

**Ten Advantages of a Federal Constitution  
and How to Make the Most of Them**

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## Executive Summary

Worldwide interest in federalism is greater than ever before and more countries are moving to adopt it. It has proved its worth and is especially well adapted to today's world, but in Australia it is still being attacked and undermined. The debate concentrates on, and exaggerates, the minor inconveniences of federalism and makes no mention of its great advantages. These include:

1. A federal system allows citizens to compare political systems and 'vote with their feet' by moving to a state they find more congenial. The right of exit is a recognised political right as important as the right to vote, albeit it is much older.
2. Federalism allows and encourages experimentation in political, social and economic matters. It is more conducive to rational progress because it enables the results of different approaches to be compared easily.
3. Federalism permits economic and cultural differences to be accommodated, thus strengthening national unity. At the same time, federations work better if regional differences are not too marked, so Australia has an advantage here. The sheer size of Australia makes some kind of federal structure inevitable in any event.
4. A federation is more democratic than a unitary system because there are more levels for public opinion to affect. A federal structure helps to offset governmental elitism.
5. The federal division of powers hampers the rise of despotic central government and thus protects liberty. This was exemplified when the states led the struggle against the political broadcasts ban in 1991.
6. Federal decentralisation makes governments easier for the people to supervise and results in better decisionmaking. State governments have fewer programmes and employees, and their smaller scale cuts monitoring costs. As the states cannot create money, the scope for abuse of power is reduced.
7. Federations produce more stable government than unitary systems, and stability is a cardinal virtue in government.
8. The competition between governments in a properly working federation reduces waste and promotes the best mix of taxation and services. The duplication issue is misunderstood—Australia spends proportionally less on government than the unitary United Kingdom or New Zealand.

9. Competitive federalism facilitates the discovery of the rules and devices that will enhance the competitive position of Australia in world markets. Australia's problem with railway gauges long predates Federation; its persistence may be a result of government monopoly ownership.

At the dawn of the Commonwealth's second century, changes are in progress that may help revitalise Australian federalism and make the most of its potential. The goods and services tax in practice provides the secure revenue base the states have long needed, and is a step towards more balanced Commonwealth-State fiscal relations. The lack of a formal national bill of rights denies the federal judiciary the de facto veto power over state (or provincial) legislation that they enjoy in the United States and Canada. The general intellectual climate is becoming more favourable to constitutionalism, checks and balances, aided by the decline of the old British theory of absolute parliamentary power.

Many of the world's other federations tap the benefits of federalism better than Australia does. There are a number of simple and inexpensive steps that would improve Australia's performance in that regard. They include reviving the Senate's role as the states' house by establishing a standing committee on federal-state relations, formalising present intergovernmental bodies by requiring, for example, regular meetings and public hearings, and recognising that the usual drive towards national conformism should be balanced by an appreciation of the benefits of diversity. The High Court should be invited to emulate the United States Supreme Court and revisit some of the centralist decisions that have undermined the Constitution. Some purely symbolic measures would help to reawaken the spirit of independence, self-reliance and community solidarity.

Our national future is not determined by our past. There is no reason why past conditions, mistakes and prejudices should be allowed to lock the nation into unhelpful patterns. Australia is a young, vigorous and successful country. Within its own borders it can be anything it wants to be.

## The New 'Age of Federalism'

Worldwide interest in federalism is greater today than at any other time in human history.<sup>1</sup> The old attitude of benign contempt towards the federal political structure has been replaced by a growing conviction that it enables a nation to have the best of both worlds—that is, shared rule and self-rule, coordinated national government and diversity, creative experimentation and liberty. 'Political leaders, leading intellectuals and even some journalists increasingly speak of federalism as a healthy, liberating and positive form of organisation',<sup>2</sup> writes a leading Canadian authority. With the move of South Africa towards a federal structure, all the world's geographically large countries are now federations with the exception of Indonesia and China, and even China has become a de facto federation by devolving more and more autonomy to the provinces, as well as guaranteeing Hong Kong semi-independent status as an autonomous region.

The same trend is apparent in countries that are not so physically large. There was scarcely any question in the minds of East Germans that on their release from captivity they would rejoin the nation as the five federal states that had been suppressed by Hitler and later by the communists. Belgium, which had previously lived under a unitary constitution modelled on Britain's, became a federation in 1993. The few remaining highly centralised nation states such as the United Kingdom, France, Spain, Indonesia, Sri Lanka, Papua New Guinea and Italy have all faced major crises of secession or separatism. Spain has had to relax its grip on the provinces as a result of pressures in the Basque country and Catalonia. Northern Italy has a vigorous separatist movement. France has established regional legislative assemblies, though what the people really want is the return of *nos belles provinces*.

The United Kingdom has been slowly disintegrating for over a century with the sometimes violent struggle for home rule gaining strength in the 1880s, the independence of Ireland in 1922 followed by Scottish and Welsh nationalism, and by civil war in Northern Ireland. The current government in 1998 took grudging steps towards a 'semi-federal' structure for Scotland and Northern Ireland. Actually it is more like a self-governing colony arrangement, even to the extent of having judicial appeals to the Privy Council in 'constitutional' matters. The arrangement is already showing signs of instability and some well-informed British people (including many in the Conservative opposition, which voted against devolution) see an independent Scotland as a real possibility in the next decade.

The Indonesian parliament is belatedly starting to debate a federalist solution and President Wahid reportedly favours the idea. Sri Lanka's British-designed unitary structure has had catastrophic results that might have been avoided if the main regions had possessed some degree of self-rule under a federal arrangement. Whereas in 1939 a Harold Laski could declare that 'the epoch of federalism is over', it would be truer to say as the new millennium approaches that unitary government has proved unstable and that we are in fact entering the 'Age of Federalism'.<sup>3</sup>

One reason for this favourable reassessment is the ending of the great confrontation between liberal democracy and tyranny that lasted from 1914 to the fall of the Berlin Wall in 1989. Democracy's success in that conflict removed one of the main justifications for centralised government, the need to maintain an economic structure that could be mobilised for war. Again, the collapse of the Soviet Union and its empire has undermined the appeal of all authoritarian, centralising ideologies, while the spread of human rights values has called in question all forms of elite governance and created increasing pressure for genuine citizen self-government. The general wariness towards utopian ideologies has also helped, in the sense that federalism is not an ideology. It is a pragmatic and prudential compromise intended to meet both the common and the diverse preferences of people by combining shared rule on some matters with self-rule on others.<sup>4</sup> In fact its decentralised design is a useful barrier to the control dynamic that lurks within ideologies and most group belief systems.

Economic change has been a factor too. An increasingly global economy has unleashed centrifugal economic and political forces that have weakened the traditional nation state in some respects and strengthened both international and local pressures. The spread of free markets has stimulated socioeconomic developments that favour federalism: the emphasis on autonomous contractual relationships, recognition of the non-centralised nature of a market economy, consumer rights consciousness and the thriving of markets on diversity rather than uniformity. Related to this are advances in technology that are shrinking the optimum size of efficient businesses, and models of industrial organisation with decentralised and flattened structures involving non-centralised interactive networks.<sup>5</sup> A further reason is the observable prosperity, stability and longevity of the main democratic federations: the United States, Canada, Australia and Switzerland. Together with New Zealand and Sweden, they are the only countries to have passed more or less intact through the furnace of the 20th century.<sup>6</sup> (The United Kingdom fails to qualify because of Ireland's secession). While Sweden and New Zealand are unitary states, not federations, they account even today for only

12 million people between them. It should also be noted that no federation has ever changed to a unitary system except as the result of a totalitarian takeover.

Within the Australian political-intellectual clerisy, however, attitudes to federalism range from viewing it as a necessary evil to, as one recent work puts it, ‘waiting for an appropriate time in which to abolish our spent State legislatures’.<sup>7</sup> There are several reasons for this dismissive, even hostile view of our constitutional structure. One is the lingering influence among intellectuals and the media of the ideologies of bureaucratic centralism which, though discredited in the real world, are still able to evoke powerful myths in the minds of those who do not place a high value on the lessons of experience. The influence of British academic writings has in the past also been a source of centralist prejudice, as the British intellectual establishment has been anti-federalist since at least the days of A.V. Dicey. Another reason is a kind of pseudo-pragmatism expressed in casual one-line assertions about the costs of a federal division of power. This attitude not only overlooks the available data and fails to consider the costs of the alternative but also takes no account of the positive benefits of the federal model.

To some extent those attitudes are understandable. The pattern of constitutional interpretation followed by the High Court over most of this century has consistently tended to favour the expansion of Commonwealth power at the expense of the states. This has made it harder for the states to perform their proper role, so that the advantages of constitutionally decentralised government are more and more difficult to identify and evaluate. This factor was highlighted when the High Court decision invalidating state retail taxes<sup>8</sup> provoked a renewed chorus of calls for the abolition of the states.

Again, federal and state governments have been able to create a kind of political cartel by the increasing use of uniform ‘national’ legislation and by heavy reliance on special-purpose grants. These developments have the effect, and probably the purpose, of denying to the people the opportunity to make comparisons between different models of legislation, taxation and spending.

To the extent that the one-sided nature of the public debate on federalism stems from the lack of information about, and recent experience of, the proper working of a federal system, it is useful to draw together and articulate in one place the main points on the other side of the argument.

We should start by defining the term ‘federation’. Decades of debate have not produced a universally accepted formula, but the list of characteristics put forward by Professor Watts of Queen’s University, Canada, will serve:

- two orders of government, each acting directly on its citizens, a formal distribution of legislative and executive authority and allocation of revenue resources between the two orders of government, including some areas of autonomy for each order;
- provision for the representation of regional views within the federal policymaking institutions;
- a written supreme constitution not unilaterally amendable and requiring the consent of all or a majority of the constituent units;
- an umpire (courts or referendums) to rule on disputes between governments;
- processes to facilitate intergovernmental relations for those areas where responsibilities are shared or overlap.<sup>9</sup>

A key element in this definition is the requirement of a written constitution. Other forms of governmental decentralisation which exist only as a matter of central government policy and can be restricted or abolished at any time, such as the regional assemblies of France and Britain, cannot be regarded as federal systems. At least in theory, Australia comes within Professor Watts's definition. What, then, are the advantages of such a system?

## Ten Advantages of a Federal System

### 1. The Right of Choice and Exit

When we think of political rights in a democracy, those that first come to mind are usually the right to vote and the right of political free speech. While they are indeed crucial, an equally important and more longstanding right is the freedom to decide whether or not to live under a particular system of government, the right to 'vote with one's feet' by moving to a different state or country.

That this is a political right is obvious from the events leading up to the fall of the Soviet Union. The communist governments were the only regimes in history ever to suppress the right of exit almost completely. The Soviet authorities well knew that if their subjects should ever seize or be granted that right, the communist system would instantly collapse. And that, of course, is what happened.

The citizen in a liberal unitary state who is dissatisfied with the national government may of course move to another country. But it is becoming harder to obtain a permanent resident visa for the kind of country to which one might wish to emigrate. Globalism notwithstanding, immigration is increasingly unpopular with voters the world over. In a federation, however (including a quasi-federal association such as the European Union), there is complete freedom to migrate to other states. A federal structure allows people to compare different political systems operating in the same country and to give effect to those comparisons by voting with their feet. This process of comparison, choice and exit has occurred on a massive scale in Australia, especially during the 1980s and early 1990s. During those years Australians moved in huge numbers from the then heavily-governed southern states to the then wide open spaces of Queensland.<sup>10</sup>

The freedom to leave has been recognised as a political right longer than perhaps any other attribute of citizenship. Plato's dramatised account of the last days of Socrates restates the principle in context: '[A]ny Athenian, on attaining to manhood and seeing for himself the political organisation of the State and its Laws, is permitted, if he is not satisfied with [them], to take his property and go away wherever he likes'.<sup>11</sup>

In the 17th century, Thomas Hobbes wrote of the consent of the governed as embodied in the willingness of the citizen to live under a particular government and respect its laws. That tacit consent

gave legitimacy to a ruler even before the advent of modern democracy<sup>12</sup>—indeed, it was the only form of political legitimacy available at that time.

A federal constitution therefore operates as a check on the ability of state and territory governments to exploit or oppress their citizens. This function did not appear in the first of the modern federal constitutions (that of the United States) as a matter of conscious design—it is merely a happy by-product of the system. None of the early commentaries discuss the value of federalism as a check on state power. Nevertheless, it is clearly an inseparable consequence of any federal structure.<sup>13</sup>

According to Professor Richard Epstein of the University of Chicago, the freedom of individual choice among governments in a federation is one of most effective of the usual safeguards against governmental excesses, the others being the full separation of powers and a legally enforceable bill of rights. The special merit of the right of exit is that it is a self-help remedy that is simple, cheap and effective.<sup>14</sup>

Some other American commentators argue that it is the most effective of the three safeguards.<sup>15</sup> Judge Robert Bork, in support of this view, points out that the division of power between federal government and states is the only constitutional protection of liberty that is neutral, in the sense that you can choose to move to the state that protects the particular freedoms you cherish most, regardless of whether they are specifically protected by the constitution or find favour with judges.<sup>16</sup> At the very least, as Gordon Tullock adds, ‘The addition of voting with your feet to voting with a ballot is a significant improvement’.<sup>17</sup>

So when centralists give federalism the disparaging label ‘states’ rights’, they are obscuring the fact that it is above all the *people’s* right to vote with their feet that is protected by the constitutional division of sovereignty in a federal system.<sup>18</sup>

This beneficial feature of federalism has two limitations, however. One is that it gives existing residents no protection for assets that cannot be moved, such as land or licences.<sup>19</sup> The New South Wales parliament exploited this limitation spectacularly in 1981 when it purported to confiscate all privately-owned coal deposits in the state without giving the owners a right to compensation.<sup>20</sup> The effectiveness of exit as a remedy is also limited by the number of states. The fewer states there are, the fewer the choices and the greater the opportunities for governments to collude on taxes, spending priorities and other areas of law or policy that are important to the citizen. The small number of states in Australia, as compared with ten provinces in Canada, 26 Swiss cantons and 50 American states,

makes collusion more likely and more effective.<sup>21</sup> This is analogous to the problem of the small number of firms in some Australian industries in the early days of competition law under the Trade Practices Act. As under the Trade Practices Act, the relatively small number of choices makes it all the more important to preserve and expand such potential for competition as the number of competitors allows.

## 2. The Possibility of Experiment

The British constitutional scholar James (Viscount) Bryce in 1888 published a monumental treatise on the United States that became the standard reference manual at Australia's federal conventions.<sup>22</sup> The fact that it is known to have been assiduously studied and constantly cited by the delegates makes it a valuable guide to the understanding and the intentions of Australia's Founders. In his appraisal of the American system Bryce identified among the main benefits of federalism 'the opportunities it affords for trying easily and safely experiments which ought to be tried in legislation and administration'.<sup>23</sup> This is the same point as Justice Brandeis was making in his famous statement that

To stay experimentation in things social and economic is a grave responsibility. Denial of the right to experiment may be fraught with dangerous consequences to the Nation. It is one of the happy incidents of the federal system that a single courageous State may, if its citizens choose, serve as a laboratory; and try novel social and economic experiments without risk to the rest of the country.<sup>24</sup>

In other words, the autonomy of the states allows the nearest thing to a controlled experiment that is available in the sphere of law making and government policy. Being closer to the workplace, state governments are in a better position than the national government to assess the costs as well as the benefits of particular policies as revealed in this way. Not only that, but the possibility of competition among states creates incentives for each one to experiment with ways of providing the combination of public goods that will maximise the welfare of a majority of its voters, and perhaps attract people and other resources from other states.<sup>25</sup>

All this is particularly important in times of rapid social change. As Karl Mannheim pointed out, 'every major phase of social change constitutes a choice between alternatives',<sup>26</sup> and there is no way a legislator can be certain in advance which policy will work best. For example, de facto relationships

have attracted legislative attention recently because society has no experience in dealing with them on the present scale. Which is the better policy: the interventionist approach of the New South Wales Property Relationships Act 1984, or the common law libertarianism of Western Australia?<sup>27</sup> The only way to be certain is to observe what happens in practice under each approach. The evidence produced by comparing the results of different policies in different states may force a modification of the approach, provided that the legislature is open to rational persuasion.

Besides making experiment and comparison possible, a federal system also makes it harder for legislatures to avoid or dismiss evidence that undermines the approach they have taken. The results of experience in one's own country are less easily ignored than evidence from foreign lands.

