and disingenuous. The war was not caused by the Constitution, but it was nevertheless a consequence of the tension within the supposedly balanced federal system in which both levels of government were autonomous or sovereign in their own spheres. As Beloff has shown in the passage quoted earlier, the belief in a clear line of demarcation was fanciful. For the purposes of his argument Clark apparently felt no obligation to enter the debate on the war nor cast a doubt over the merits of the American Constitution. He was anxious to assure the Conference that the Constitution had not *caused* the war so he said,

> I do not think we need fear to go upon the lines of the Constitution of the United States in defining and enumerating the powers of the central legislature, and leaving all other powers to local legislatures.[23]

In the sense that this general position was adhered to throughout the decade of the Federation debates Clark, at this early juncture, had already given the last word. So, Chief Justice Owen Dixon's later comment about the influence of the American Constitution on the Australians as "damping the fires of originality" is perhaps most

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[21] 1890, 105.
[22] 1890, 106.
[23] 1890, 106

pertinent to the manner in which the whole issue of the division of powers was addressed.[24] As the central defining characteristic of federal systems, the significance of the division of powers was appreciated yet the list of powers which the Australians came to adopt was accepted with only a minimum of critical debate.

Deakin had given a solemn statement about how seriously the matter was to be considered. The principle by which powers ought to be divided should be in accord with the "national interest". The differentiation of powers into central and local governments should be determined by establishing what powers were necessary for national interests and only those powers should be so granted.

> What we have to study is how to give the central authority all the powers which can best be exercised by such a body to the distinct advantage of the whole of the people.[25]

With the dampening example of the United States before them and the alternative but no less dampening example of the *British North America Act*, which Griffith had cited with approval, it was difficult for the Australian framers to bring a disinterested mind to the task and study the problem as Deakin wished.[26] With so many other lions in the path there was little wish or need to conjure a new one where the path already seemed clear.

SYDNEY 1891

When Griffith introduced the draft Bill to the 1891 Convention he noted that the drafting committee had spent much time on the legislative powers of the parliament. He was sure that this aspect of the Constitution would receive "most careful attention and consideration from the Convention, as it will from the people of the different states" because of the presence of the paramountcy clause which gave the Commonwealth superiority in a conflict of laws. Griffith understood this provision to be the key to the division of powers and necessitated careful consideration of the powers granted to the Commonwealth.

> It is, therefore, very necessary, bearing in mind the original limitation in the first of the resolutions ... to see that we do not exceed that limit, and do not propose to transfer from a state parliament to the parliament of the commonwealth any power which can be better exercised by the state parliament, or the exercise of which by the parliament of the commonwealth is not necessary for its good order and government.[27]

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[24] O. Dixon "The Law and the Constitution" in *Jesting Pilate*, 38, 44, quoted in B. Galligan *Politics of the High Court* (1987), 66.
[25] 1890, 92.
[26] 1890, 57-8.
[27] 1891, 523.

Again, Griffith's comment served a dual purpose. Firstly, he re-enforced his own position that the new Commonwealth ought to be vested with only "necessary" powers. Secondly, in acting as an advocate for the Bill he gave a reassurance to the small states delegates and the conservatives who feared the possibility that the grant of power to the Commonwealth was too great. For Griffith, the "rule" was to grant a minimum of necessary powers. As to how far the committee had succeeded in adhering to that rule he thought the public should judge. He listed the powers which "will be admitted as being powers which ought to be within the province of the federal legislature".[28] Many required "scarcely any comment". The list included regulation of trade and commerce, customs and excise, taxation, loan-raising, postal and telegraphic services, military and naval defences, to which he added matters which related to trade and commerce such as navigation, fisheries, census, as well as general mercantile law. Also it was proposed to give the Commonwealth the power to deal with naturalization, immigration and emigration, the influx of criminals, external affairs and treaties and also relations with the Pacific Islands which was a matter of particular concern to Queensland.[29] For Griffith, at this stage, "All these matters, I think, require no comment".[30] These matters it seems were uncontroversial in that a consensus prevailed within the Convention that these were properly within the ambit of Commonwealth responsibility. The lack of debate later in the Committee stage substantiates this.

There was a hiatus in the general proceedings of the Convention after the plenary session and prior to the consideration of the draft Bill in Committee so, when Griffith introduced the Bill, there was not the time for lengthy speeches. The procedural constraints of the Convention militated against an informed general discussion of this part of the Bill in particular. During the plenary session the comments of delegates concerning the division of powers had been generalized and repetitive insofar as there was agreement that the Commonwealth should be vested with necessary powers and the states should keep the rest. This agreed position was not meaningful until the necessary powers were described, which was not done until the drafting committee met. However, once the draft was presented the only debate was a clause by clause assessment of the Bill, not a general discussion of the scope of the powers granted. So, during the 1891 Convention there was no formal opportunity for a general consideration of the range of the particular enumerated powers. For this reason the debate in 1897 over the powers provided a greater opportunity to debate the scope of powers in a

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[28] 1891, 524.

[29] External (or Foreign) affairs would still of course be conducted through the British Foreign Office.

[30] 1891, 524.

reflective and informed manner. In his speech in 1891, Griffith left contentious issues aside for special mention including the matters of the rivers, delegated legislative authority and railways. So, of course, had delegates been unhappy with the general scope of the powers then they would have found a chance to indicate their views.

The small states advocates and conservatives were caught in a dilemma. Whilst not wishing to be seen as anti-federal, which was a slur on one's character, they each recognized that the federal government must have powers for a sensible system of government, but they were nevertheless reluctant to cede powers to the Commonwealth. A compromise would be achieved in the grant of powers by maintaining a joint authority over as wide an area as possible and so the previously adopted metaphor of the spheres was contradicted. Thus Griffith said:

> With respect to these subjects, it is not proposed to give the parliament of the commonwealth exclusive jurisdiction; they will have paramount jurisdiction; but it is proposed that, until they exercise those powers, the existing laws shall remain in force, and that, until they choose to make laws to the contrary, the state legislatures may go on exercising their existing powers.[31]

With the Senate to protect the small states this arrangement seemed secure enough. The exclusive powers of the Commonwealth were narrow. They were concerned only with the seat of government, departments of the Commonwealth government, and "such other matters" which also included the great housekeeping question of racial affairs. With the exception of the "Aboriginal native race" and the Maori race in New Zealand, the Commonwealth reserved the right to make laws with respect to the "affairs of people of any race".[32] This was a necessary defensive arrangement against the hordes - the Chinese, "Hindoos" and "coolies from British India".[33] So, in presenting the Bill to the Convention, Griffith stressed the minimal nature of the grant of power, the extent of the concurrent jurisdiction and the narrow confines of the exclusive powers.

The contradiction in Griffith's position, and that of other delegates, was that this formulation of the distribution of powers was in conflict with the hegemonic Brycean metaphor of the clear distinction of spheres of activity. In Bryce's words the two great machines worked separately from each other but in the Australian system the states were to have overlapping responsibilities with the Commonwealth. In closing his discussion of the division of powers Griffith gave lengthy consideration to the powers reserved for the states. He noted that it was both unscientific and impossible to list

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[31] 1891, 524-5.

[32] 1891, 525. In the final form the power to levy customs and raise and maintain armies were added to the exclusive powers of the Commonwealth; the race power was not exclusive

[33] 1891, 703.

these powers, and he did not think that "anybody could attempt to enumerate them all". His intention here was to indicate the breadth of exclusive state powers,

> for the benefit of those who think that this Convention has some sinister object or desires in some sinister way to deprive the state legislatures of their autonomy.[34]

He concluded with the observation that the states were left with a lot of work to do.

ADELAIDE 1897

Barton's resolutions of 1897 laid down "the essential condition of Federation" but did not elaborate upon the issue of the division of powers. Barton merely explained the resolutions without dwelling upon the issue of the division. Representatives at the Adelaide session of the second Convention were faced with an agenda slightly different from that of the 1891 Convention. The old lion in the path - the tariff - had been disposed of and a number of new issues had arisen, in particular the questions of the rivers and railways. The Murray-Darling river system covered four states and the question of management of the waterway became a problem. The other arterial system, the railways, also took up much of the time of the Convention. The third major issue was the powers of the Senate and the fourth was the question of finance.

All these issues of course pertain to the federal structure but they are not central to federalism. The empirical problems of Australian federation were naturally the object of much discussion at the Convention yet the solution to those problems could only be found in an exploration of the federal system. If the federal system was an organization of government into spheres of operation or, in Bryce's words, as two great machines working independently of each other, then how would the duties and responsibilities - the powers - be divided? What powers could appropriately be given to the federal government and what retained for the states? The debate in Adelaide did not address this question in a comprehensive or organized manner.

Barton, while saying that the plenary debate was not the opportunity for "laying down matters of detail", nonetheless set the terms of debate which followed.[35] His stated position exemplified the intellectual framework within which the Australian framers were operating. Their understanding of social structure, government, and federalism were determined by their inherited philosophical assumptions which can

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[34] 1891, 525.
[35] Adelaide 1897, 19.

be seen as implicit in Barton's opening address. Seemingly, for the framers of the Australian Constitution the explanation of the origin of society and government was to be found in the social contract. The formation of a union of the colonies would therefore be an extension of this mataphor into a larger society with greater natural freedom.

> Federation is necessary "in order to enlarge the powers of self government of the people of Australasia" . . . The idea of surrender seems to have occupied a large place in the minds of the people. Federation really adds to the powers of self-government . . . It is an enlargement of the powers of self government to include within the scope of action the dealing with national affairs which previously we could not touch. It is the very object which has brought us together in Convention.[36]

Barton's argument here embraced both the Lockean notion of contractual basis of federation and Lincoln's argument that the union is greater than the sum of its parts. "Self-Government" was the term which the Australians adopted whereas the Americans adopted "Freedom". For the Australians, "freedom" possibly inferred democratic republicanism. For monarchists, who still governed convict stock, "freedom" was not a congenial term; "self government" was far more appropriate. Barton described what he called "the principle conditions of federation - those matters which must be granted as guarantees of the security of the federating colonies"[37] Again Barton chose carefully; "security" was here preferred to "liberty".

> The first is that the several colonies are not to be touched in any of their powers, privileges, and territories, except perhaps where a surrender is necessary to secure uniformity of law and administration in matters of general concern.

This first principle is re-iterated throughout the debates. At every opportunity, in the formation of the resolutions and in the general debates, the sanctity of state powers and territory was endorsed. Barton continued:

> The individualism of the States after Federation is of as much interest to each colony as the free exercise of national powers is essential to that aggregation of colonies which we express in the term Federation. If one trenches upon the other, then so far as the provinces assert their individuality overmuch the fear is an approach to a mere loose confederation, not a true Federation. The fear on the other hand is, if we give the power to encroach, that is, if we represent the federated people only, and not the states in their entities, in our Federation, then day by day you will find the power to make this encroachment will be gladly availed of that, day by day and year by year, the body called the Federation will more nearly approach the unified or "unitarian" system of government.[38]

This question from Barton showed how he, among the other framers, conceived of the federal system and the problem of encroachment. In order to prevent the transformation of a true federation into either a "loose confederation" or a "unitarian" system of government an institutional barrier was to be erected. What Barton called

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[36] Adelaide 1897, 20.
[37] Adelaide 1897, 20.
[38] Adelaide 1897, 21.

"the basic principle of federation" was to be "conserved in that chamber which is representative of the rights of the States". Encroachment was not to be prevented by the division of powers into discrete spheres of operation but by establishing a strong Senate. He later emphasized this point with great vigour. Thus, in Barton's introductory speech and in the speeches of all the representatives who followed him in the plenary session of the Convention, the issue of the division of powers, which was fundamental to the federal system as they understood it, was diverted into debate on empirical issues of rivers or finance, or deflected into a consideration of the powers of the two houses.

Baker, who followed Barton, was caught by surprise and made a short but lucid speech. According to his own assessment, he was a man who sought to investigate the facts. He used what he thought to be an unimpeachable fact as a metaphor for the federal system. For Baker, the fact of Newtonian mechanics was a perfect parallel for the facts of federal government. Baker would not have been able to conceive that Newtonian physics, in a few years, would be shown to have only local rather than universal application. The reduction of nature to two forces was an inadequate explanation in physics and not a proof of political science either.

> We find that in all nature there are two forces acting, the centrifugal and the centripetal, and if you give undue prominence to either one of there two forces the planets would cease to revolve in their proper orbits. And in this federal form of government there will be two forces - the centrifugal represented by the Senate, and the centripetal or centralizing force represented by the House of Representatives. What we want is an equilibrium between these two, so that Federation may move in a true and proper course. In order to do that we must not only consider the words of the Constitution which we are about to frame, but we must consider the powers which are behind. Every Constitution is liable to alter and change no matter what its terminology may be. Nothing had proved this more conclusively than the history of the American Constitution, which in may respects had turned out entirely different to that which the authors contemplated. . . . Therefore, as statesmen, we want a federal form of government to continue, and if we wish to prevent a nominal Federation from becoming an actual amalgamation, we must look to the forces behind, and we must give those powers to the Senate which will enable it to hold its own with the House of Representatives.[39]

Richard Chaffey Baker was, in the absence of Clark, the leading states' rights theorist in the Convention. He immediately demonstrated both a breadth of understanding about historical evolution of federation and a narrowness of understanding about how the Australian Constitution might be maintained in a fixed balance. Baker's statement on the prevention of constitutional change exemplified the mode in which the small states delegates, in particular, understood their task.

> *Baker*: Every Constitution is liable to alter and change, no matter what its terminology may be. Nothing proved this more conclusively than the history of the American Constitution, which in many respects had turned out entirely different to that which its authors contemplated.

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[39] Adelaide 1897, 31. For Baker, "Experience is a safer guide than theory". 1891, 542.

Peacock: Hear Hear.

Baker: Therefore, as statesmen, we must look ahead. If we want a federal form of government to continue, and if we wish to prevent a normal Federation from becoming an actual amalgamation, we must look to the forces behind, and we must give those powers to the Senate which will enable it to hold its own with the House of Representatives.[40]

Baker could not have demonstrated his position more clearly. He understood the dynamic nature of constitutions as being prone to change yet he believed that the forces behind change could be resisted by empowering the states, thorough the Senate, to protect themselves from the national power in the House of Representatives. The history of the American Constitution was, for Baker, only instructive in so far as it demonstrated change; it was not a tale for him of internal contradictions of the federal system.

Apart from the interesting nature of Baker's conception of science and facts this speech, as with Barton's and many who followed, showed that the key, as they understood it, was to charge the Senate with power to prevent the federal government from gaining power. The details of the grant of power to the federal government were not discussed as part of the problem. Encroachment was to be stopped in the moment of the Parliamentary debate not at the barrier of the Constitution. There would accordingly be no division of powers into spheres, despite the declaration that this was the logic of the federal system.

While most representatives who followed Barton and Baker only reiterated what had become commonplace statements about proper federalism and powers, Higgins remained the one who grasped the main point. Those other delegates, like Turner and O'Connor, who methodically dealt with the important points were sketchy in their treatment of the powers. When Turner said that "the next important point upon which I desire to express my views is with regard to the powers", he spoke about railways.[41] O'Connor twice mentioned the need to determine the scope of power, but on both occasions he slipped into a discussion of the particular issues of railways and taxation.[42] Downer said he would only deal with the powers "incidentally" and he, like Barton and Baker, stressed the importance of the Senate.[43] Forrest characteristically had nothing to say about the larger abstract questions of the federal system and spoke about railways, posts and telegraphs, defence, taxation and quarantine.[44] Dobson mentioned the issue of the powers, then quoted Elizabeth Barrett Browning, and then returned to

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[40] Adelaide 1897, 31.
[41] Adelaide 1897, 41-2.
[42] Adelaide 1897, 50-51.
[43] Adelaide 1897, 207.
[44] Adelaide 1897, 251-2.

his favourite theme of "one man one vote" as the end of civilized society.[45] Symon reiterated the contractual divide between the states and the federal centre, wherein, "they are called upon to enter into a partnership by dividing powers which they possess and the functions which they exercise", but he did not elaborate further.[46] Reid said that the powers given to the Federal government were in keeping with the 1891 design and announced his satisfaction with this arrangement.[47]

Holder was more fulsome in his discussion of the powers than other representatives. He said that he would go into the "question of the powers and functions to be exercised and enjoyed by the federal authority". He reminded hon. members of the "rule I laid down in the beginning"; that the states would control "everything that is local" and the national government would deal with interstate and national affairs. He continued:

> Now, applying that rule, we can very materially cut down the powers to be entrusted to the federal authority in the Commonwealth Bill. I would point out to hon. members this fact, that whatever we give to the federal authority the states divest themselves of. It is almost impossible to make the authorities concurrent. Further, it is much easier to give than to take back. I think we may safely assume that the States will never get back any power entrusted in the beginning to the federal authority ... Let us scrutinize every detail that we propose to give to the federal authority ... We can always add to the authorities handed over, but we cannot take back again.
>
> *Glynn*: Why not? We can go to the Imperial Parliament, an Act which can do anything.
>
> *Mr Holder:* We do not want to be going to the Imperial Parliament every now and again to review our Constitution[48]

Holder's caution was exemplary. The warning he sounded about the importance of dividing powers rather than bolstering the Senate, or appealing to either Mother England or British good sense, was not to be taken up by other representatives with the exception of H.B. Higgins.

Abbott, Braddon and even Deakin did not mention the powers. Quick said that he did not want to take up the large number of issues relating to the powers because he did not wish to absorb the time of the Convention![49] Glynn said that he would speak to "four or five important matters which can lead to differences of opinion", but powers was not one of them.[50] Fraser also did not "dwell in the least degree on matters that are not necessary"[51] Henry, seemingly aware that he was out of his depth, made only one point which was pertinent. He said: "I only trust that the machinery for gathering

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[45] Adelaide 1897, 191.
[46] Adelaide 1897, 127-8.
[47] Adelaide 1897, 271-2.
[48] Adelaide 1897, 151.
[49] Adelaide 1897, 189.
[50] Adelaide 1897, 70.
[51] Adelaide 1897, 78.

direct taxation in the several colonies will never be set in motion in a federated Australia".[52] McMillan acknowledged the difficulty in restricting the powers granted to the federal government in a "scientific" manner.[53] Fysh thought that "our protection is to follow the American system" by which he meant giving specific powers to the centre not to the states under the Canadian system, which was an option that had been emphatically disposed of years before and hardly advanced the debate.[54] Isaacs said that he intended to "direct attention to two or three of what I believe to be the more crucial points that will arise". He accordingly made a long speech concerning the Senate and dealt with repeated interjections in order to clarify his position which a number of small states representatives found troubling. The money power, the franchise, referendum and amendment procedures he thought to be issues of most importance.[55]

Higgins, Wise, Cockburn and Barton (in his concluding address to the plenary session of the Convention) were the representatives who most closely identified the relationship between the extension of the power of the centre and the role of the Senate as the defender of the states. Higgins, the democrat, was interested in undermining the place of the Senate in the federal system and he exploited the argument that it could not preserve the powers and territory of the states in the face of an expanding centre. A better defence, he argued, would be to pay careful attention to the division of powers. To sustain his argument he quoted Bryce's point that the small states and the large states had never been divided against each other. "American politics have never turned upon an antagonism between these two sets of Commonwealths." Bryce had written that the Senate showed no greater tendency to protect the rights of the states than the House of Representatives and that the small states have never had conflicting interests with the large states. Higgins posed a question:

> Where does the protection of the smaller States come in there? The truth is that the true protection for the smaller States lies in the limitation of the power given to the Federal Parliament. The true protection of the smaller States lies also in insisting that no subjects which cannot be better dealt with by Federation are to be given to the Federation, and that all those subjects which can be best dealt with by a colony, as a colony, should be still left to the colony.[56]

Higgins continued his argument by showing that a connection between the State legislatures and the Federal Senate through the appointment of Senators would tend to

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[52] Adelaide 1897, 124-5.
[53] Adelaide 1897, 223.
[54] Adelaide 1897, 245.
[55] Adelaide 1897, 170.
[56] Adelaide 1897, 100.

increase the likelihood that state politics and the state sphere would be invaded by federal powers. He was convinced that the franchise should be a federal matter.

B.R. Wise, who followed Higgins, responded to his argument about the division of powers and argued the point about his interpretation of the likelihood of federal interference:

> He very forcibly insisted, and he drove the argument home very clearly, that the true protection of the States interests was to be found in the limitation in the Constitution Act of the powers of the Federal Government. While I entirely agree that it is undoubtedly a great protection of the interests of all the States, both small and large, it does not seem to answer the argument that was in the mind of the hon. member when he used those words. The danger to the States interests that the smaller States fear is not, as I understand it, the encroachment of the Federal Government upon the powers which the Constitution limits to the States, but the improper exercise by the Federal Government of its powers in Federal matters to the injury of the States.[57]

Higgins interjected at this point and asked Wise to provide an illustration. The question, however, could have been asked of Wise to further explain what he understood this difference to mean. Seemingly he was suggesting that a division could be maintained between the powers of the states and the powers of the federal government yet simultaneously the federal government could exercise its powers to the detriment of the states. Wise had taken Higgins argument seriously but he, like other representatives, was drawn into a discussion over particular potential problems. Wise's speech was interrupted and he was obliged to respond to a interjections about duty on iron, defence and in response to Berry, the role of the House of Representatives.

