# Chapter Eleven

# Ten Advantages of a Federal Constitution

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## Introduction: The New Age of Federalism

Worldwide interest in federalism is greater today than at any other time in human history. The old attitude of benign contempt towards the federal political structure has been replaced by a growing conviction that it enables a nation to have the best of both worlds, those of shared rule and self-rule, co-ordinated national government and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 organization", 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 China, and even that country has become a *de facto* federation by delegating more and more autonomy to the provinces, as well as allowing 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 (*Lander*) 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 centralized democratic nation states, such as the United Kingdom, France, Spain, Sri Lanka and Italy have all faced major crises of secession or devolution. 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 councils with legislative power, 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 1921 followed by Scottish and Welsh nationalism, and by civil war in Northern Ireland. The current government is now taking grudging steps towards a semi-federal structure. Sri Lanka's British designed unitary structure has had catastrophic results that might have been avoided if the Tamil 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 centralized government, the need to maintain an economic structure that could be mobilized. While the collapse of the Soviet Union and its empire has undermined the appeal of all authoritarian, centralizing ideologies, the spread of human rights values has called in question all traditional 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>

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 socio-economic developments that favour federalism: the emphasis on autonomous contractual relationships, recognition of the non-centralized 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 causing the optimum size of efficient businesses to shrink, and models of industrial organization with decentralized and flattened structures involving non-centralized 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 twentieth century.<sup>6</sup> (The United Kingdom fails to qualify because of Ireland's secession.) But 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.

Throughout the world conferences, seminars and special purpose organizations are now being put together to study and debate federalism as a liberal political ideal. In Australia, valuable work on this concept has been done by a number of scholars, and by bodies such as the Centre for Independent Studies, the Australian Institute for Public Policy and, of course, The Samuel Griffith Society.

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". 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 fails to consider the costs of the alternative but, more importantly for present purposes, it takes no account of the positive benefits of the federal model.

To some extent these 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 increasingly difficult for the States to perform their proper role, so that the advantages of constitutionally decentralized government are more and more difficult to identify and evaluate. This factor was highlighted when the recent 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 may be 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 policy-making 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 decentralization 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, 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?

### 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 long-standing right is the liberty 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 that right 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 leave and go to live in another country. But these days 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 eighties and early nineties. 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 recognized as a political right longer than perhaps any other attribute of citizenship. Plato's dramatized account of the last days of Socrates has the philosopher restating the principle in context:

"[A]ny Athenian, on attaining to manhood and seeing for himself the political organization 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". 11

In the seventeenth 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 12 — 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 the 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, 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, one must agree with Gordon Tullock's conclusion that: "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. (The States themselves — if one means by that their governments — have, on the contrary, shown an increasing willingness to surrender their rights to the Commonwealth.)<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 legislated 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, twenty-three Swiss cantons and fifty American States, makes collusion more likely and more effective. This is analogous to the problem of the small number of firms in some Australian industries in the early days of economic competition policy under the *Trade Practices Act*. As under that Act, therefore, 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 workface, 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 maximize 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", 26 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 best policy: the interventionist, paternalist approach of the New South Wales *De Facto Relationships Act* 1984, or the common law libertarianism of Queensland and Western Australia? 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.

That is another reason 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>27</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>28</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, both as regards its substance and its administration, as Lionel Murphy's federal legislation in this vital field.<sup>29</sup> A good case can be made for uniform divorce laws, rather than the separate State laws that existed before 1959,<sup>30</sup> but in this case uniformity has been purchased at a cost that many Australians still regard as too heavy. If evidence produced by alternative contemporary approaches had existed, some salutary adjustments might have been made.<sup>31</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>32</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.

As Justice Einstein of the New South Wales Supreme Court has pointed out, the exercise of these discretions is not normally reviewable on appeal. Consquently, the result of the legislation is a substantial extension of the powers of individual trial judges in matters of admissibility.<sup>33</sup> So 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. Besides adding greatly to the uncertainty of the law, this 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.

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.