Even if residents do not or cannot exercise the exit option, a federal structure stimulates what the Nobel laureate James Buchanan calls 'virtual exit', an important mechanism in the internal process of political decision and choice. 'The mere fact that coexisting units of government exist and can be observed to do things differently exerts spillover effects on internal political actions', Professor Buchanan argues. 'As a practical example, even though exit was of some importance, especially in Germany, the *observations* of Western economies, culture, and politics by citizens of Central and Eastern Europe were independently critical in effecting the genuine political revolutions that occurred in 1989-91'.<sup>28</sup>

That is one of the main reasons why ideologues tend to be hostile to federalism. Hardly a week passes without some activist group lamenting the 'inconsistent' (the term being misused to mean merely 'different')<sup>29</sup> approaches taken by state laws to current social or economic issues and calling for uniform 'national' legislation to deal with the problem. Behind these calls for uniformity lies a desire to impose the activists' preferred approach on the whole Commonwealth, precisely so that evidence about the effectiveness of other approaches in Australian conditions will not become available. Unless experimentation can be suppressed, the activists cannot isolate their theory from confrontation with contrary evidence.<sup>30</sup>

The Family Law Act 1975 is an example of a law that has been insulated from feedback in this way. Seldom has an Australian law been as consistently controversial as Lionel Murphy's federal legislation in this vital field.<sup>31</sup> A good case can be made for uniform divorce laws rather than the separate state laws that existed before 1959,<sup>32</sup> but Senator Murphy's brand of uniformity has exacted a cost that

many Australians still regard as too heavy. If evidence produced by alternative contemporary approaches had existed some useful adjustments might have been made.<sup>33</sup>

Not only may suppressing the possibility of experiment be too high a price to pay for uniformity, but the uniformity itself may be an illusion. The federal Evidence Act 1995, intended to be re-enacted by all the states, was promoted with the claim that uniform legislation was needed to put an end to the ‘differences in the laws of evidence capable of affecting the outcome of litigation according to the State or Territory which is the venue of the trial’.<sup>34</sup> The Act certainly does away with some legal differences, but in most cases it does so by granting the trial judge a discretion whether to admit the evidence or not. The exercise of these discretion has generated innumerable disputes. Indeed Justice Callinan reports that since his appointment to the High Court the Act has given rise to more appeals than any other statute.<sup>35</sup> Few litigants can afford to seek special leave to appeal to the High Court, and even fewer actually obtain it, so one result of the legislation is a substantial extension of the powers of individual trial judges in matters of admissibility. Thus, instead of eight different state or territory laws capable of affecting the outcome of a case, we now have in effect as many different evidence ‘laws’ as there are trial judges. This has increased delays and uncertainties in litigation, besides making out-of-court settlement more difficult to achieve, because no-one can confidently predict what evidence will be admitted and what will not. Besides adding to the uncertainty of the law and the cost of litigation, this also represents a major transfer of discretionary power from the private sphere to the public sector, in this case the judicial arm of government. Since to date only New South Wales has adopted the Act, it remains open to the other states to experiment with reformed evidence laws (uniform or not) that do not suffer from those defects.

Again, centralists tend to assume that uniformity and centralisation of the law bring greater legal and commercial certainty.<sup>36</sup> But uniformity and certainty are quite unrelated. That is clear from experience with the Evidence Act and the Family Law Act, not to mention the federal tax laws, all of which are uniform but at the same time severely lack certainty or predictability. In this light the recent decision of South Australia and Western Australia to capitulate, under intense political and media pressure, to the Commonwealth's campaign for the states to refer their legislative powers over corporations to Canberra takes on a more ambivalent aspect. Theoretically at least, if the two states had kept their powers they could have followed the example of Delaware and developed a more simplified approach to corporate law. Delaware is a popular jurisdiction for incorporation, not because

its laws are permissive or lax, but because the approach of its courts and legislature is to rely on the development of standards and principles of business conduct rather than detailed regulation by minute and pervasive prescription. In Australia such an approach could have been an efficient alternative to the ever-changing and bureaucratic national system. So the surrender by South and Western Australia may have been rather less of a triumph for efficiency and more of a missed opportunity. The five-year sunset clause in the referral legislation provides an opportunity to consider all the options for corporate law rather than simply taking for granted the superiority of bureaucratic centralism.<sup>37</sup>

Neither uniformity nor diversity is an absolute value in itself. Sometimes the gains from nationwide uniformity will outweigh the benefits of independent experimentation. This will usually be the case in areas where there is long experience to draw on, such as defence arrangements, the official language, railway gauges, currency, bills of exchange, weights and measures and sale of goods. But experimentation has special advantages in dealing with the new problems presented in a rapidly changing society, or in developing new solutions when the old ones are no longer working. Celebrations of conformism should be balanced by a greater appreciation of diversity's dynamic potential.

### **3. Accommodating Regional Preferences and Diversity**

*Unity in diversity.* The decentralisation of power under a federal constitution gives a nation the flexibility to accommodate variations in economic bases, social tastes and attitudes. These characteristics correlate significantly with geography, and state laws in a federation can be adapted to local conditions in a way that is difficult to achieve through a national government. By these means overall satisfaction can be maximized<sup>38</sup> and the winner-take-all problem inherent in raw democracy alleviated. Professor McConnell illustrates the point with this example:

[A]ssume that there are only two states, with equal populations of 100 each. Assume further that 70 percent of State A, and only 40 percent of State B, wish to outlaw smoking in public buildings. The others are opposed. If the decision is made on a national basis by a majority rule, 110 people will be pleased, and 90 displeased. If a separate decision is made by majorities in each state, 130 will be pleased, and only 70 displeased. The level of satisfaction will be still greater if

some smokers in State A decide to move to State B, and some anti-smokers in State B decide to move to State A.<sup>39</sup>

Government overall thus becomes more in harmony with the people's wishes, as Professor Sharman explains: '[F]ederalism enhances the range of governmental solutions to any given problem and consequently makes the system as a whole more responsive to the preferences of groups and individuals'.<sup>40</sup> That is one of the reasons for what Professor Buchanan calls the greater 'political efficiency' of federations as compared with unitary systems.<sup>41</sup>

Paradoxically, perhaps, a structure that provides an outlet for minority views strengthens overall national unity. 'In contrast with what conventional wisdom would have us believe', writes Jean-Luc Migué of the University of Quebec, 'the unity of a federation does not require a strong central government. Quite the opposite. Centralisation is everywhere the enemy of harmony inside national communities'.<sup>42</sup> Without the guarantee of regional self-government, Western Australia, at least, would not have joined the Commonwealth. The state has a long-standing secession movement that has revived in recent years. If that guarantee were by some means abolished, the West might secede, perhaps taking one or two other states with it. Wayne Goss, when premier of Queensland, was making essentially that point when he warned that abolishing the states, even de facto, could fracture the unity of the nation.<sup>43</sup> Federalism thus has an important role, as Lord Bryce observed, in keeping the peace and preventing national fragmentation.<sup>44</sup> It is far from impossible that if the British had adopted a federal structure, as many reformers in the last century urged,<sup>45</sup> the Irish might have preferred to stay in the United Kingdom (or the 'Federal Kingdom' as it might then have been) and a century of strife might have been avoided.

*Cultural differences in Australia.* Though the fact is often overlooked in Canberra and Sydney, there are attitudinal and cultural differences, sometimes quite marked, between the Australian states. Differences in ethnic composition and demographic profiles also seem to be widening. 'It should be recognised', writes former Chief Justice Green of Tasmania, 'that although relatively speaking the Australian population as a whole is fairly homogeneous, each State and Territory has different laws, values, history, economic profiles, electoral and parliamentary systems and court systems'.<sup>46</sup> Victoria's Federal-State Relations Committee likewise concluded that 'Australia is a country of significant regional diversity'.<sup>47</sup>

A central government in a country as vast as Australia can never hope to accommodate those differences as efficiently as a state or territory government can. A classic illustration is the well-documented case of Darwin Hospital, which was designed by Canberra bureaucrats for snow—not because they thought it might snow in the tropics, but because they simply rebuilt a Canberra suburban hospital in Darwin on the false assumption that climatic and cultural differences could be fully offset by the air-conditioning system.<sup>48</sup>

Some commentators see sociocultural diversity as the only possible explanation and justification of federalism. This leads to the assertion that the regional differentiation of social characteristics in Australia is not sufficiently marked to warrant a federal structure. The borders between the states are purely arbitrary, it is argued, so the states lack a genuine social basis.<sup>49</sup> Those propositions are unfounded, for reasons succinctly expressed by Professor Sharman:

To begin with, a sense of political community can exist quite independently of social differences between communities. Geographical contiguity, social interaction and a sharing of common problems all tend to create a feeling of community, whether it is a street, a neighbourhood or a state. The chestnut about the arbitrary nature of state boundaries is not only wrong as a geographical observation for many state borders—deserts, Bass Strait and the Murray River are hardly arbitrary lines—but fundamentally misconceives the nature and consequences of boundaries. Drawing political borders on a featureless plain is an arbitrary act, but once drawn, those lines rapidly acquire social reality.<sup>50</sup>

To Sharman's list of the natural boundaries between the states one could add the Queensland border ranges, which mark the real beginning of the eastern tropical and sub-tropical zones, and the factor of sheer distance between the urban settled areas, a feature perhaps more marked in Australia than in any other country. Despite the wonders of modern communication, if people are really to understand and empathise with one another they still need to meet and talk face to face. So it could never be said here, as Lord Bryce did of America, that 'The states are not areas set off by nature', with only California having genuine natural frontiers, the Pacific and the Sierra Nevada.<sup>51</sup> Yet in America the states have undoubtedly become real political communities in the way described by Sharman, including the arbitrarily-drawn 'quadrilateral' states west of the Mississippi.

*Less can be better.* The argument that Australia is too homogeneous to be a federation also runs into the problem that federalism plainly works best when sociocultural differences are not *too* great or too territorially delineated. Multi-ethnic federations are among the hardest to sustain.<sup>52</sup> The United States has had no serious secessionist movement since 1865 because, although it is a land of unbelievable diversity, the areas occupied by competing minorities do not correspond closely with political boundaries. For example there is no state, or group of states, that is overwhelmingly black, or American Indian, or Jewish, or Catholic or Asian. This is less true of language, ethnic and religious differences in Switzerland,<sup>53</sup> but the Swiss constitution has the added safeguard that its citizen-initiated referendum system makes it virtually impossible for politicians to engage in fear-based manipulation of regional or other differences.

Contrast Canada, where most of the French-speaking population is concentrated in Quebec, which in turn is overwhelmingly francophone. The results are obvious. Similar tensions caused Singapore, which is almost entirely Chinese, to secede from the Malaysian federation.

In that light, Australia's relative sociocultural homogeneity is an argument for, not against, a federal structure.

*Isolating discord.* Federalism's tolerance for diversity has the further advantage of preventing the national government from being forced to take sides on matters of purely regional concern. This is consistent with the axiom of modern management science that problems should so far as possible be dealt with where they arise. As Lord Bryce put it, '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 contest of national magnitude'.<sup>54</sup> For example, the Northern Territory's voluntary euthanasia legislation became a national political issue because, as a territory enactment, it could be overridden by a Commonwealth Act.<sup>55</sup> Had the issue arisen in a state, there might still have been a nationwide debate but the federal government would not have been directly involved.

*Subsidiarity.* In Europe the accommodation of national differences underlies the concept of 'subsidiarity', enshrined as a fundamental guiding principle in the European Union treaties.<sup>56</sup> Article 3b (2) of the EC treaty defines subsidiarity as meaning that the Community shall take action 'if and

only in so far as the objectives of the proposed action cannot be sufficiently achieved by the Member States and can therefore, by reason of the scale or effect of the proposed action, be better achieved by the Community'. Obviously much will depend on how this piece of Eurospeak is applied in practice, but the principle's adoption is credited with saving the 1991 Maastricht agreement.<sup>57</sup> Public misgivings over the centralist ambitions of the French president of the Commission at the time, Jacques Delors, might otherwise have blocked any further moves towards European integration. Australia's premiers in 1997 adopted subsidiarity as a guiding principle for a review of Commonwealth-state responsibilities.<sup>58</sup>

#### **4. Participation in Government and the Countering of Elitism**

A federation is inherently more democratic than a unitary system because there are more levels of government for public opinion to affect.<sup>59</sup> The great historian Lord Acton went further, saying that in any country of significant size, popular government could only be preserved through a federal structure. Otherwise the result would be elite rule by a single city:

For true republicanism is the principle of self-government in the whole and in all the parts. In an extensive country, it can prevail only by the union of several independent communities in a single confederacy, as in Greece,<sup>60</sup> in Switzerland, in the Netherlands, and in America, so that a large republic not founded on the federal principle must result in the government of a single city, like Rome and Paris;. . . or, in other words, a great democracy must either sacrifice self-government to unity, or preserve it by federalism.<sup>61</sup>

De Tocqueville was making the same point more broadly when he wrote that democracy works best when it proceeds from the bottom up, not from the top down, with the central state growing out of a myriad of associations and local governments<sup>62</sup> Decentralised government makes people more like active participants than passive recipients; it produces men and women who are citizens rather than subjects and gives government a greater degree of legitimacy.

*The fall and rise of political elitism.* This more deeply democratic aspect of federalism is especially important at a time when elitist theories of government, albeit clothed in democratic rhetoric, are once again in vogue. The struggle between the idea of government by the people and government by an

elite is as old as the Western political tradition itself. In fact political philosophy was founded on that controversy: Plato's *The Republic* was largely his criticism of democracy in the form in which it was practised at Athens. In its latest manifestation the conflict between elitism and democracy explains modern politics more satisfactorily than the traditional division between left and right.<sup>63</sup>

Elitism has been dominant throughout most of history. The democracy that exists today in countries influenced by the Western tradition is only two centuries old, a legacy of the French and American revolutions. When united with the English traditions of liberty and the rule of law, democracy has produced not only an unprecedented measure of individual freedom but also a huge and unsurpassed increase in the material well-being of the masses.

Despite democracy's success, elitism has never conceded defeat. Throughout the 19th century, critics assailed the belief that the common man could govern as being contrary to experience and an absurdity. One after another, new theories were advanced to justify rule by a select few, on technocratic grounds, on the basis of some romantic 'superman' mystique, or by reason of a supposed historical inevitability. In the 20th century those theories brought forth the twin poisoned fruit of communism and Hitlerian national socialism.

The defeat of those two monstrosities through the heroism of ordinary men and women has not brought democracy final victory. For the 1960s saw the sprouting of a new hybrid of the old Platonic plant that has now grown to a position of dominance. This is a model of government that lies somewhere between the traditional poles of democracy and elitism, a model in which the power of an enlightened minority would help democracy to survive and progress. The several variations of this model have come to be known as the 'theories of democratic elitism'. The late Christopher Lasch deplored this 'paltry view of democracy that has come to prevail in our time' as reduced to nothing more than a system for recruiting leaders, replacing the Jeffersonian ideal community of self-reliant, self-governing citizens with a mechanism for merely ensuring the circulation of elites.<sup>64</sup>

The new wave of elitism has gained momentum from the trend towards globalisation. The growth of global consciousness is no doubt a good thing, but the other side of the coin is that it has opened the way for undemocratic bodies such as the United Nations and its agencies to implement an elitist agenda under the pretext of promulgating 'international norms'.<sup>65</sup> International relations circles have acknowledged this problem and labelled it 'democratic deficit',<sup>66</sup> but no steps other than cosmetic measures have been taken to overcome it.

*Free speech for all, or the few?* The new elitism and the characteristics of the groups it has brought to power have been explored by Lasch, Thomas Sowell, Jeffrey Bell, Robert Nisbet and others,<sup>67</sup> so there is no need to detail them here. One striking example of how these theories have worked in Australia should be noted, however, if only to show their ominous consequences. From the 1970s onwards, elitist politicians have repeatedly attempted to install an elitist version of the doctrine of free speech, under which the government would decide which political issues would be admitted to the public forum and by whom they would be debated. In August-September 1975 the Whitlam federal government proposed a scheme whereby newspapers would be granted (or deprived of) a licence to publish by a special government body on the basis of whether or not they were meeting the needs of the 'community'.<sup>68</sup> The wave of public fear generated by this blatant attempt at political censorship was a factor in the 1975 constitutional crisis, though it is never mentioned in media accounts of those events.

The next attempt was the Political Broadcasts and Political Disclosures Act 1991 (Cth.), promoted by Senator Nick Bolkus, which prohibited all political advertising (paid or unpaid) on radio or television in the period leading up to an election. Blocks of free air time were to be allocated to approved parties by a government-appointed tribunal. The Act was overturned by the High Court,<sup>69</sup> but there are ominous signs that forces opposed to press freedom are still on the offensive. In April 2000 a Senate committee recommended the establishment of a government-appointed panel to enforce media 'codes of conduct' with powers to impose sanctions for breach of code rules, many of which have significant political content. As the panel would duplicate the existing Australian Press Council, but with the addition of coercive powers, the proposal is explicable only as a first step towards government control of the news media.<sup>70</sup> Again, Senator Bolkus has advanced a new proposal based, not on direct prohibition as in 1991, but on a de facto takeover of political debate by Commonwealth-funded elite bodies. '[T]alk is cheap,' he writes. 'Real freedom of speech is about resourcing durable institutions within society that can present alternative views, critique government policy, and review government decisions'.<sup>71</sup>

No doubt if given the opportunity Senator Bolkus will seek to put his revised vision into effect. If he succeeds, his view of public political debate as 'cheap', ill-informed and unenlightened, could be self-realising. It was Christopher Lasch, following the philosopher William James, who observed that our

search for reliable information is itself guided by the questions that arise during argument about a given course of action. It is only through the test of debate that we come to understand what we know and what we still need to learn.<sup>72</sup> Exclude the people from political debate and you deny them the incentive to become well informed.