The debate in the Conventions was characterized by this tendency. Representatives, like Wise in this instance and elsewhere Higgins, Isaacs and Deakin amongst others, were obliged to debate interjections from those interested in talking about the facts. They were asked to provide predictions about particular instances in order to justify an otherwise general and abstracted line of argument. The prevailing empiricist assumptions of most of the framers determined the nature of the debate and militated against exploratory argument which was not tied to particular real examples. On those occasions, when Representatives tried to clarify general issues and perhaps their own partially-formed ideas, they were harried by opponents to give a prognosis of how this would work in the fact. The result was almost invariably a descent into debate on immediate, even petty, issues, like a duty on iron, which only served to obscure problems, such as the one Higgins raised concerning the powers, and to which Wise initially tried to respond. Seemingly many representatives, among them Forrest, Dobson and Baker, were not comfortable with abstractions or questions which begged a more deeply theoretical consideration, with the result that the course of the debate

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[57] Adelaide 1897, 109.

was constrained within particularly narrow empirical bounds and allowed only for a debate around a series of schematic solutions to theoretical problems.

Cockburn's notable speech toward the end of the plenary debate on the Resolutions was provocative and vital. He was anxious to defend the states as the "fear . . . of possible federal encroachment is not a fanciful one; it is a real one."[58] He quoted a Canadian author, Watson, to the effect that the states in their "separate sovereignties" were threatened as the "words federal authority and centralization have become on the southern side of the frontier [in the United States] equivalent expressions". Cockburn spoke of his fear of the "central vortex" and of states' rights and the need for defence. "We must have a strong House to guard against any possible federal encroachment on the rights of the States, because local government, self-government, and government by the people are analogous terms." Cockburn's argument was an echo of the Jeffersonian defence of small republics and the proper working of democracy.

Barton interjected three times in this part of Cockburn's speech although he agreed with the expressed line of argument in favour of a strong Senate. Cockburn held views in common with Barton in so far as they both voiced their belief in what was a schematic response to the problem of the determination of the division of powers. This was a response which also conveniently contained within it their assumptions about what would be the role of the High Court. This viewpoint was advanced by Barton in his lengthy reply to the Convention at the close of the plenary session in Adelaide. By the time he spoke, the question of the federal government budget surplus had become current. He immediately addressed some remarks to that issue from which he led into a discussion of the matter of the division of powers and he mildly rebuked some delegates for showing a tendency for anti-federal sentiment which was of course anathema to a proper and loyal federal spirit.

> The States have sent us here charged with the duty of arriving at a Federal Constitution, and we are charged, further with the duty of giving a Constitution embodying such powers as will make it strong and effective, and giving it such power that even if, with a certain degree of efficiency, certain things could be performed locally, they could still be better performed by a central control over the whole.[59]

Barton provided some instances of this including posts and telegraphs and lighthouses and continued to speak of the need for protection of the states.

> *Mr Barton*: The State interests must be conserved, not only by safeguarding their full right to exercise all functions reserved to them, but by making the powers to be exercised by them so certain that there can be no doubt, even if the matter is referred to the Supreme Court, about the clearness of the definition.

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[58] Adelaide 1897, 339.

[59] Adelaide 1897, 376.

Sir Richard Baker: There is the danger of the powers overlapping.

Mr Barton: I am coming to that in a minute . . . We know that there is a constant liability to overlapping; that when the federal body exercises its powers of legislation which are definitely given to it, if the utmost care and the utmost precision are not exercised to confine the legislative operations within the circle of the power given in the Constitution, there will be cases of overlapping in the federal law, which would constitute an encroachment upon the competency and individuality of the States. These cases must arise, and they form one of the strongest arguments for a second Chamber in the Federation, and for arming that Chamber with competent powers to prevent overlapping.[60]

The certainty that the framers had about the Senate obscured and limited the debate in both Conventions on the extent and scope of the powers to be granted to the new Commonwealth. This can be seen readily through an internal investigation of the debates themselves and externally by the words Robert Garran who was one of the principal participants in the whole federation movement and a dominant figure in the formation of the early Commonwealth.

PROSPER THE COMMONWEALTH

Robert Garran was the last survivor of the Federal Conventions and was a figure of great eminence in Australian politics. He had been involved in the second Convention and he wrote an accompanying treatise on federal government entitled *The Coming Commonwealth*. Together with John Quick he wrote the monumental and standard commentary on the origins of the constitution, *The Annotated Constitution of the Commonwealth of Australia*. He was the first public servant employed by the new Commonwealth and he remains the longest serving permanent head of a Commonwealth department. In the last years of his life he published a book which was both a commentary on Australian politics and an autobiography. Published in 1958, *Prosper the Commonwealth* contained extensive sections on his experience of the Federation debates and the subsequent development of the Constitution. In this reflective work Garran wrote about the failure of the Conventions to address one of the main questions of federal government. He identified the theory of the spheres which had been so pervasive and recognized that the crucial matter of the division of power had been neglected.

Of course, the division of legislative power between Commonwealth and States according to subject-matter involves drawing a boundary in some way between the two sets of powers. This is a task which framers of federal Constitutions have found difficult. It is easy to make on paper a list of subject-matters, but not so easy to decide whether a particular law is, or is not, within a given subject-matter.[61]

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[60] Adelaide 1897, 377.

[61] R. R. Garran, *Prosper the Commonwealth* (1958), 171.

When we remember the importance, in a federation, of the line of division between the subject-matters of federal and State legislative power, and when we also remember the many later attempts to amend the Constitution in the direction of giving wider powers to the Commonwealth, it seems remarkable how little discussion there was in the Convention of the list of federal powers The fact is that the men of the nineties thought they knew the answer to the question, "What are the matters of essentially national concern?" They accepted, with only a few additions, the century-old American list. Especially, they accepted, too uncritically it now seems, the American bisection of trade and commerce into trade within a State (left to the States) and trade with other countries and among the States (assigned to the Commonwealth).[62]

Garran wrote also of "imperfect classification, due to a too close imitation of the American pattern."[63] This general argument is supported by Sawer:

The general problems of intergovernmental immunity and of the balancing of Commonwealth and State powers were never discussed at the Conventions.[64]

But powers given to governments have a low degree of identity and identifiability; they are abstractions denoted by general, vague, often ambiguous and obscure phrases which have a wide range of possible meanings.[65]

Garran and Sawer have recognized in hindsight a problem which was not seen by the framers. Could this have been avoided through a closer reading of the American literature?

The Australian debates contain explicit references to a large number of writers and theorists. Some are commentators of little lasting renown and others are great authors of classic texts. While the absence of Calhoun is perhaps understandable the writing of Thomas Jefferson, who does not have a doubtful place in American history, is more surprising. He is almost entirely absent from the Australian debates but his concerns about the direction of development of the American federal system were explicit and often reiterated in his work. He stands in opposition to the centralists, like John Marshall, and would have had a sympathetic audience in the small states advocates in Australia. Jefferson's absence is puzzling.

THE JEFFERSONIAN TRADITION

If the central feature of the federal system is the division of powers between two levels of government then the great problem of federalism is to maintain the line of demarcation so contrived. Nineteenth century American history should have revealed

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[62] Garran, 114-5.
[63] Garran, 175.
[64] Sawer, 126.
[65] Sawer, 199.

to the Australian framers a tale of conflict and struggle within the institutions they were attempting to reproduce. The principal place of conflict, and ultimately war, was where federal and state jurisdictions met. If the spheres were limited then friction between them was the great problem. The two sides of the federal conflict may be represented by Chief Justice John Marshall on the side of the centralist national forces and his cousin Thomas Jefferson who feared and resisted the central government and placed his faith in individual liberty and its alleged extension, states rights.

According to Jefferson, centralism could only lead to monarchism and oligarchy. Marshall represented, for Jefferson and those who believed in the autonomy and sovereignty of the states, a threat to freedom and to the principles of association under the federal arrangement.[66] The Supreme Court itself became, therefore, an instrument of subversion of the Constitution as its interpretive strategies allowed a systematic expansion of national powers at the expense of the states. By 1821 Jefferson wrote of the Court:

> It has long . . . been my opinion . . . that the germ of dissolution of our federal government is in the constitution of the federal judiciary; an irresponsible body (for impeachment is but a scarecrow) working like gravity by night and by day, gaining a little today and a little tomorrow, and advancing its noiseless step like a thief, over the field of jurisdiction, until all shall be usurped from the States and the government of all be consolidated into one.[67]

As one of the three great arms of government, the Supreme Court was playing a role which, for Jefferson, was profoundly wrong. The balance which he wished for, and at the time of the ratification debates he believed had been achieved, was being irrevocably upset. The prudent action of federal government so desired was only honoured in the breach.

> I have always thought that where the line of demarcation between the powers of the General and State governments was doubtfully or indistinctly drawn, it would be prudent and praiseworthy in both parties, never to approach it but under the most urgent necessity.[68]

The Australian framers looked to American history for lessons. They read *The Federalist*, Marshall's judgements, general histories, and they cited Madison, Hamilton and Washington which left a silence in their language with the absence of the Jeffersonian tradition and this is notable. Throughout Jefferson's writing, from the Kentucky Resolutions to his death, he warned against the tendency for the federal government to usurp power of the states and to invade their sphere. For the small state

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[66] D.O. Dewey, *Marshal versus Jefferson: The Political Background to Marbury v Madison* (1970)
[67] Jefferson to Hamond, 18 August 1821, *Writings of Thomas Jefferson*, A.A. Lipscomb & A.E. Bergh eds (1907), XV: 331-2 cf. Jefferson to Richie 25 December 1820 XV:297; Jefferson to Roane, 9 March 1821 XV: 326.
[68] Jefferson to Cabell, 17 January 1814.

Australian framers, Jefferson represented a tradition which they were attempting to follow, yet seemed unable to apprehend.

A modern critic cannot simply level accusations about what the framers should have read and should have done in order to understand their own task, but still there is nevertheless something lacking in their conception of what they were doing. Their understanding of the United States was Brycean. The history of the United States can be seen to be about the conflation of several strands of federal thought into an integrated central rationalistic and progressive order. The Nation and Separatism were representations of the opposition of good and evil. The federal system, according to Bryce, was settled, coherent, organized and ordered. Whereas Jefferson's view of his own times was at odds with this interpretation. He argued that the division of powers was manipulated by the Supreme Court against the interests of the states and against the federal balance which was struck at the inauguration of the Union. In this sense the federal system was not working as it should despite the institutional protection supposedly built into the design. The Court's interpretation of the division of powers was the weak link. The intended rigidity of the institutional structure failed.

Jefferson had hopes which he voiced to the Rhode Island Legislature in 1801. He wanted to,

> preserve the line drawn by the federal constitution between general and particular governments as it stands at present, and to take every prudent means of preventing either from stepping over it.[69]

By 1825 Jefferson had changed his view of the operation of the federal system.

> I see as you do, and with the deepest affliction, the rapid strides with which the federal branch of our government is advancing towards the usurpation of all the rights reserved to the states and the consolidation in itself of all powers foreign and domestic. Take together the decisions of the federal court, the doctrines of the president and the misconstruction of the constitutional compact acted upon by the legislature of the federal branch and it is but too evident that the three ruling branches of that department are in combination to strip their colleagues the state authorities of the powers reserved to them, and to exercise themselves all functions foreign and domestic.[70]

Had the Australian small states advocates read Jefferson rather than Bryce what would the result have been for the constitutional structure of the Australian federation? The Australian states' rights advocates would have found Jefferson instructive as they would have found Calhoun and John Taylor of Caroline. They had

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[69] Jefferson to Stuart, 23 December 1791, *Writings* VII.

[70] Jefferson to W. B. Giles, 24 December 1825. *Writings*, XVI, 146-147. See also "Solemn Declaration and Protest of the Commonwealth of Virginia on the Principles of the Constitution of the U.S.A." an violation of them. XVII, 442-448.

all concentrated on the necessity of maintaining the division of powers, through active measures, against institutions like the Supreme Court and the executive which sought to subvert the proper workings of the federal system. As Jefferson said, "misconstruction" of the constitutional compact was threatening and destroying the states. A mere statement of intent in the Constitution and the assumption that the institutions of national government would behave properly was insufficient. The active protection of the "doubtfully and indistinctly" drawn line was the states most vital task. The Australian framers were, however, content with the Brycean formulation of the spheres and wheels working independently of each other. Touching in only certain places there was little need for concern. The list of powers once drawn would not be a problem. Thus the role of the Court, or tribunal, to determine the line between national and state objects of power became crucial and this is the subject of the next chapter.

CHAPTER SIX

THE HIGH COURT

> What, for instance, would avail restrictions on the authority of the state legislatures, without some constitutional mode of enforcing the observance of them? The states, by the plan of the convention, are prohibited from doing a variety of things; some of which are incompatible with the interests of the union, others, with the principles of good government ... No man of sense will believe that such prohibitions would be scrupulously regarded, without some effectual power in the government to restrain or correct the infractions of them.[1]
>
> *Federalist* 80

This chapter is concerned mainly with the Australian debate over the role and function of the High Court. A detailed investigation of the evolution of thought concerning this institution within the Conventions is undertaken here to clarify the question of the expectations that the framers held about how the Court was to operate. The central concern which was voiced by the framers was whether to allow appeals to the Privy Council or establish final jurisdiction in the High Court. A feature of the compound system, which Madison identified, was what he referred to as the "boundary between the two jurisdictions" of national and state governments. He deemed it necessary to create a "tribunal which is to ultimately decide" in which sphere authority resides. Such a tribunal is central to the federal system, but it is argued in this chapter that the Australian framers did not perceive, until late in the debates, that the Court would be crucial to constructing the meaning of the Constitution. The framers believed that the Senate would be the effective line of defence against possible encroachment and the states would thus be protected. So prior to proceeding to an analysis of the Australian debates a brief introduction to *The Federalist's* account of the role of the Court is necessary.

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1 *Federalist* 80, 406.

THE FEDERALIST AND THE ROLE OF THE COURT.

For Hamilton and Madison the control of the expansionary tendencies of the states was crucial to the success of the new order. Both of them were firmly committed to the maintenance of central power, enforced through a tribunal, which would control the states and protect the constitutional settlement. The Antifederalist opponents of Hamilton and Madison, who dreaded the power of the large states and of the Union, also dreaded the new Court, but through their insistence on the foundation of a Bill of Rights (especially Article 10) the Antifederalists solved the central/state dispute only in the first instance. Their fundamental objection to the Court, however, was not obviated.[2] In order to preserve the Constitution the necessity was accepted of establishing a Court to protect the delicate balance that had been established by the Convention in the belief and hope that their particular interests would be protected.[3]

Hamilton identified six areas, or cases, where the authority of the judiciary should extend: first, to all those cases which arose out of the just pursuance of the constitutional legislative powers of the United States; second, to those matters concerning the "execution of the provisions expressly contained in the articles of union"; third, to all those cases which concern the United States as a party; fourth, to matters of the "PEACE OF THE CONFEDERACY" which involve disputes between the United States and other nations or between states of the Union; fifth, to cases which "originate in the high seas"; sixth, Hamilton thought the Court should be constituted to hear cases for which it could not be supposed that the state courts could be "impartial and unbiassed".[4]

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[2] According to the Antifederalist pamphleteer *Brutus*, (31 January 1788),
"Much has been said and written upon the subject of this new system on both sides, but I have not met with any writer, who has discussed the judicial powers with any degree of accuracy. And yet it is obvious, that we can form but very imperfect ideas of the manner in which this government will work, or the effect it will have in changing the internal police and mode of distributing justice at present subsisting in the respective states, without a thorough investigation of the powers of the judiciary and of the manner in which they will operate ... They [the courts] will give the sense of every article of the constitution, that may from time to time come before them. And in their decisions they will not confine themselves to any fixed or established rules, but will determine, according to what appears to them, the reason and spirit of the constitution. "
Brutus was Robert Yates, one of Hamilton's New York colleagues, who left the Convention early in a protest against the institutionalization of the Virginia plan in the proceedings. Yates continued this argument in a lengthy and original early critique of the power of judicial review. *The Complete Antifederalist* Herbert Storing ed. II, 2.9, 130.

[3] The debate on the Court was not extensive in the Philadelphia Convention. It was taken up more fully by the critics and defenders of the Constitution in the debate over ratification.

[4] *Federalist* 80, 405-6. Hamilton's influence on the Australian's can be discerned in that they took after his fashion of enumerating areas of jurisdiction; see Griffith, *Notes on Australian Federation* (1896), 21 and Garran, *The Coming Commonwealth*, 153-5.

Whilst Hamilton's antipathy toward the states was only thinly disguised, Madison maintained an attitude which was more deliberately restrained and diplomatic. He reassured his readers that matters which arose under the Constitution would be dealt with by the new Court because it was impartial. In stating the case for the impartiality of the Supreme Court Madison astutely avoided making the direct charge that the state courts were *not* impartial.

In weighing the relations between the national and 'federal' (i.e. state) influence on the judiciary Madison, in *Federalist* 39, wrote:

> It is true, that in controversies relating to the boundary between the two jurisdictions, the tribunal which is ultimately to decide, is to be established under the general government. But this does not change the principle of the case. The decision is to be impartially made, according to the rules of the constitution; and all the usual and most effectual precautions are taken to secure such impartiality. Some such tribunal is clearly essential to prevent an appeal to the sword, and a dissolution of the compact; and that it ought to be established under the general, rather than the local governments; or, to speak more properly, that it could be safely established under the first alone, is a position not likely to be combated.[5]

THE COURT IN AUSTRALIA

The legacy of the American influence on the Australian Constitution has been widely noted most often perhaps with regard to the Judicature chapters. Constitutional lawyers and jurists, who perhaps more than other scholars have scrutinized the Federation debates, have commented repeatedly on the American influence. Once the Commonwealth was established, this association was shown by Andrew Inglis Clark, who was responsible for copying the American model and who was the principle and original author of the Judicature chapter. He wrote of the Australian Constitution in 1901: "the authors of its American prototype may be fitly regarded as being also the primary authors of the Constitution of the Commonwealth of Australia."[6]

More recently Cowen and Zines have written:

> The influence of American precedents on Australian constitution making was considerable. In no other area, probably, was that influence stronger than on the judicature chapter of the Constitution.[7]

Similarly in stressing the American influence, Galligan was right to claim "Dixon was right":

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[5] *Federalist* 39, 195.

[6] Clark *Studies in the Australian Constitution* (1901), 358.

[7] Zines and Cowen, *Federal Jurisdiction in Australia* (1978), 1. See also Sawer *Australian Federalism in the Courts*, 76; Galligan, 52; Hunt, 185-200.

Australia's greatest judge, Sir Owen Dixon, rejected the view that the predominant influence on the Australian Constitution was British. Dixon claimed to belong to a court "fashioned upon the model of the Supreme Court of the United States", and described the Australian constitution as "framed after the pattern of that of the United States".[8]

The discussion over the role and structure of the Court was not one of the divisive and potentially destructive issues of the Federation debates in Australia. While Publius had been obliged to stress that appointments to the Supreme Court would be scrupulously fair and impartial, despite the central government holding that authority, that point in Australia was of little contention. This lack of concern is evident in the tone adopted by Quick and Garran, in their discussion of the Judicature section, in a display of either consensus or indifference over the Court, they wrote:

In the United States there is only an appeal to the Federal Supreme Court in those enumerated cases to which the "judicial power" is expressed to extend. In all cases which do not come within one or other of the enumerated classes, the decision of the last court of resort in each State is final. That is because, in the construction of the federal judiciary of the United States, strictly federal principles were adhered to, and the union was given no more power of interfering with the administration of justice in the States than was necessary for national purposes. But in Australia, as in Canada, the appellate jurisdiction is not one of those jealously-guarded State rights which make anything more intimate than a federal union impossible. We are accustomed to a common court of appeal in the shape of the Privy Council: we are so assured of the independence and integrity of the Bench that the advantages of having one uniform Australian tribunal of final resort outweigh all feelings of localism, and the federal tribunal has been entrusted (subject to the rights reserved with respect to the Privy Council) with the final decision of all cases, whether federal or purely local in their nature.[9]

So, in Australia, the High Court was entrusted with a jurisdiction beyond that granted to the Supreme Court of the United States, as Clark explained in Sydney, because the colonies held confidence in the impartiality and independence of the Bench.[10] In this matter there were no "jealously-guarded State rights" about which to remain vigilant. In a vein dissimilar from that of Hamilton, and more in keeping with Madison's diplomatic style, Quick and Garran argued that the Court,

is as much concerned to prevent encroachments by the Federal Government upon the domain of the States as to prevent encroachments by the State Governments upon the domain of the Federal Government.[11]

Judicial Review in the Constitution

What were the expectations and intentions of those who framed the Constitution regarding the High Court? Did they anticipate that it would be the responsibility of

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[8] Galligan, 43, quoted from Owen Dixon "Two Constitutions Compared" *Jesting Pilate* (1965), 100-1.

[9] Quick and Garran, 724-5.

[10] 1891, 253.

[11] Quick and Garran, 725.

the Court to maintain the 'federal balance'? Did the framers expect that the Court could be responsible for a 'shift of power' to the centre and away from the States?

Recent works on judicial review in Australia have addressed questions about the framers intent regarding the High Court, and have tried to seek out the origins of the Court in the debates, only to find that there is something of a mystery at the heart of things. James Thomson's work *Judicial Review in Australia: The Courts and the Constitution* examined the origins of judicial review through tracing British, colonial and American antecedents.[12] Through an examination of the debates and the Constitution he concluded that a "constitutional justification for judicial review has not been substantiated". Those who would claim that there is a textual basis for judicial review, Thomson argued, are "endeavouring to rest a prodigious power on a slender reed".[13] According to Thomson the Justices of the Court themselves have not attempted to do so. The purpose of this chapter is not to replicate Thomson's task nor to provide obiter for the Justices of the High Court, but rather to address questions concerning the origin of the High Court in the debates, in relation to its *federal* function of judicial review.