#### 3. Accommodating regional preferences and diversity

*Unity in diversity.* The decentralization 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>34</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 per cent of State A, and only 40 per cent 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". 35

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>36</sup>

Paradoxically, perhaps, a structure that provides an outlet for minority views strengthens overall national unity. 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 this point when he warned that abolishing the States, even *de facto*, could fracture the unity of the nation.<sup>37</sup> Federalism thus has an important role, as Lord Bryce observed, in keeping the peace and preventing national fragmentation.<sup>38</sup> It is far from impossible that if the British had adopted a federal structure, as many reformers in the last century urged,<sup>39</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 between the Australian States. These differences are sometimes quite marked, and not only in Queensland, despite the tendency of some southern commentators to view the State as a pathological aberration. "It should be recognized", 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>40</sup>

Some commentators see regional socio-cultural 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 pronounced 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>41</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". 42

To Sharman's list of the natural boundaries between the States one could add the Queensland border ranges, which mark the 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 empathize with one another, they still need to meet and talk face to face. So it could never be said here, as Lord Bryce said 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. 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 socio-cultural differences are not too great or too territorially delineated. Multi-ethnic federations are among the hardest to sustain.<sup>44</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.

The same is true of language, ethnic and religious differences in Switzerland, to a lesser extent. The Swiss Constitution, however, has the added advantage 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 this light, Australia's relative socio-cultural 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". 46

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>47</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 this principle is called "subsidiarity", and it is now enshrined as a fundamental guiding principle in the European Union treaties. Article 3b (2) of the European Community 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 treatyspeak is applied in practice, but the principle's adoption is credited with saving the 1991 Maastricht agreement. Public misgivings over the centralizing ambitions of the French president of the Commission at the time, Jacques Delors, might otherwise have blocked any further progress towards European integration.

#### 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>50</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>51</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>52</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. Decentralized government makes people a little 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 this 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. Section 19 to 19 to 20 to 2

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 nineteenth 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 twentieth Century those theories brought forth the twin poisoned fruit of Communism and Hitlerian national socialism.

The defeat of those two monstrosities through the heroic efforts and sacrifice 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>55</sup>

The new wave of elitism has gained added momentum from the trend towards globalization. The growth of a global consciousness is no doubt a good thing, but the other side of the coin is that it has opened the way for unrepresentative bodies such as the United Nations and its agencies to implement an elitist agenda under the pretext of promulgating "international norms". <sup>56</sup> International relations circles have acknowledged this problem and given it the label "democratic deficit", 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, 57 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 practical consequences.

From the 1970s onwards, elitist politicians have repeatedly attempted to instal 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". The wave of public fear generated by this blatant attempt at political censorship was a major factor leading to 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, 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 panel. The Act was overturned by the High Court in one of its best-ever decisions, <sup>59</sup> but Senator Bolkus and his academic supporters remain on the offensive. Recently the Senator has advanced a new proposal based, not on direct prohibition as in 1991, but on a *de facto* takeover of political debate by nationally 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>60</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-realizing. It was Christopher Lasch, following William James, who perceived 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. 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, 62 it is all the more important to protect the inherently more open and democratic political texture afforded by our federal system.

*Creative controversy.* In one sense, as Campbell Sharman points out, federalism's more open texture will produce 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>63</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>64</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. They foster a sense of responsibility and self-reliance.<sup>65</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>66</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", 67 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". 68

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 organization". The States therefore also help to preserve freedom, because they can rally citizens to the cause of freedom, helping to overcome the organizational problems that otherwise might cause national usurpations to go unchallenged by the "silent majority" of citizens.

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>71</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", 72 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 sensitized 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 unjustifiable. 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-criticized practice of "legislation by ministerial fiat". Proliferating quasi-judicial tribunals took politically sensitive areas of law away from the ordinary courts so as to deprive accused persons of due process, subjecting them to rulings by tribunals whose members were appointed precisely because they were known not to be impartial.

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. Further, the whole concept of responsible government born of the 1688 English revolution, under which the executive government is responsible to Parliament, has been made a legal fiction by modern party discipline. It was finally buried 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. The Executive's counter-revolution against the 1688 settlement was thus largely complete.

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>77</sup> The Kirribilli Agreement, in some ways Australian democracy's lowest point, showed that government leaders could with impunity conspire to deceive the electorate about the fundamental matter of who was to lead the government after the election.<sup>78</sup> Finally, there is extensive evidence of systematic ballot-rigging, on a scale sufficient to have altered the outcome of at least one recent federal election.<sup>79</sup> The Joint Standing Committee on Electoral matters, on the basis of that evidence, recommended some obvious changes to the electoral laws, such as requiring proof of identity for enrolment and voting, but the government Bill embodying those reforms has been blocked by the Opposition in the Senate.<sup>80</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 is secure. In particular, 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 weakened 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 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, Australian federalism has shown its value as a safeguard of liberty. For example, Premiers and other State political leaders helped to organize the opposition to the 1991 political advertising ban. The New South Wales government was a plaintiff in the successful High Court challenge to the legislation, the most important milestone in the progress of Australian democracy 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. It must learn to evaluate the costs as well as the benefits, to consider the evidence against its theories as well as in favour. 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". 83

#### 6. Better supervision of government

Decentralized governments make better decisions than centralized ones, for reasons additional to the spur of competition provided by the citizen's right of choice and exit.<sup>84</sup> There are two main reasons for this.