With democracy's victory obviously only half complete, we must continue to defend all available supports for popular government. As elites will resist any new outlets for public opinion,<sup>73</sup> it is all the more important to protect the inherently more open and democratic political texture afforded by our federal system.

*Creative controversy.* So long as people are free, they will disagree. In that sense conflict is an inescapable part of civilised life. It is only authoritarian governments that see liberal freedom as encouraging social division and seek to abolish conflict by creating a false consensus.<sup>74</sup> As Campbell Sharman points out, federalism's more open texture will produce more overt political conflict, 'but it does this only as a reflection of the increased opportunity for individual and group access to the governmental process—such conflict is clearly highly desirable'. Federalism, he explains, 'simply makes visible and public differences which would occur under any system of government. It is nonsense to think that problems would disappear if Australia became a unitary state and there would be few who would argue that the politics of bureaucratic intrigue is preferable to the open cut and thrust of competitive partisan politics in the variety of forums provided by a federal structure'.<sup>75</sup>

The interrelation of government bodies, then, is as much of a problem in unitary states as in federations. Gordon Tullock observes that relations between Arizona and New Mexico are much less unfriendly than those between the federal State Department and the CIA.<sup>76</sup>

*The 'voice' factor.* Democratic participation in a federation is also enhanced by what is called the factor of 'voice'. The basic logic of this idea is that the size of the political unit, as measured by the number of members, is a relevant variable in upholding the individual's political sovereignty, quite apart from the opportunity for exit.<sup>77</sup> If for any reason people are unwilling or unable to exercise their right of exit, they may be able to exercise 'voice', which is defined as activity that participates in determining political choices. Voice is more effective in small than in large political units—one vote is more likely to be decisive in an electorate of 100 than in an electorate of 1000 or 1 million. It is also easier for one

person or small group to organise an influential coalition in a localised community than in a large and complex polity.<sup>78</sup>

The fact that the influence of an individual varies inversely with the size of the group thus lends independent support to federal structures. This enhanced democratic participation remains a benefit even if the process produces identical outcomes in more than one state.<sup>79</sup> Overriding it is justified only when there is a national imperative that must take priority over the interests of people in individual states.<sup>80</sup>

On the basis of democratic values alone, therefore, we should not allow the elitists to talk us out of federalism. Its greater opportunities for popular participation are a major political end in themselves and one of the main reasons for its superior political efficiency. They foster a sense of responsibility and self-reliance and are a seed-bed of what is now called 'social capital'.<sup>81</sup> They lead to better-informed public debate. And, as Lord Acton said, they 'provide against the servility which flourishes under the shadow of a single authority'.<sup>82</sup>

## 5. The Federal Division of Powers Protects Liberty

*Barrier of our liberty.* We saw above how a federal structure protects citizens from oppression or exploitation on the part of state governments by allowing them the right of exit, to vote with their feet by moving to another state. But the diffusion of law-making power under federalism is also a shield against an arbitrary central government. When Thomas Jefferson declared that 'the true barriers of our liberty in this country are our State governments',<sup>83</sup> he meant that the constitution's 'vertical' separation of legislative powers between Congress and the states performed a function similar to the 'horizontal' separation of powers between legislative, executive and judicial arms of government. Lord Bryce likewise affirmed that 'federalism prevents the rise of a despotic central government, absorbing other powers, and menacing the private liberties of the citizen'.<sup>84</sup>

The imperfections of human nature meant that no-one could be trusted with total power; in Lord Acton's words, all power corrupts, but absolute power corrupts absolutely. Power therefore had to be dispersed. Good government, as Montesquieu had observed, also required that people should be unafraid, and concentrations of power give rise to apprehensions that they will be used tyrannically.

By dividing sovereignty, the federal division of powers reduces both the risk of authoritarianism and the apprehension of it.

‘Liberty provokes diversity,’ Acton remarked, ‘and diversity preserves liberty by supplying the means of organisation’.<sup>85</sup> The states therefore also help to preserve freedom because they can rally citizens to the cause of freedom, helping to overcome the organisational problems that otherwise might cause national usurpations to go unchallenged by the ‘silent majority’ of citizens.<sup>86</sup> The states help to preserve judicial independence and impartiality as well. The existence of independent state court structures prevents a national government from filling all the courts in the land with judges believed to be its supporters. Even the late Geoffrey Sawer, an eminent constitutional lawyer but definitely no federalist, had to concede the value of a federal structure as a safeguard of liberty.<sup>87</sup>

That this aspect of the federal compact has not attracted much attention or comment in Australia is probably a function of history. Newcomers from Europe have often remarked that Australians are too complacent about their freedom because they have never had to fight for it. That is not quite true, at least as regards external threats; from 1941 to 1945 Australians were defending their liberty in the most direct way possible. But the perception is generally correct in relation to internal threats. After the Australian colonies in the 1850s ‘erected what were for the time advanced democratic political institutions,’<sup>88</sup> democratic progress followed a course that was smoother than anywhere else in the world. There was no turbulent formative period comparable to the American revolutionary era, which seems permanently to have sensitised Americans to infringements of their freedom. Australians received no inoculation of that kind. That they should have come to take their freedom for granted was to some extent understandable.

*Recent assaults.* But a succession of federal government attacks on civil and political rights over recent decades make such nonchalance now quite unjustified. First there have been the already noted attempts to restrict political debate in the media. Then Malcolm Fraser’s retrospective tax legislation, which broke the constitutional convention against ex post facto law-making and led in due course to the widely-criticised practice of ‘legislation by ministerial fiat’.<sup>89</sup> Proliferating quasi-judicial tribunals took politically sensitive areas of law away from the ordinary courts, thereby depriving accused persons of due process and subjecting them to rulings by tribunals whose members may have been appointed precisely because they were known not to be impartial.<sup>90</sup>

One of the most dramatic challenges to liberty was the Australia Card Bill 1985, which would have required citizens to carry a government number recorded on an identity card. Among its many other consequences, this legislation would have reversed the constitutional presumption that it is for the government to justify its actions to the people, not the other way around.<sup>91</sup> Further, the whole concept of responsible government, under which the executive government is responsible to parliament, has to an extent been made a legal fiction by modern party discipline. It sustained further damage in 1993 when Paul Keating announced that ministers, including the prime minister, would no longer be available to answer questions in the House but would attend on a roster basis. This move stemmed from Mr Keating's earlier-expressed view that question time 'is a courtesy extended to the House by the Executive branch of government' and did not reflect any right that parliament might have to demand an account from the political executive.<sup>92</sup> The executive had thus formalised a partial overthrow of the constitutional order.

Then we have seen the manipulation of the media through the government-funded National Media Liaison Service and the use of threats and intimidation against individual journalists.<sup>93</sup> The Kirribilli Agreement, in some ways Australian democracy's lowest point, showed that government leaders could with impunity conspire to deceive the voters about the fundamental matter of who was to lead the government after the election.<sup>94</sup> Finally, there is evidence of systematic ballot-rigging on a scale sufficient to have altered the outcome of at least one relatively recent federal election.<sup>95</sup> This has mainly taken the form of wholesale falsification of the electoral roll, a simple matter once all identity checks on applicants for enrolment were abolished by the 1983 amendments to the electoral laws. The Joint Standing Committee on Electoral matters, on the basis of such evidence, recommended some obvious changes to the electoral laws such as requiring proof of identity for enrolment and proof of citizenship for persons claiming to be naturalised, but the government Bill embodying those reforms was blocked by the Opposition in the Senate for two years and eventually passed only in weakened form. Its proclamation is still held up.<sup>96</sup>

Especially arresting is the fact that all these attacks on liberty have occurred, not during a war or similar calamity that might have excused or explained some of them, but in a period of peace and general prosperity. A country with a recent record like that has no reason to assume that its freedom and democratic rights are secure. It has much to fear from any further concentration of government power.

Recent experience shows, therefore, that contemporary Australia needs the federal division of power, not just in the crippled form left by successive pro-centralist decisions of the High Court but in something like its intended sharpness, as a check on the arrogance of central power. Federal politicians have shown themselves no more immune to human failings than their state counterparts, but potentially more dangerous because of their monopoly powers in key areas, the support of a huge, pro-centralist bureaucracy and the fiscal stranglehold that the High Court has bestowed on them.

Even in its present battered condition, though, Australian federalism has proved its worth as a safeguard of liberty. For example, premiers and other state political leaders helped lead the struggle against the 1991 political broadcasts ban. The New South Wales government was a plaintiff in the successful High Court challenge to the legislation, the greatest advance in Australian political liberty since Federation.

*An end in itself.* In a properly working federation, a national government seeking to implement a uniform policy in an area where it has no constitutional power must learn to proceed by negotiating and seeking consensus, not by diktat, bribery or menaces.<sup>97</sup> It must learn to evaluate the costs as well as the benefits, to consider the evidence against its theories as well as in favour.<sup>98</sup> Government by consensus can not only be more efficient, it can also be an end in itself, as Professor Sharman explains:

[I]t should be noted that national governments have a strong preference for imposed solutions rather than negotiated ones. While it may be frustrating for a national government to acquire the consent of six other governments for some uniform scheme of legislation, this says nothing about either the desirability of the finished product or about the virtues of compromise and accommodation as inherently desirable characteristics of the governmental process.<sup>99</sup>

As George Washington put it in 1785, 'Democratical states must always feel before they can see; it is this that makes their governments slow, but the people will be right at the last'. The relative slowness of the process of consensus-seeking, especially a federation, is a source of the great stability of federal systems (as to which more later) and of their exceptional political efficiency.

## **6. Better Supervision of Government.**

Decentralised governments make better decisions than centralised ones, for reasons additional to the spur of competition provided by the citizen's right of choice and exit.<sup>100</sup> There are two main reasons for this.

*Lower monitoring costs.* Lord Bryce found that 'the growth of order and civilisation' in the United States had been aided by the fact that state governments were more closely watched by the people than Congress could have been.<sup>101</sup> For the same reason, 'It deserves to be noticed', he continued, 'that, in granting self-government to all those of her colonies whose population is of English race, England has practically adopted the same plan as the United States'.<sup>102</sup> Leaving aside the Victorian view of the 'English race', the point is a good one, as the rationale behind power devolution to the then British colonies is often overlooked. It contrasts with the French pattern of colonial self-government, which was to permit the colonies to elect members of the National Assembly in Paris, while administering the colonies simply as overseas departments of France.

The closer supervision of state governments is a function of lower monitoring costs. There are fewer programmes and employees, and the amounts of tax revenue involved are smaller. Citizens can exercise more effective control over government officials when everything is on a smaller scale.<sup>103</sup> Unlike the Commonwealth, the states cannot create money, and this further limits the scope for abuse of power.

Large governments encourage wasteful lobbying by interest groups engaged in what economists call 'rent-seeking', the pursuit of special group benefits or privileges. Rent-seeking is easier in large than in small governments because it is harder for ordinary citizens to see who is preying on them. The lower information costs at the lower echelons make it easier to spot the deals made with interest groups at the state government level.<sup>104</sup> Further, the more liable to abuse the powers involved, the more important it is that they should be decentralised, according to Professor Guido Calabresi:

[I]t often makes sense to lodge dangerous and intrusive police powers over crime and over controversial social issues in the states where government officials may be monitored more easily by the citizenry.<sup>105</sup>

The general observation about the freer flow and readier absorption of information about state government is borne out by the Australian scene. Most of the content of the major Australian newspapers relates to state and local matters. The national dailies have much smaller circulations than

their state-based rivals and successive attempts by the Australian Broadcasting Corporation to adopt a national format for its news and current affairs programmes have had disappointing results.

In that case, then, how to account for the financial disasters of the Victorian, South Australian and Western Australian governments in the late 1980s? Here, it seems, the supervisory mechanism failed as a result of media behaviour. Information about the looming disasters existed but, largely because of the political leanings of reporters, editors and producers, it was not passed on to the electors. Paul Keating as treasurer attacked the *Melbourne Age* for having covered up the Victorian government's evolving financial debacles,<sup>106</sup> and others have made similar charges about the media in the three affected states. But the same kind of thing was also happening in Canberra. The difference was that the federal government was not content to rely on political predispositions but resorted to threats and reprisals against media organisations and individual journalists.<sup>107</sup>

*Coping with size.* The greater ease of supervising state government is a function of the broader proposition that a physically large country without a federal system is ungovernable. Jefferson was emphatic that the United States, which in his day was a fraction of its present size, was 'too large to have all its affairs directed by a single government'.<sup>108</sup> In our own time even a centralist like Geoffrey Sawyer had to admit that in Australia, geographic factors make a good deal of devolution of powers inevitable.<sup>109</sup>

Professor Cheryl Saunders of the Centre for Comparative Constitutional Studies at the University of Melbourne declares that 'I cannot conceive this country being governed solely from Canberra. Down in this corner of the continent we tend to think sometimes we could. But if you are in the west or Queensland or Tasmania it is inconceivable. Governments exist for people. If the people of Australia want to have their government a little closer to them than Canberra it is incumbent on us to have a system of government that makes that work'.<sup>110</sup>

Lord Bryce thought this factor of special importance in a young country: 'It permits an expansion whose extent, and whose rate and manner of progress, cannot be foreseen to proceed with more variety of methods, more adaptation of laws and administration to the circumstances of each part of the territory, and altogether in a more natural and spontaneous way, than can be expected under a centralized government' and the spirit of self-reliance among those who build up new communities is stimulated and respected.<sup>111</sup> Federalism also relieved the national legislature of 'a part of that large

mass of functions that might otherwise prove too heavy for it'. The 'great council of the nation' thus had more time to deliberate on those questions that most closely affected the whole country.<sup>112</sup>

A less obvious result of dividing a large country into states with some commonality of sociocultural attitudes is given by Professor Calabresi. He argues that state governments may be able to enforce criminal laws and regulations of social mores less coercively than the national government because of the lower costs and greater ease of monitoring citizen behaviour in a smaller jurisdiction than in a continent-sized commonwealth. 'The greater congruence of mores between citizens and representatives in state governments may in turn produce greater civic mindedness and community spirit at the state level'.<sup>113</sup> This might offset the decline of public spiritedness at the national level, which in Australia is linked with a palpable public antipathy towards Canberra (most notably in the outlying states) and the Commonwealth Parliament, a sentiment not alleviated by the tone and quality of parliamentary debate over the last 15 years or so.<sup>114</sup>

*The limits of moral capacity.* The need to decentralise sovereignty is also in part a function of the fact that each of us has only a limited moral capacity. It is easier and more natural, Professor Buchanan points out, to feel sympathy for, and care about, others who are members of the same small community than it is to care for members of a large polity:

[A] major factor in the generating the breakdown of the welfare state was the shift of transfer activities to the central government and away from local communities in which political action might well embody a greater sense of interdependence . . . [T]he shift of political activities that must incorporate moral elements to levels of interaction that extend well beyond our moral capacities can only serve to exacerbate the emergence of raw self-seeking by groups of political clients on the one hand and by those who feel unduly exploited on the other.<sup>115</sup>

This is closely related to the human tendency to classify others as 'us' and 'them', or 'neighbours' and 'strangers'. This tendency is encouraged by the need to make political choices that are made for, and coercively imposed upon, all members of the relevant political community. Federal structures allow some congruence of politics with these 'tribal identities', or at least reduce the extent to which those identities in politics must be forcibly overridden. This is especially true where the moral linkages are locational rather than strictly genetic.<sup>116</sup>

## 7. Stability

Stability is a cardinal virtue in government. Stable government enables individuals and groups to plan their activities with some confidence and so makes innovation and lasting progress possible.

Political stability is much valued by ordinary people because they are the ones likely to suffer the most from sudden shocks or changes of direction in the government of the country. A stable polity is in that sense more democratic than an unstable one, other things being equal. This, as Carl Friedrich pointed out, explains the political prudence of the common man, who finds stability the best framework in which to think out matters of great weight in an environment shot through with political propaganda.<sup>117</sup>

Stability is obviously a high priority with the Australian people. This can be seen from their widespread practice of voting for different parties in each of the two houses of parliament, thereby denying the government a free hand in passing whatever legislation it likes. Based on the voters' distrust of the career politician, this practice reduces the destabilising potential of transient majorities in the lower house.