Brian Galligan's *The Politics of the High Court* is concerned, in part, with the origins of judicial review in Australia. Galligan persuasively argued, through an examination of the Federation debates, that the lineage of judicial review can be traced exclusively to American sources, rather than the British judicial tradition. Although differing in their respective emphases on the formative influences on this feature of the Constitution, both Thomson and Galligan seem puzzled by the lack of explicit statement in the debates to justify the basis of establishing, within the Court, a power to overturn legislative enactments. For Galligan:

> The reasons why judicial review was not spelt out in the various constitutions are less clear. In the Australian case ... and probably also in the American, judicial review was implied by judicial decisions and the paramountcy principle. We can speculate that there were perhaps other reasons of political expediency and prudence for not making such an important power explicit. To spell out judicial review would violate that discrete reticence which tends to disguise the court's delicate political function and to enhance its ability to exercise such a function.[14]

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[12] J. Thomson *Judicial Review in Australia: The Courts and the Constitution* unpublished S. J. D. thesis, Harvard University 1979.

[13] Thomson *Judicial Review*, 325-6

[14] B. Galligan, *Politics of the High Court*, 46. Galligan concentrated much of his argument on the leadership role of Clark and Barton in the 1891 and 1897-8 Conventions respectively and on the debate which took place in the first Parliament 1902-3, where there was a good deal of discussion of judicial review, (however, this debate was not part of the foundation of the federal system as the institutions were already of course constitutionally established by this time). See also B. Galligan, "Judicial Review in the Australian Federal System: Its origins and functions." 10 *Federal Law Review* (1979), 367.

Is this plausible? Would the framers, as a group, have reached a tacit understanding over the far-reaching implications of judicial review in the operation of the Constitution when there had been such bitter divisions and exhausting debate in the Conventions over other institutions? Would the framers simply have not discussed the possibility of the federal structure being unbalanced by the Court when such a battle had raged over the powers of the Houses, over representation and over finance? The achievement of the balance had been so vigorously contested on these issues that they had all threatened the continuation of the Conventions.

Thomson likewise could only speculate:

> If the conclusion of students of the Australian Constitution is correct, why did the Australian convention delegates, who were in numerical strength overwhelmingly members of colonial parliaments, intend the courts to possess the power of judicial review? ... If, as some have maintained, the text of the Constitution does not provide for judicial review, is there room to argue, despite the public nature of convention proceedings, for the possibility that the Framers conspired to conceal their intentions concerning judicial review? Such a dichotomy between clearly expressed intention in the convention debates and, at best, opaque constitutional provisions concerning judicial review makes it more plausible to suggest as a possible answer that the Framers of the Australian Constitution concealed, from those who turned merely to the written words of that document, their belief that judicial review would be part of the new federal system.[15]

This explanation seems to be fudging the issue! Thomson cannot provide a plausible explanation as to why the framers did not confront the matter of vesting the High Court with the power of judicial review. To contend that the framers, as a whole, concealed their intentions is not plausible. Why would representatives who were deeply committed to state rights and deeply fearful of the power of New South Wales and Victoria, in Baker, Forrest, Braddon, Cockburn, and Dobson, conspire with democratic nationalists, Higgins, Kingston, Isaacs, Trenwith and the early Deakin, or with the group of moderates, Barton, O'Connor, Griffith, and the later Deakin, to prevent an issue of such profound importance being discussed. Would George Reid, who later seemed to take so much delight in being troublesome, remain a silent and acquiescent party to such a concealment?

In order to maintain the conspiracy theory it is necessary to argue that the framers were a group, with a unity of purpose, which was to win a consensual agreement for the greater 'national interest'. But the delegates were not such an undifferentiated mob. If

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15 Thomson, *Judicial Review*, 131-2. Thomson speculated that Barton may have thought the inclusion of a positive statement on judicial review to be "unnecessarily redundant" and that it is "surprising" that it was not included, 155. See also, 159, where Thomson said that Barton "conspicuously failed to ground this power ... in the Constitution". In this context Galligan, 45 & 270, cited P.H. Lane who argued that judicial review was not expressed or to be construed in the text of the Constitution and Lindell's reply. P.H. Lane *The Australian Federal System* (1979), 1143-4. G. Lindell "Duty to Exercise Judicial Review" in L. Zines ed. *Commentaries on the Australian Constitution.* (1977), 183.

there was no wide conspiracy of silence then those who did realize the potential of the Court must have all been aligned and the secret must have been very well kept. The theory that some, or all, of the framers concealed the truth throughout the long and sometimes bitter debate is a speculative explanation at best.

Another interpretation is that while some saw the importance of the Court in forming the Constitution others seemed to have thought little of its place and function - it was simply not seen as an important issue.[16] In Sydney, in 1891, the establishment of the Judiciary Committee was an afterthought. When Clark insisted that it be separately constituted, and not be merely a subcommittee of the Constitutional functions committee, Barton continued to argue that it should remain a subcommittee. In Adelaide, in 1897, of those who spoke to the second reading of the new resolutions only Barton himself, who seems to have been converted, spoke at length about the Court. He placed some stress on the need for the Court to be constituted with the power to pronounce Acts *ultra vires* and then addressed the function which the great majority of delegates thought was the more important, that of deciding whether the Court should be a final court of appeal.[17]

The framers, whilst recognizing that the Court was an important institution of the new Commonwealth, did not think it would be important in determining the character of the federation. Indeed as Deakin wrote in *The Federal Story*, the only "subject of feeling" regarding the judiciary was the question of appeal to the Privy Council.[18] There is little evidence that the framers did think it important as they believed the key institution to be the Senate. The Senate would be constituted in such a way and with such powers as to protect the states. Why would delegates who fought fiercely over the Senate powers meekly remain silent over the Court?

In the overall context of the debates the Court was scarcely mentioned and this applies specially to the first Convention. This absence of debate is corroborative of the

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[16] Galligan wrote: "The framers laboriously thrashed out the issue of judicial review" and "the Australian founders deliberately created a powerful court whose prime function was to interpret the constitution and apply it in settling federal disputes. In so doing they were consciously adopting an integral part of the classic American federal system. They intended the federal court to exercise judicial review over both state and federal legislation and constituted it accordingly." *High Court*, 66 & 69. Galligan has established incontestably that the framers intended judicial review but the actual function of the court is less clear and that the issue was "laboriously thrashed out" would seem to be overstating the case. This chapter is intended to demonstrate that the framers were not fully aware of the potential power of the Court.

[17] 1891, 24-5. Thomson's account of Barton's argument about judicial review is tentative, in that he said that if Barton "understood" that "some arbiter" should be included positively in the Constitution he did not "publicly indicate that fact", *Judicial Review*, 160. Thomson later claimed that Barton had a "clear grasp of the theory of judicial review" yet, as he showed, Barton had not heard of the most famous American case to come before the Supreme Court to establish that power, *Marbury v Madison*, 166. If he had a "clear grasp" it was unschooled. See note 113 below.

[18] Alfred Deakin, *The Federal Story*, 33.

argument of this thesis that the framers were not fully appreciative of the point that establishing a powerful Senate would not guarantee that the federal balance or "true federation" (as they persistently referred to it) would be maintained. Their understanding of the relative insignificance of the division of powers is shown by the importance which was attributed to the powers of the Senate, which they genuinely intended to be a states' house, and the lack of importance which was attached to the role of the Court. The belief that the division of powers would be maintained by the Senate, not the Court, can be understood in terms of their use of metaphor of the spheres. A federal arrangement was one with spheres of activity *not* of overlapping responsibility. If they had more clearly understood that overlapping or concurrent powers comprised the federal settlement, then the role of the Court would necessarily have become more important to them, especially if the Senate failed to "jealously-guard States' rights" as one or other of the institutions, the Court or the Senate, must determine and protect the line of demarcation so contrived.

Quick and Garran gave expression to the line of demarcation under the heading *Principles of Interpretation* in the Judicature section.

> The Constitution of the Commonwealth is a Federal Constitution; it establishes a government of limited and enumerated powers. The Federal Parliament is not, like the British Parliament, sovereign; it is not even, like the Parliament of the colonies before Federation, invested with powers which, within its territorial jurisdiction, are practically sovereign; its authority is limited to specified subjects. The Constitution draws a line between the enumerated powers assigned to the Federal Government and the residue of powers reserved to the State Governments. Both sets of Governments are limited to their sphere of action; but within their several spheres they are supreme.[19]

Quick and Garran were here reiterating the view held at the Convention, that the supposed line of demarcation between federal and state activities was objective and unmistakable, as the two sets of governments remained within their spheres. Or, as Barton said elsewhere, the legislature would have "a power rigidly circumscribed".[20] Yet the Constitution, as it was written, did *not* draw a line.

The Constitution contained enumerated powers of the federal government (in the section finally designated as 51) but it set no boundary to those powers which the states also held concurrently. Quick and Garran continued their commentary by citing the canons of interpretation which would determine the extent of the grant of powers which had been expressed by Chief Justice John Marshall of the Supreme Court of the United States. Marshall's guiding principle, according to Quick and Garran, was that,

> The Federal Government can have no power which, on reasonable construction of the whole Constitution, has not been given expressly or by necessary implication. But when once it has

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[19] Quick and Garran, 794.

[20] N.S.W.P.D. 1897 Commonwealth of Australia Bill special volume, 601.

been determined that the Federal Government has power over the subject matter, the scope of the power, and mode of giving it, will receive a broad and liberal construction. The power of the Federal Parliament, though limited to specified objects, is plenary as to those objects.[21]

So, in the reckoning of Quick and Garran, if the powers were given expressly, or by implication, then a liberal interpretation should follow. But if the original grant of power - concurrently held - was broad, then what was to prevent a general expansion of federal power under a liberal construction, to the detriment of the states? What was to stop the balance, that they fancied they had achieved, from tipping in favour of the centre? The assumption of a demarcation was central to this understanding of the Constitution, but it was a demarcation to be patrolled by an institution other than the Court itself.

The absence of debate over the Court is remarkable. The little debate that did take place throughout the Conventions was not conducted methodically. The issues surrounding the establishment of the Court were not exhaustively discussed. The principle issue raised, regarding the judiciary, was the status of the Court as an Appeal Court. From the earliest stages of the Melbourne Conference in 1890 through to the debate at Westminster over the *Commonwealth of Australia Constitution Bill* the first concern was whether the High Court or the Privy Council should be the final Court of Appeal. The federal function of the Court, as a tribunal to determine the meaning of the Constitution, was in comparison regarded as of a secondary importance.

MELBOURNE 1890 AND SYDNEY 1891

Melbourne 1890

In Melbourne, in 1890, Playford's opening comments on the Court were brief and declamatory, as were the remarks of those who spoke after him. His concerns were over the expense and unnecessary duplication of functions that the establishment of the Court would entail. Playford mused that it sounded like another method of "putting money into the pockets of lawyers".[22] Deakin, who followed Playford, made the most expansive statement of the Conference on the character of the Court. He introduced his remarks by stressing the value of the Court in its appellate role and added that benefits would accrue from copying the model of the United States Supreme Court which was one of the "organizations by which the power of its Union makes itself felt".[23] Deakin's source for this opinion was, he said, "that monumental work by Mr

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[21] Quick and Garran, 794.
[22] Melbourne 1890, 72.
[23] Melbourne 1890, 89.

Bryce", which showed the extent of the federal court system beyond the Supreme Court itself.[24] "The powers with which the courts are entrusted", said Deakin, "and the cases with which the courts deal, indicate the reality of the federation of the states comprising the Union". Through quoting Bryce, Deakin explained the extent of the jurisdiction of the Supreme Court, and the value of an independent Court system for pursuing matters between states and between people of different states.

Andrew Inglis Clark's comments on the Court, whilst fuller than other delegates, were briefer than Deakin's. He was content to say that Deakin had said "all that could be said upon that question".[25] He added only that there would be consequential benefits for the court system, as a whole, when judges knew that their work would be scrutinized by higher courts. No other delegates gave more than a passing mention to the courts of the proposed Commonwealth.

The Melbourne Conference allowed only a preliminary exploration of the myriad issues surrounding the question of federation, all of which were potentially troublesome, so it is perhaps unexceptional that there would be only a brief discussion of the Court. This being so, the treatment accorded to the Court at the Sydney Convention of 1891 was more illustrative of the overall perception, held by the delegates, of its place in the new order.

Sydney 1891

The Parkes resolutions stated that a judiciary would be created, yet only referred to its appellate capacity. Resolution 2 allowed for the creation of,

> A judiciary, consisting of a federal supreme court, which shall constitute a high court of appeal for Australia, under the direct authority of the Sovereign, whose decisions, as such will be final.[26]

Parkes observed that the Court would be a final Court of Appeal and asked the "several gentlemen, learned in the law . . . to dwell further, and in a more definite way upon this branch".[27] Griffith, in following Parkes, made a speech which was thoughtful and evaluative in contrast to Parkes' rhetorical excesses. Said Griffith:

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[24] Galligan, *High Court* 44-5 and Thomson, 213-7 on Bryce.
[25] Melbourne 1890, 108.
[26] 1891, 23.
[27] 1891, 26.

With regard to the judiciary I do not propose to occupy the time of the Convention now. I believe that there should be a supreme court, and that not on the American model, but a real court of appeal for Australia from all the Australian courts.[28]

Griffith's comment here has an ambiguity which needs explanation. His rejection of the American model was not a rejection of the federal character of the Court, it was a more narrow rejection of the appellate provisions, which denied the right of appeal to the Supreme Court on non-federal matters. He was stressing the need to create that capacity, which American states did not possess, for appeals on state law from the Australian state courts to a higher court.

Again Griffith's comments did not address the federal review function with which the Court was to be vested and even Deakin, when he spoke, only mentioned the Appeal function.[29] Barton, however, did pass comment on the question of review. The Court must have the power to enforce its decrees as "the three great arms of the state" must all reach individuals. Barton said,

where it becomes necessary to construe the validity of a statute, either the statute of one of the provinces, or where the statute of the federal parliament may seem to impinge upon the state statute itself - in either of those cases the safest course is to trust to the interpretation of the federal court, because by that means the interpretation by individual cases is likely to meet with a more harmonious acceptance than would be the result if jealousy were provoked by endeavouring to settle it as between state and state.[30]

These remarks were the first substantial statement which were concerned with a function other than the Court's appellate jurisdiction. But the lustre of Barton's original insight into the role of the Court was dulled later by his resistance to Clark's initiative on the Committee structure.[31] The speakers who followed Barton, in addressing the Parkes resolutions, concentrated their remarks on what they perceived to be the principle concerns of the federation - concerns which did not include the Court. Downer's comments were more extensive than most other delegates. With Barton's speech fresh in his mind he concurred in wishing for a "strong judiciary" which, he said, had been the experience in the United States. The Union only worked, according to Downer, because of the assistance which came from the bench "from time to time".[32] He added that his experience agreed with that of other professional men of the colonies which was that it was not necessary to retain the right of Privy Council appeal.

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28 1891, 33. See also Griffith, *Notes on Australian Federation: Its Nature and Probable Effects*, (1896), 20-1.
29 1891, 83.
30 1891, 96.
31 1891, 501.
32 1891, 103.

Rutledge, from Queensland, specifically but briefly mentioned the need for the Court to possess original jurisdiction "in those subjects which this Convention may see fit to prescribe".[33] Kingston, in reference to the need for a system of federal courts, said that in locating the the appeal function in the Court there was a duty to finally settle all disputes in Australia and to dispense with the necessity for an appeal to Queen in Council. The most important function of the Court, in Kingston's view, included an arbitration and conciliation role:

> there will be no matter of greater importance to persons actively engaged in trade or to the general community than the supply of facilities for the speedy settlement of troubles.[34]

Kingston's only other remark on the Court was that he saw the importance of the "duty of deciding constitutional questions arising between the federal and local parliaments", but he said no more.

Fitzgerald, like a number of his colleagues, referred to the judiciary at the end of his address and only after commenting that he would not occupy the time of honourable members much longer. Fitzgerald did not wish to weaken the ties that bound Australia to the Empire and favoured a retention of Privy Council appeals despite the high regard in which he held many of the colonial judges.[35]

Lee-Steere understood the judiciary provision only in terms of the proposal to "do away with appeals to the Privy Council" which, he said, did not commend itself to his mind.[36] The Victorian delegate Sir Henry Wrixon (who had arrived at the Convention late to recover his position from his temporary replacement Attorney-General Shiels) gave a relatively lengthy account of the judiciary which covers three columns of the transcript. Wrixon was concerned to argue for uniformity concerning patents, bankruptcy and the court system, but he was not inclined to approve of a national criminal law and cited Clark's views in support.[37] Wrixon seemed to favour a uniform judicial system over local courts whilst supporting the retention of Privy Council appeals. He thought it would be difficult to constitute a Court with sufficient strength to "command unquestioned confidence of the provinces".[38] In contrast, the Victorian Premier Duncan Gillies made one of the longest speeches to the Convention but failed to mention the Court.

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[33] 1891, 152.
[34] 1891, 164.
[35] 1891, 172. Fitzgerald typified the colonial group who believed that the Privy Council was necessarily a more impartial body than a local tribunal.
[36] 1891, 194.
[37] 1891, 216-7.
[38] 1891, 217.

Gillies was followed by Andrew Inglis Clark who addressed the specific issue of the role of the Court in determining federal/state conflicts more fully than any other speaker. Whilst his treatment of the role of the Court was thorough, he did not emphasise the point about its decisive position in determining constitutional outcomes. He described the political rather than justiciable nature of federal/state relations but preferred to understate the centrality of the Court in a federal system.[39] If state interests were under threat through the legislative action of the federal government then those states could, with others, veto the legislation. Clark referred to Deakin's rhetorical question:

> what powers given to the federal government, either in the American Constitution or in the Canadian Constitution, could possibly create any danger to state interests?[40]

Clark replied to this question by citing the commerce power as a threat to the states - "that is the answer to the statement of the hon. member Mr Deakin".[41] Clark's solution was that, "We should put our state interests under the protection of the federal constitution and the federal courts". Yet he added: "There are some injuries for which there is no judicial remedy; the remedy is only political".

Clark was in a difficult position. He was committed to the federal system and to the protection of states interests. As an advocate of the American system and a student of the Supreme Court he understood the potential risks to which the states in America and in Australia were subject. He spoke of the review function of the Court and understood its application in the United States but recommended a different solution to the problem for Australia:

> But let us not trust to judicial remedies. Let us embody distinct remedies for injured states interests in our constitution; let us give every state the power to protect itself. Self-protection is better than protection by another.[42]

Clearly Clark foresaw the probability of state interests being compromised by the process of judicial review and was resolved to ensure protection through the provisions of the Constitution as a whole. Clark did not follow through with an explanation, as

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[39] 1891, 252-5.

[40] 1891, 251.

[41] Edward S. Corwin, *The Commerce Power versus States' Rights.* (1936). Corwin's (New Deal inspired) argument was a later vindication of Clark's claim. Corwin was, however, applauding the application of national power and denouncing the six propositions which he identified that were advanced by state rights advocates in an attempt to limit an extension of federal power. Corwin lionized Marshall and quoted him, for example: "In war we are one people. In making peace we are one people. In commercial relations, we are one and the same people." *Cohens v Virginia,* Wheat. 264, 213. See also Joan Roefels "The Warren Court and Corporate Capitalism" 39 *Telos* (1979), 94 for an interpretation of the nationalization of powers as an attempt to coherently organize capital, markets and labour in the interests of American capitalism.

[42] 1891, 252.

he saw it, of the implications of the commerce provisions for the federal balance. In rising to Deakin's challenge Clark unknowingly made an accurate prediction about what would become the typical action before the High Court, as the business of the Court, in its original jurisdiction, has been mainly dedicated to resolving disputes over the meaning of the Constitution in respect of the federal/state division.

With the exception of Downer, who later commented on the place of judicial review within the federal system, no speaker who followed Clark took up the issues which he had raised. Cuthbert voiced his support for the Attorney-General of Tasmania, but only with respect to the importance of not allowing interference with the appointments of judges.[43] He added only that the, "high court should deal with questions between the states and the federation".

Of the other delegates who spoke in the second reading debate Bird, Jennings, Dibbs, Lee-Steere, Cockburn and Brown only mentioned the need for a Court.[44] Among the remaining lesser-lights of the Convention Thynne, Smith, Grey, Bray, Moore, Abbott and Donaldson failed to mention the Court. This is explicable insofar as they were either following more illustrious speakers or spoke late in the debate and were anxious not to appear to be taking up valuable time. More puzzling, however, is the number of eminent delegates who did not mention the Court; amongst them were the Victorian Premier Gillies (who again made one of the longest speeches), John Forrest, William McMillan, Ayde Douglas, John Hackett and most remarkably Richard Chaffey Baker. Nor did Parkes, in his lengthy response to the debate, make any mention of the Court.

If the High Court, in its principle function as a body to interpret the meaning of the Constitution and to adjudicate between State and federal spheres, was to be "the keystone of the federal arch" then this was poorly appreciated in the early part of the debates.[45] Furthermore it seems to have been poorly appreciated by some of the most acute members of the Convention. Baker, the enemy of the federal power, apparently thought it not of sufficient significance to merit discussion when compared with the issues of the distribution of powers, representation and finance.[46]

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[43] 1891, 294.

[44] 1891, Bird, 123; Jennings, 126; Dibbs, 185; Lee Steere, 194; Cockburn, 202-3; Brown, 209.

[45] The phrase has been attributed to Deakin but it seems to have coined by Symon.

[46] Baker, *Manual for Members*, In his chapter on the Federal Courts Baker wrote' "The judgements of a Federal Judiciary may give rise to important political results, but it is not correct to state that they exercise political functions; no new principles are laid down for application by them, no novel duties are imposed on them, they are only required to apply the principle 'that any act done by an agent outside its powers is void'", 126-7.