Lower monitoring costs. Lord Bryce found that "the growth of order and civilization" 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. So 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". 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, and still is, 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 programs 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. 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. Further, the more liable to abuse the powers involved, the more important it is that they should be decentralized, according to Professor 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 citzenry".<sup>89</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 programs have failed.

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 central problem was not federal structure but 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 public. Paul Keating as Treasurer attacked Melbourne's *The Age* for having covered up the Victorian government's evolving financial debacles, <sup>90</sup> and others have made similar charges about the ABC and the press 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 organizations and individual journalists. <sup>91</sup> (More on this later).

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 only a fraction of its present size, was "too large to have all its affairs directed by a single government". In our own time, even a centralist like Geoffrey Sawer had to admit that in Australia, geographic factors make a good deal of devolution of powers inevitable. 93

Lord Bryce thought this factor of special importance in a new 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. 94 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. 95

A less obvious result of dividing a large country into States with some commonality of socio-cultural 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". 96

This might offset the decline of public spiritedness at the national level,<sup>97</sup> which in Australia is linked with the palpable public antipathy towards Canberra (most notably in the outlying States) and the Commonwealth Parliament, especially in the days when the tone of debate was set by Mr Keating.

#### 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, is a function of 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. 98

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' profound distrust of the career politician, this practice reduces the destabilizing 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 stabilizing effect of the Constitution.<sup>99</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". 100

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 necessary. 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<sup>101</sup> or the bureaucratic wilderness 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 destabilizing one. In New Zealand it led to public pressures that resulted in substantial changes 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>102</sup> In this way federalism tends to become a self-reinforcing system almost with a life of its own. <sup>103</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". 104

Professor Watts uses the more modern fail-safe analogy:

"The redundancies within federations provide fail-safe mechanisms and safety valves enabling one sub-system 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". 105

In this way federalism makes it harder for any one group of politicians to ruin the entire economy at once. The deadly mixture of corporate statism with 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. 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 be weathering the Asian economic storm as well as it is.

For the same reasons, damage control can bring results more quickly when the impact of an economic mistake or misfortune can be localized 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, privatization and reform of government business enterprises from New South Wales, scaling back the public sector from Tasmania. 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 crippling inflation ignited by Treasurer Frank Crean's 1973 federal Budget has only recently been brought under control, almost a generation later.

One should therefore not assume that a healthy national economy requires, or will even be assisted by, comprehensive macro-economic and micro-economic 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), and that centralized fiscal control creates a "fiscal illusion" by disguising the true cost of public services and making government look smaller than it is. In this way it perpetuates the "collectivist hand-out culture in public finance".

The economic columnist 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". 110

#### 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. 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 programs will be administered so as to minimize the proportion of the program'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 program to pay money to the poor will minimize the revenues directed to the needy, and use the surplus to expand the administering bureaucracy, improve staff gradings and pay for overseas conference travel. 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>113</sup> An often-cited illustration of this is Australia's set

of federal policies designed to benefit the Aboriginal people. The States also have Aboriginal assistance programs, but these have not attracted the same kind or degree of criticism, perhaps because a higher proportion of the funds are being used for their intended purpose.

Another example is Australia's public university system. In the days when they were administered by the States, the universities 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 vice-chancellors were part-time officials who spent much of their time on teaching and research. Commonwealth involvement consisted mainly of funding Commonwealth scholarships, which were available to any student who did better than average in the final school examinations. As a result, fully 70 per cent of students went through their tertiary education paying no fees at all.

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.

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 co-ordinators, 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. Nearly all students now pay fees, building up large debts through the HECS system. Academic salaries in real relative terms are a little over one-third of their level in the 1960s. 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. 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. 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. 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.

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 defence and foreign relations, nor are large organizations necessarily any better at dealing with complex problems than smaller ones. <sup>120</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 organizations such as hospitals or medical practices. The part of the operation that is centralized is the simplest portion. <sup>121</sup>

Even in highly centralized governments, a great many decisions must be made at a low level. <sup>122</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.