Professor Brian Galligan supports this assessment with his observation that the traditional literature on Australian politics has exaggerated the radical character of the national ethos while at the same time overlooking the stabilising effect of the Constitution.<sup>118</sup>

What is the source of this stability? The federal compact, Professor Galligan continues, deals in an ingenious way with the problem of the multiplicity of competing answers and the lack of obvious solutions by setting government institutions against one another: 'The shape of the nation is as much the product of the interaction and clash of competing ideas and institutions as it is of any intentional order or national consensus. That is particularly and deliberately so for a federal system of government that breaks up national majorities and sets government institutions against one another'.<sup>119</sup> And the people prefer it that way, as their votes in constitutional referendums show.

The result is that while in a federation sweeping reforms are more difficult, they are also less likely to be needed. Successive federal governments have encountered more frustrations in their efforts to restructure the economy than their counterparts in the United Kingdom and New Zealand, but the Australian economy was not in such dire need of restructuring. The nation's federal system had effectively prevented earlier governments from matching the excesses of collectivism attained in pre-

Thatcher Britain or the bureaucratic stupor of ‘Muldoonery’ in New Zealand. Opinion polls in those two countries show that most people consider the reforms made by the Thatcher and Lange governments to have been beneficial, but the process was a stressful and destabilising one.<sup>120</sup> In New Zealand it led to public pressures that resulted in substantial changes, not necessarily for the better, to the whole system of parliamentary representation.

The stability that federalism promotes also has a valuable flow-on effect in the political consciousness of the people, according to Lord Bryce. It strengthens ‘their sense of the value of stability and permanence in political arrangements. It trains them to habits of legality as the law of the Twelve Tables trained the minds of the educated Romans’.<sup>121</sup> In this way federalism tends to become a self-reinforcing system almost with a life of its own.<sup>122</sup>

## 8. Fail-safe Design

Besides acting as a brake on extreme or impetuous action by the national government, federalism cushions the nation as a whole from the full impact of government blunders or other reverses. Lord Bryce likened a federal nation to a ship built with watertight compartments: ‘When a leak is sprung in one compartment, the cargo stowed there may be damaged, but the other compartments remain dry and keep the ship afloat’.<sup>123</sup> Professor Watts uses the more modern fail-safe analogy:

[T]he redundancies within federations provide fail-safe mechanisms and safety valves enabling one subsystem within a federation to respond to needs when another fails to. In this sense, *the very inefficiencies about which there are complaints may be the source of a longer-run basic effectiveness*.<sup>124</sup>

In this way federalism makes it harder for any one group of politicians to ruin the entire economy at once. The mixture of neo-corporatism and public sector expansion on borrowed money that undid Victoria, South Australia and Western Australia in the 1980s was also the fashionable policy in Canberra at the time.<sup>125</sup> It might well have been comprehensively extended to the whole country if the constitutional power to do so had existed. Had that happened, Australia might not have weathered the Asian economic storm as well as it did.

For the same reasons, damage control can bring results more quickly when the impact of an economic mistake or misfortune can be localised in this way. The three states that were devastated in

the 1980s have now recovered from their tribulations. In their reconstruction processes they were able to borrow policies that had proved successful in other states: fiscal policy from Queensland, privatisation and reform of government business enterprises from New South Wales, scaling back the public sector from Tasmania.<sup>126</sup> Repairing the damage done by a policy error in an area where the Commonwealth has a monopoly, such as monetary policy, seems to take longer, however. The unprecedented inflation ignited by treasurer Frank Crean's 1973 and 1974 federal budgets has only recently been brought under control, almost a generation later.<sup>127</sup>

One should therefore not assume that a healthy national economy requires, or will even be assisted by, comprehensive macroeconomic and microeconomic control from the centre. Economists increasingly take the view that the role of national governments is best confined to establishing general rules that set an overall framework for market processes (the economic order)<sup>128</sup> and that centralised fiscal control creates a 'fiscal illusion' by disguising the true cost of public services and making government look smaller than it is.<sup>129</sup> In this way it perpetuates the 'collectivist hand-out culture in public finance'.<sup>130</sup>

The economic commentator Padraic P. McGuinness maintains that it is quite practicable to devolve tax and fiscal policy powers to the states because under a unified currency it is not possible for one state to conduct an inflationary fiscal policy by running budget deficits for very long. There is no good reason, he writes, for Canberra to deny to states the possibility of divergent policies with respect to the overall level of revenue raising and spending. Most of the powers the Commonwealth exercises in relation to economic policy are not only unnecessary but positively counter-productive: 'In fact, the need for central macro-economic policy is largely the product of over-regulation and mistaken micro-economic policies'.<sup>131</sup>

## **9. Competition and Efficiency in Government**

Like all other human institutions, governments if given the chance will tend to behave like monopolists. In Australia it has taken firm constitutional constraints to prevent the federal government from restricting political broadcasts so as to abridge the public's opportunities to compare political policies and personalities.<sup>132</sup> A government that can restrict comparisons and prevent people

from voting with their feet is in the position of a classic single-firm monopolist and can be as inefficient and oppressive as it likes. The paradigm case is the former Soviet Union.

*Government of the people, for the governors.* Inefficiency in government usually takes either or both of two forms. One is a tendency to higher tax rates, which is obvious and easy to detect. The other, less obvious, has been identified and extensively described by the economists who have developed the 'public choice' model of government that has achieved wide acceptance in recent years. This model is based on the proposition that government agents (elected representatives and public servants) act from the same motives of rational self-interest as other people. It predicts that government programmes will be administered so as to minimise the proportion of the programme's budget that is actually received by the intended beneficiaries, with the remainder—the surplus—being used to further the interests of the administrators. Those administering, for example, a programme to pay money to the poor will minimise the revenues directed to the needy and use the surplus to expand the administering bureaucracy, improve staff gradings and pay for overseas conference travel.<sup>133</sup> The politicians in charge will use the surplus to acquire added powers of patronage through opportunities to appoint their supporters to boards, committees and specialist tribunals.

A government that enjoys monopoly power is able to generate such a surplus for discretionary use by officials and politicians.<sup>134</sup> An example is Australia's public university system. In the days when they were administered by the states, the universities, though far from perfect, were efficient bodies with the 'flattened' management profile so admired today. A dean's administrative duties seldom took as much as a day per week and even some vice-chancellors were part-time officials who spent some time on teaching and research. Commonwealth involvement consisted mainly of funding Commonwealth scholarships. These were essentially a voucher system and were available to any student who did better than average in the final school examinations or who successfully completed the first year of a degree course. Failing a year meant loss of the scholarship, but it could be regained if the student's grades later returned to pass level or better. A living allowance was available to those whose parents had limited means. Under the Commonwealth Scholarship scheme fully 70% of students went through their tertiary education paying no fees at all.<sup>135</sup> Recently the economist and education administrator Professor Peter Karmel concluded that a national scholarships scheme of this kind is the best available option for reforming university funding.<sup>136</sup>

The transformation began in 1974 when the Commonwealth assumed financial control over the universities, relying on the conditional grants power in s.96 of the Constitution. Access to the proceeds of the Commonwealth's monopoly over income taxation generated a revenue surplus which, as the public choice model predicts, was increasingly used to expand the bureaucracy, both in government and in the universities themselves. Finally, the Dawkins revolution converted higher education into a total command economy administered from Canberra. Just when the world was abandoning the many-layered, command-and-control management model, the Commonwealth forced the universities to adopt it.

The vastly increased paperwork demands of a vastly expanded Commonwealth department generated multiple new layers of career bureaucracy in the universities—not only vice-chancellors, deputy vice-chancellors, pro-vice-chancellors, directors and coordinators, but also full-time deans, deputy deans and heads of department. At a university with which I am familiar the ratio of teaching academics to administrative staff sank to 0.6 to 1. In other words, there were substantially more full-time bureaucrats than teaching staff, a disturbing fact that several senior academics tried unsuccessfully to bring up for debate.<sup>137</sup> Nearly all students now pay fees, building up large debts through the HECS system. These fees cover 35 to 40 percent of education costs per student, by world standards a high proportion for students attending public institutions.<sup>138</sup> Academic salaries in real relative terms are something over one third of their level in the 1960s<sup>139</sup> even though tenure has been all but abolished. And when the university budget has to be cut, it is the teaching academics, not the administrators, who bear the weight of the retrenchments.

On the other hand, research in Australia and abroad shows that competitive federalism, by creating a competitive market for public goods, provides consumer-taxpayers with their preferred mix of public goods at the lowest tax price.<sup>140</sup> Though the composition of the tax/service bundles may vary, the proportion of revenue that is appropriated for the purposes of the bureaucracy and politicians is less because no government is able to exact a surplus from its citizens.<sup>141</sup> Competition coupled with the right of exit also makes it harder for states systematically to favour particular regions while imposing the costs on other regions.<sup>142</sup> Better schools are a powerful attraction for new businesses and residents. Business has a strong interest in an educated workforce, which raises productivity. Overall, competition gives governments an incentive to improve their performance in all areas, including the law. Judicial appointments are more likely to be made on grounds of merit rather than political

affiliations, because a court system that is seen to be unpredictable or biased is a factor in business decisions on where to establish plants or headquarters.<sup>143</sup>

The efficiency gains from competitive federalism are not significantly reduced by the smaller size of state governments. There are few economies of scale in government except in the areas of foreign relations and defence (and even here the problems of the Collins submarine, the Steyr rifle and the Enfield artillery piece arouse reservations), nor are large organisations necessarily any better at dealing with complex problems than smaller ones.<sup>144</sup> As Gordon Tullock points out, the Cray is the world's most complex computer, but the Cray company is not a particularly large computer company. Further, he continues, many of the functions carried out by national governments are not complex, notably the distribution of health and social welfare payments, which is the largest single portion of their work. The actual provision of health services, for example, is quite complex, but that is performed by smaller organisations such as hospitals or medical practices. The part of the operation that is centralised is the simplest portion.<sup>145</sup>

Even in highly centralised governments, a great many decisions must be made at a low level.<sup>146</sup> All Commonwealth departments of any size maintain offices in the state capitals where most of the core work is done, and which enjoy varying degrees of semi-autonomy.

Competitive federalism will assume greater importance as the structural changes wrought by the new technologies continue to work themselves out. In recent years most of the net addition to employment has come from self-employment and small businesses, and the trend is likely to accelerate as the effects of the information revolution spread through the economy. Small entrepreneurs need simpler and less intrusive government, union structures and taxes, and will pressure governments to provide them. As the New Economy is uniquely mobile, governments that fail to adapt will lose business.<sup>147</sup> Australian governments may try to reinforce their regulatory cartel so as to restrict entrepreneur choice, but the size of this mobile sector will make successful collusion more difficult. The more a governmental cartel burdens this sector, the more tempting it will become for an individual government to attract it by breaking ranks. Queensland adopted this strategy in 1977 when it became the first state to abolish death duties, thereby inducing many affluent middle-aged people to move north. International competition will augment this pressure, as globalisation has brought some features of federalism into being at the worldwide level.<sup>148</sup>

Conversely, it has been argued that the weakness of local government in Australia stems from the lack of effective competition at that level.<sup>149</sup> Poor performance by councils results in their removal by the state government, so that the effects of bad electoral choices are not directly brought home to the voters. Local rate levels are capped by statute. In New South Wales at least, the system of appeals to the Land and Environmental Court from local planning decisions encourages councils to let the time for decision go by without decision so that the court will bear the responsibility for the decision. On occasion local councils apparently make the easy decision, knowing that the court will probably reverse it and bear the opprobrium for a hard choice.<sup>150</sup> All these factors weaken the impact of bad local decision making on voter-residents, thus reducing their incentive to take an active part in supervising local government bodies.

*The duplication issue.* An issue that often arises in discussions of efficiency in a federal system is the question of duplication. This can be vertical (that is, overlap between federal and state government activities) or horizontal (duplication as among the states themselves). As to the vertical type, the fact that there is a Commonwealth department of health and a state department of the same name does not necessarily mean they are duplicating one another, any more than the state office of the Commonwealth department of social security is necessarily duplicating the work of its own head office in Canberra. They may be dealing with different aspects of the problem. The federal department of health may be wholly or partly unnecessary in the sense that it is performing a task that would be better left to the forces of competition, but it is not necessarily duplicating a state function.

To the extent that there is actual duplication, it seems to stem in the main from the Commonwealth's entry into areas in which it has no legislative power, such as education, as a result of pressure from special interest groups such as the teacher unions. The constitutional vehicle for this has been the making of Commonwealth grants which, under the High Court's extremely wide interpretation of s.96, are subject to extensive conditions amounting to detailed, day-to-day regulation. The remedy lies in a more balanced reading of s.96, which as its wording makes clear, was intended as a largely transitional measure of relatively minor importance. In the educational sphere a proper interpretation of s.96 would allow the Commonwealth to play a useful role in, for example, interstate coordination, educational research and the development of comparable standards, at much lower cost than the authoritarian and counterproductive interference seen in recent years.

A common criticism based on vertical duplication is that with two sets of politicians, state and Commonwealth, Australia is over-governed and that it would be more efficient to dispense with the lower tier.

Australia has 576 state parliamentarians.<sup>151</sup> That is not a huge number when compared with the 378,700 people employed in government (not counting those engaged in education, health care or social welfare, or working for government corporations) or with the nation's 878,800 managers and administrators. But it is unrealistic to suppose that abolishing the states would lead to a net saving of those 576 positions plus their support staffs.

Centralists always suggest replacing the six states with 'regions', between 20 and 37 in number.<sup>152</sup> That structure would require the appointment of regional governors, prefects, sub-prefects, *Gauleiter* or what have you, together with support staff. France's regions are administered by an elite *corps préfectoral*, a highly-paid class who live like diplomats in their own country, with official residences, servants and entertainment budgets. Sooner or later, as in France, our national government would be forced by public dissatisfaction to create elected regional assemblies, between 20 and 37 in number. By then any savings would long since have evaporated. As matters stand the 32.7% of GDP that Australia allocates to general government expenditure is lower than unitary New Zealand's 39.6%, the United Kingdom's 40.1% (before devolution) or France's 52.4%.<sup>153</sup> Australia's figure is closer to the United States' 30.5%. Six sets of state parliamentarians thus seems quite an efficient arrangement.

A variant of the vertical duplication argument is the simple assertion that Australia's population is just too small to support six state governments. Some comparisons may be helpful here. In 1788 the population of the 13 American states was 3 million, significantly less than Australia's population in 1901. By 1832 it had risen to 15 million<sup>154</sup> but probably did not match Australia's current population of 19 million until about 1845. Switzerland, that land of supreme efficiency, has 5.5 million people for its 26 cantons. It is a more decentralised federation than Australia, with even some defence functions being performed by the cantons.

Horizontal duplication may to some extent be unavoidable because of the sheer size of the country. That aside, however, Professor Wolfgang Kasper of The Centre for Independent Studies answers the point:

All competition requires a degree of duplication, but the reward is that the deadweight loss and the monopoly rents of the 'government cartel' disappear. New, productive ideas about public

administration are generated. The [duplication] argument is no different from any defence of monopoly and cartels. Nor is it intellectually more respectable because administrators and not businessmen are involved in rigging the market. . . . [D]uplication within rival State and local governments will serve the constructive purpose of enhancing the contribution of government to economic growth and citizen welfare.<sup>155</sup>

In the days of the old Telecom monopoly, the opponents of competition argued that if its monopoly were removed, call charges would rise and service would decline because of the costs of duplication. The opposite has happened, and from the consumer's standpoint the Telstra of today is scarcely recognisable as the same corporation as the surly monster of old.<sup>156</sup>

The 1994 Australian Federalism Conference concluded that considerations of economic efficiency provide no basis for any change in Australia's constitutional structure in the direction of further centralisation. The nation already has a cost-efficient system of government, the Conference concluded, which could be improved still further by the return to the states of powers that have been taken over by the Commonwealth.<sup>157</sup> Similarly, the Federal-State Relations Committee found that competitive federalism was being severely hampered by central dominance in major programme areas. Nor could there be vertical competition in major programme service provision so long as the Commonwealth determined the extent, and the conditions governing, the states' expenditure.<sup>158</sup>

## 10. A Competitive Edge for the Nation

Often overlooked even by advocates of federalism is the value of competition among the states as a means of enhancing the international competitiveness of the nation as a whole. In other contexts this principle is quite a familiar one. It is, for example, the basis on which international sporting teams are selected. Out of the deliberately-encouraged rivalry between local, regional and state teams emerges the squad that will represent Australia in the Olympics or other international event. No other means of identifying the best possible national team has ever been seriously suggested. Competitive federalism harnesses this principle, which Australia has used with unequalled success in the sporting field, to the goal of earning a better standard of living for all.