The 1891 Convention in Committee

When the Sydney Convention dissolved into a Committee of the Whole to discuss the resolutions, prior to establishing the drafting committees, the judiciary provision was accorded cursory treatment. The overall debate over the form that the resolutions should take took four full days and covers 174 pages of the transcript.[47] The original Barton motion was subject to amendments and explanation and some new resolutions were proposed and debated. Resolution No. 2, on the Judiciary, had been postponed in order to resolve the wording of the *Parliament and Executive* resolution and was the last of the original three to be debated. The debate on the judiciary covers just three of those 174 pages and the issue at the centre of this brief discussion was Wrixon's successful attempt to remove the provision which stipulated that the Court's "decision as such shall be final".[48]

Only Wrixon, Clark, Kingston and Downer spoke to Resolution 2. Of the remarks which were made Kingston and Downer briefly referred to review function. Kingston said that it would be "in the highest degree lamentable" if the Court were not given final power to decide questions between the dominion and the states of which it was to be constituted.[49] Perhaps Downer should be given the plaudits for being able to foresee future developments. His comments in 1891 seem to be out of keeping with the concerns of his fellow delegates, but when compared with his comments at Melbourne in 1898 he seems to have appreciated the significance of the Court earlier than did his colleagues.[50] In 1898 he predicted that the Court "will have the greatest part in forming this Commonwealth", and continued with an eloquent statement of the role of the Court as an agent of change. He rehearsed these comments in 1891 by saying that there "might still be an appeal to the Privy Council" because,

> it occurred to me that if the federal judicature were the only tribunal to decide finally what authority the federal government had, then the federal parliament might go beyond what was contemplated - beyond the provisions of the statute creating it, and by the power of judge-made law and judicial construction extend the original intention and the ambit of jurisdiction, as undoubtedly Chief Justice Marshall did in America, as happened in that case to the infinite benefit of the republic.[51]

The obvious implication in Downer's remarks was that such an extension would not be to the benefit of the Commonwealth of Australia.

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[47] 13, 16, 17, 18 March.
[48] 1891, 473.
[49] 1891, 475.
[50] Melbourne 1898, 275.
[51] 1891, 476

Immediately following Downer's astute observation the resolution (with the Wrixon amendment) was adopted without further debate. So, with the exception of these remarks and Clark's earlier comments, Barton's brief words were, to this stage, the only reference of any substance to the place of judicial review in the federal system and, as has been widely argued, the judiciary section of the draft was but little changed throughout the decade to 1901.

The only other matter pertaining to the Court which was discussed prior to the establishment of the drafting committees was whether or not the establishment of a separate Judiciary Committee was necessary. Clark was insistent that a separate committee was needed and, although Barton opposed the idea, the Committee of the Whole was in favour. A federal practice was adopted and the three committees comprised an equal number of delegates from each colony. The Judiciary Committee consisted of Clark, Dibbs, Wrixon, Rutledge, Kingston, Hackett and Atkinson of New Zealand. Downer was appointed to the more important Constitutional Functions Committee.[52]

The committees have left no evidence of their deliberations. Quick and Garran gave only a narrative account of their formation which amounts to no more than can be gleaned from the debates themselves. Their summary is that, "The deliberations of the Committee were private".[53] The contributions of the various members of the judiciary committee can, however, be estimated. L.F. Crisp has identified Dibbs, "the Ishmaelite of the Convention", (Deakin's words) as a non-contributor. "I have occupied less time than has any member of the Convention" said Dibbs.[54] Rutledge made little contribution to the plenary sessions so it is unlikely that he provided very much constructive assistance. Atkinson would have provided even less. Hackett and Wrixon held independent views and may have played a useful supportive role to the two leaders Kingston and especially Clark. Clark had furnished a draft Constitution early in the proceedings to which Kingston responded with an alternative proposal. The important features in both drafts have been identified by Crisp.[55] Under Clark's plan the Court would hear appeals from lower federal courts and state Supreme Courts but no appeals would be permitted to the Privy Council. This was a point which Kingston also included. Kingston further allowed for the Court to be constituted by empowering the Executive Council to appoint state Supreme Court judges to the Bench. So it may be

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52 1891, 509-10.

53 Quick and Garran, 130.

54 L.F. Crisp *George Richard Dibbs 1834-1904: Premier of New South Wales Prophet of Unification* (1980), 31.

55 L.F. Crisp *Charles Cameron Kingston: Radical Federationist.* (1984), 36-7.

readily assumed that between them Clark and Kingston, who both had sophisticated ideas about federal government, designed the Judiciary.

The report of the Judiciary Committee, when delivered, differed from the provisions which were included in Griffith's Draft Bill. He explained to the Convention that the Bill embodied the recommendations "in substance though, not in form".[56] When he introduced the Bill to the Convention Griffith, in his commentary on the third Chapter, stressed mainly the Court's appellate jurisdiction. In addition he only alluded to the federal function by mentioning that separate Courts would be established with a jurisdiction "which may be exclusive of, or concurrent with, that of the courts of the states".[57] He did not link his comments about the role of the Court to the remarks he had just made about the state and federal spheres of activity.[58]

Griffith's speech covered exclusive and concurrent powers and he stated that the paramountcy clause would privilege federal legislation where necessary:

> It is only when the federal parliament comes to the conclusion that it is necessary to make laws on those matters that the powers of the states will be excluded.[59]

He defended the strategy of enumerating federal powers, as was the case in the United States, rather than enumerating the powers of the provinces as was the Canadian practice. The committee did not follow the Canadian lead because Griffith thought it to be "unscientific, and ... impossible" to list the appropriate powers. Griffith surveyed the scope of state powers and emphasized the breadth of subjects contained therein: "if they are not enough for a state to exercise its functions upon, then the state must be very eager to do a lot of work".[60] As to a contested case over the intersection of the federal and state spheres Griffith said nothing. He did not mention competing claims to specific powers nor methods of reconciling those claims. In this context the Court could have been discussed, but was not.

During the clause by clause debate of the Bill, in the committee stage, Chapter III on the Federal Judicature was dealt with very briefly. The debate covers less than ten pages of the transcript of proceedings most of which concern Kingston's mistimed and failed attempted to win approval for his suggestion involving arbitration and conciliation.[61] Deakin, who spoke for Kingston's motion, claimed that he would have

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[56] 1891, 527.
[57] 1891, 528.
[58] 1891, 524-5.
[59] 1891, 525.
[60] 1891, 526.
[61] 1891, 779-87.

voted against it if he thought that it threatened the local parliaments.[62] Dibbs also spoke for the motion but it was Griffith who spoke for the majority when he voiced his concern that, if adopted, both property rights and civil rights would be infringed.[63] Kingston tried to mollify delegates in opposition with the claim that if he thought that state rights would be infringed he would "not for a moment dream of moving the amendment".[64] Griffith again was concerned that such a Court might raise the wages of workmen and thus "depreciate the value of property in a state". He added; "we ought to hold fast by the principle that we are not going to interfere with the rights of property in the states".[65] Property rights were in the forefront of Griffith's mind during the Convention because, as Premier of Queensland, he was responsible for the Government's policy against the shearer's strike, by mobilising special forces and arming the pastoralists.[66]

Such a narrow conception of the role of the Court and the limited expression of its functions suggests that the powers of the Court were, in Griffith's view, to be circumscribed. Kingston's motion was defeated, as was Wrixon's attempt to alter the provision which allowed only a limited right of appeal to the Privy Council.[67] The latter proposal, curiously, was supported by Dibbs who earlier had alarmed delegates by airing his republican sympathies. Parkes especially had been distressed by the "wild ravings" which had been so "ungraciously launched amongst us".[68] Dibbs, in his republicanism (uncertain as it was) found himself in very limited company.[69]

Apart from these peripheral matters there was no discussion of the Court in committee. As Barton noted the draft of the Judiciary section remained virtually unchanged in the 1897-8 draft from the 1891 draft.[70] Yet in 1891, as has been shown here, the Judiciary

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[62] 1891, 781.

[63] 1891, 781-2.

[64] 1891, 782.

[65] 1891, 784.

[66] According to R.B. Joyce, the most recent biographer of Griffith, historians have not given him credit for preventing extreme Queensland Government action against the strikers. Joyce contended that Griffith was not implicated in the decision to supply arms to pastoralists but he was aware of the increasing numbers of troops being deployed by the government against strikers. (1200 in total) Horace Tozer, the Colonial secretary, was anxious to take charge in Griffith's absence and later distinguished himself by issuing 'shoot to kill on suspicion' orders during the 1894 strikes. Seemingly Griffith's liberal reputation has been fortuitously preserved by virtue of his commitments in Sydney. R.B. Joyce *Samuel Walker Griffith*, (1984) 166-7.

[67] 1891, 785-87. Wrixon moved to delete the words which allowed for the right of appeal only on matters of "public" interest which presumably precluded private matters.

[68] 1891, 323, Dibbs, 185. Later Dibbs spoke about his wish *not* to "sap the foundations of a union under the Crown", 786.

[69] See Crisp *Dibbs*, 31. Clark was the only other avowed republican at the Conventions but he remained silent about his sentiments. J. Williamson, *Democrat by Despair: Andrew Inglis Clark, Nineteenth Century Liberal and Nationalist* B.A. Hons dissertation, University of Tasmania 1987.

[70] Adelaide 1897, 445. Also Galligan, *High Court* 56.

section was hardly mentioned. Was this because the delegates understood the far-reaching implications of judicial review and realized the potential, that the Court through judicial construction of the meaning of the Constitution could change the entire edifice which they had so painstakingly and laboriously erected, or was it because they did not clearly foresee the role the Court would fulfil?

The answer can be found in Clark's argument that the states must act in their own interests and in their own defence. They should protect themselves, not leave it to a judiciary, no matter how trustworthy they believed it to be. This was what the framers believed they were doing. Thus the great weight of debate in 1891 was concentrated on the Senate and the High Court was largely ignored.

THE CONVENTION OF 1897-8: THE ROLE OF THE COURT

Adelaide 1897

The manner in which the Judiciary was dealt with during the second Convention indicates that representatives were only gradually coming to understand that the Court was a crucial institution in the federal system. At Sydney, in 1891, the Court had been treated as an issue which was necessary but peripheral to the main questions of the Convention and this was the approach that representatives at the Adelaide session of the 1897-8 Convention adopted. Mention of the Court in the debate on the Barton resolutions was sparse. Due to the procedures which the Convention adopted, the Judiciary sections were not debated in the second session in Sydney, so it was not until the third session in Melbourne that there was a lengthy consideration of the place of the Court in the Federation. The Melbourne session was a continuation of the committee stage which had been entered into in Adelaide. The clauses of Chapter III, on the Judiciary, were at first considered *in seriatim* and debated at length, after which half a dozen clauses were reconsidered, some twice, before the wording was finalized.

In Adelaide (in the absence of Griffith and Clark) Barton stressed the importance of the federal Judiciary. This was a minor conversion from 1891 as, in Barton's view, the power to hold the federation together would reside with the Court. It would also preserve the harmonious balance of the system:

> What seems to me to be the first function of a Federal Supreme Court is not that it should be a High Court of Appeal, but that it should settle State difficulties.[71]

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[71] Adelaide 1897, 25. Barton also spoke about the need for "some arbiter as to the interpretation of that instrument ... It is just here that the principal use of the federal judiciary arises". N.S.W.P.D. 1897, 601.

The resolution which Barton was addressing was, in substance, identical to the final Judiciary resolution proposed in 1891.

> There shall be a Supreme Federal Court, which shall also be the High Court of Appeal for each colony in the Federation.[72]

As Barton himself noted, the resolutions corresponded very largely with those introduced by Sir Henry Parkes in 1891.[73] He added later that the Judicature chapter "in the main or to a large extent ... correspond with the ... Bill of 1891".[74] The difference being that cognizance was taken of Wrixon's successful motion which removed the provision establishing the High Court as the final court of appeal. The Court, said Barton in an echo of Alexander Hamilton, would be an arbiter between parties which, in a federation, would prevent the only other form of arbitration - "the arbitrament of blood".[75] A Supreme Court would be,

> a body which shall decide in the peaceful and calm atmosphere of a court, not under surroundings of perturbed imagination or of infuriated party politics, those questions of dispute which arise, and which must arise, under a Federal Constitution, and many of these questions are precisely the questions which will arise between State and State when conducted by separate Governments, questions of the boundaries between States, questions of the validity of the laws of the States, and other questions which may arise, and which could only then be ultimately resolved by warfare.[76]

The clarity of Barton's statement would not readily allow a mistaken impression of the role of the Court to be maintained. He was clearly saying that the Court would be empowered to decide the boundaries of federal and state jurisdiction. The Court would be empowered to declare laws which transgressed those boundaries to be unconstitutional. Whilst in the speeches which followed there was no dissent from Barton's view, the issues which he raised were also not addressed. Explaining the absence of dispute is a problem of the interpretation of silence. Does this absence indicate consensus or a lack of appreciation of the significance of the power of the Court to "make" the Constitution? Given the context of the general concern over the potential power of the Commonwealth the silence would, despite Barton's speech, indicate that the role of the Court was not fully realized.

The question of the appeal was again laboured throughout the second Convention. This obscured the more important question of judicial review which Barton had raised at the beginning. Whilst the Court was discussed at greater length than previously the review function was neglected and merged with the appeal issue. Should all classes of

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[72] Adelaide 1897, 24.
[73] Adelaide 1897, 20.
[74] Adelaide 1897, 445. He repeated this at N.S.W.P.D. 1897, 601. See also Sawer, 11.
[75] Adelaide 1897, 25.
[76] Adelaide 1897, 25.

cases be allowed through on appeal? Should only matters which concerned imperial interests be open to appeal? Did the Privy Council have full and sufficient knowledge to deal with remote Australian matters? If the colonies could draft a Constitution could they not also be capable of interpreting its meaning?[77] These questions were raised in debate yet, while they relate to the issue of judicial review, they were not central to it.

Most of the speakers who followed Barton ignored the Court while others made bad predictions. Glynn who claimed that in matters such as the appointment of a Federal Supreme Court of Appeal "we are in perfect agreement".[78] He said that in comparison with the United States,

> I venture to think that there is not the same possibility of intercolonial differences in Australia, with its seven States, [sic] and little room for territorial expansion . . . It is not advisable to create a tribunal at a very large expense and for its functions to approach to almost zero.[79]

Symon, who was later appointed chairman of the Judiciary committee, mentioned the two functions of the tribunal and seemed to be supportive of the role played by the Supreme Court of the United States in giving a "calm judicial decision over the arbitrament of the sword". The Supreme Court has gone on its way in "interpreting the provisions of the Constitution for the benefit of the United States". That was the character of a tribunal which "Australia would wish to see".[80] Reid stressed the importance of setting up a Supreme Court as an independent constitutionally created institution rather than allowing it to be a creature of the Parliament. A strong Court was necessary to be a "guardian of all the rights and liberties of the States and the people". Reid added with characteristic impudence: "I am glad that Mr Barton agrees with me in this respect".[81] Trenwith sought to reassure the nervous small states representatives that a "proper Federal Supreme Court" would guard state rights and the Constitution.[82]

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[77] LaNauze has shown how the Colonial Office became aware of the sensitivity of the Australian delegation to questions of "corrections" to the Constitution. John Anderson, a senior official, noted on the official 1899 proof copy of the Constitution that there was a "peculiar Australian jealousy" over interference with the draft. He later wrote that the Australians hold that the Constitution was a matter for "themselves to interpret ... this they feel most strongly", *The Making* 253. Carruthers was one who "combated" the idea that Australian courts should interpret the Constitution. Melbourne 1898, 2312.

[78] Adelaide 1897, 70.

[79] Adelaide 1897, 71. Gerald O'Collins, Glynn's biographer, says of him that he was "one of the most vocal opposition members" in the new Parliament. G. O'Collins *Patrick McMahon Glynn* (no date 1964?), 171. Galligan wrote that Glynn was one of the most implacable parliamentary opponents of the new court". *High Court*, 73 Glynn miscounted both the Australian states (7) and the original American states (14) Adelaide, 1897, 71.

[80] Adelaide 1897, 129.

[81] Adelaide 1897, 272.

[82] Adelaide 1897, 336.

As an indication of the importance which was attached to this question most representatives either failed to mention the Court or referred to it by name only. Turner, in a long speech, acknowledged the power of the Court to pronounce legislation *ultra vires.* [83] O'Connor, Braddon, Fraser, Carruthers, Wise, Henry, Holder, Dobson, Fysh, Solomon, M. J. Clarke and Gordon mentioned the Court briefly.[84] Whereas astonishingly, Lyne, Isaacs, Quick, Downer, McMillan, Forrest, Deakin, Walker, Howe, Zeal, Brunker, Baker and Cockburn failed to refer to the Court in their speeches![85] The final surprising aspect of the debate was that Higgins - the radical nationalist - did not mention the Court, but argued like Cockburn and Baker that, "The truth is that the true protection for the small States lies in the limitation of the power given to the Federal Parliament."[86] Labour man Trenwith echoed Higgins sentiments that the limited power given to the federal government was the protection of the states "the Constitution is the guardian of the State rights".[87]

Barton in his reply to the second reading speeches stressed the role of the Court as a federal arbiter and said (as Madison had in *Federalist* 39) that it "is right that it should be a federal instrument".

> I will not waste time in further argument on that subject, because commonsense and reason combine in declaring that the Federal Executive must be free in the choice of its court, which is to be the safely valve in the Federal Constitution.[88]

So ended the discussion of the Court in the plenary sessions of the Conventions.

The Second Convention in Committee

The committee of the whole which considered the Bill clause by clause was told at the outset by Barton that the work of the Judiciary committee left the drafting committee with little to do as the clauses were well drawn.[89] Corresponding, as they did, to the 1891 Bill there was initially little room for disagreement on this point. Clauses 69 to 78 of the draft Bill covered the Court but only three of those clauses were discussed at length. A dispute arose as to the number of justices to be appointed and the question of

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[83] Adelaide 1897, 43.

[84] Adelaide 1897, O'Connor, 58; Braddon, 68; Fraser, 83; Carruthers, 92-3; Wise, 115-6; Henry, 119; Holder, 156; Dobson, 200-1; Fysh 236; Solomon, 266-7; Clark, 307; Gordon, 326.

[85] In quoting from a Canadian source Cockburn mentioned the Canadian Court in passing, but not the Australian, 338.

[86] Adelaide 1897, 100.

[87] Adelaide 1897, 336. See also Trenwith's more expansive statement, 940.

[88] Adelaide 1897, 369.

[89] Adelaide 1897, 432.

the tenure of justices was raised.[90] Glynn quoted Hamilton in saying that the "permanency of the judiciary was the very citadel of public justice". He also cited James Wilson who showed that attempts had been made to "what Webster calls dilute the Constitution by adding additional judges".[91]

Symon also quoted Hamilton's argument that courts were the "bulwarks of a limited Constitution" which could only be protected by independent judges. Without this "you will damage what is really the keystone for the federal arch".[92] The independence of the Court should be "placed above the interference of Parliament" argued Symon. This was the beginning of what Galligan has argued has been the pervasive and successful strategy of isolating the Court from *political* interests, which has enabled it to occupy a remote and suitably judicial distance from the political fray, despite its position which, as Symon said, was "supposed to be co-equal with the Parliament".[93] Downer again showed his grasp of the significance of the review function of the Court:

> I look upon this part of the Bill as the most important part of all, because this court is what we have to look to, what all the states have to look to, for the protection of the Constitution.[94]

Cockburn interjected that protection was needed against federal encroachment. Downer, whilst seeing that the Court was central to protecting the balance from being upset by "federal encroachment", maintained that it should be "noble and lofty" and that "we have to put it beyond all possibility of being terrified by influence of any kind". Implicit in Downer's remarks was the belief that the Court would guard the Constitution, and the *meaning* that was intended, from political influence.[95] He claimed that the Americans took much care to avoid this possibility and cited Symon's quotation from Hamilton to prove his case. The strength given to the judiciary would need to be protected so that they in turn could "do their duty" to "preserve us against encroachment" and prevent "the destruction of the Constitution".[96]

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[90] Adelaide 1897, 935-44. The term "Justices" was adopted in preference to "judges", 944. Cl. 69, The Carruthers amendment to remove the restrictions on the minimum number of Justices failed. Symon used the argument that justices could not be removed in the U.S.A. where "the system is most perfect".

[91] Adelaide 1897, 945. The threat by Roosevelt to stack the Supreme Court has been the most notorious case of attempting to "dilute the constitution", but as Galligan has argued this strategy has not been transferred to Australia, *High Court* 6 & 147 Higgins and Symon were both conscious of the possibility of "stacking". Adelaide 1897, 951.

[92] Adelaide 1897, 950. Dobson also reminded the Convention that the duty fell to the Court to interpret the Constitution, 973.

[93] Adelaide 1897, 951

[94] Adelaide 1897, 956

[95] Adelaide 1897, 957.

[96] Adelaide 1897, 956.

Sir William Zeal said that it was extraordinary that the whole question of Federation was being subordinated to the rights of the legal profession and that the Convention was wasting its time "while the great question of Federation is trembling in the balance". He was tired of "legal gentlemen continually getting up and practically hair-splitting as to the meaning of words".[97] Clearly, according to Zeal, Downer's point was not a great issue of federation. Meanwhile, clause 71, covering the judicial power was only debated with respect to Glynn's attempt to add a subsection to give the High Court jurisdiction over "any matters that the Parliament may prescribe".[98] The members of the Convention found this too far-reaching and potentially fraught with too many problems so they rejected the proposal.