The duplication issue. This leads to an issue that often arises in discussions of efficiency in a federal system: 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 co-ordination, 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.

In 1996 Australia had 576 State parliamentarians.<sup>123</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", somewhere between 20 and 37 in number. This 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 to create elected regional assemblies, between 20 and 37 in number. By then, any savings would long since have evaporated. As matters stand, the 38.3 per cent of GDP that Australia allocates to general government expenditure is lower than the United Kingdom's 44.1 percent or France's 52.0 per cent. Six sets of State parliamentarians thus look like 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 thirteen American States was 3 million, significantly less than Australia's population in 1901. By 1832 it had risen to 15 million, but probably did not match Australia's current population of 18 million until about 1840. Switzerland, that land of supreme efficiency, has 5.5 million people for its 23 cantons. It is a more decentralized 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 University of New South Wales - ADFA 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". 127

In the days of the old Telecom government 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 Telstra today is scarcely recognizable as the same corporation as the surly monster of old.

# 10. A competitive edge for the nation

Often overlooked, even by advocates of economic 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.

A local example can be found in the Australian road transport industry. After the High Court's interpretation of s.92 of the Constitution swept away most of the regulatory structure that had impeded its development, Australian trucking rapidly earned the nation the reputation of having the world's most efficient system of long-distance road transport. 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 centralization, 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.

- 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. 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.

A race to the bottom? Professor Kasper deals with the most likely criticisms of his proposal, 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 more stringent 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 South Australia were to ban the use of genetically-engineered soya beans in processed food, and research actually showed that the beans were bad for you, local processors could advertise interstate that their products were 100 per cent free of the offending vegetable and so reap extra sales among health-conscious consumers. If the ban were not empirically justified but stemmed from food-faddist paranoia, the government and the voters who elected it would have to accept the consequences in reduced economic activity and job opportunities.

Professor Richard Espstein 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". 132

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>133</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, the 7 foot broad gauge being 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 standardized within two decades. In July, 1881, 3,000 workmen converted the entire 885 kilometres of the Illinois Central southern lines by 3:00pm on a single day. 134

Obviously our federal structure cannot account for the fact that, over a century later, most of Australia's non-standard rail networks are still unconverted. The answer, as Gary Sturgess has suggested, probably lies in the fact that Australia's railways were from the outset government-owned. In the absence of the profit motive, the most powerful motivation in the world of economic affairs is the desire for the quiet life. In the absence of the profit motive, the most powerful motivation in the world of economic affairs is the desire for the quiet life.

#### 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>137</sup> Australia's federal Constitution has been subjected to an inordinate amount of negative comment. 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 focused 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" 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*. 139

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

Australian federalism can begin to realize 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 recognize that competition and co-operation both have their place in a federation. The judiciary obviously has a crucial part to play here.

The United States Supreme Court, in a series of decisions over the last five years, has called a halt to sixty years of centralist jurisprudence, declaring that the federal division of powers is part of constitutional law, is there for a purpose and must be respected. In similar manner, the High Court could usefully revisit the extreme interpretations of constitutional provisions such as s.51

(xxix) (external affairs)<sup>142</sup> and s.90 (excise duties),<sup>143</sup> that have crippled the working of the decentralized political structure called into being in 1901.

Voters should refuse to accept further centralization of authority unless the benefits of greater Commonwealth power can be shown to outweigh the costs. Nor need people be too awed by claims that centralization 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 centralists. 144

Some adjustments in thinking will be required under a true system of competitive and cooperative federalism. State governments will need to shoulder 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, there were some consumers who actually complained about the advent of discounting because prices were no longer uniform. Eventually they realized that by shopping around a little — that is, by taking responsibility for their own lives and choices — they could enjoy a significantly higher standard of living than before. The same process will take place when the current political 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>145</sup>

Nevertheless, an awareness of the positive benefits of federalism will make the constitutional debate a more equal and fruitful one. This will mean recognizing 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, and more stable. Its decentralized, participatory structure is a buttress of liberty and a counterweight to elitism. 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 civilization, this "liberating and positive form of organization" 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, 1994, 1, 5. See generally D Shapiro, Federalism: A Dialogue, New York, 1995.
- 2. Watts, op. cit., 4.
- 3. Calabresi, op. cit., 757. See A Marr, Ruling Britannia: The Failure and Future of British Democracy, London, 1995.
- 4. Watts, op. cit. 5; Walker, *Initiative and Referendum: The People's Law*, St. Leonards, NSW, 1987, ch. 1; Watts, op. cit., 7-8.