That this principle applies to the economic sphere can plainly be seen from the case of China, which emerged as a world economic power only after it became a de facto federation by devolving

wide economic policy-making powers to the provinces. It was not only the centralism of the earlier communist decades that handicapped China, but also the unitary system that prevailed under the emperors. While for the past 1500 years no unified system of control has ever been imposed across western Europe as a whole, China's imperial rulers were able to ban some technological advance or form of commerce and the ban would be obeyed. The bans imposed during the Ming dynasty (1368-1644) on all coastal maritime trade and on private external commerce, following earlier partial restrictions under the Sung and Chin dynasties, thus had dire effects on China's economy.

Europe's regimes tried to do such things, but decentralised rule made such attempts self-defeating, as the *The Economist* pointed out in a survey of economic progress over the past millennium:

Florence issued an edict in 1299 forbidding bankers to use Arabic numerals; in 1397 Cologne ordered its tailors not to use machines; after the invention of the ribbon loom in 1579, the city council of Danzig is said to have ordered the inventor to be drowned. But their efforts were in vain, indeed self-damaging: a rule that hurt the economy hurt the state that made it, as against others economically more enlightened. In Europe, rivalry among governments wore away at the interests opposed to economic growth. In this pluralistic setting, the institutions conducive to growth gradually took shape.<sup>159</sup>

A local analogue can be found in the Australian road transport industry. After the High Court's application of s.92 of the Constitution swept away most of the regulatory structure that had impeded domestic competition, Australian interstate trucking rapidly earned the nation the reputation of having the world's most efficient system of long-distance road transport.<sup>160</sup> It has been used as a case study and model in the deregulation of road transport throughout the world. Trucking in fact became one of our first multinational industries, with Australian companies making inroads in some of the world's most competitive markets, including North America.

*Facilitating the selection function.* Professor Kasper argues that federations have a real advantage in discovering rules and devices that assist international competitiveness. He proposes four conditions for enabling competitive federalism to perform this selection role most effectively:

1. The principle of subsidiarity mentioned above, under which tasks should be administered centrally only when there are proven welfare gains from centralisation, as when a diversity of rules leads to

unnecessarily high transaction costs—for example if there were different weights and measures in each state.

2. The ‘rule of origin’, which means that a product or service is automatically accepted throughout the country if it is deemed acceptable on health, safety and other grounds in the state in which it was produced. At present, Professor Kasper argues, we have excessive and unsystematic regulation because there is a cartel of regulators who are unchecked: ‘Under a rule of origin, State and local governments that want to attract industry will compete with one another to develop the best possible set of regulations. This will put a competitive check on the regulators.’ A state that prescribed poor safety standards that hurt consumers would soon lose its attractiveness to industry, which would seek certification by a state with appropriate standards. The rule of origin operates extensively in the European Union. The Single European Act 1986 (EU) machinery dealing with the harmonisation of product specifications relies largely on mutual recognition of national standards.
3. Assignment of tasks under the Constitution is clear and explicit. At present, Canberra has usurped tasks far beyond those granted to it in Chapter I, Part V of the Constitution in areas such as education and industry regulation. This, Professor Kasper argues, has created overlap and duplication that impose unnecessary compliance costs and lessen Australia’s international competitiveness.
4. Fiscal equivalence: each level of government should finance its assigned and chosen tasks with the funds it raises. The beneficiaries of a public service should as far as possible be identical with those who are asked to pay for it. This would eliminate inefficient compromises, ‘fiscal illusion’, free-riding and much political conflict. States would have an incentive to create their own, growing tax bases by pursuing far-sighted policies and competing for mobile resources. If the present vertical fiscal imbalance were eliminated, governments and the voters who elect them would have to live with the long-term consequences of their tax and development policies.<sup>161</sup> A similar point was made by Lord Bryce, who added that this would strengthen the sense of responsibility and spirit of self-reliance of the people.<sup>162</sup>

*A race to the bottom?* Professor Kasper deals with the most likely criticisms of his proposal,<sup>163</sup> but there is one objection which is sure to be pursued strongly and merits further attention. It is the proposition

that the 'rule of origin' would induce states to compete by lowering industry standards to the detriment of the public. This is the 'race-to-the-bottom' argument, which has been used to justify, among other things, the uniform Corporations Law.

In answering this objection, one may begin by pointing out that the Commonwealth has the undoubted power under s.51(i) of the Constitution to set minimum standards of health, safety and integrity in interstate and overseas trade. The exercise of those powers can be a legitimate part of its role of setting the basic framework for the economic order.

A state that wished to prescribe additional standards would need to consider carefully whether the evidence genuinely justified that step. If it did, producers in that state might actually gain a competitive advantage from the legislation. For example, if a state were to ban the use of genetically-modified soya beans and research showed that they were detrimental, local processors could advertise interstate that their products were 100 percent free of the GM beans. Their sales could benefit in the way that Sweden's car exports are seemingly helped by that country's reputation for stringent safety regulation. If the ban were not empirically justified the government and the voters who elected it would have to accept the consequences in reduced economic activity and job opportunities.

Professor Richard Epstein evaluates the race-to-the-bottom argument specifically in relation to corporation laws and finds it to be flawed. He points out that the protection individual investors receive under a system of federalism derives from their ability to withhold their consent. If the rules facilitate the exploitation of shareholders, initial investors (including institutional investors with great sophistication) will demand at incorporation more favourable terms to compensate them for the added risks they are asked to assume. Noting that businesses announcing an intention to shift their state of incorporation to Delaware (the state that pioneered simplified incorporation laws) see significant advances in the value of their shares, he concludes that the exit right offers incentives for states to find the right mix between contractual freedom and state regulation. As regards creditors, he considers it likely to be only the rare situation in which incorporation in a particular state would benefit shareholders as a group but at the same time subject outside creditors (who otherwise benefit from the increased asset cushion) to greater risks than they would otherwise face: 'If most shareholders are risk averse, it is unlikely they will support, even by a simple majority vote, any reincorporation in another state that increases the volatility of their holdings, the scenario most likely to prejudice any creditors'.<sup>164</sup>

Other scholars who have examined the race-to-the-bottom thesis in environmental and commercial law have likewise concluded that it lacks empirical foundation.<sup>165</sup> Professor Richard Revesz of New York University Law School points out that it is not uncommon for states to exceed federal regulatory requirements when there is a particularly acute environmental concern. California's automotive emission standards have long been more stringent than their federal counterparts.

New York has recently moved to adopt the California standards. That the two states with the most severe emission problems have also introduced the strictest rules to cope with them is quite appropriate and shows that, given the strong public support for environmental protection today, states are likely to compete on environmental as well as economic grounds. States that under-protect the environment are as likely to suffer through interstate competition as those that overprotect it. Further, the local and regional nature of many environmental problems means that local knowledge and expertise are needed for the development of optimal solutions. A one-size-fits-all national policy can too easily become one-size-fits-nobody. And the monopolistic nature of national regulation leads to inflated bureaucracy and the proliferation of controls for their own sake.<sup>166</sup>

*The truth about railway gauges.* No discussion of governmental competition and efficiency in the Australian federation can overlook the old reproach that Australia's mixture of railway gauges is a consequence of the federal system. As the main rail networks were completed decades before federation, presumably the argument is that if a unitary constitution had been adopted in 1901 we would not have had to wait until now to have merely the mainland state capitals linked by standard gauge; or that if a unitary system had been adopted earlier (much earlier), the differences would never have come about in the first place.

The argument does not withstand scrutiny. The United Kingdom too had a variety of gauges, including all those found in Australia, together with the seven foot broad gauge, which was particularly widespread in the densely-populated south. But most of the non-standard track was converted by the 1880s. In fourteen working days in 1872, 380 kilometres of double track, including pointwork in stations, were converted without stopping the traffic. The 690 kilometre main line from London to Penzance via Bristol was narrowed to standard gauge in a single weekend. The United States in 1861 had 20 different gauges, but all were standardised within two decades. In July 1881, 3000

workmen converted the entire 885 kilometres of the Illinois Central southern lines by 3:00pm on a single day.<sup>167</sup>

Obviously our federal structure does not explain why, over a century later, most of Australia's non-standard track remains unconverted. The answer, as Gary Sturgess has suggested, probably lies in the fact that Australian's railways were from the outset almost all government-owned.<sup>168</sup> They remained so until the reforms of the last decade. In the absence of the profit motive, the most powerful motivation in the world of economic affairs is the desire for the quiet life.<sup>169</sup>

## Making the Most of a Federal Structure

### Developments Favourable to Federalism

For most of the 20th century the political environment was unfavourable to federalist constitutionalism. The influence of centralising ideologies and the pattern of continual war and international tension especially favoured the growth and concentration of government power. But that environment is changing. Several developments, in addition to the factors mentioned earlier, now favour a move towards less centralised forms of government. Specifically, they raise the possibility that the Commonwealth Constitution may be made to work in a way that will maximise the political, social and economic benefits of a federal structure.

First of these is that the worldwide surge of interest in federalism earlier discussed is starting to influence the overall intellectual climate. Justice Hayne of the high Court has noted that 'Federal forms of government, far from becoming outmoded, may become increasingly common and important in the years that lie ahead of us'.<sup>170</sup>

Indeed, Galligan and Walsh argue that the long controversy over Australian federalism has been settled and that the Labor party, originally committed to abolishing the states, has abandoned the idea. The case against federalism, they write, 'should now be considered closed. That was demonstrated in the most obvious and democratic way by the defeat of the 1988 referendums that proposed only minor tinkering with the system but met with the most negative results of any proposals ever put to the Australian people'.<sup>171</sup>

Assuming Galligan and Walsh are right, there is an interesting comparison and contrast with the United States here. During its first century the Union faced destruction as a result of the Southern states' claims to continuing full sovereignty and the right to secede, and the issue was settled only by the Civil War. Thus, the threat to the American federation came from the secessionists of the South, and was resolved militarily; while the threat to the Australian federation came from the centralists of the Left, and was settled democratically.

Paradoxically perhaps, the introduction of the goods and services tax (GST) under the New Tax System legislation may be a net benefit to federalism. The conventional view has been that GST is a blow to the states because the agreement requires them to abolish a number of existing state taxes in

favour of a new tax controlled largely under federal legislation, which the states have no power to alter but which can be altered by the Commonwealth (only in accordance with the agreement with the States,<sup>172</sup> though that requirement itself could be repealed by federal legislation. But in practice it would be politically difficult to amend the legislation without state concurrence).

If one looks further ahead, however, GST can be seen as a major step towards more balanced Commonwealth-state fiscal relations. As the evolution of China's de facto federalism shows, political power follows the money. Australia's GST has already proved a prodigious source of revenue, and that revenue is all paid to the states and territories.<sup>173</sup> It is the secure growth tax the states have long needed and it strengthens the states as a group vis-a-vis Canberra by reducing the Commonwealth's ability to use the states' mendicant status to dictate policies in areas where the Commonwealth has no constitutional power. By making it possible to cut federal income tax levels (with perhaps more cuts to come), it will boost the states' share of total tax revenues. This will enable (or require) them to resume some of the functions latterly taken over by the Commonwealth. This in turn will enlarge the scope of competitive federalism, especially as the states even now directly provide the bulk of the day-to-day services of government. While the GST rate is uniform nationwide, there still remains room for interstate competition in relation to other taxes. For example, the punitive New South Wales rates of land tax on high-value dwellings could start to influence peoples' choices of where to live. On the other hand, North American experience suggests that the level of retail sales taxes is not a major factor in such decisions. In the longer run, then, GST may repair much of the damage to the federation caused by the effect of some High Court majority decisions on fiscal autonomy of the states.

Australia's lack of a comprehensive national bill of rights may also be an advantage. Traditionally the main objection to constitutionally entrenched guarantees was the Madisonian argument that specifying the rights to be protected would both limit those rights and raise the presumption that other rights were unprotected. In recent decades the opposite objection has predominated—that courts, especially federal courts (or quasi-federal, as in the European Union) tend to interpret bills of rights too broadly, and by creating new constitutionally entrenched rights beyond the traditional ones such as life, liberty, property, speech and religion, have circumvented the democratic process, enshrining rights that could never have been obtained through legislation. The classic examples are the United States Supreme Court's creation of a constitutional right to abortion and its prohibition of religious reference or allusion in the public sector - both highly controversial issues in a generally religious

society. The broad interpretations of the Bill of Rights since World War II have given the federal courts an almost general power of veto over an unlimited area of state legislative power.

Similarly, the Canadian Charter of Rights is said to have weakened the provinces by giving well-organised minorities a day-to-day influence on law-making that their numbers in individual provinces would not earn them in the polling booth. A new 'Court Party' under the control of an 'oppositionist intelligentsia' that lacks a regional base is able to invoke the judiciary's de facto veto power over legislation at much lower cost than would be involved in winning the support of significant numbers of voters in an individual province.<sup>174</sup>

The Commonwealth Constitution contains a number of express and implied protections of individual rights which between them cover most of the explicit rights in the American First and Fifth Amendments.<sup>175</sup> These protect the citizen in relation to Commonwealth, and to a lesser extent state, legislation and executive action. But they are contained in individual, scattered provisions rather than in a single grand declaration, and some depend on implications rather than express language. This makes it harder for courts to treat them as a general roving commission to root out state laws that do not accord with elite opinion, as has tended to happen with express bills of rights in North America and the European Union.

Galligan and Walsh observe that a large part of the great Australian debate over federalism can be summed up as liberal constitutionalism versus parliamentary supremacy.<sup>176</sup> That being so, it is significant that the British doctrine of parliamentary sovereignty as enunciated in 1885 by the Oxford academic AV Dicey is increasingly being doubted and challenged. Dicey theorised that the British parliament (and those modelled on it) had absolute legislative power. There was no law that it could not make and no judicial review of its acts. Academics loved to shock law students by telling them that an Act declaring that all blue-eyed babies should be killed would be valid. But Dicey's theory has never been squarely tested and there is no clear authority to support it.<sup>177</sup> Nevertheless, during the century when it stood as unchallenged orthodoxy, it tended to undermine federalist notions of constitutionalism and divided powers. Diceyan believers were impatient with federalism, regarding it as a transitional stage pending the final victory of unitary absolutism in a single parliament. This was all the more so as Dicey himself, a strong opponent of Irish Home Rule, was concerned to discredit the idea of a federated United Kingdom as an answer to Celtic nationalism and accordingly declared war on the whole idea of federalism.

World War II forever discredited the legal positivism that underlay Dicey's theory, and the rise of human rights consciousness has brought a kind of return to the constitutionalist ideas of Lord Camden and the Old Whigs.<sup>178</sup> In Britain today the courts speak of 'constitutional rights' in much more than merely metaphorical terms,<sup>179</sup> while the High Court of Australia has hinted that the framework of legislative power may embody some limits arising from inalienable rights and the rule of law.<sup>180</sup> That a legal doctrine that helped to keep federalism on the defensive has now had its day is a development that can only aid in rediscovering and exploiting the advantages of decentralised government.

Other positive developments include the adoption by the state premiers of subsidiarity as a guiding principle<sup>181</sup> and the growing availability of comparative figures from OECD and similar sources showing that Australia's overall costs of government already compare favourably with those of other Western-style countries (though not with those of our immediate competitors in the Asia-West Pacific region).

### **Some Steps Towards More Effective Federalism**

In the view of the Federal-State Relations Committee, two fundamental points emerge from a study of federal systems throughout the world: 'The first is that many of these other federations better uphold the virtues of federalism than does Australia. The second is that the strength of federalism in these other federations is in part attributable to certain identifiable features of their federal arrangements'.<sup>182</sup>

The following steps (including some recommended by the Committee) would help Australia better to uphold the virtues of federalism. Some of them are institutional measures, some are behavioural and some are symbolic, but none involves radical or costly changes.