Barton took this moment to reiterate his view of the overall position of judicial review in the Constitution. This speech was important in so far as it demonstrated his understanding of the nature of the Australian federal system as a hierarchical inter-relationship of defences against Commonwealth power not as a group of singular or separate institutions. Barton said:

> My friend Mr O'Connor points out that the most important questions that may arise may be those between the States and the Commonwealth, the validity of State laws, and the validity of Commonwealth laws which may overlap or override them. Those very questions which the Senate exists to prevent may be arising and embarrassing the Constitution. The Senate will have to exercise its powers to prevent overlapping of that kind, but if it fails to exercise its authority power must be present in the court to adjust matters.[99]

This statement would seem to be crucial. Barton was the most advanced thinker about federalism in the second Convention and understood the Court, at this juncture, to be secondary to the Senate which was to be the principal protector of the Constitutional settlement. By this stage of the debate the emphasis on the review function of the Court had altered. A greater appreciation of the potential role of the Court is apparent in the remarks of some representatives, most notably Barton. If the Senate were to fail (which representatives were primarily intent on preventing) then the Court would be relied upon. The Court, according to Barton, was *not* to be the first line of defence. This being so then the whole question of judicial review can be understood as a secondary, not a primary, question of federation.

The only other clause on which any debate was generated was clause 73 which denied the right of Privy Council appeal.[100] The merits of Privy Council appeals and the

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[97] Adelaide 1897, 957. Later Zeal in another outburst said: "We are better off without the lawyers". Melbourne 1898, 297. See also Adelaide 1897, 937, "Lawyers again".

[98] Adelaide 1897, 962.

[99] Adelaide 1897, 962.

[100] Adelaide 1897, 968. The exception to this clause was that, if leave was granted, "the Queen" would hear appeals on matters of "public interest".

necessity of final Australian control of appeals were restated. Zeal announced in response that he had heard "quite enough of this - quite enough" and he threatened to go home.[101] Higgins dismissed the "miserable right of appeal" on two grounds: firstly, it was worthless because the Council was a "back water of English law" and secondly, it was useless as a tie to bind together the Empire. But, irrespective of the merits of the views of Zeal or Higgins, the important issue is that the debate did not depart from the question of appeal as Downer, seemingly alone, thought that the federal review function was the most important aspect of the Bill. Notably, O'Connor, later one of the first three justices of the High Court, did not make any contribution to this part of the debate.

Melbourne 1898

Although the Convention dissolved into a committee of the whole during the Adelaide session, the Judiciary chapter was not dealt with until the Melbourne session. When it was eventually considered Glynn proposed an amendment which concerned the tenure of justices and although this was not immediately relevant to the federal jurisdiction of the Court it nevertheless raised important issues about its role. In speaking for his amendment Glynn made yet another poor prediction (albeit one which seemed to have been a widely held opinion) which was that: "In very few cases will there be an application to the original jurisdiction of the Federal Court".[102] He thought that very few matters delegated to Federal Parliament would become subjects of legislation during the first ten or fifteen years of the new Commonwealth. This was a view which Dobson was later to reiterate. If there was expeditious action on federal matters, said Glynn, then "the chances are that the functions of the Federal Parliament would be exhausted in 25 or 30 years".

Higgins asked Glynn if he thought that a large number of cases would arise in the early years to which he replied that he thought not, because the American experience had shown that little judicial action had followed the union of the American states, despite the "far greater likelihood of disputes ... arising between those thirteen states, because [of] their mutual feelings prior to 1787".[103] Higgins again interjected that the jurisdiction of the Australian Parliament was to be wider than the "American Parliament", but Glynn stubbornly persevered with his argument, "I think that the constitutional points will be few". He acknowledged that there was a greater

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[101] Adelaide 1897, 986.
[102] Melbourne 1898, 266.
[103] Melbourne 1898, 266.

complexity of interstate relationships due to mercantile concerns and railways but, he said, (getting the numbers wrong again) the "clashing of interests cannot be very great, where there are only four or five states".[104] Reid interjected at this point by asking for a ruling on whether the argument was relevant to the debate. The Chairman ended the exchange by ruling that it was not! A small irony was that Reid himself later raised the issue with which Glynn and Higgins were grappling in order to seek clarification from the Convention as, in a rare moment, he seemed genuinely puzzled about a problem with the new Constitution. The matter which the debate was strictly addressing at this juncture was the tenure of justices, therefore, Reid's call for a ruling on the relevance on the Glynn/Higgins exchange could be construed as reasonable. Within the debates overall, such a strict ruling from the Chair was rare, which indicates that even by this stage, the Convention was impatient with issues which did not pertain immediately and demonstrably to the clause under consideration.

The important issue was raised again, this time by Kingston, who in speaking to the clause noted that,

> [the] court will be created to a very great extent for the purpose of settling disputes between the Commonwealth and the states, which may arise very frequently, and for the purpose of determining what shall be the relative rights of these two bodies.[105]

Kingston again had arrived at the central issue but in a context other than a direct debate upon the question. Rather than debate the substance of this issue Kingston was worried about the possible bias of the judiciary in its decisions concerning: "One of the most important subjects which is ... where the federal authority ends and the state authority commences, or *vice-versa*". Walker interjected that he agreed with this position and was anxious to remind Kingston that if there was any bias on the part of the bench then it would be entirely unconscious.[106]

As in Adelaide, Downer was the one delegate to speak at length about the role of the Court in determining the structure and process of federalism under the new Constitution, and although he was later echoed by Isaacs, he again must be attributed the credit of identifying the key issue:

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[104] Melbourne 1898, 267.

[105] Melbourne 1898, 272.

[106] Melbourne 1898, 272. Carruthers related a tale of how the Privy Council had "corrected" a case in which unconscious bias had influenced the N.S.W. judge, 327. He later admitted to being prepared to accept High Court judgements, as final, on matters of interpretation of the Constitution but, like Downer, he seemed convinced that the *intent* of the framers was the only principle on which the Constitution would be understood. He, like other representatives, thought of interpretation only in terms of Courts deliberating on the *intent* of the legislators who drafted the legislation. Melbourne 1898, 2313-4.

> The very essence of this Constitution is the establishment of a Commonwealth which is not to interfere with the rights conferred on the states, and a tribunal to decide when those rights are imperiled.[107] ... honourable members must not forget that, although we form it [the Commonwealth] in form, they [Justices] form it to a large extent, in substance. With them rest the vast powers of judicial decision, in saying what are the relative functions of the Commonwealth and of the states. With them rest the interpretation of intentions which we may have in our minds, but which have not occurred to us at the present time. With them rests the obligation of finding out principles which are in the minds of this Convention in framing this Bill and applying them to cases which have never occurred before, and which are very little thought of by any of us. With this Supreme Court, particularly in the earlier days of the Commonwealth, rests practically the establishment on a permanent basis of the Constitution, because with them we leave it not to merely judicially assert the principles which we have undoubtedly asserted, but with them rests the application of those principles, and the discovery as to where the principles are applicable and where they are not.[108]

In this speech, one of the most significant of the Conventions, Downer placed the Constitution in its working context. He identified it as a document which was to be interpreted, not a thing which would speak for itself. The significance of this speech was that it revealed how in comparison others were ill-informed in regard to this question of interpretation and construction of Constitutional principles. Isaacs, in directly following Downer, only briefly reiterated the point that the American Constitution was made not only by delegates at the Philadelphia Convention and the states at the ratification Conventions but also by "the renowned Judges who have pronounced upon the Constitution".[109] Inhering in Downer's speech was the belief that while the Constitution would be made through interpretation it would be done so according to the intentions of the Convention which framed its provisions. This proved an erroneous belief.

The framers here were poised to consider the question of what their Constitution would mean to those who would be its inheritors. Downer's point, however, was a distinct departure from the manner in which the two Conventions had previously dealt with the question of *meaning*. Previously the attitude was that the problem of meaning was not material as the document would speak for itself. Downer had broached the issue, albeit briefly, that the Courts would interpret the document and that, as he understood it, the meaning duly vested in the words would accord with the meaning and intentions of the framers. It was a belief about constitutional construction that was commonly held in the Convention as Reid's later comments indicated.[110] Unbiassed justices would make clear, in their judgements, the intentions of the framers.[111] O'Connor had

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[107] Melbourne 1898, 274

[108] Melbourne 1898, 275.

[109] Melbourne 1898, 273.

[110] Melbourne 1898, 2275. Reid wanted to avoid "mischief" by placing a deliberate statement on record to show the *intent* of the framers.

[111] The "original intent" debate has been revived in the U.S.A. For recent trenchant contributions see R. Berger, "Original Intention in Historical Perspective" 54 *George Washington Law Review* (1986), 101. R. Bork, "Original Intent and the Constitution, 7 *Humanities Magazine* (1986), 22-3; For articles more methodologically self conscious, on the difficulties of

pointed to the possibility that "exceedingly high feeling" could arise over a particular "interpretation of a law". "It may be a matter involving political issues of a very grave character", said O'Connor.[112] Yet O'Connor, Downer and Higgins did not take their argument further to show that it would be possible, under a different construction, for the federal system which they had worked so hard to establish and with such attention to detail to be altered from their *intended* form. There was a risk that the doctrine of states' rights could become a mockery as *Brutus* had warned in the American debates.

The Convention did not approach this problem. A series of rationalizations prevented the next step in the argument from being taken. As they understood it, the Court in due course would interpret the words of the Constitution, but only according to their intentions. Justices of the Court would be unbiassed and act in accordance with federal principles and apply (what later came to be understood as) a strict legalism. Finally, the real protection to the Constitution, some thought, would be through the Privy Council. It would be the "bulwark of the Constitution" as Carruthers the most zealous advocate of the right of appeal, announced to the Convention.[113] Regardless, Turner and Walker urged for the necessity to trust the legislature, as Madison had similarly argued.[114]

Once the Bill had been subject to a *seriatim* clause by clause examination by the committee it was recommitted for further debate of select clauses. Clauses 73, 74, 77, 79 and 80 were reconsidered initially, then 73, 74, 75, 77 and 80 were again debated. Clauses 73 and 74 of the Bill, which covered the "Extent of judicial power" and the jurisdiction of the Court, were the subject of most debate. Barton was anxious to clarify certain issues surrounding the jurisdiction of the Court with regard to the "proceedings against the crown". He cited the American case of *Marbury v Madison* which LaNauze has shown was brought to his attention by Andrew Inglis Clark.[115] He thought it

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interpretation see A.J. Powell, "The Original Understanding of Original Intent" 98 *Harvard Law Review* (1985), 888; M. Tushnet, "Following the Rules laid down: A critique of the Interpretavism and Neutral Principles" 90 *Harvard Law Review*, (1983), 781. M. Perry, "The Authority of the Text, Tradition, and Reason: A theory of judicial interpretation" and L. Simon, "The Authority of the Constitution and its meaning: A preface to a theory of Constitutional Interpretation" 58 *Southern California Law Review* (1985). These last two articles are part of a wide ranging symposium on "Interpretation" in that issue.

112 Melbourne 1898, 286.

113 Carruthers also referred to the federal judiciary as the "bulwark of the people" in a subtle change to placate tender majoritarians. N.S.W.P.D. 1897, 7.

114 Melbourne 1898, 316 & 291. This issue had been of sufficient moment for Quick, in Melbourne, to refer to how, in "earlier stages of the history of the Convention we heard the doctrine propounded of 'Trust the Parliament'", 2007. For instance, Walker had reproached Downer for not showing trust. Melbourne 1898, 291.

115 J.A. LaNauze, *The Making*, 234. Barton wrote to Clark: "I have to thank you further for your telegram as to the striking out of the power given to the High Court to deal with cases of mandamus & prohibition against officers of the Commonwealth. None of us here had read the

advisable to insert words to put some matters beyond doubt. As Barton explained it was advisable to allow for those "classes of cases on original jurisdiction which otherwise would only come before the Court under appellate jurisdiction".[116] The overall effect was to broaden the power of the Court to hear classes of cases which were inadmissible to the American Supreme Court.

When the clause was reconsidered a week later, under a motion of amendment by Reid, the problem of the area of overlapping federal and state jurisdictions was raised, then abandoned. Reid tried to ask the hard question about concurrent jurisdiction but it seems he found it difficult to arrive at the nub of the issue. His concern was to clarify the situation which arose when a perfectly good state law came into conflict with a perfectly good Commonwealth law, and due to the paramountcy clause, the Commonwealth law must prevail. Reid, in searching for an example, used the rivers question to illustrate his point which diverted the debate of this important principle into a discussion of the particular issue. Thus the main point of Reid's argument became lost. If the Commonwealth law must prevail, argued Reid, "What a mockery ... [of] state rights".[117] Reid sought an amendment to overcome the problem. His uncharacteristically clumsy presentation of the argument left some delegates perplexed. He acknowledged O'Connor's point, that jurisdiction already resided with the Court, yet he insisted that the issue "is a matter of so much importance that it should be specially mentioned".[118] To grant the Commonwealth such extensive powers and couple them with the paramountcy clause was creating a "very dangerous" situation:

> That is a very dangerous position of supremacy in which to put the Commonwealth. It practically has this effect, in that very wide and nebulous area where the sovereign rights of the states and the rights we wish to hand over to the Commonwealth come into collision, without any sort of consideration to the rights or the wrongs, the law of the states as to its sovereign powers must go down.[119]

Reid continued by saying that if the supremacy of the Commonwealth was to be entrenched "well and good", however, whilst the states were respected only in rhetorical terms they may be in great danger because their sovereign powers may be

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case mentioned by you of *Marbury v Madison* or if seen it had been forgotten - It seems however to be a leading case. I have given notice to restore the words on the reconsideration of the clause." 14 February 1898. LaNauze noted that this case was brought to Barton's attention "presumably ... more in sorrow than in anger". Their ignorance of this case is significant for what it shows about their knowledge of American political history as it was the leading Constitutional case in the United States which established the principle of judicial review.

[116] Melbourne 1898, 1881. The provisions expressly allowed for the court to issue a "writ of mandamus or a prohibition or an injunction against an officer of the Commonwealth", 1875-6.

[117] Melbourne 1898, 2272.

[118] Melbourne 1898, 2269.

[119] Melbourne 1898, 2269-70.

supplanted by this construction of the Constitution. Reid found difficulty in making himself understood in framing his argument. Both Isaacs and Higgins interjected by appealing for a clarification of the point. Toward the end of his speech, Reid said, "I am awfully sorry I have failed to be understood after speaking so long", which it seems indeed he had.[120]

Barton resumed the debate in reply to Reid and referred closely to the rivers issue without, it seems, appreciating the principle to which he was alluding. Perhaps Barton did realize the significance of the point with which Reid was fumbling and thought it prudent not to re-open the whole states' rights question. Reid proclaimed himself to be "entirely satisfied" with Barton's explanation, unsatisfying as it was, in resolving what was to become the central question of Australian federalism.[121] Reid seems to have been so uncertain of the point that he was trying to grasp that he dropped the argument. The conspiracy theory explanation, if applied here, must mean that Reid abandoned the issue because he realized the enormity of the question for the whole structure. Reid had raised the key issue of Commonwealth/state relations and the role of the Court to which Barton gave him a one paragraph reply. Reid responded:

> I am very glad that I have elicited this clear statement from our leader, because I feel sure that without some such statement on our records a great deal of mischief would have been made on the subject. The explanation does not cover all the ground but it covers it as nearly as is perhaps possible. Personally, I am entirely satisfied with it, and I now see that there would be no utility is pressing my amendment.[122]

That Reid could so easily dismiss this issue, which was to become central to the operation of the Australian federal system, is curious as his notoriety stems, in part, from his troublesome "Yes/No" stance during the New South Wales referenda campaigns. Reid was probably the least likely candidate to involve himself in a convenient campaign to suppress the difficult issues and it was more likely that he was genuinely uncertain on the floor of the Convention and perhaps to save embarrassment and time allowed the issue to pass.

Isaacs made a statement before the motion was withdrawn which illustrated two points. He argued, with reference to Reid's point, that "reasonableness of the use of the water" was a political question for the legislature not a justiciable one. The matter of what was "reasonable", Isaacs argued, was a question which was political. He did not, however, follow through this argument in his later statement; where there was an

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120 Melbourne 1898, 2271.

121 Melbourne 1898, 2274.

122 Melbourne 1898, 2274. *Tasmania v Commonwealth* (1904) decided that the Federation debates would not be used in argument before the Bench on the meaning of the Constitution.

inconsistency of laws the Commonwealth should prevail. "You cannot frame your Constitution on any other basis", said Higgins.[123]

In the context of the overall debate the willingness of representatives to avoid re-opening debate on basic principles at this late stage is understandable but the point which Reid had here raised had not been addressed earlier. Some representatives at the Melbourne session of the Convention may have gradually awakened to the implications of creating a Court, with a review function, which was capable of altering the federal balance. This realization would more properly be a premise on which assumptions and plans of the federal system would be based rather than a consequence, belatedly recognized, of the model of the federal system to which they subscribed. Crucial as Reid's point was to modern federalism it is instructive to note that it was one of the last to be made in the Australian Federation debates, rather than one of the first. Following the debate on the rivers question, which was potentially destructive to the larger agreement, there was no enthusiasm amongst representatives to re-open discussion on basic principles. The hard questions which remained would be worked out later. Reid's point about the potential expansion of Commonwealth power was lost in the continuing debate over the appellate provisions as ties of blood and sentiment (and investment) were more immediately pressing issues in the minds of the framers.

THE KEYSTONE COURT

Sir Samuel Griffith who had been absent from the second Convention returned to the debate, once the draft Bill had been finalized. In a written paper Griffith commented on the Court:

> The citizens of Federations are familiar with this division of power into two classes, each of the sovereign authorities having absolute power within its own sphere, and neither being able to interfere with the other. It is plain, however, that questions may arise whether in any case either power has transgressed the limits of its authority. If it does, its legislation is unauthorized and void ... It is desirable, therefore, that there should be a tribunal charged with the duty of determining such questions in an authoritative manner, as well as of interpreting the Federal laws of the Commonwealth ... the obvious importance of making provision that the laws of a Sovereign State* shall be interpreted and enforced by a Court established by the State itself, and owing allegiance to it alone, have almost always lead to the establishment in Federal States of a Federal Court of Justice. It is accordingly proposed that there shall be a Court to be called the High Court of Australia, with original jurisdiction over controversies affecting external affairs of the several States, or the execution of the laws of the Commonwealth.[124]

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[123] Melbourne 1898, 2275.

[124] Griffith's Paper was prepared for the Queensland Federation League. 26 May 1898. * He here means a nation state.

From speeches such as these there can be little doubt that the framers of the Australian Constitution intended the Court to exercise the function of judicial review. In a comparison with *The Federalist*, or with the speeches to the Conventions of the American states, Griffith's words seem to be identical in meaning.[125] When these words are compared with the overall consideration that judicial review received in the Conventions it is clear, however, that the framers were initially unaware or ultimately uncertain of the significance of the place of the Court in the overall structure.

Whether the final court of appeal was the High Court or the Privy Council was an issue which was not relevant to to the *federal* character of *either* court as the latter could, in principle, exercise the review function necessary to the Australian Commonwealth Constitution. That the final Court of appeal should be an Australian Court, familiar with Australian conditions not, as Higgins said, a "legal backwater" like the Privy Council, was an argument that had veracity but it was not immediately relevant to the principle of judicial review. Although the location of the final appeal Court was surely an important question, it nevertheless scarcely mattered, in this principle, even in constitutional cases, as to *where* the issue was to be decided. Although in terms of sovereignty or practical familiarity this may be important. The primary question remained whether or not the review function was to be exercised, not which court.

The pressing commercial issue of whether the High Court was to be the "keystone to the federal arch" or the Privy Council was to be the "bulwark of the Constitution" began as the main argument and remained so.[126] The possibility of the Court re-creating the federal system was, almost unintentionally, approached, then avoided, as debate on the Judiciary section of the Bill haltingly continued through to the final stages of the Conventions.

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125 See Hamilton *Federalist* 80 and Ellesworth in the Connecticut ratifying Convention of January 1788:
"This Constitution defines the extent of the powers of the general government. If the general legislature should at any time overleap their limits, the judicial department is a constitutional check. If the United states go beyond their powers, if they made a law with the Constitution does not authorize, it is void; and the judicial power, the national judges, who, to secure their impartiality, are to be make independent, will declare it to be void. On the other hand, if the states go beyond their limits, if they make a law which is a usurpation upon the general government, the law is void; and upright independent judges will declare it so." *Elliot's Debates* II, 196.

126 Barton: Adelaide 1897, 952. For an account of the passage of the Constitution through the Colonial Office and Westminster in which the only question of importance was the Appeal to the Privy Council, see B.K. deGaris "The Colonial Office and the Commonwealth Constitution Bill" in A.W. Martin ed. *Essays in Australian Federation*. (1976), 2nd edn; LaNauze, *The Making* 248-69.

The manner and form of the establishment of the High Court can only be understood in terms of its relationship with other structures of the Australian federal arrangement and against the background of knowledge and interests which informed the views of colonial representatives at the Conventions. The defence of state rights was foremost in the minds of representatives from the small colonies and they intended the Senate to be the first line of defence against federal encroachment. The work of the Court in this respect would be of secondary importance. It would be a second filter, or arbiter, and not the principal arena of federal/state disputation. The states would need to look to their own defences as Clark had argued early in the debates and not rely on external support in the Court.

That the framers intended the exercise of judicial review is not in question as numerous speakers repeatedly mentioned the need for a tribunal to determine the boundaries of jurisdiction. This, however, must be placed in the overall context of the debates and against the issues which assumed importance through the Conventions. The lack of debate over the *federal* function of the Court cannot be interpreted as an indication of the desire among representatives to suppress revelations about its real activity, instead it is an indication of their anticipation of its relative importance. As Galligan has written; "the intended exercise of judicial review by the new court explains why other parts of the constitution appear as they do".[127] But the Court can only be understood in terms of those other features, they cannot be interpreted simply in terms of their relationship to its prescribed role, as after all it was one of the least important and divisive areas of discussion and the Senate was one of the most. In other words, the Court appears as it does because other institutions were perceived to be more important. Had the states' rights faction imagined that the Court could re-draw the federal compromises or interpret the Constitution on principles other than "original intent" then the Court would have been a contested area and the Privy Council appeal would not have been "the only subject of any feeling".