- 5. *Ibid.*, 5.
- 6. See DP Moynihan, *Pandaemonium: Ethnicity in International Relations*, Oxford, 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 1900 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 might not now meet Moynihan's 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, 1997, 67, 82.
- 8. Ha v. New South Wales (1997) 71 ALJR 1080.
- 9. Watts, op. cit., 8-9.
- 10. M Bell, *Internal Migration in Australia 1981-1986*, Canberra, 1992, 296; same author, *Internal Migration in Australia 1986-1991: Overview Report*, Canberra, 1995, 57.
- 11. Plato, *Crito*, in *Plato: The Last Days of Socrates*, H Tredennick, H Tarrant trs., London, 1993, 88.
- 12. T Hobbes, Leviathan, Cambridge, 1991, e.g., 149-51.
- 13. R Epstein, Exit Rights Under Federalism (1992) 55 Law and Contemporary Problems, 147, 150.
- 14. *Ibid.*, 165.
- 15. Calabresi, op. cit., 789-90; R Bork, The Tempting of America: The Political Seduction of the Law, New York, 1990, 53.
- 16. Bork, loc. cit..
- 17. G Tullock, The New Federalist, Vancouver, c. 1994, 34.
- 18. 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.
- 19. Epstein, op. cit., 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 the subject of litigation: Durham Holdings Pty Ltd v. New South Wales, NSW Supreme Court No. 30033 of 1998.
- 21. P Grossman, Fiscal Federalism: Constraining Governments with Competition, Perth, WA, 1989, (vi), 31.

- 22. J La Nauze, The Making of the Australian Constitution, Melbourne, 1972, 19, 273.
- 23. J Bryce, *The American Commonwealth*, Indianapolis, 1995 (first published London, 1888), Volume 1, 315.
- 24. New State Ice Co v. Liebmann (1932)285 US 262,311.
- 25. Calabresi, op. cit., 777; Tullock, op. cit., 122.
- 26. K Mannheim, Essays on the Sociology of Culture, London, 1956, 169.
- 27. E.g., Consumer Wise, Department of Industry, Science and Tourism, Canberra, September, 1997, 2; O Morgan, book review, 14 Policy No.2, Winter, 1998,54. "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. Thus there is no "inconsistency" between a speed limit of 110 km/h in one State and 100km/h across the border.
- 28. T Sowell, A Conflict of Visions: Ideological Origins of Political Struggles, New York, 1987, 208-10.
- 29. See G Walker, *The Rule of Law: Foundation of Constitutional Democracy*, Melbourne, 1988, 293, 439.
- 30. 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 trivial when compared with those in the *Family Law Act*. The 1959 Act worked well in practice and was not controversial.
- 31. 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. 30 *supra*). 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*, in *American Bar Association Journal*, September, 1997, 28.
- 32. Australian Law Reform Commission, *Interim Report No. 26*, Canberra, 1985, para. 211.
- 33. 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.
- 34. Calabresi, op. cit., 775.
- 35. M McConnell, Federalism: Evaluating the Founders' Design (1987) 54 University of Chicago Law Review, 1484, 1494.
- 36. C Sharman, Governing Federations, in M Wood, C Williams, C Sharman (eds), Governing Federations: Constitution, Politics, Resources, Sydney, 1989, 1,4.

- 37. Weekend Austalian, October 22-23, 1994: Abolition of States a danger to unity: Goss; The Australian, September 21, 1994, Define State powers or risk their loss.
- 38. Bryce, op. cit., 308-09; Calabresi, op. cit., 770.
- 39. Bryce, op. cit., 310. For a recent viewpoint on this issue see S Jenkins, *The Australian*, July 10, 1998, *Ulster must be allowed to grow up*.
- 40. G Green, *The Concept of Uniformity in Sentencing* (1996) 70 ALJ 112, 118. There are apparently only seven homogeneous countries with no border problems: Demark, Iceland, Japan, Luxemburg, the Netherlands, Norway and Portugal: Moynihan, *op. cit.*,72.
- 41. Sharman, op. cit., 5-6.
- 42. *Ibid.*, 6.
- 43. Bryce, op. cit., 369.
- 44. Watts, op. cit., 10.
- 45. Calabresi, op. cit., 770.
- 46. Bryce, op. cit., 309.
- 47. Rights of the Terminally Ill Act 1995 (NT), overriden by Euthanasia Laws Act 1997 (Cth).
- 48. The Subsidiarity Principle (1990) 27 CML Review, 181; T Schilling, A New Dimension of Subsidiarity: Subsidiarity as a Rule and a Principle (1994)14 Yearbook Eur. L., 203; G Cross, Subsidiarity and the Environment (1995)15 Yearbook Eur. L., 107.
- 49. Schilling, op. cit..
- 50. J Bell, *Populism and Elitism: Politics in the Age of Equality*, Washington, 1992, 78; see generally Hon John Wheeldon, *Federalism: One of Democracy's Best Friends*, in *Upholding the Australian Constitution*, Proceedings of The Samuel Griffith Society, Volume 8 (1997), 189.
- 51. Presumably Acton is referring to the Achaean League in antiquity, the earliest known federation.
- 52. Acton, Nationality, St. Leonards, NSW, 1997 (first published London, 1862), 3-4.
- 53. F Fukuyama, *The End of History and the Last Man*, London, 1992, 218; A de Tocqueville, *Democracy in America*, New York, 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, 1992, 133-53.
- 54. J Bell, op. cit., 3.
- 55. C Lasch, The Revolt of the Elites and the Betrayal of Democracy, New York, 1995, 76.