1. The Senate should move to recover at least some of its intended role as the states' house. While Australia has an extensive network of intergovernmental relations, they do not involve the Senate in any way and there is no systematic means of ensuring that the Senate is made aware of the views of state governments. Professor Kenneth Wiltshire's solution to this is a permanent Senate standing committee on federal-state relations.<sup>183</sup>
2. Intergovernmental bodies should play a more important role if the states are not to be further marginalised through divide-and-conquer tactics. To do this they need appropriate institutional and procedural structures. For example, the Council of Australian Governments should be given a permanent secretariat and should mandatorily meet at least once a year or if a meeting is requested

by the prime minister or any four premiers.<sup>184</sup> Several schemes of uniform legislation give executive intergovernmental bodies the power to legislate and regulate. Law-making decisions made by such bodies should be taken in open meetings that the public can attend, and a record kept and transmitted to the parliament of each participating state.<sup>185</sup>

3. The states must be free to make their own policy decisions unless there is an overriding national imperative for a single policy for the whole of Australia.<sup>186</sup> All governments should recognise that, especially in dealing with novel social problems about which there is little accumulated experience, there is unlikely to be a single, self-evident solution. It will be more politically efficient for lawmakers to observe the results of different approaches than to engage in premature nationalisation of the law in new areas. Where mobility of citizens or businesses is a factor, mutual recognition (or the 'rule of origin') may be a better solution than enforced uniformity.
4. Commonwealth proposals for new regulatory laws should be accompanied by a federalism impact statement spelling out the likely effect of the legislation on the powers and effectiveness of state governments and identifying the costs as well as the benefits of any encroachment on them. A useful source of ideas in this regard is the McIntosh-Thompson Federalism Bill laid before the United States Congress in 1999.
5. Anti-federalist case-law should be re-examined. The centralisation of law-making power over the past century has stemmed from pro-centralist High Court decisions rather than from constitutional alterations approved by the people. Indeed, the Court's enthusiasm for concentrating power in the federal government's hands has often exceeded the federal minister's own wishes.<sup>187</sup> The states should therefore in appropriate cases apply to the Court to reverse those decisions, some of which (such as the Tasmanian Dams case) defy all accepted canons of legal interpretation. The United States Supreme Court, in a series of decisions over the last eight years, has called a halt to six decades of centralist jurisprudence, declaring that the federal division of powers is part of constitutional law, is there for a purpose and must be respected.<sup>188</sup> In similar manner, the High Court should be invited to revisit the extreme<sup>189</sup> interpretations of constitutional provisions such as s.51 (xxix) (external affairs)<sup>190</sup> and s.90 (excise duties)<sup>191</sup> that have crippled the decentralised political structure called into being in 1901.
6. The Commonwealth should consider not automatically and resolutely opposing such state applications to reopen constitutional decisions. This could well be in the Commonwealth

government's own interests. Any widening of the Commonwealth's constitutional powers increases the exposure of federal parliamentarians to political and media attack. The converse must also be true. There must be many in Canberra who wish the Commonwealth had never meddled with universities and nursing homes and who would welcome the opportunity to concentrate their time and energy on matters of genuinely national concern.

7. At least until a proper federal balance is restored, the states' exercise of their powers should be guided by the maxim 'use it or lose it'. Referrals of state legislative power to the Commonwealth under s.51 (xxxvii) of the Constitution are politically risky. More creative solutions such as mutual recognition are much to be preferred in the interests of political efficiency. Safeguarding state powers is not concerned only with legislative, executive and judicial powers in the purely legal sense but extends also to symbolic matters. People are more likely to identify with an institution—whether a football club, a church, a state or a nation—if it makes use of symbols with positive associations. Here the states have fallen behind the Commonwealth, which has at its disposal a range of symbols (including the word 'Australia' itself) that have acquired a strong positive charge over the last century, largely as a result of cooperation and sacrifice in war. This lesser ability to focus people's feelings puts the states at a political disadvantage in negotiations or confrontations with Canberra over questions of governmental power. But all Australian states have features in their history or natural environment that can be used to symbolise their special traditions and qualities of life. State flags are an example, though perhaps they need to be made more distinctive than the uniform colonial ensigns now flown. Useful sources of ideas in this regard are the 'corporate identity' programmes of the Canadian provinces and the American states, with their 'Celebrate our State' initiatives.

One power the states will either use or lose is itself purely symbolic, though politically significant. This is the power to award honours. Before 1992, the states used to award Imperial honours independently, without involvement by the British or Australian governments. At various times some states had decorations of their own, such as the Victorian Police Medal. The Order of Australia and associated Commonwealth bravery awards in 1992 replaced all the Imperial honours. As the pattern of awards (and of non-awards) shows, the Order of Australia tends to reflect Canberra perspectives and values. There is, however, nothing to prevent the states from instituting

their own system of honours.<sup>192</sup> By so doing they could recognize a wider range of achievement and at the same time issue a symbolic reminder that they are in important respects sovereign entities.<sup>193</sup>

## Conclusion

All human institutions are imperfect and open to criticism. But for a framework of government that has created a new nation and given it external security, internal peace, stability, progress and prosperity throughout the most violent, turbulent century in human history,<sup>194</sup> Australia's federal constitution has been subjected to an inordinate amount of negative comment by the political-intellectual elite. Reasons for this were suggested earlier, but the chief obstacle to balanced appraisal today is the failure of the main opinion communicators to consider the advantages of federalism. The debate has focussed exclusively on its disadvantages and has generally taken the form of assertions repeated so often as to become accepted as facts. Minor inconveniences have been given an inflated importance by critics who, in Professor Galligan's words, 'did not appreciate the powerful liberal rationale that underpinned this ingenious system of government'<sup>195</sup> and failed to consider the costs and disadvantages of an alternative system. Nor has it occurred to them that the 'horse and buggy' constitutional model of 1901 might be more serviceable and environmentally friendly than the 'Model T Ford' version that has dominated the constitutional highways since the 1920 *Engineers' case*.<sup>196</sup>

That the benefits outlined above are not being fully achieved at present results from the current imbalance between centralisation and decentralisation, uniformity and diversity, cooperation and competition. Lord Bryce's 'watertight compartments' have been punctured and the ship is listing towards centralised uniformity, denying the people the benefits of competitive federalism and bringing government cartelisation, inefficiency and elitism.

Australian federalism can begin to realise its full potential if all three branches of Commonwealth government take into account the benefits of experimentation, diversity and multi-level democratic participation. They must recognise that competition and cooperation both have their place in a federation. The judiciary obviously has a crucial part to play here.

Australian voters have repeatedly shown by their votes in constitutional referendums that, by and large, they prefer the decentralised constitutional model. They should refuse to accept further centralisation of authority, direct or by elite subterfuge, unless the benefits of greater Commonwealth power can be shown to outweigh the costs. Nor need people be too awed by claims that centralisation is 'vital' for the resolution of some current 'crisis'. Exaggerating a problem or even engineering a crisis so as to create a clamour for something to be done, and then stepping forward with a prepared

solution that further concentrates power and curtails freedom, is a time-honoured tactic of certain elitists.<sup>197</sup>

Some adjustments in thinking will be required under a true system of competitive and cooperative federalism. State governments will need to shoulder the full responsibility for their own spheres of action and not seek to shunt the hard issues down the line to Canberra. In the general population, some individuals may at first be disconcerted by the wider range of choices available to them. It has happened before. When the old price cartels and monopolies were starting to break down under the Trade Practices Act 1967, some consumers actually complained because prices were no longer uniform. Eventually they realised that by shopping around a little—that is, by taking responsibility for their own lives and choices—they could enjoy a significantly higher living standard than before. The same process will take place when the present government cartel begins to crack.

Those who contrast the veneration with which Americans view their 1788 constitution with the alleged apathy of Australians towards theirs overlook the fact that for the first hundred years of its life the United States Constitution was intensely unpopular in a way that the Commonwealth Constitution has never been during its own first century.<sup>198</sup> The tensions that emerged from the outset over central power led Chief Justice Marshall to write in 1832 that ‘our Constitution cannot last’.<sup>199</sup> By the 1850s the Union was in its ‘death throes’.<sup>200</sup> In Australia, even when the centralist challenge to our federal order was at its height, even the most committed centralists stopped short of such bleak assessments.

This inferiority complex about the Australian constitutional tradition and its achievements may stem in part from the Anglo-European influence on Australian academia. Some of this country's constitutional writers seem to have taken on the despondent resignation so often seen in the scholarly circles of the Old Continent. They assume that past mistakes are unalterable and that Australia can never hope for a balanced federal structure because of party control of the Senate, or the legacies of Benthamite-Jacobin utilitarianism, or the centripetal forces of the 20th century. That is not how the modern world works. Our past does not determine our destiny. What creates the events of today is the intention we set for the future, the world we would like to manifest. We can create our reality from the future by observing what is unsatisfactory now and deciding not to repeat or preserve it. Australia is a young and vigorous country. Within its own borders it can be anything it wants to be.

An awareness of the positive benefits of federalism will make the constitutional debate a more equal and fruitful one. This will mean recognising that in a properly working federation government is more adaptable to the preferences of the people, more open to experiment and its rational evaluation, more resistant to shock and misadventure, more politically efficient and more stable. Its decentralised, participatory structure is a buttress of liberty, a counterweight to elitism, and a seedbed of 'social capital'. It fosters the traditionally Australian, but currently atrophying, qualities of responsibility and self-reliance. Through greater ease of monitoring and the action of competition, it makes government less of a burden on the people. It is desirable in a small country and indispensable in a large one. And if, as is often said, the pursuit of truth in freedom is the essence of civilisation, this 'liberating and positive form of organisation' has a special contribution to make to the progress of humankind.

## Endnotes

- 1 S. Calabresi, "A Government of Limited and Enumerated Powers": In Defense of United States v Lopez" (1995) 94 *Michigan Law Review*, 752, 756; R. Watts, 'Contemporary Views on Federalism', in B. de Villiers (ed), *Evaluating Federal Systems*, (Dordrecht: Nijhoff, 1994), 1, 5. See generally D. Shapiro, *Federalism: A Dialogue*, (Evanston, Ill.: Northwestern University Press, 1995).
- 2 Watts, 'Views on Federalism', n. 1, 4. See also R. Murray, 'In Praise of the Constitution', *Quadrant*, (May 2000), 60.
- 3 Calabresi, 'Limited and Enumerated Powers', 757. See A. Marr, *Ruling Britannia: The Failure and Future of British Democracy*, (London: Michael Joseph, 1995).
- 4 Watts, 'Views on Federalism', n.1, 5; G. Walker, *Initiative and Referendum: the People's Law*, (St. Leonards NSW: The Centre for Independent Studies, 1987), ch.1; Watts, 'Views on Federalism', n. 1, 7-8.
- 5 Watts, 'Views on Federalism', 5.
- 6 See D.P. Moynihan, *Pandaemonium: Ethnicity in International Relations*, (Oxford University Press, 1993), 10-11, 175-76. Moynihan lists countries that have not had their form of government changed by force since 1914, whereas I am also taking into account violent changes in government systems and significant losses of territory since 1901 as well. Thus Moynihan would include not only the United Kingdom but also South Africa. The latter does not meet my definition because its form of government was changed by force in 1902 (following Britain's victory in the Boer War) and would not now meet Moynihan's (or mine) because the transition to majority rule was at least partly the result of force.
- 7 G. Maddox, T. Moore, "In Defence of Parliamentary Sovereignty", in M. Coper, G. Williams (eds), *Power, Parliament and the People*, (Annandale NSW: Federation Press, 1997, 67, 82). On this issue see Parliament of Victoria, Federal-State Relations Committee, *Australian Federalism: The Role of the States*, 2nd Report, Melbourne 1998 ('FSRC 2nd Report') 9-12.
- 8 *Ha v New South Wales* (1997) 71 ALJR 1080.
- 9 Watts, 'Views on Federalism', n.1, 8-9.
- 10 M. Bell, *Internal Migration in Australia 1981-1986*, (Canberra: AGPS, 1992), 296; also *Internal Migration in Australia 1986-1991; Overview Report*, (Canberra: AGPS, 1995), 57.
- 11 Plato, *Crito*, in *Plato; The Last Days of Socrates*, H. Tredennick, H. Tarrant trans., (London, 1993), 88.
- 12 T. Hobbes, *Leviathan*, (Cambridge, 1991), e.g. 149-51.
- 13 R. Epstein, 'Exit Rights Under Federalism', 55 *Law and Contemporary Problems*, (1992), 147, 150.
- 14 Epstein, 'Exit Rights', 165
- 15 Calabresi, 'Limited and Enumerated Powers', n.1 789-90; R. Bork, *The Tempting of America: The Political Seduction of the Law*, (New York: Free Press, 1990), 53.
- 16 Bork, *The Tempting of America*, 53.
- 17 G. Tullock, *The New Federalist*, (Vancouver: Fraser Institute, 1994), 34.
- 18 The states themselves—if by that one means their governments—have on the contrary shown a short-sighted willingness to surrender their rights to the Commonwealth. Thus, Victoria has referred its power over industrial relations to the Commonwealth, and John Fahey when premier of New South Wales was minded to do likewise. In 1996 premier Robert Carr

- proposed referral of state powers in relation to firearms and in 2000 all premiers agreed to refer their powers over corporations for five years.
- 19 Epstein, 'Exit Rights Under Federalism', n.13, 154ff.
- 20 Coal Acquisition Act 1981 (NSW). After years of public protest, partial arrangements for compensation were made and some coal deposits were restored to the owners. The issue is currently awaiting judgment in the High Court: *Durham Holdings Pty Ltd v New South Wales*, No S155 of 1999.
- 21 P. Grossman, *Fiscal Federalism: Constraining Governments with Competition*, (Perth: AIPP, 1989), vi, 31.
- 22 J. La Nauze, *The Making of the Australian Constitution*, (Melbourne: Melbourne University Press, 1972), 19, 273.
- 23 J. Bryce, *The American Commonwealth*, (Indianapolis: Liberty Press, 1995 [London: 1888]), vol. 1, 315.
- 24 *New State Ice Co. v Liebmann* (1932) 285 US 262, 311.
- 25 Calabresi, 'Limited and Enumerated Powers', n. 1, 777; Tullock, *The New Federalist*, n. 17, 122.
- 26 K. Mannheim, *Essays on the Sociology of Culture*, (London: Routledge & Keegan Paul, 1956), 169.
- 27 William Carr, president of the Family Law Practitioners' Association of Western Australia argues for uniform de facto relationships laws without offering any reasons for preferring uniformity to diversity and experiment: 'A poor state of affairs on couples' rights' *The Australian*, (17 January 2000), 9. But Mr Carr makes it plain that uniformity must be on his terms. He makes the unspoken assumption that de facto relationships should be treated as equivalent to marriage, a contentious issue as research shows that cohabitation arrangements are much more unstable than marriages and greatly increase the risk of abuse to women and children: Patricia Morgan, *Marriage-Lite: The Rise of Cohabitation and its Consequences*, (UK: Institute for the Study of Society, 2000); T. Sowell, *The Vision of the Anointed: Self-Congratulation as a Basis for Social Policy*, (New York, Basic Books, 1995), 172-77.
- 28 J. Buchanan, 'Federalism and Individual Sovereignty', *Cato Journal* 15: 2-3, (1996), 259, 263.
- 29 E.g. *Consumer Wise*, (Canberra: Dept. of Industry, Science and Tourism, September 1997), 2; O. Morgan, book review, *Policy* 14: 2, (Winter 1998), 54; W. Carr, 'A poor state of affairs on couples' rights', *The Australian*, (17 January 2000), 9. 'Inconsistent' means that two laws are not merely different, but that it is impossible to obey one without breaking the other, or that one law takes away a right conferred by the other: *Western Australia v Commonwealth* (1995) 183 CLR 373, 253; *R. v Credit Tribunal; ex parte General Motors Acceptance Corporation* (1977) 137 CLR 545, 563; Deane J. speaks of 'different but consistent' state laws in *Breavington v Godleman* (1989) 169 CLR 41, 136-37. Thus there is no 'inconsistency' between a speed limit of 100 km/h in one state and 110 km/h across the border. Chief Justice Bray of South Australia once exclaimed, 'can't understand this itch or urge towards uniformity. What on earth is wrong with having different laws in different states? Surely . . . the States can act as laboratories and perform experiments of their own.' He pointed out that different laws resulted from points of difference in the platforms of political parties, and if an election was fought on the basis of such differences (in this case on the question of censorship) he could not see why the winning party should not be allowed to put its policy into operation irrespective of what other governments were doing: Comment, (1971) 45 *ALJ* 585, 586.