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[127] Galligan, *High Court*, 69.

CHAPTER SEVEN

"THE ARBITER OF LEGAL FORMS": RATIFICATION AND AMENDMENT OF THE CONSTITUTION

The purpose of this chapter is to inquire into the remaining two features of the Constitution which were listed by Madison in order for him to ascertain "the real character of government". These two features of the Constitution were the "foundation on which it is to be established" and "the authority by which future changes in the government are to be introduced".[1] In Australia these correspond respectively with firstly, the ratification campaigns and referenda and secondly, with the adoption of the amendment provisions. This chapter is concerned with these provisions of the Australian Constitution in order to show their relationship to those other parts of the federal arrangement already addressed, in an attempt to locate both of them within the liberal democratic theory of the Constitution as a "contract" based on "consent".

Through exploring these features of the settlement it is possible to locate the debate within a broad theoretical context. The ratification campaign and the plebiscites served as a necessary act of consent to legitimate the Australian Constitution. The process of adopting the Constitution through the deliberate positive act of the plebiscite lacked any strict immediate legal force, as *de jure* authority lay with the British Parliament, but the liberal democratic (and federal) notion of consent was manifestly served, as a contractual basis for the Commonwealth (of people and states) was established. The principles of "consent" and "participation", which are fundamental to liberal democratic political theory, were given an extremely powerful impetus in the new Australian Constitution.

For Madison in 1787, granting assent to the new American Constitution through ratification was not a *national* but a *federal* act. As women and slaves were of course excluded, only a proportion of the people participated in indirectly chosing their state representatives at the ratification Conventions, but nonetheless the adoption of the Constitution was still deemed to be by popular assent. Crucially, however, citizens of the *states* rather than of the *nation* engaged in the act of participation. The several states were, in Madison's words, "distinct and independent", and the people of those states gave their consent to submit to the new Constitution, but they did not do so as "individuals composing one entire nation". Thus the ambiguity of the opening words of the United States Constitution can be emphasized:

> we the people of the United States, in order to form a more perfect Union ... do ordain and establish this Constitution for the United States.

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[1] *The Federalist*, 39, 192-3.

The ambiguity is apparent if these "United States" is read as a description of the several States acting in unison rather than as a single corporate entity. So, the states united in order to adopt the Constitution. This same point was taken up in Australia by Isaacs in the opening of the committee stage at the Adelaide Convention. Clause 3 of the draft bill allowed for Her Majesty to proclaim the passing of the Act to unite the colonies in a Federal Constitution. Isaacs moved that the word "people" be inserted so that the Act could unite the people of "the said colonies" in a Federal Constitution. Isaacs was making a very good modern federal point when he said: "The Commonwealth I understand to be a Commonwealth of the people of Australia, not merely of the colonies"[2] So the *people* of the *states*, acting prior to the formation of the Union, united to create the Constitution. Madison, in reiterating that this was a federal not a national act, had written that, "Each State, in ratifying the Constitution, is considered as a sovereign body independent of all others, and only to be bound by its own voluntary act".

The last relation which Madison dealt with in *Federalist* 39 was the authority by which amendments to the Constitution were to be made. The process was, in his well known formulation, "neither wholly national nor wholly federal". If it was national then the majority voting *en masse* would make a decision and would be capable of abolishing the established government. Were it entirely federal, then the concurrence of every state would be required. In the United States, "The mode provided by the plan of the Convention is not founded on either of those principles" alone. So too with the Australian plan which was readily adopted. To alter the Constitution a majority of votes and a majority of states was necessary: so, as in the American case, the Australian plan was neither wholly national nor wholly federal (in Madison's archaic usage of the terms).

The amendment provisions of the Australian Constitution are stringent because the framers did not want their work to be changed. The structure that they erected was not to be altered by the popular whims and enthusiasms of the electorate. The numerical majority was not to have its way. The federal principle of people and states was to be maintained and the small states were not to be overwhelmed by the large states. The powers of the Senate and the control of the expansionary tendencies of the Commonwealth were of paramount importance to the small states delegations and their supporters. The dual bulwarks of the states and the states' house were to be protected by the difficulty of amending the written word of the Constitution. Through

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[2] Adelaide 1897, 620. Wise also emphatically made this point earlier in the Adelaide session, 115.

the decade of the federation movement the attitude of the majority of delegates altered from a suspicion of democracy to accepting the need, indeed the necessity, of popular participation in the ratification and amendment of the Constitution. The hoariest conservatives were still fearful of the democratic principles of popular participation and consent. Ironically, however, once these principles were embraced they served to entrench far more securely the preferred federal, anti-majoritarian institutions. Democratic participation and consent served to protect the alleged undemocratic elements of the Constitution.

MELBOURNE 1890: DEMOCRATIC AND PATRICIAN FORMS

The first Conference in Melbourne in 1890 was concerned with establishing a legitimacy for both the incipient federation movement in general and for its own immediate purpose. In an attempt to locate its actions within a legitimate framework the Conference directed a formal declaration to what was believed to be the proper source of constitutional authority. In so doing the Conference did not appeal directly to the people of the colonies, which would have been a republican act, but consistent with the requirements of monarchical government, a plea and loyal oath was made to the Sovereign of the Empire. The members of the Conference, to further the federation movement, made an "Address to the Queen's most Excellent Majesty" and agreed to:

> induce the Legislatures of their respective Colonies to appoint, during the present year, Delegates to a National Australasian Convention, empowered to consider and report upon an adequate scheme for a Federal Constitution.[3]

When this action was taken the Colonial Parliaments were provided with the means of establishing an authorized constitutional Convention, but there was no provision made for direct election of delegates. Instead appointments were made to the Convention by the Parliaments of the respective colonies.

The perception that the delegates to the 1890 Conference had about their role was patrician. Although they said they were speaking with the support of the public and believed that they were actually acting on their behalf, they were only indirectly accountable to the electorate which was moreover based on a restricted franchise. Sir Samuel Griffith was speaking in the context of the debate over the advisability of allowing the press to be present to witness the proceedings when he gave an indication of his belief about the relationship of the delegates and the public:

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[3] Melbourne 1890, 4.

I apprehend we are met here principally for the purpose of exchange of ideas amongst ourselves, as representing the public opinions of the different colonies, as to how far Federation is practicable at the present time, and to that extent we should be witnesses giving our own opinion as to the state of public opinion.[4]

William McMillan, from New South Wales, justified the Conference and his role as a delegate through a circular argument by saying that he knew he was there to lead public opinion on the question of federation and to follow their wishes. According to McMillan, there was a wave of opinion but no-one could be certain whether it was there or how large it was:

We are here because we believe that a large wave of public opinion has gone over the Australasian Colonies, and no man can judge absolutely to what extent that wave had permeated the masses. No man can say that in his colony there is a large and overwhelming majority in favour of Federation.[5]

The circularity of the argument and the redundancy of some of his justification is not a reflection on his capacity for coherence *per se* but is a general indication of the tenuous nature of the claim that the Conference and the Federation movement were popularly supported.

Parkes was intent on acting in "the national interest" and he argued for caution but also for haste. A persistent theme throughout the debates was the claim that Federation must be secured soon or not at all. There was an attempt to generate an urgency about Federation because, it was argued, the chance would be lost for ever or at the least it would be monumentally difficult to achieve if delayed further.

If we proceed on any inferior plans of action - on that of personal interest, for example, which I cannot believe will enter the mind of any member of the Conference - or if we take any less elevated ground than that of public honour, as well as of importance, we can never hope for the next hundred years to give birth to a nation in this part of the world.[6]

Griffith implored delegates to the conference to direct their attention to problems to enable themselves and "the public to arrive at a just conclusion" and to quickly ask the parliaments to empower representatives to form a Convention.[7]

Thomas Playford, the liberal from South Australia, was much more sceptical and unsentimental in his evaluation of the movement, the role of the public, and the groundswell of popular support on which the Conference was ostensibly justified. Playford considered that, "we have to build up, and to build up slowly and carefully, a

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[4] Melbourne 1890, 10. Parkes was in favour of admitting the press to general sessions and "the public should be admitted" except when the Conference was in Committee.
[5] Melbourne 1890, 12.
[6] Melbourne 1890, 35.
[7] Melbourne 1890, 59.

public opinion in these colonies."[8] He denied that there was any real public support for a Federation Convention and asserted that since all great reforms "sprung from the people" then so must this one:

> if the people of Australia had taken up this question in the first instance we should have had it brought to a conclusion long ago. But it has been taken up by the leading statesmen of the various colonies, and, as a consequence - well, I won't say as a consequence, but as a fact - the question has not been taken up by the people. It has not sprung from the people, and we are met here to-day, so far as South Australia is concerned, with the people not so educated on the question as to enable us to state that they, at all events, are distinctly and unmistakably prepared for Federation, and to what extent they are willing to go.[9]

Playford, unlike most other delegates who were intent on showing how well supported they were, was prepared to identify the real source of agitation in favour of Federation:

> The great mass of the people, however, remain quiescent in regard to the question. They listen to what is going on, and they read their newspapers, but they do not appear to be greatly moved ... the result is that they do not take much interest in the subject of Federation. Those who have occupied public positions for many years past, however, have felt the colonies ought to federate.[10]

Deakin, at this juncture, adopted a mediating role which, as noted earlier, became characteristic of him, especially in the second Convention of 1897-8. He attempted to persuade those delegates who did not fit into the developing culture of consensus politics to become accommodated to the subtly coercive environment of the Conventions and the Federal movement. Deakin played the role of the reasonable and moderate man who would appeal to difficult delegates on the basis of the greater national interest. There were limits to dissent and he undertook, with Barton also, the task of guiding those who may have been lacking something of the fully realized federal spirit. Deakin spoke about nationhood and union and against Playford's remarks about a public disconnected from the federal movement and the prospect of separate and antagonistic colonial interests. Deakin made an appeal to the sentiments of national character and unity about which Andrew Inglis Clark would also speak. For, said Deakin:

> I believe that this passion of nationality will widen and deepen and strengthen its tides until they will far more than suffice to float all the burdens that may be placed upon their bosoms.[11]

Deakin also sought to reinforce the illusion of a national or colonial general will. Even if there was nothing explicit said about the need for the positive assent of the people

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[8] Melbourne 1890, 67.
[9] Melbourne 1890, 61.
[10] Melbourne 1890, 73-4.
[11] Melbourne 1890, 78.

to be given it was, however, necessary to argue that the people were being served. Deakin claimed that, "throughout the whole of Victoria there is in the hearts of the people a strong desire for federation". William McMillan similarly was sure of the groundswell of national spirit in New South Wales.

> Has not such a wave of feeling flowed over the minds of the Australasian people that the public men assembled here may well feel justified in asking their several parliaments to bring about a Convention to discuss the whole question of Federation, in an absolutely untrammelled way, from beginning to end?[12]

There was no question, McMillan added, that the public of New South Wales wanted Federation. Bird spoke for the Tasmanians by "bearing testimony ... to the strong feelings and deep interest which exist in Tasmania in favour of Federation."[13] Macrossan argued that the movement in Queensland for the separation of that colony into several parts, and the attendant problem of agreeing on the nomination of delegates to the Federation Conferences, was an indication, not of a reluctance, but of enthusiasm to pursue Federation in that colony.[14]

Deakin was more genuine and constant than some of the other more conservative members of the Conference in associating the general will, or popular support for the movement, with the necessities of constitutional formation. He saw the veracity of Playford's point that the federation movement would only succeed if it had widespread popular support; it would only come to fruition with democratic roots. Deakin, the democrat, wanted to connect the sentiment of national will with participation in the process and to this end he made major speeches concerning the need for proper amendment provisions to be enshrined in the Constitution. The task before the Conference was in every sense preliminary:

> A far greater task awaits the Convention, which will be called upon to frame a Federal Constitution. This will be a work of transcendent responsibility, yet the Constitution then shaped will, after all, however admirable, not be a final Constitution. There is not the least need to suppose that the Convention, when it addresses itself to the task, will do so under the impression that it is required to frame such a scheme as can never be improved upon for all time to come. Let that Constitution be what it may, if in any respect it fails to meet the wishes and needs of the people of Australia, they will still have the right, and certainly should be specially endowed with the power of moulding it from time to time more and more into harmony with their own needs and desires. ... The prospect of an eternal flux in a Constitution is not to be wished. But a Constitution lives for and from the people, and except so far as it coincides with their character is a dead burden. In national growth there must necessarily be constitutional changes suited to that growth, and such changes have been made, not only in this colony but in every other colony in the Australian group, so that we should not entertain too great a sense of the responsibility resting upon the Convention. It is a certainty that the Australian Constitution adopted in our time will not be absolutely perfect, and if ever it is found not completely adapted to the

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[12] Melbourne 1890, 149.
[13] Melbourne 1890, 158-9.
[14] Melbourne 1890, 195.

circumstances of the Australian people it ought to be altered, and will be altered to suit themselves.[15]

Deakin used metaphors of growth and evolution to describe a Constitution that would be able to adapt to the needs of the people. That Constitution would only be capable of serving the national will if it were organically connected to the people and sensitive to changing conditions. He reiterated this argument toward the end of the proceedings. The following passage indicates the relative weakness of his position as his speech is seemingly pitched at a largely unsympathetic audience and, rather than a declaratory statement of authority, it is an appeal to good liberal democratic sense.

> Let us hope that it will provide the elastic remedy for any errors which may creep into the scheme as first adopted, which is so useful in each of the State Constitutions of the American Republic. It is but reasonable that the people of these colonies should be enabled, when necessary, to revise the Constitution under which they live without disorganization of their local parliaments, or in other words, that when the need for an amendment of the Federal Constitution arises (as it has arisen repeatedly in regard to the Constitution of the United States, without any sufficient means for the distinctly affirmed will of the people to secure the amendment it desires) we shall possess the power of obtaining a direct reference of the issue to the electors independently of all other issues, and without affecting their choice of representatives. The ablest jurists in the United States consider the great difficulty of amending their Constitution to be a serious defect; but they find no such defect in their State Constitutions, where a safety-valve has been provided in the appeal to the people; and recognizing this, I trust that the members of the Convention will shape the Constitution they propose for and Australian Dominion in such a way as will not only allow it to answer to the needs and necessities of our time, but render it capable of answering to all our future needs, sufficiently pliant to adapt itself to the course of circumstances, related to our national characteristics and capacities so that it may unfold with their unfoldment, expand with our expansion, and develop with our destiny. They can only accomplish this by making, in all things, the nation the sole judge and sole arbiter of legal forms which may confine but should sustain our national life.[16]

The amendment provisions that Deakin was here appealing for were later given operation, but with a federal rather than national character as he here inferred should be done; there was to be no simple national majority. The success of a proposed constitutional change was dependent upon the agreement not only of a majority of people but a majority of people in a majority of states.

COLONIES AND PEOPLE: RATIFICATION OF THE CONSTITUTION

In the 1891 Convention the question of the process of ratification was not explored in the early stages of the debate. The Queensland delegate Andrew Thynne raised the matter as a point of speculation, but as the following exchange shows the members of the Convention had not formulated a plan of how the Constitution Bill, once drafted, would be managed. Questions about the role of parliaments, elected or nominated

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[15] Melbourne 1890, 94.

[16] Melbourne 1890, 252-3.

Conventions, or the participation of the public, were all unexplored. This exchange is an illustration of that separation of the constitutional process from the public interest, which Playford had noticed. Thynne drew attention to the problem and responded to other delegates:

Mr. Thynne: No doubt the constitution which is framed by this Convention will have to go to the parliaments of each of the several colonies, and will have to be endorsed by them before it can come into question ...
Will it be necessary that the constitution which we are about to frame shall be submitted to each parliament and adopted by it, or will it be sufficient to have it submitted to conventions in the separate colonies?

Dr. Cockburn: Direct to the people!

Mr. Thynne: I approve of its being submitted direct to the people ...

Sir Samuel Griffith: It could not be be submitted to a convention without the consent of parliament.

Mr. Deakin: Or to the people without the consent of the parliament!

Mr. Thynne: Probably the constitution will be submitted to the several parliaments, and then they will make provision by which conventions shall be called together in each of their colonies, to give an affirmative or a negative vote upon the adoption of the constitution; but of course before that can be done the parliaments will have to a certain extent to give their approval to federation.[17]

Obviously much doubt surrounded the method of approval of the Constitution. Despite the certainty that Westminster had legal authority there was uncertainty about just where sovereignty lay. Was ultimate authority with the Queen-in-Council, the Parliament, a nominated or elected constitutional convention or with popular ratification? In 1891 this was uncertain and of little substantial interest to the delegates; it was not a lion in the path.

The will of the people was not sacrosanct to the Convention delegates in 1891 and Deakin's appeal in 1890 to a democratic base was not accepted as necessarily a profound or foundational argument. As Raymond Williams has shown, the appeal to democratic principles at the end of the nineteenth century was by no means a guarantee of success as not all politicians acknowledged such rights as absolute.[18] The Tasmanian delegate, Ayde Douglas M.L.C., was not impressed with either the will of the people or with what he regarded as a slavish political response; for Ayde Douglas had dreamt Edmund Burke's nightmare:

Mr. Ayde Douglas: Hon. members are talking of the people. They are afraid to do anything that does not concur with the will of the mob. That is the principle hon. members adopt. They are afraid to go and speak their real opinions if they do not suit the mob.

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[17] 1891, 340.

[18] Raymond Williams *Keywords: A Vocabulary of Culture and Society* (1983), 93-98.

Mr. Munro: We have no mob in Victoria.

Mr. Ayde Douglas: I have known Victoria longer than the hon. member. I was there before they had representative institutions at all, and when the hon. member comes to talk here he must not think that he is going to win us over with his blarney. The hon. member thinks that the *vox populi* is the *vox Dei*.

Colonel Smith: So it is!

Mr Ayde Douglas: No doubt it is in Ballarat!

Colonel Smith: It is in Tasmania, too!

Mr Ayde Douglas: We have representatives in Tasmania who care very little about what is termed popular opinion.[19]

These statements could be made in 1891, but by 1897 they were no longer so certain. The shift of political opinion in the years after the maritime strikes coincided with the incipient emergence of labour parties and Fabianism in both Britain and Australia and with the rise of European socialism. The candour of Douglas and Dobson in particular was a contrast with Deakin in 1891 and certainly with the broadly held democratic sentiments of the later Convention. An indication of the complete confidence with which such anti-democratic views were held in the early 1890s, and their pervasiveness, is that these remarks were openly expressed in the Convention in the full knowledge that the press and the public were present. The question of the admission of the public and press to the first Convention was initially uncertain, but it was resolved in the earliest stages. Unlike the Philadelphia Convention, the Australian proceedings were to be open to the people for the discussion of matters of general concern. When in committee the debate was to be conducted *in camera*.[20]

The right of the people to know about the proceedings of the Convention may have been resolved early in the democratic interest, but the crucial question of the adoption of the Constitution was only addressed in the closing stages. Griffith moved:

That this Convention recommends that provision be made by the parliaments of the several colonies for submitting for the approval of the people of the colonies respectively the constitution of the commonwealth of Australia as framed by this Convention.[21]

A democratic legitimation was needed, even if the Constitution was to only have legal force if "Her Majesty's government" were, in the words of the penultimate motion of the 1891 Convention, "requested to take the necessary action to establish the constitution in respect of those colonies".[22] In hindsight it is unsurprising that the popular support for

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[19] 1891, 400.
[20] 1891, 12 - 22.
[21] 1891, 927.
[22] 1891, 937.

nation-making was so poor if the major democratic question of "consent" in the form of ratification was only summarily discussed at a late stage as a merely mechanical procedure.

By 1897 Deakin, the liberal-democrat, found himself with the majority as, unlike their American or Canadian counterparts, the Australian framers were obliged to submit their work to the electors. Deakin thought that this requirement made their undertaking more difficult. For him, it was a condition which "enormously increases the burden of the task". Deakin reminded the Convention that "Bryce reminds us", that the American Constitution would not have been accepted if put to a popular vote. Were he not "so great an authority", Deakin said, he would not be so inclined to quote Bryce on the American experience for the benefit of the Convention:

> It is because our proposals have to be remitted to the referendum in the more populous and in the less populous States that I have been casting about in my mind to see if it were not possible to find some line of argument and compromise which would enable us to go to our several constituents and place before them a scheme which they would all accept. It is absolutely necessary that this Convention should carry the more populous States; it is equally necessary it should carry the less populous States, and, if possible, carry them both together...
>
> What is the principle upon which our present form of government is erected, and upon which is it worked from day to day? What is that principle to which we appeal because it constitutes our final arbiter in all political discussions, and to which we must appeal in the last resort? I am not here to argue as to whether it should be the sole arbiter. The sole arbiter, the sole Court of Appeal, which constitutionally we have come to recognize in this country, or in the mother-country, is the rule of the majority. Upon the ultimate rule of the majority the British Constitution swings as upon a pivot, and upon that principle it rests. Our whole history is the history of a struggle to give more and more effect to that principle, and the whole occasion of the existence of our parties, whether in the colonies or in the mother-country, is the division between those who frankly and fully accept the principle of the rule of the majority, and those who, for one reason or another accept it only with qualification.[23]

Deakin's argument here is obviously intended to move some of the more conservative members to accept democratic basis of the new Constitution. The difficulty for the progressive members of the Conventions was to appease the conservatives and argue for the will of the people while also retaining vice-regal powers. Deakin's argument is, on the surface, indistinguishable from the republican position which was put in *Federalist* 39. In a republic the final arbiter, in principle, is necessarily the people but, in a constitutional monarchy regal or vice-regal powers are considerable and mainly unexplored. Numerous sections of the Australian Constitution, including the amendment provision, (finally designated as s128) allow for the monarch to exercise a discretion which is independently of the supposed "final arbiter". This situation is not easily reconciled with Deakin's argument about the ultimate rule of the majority.