- 30 T. Sowell, *A Conflict of Visions: Ideological Origins of Political Struggles*, (New York: Morrow, 1987), 208-10.
- 31 See G. Walker, *The Rule of Law: Foundation of Constitutional Democracy*, Melbourne: Melbourne University Press, 1988), 293, 439. The Family Court is in the unprecedented position of conducting serial contempt of court hearings to punish its critics (one of which was ex parte Torney, see n.32 below).
- 32 The first federal divorce law was Garfield Barwick's Matrimonial Causes Act 1959, but the changes it made in relation to existing state laws were minor compared with those in the Family Law Act. The 1959 Act was not significantly controversial, whereas Murphy's 1975 law is intensely so. Even the Chief Justice of the Family Court, Alistair Nicholson, concedes that most of the complaints received by federal parliamentarians relate to Family Court or child support matters: *Re Colina; ex parte Torney* (1999) 73 ALJR 1576, 1579. The core of the problem is not so much the court as the philosophical orientation of the Family Law Act itself, which is based on an ideology of social engineering rather than on generally accepted ideas of justice and deserving that are fundamental to Australian society: see Walker, *The Rule of Law*, n.31, 352-53. Even the separate state divorce laws that existed before 1959 caused much less conflict, expense and controversy than the present federal law. In Canada and the United States, where divorce is a provincial or state matter, family law is not a significant source of public contention.
- 33 Australian pro-family groups are starting to advocate the introduction of something similar to Louisiana's 'covenant marriage' laws under which couples can choose a more binding form of marriage under which divorce would be available only on grounds rather more liberal than those in the Matrimonial Causes Act 1959 (see n. 32 above). But for s.8(1) of the Family Law Act 1975 (Cth.), state legislation introducing such a system as an alternative to the Family Law Act no-fault regime might arguably be valid under s. 109 of the Constitution if couples could select it only by making an active choice. See 'A Stealth Anti-Divorce Weapon', *ABA Journal* (American Bar Association, September 1997), 28.
- 34 Australian Law Reform Commission, *Interim Report No. 26*, (Canberra, 1985), para. 211.
- 35 Justice Callinan, 'Legal and Other Literature', John Bray Law Chapter Oration 2000, 18. Justice Einstein of the New South Wales Court of Appeal has pointed out how the Act widens the powers of trial judges: C. Einstein, "'Reining in the Judges?': An Examination of the Discretions Conferred by the Evidence Acts 1995", (NSW Bar Association, October 1995), 19. The paper was delivered shortly before Justice Einstein's appointment to the bench.
- 36 Thus, one commentator asserts that the world is 'heavily dependent on uniform national laws for certainty': L. Gamertsfelder, 'Australian Constitution: searching for essential characteristics', 74 *ALJ*, (2000), 58.
- 37 Amelia Simpson and George Williams write that: 'If Australia is to secure its place in the global economy, few would deny the importance of a single, national scheme of corporate regulation. Any doubters need only turn to Canada to see the damage that a state [*sic*]-based regulatory scheme can inflict upon a national economy desperate to attract foreign capital': 'Corporations law referral—one small step forward', *Australian Corporate News* No 19, (12 September 2000), 253. The description of Canada, one of the G8 economies, as 'desperate to attract foreign capital' stands reality on its head. In recent decades, and especially since

NAFTA, a major issue in Canadian politics has been how to keep foreign capital *out*, so as to slow the takeover of Canadian businesses by foreign investors.

For Australia, a uniform national corporations law would be the best solution if it were stable, predictable and efficient, but the experience with federal family, tax, native title and evidence laws provides little reason for optimism in that regard. In the meantime, the scope for an efficient Delaware-type alternative resulting from competitive federalism (discussed further below) should not be dismissed.

- 38 Calabresi, 'Limited and Enumerated Powers', n.1, 775.
- 39 M. McConnell, 'Federalism: Evaluating the Founders' Design', *University of Chicago Law Review* 54 (1987), 1484, 1494.
- 40 C. Sharman, 'Governing Federations', in M. Wood, C. Williams, C. Sharman (eds), *Governing Federations: Constitution, Politics, Resources*, (Sydney: Hale & Iremonger), 1989, 1,4.
- 41 Buchanan, 'Federalism and Individual Sovereignty'.
- 42 J.-L. Migue, Comment on Buchanan, 'Federalism and Individual Sovereignty', n. 28, 269, 274.
- 43 'Abolition of states a danger to unity: Goss', *Weekend Australian*, (22-23 October 1994), 5; 'Define state powers or risk their loss', *The Australian*, (21 September 1994), 15.
- 44 Bryce, *The American Commonwealth*, 308-09; Calabresi, 'Limited and Enumerated Powers', n. 1, 770.
- 45 Bryce, 'Limited and Enumerated Powers', n. 23, 310. For a recent viewpoint on this issue see S. Jenkins, 'Ulster must be allowed to grow up', *The Australian*, (10 July 1998), 13.
- 46 G. Green, 'The Concept of Uniformity in Sentencing', 70 *ALJ*, (1996), 112, 118. There are apparently only seven homogeneous countries with no border problems: Denmark, Iceland, Japan, Luxemburg, the Netherlands, Norway and Portugal: Moynihan, *Pandaemonium*, 72.
- 47 Parliament of Victoria, Federal-State Relations Committee (FSRC), *Australian Federalism: The Role of the States*, 2nd report, (Melbourne 1998), 9.
- 48 FSRC, *Australian Federalism*, 8.
- 49 Sharman, 'Governing Federations', 5-6.
- 50 As above.
- 51 Bryce, *The American Commonwealth*, 369.
- 52 Watts, 'Views on Federalism', 10.
- 53 Calabresi, 'Limited and Enumerated Powers', 770.
- 54 Bryce, *The American Commonwealth*, 309.
- 55 Rights of the Terminally Ill Act 1995 (NT), overridden by Euthanasia Laws Act 1997 (Cth.).
- 56 'The Subsidiarity Principle', 27 *CM Law Review*. (1990), 181; T. Schilling, 'A New Dimension of Subsidiarity: Subsidiarity as a Rule and a Principle', 14 *Yearbook Eur. L.*, (1994), 203; G. Cross, 'Subsidiarity and the Environment' 15 *Yearbook Eur. L.*, (1995), 107. Some critics maintain, however, that the Amsterdam Treaty 1997 substantially undermines the subsidiarity principle.
- 57 Schilling, 'A New Dimension of Subsidiarity', 203.
- 58 FSRC 2nd report, *op.cit.supra* n. 47, 57.
- 59 J. Bell, *Populism and Elitism: Politics in the Age of Equality*, (Washington: Regnery, 1992), 78; see generally Hon. John Wheeldon, 'Federalism: One of Democracy's Best Friends', in

*Upholding the Australian Constitution*, vol. 8, (East Melbourne: Samuel Griffith Society, 1997), 189.

60 Presumably Acton is referring to the Achaean League in antiquity, the earliest known federation.

61 Acton, *Nationality*, St. Leonards, NSW: The Centre for Independent Studies, 1997 [London, 1862], 3-4.

62 F. Fukuyama, *The End of History and the Last Man*, (London: Macmillan, 1992), 218; A. de Tocqueville, *Democracy in America*, (New York: Dutton, 1966), e.g. 61, 225, 482-83; R. Hancock, 'De Tocqueville on the Good of American Federalism', in P. Lawler ed., *De Tocqueville's Political Science: Classic Essays*, (New York: Garland, 1992), 133-53.

63 Bell, *Populism and Elitism*, 3.

64 C. Lasch, *The Revolt of the Elites and the Betrayal of Democracy*, (New York: Norton, New York, 1995), 76.

65 See B. Robertson, *Economic, Social and Cultural Rights: Time for a Reappraisal*, (Wellington: New Zealand Business Roundtable, 1997), 51, 60-61; R. Kemp, 'International Tribunals and the Attack on Australian Democracy', in *Upholding the Australian Constitution*, vol. 4, (East Melbourne: Samuel Griffith Society, 1994), 119; Senate Legal and Constitutional References Committee, *Trick or Treaty? Commonwealth Power to Make and Implement Treaties*, (Canberra: AGPS, 1995). An example of the elitist agendas promoted by such bodies was the draft treaty advocated by UNESCO during the 1980s for the licensing of foreign correspondents and television crews by host countries, thereby enabling governments to control what was said about them in the international media: S. Nihal Singh, *The Rise and Fall of Unesco*, (Riverdale Md: Riverdale Co., 1998), 2, 9, 111, 114. The Australian government of the day supported the proposal. Made largely obsolete by the Internet and the fax, the proposal appears to have been abandoned. There are indications, however, that UNESCO is now casting about for ways of introducing censorship of the Internet.

Tzvi Fleischer, writing of the UN Human Rights Commission and similar bodies, observes: 'Firstly, these committees constantly seek to extend the broadest possible interpretation to UN Human Rights treaties, finding rights to things like abortion, and gay marriages which appear nowhere in the relevant treaties. Second, they privilege the testimony of non-government organisations, generally taking their evidence automatically at face value, and as a result are almost always more critical of democracies, which allow such bodies, than of totalitarian regimes with much worse records.

And finally, the committees reflect the political biases of the generally unrepresentative NGOs, including anti-imperialism, meaning sympathy for Third World States and hostility to the West, strongly pro-indigenous rights, radical feminism, anti-capitalism, and of course, anti-Zionism: *The Review* (Melbourne, October 2000).

66 Sir Ninian Stephen, former Governor-General and High Court Justice, discerns a parallel 'democratic deficit' as regards treaty-making in all Western systems; and particularly in Australia in view of the effect on the constitutional alteration mechanism: Parliament of Victoria, Federal-State Relations Committee, *International Treaty-Making and the Role of the States*, (Melbourne 1997), 13.

- 67 Lasch, *The Revolt of the Elites*; Bell, *Populism and Elitism*; T. Sowell, *A Conflict of Visions*; also *The Vision of the Anointed*, (New York: Basic Books, 1995); R. Nisbet, *Twilight of Authority*, (New York: Basic Books, 1975); Walker, *The Rule of Law*, ch. 9.
- 68 *Sydney Morning Herald*, (9 August 9, 11-16 August, 19 August 19, 21-22 August 1975).
- 69 Australian Capital Television Pty. Ltd. v Commonwealth (1992) 177 CLR 106.
- 70 Parliament of the Commonwealth, *In the Public Interest: Monitoring Australia's Media*, Report of the Senate Select Committee on Information Technologies, (Canberra: APGS 2000), ch.6; D. Pearce, 'In the Public Interest?', *Australian Press Council News*, 12: 3, (August 2000), 1.
- 71 M. Duffy, N. Bolkus, 'Was dissent stifled under Labor?', *The Australian*, (11 June 1998), 13. For the views of one of Senator Bolkus's academic supporters, see H. Reynolds, 'Unrestrained and Dangerous', *The Australian*, (25 September 1996), 13. Historically, of course, introducing and upholding the right of free speech has proved to be anything but 'cheap'.
- 72 Lasch, *The Revolt of the Elites*, 170.
- 73 Bell, *Populism and Elitism*, 89.
- 74 M. Diboll, 'Democracy Direct' in K. Sutherland ed., *The Rape of the Constitution?* (Thorverton, UK: Imprint Academic, 2000), 349, 362-63. See also Duffy, Bolkus, 'Was dissent stifled under Labor?'.
- 75 Sharman, 'Governing Federations', 6.
- 76 Tullock, *The New Federalist*, 112.
- 77 Buchanan, 'Federalism and Individual Sovereignty', 261-62.
- 78 As above.
- 79 Parliament of Victoria, Federal-State Relations Committee, *Federalism and the Role of the States: Comparisons and Recommendations*, 3rd report, (Melbourne 1999), 189-90.
- 80 As above; B. Galligan, C. Walsh, *Australian Federalism—Yes or No*, Discussion Paper 9, (Canberra: ANU Federalism Research Centre, 1991), 9.
- 81 Bryce, *The American Commonwealth*, 300, 311. See generally A. Norton, M. Latham, G. Sturges, M. Stewart-Weeks, *Social Capital: The Individual, Civil Society and the State*, (St Leonards, NSW: The Centre for Independent Studies, 1997).
- 82 Acton, *Nationality*, 13.
- 83 Letter to A.L.C. Destutt de Tracy, *Thomas Jefferson: Writings*, (New York: Library of America, 1984), 1241, 1245.
- 84 Bryce, *The American Commonwealth*, 311.
- 85 Acton, *Nationality*, 13.
- 86 Calabresi, 'Limited and Enumerated Powers', 786.
- 87 G. Sawyer, *Modern Federalism*, (Carlton, Victoria: Pitman, 1976), 153.
- 88 R. Gollan, *Radical and Working Class Politics*, (Melbourne, Melbourne University Press, 1960), vii.
- 89 G. Walker, 'The Law that Wasn't There: Retrospectivity Becomes Routine', *Australia and World Affairs* 5 (Winter 1990), 47.
- 90 G. Walker, 'The Tribunal Trap', *Australia and World Affairs* 8 (Autumn 1991), 53. The High Court restored some legal rigour to this area in *Brandy v Human Rights and Equal Opportunity Commission* (1995) 183 CLR 245, 69 ALJR 191.
- 91 G. Walker, 'Information as Power: Constitutional Implications of the Identity Numbering and Identity Card Proposal' *Queensland Law Society Journal* 16 (1986), 153. National ID cards are a

- perennial favourite of elitists and are regularly advocated by them in the United Kingdom, the United States and other countries.
- 92 J. Uhr, 'Parliament', in G. Galligan, I. McAllister, J. Ravenhill (eds), *New Developments in Australian Politics*, (Melbourne: Macmillan, 1997), 68, 72; *House of Representatives Debates*, (24 November 1988), 3206. The Howard government abolished the roster system in 1996, but it could be revived by a future government.
- McHugh J. may have been alluding to this episode when he said: 'Only in comparatively recent times does the existence of the power [to ask questions and seek documents] seem to have been denied': *Egan v Willis* (1999) 73 ALJR 75, 100. Nevertheless in that case the High Court showed that there are legal limits to the executive's ability to ignore parliament.
- The impression of elite contempt for democracy and the constitution was reinforced when the Hon. Graham Richardson, former senator and cabinet minister, claimed when launching his autobiography *Whatever it Takes* that the Westminster system requires ministers to tell lies. His former cabinet colleague, the Hon. Peter Walsh, disagreed: P. Walsh, *Confessions of a Failed Finance Minister*, (Milson's Point NSW: Random House, 1995), 277.
- 93 M. Steketee, 'The Press Gallery at Work', in J. Disney and J. Nethercote (eds), *The House on Capital Hill: Parliament, Politics and Power in the National Capital*, (Sydney: Federation Press, 1996), 195, 198-99, 210. The NMLS was abolished by the Howard government in 1996, but there is nothing to prevent a future government from reviving it.
- 94 It is not clear if the agreement was specific about how soon after the election Hawke would step down, but Keating's interpretation was apparently that the changeover would begin to be implemented as soon as government business resumed after the poll was declared. After five months had passed since the election, Keating concluded that Hawke had reneged: M. Gordon, *A True Believer: Paul Keating*, (St Lucia, Queensland: University of Queensland Press, 1993), 86-7, 89, 111, 161.
- 95 Joint Standing Committee on Electoral Matters, *Report of the Inquiry into all Aspects of the 1996 Federal Election and Matters Related Thereto*, (Canberra: AGPS, June 1997), chs. 2, 5. As to the effect of fraud on particular elections, see C. Copeman, Amy McGrath (eds), *Corrupt Elections: Recent Australian Studies and Experiences of Ballot Rigging*, (Kensington, NSW: HS Chapman Society, 1997), 29-44, 107-130; 'Remembering H.S. Chapman', *Sydney Morning Herald* editorial, (3 October 1998); P. Sheehan, *Among the Barbarians*, (Sydney: Random House, 1998), ch.12; 'Beattie calls for poll fraud squad', *The Australian*, (6 November 2000), 6.
- 96 Electoral and Referendum Amendment Act (No.1) 1999, No. 134. As the electoral roll is a joint federal-state responsibility, the reforms cannot take effect until accepted by the states. The four Labor state governments have rejected the reforms, however, for reasons that may not be unrelated to the current inquiry ordered by the Criminal Justice Commission into, among other things, whether the present Queensland government owes its majority to ballot-rigging: 'Labor should come to the party on vote reform', *The Australian*, (6 November 2000), 14.
- 97 Conditional grants under s. 96 often have this character. See 'Cabinet may force road laws on states', *The Australian*, (9 October 1990).
- 98 In an interesting parallel development, Finn J. of the Federal Court has held that a statutory research body has an enforceable legal duty to consider all the evidence: *Tobacco Institute of Australia v National Health and Medical Research Council* (1996) 142 ALR 1, 71 FCR 265.

- 99 Sharman, 'Governing Federations', 4.
- 100 Calabresi, 'Limited and Enumerated Powers', 777.
- 101 Bryce, *The American Commonwealth*, 314.
- 102 As above.
- 103 Calabresi, 'Limited and Enumerated Powers', 777-78.
- 104 Tullock, *The New Federalist*, viii-ix.
- 105 Calabresi, 'Limited and Enumerated Powers', 778.
- 106 *The Australian*, (29 August 1990).
- 107 Steketee, 'The Press Gallery at Work', 195, 198-99.
- 108 Letter to Gideon Granger, Jefferson, *Writings*, 1078.
- 109 Sawyer, *Modern Federalism*, 112.
- 110 FSRC 2nd report, *Australian Federalism*, 6.
- 111 Bryce, *The American Commonwealth*, 311.
- 112 As above, 314.
- 113 Calabresi, 'Limited and Enumerated Powers', 778.
- 114 As above. Between 1983 and 1985, confidence in the federal government plummeted by 29.2%, the sharpest fall recorded for any major public institution. By 1995, 73.5% of Australians described their level of confidence in Canberra as 'None at all' or 'Not very much': E. Papadakis, 'Constituents of confidence and mistrust in Australian institutions', *American Journal of Political Science* 34: 1, (March 1999), 75, 76.
- 115 Buchanan, 'Federalism and Individual Sovereignty', 264.
- 116 As above, 264-65.
- 117 C. Friedrich, *The New Belief in the Common Man*, (Boston 1942), 135.
- 118 B. Galligan, *Politics of the High Court*, (St Lucia, Queensland: University of Queensland Press, 1987), 15, 12
- 119 As above, 25, 251.
- 120 Britain's postwar nationalisation program went much further than Australia's, extending not only to coal mines and steel mills but even, at one stage, to the travel agency Thomas Cook & Son and a furniture removalist, Carter Paterson & Pickford. The moves by New Zealand's present Clark minority government to reverse many of the Lange reforms apparently command only minority support. Emigration, especially by young, enterprising people, has consequently risen by 350%: J. Hewson, 'Kiwis mugged by reality', *Australian Financial Review*, (8 September 2000), 68.
- 121 Bryce, *The American Commonwealth*, 362.
- 122 Galligan, *Politics of the High Court*, 25.
- 123 Bryce, *The American Commonwealth*, 313.
- 124 Watts, 'Views on Federalism', 22, my emphasis; Sawyer, *Modern Federalism*, 124.
- 125 When Ralph Nader visited Australia in the mid-1980s, Prime Minister Hawke reportedly told the visitor of his ambition to create a 'corporatist state' in Australia: B. Wilshire, *The Fine Print*, (Round Corner, NSW: Wilshire, 1992), 79.
- 126 Alan Wood, 'Our Federation at a Crossroads', *The Australian*, (2 August 1994), 13.
- 127 The inflationary results of the 1973 and 1974 budgets, coupled with a federal government-backed wages explosion at a time of low growth, were well understood even at the time: 'Oh, No—not the 1973 budget again', *Australian Financial Review (AFR)*, (27 August 1974), 2; 'The

- inflation merry-go-round', *AFR* (27 August 1974), 1; 'Hyperinflation and low growth—the two threats', *AFR* (6 August 1974), 12. Many countries suffered high inflation during that period as a result of the OPEC governments' monopoly pricing. Australia lacked that excuse, however, because Bass Strait and Barrow Island crude made Australia self-sufficient in petroleum during the relevant period and government price controls prevented Australian oil producers from raising their prices to world levels: P. Walsh, *Confessions of a Failed Finance Minister*, (Sydney: Random House, 1995), 16; J. Nevile, 'Australian Inflation—Made at Home or Imported?' in W. Kasper (ed), *International Money—Experiments and Experience, Papers and Proceedings of the Port Stephens Conference*, (ANU Department of Economics, RSSS, 1976). In Switzerland, direct citizen control over government budgets via the referendum system kept inflation (and unemployment) in that country below 2% despite that country's exposure to the full effects of OPEC price rises.
- 128 W. Kasper, 'Competitive Federalism: May the Best State Win', in G. Walker, S. Ratnapala, and W. Kasper, *Restoring the True Republic*, (St Leonards, NSW: The Centre for Independent Studies, 1993), 55, 63.
- 129 Grossman, *Fiscal Federalism*, 14. See also B. Dollery, A. Worthington, 'Federal Expenditure and Fiscal Illusion: A Test of the Flypaper Hypothesis in Australia', *Publius: The Journal of Federalism* 23 (1995).
- 130 Kasper et al., *Restoring the True Republic*, 60.
- 131 P. McGuinness, 'Federalism's Hypocrites', *The Australian*, 31 October 1990.
- 132 See sub-heading 4 in the above.
- 133 Grossman, *Fiscal Federalism*, 7.
- 134 As above, 11.
- 135 Personal communication, September 1995, from Professor Brian G. Wilson, vice-chancellor of the University of Queensland. Professor Wilson was a former convenor of the Australian Vice-Chancellors' Committee and had chaired a number of government committees on universities.
- 136 P. Karmel, 'Funding Universities', in T. Coady (ed), *Why Universities Matter*, (St Leonards, NSW: Allen & Unwin, 2000), 159, 181.
- 137 This figure included some administrative staff who really are needed for a university to operate, such as those working in enrolments, examinations, registry and, of course, salaries. On the other hand, it excluded academics in the faculties and departments such as deans and department heads who are wholly or partly exempt from teaching and examining because of their administration load.
- 138 Karmel, 'Funding Universities', 60.
- 139 In the 1960s a senior lecturer salary was roughly on a par with that of a District Court or County Court judge. Now it is somewhat over a third of that level, even though the judge's real salary itself fell during the inflation of the 70s and 80s. Another matter of concern to academics relates to research grants, the winning of which is now a prerequisite to obtaining tenure (such as it is) and promotion. The universities have lost most of their power to grant research funds, which are now monopolised and distributed by the government-appointed Australian Research Council. This has further politicised and distorted the whole enterprise of academic research.
- 140 Calabresi, 'Limited and Enumerated Powers', 775; Grossman, *Fiscal Federalism*, chs. 3-6.

141 Grossman, *Fiscal Federalism*, 9-10. Vertical competition in federations can also improve governmental efficiency: A. Breton, 'Towards a Theory of Competitive Federalism', *European Journal of Political Economy* 3: 1 & 2, (1987), 263-329.

142 Calabresi, 'Limited and Enumerated Powers', 779.

143 It is well known in commercial law circles that New York is losing ground to London as a financial and corporate centre, partly because of England's more stable and predictable contract law—a result of the English courts' willingness to uphold bona fide lawful contracts. See Lord Steyn, 'Contract Law: Fulfilling the Reasonable Expectations of Honest Men', *LQR* 113, (1997), 433, 442.

144 Tullock, *The New Federalist*, ch. 7.

145 As above, 95.

146 As above, 99.

147 H. McRae, 'Giving the little guy a hand', *Forbes*, (24 January 2000), 32; W. Kasper, *Building Prosperity: Australia's Future as a Global Player*, (St Leonards, NSW: The Centre for Independent Studies, (2000), ch. 4.

148 J. Buchanan, 'Federalism as an Ideal Political Order and an Objective for Constitutional Reform', *Publius: The Journal of Federalism*, 25: 2, (1995), 19, 27

149 Kasper, *Building Prosperity*.

150 'Inquiry into the New South Wales Land and Environment Court' *ALJ* 74, (2000), 643.

151 *Yearbook Australia 1997*, (Canberra: AGPS, 1997), 34.

152 'Could this be Australia's new Constitution?' *ABM*, November 1992, describes Mr Ken Thomas's plan for 37 regions, each one under the direction of a kind of management committee. See also FSRC 2nd report, *Australian Federalism*, 10; Parliament of Victoria, Scrutiny of Acts and Regulations Committee, *Report of the Australian Federalism Conference, July 14-15 1995*, (Melbourne, 1994), 3.

153 *OECD Economic Outlook* No. 66, (December 1999), Table 28, 220; K. Coghill MLA, 'Benefits may be illusory', *The Australian*, (26 May 1993), 10.

154 Bryce, *The American Commonwealth*, 3.

155 Kasper, *Restoring the True Republic*, 67; also FSRC 2nd report, *Australian Federalism*, 113-14.

156 I say 'from the consumer's standpoint because Telstra's business competitors may not think there has been such a marked change: e.g. *ACCC v Telstra Corporation Ltd* (1977) ATPR para 41-540; *TPC v Telstra Corporation Ltd* (1993) ATPR para 41-256; *Talmax Pty Ltd v Telstra Corporation Ltd* (1996) ATPR para 41-535. Disputes among competitors are less important than the result for the consumer since, as Adam Smith said, consumption is the end of all production.

157 Parliament of Victoria, *Report of the Australian Federalism Conference*, 5.

158 FSRC 2nd report, *Australian Federalism*, 114.

159 'The road to riches', *The Economist*, (31 December 1999), 10, 12.

160 See e.g. S. Joy, 'Unregulated Road Haulage: the Australian Experience', in Webb and McMaster (eds), *Australian Transport Economics*, (Sydney: Aust. & NZ Book Co., 1975), 383. Conversely, in the early 1980s the Hawke federal government pressured the states into joining a national computerised legal materials database that used obsolescent Harwell software. Only Queensland stayed outside the resulting system, which was so user-unfriendly that it held back the advance of legal data computerisation in Australia by a decade.

- 161 Kasper, *op. cit. supra* n. 107, 60, 62-5. On the other hand, Professor Sharman considers that vertical fiscal imbalance is not necessarily the problem it is often said to be: *op. cit. supra* n. 36, 8-9. See also FSRC 2nd report, *Australian Federalism*, 111.
- 162 Bryce, *The American Commonwealth*, 300, 311.
- 163 Kasper, *Restoring the True Republic*, 66-69.
- 164 Epstein, 'Exit Rights', 152-53.
- 165 R. Revesz, 'Rehabilitating Interstate Competition: Rethinking the Race-to-the-Bottom Rationale for Federal Environmental Regulation', *NYU L Rev.* 67, (1992), 1210; R. Winter, 'Private Goals and Competition Among State Legal Systems' *Harvard Journal of Law and Public Policy* 127 (1982); R. Revesz, 'The Race to the Bottom and Environmental Regulation: A Response to Critics', *Minnesota Law Review* 82, (1997), 535; J. Adler, 'A New Environmental Federalism', *Forum for Applied Research and Public Policy*, (Winter 1998), 55; D. Joel, 'Rhetoric vs. Reality: New Jersey Regulatory Reform', *Regulation* 2, (1996), 55.
- 166 As above.
- 167 J. Simmons, *The Railway in England and Wales 1830-1914*, (Leicester: Leicester University Press, 1978), 47; A. Vaughan, *Railwaymen, Politics and Money*, (London: John Murray, 1997), 191-92; J. Stover, *American Railroads*, (Chicago: University of Chicago Press, 1961), 154-56.
- 168 G. Sturges, 'Taking Social Capital Seriously', in A. Norton, M. Latham, G. Sturges, M. Stewart-Weeks, *Social Capital: The Individual, Civil Society and the State*, (St Leonards, NSW: The Centre for Independent Studies, 1997), 49, 62.
- 169 Monopoly power is more likely to manifest itself in inefficiency and lack of innovation than in above-normal profits: G. Walker, *Australian Monopoly Law: Issues of Law, Fact and Policy*, (Melbourne: Cheshire, 1967), 155. In recent years, however, privatisation and competitive reforms have greatly improved the efficiency of, and outlook for, rail: R. Sims, 'In Defence of Competition: The Successful Application of Competition Policy in NSW Rail', *A.J. Pub. Admin.* 58: 4, (1999), 96.
- 170 Justice KM Hayne, 'Australian Justice in the Twentieth Century', *ALJ*, 74 (2000) 373, 374.
- 171 Galligan and Walsh, *Australian Federalism—Yes or No*, 3; also B. Galligan, *A Federal Republic: Australia's Constitutional System of Government*, (Cambridge University Press, 1995), 105.
- 172 A New Tax System (Goods and Services Tax) Act 1999, No. 55 (Cth), s. 1-3.
- 173 As above.
- 174 F.L. Morton, 'The Effect of the Charter of Rights on Canadian Federalism', *Publius: The Journal of Federalism* 25: 173 (1995), 186-88. Of particular concern has been some general language in the charter referring to, but not explicitly recognising, a right to aboriginal self-determination. Bitter disputes between aboriginal groups and provincial and federal governments have resulted, including a tragic clash between the Mohawks and the Canadian army: T. Glavin, 'Canada's native people fight for self-government on many fronts', *Federations*, 1: 1, (November 2000).
- 175 The exceptions are the privileges against self-incrimination, double jeopardy and indictment for a major ('infamous') crime except on the presentment of a grand jury. The first two rights do not seem gravely endangered in Australia today. The third never had a chance because of the difficulty in the early convict settlement days of finding 24 law-abiding grand jurors for every major offence.
- 176 Galligan and Walsh, *Australian Federalism—Yes or No*, 6-7.

- 177 J. Laws, 'Law and Democracy', *Public Law* 72 [1995], 86; AWB Simpson, 'The Common Law and Legal Theory' in A. Simpson (ed), *Oxford Essays in Jurisprudence*, 2nd series, (Oxford University Press, 1973), 77, 96.
- 178 TRS Allan, 'Parliamentary Sovereignty: Law, Politics, and Revolution' *LQR* 113, (1997), 443, 449; Laws, *Public Law*, 83; S. Sedley, 'Human Rights: A Twenty-First Century Agenda' *Public Law*, [1995], 386, 389.
- 179 R v Lord Chancellor; ex parte Witham [1998] QB 575; 586; Broome v Cassell & Co Ltd [1972] AC 1027, 1133.
- 180 Union Steamship Co. of Australia Pty Ltd v King (1988) 166 CLR 1, 10; Kartinyeri v Commonwealth (1998) 195 CLR 337, per Gummow and Hayne JJ at 381.
- 181 FSRC 2nd report, *Australian Federalism*, 57.
- 182 FSRC 3rd report, *Federalism and the Role of the States*, 184.
- 183 As above, 219-20
- 184 As above, 202-05
- 185 As above, 210-11
- 186 As above, 189-90
- 187 FSRC 2nd report, *Australian Federalism*, 31 quoting the South Australian Constitutional Advisory Council.
- 188 United States v Morrison 120 S Ct 1740 (2000); New York v United States (1992) 505 US 144; United States v Lopez (1995) 514 US 549; Printz v United States (1997) 117 S Ct 2365; Seminole Tribe of Florida v Florida (1996) 116 S. Ct. 1114; and arguably City of Bourne v Flores (1997) 117 S. Ct. 2157. See generally C. Massey, 'The Tao of Federalism', *Harvard Journal of Law and Public Policy* 20 (1997), 887; R. Brisbin, 'The Reconstruction of American Federalism? The Rehnquist Court and Federal-State Relations' *Publius: The Journal of Federalism*, 28, (1998), 189.
- 189 Justice Dixon in R. v Burgess, ex parte Henry (1936) 55 CLR 608, 669, described as 'extreme' the Evatt doctrine on the external affairs power later adopted by the High Court in Tasmania v Commonwealth, below.
- 190 Tasmania v Commonwealth (1983) 158 CLR 1; Victoria v Commonwealth (1996) 187 CLR 416, 70 ALJR 680.
- 191 Ha v New South Wales (1997) 189 CLR 465, 71 ALJR 1080.
- 192 If the states did not wish to establish a new honours system, the British government might be willing to transfer one of its unused orders to them. The Order of St Patrick, for example, which has not been awarded since Irish independence in 1923, might not be inappropriate for a country that proportionally has the largest Irish-descended population outside the Emerald Isle.
- 193 In its first major constitutional decision, the High Court said, 'In considering the respective powers of the Commonwealth and of the States it is essential to bear in mind that each is, within the ambit of its authority, a sovereign state . . .' in D'Emden v Pedder (1904) 1 CLR 91, 109.
- 194 The number of people per million of population killed in war or civil strife in the 20th century was found by the sociologist P.A. Sorokin to dwarf that for each of the previous twenty centuries, even on his initial calculations that only used data up to 1925 and thus took

- no account of World War II: P. Sorokin, *The Crisis of our Age*, (New York: Dutton, 1941), 212-17.
- 195 Galligan, *Politics of the High Court*, 25.
- 196 *Amalgamated Society of Engineers v. Adelaide Steamship Co. Ltd.* (1920) 28 CLR 129. The 'Model T' metaphor is from Calabresi, 'Limited and Enumerated Powers', 779.
- 197 An alleged crisis of tax evasion was the main pretext for the Australia Card proposal: see Walker, 'Information as Power. . .'. After the card proposal was defeated, little more was heard about the tax evasion 'crisis'.
- For the past century or more, elitist movements such as communists and fascists (as well as some less extreme bodies) in their strategies for seizing power have made effective use of the Hegelian dialectical idea that conflict determines history. According to Hegel, a force (thesis) summons up its own opposing force (antithesis), the conflict between them resulting in a third force (synthesis). From this theory came the realisation that the planned creation of conflicts or crises is a way of producing predetermined outcomes. The paradigm case is the Reichstag fire of 1933. Planned and executed by the Nazis but blamed by them on their enemies, it created a public reaction that gave Hitler a pretext for abolishing the Weimar constitution. The application of controlled chaos brought the population to the point where it willingly submitted to total control. Similarly, Sir Isaiah Berlin pointed out that totalitarian regimes present all situations as critical emergencies demanding ruthless suppression of all goals or principles except one. See P. Johnson, *Enemies of the People*, (London, 1977), 153.
- 198 P. Smith, *The Constitution: A Documentary and Narrative History*, (New York, Morrow, 1980), 306, 471.
- 199 As above, 394
- 200 As above, 425. The Constitution came under attack again in the early 20th century as an archaic document impeding social progress (17, 86). Originally, some of the makers of the 1788 constitution had favoured abolishing the states altogether (115, 128, 133), something not one of the delegates to the Australian federal conventions (including the Labor delegates) advocated.