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[23] Adelaide 1897, 289.

STATES AND PEOPLE: AMENDMENT OF THE CONSTITUTION

Chapter VII of the 1891 draft bill concerned the amendment provisions of the Constitution. The Constitution could only be amended in the following manner: the appropriate law must pass by an absolute majority of the House of Representatives and the Senate, and then be submitted to Conventions which were to be elected by the electors of the states (all those eligible to vote for the House of Representatives); the Conventions were to be held according to procedures laid down by the Commonwealth; if the proposed law was passed by a majority of Conventions then it would become law but subject to disallowance by the Queen; any alteration which allowed for the relative diminution of the representatives from any state in either house would require the agreement of the state affected.[24]

James Munro was one of the progressive Victorian delegates and he objected to what amounted to double jeopardy of the amendment at the pleasure of the states. The amendment would have to pass the states' house and then be submitted to the states proper. He did not regard this as a correct principle and he thought in such a case the numbers should have some weight. The minority, he argued, would have the chance of veto twice.[25] The Premier of Victoria, Duncan Gillies, was not of the same mind and he responded by relating the views held in the constitutional drafting committee. He invoked the argument (that Madison used in *Federalist* 39) that the Constitution was neither wholly national nor wholly federal, but he used this principle to defend a proposition which, according to the more democratically minded delegates, was not keeping the states in an equal balance with the people. The states in this case were being privileged. But the states, according to Gillies, "made a bargain, entered into an agreement - a written agreement" and the terms of which should not be "lightly set aside". Any change should "require the greatest consideration, not only of the majority of the people as represented in the Conventions, but a majority of the state representatives as representatives".

This was a variation of Madison's double organization of the "compound" system. He went further in his defence of the mode of amendment by asserting that no state should be obliged to acquiesce to any alteration of the Constitution, to which it had not agreed, if it did not retain the right to leave the Federation. In his words: "no state ought to be compelled to submit to an amendment of the Constitution when it had not a

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[24] 1891, 884.
[25] 1891, 884.

right to withdraw from that Constitution, certainly not to amendments which would really press improperly upon state rights."[26] This arrangement was potentially very protective of the (small) states and it was one which ultimately did not prevail. A tactical advantage to the small states was gained, however, as they held the initiative in formulating a position. Once this advantage was established it placed the onus on the large states to vary the written draft. The occupation of such a strategic position is reminiscent of the opportunism of the large states in promoting the Virginia plan at Philadelphia; in both instances the advantage derived through holding the initiative was considerable and in neither case was it reversed.

This also marked the beginning of the problem which has since endured in Australian politics. How are the potentially competing interests of the states and the people to be reconciled? Munro was emphatic that in some circumstances the large states were at the mercy of the small states; this was for Munro an "injustice. The small states, however, would not be gullible.

Mr Kingston: The hon. gentleman wants a reference to the whole of the people of Australia in one convention!

Mr Munro: Yes.

Mr Baker: "'Come into my parlour', said the spider to the fly"![27]

Deakin joined Munro and suggested that although there was a desire to protect the states in "every possible way" it was at least open to argument that the double protection against constitutional amendment was "not a little too much safeguard". He thought that other arrangements should be developed. To the contrary, Donaldson wanted to make amendment of the Constitution "as difficult as possible".[28] The states had entered into the Federation "in good faith" and their interests should be protected. Playford wanted to hold an equal balance and with his colleagues from Victoria, Munro and Deakin, he held that the views of the people as well as the states should be represented. He took an unpopular stance against his small states colleagues by saying that, "I want also to protect the the interests of the larger as against the smaller states".[29] To this end he argued against the need for special state Conventions to ratify the amendments. Deakin again intervened against Donaldson's opinion which, he said, made amendment of the Constitution almost impossible.

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[26] 1891, 884. Gillies' argument here is reminiscent of the states' rights claims made by Calhoun in regard to the interpretation of the Constitution which allowed the possibility of states retaining an autonomy within the Union or the Commonwealth. If Gillies' point is recognized, then the notion of a divided sovereignty would follow and the Nation has no power of enforcement.

[27] 1891, 886.

[28] 1891, 887.

[29] 1891, 888.

I take it that one of the first principles of the Constitution is that we present it to the several colonies, not as a complete Constitution, but as one which they can make complete; not as a Constitution necessarily adapted to their needs and desires, but one which they can themselves adapt to those needs and desires.[30]

Deakin was urging a participatory ethos in constitution-making. He supported Playford's amendment on the grounds of equity and, interestingly, he did not use the term "democracy". Others took up the cause. Munro said in passing: "We want to refer the question to the people". In regard to "the people", Sir George Grey from New Zealand made one of the most passionate speeches in favour of democratic politics in the Conventions. That Grey's speech was considered hostile is an indication of why the first Constitution Bill failed and when compared with the speeches which tested the bounds of political acceptability in the later Convention a significant shift can be observed. Grey was arguing for political power based on a just and liberal popular franchise not one based on property.

I am endeavouring to destroy what I believe to be one of the greatest abuses in existence. ... I contend that it [the Victorian constitution based on plural voting] is most illiberal, and that the people are not represented in any way whatever. I stand up here and say that to claim that in the young commonwealth of Australia the persons in the chamber of representatives will represent the people is an unfair way of putting the statement before the public, because they represent only capital...
It is property that is represented; not people, not individual living men, not individual interests of families, of wives, and of children, but the bare soil of the earth. ...
The term "chamber of representatives" is used, but they represent the soil of the earth, and do not represent real living human beings, upon a fair scale. That is the point, and I contend that we ought not to be led away by statements of that kind, but we ought to face the actual difficulties, tell the actual truth to the people of the commonwealth of Australia, and not lead them to believe they are fairly represented, and that they have one of the most liberal constitutions in the world ... what is actually represented is property.[31]

Gillies made some token interjections to contradict Grey's argument. Evidently, from the speeches and silences in the transcript which follow, this speech by Grey was an embarrassment to the members of the Convention. Griffith directed his immediate reply to the comments by Munro which were made some time earlier and he passed no comment on Grey's oration. But Grey was right and the illiberality of the Constitution was one of the main reasons why the popular support that the delegates, Griffith amongst them, claimed to enjoy was lacking. In 1891 Grey spoke of "liberality", but by 1897 representatives used different terminology and evidently they could use the word "democracy". In 1891, however, the forces of democratic reform were represented by Grey and Deakin, Munro, Dibbs, Kingston, Playford and a few others but the fact that they were in a minority in only asking for a mode of amendment which gave equality to people and states (instead of the double opportunity for the small states to determine

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[30] 1891, 888.
[31] 1891, 889-90.

the fate of an amendment) is an indication of the deeply conservative sentiment of the 1891 Convention and obversely helps explain both the sectional popular hostility and the widely held indifference to the draft.

Adelaide 1897

By 1897 the assumptions that colonial politicians held about democratic legitimation and participation had altered substantially from those of 1891 and Barton could say:

> This is the first Convention directly appointed by the people, and therefore the inference from that is that the desire of the people is that, as far as possible, this Convention shall originate the Constitution.[32]

Members of the second Convention were elected by popular vote rather than appointed by the colonial parliaments and although this was important there was more significance for Constitution-making in the notions of consent and participation which democratic foundation entailed. Election represented a far deeper change in the progress of democratic politics. This was manifest in the debates. Deakin, one of the more radical delegates to the first Convention, could confidently assert his position of leadership as a senior member of the second Convention and as a democrat.

> In the Commonwealth Bill it was my misfortune to be in the minority, and sometimes a small minority, on certain important points. On one or two of these points it appears to me that there is a prospect of that I may happen to be with the majority.[33]

Deakin may have been directing his remarks to representatives like Henry Dobson from Tasmania who several days earlier had shown his conservative cut:

> *Mr Dobson*: I do not think any members who pose as or who are advanced democrats, would agree to enter into an industry or company, and give to their working men and every one engaged in the industry, no matter how ignorant, the same equal voice in the management of it, and expect to extract dividends out of a competitive market.
>
> *Mr Isaacs*: To whom does the country belong?
>
> *Mr.Dobson*: The country belongs to the people; but the people who are most entitled to our consideration are the people who are thrifty and intelligent, and have something to pay our liability.
>
> *Mr Isaacs*: Life and liberty go for nothing then?
>
> *Mr Dobson*: ... I do not believe entirely in making our Federal franchise as broad as we can, nor in the claim that the government should be broad based on the people's will. There is something besides the mere will of the people; there is intelligence.[34]

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[32] Adelaide 1897, 11.
[33] Adelaide 1897, 285.
[34] Adelaide 1897, 197.

Possibly Deakin himself had changed since 1891 and, in his own words, his "opinions seem more malleable, and more capable of modification". But more significantly, Australian politics had moved since that time when Dobson's conservatism was easily maintained. Mass political movements and immanent democratic claims on power after the big strikes meant that, in the few years between the two Conventions, the democrat Deakin was joined and Dobson was abandoned. The views of the latter were no longer tenable, even to those of a conservative disposition. After the strikes, after the armed confrontation at Barcaldine between workers and the State, and with the developing power of an organized labour party, an explicit democratic recognition of the Constitution was mandatory.

Unlike the 1891 debate, the question of the franchise was discussed in the second Convention. Clause 29 of the draft bill provided for those electors who were eligible to vote for the most numerous house of their colonial parliament to also be eligible to vote for the Commonwealth, "Until Parliament otherwise provides". Plural voting was prevented and the right to vote, once granted, could not be subsequently denied.[35] Like interstate trade, there were to be no internal restrictions on the franchise and voters would be absolutely free to cross state boundaries with rights intact. There was a consensus in Adelaide that plural voting was to be prevented and, in Kingston's words, "the principle of one man one vote should be embodied in this Constitution".[36] Kingston and his South Australian colleagues were in a different position in regard to the franchise than representatives from other colonies because female suffrage had already been secured and indeed the principle of one *man* one vote had been reformed.

The variation in the franchise related to the second part of the clause in that no elector who secured the vote was to be deprived subsequently. This situation would apply of course to women who were eligible to vote in South Australia and who migrated from that state to another. As with most clauses a number of suggestions were made to Barton about suitable or more elegant wording. Barton himself often took the initiative in moving amendments to either tighten or simplify the draft clauses. In this instance he wished to preserve the franchise for anyone entitled to vote so that even,

> If the suffrage was extended to females of 18 or 19 years of age, or to a certain undesirable class, that right being once made could not be touched by any law of the Commonwealth.[37]

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[35] Adelaide 1897, 1192.
[36] Adelaide 1897, 1193.
[37] Adelaide 1897, 1194.

Seemingly, as Barton put it, the Convention was not inclined to "interfere with the adult suffrage in South Australia", but he reserved the right for the Commonwealth "to make such a uniform suffrage as would not compel it to grant every extension that should wilfully and captiously made by any State." So if the citizen lost the right to vote for their local lower house they lost the right to vote for the Commonwealth Parliament. If the right to vote "happens to be taken away by the will of the State, the voter cannot set up a claim to vote for the House of Representatives." However, once the Commonwealth legislated on the franchise it must be uniform throughout the states and no elector could be deprived of a right to vote once secured. The Convention was anxious not to impair the ability of any state to broaden its franchise prior to the Commonwealth acting.

At the 1897 Convention the procedure for amendment of the Constitution was altered and rendered more directly democratic. Instead of allowing a specially elected constitutional Convention the right to ratify proposals emanating from the Commonwealth Parliament, such amendments would be submitted directly to the electors (eligible to vote for the House of Representatives). A "proposed law" must pass the Houses of Parliament then be submitted to the people and if approved by a majority of the electors of a majority of the states the proposal was to be submitted for royal assent. The construction of this clause of the draft bill was awkward and was later subject to motions of amendment for clarification. Any alteration which either reduced the proportionate representation of any state in Parliament, or the minimum number of representatives of a state, required the acquiescence of that particular state. Furthermore, the vote was to be taken in a manner that the Commonwealth Parliament prescribed.

Deakin summarized the amendment procedure in a way that has become familiar in literature on the Constitution:

> any amendment of the Constitution requires an absolute majority of the Senate and the House of Representatives, a majority of the whole of the people and a majority of the States of which the Commonwealth is composed.[38]

Deakin wondered if it were necessary to have an absolute majority, as the reform is "practically remitted to the people". He moved an amendment accordingly. The Premier of Tasmania, Sir Edward Braddon, responded in a fashion that was characteristic of the attitudes of the defenders of the small states in both Conventions. This attitude toward reform, or lack of it, has led later writers to refer to Australia as

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[38] Adelaide 1897, 1020.

the "constitutionally frozen continent".[39] Braddon was reiterating a view which had been expressed by his fellow Tasmanian, John Henry, during the opening speeches of the Adelaide session.[40] As with Henry's assertion about the need for "stability", Braddon's remarks say much about the attitude of the small states:

> I think the feeling in regard to this clause has been that it should be made as difficult as possible to amend the Constitution. The idea underlying the clause is to provide that, while an amendment of the Constitution is not made absolutely impossible, the Constitution shall not be so easily capable of amendment that in any fluctuation of public opinion, any change of feeling on the part of the people in some crisis of a temporary character, it might be changed.[41]

This was a deeply conservative position. Higgins, in particular, was vehemently opposed to this view that the people were not mature enough to be able to be responsible for their own decisions and were prone to flights of fancy and temporary delusions. For Braddon, the people must be prevented from being at the mercy of their own folly whereas, for Higgins, the basis of democratic politics was a capacity for self determination and the Constitution should not be constrained by the dead hand of autocracy.

Isaacs was with Higgins in hoping that "these words be eliminated". He said that he did not need to elaborate upon the evils that had been identified in the difficulty of amending the American Constitution; three million Americans could veto the wishes of 48 million. McMillan had common cause with Braddon and said he did not see the logic of Isaacs' argument. Fraser, the Victorian conservative, did not want the Constitution "blown hither and thither" by every gust of wind. As a result the amendment was negatived on the voices.[42]

The debate centred on altering the wording of the clause to render an otherwise clumsy construction both more elegant and clearer. This was in order to avoid what was identified as the remote possibility that a minority of electors may, in Barton's words, "rule the roost".[43] Neil Lewis, a representative from Tasmania and a later Premier, foresaw this possibility and his speech on this point was his most substantial contribution to the Convention debates. Deakin acknowledged Lewis' suggestion and, in defence of the federal principle, said that it was necessary to maintain the axiom that a majority of people and a majority of states must agree to any proposal that allowed the Constitution to be amended. This section of the Constitution was, according to

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[39] G. Sawer *Australian Federalism in the Courts* (1967), 208.
[40] Adelaide 1897, 119.
[41] Adelaide 1897, 1021.
[42] Adelaide 1897, 1023.
[43] Adelaide 1897, 1204.

Deakin, an "entire change of principle" from 1891 and was one of the "most important provisions of the Bill".[44]

A problem again arose, however, in the wording of the draft in regard to the franchise which was not uniform throughout the colonies; South Australia was exceptional. This circumstance, if enduring, would effectively give that state twice as many votes to contribute to the total of the majority. Obviously a uniform franchise was necessary to the sensible operation of these amendment provisions. There was consensus among representatives at the end of the Adelaide session of the second Convention that, in O'Connor words: "In this matter we should be largely guided by the views of South Australia."[45] Federation clearly hastened the broadening of the franchise.

Democratic views were more pervasive than they had been in 1891, but regardless of this the alteration of the Constitution was protected by the federal "axiom" as it had been called by Deakin. Success could only be gained with the majority of people and the majority of states. The democratic influences on the framers of the Constitution although more evident was still not entrenched in their draft. The conservatives and small states representatives were extremely wary.

Melbourne 1898

The amendment clause of the draft Constitution was not taken up again until the Melbourne session of the Convention. The clause, as agreed to in Adelaide, met with some minor alterations, but only after a major debate. Isaacs' initial query that the mode of alteration did not necessarily preclude additions to the Constitution was noted by Barton for further attention. The next matter that Isaacs raised was an outcome of his own democratic beliefs and because, "The clause is one of the most important - in many respects the most important - in the Bill".[46] He made a concerted effort to convince the Convention to alter the terms of the clause to allow an amendment to go to the people if one House of the Parliament passed a motion seeking alteration of the Constitution. Under the clause as it stood an absolute majority of both Houses was required. Isaacs made two lengthy speeches explaining how the stipulation of a majority in both houses to initiate a change may be against the best interests and genuine concerns of the people.

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[44] Adelaide 1897, 1206.
[45] Adelaide 1897, 1207.
[46] Melbourne 1898, 716.

I only ask, in the interests of the whole Federation, for some outlet for ill-feeling that might otherwise arise. I only ask for some ultimate means of preventing catastrophe. I only ask those honourable members who say "Trust the Federal Parliament" to go further and meet the inevitable by trusting the people who are behind the Federal Parliament...
On matters of the Constitution it is surely right to let the people have an opportunity of expressing their opinions one way or the other.[47]

He argued that the will of the people must be given expression if one house wishes an amendment and the other did not. Otherwise, under the clause as it stood, a proposal must pass the small states twice; in the Senate and by referendum. He argued not only that the referendum gave the smaller states a sufficient protection, but that ratification was to be embraced as a matter of the logic of democratic legitimation.

I am going to ask those honourable members who object to the referendum on principle - who object to it on the ground that it is appealing from wisdom, so called, to folly, so called; who say that it is an appeal from the well-informed to the ill-informed; from knowledge to ignorance - I am going to ask them, if that is the ground of their objection, why do they consent at all in this clause to have a ratification of the act of their Legislature - their united Legislature - by going before the people? Do they see that they are giving their whole argument away.[48]

Deakin had lost in Adelaide when he opposed the need for that majority to be "absolute" in both chambers rather than "simple" in each. Isaacs was mounting perhaps a more difficult amendment to the draft bill. As Attorney-General of Victoria he was bringing forward an amendment proposed by the Victorian Parliament and it was met with deep suspicion by most representatives who mistrusted the motives of the Victorian liberal-nationalists. James Howe, from South Australia, virtually accused Isaacs of a subterfuge in trying to weaken the principle of equal representation and, as if to comically prove his own point, he became confused while saying that the reason why he mistrusted Isaacs was because he had a sharp intellect and "tenacity of purpose".[49] Josiah Symon, another South Australian, was opposed to the amendment because it was, he said, illogical and it was possible that the "hot passion" of the people may prevent them from coming to a "just and meritorious decision". Also it was an attack upon the Senate.[50] Glynn thought that such an alteration would prevent the Senate from being heard while John Cockburn and Charles Cameron Kingston, from that colony also, saw no threat to the Senate and were prepared to vote for the Isaacs motion. William McMillan reiterated the point that he had made in Adelaide in opposition to Deakin and affirmed that an absolute majority should be necessary in both houses for a referendum proposal to be put to the people.[51] Downer, O'Connor,

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[47] Melbourne 1898, 722.
[48] Melbourne 1898, 718.
[49] Melbourne 1898, 754.
[50] Melbourne 1898, 733.
[51] Melbourne 1898, 716.

Wise and Solomon spoke against the motion. The Tasmanians, Braddon and Dobson, were of course opposed, as was Sir John Forrest the Premier of Western Australia.

Reid and Higgins, in a doomed attempt to turn the debate, argued that the amendment was worthy because the Senate, as the states' house, may want some changes which the large states may block in the House of Representatives. If the Isaacs amendment succeeded, they claimed, then the possibility of the states being protected by the Senate was actually enhanced.[52] This did not seem to persuade any doubters and by 31 votes to 14 the division was lost.[53] In the final outcome, however, Isaacs may have been satisfied on this matter as a version of his amendment was adopted in the 1899 Premiers' Conference.

The New South Wales Campaign and the Premiers' Conference of 1899

The finalization of the Constitution at the second Convention was not the end of debate and amendment of the draft. Referendums were planned in three of the colonies, Victoria, New South Wales and Tasmania on 3 June 1898 and in South Australia for the next day. Forrest's Government in Western Australia would not permit a referendum to be held until the Bill had been first submitted to the Parliament for scrutiny and Queensland was still not fully integrated into the federal process. There was widespread opposition to the Bill in all colonies, but only in New South Wales was the risk to the federal cause serious. The Premier, George Reid, earned the sobriquet "Yes/No Reid" because of his qualified opposition to the Bill. He said that although he himself was obliged to vote for the Bill he would not advocate a "Yes" vote. So, with Reid's connivance, the well organized and widely supported opponents of the Bill mounted a powerful anti-federal campaign in New South Wales.

The Labor party, and the *Daily Telegraph* newspaper as well as leading politicians campaigned for a "No" vote. One of the leading opponents of the Bill was Henry Bournes Higgins who travelled through New South Wales, as well as his home colony Victoria, to speak to meetings and rallies. Higgins maintained a consistent opposition to the anti-democratic elements of the Bill including equal representation of the states in the powerful Senate.[54] Deakin and his biographer J.A. LaNauze have both characterized Higgins' opposition to the Bill as peculiar. For LaNauze the actions of

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[52] Melbourne 1898, 735 & 740.
[53] Melbourne 1898, 765.
[54] Higgins *Essays and Addresses* (1900)

Higgins were self-serving and petty. According to LaNauze, Deakin and Wise deplored, but understood, opposition to the Bill which was based on ignorance; what they could not tolerate was what he called the "vanity of idiosyncrasy" on the part of Higgins.[55] Deakin obviously respected Higgins and wrote about him as having "dogged courage", a powerful intellect, an iron will and fine brain. His ideals were "well thought" out but he had a "dominating ego" and "towering ambition". Deakin, the radical of 1891, had much in common with Higgins, but he wrote of him in 1898: "Gradually he unmasked his aims, and in his resolute devotion to them as his own and to his own ambition, became less and less scrupulous in tactics as he politically developed."[56]

Of another anti-federalist who had been a representative at the second Convention Deakin was contemptuous. He wrote of William Lyne that he had some amiable and estimable qualities, but he appealed to the "pettiest and meanest" provincialism. According to Deakin, "He cut the sorriest figure of any member of the Convention and was one of the feeblest leaders of an opposition ever beheld in Australia". Also he was slow-witted, clumsy of speech and figure, suspicious, weak and obstinate, stubborn, plastic, cunning but slow, drab, doleful, monotonous and of unpretentious plainness.[57] On Lyne he seems severe, but Deakin reserved his real venom for George Reid.

Reid was not committed to the Commonwealth, unlike his colleagues from New South Wales, Barton, Wise, O'Connor, and McMillan who, "spent themselves heroically in the cause".[58] Reid was not even committed to oppose the Bill as were Higgins and Lyne. Reid's cleverly vacillating position was condemned by Deakin as mendacious in the extreme.[59] The near success of the first referendum in New South Wales was interpreted by Deakin as deriving from the hard work of the federationists who were "poorer in funds and richer in scruples than their opponents".[60] A majority of voters in New South Wales voted in favour of the Bill but the statutory requirement of 80,000 was not reached. The qualified acceptance of the Draft Constitution gave impetus to both the anti-federationists in New South Wales and to the federal movement. The government of George Reid was in a strong bargaining position to negotiate some changes to the Constitution, but he was not able to deny the popularity of the federal

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55 LaNauze. *The Making of the Australian Constitution,* 239.
56 Deakin *The Federal Story,* 71.
57 Deakin *The Federal Story,* 105-6.
58 Deakin *The Federal Story,* 99.
59 Deakin *The Federal Story,* 62-64.
60 Deakin *The Federal Story* , 99.

movement. In Deakin's words, Reid "declared for an amended Bill".[61] The New South Wales Parliament similarly declared for an amended Bill and nominated ten particular changes which would need to be made.[62]

A Premiers' Conference was convened in Melbourne in late January 1899, the proceedings of which were secret and were not recorded. The amendments proposed by the New South Wales Parliament were presented to the Conference and a number of decisions were made to alter the Bill including a change to the mode of amendment of the Constitution.[63] The argument that Isaacs had made in the last stages of the Melbourne session was, in effect, adopted at this Conference. His amendment would have allowed a referendum question to go to the people in the event that it had the support of only one house. The Premiers accepted a variation of this suggestion. A proposed alteration of the Constitution could be submitted for referendum if twice passed by one house (by an absolute majority) and twice rejected or obstructed by the other. The Governor-General in this event *may* (with or without the amendments of the other house) refer the question to the people. From the wording of Section 128 it can be inferred that the Governor-General also might not.

CONSENT, PARTICIPATION AND LEGITIMATION

The British Constitution itself, and Australian constitutional thought which was derived from it, was partially sustained by the myth, or legal fiction, of the notion of "consent". The contribution that John Locke made to constitutional thought in the *Two Treatises on Government* was to provide a liberal rational explanation of the relationship of the subject to the State. The distribution and alienation of natural rights and the empowerment of the State were explained by Locke in terms of the contract. The sovereign was empowered to make laws which bound subjects because they had consented, in the formation of society, to be bound by the will of the majority. So for Locke:

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61 Deakin *The Federal Story* , 100.

62 LaNauze *The Making of the Australian Constitution,* 240-1.

63 Other decisions were: the limitation of the operation of the Braddon clause on finances; the change from a three-fifths majority to an absolute majority in a joint sitting; the specification of a seat of government; the stipulation that no alteration could be made to a state boundary without the agreement of that state; the Queensland Parliament may divide the state into divisions for Senate elections; the number of Senators from original states will be set at six; clauses on rivers, money bills and judicial appeals would remain unchanged.

When any number of men have, by consent of every individual, made a community, they have thereby made that community one body, with a power to act as one body, which is only by the will and determination of the majority.[64]

The crucial act of formation for Locke was the event of giving consent to be governed. This act simultaneously allowed the individual to leave the state of nature for the advantage of societal benefits, but also caused the alienation of natural "sovereign" rights, in binding the subject to the will of the sovereign which could be the "majority" or, in the American case, the "republic":

Men being, as has been said, by nature all free, equal and independent, no one can be put out of this estate, and subjected to the political power of another, without his own consent. The only way by which any one divests himself of his natural liberty and puts on the bonds of civil society is by agreeing with other men to join and unite into a community.[65]

Whether Locke understood his own explanation of the origins of society and government as a metaphor or, after the Biblical Fall, as a real historical explanation of society is uncertain. Several features of this explanation have presented problems for Locke and for interpreters of the Lockean contract. Is consent, once given, held in perpetuity? What rights does the subject reserve? At what juncture can the subject renounce the contract? Is consent by a proxy equally binding? Locke, it seems, has an implicit caveat on the complete obligation of the subject in society. He allowed for an existence outside society because it is possible that government may cut "him off from being any longer a member of it." This, however, does not clarify (but further obscures) the limits of obligation, as the essential conditions for that expulsion are not explored.[66] These questions arise in dealing with Locke both in his own terms and in contrast with the position of other contractarians such as Hobbes and Hooker. The more general problem for such a construction is the one identified by David Hume that, as a notion of actual historical consent, the social contract is total nonsense.[67] Equally, as a metaphor, the explanatory power of the social contract and consent is dubious.

The origins of government in coercion, tyranny and enslavement, are more plausible explanations than the contract. Locke could not provide an instance of when that moment of consent occurred. Regardless, Locke's work is still held as an important legitimating device in explaining the origins of the British Constitution, despite the notion of consent being an historical and legal fiction. However, it is in Australia, oddly, that the Lockean contract, as a basis of the origins and legitimation of constitutionalism, is most closely approximated as a demonstrable real historical

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64 Locke *The Second Treatise* #96.

65 Locke *The Second Treatise* #95.

66 Locke *The Second Treatise* #121.

67 D. Hume "Of the Original Contract", *Social Contract: Essays by Locke Hume Rousseau* E. Barker ed. (1971), 149.

event. One of the great, and perhaps unidentified, legitimating foundations of the Australian Constitution is that the colonial subject, by personal positive volition, consented in adopting, and being adopted by, an explicit constitutional form. The sorts of problems which arose in explaining the Lockean origins of the British Constitution do not occur, at least not in the same manner, in the Australian case after the referendums of 1898 and 1899. In Australia, there is no need to explain consent as tacit, or vicarious, or by proxy. In Locke's words:

> Every man being, ... naturally free, and nothing being able to put him into subjection to any earthly power but only his own consent, it is to be considered what shall be understood to be sufficient declaration of a man's consent to make him the subject to the laws of any government. ... Nobody doubts but an express consent of any man entering into any society makes him a perfect member of that society, a subject of that government.[68]

After the referendums the "perfect members" were all the people of the states. In the society of Locke the minority were also bound by the decisions of the majority, given the presumption that a right to participate in the decision was able to be exercised. The democratic decision, in Australia, was seemingly sufficiently broadly based (although half of the society were not able to vote on the Bill) for it to be binding on all. There is a precious irony in finding an explanation of the basis of the Australian Constitution in these Lockean terms for his insistence that prior to the moment of consent all subjects were perfectly free is not immediately reconcilable with the convict origins of Australia since 1788.

> But submitting to the laws of any country, living quietly and enjoying privileges and protection under them makes not a man a member of that society. ... But this no more makes a man a member of that society a perpetual subject of that commonwealth, than it would make a man subject to another in whose family he found it convenient to abide for some time. ... Nothing can make any man so, but his actually entering into it by positive engagement, and express promise and compact. This is that which I think, concerning the beginning of political societies, and that consent which makes any one a member of any commonwealth.[69]

Including the Australian Commonwealth! This is not to suggest the the framers read Locke or where directly influenced by the *Second Treatise* as has been argued was the case with the American framers.[70] The actual reading of English high political

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[68] Locke *The Second Treatise* #119.

[69] Locke *The Second Treatise* #122.

[70] See Diggins' opening chapter entitled "Whose afraid of John Locke?" *The Lost Soul of American Politics*, 9. Diggins seeks out the "deeper stream underneath the 'main currents' of American thought", to enquire into the seriousness of the challenge to the Lockean-Calvinist tradition by the three streams of recent scholarship: classical republicanism, Scottish moral philosophy and Marxism. The Lockean tradition is represented by Louis Hartz, *The Liberal Tradition in America: An Interpretation of American Political Thought Since the Revolution* (1955). John Pocock has presented the most thorough challenge to this interpretation in "The Myth of John Locke and the Obsession with Liberalism", in *The Political Thought of John Locke*, J. G. A. Pocock & Richard Ashcraft eds (1980), 3-24. See also, J. G. A. Pocock, *The Machiavellian Moment*. Charles Beard the most "provocative, influential and controversial historian of the period" represents the older Marxist tradition.

theory was not, on the surface, a notable feature of Australian constitutional debates at the time of the Conventions. That these ideas were influential, however, cannot be seriously doubted. The Australians were not mere pragmatists who readily improvised a suitable constitutional system. The truism that they were influenced by the prevailing ideas of the time is, nonetheless, a point worth making. If, as is axiomatically contended, Locke was a giant figure in British and American constitutional thought, and the Australian Constitution is principally a derivative of Anglo-American constitutional thought, it should follow that Locke (along with Jefferson, Calhoun and Lincoln) is a major missing person in accounts of the formation of the Australian Constitution.

Within this context John Rickard's observation, in his biography of Higgins, that the federationists deliberately tried to engage the "people" in the federal enterprise after the failed Convention of 1891 is given a different facet. The popular election of representatives to the second Convention was deemed necessary to underwrite the movement with a popular or democratic legitimacy which it otherwise lacked. Rickard contends that the greater sense of credibility which was felt by the later delegations moved them toward a greater responsibility in gaining a consensus. The very success of the Convention would then be a proof of incipient nationhood. But for Rickard:

> The intrusion of the people was to some extent illusory, for these colonial politicians - the very 'men of experience ... tested and tried by a long career in politics' that Higgins had in the first place hoped for - all had very fixed notions as to what their colony's interests were, notions which were the product of each colony's history. Consulting the people was to legitimise their guardianship of those interests, rather than to stimulate new visions of Australia, or new leaders to express them.[71]

The intrusion of the people may have been illusory in the actual event of participation in the formation of the Constitution, and Rickard may be right, but that is not wholly the point. The very illusion itself, of participation, may be the real event of Constitution making. However coercive and cynical the procedures for the act of adopting the Constitution may have been it was still legitimately based on consent and participation. Participation and consent are the two legitimating devices in liberal democracies and, as Deakin argued to his still sceptical anti-democratic colleagues in 1891, they were fundamental to the British Constitution; it was based on the will of the people as "final arbiter". The fact that the people may have no power to influence the actual shape of the Constitution, which in turn significantly shapes their society is, in liberal polities, almost beside the point. What is material is that the

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[71] John Rickard, *H.B. Higgins: The Rebel as Judge* (1984), 92-3.

Constitution was based on the *idea* of consent. In a federal democracy that consent can be granted by the people of the states.[72]

In Australia, therefore, the Lockean contract was secured in a manner which was even more immediate than in the United States, as the "people" (with significant exceptions) were personally obliged to positively act. This was more direct than in the United States where the vote to accept the contract (Constitution) was taken by proxies of the people who were not even directly chosen. Participation in the act of approval of the contract was remote in this case although still seen as legitimate. The framers of the Australian Constitution were not intending to explicitly create an actually existing corollary of the Lockean idea of contractarian consent, but this was the result.

The act of voting placed the people of the states of Australia into a more intimate relationship with the Constitution than other polities, including Great Britain, whose constitutions are still based on consent, but to which no-one actually consented. The notion of tacit consent was substituted. The contractarian act of legitimation in Australia was by deliberate volition rather than just by metaphor. The actual choice of the people of the states may not have been real, in that there was no alternative, and the democrats and progressives may well have bitterly opposed some of the features of the Constitution, which they were prevented from changing, but these factors do not alter the foundation of the Constitution coming from an organic democratic acceptance. The irony of the act of legitimation is that, even if the democrats of the time were correct, the anti-democratic features of the Constitution to which they were opposed were democratically adopted and, therefore, held to be unimpeachable. Dobson's anti-democratic sentiments were entrenched in the Constitution by democratic vote.

The amendment provision of the Constitution is itself protected by the amendment provision. The candid opinion of some of the conservatives at the Conventions was that the Constitution should be difficult if not impossible to change. The amendment provision allowed for an absolute majority in each house and when Isaacs argued against the restrictiveness of this condition he was soundly beaten. Although this provision was later altered, at the 1899 Premiers' Conference to allow either house to

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72 When the Enabling Acts which established the Convention were passed in the colonial parliaments the provisions allowed for the final draft Constitution to be submitted directly to the people rather than returned to the parliament. (I am grateful to Professor Leslie Zines for drawing this my attention.) The provisional draft had, however, been submitted to the colonial parliaments for comment prior to the Sydney session.

propose a referendum, it is nevertheless an indication of the intractability of Isaacs' opponents that they would not easily simplify the terms of amendment.

The framers of the Australian Constitution were intent on preserving the Constitution as they wrote it and as they intended it to work. That the written document was submitted to a democratic test at referendum served as further entrenchment and legitimated the actions of its framers. As the framework for a national government the Constitution protected the states and was intended to endure in the form in which it was written. The construction of meaning through interpretation of the words of the text was, however, a different matter and one beyond the control of the framers once that generation of High Court judges who drafted it passed from the Bench.

One of the great strengths of the Australian Constitution derives from its democratic basis in the ratification campaigns in particular. The American tradition of celebrating the founders, their triumph, and the inherent genius of the Constitution, may be translated, in a milder form, to Australian attitudes about the origins of the Constitution. The obvious and marked reluctance of Australian electors to vote to alter the document may be partially explained in the difficulty that critics of the "horse and buggy", "anti-democratic" Constitution have in overcoming the conservative argument about the wisdom of the framers or that the people of the states knew best in their democratic acquiescence. Voters, at a referendum, may place more trust in the comforting abstraction of the "great men and ordinary people" of the past, more than in the immediate designs of contemporary political leaders. The Lockean contract, played out in the ratification campaigns and in the final majority in each colony, has seemingly deeply entrenched the Constitution in popular opinion. The Constitution is apparently seen as an expression of the general will that Deakin was so intent on fostering. Even more than the Constitution of the United States the Australian Constitution can be shown to have been not only democratically accepted by the representatives of the people, but accepted by them through a direct act of volition.

CONCLUSION

According to Isaiah Berlin the "parthenogenic fallacy" is the assumption that ideas have a transcendent quality which allow them to be transferred through time and space.[1] Ideas, of course, do not have an independent life of their own; they are necessarily dependent upon a context of economic and social conditions and the prevailing intellectual environment. The focus of attention of this thesis has been on the development of the federal idea in Australia and the American influence on the Australian framers. In the creation of the Commonwealth Constitution the American system served as a very influential model. The mere existence of the American federation, however, was not of itself sufficient to influence the formation of the Australian Commonwealth as, necessarily, the conditions in Australia would have to be conducive to the adoption of the federal system as a widely acceptable form of government. The thesis has not approached the (as yet unanswered) question of why federation took place when it did. The thesis is an account of the formulation of federal ideas and institutions in Australia and has been concerned with tracing the influence of American federalism on the structures which the Australian framers created.

The Australian Constitution has been given meaning through modes of understanding which have been largely controlled by judges and lawyers. The seemingly inescapable conclusion is that the latest interpretation of the High Court is what the Constitution effectively means. When new departures are found, or interpretation changes, then the previous understanding is deemed to be "wrong" in law. While many judgements, building on previous cases, merely refine meaning others overturn prior meanings and, in effect, cause them to be judicially forgotten. Thus, the meaning of the Constitution is constantly subjected to immediate but thorough revision as more "correct" judgements are made. Such an understanding, through the dictates of legalistic rationality, does not readily allow for an acute historical or political sensitivity.[2] The result is that the Australian constitutional legacy, which is problematic and contradictory, is "flattened out" as, supposedly, ambiguity and contradiction are not tolerated.

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[1] "An Interview with Isaiah Berlin" *Partisan Review*. 50 (1983): 7-28.

[2] This point is made also by Reid *The Concept of Liberty*, 3.

The document is constantly revised, yet it is also suspended in "history" within a written framework of the ideas of the time. This paradox is masked when constitutionalists impose a single truth on interpretation through correct law. Only through political interpretation and analytical exegesis can ideas which formed the Constitution be scrutinized and a picture of it, its formation and transformations, can emerge which has depth and historical perspective.

That the terms of the Constitution are constantly evolving and being reproduced is clear in the use and understanding of the central notion of "federal government". A theme of this thesis has been to explore the meaning of federal government as it was understood and deployed by the framers of the Australian Constitution. One of the contentions of the thesis has been to show that federal theory, as it was adopted and developed by the Australian framers, was problematic as it was derived from American sources which had been in dispute since the Philadelphia Convention of 1787. An ambiguity about the meaning of "proper federal government" has been apparent since then, when the American framers replaced the old limited confederal arrangements and gave definition to the new Constitution. In doing so they also fractured the formerly accepted understanding of "the federal system" and caused multiple meanings to become current. The conception of federal government held at the end of the Philadelphia Convention was different from that which had been subscribed to at the beginning. That understanding was different again from Lincoln's account in 1861. Similarly, in Australia, the notion that the framers had of a proper federal system was different in 1891 from that which the heirs of the Commonwealth Constitution had in 1921, or since. In all cases, however, there was still an unstated normative assumption about the pursuit of the proper federal arrangement.

By its inescapable nature, the Constitution is constantly being reshaped. Words in a Constitution cannot have a fixed meaning. There are different and, in some cases, competing interpretations of a putative "correct" constitutional meaning. The disputes and differences over the understanding of the proper federal system are politically crucial as the construction of meaning has an immediate influence on the relations of particular institutions to each other. Dominant interpretation resultantly determines ascribed powers and functions. Consequently, and most importantly, the the overall shape and character of the democracy is determined by the theories which are used to legitimate and defend the structure of the Constitution.

The reality of constant change and ambiguity is not, of course, a cause to lament. Moreover, despite judicial forgeting, the older meanings of federal government are not entirely lost. Elements of the past usage are contained continued in political life. Changes are neither complete nor sudden, even though those changes are usually marked by the specific dates of important constitutional cases or dramatic events. *Marbury v Madison*, the *Engineers* case, *the Dams* case, or the war of attempted secession are historical moments which are construed as crucially important turning points. Constitutional cases signal change, but are themselves only indicators or manifestations of more general and not so readily identifiable forces. Changes to the distribution of powers within federal governments do not come about because ideas pass into the minds of justices of the superior courts, but because these actors provide a legitimating force as a response to larger movements. The Constitution is interpreted within a framework of priorities and principles which constitute the desired trajectory of national development. In Australia, the expansion of Commonwealth powers has been favoured over time because it serves large national economic and political needs. The actions of the national government, both domestically and internationally, have accordingly been judicially structured. If the Constitution is old fashioned, as is sometimes alleged, it nonetheless has been made to work.

The meaning of the events and ideas which surround the American Constitution in its formative stages are argued over endlessly because, seemingly, Americans think these are matter worth debating. The American Revolution and the Constitution are treated with a seriousness and a respect which, at its most passionate, borders on totemic obsession. In contrast, the prevailing interpretative tendency in Australia has been to reveal the "true" meaning of the document with comparatively little fuss or contention with the result that the rich methodological debate which has recently developed in the United States has not, as yet, been duplicated in Australia.

Furthermore, the interpretation of Australian federalism has been contained within a somewhat arbitrary geological methodology of periodization; the categories of co-ordinate, coercive, and co-operative federalism are widely accepted in Australian political science. The assumption is that the dynamics of federal/state relations change at crucial moments according to land mark cases in the High Court. *Engineers, Uniform Tax, Koowarta* or *Tasmanian Dams* are considered to be ruptures and are accordingly attributed significance because they are construed as turning points in history. The doctrines of federalism are understood to be revealed and changed by the

interpretations of the High Court. That the High Court is itself responding to structural forces rather than boldly making history is usually not discussed. The High Court is seen as the dynamic place of change in the federal system rather than merely representing and legitimating broader political change, which is, perhaps, less well understood.

The recent decision of the High Court to allow the Federation debates to be used more fully in determining the meaning of the Constitution will give a currency to the framers and their arguments which has not previously been experienced. The judgement about the framers, which will continue to be made, will revolve around the question of whether or not they "got it right". This question will be asked again as it was after the events of 1975. The question is interesting but erroneous as the framers could not be expected to have predictive gifts; they should not be expected to have had divine insights into the future. To expect them to have had those qualities is itself a form of hagiography. More fruitful questions concern the meaning of their work. In enquiring into the origins of the Constitution, as its centenary approaches, scholars can debate the motives, the reasons, the forces which propelled the framers, and investigate how they understood their own task.

In assessing the importance of James Bryce, and the influential circle of which he was a part, Christopher Harvie wrote that, while their collective failures and failings were considerable, so were their accomplishments.[3] For Harvie, "The destruction of their own historiography has been a necessary preliminary to the rediscovery of their contribution to modern British politics"[4] As for the framers of the Australian Constitution, while their failures were considerable their accomplishments were great. It may be necessary to destroy their historiography and their constitutionalism in order to rediscover their contribution to modern Australian politics.

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[3] Harvie *The Lights of Liberalism*, 9.
[4] Harvie *The Lights of Liberalism*, 13.

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