- 56. See B Robertson, Economic, Social and Cultural Rights: Time for a Reappraisal, Wellington, New Zealand, 1997, 51, 60-61; R Kemp, International Tribunals and the Attack on Australian Democracy, in Upholding the Australian Constitution, Proceedings of The Samuel Griffith Society, Volume 4 (1994), 119; Senate Legal and Constitutional References Committee, Trick or Treaty? Commonwealth Power to Make and Implement Treaties, Canberra, 1995.
- 57. Lasch, op. cit.; J Bell, op. cit.; T Sowell, op. cit.; same author, The Vision of the Anointed, New York, 1995; R Nisbet, Twilight of Authority, New York, 1975; Walker, op. cit. supra n. 29, ch. 9.
- 58. The Sydney Morning Herald, August 9, 1975.
- 59. Australian Capital Television Pty Ltd v. Commonwealth (1992)177 CLR 106.
- 60. M Duffy, N Bolkus, *Was dissent stifled under Labor?*, in *The Australian*, June 11, 1998. For the views of one of Senator Bolkus's academic supporters, see H Reynolds, *The Australian*, September 25, 1996: *Unrestrained and Dangerous*.
- 61. Lasch, op. cit., 170.
- 62. J Bell, op. cit., 89.
- 63. Sharman, op. cit., 6.
- 64. Tullock, op. cit., 112.
- 65. Bryce, op. cit., 300, 311.
- 66. Acton, op. cit., 13.
- 67. Letter to ALC Destutt de Tracy, *Thomas Jefferson: Writings*, New York, 1984, 1241, 1245.
- 68. Bryce, op. cit., 311.
- 69. Acton, op. cit., 13.
- 70. Calabresi, op. cit., 786.
- 71. G Sawer, Modern Federalism, New Edn, Sydney, 1976, 153.
- 72. R Gollan, Radical and Working Class Politics, Melbourne, 1960, vii.
- 73. G Walker, The Law that Wasn't There: Retrospectivity Becomes Routine, in Australia and World Affairs, No. 5, Winter, 1990, 47.
- 74. G Walker, The Tribunal Trap, in Australia and World Affairs, No. 8, Autumn, 1991, 53. The High Court restored some legal rigour to this area in Brandy v. Human Rights and Equal Opportunity Commission (1995) 69 ALJR 191.
- 75. G Walker, Information as Power: Constitutional Implications of the Identity Numbering and Identity Card Proposal (1986)16 Queensland Law Society Journal, 153.

- 76. J Uhr, *Parliament*, in B Galligan, I McAllister, J Ravenhill (eds), *New Developments in Australian Politics*, Melbourne, 1997, 68, 72; *House of Representatives Debates*, November 24, 1988, 3206. The Howard government abolished the roster system in 1996, but it could be revived by a future government.
- 77. M Steketee, *The Press Gallery at Work*, in J Disney, J Nethercote (eds), *The House on Capital Hill: Parliament, Politics and Power in the National Capital*, Canberra, 1996, 195, 198-99, 210. The National Media Liaison Service was abolished by the Howard government in 1996, but there is nothing to prevent a future government from reviving it.
- 78. 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 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, 1993, 86-7, 89, 111, 161.
- 79. C Copeman, Amy McGrath (eds), Corrupt Elections: Recent Australian Studies and Experiences of Ballot Rigging, Kensington, NSW, 1997, 29-44, 107-130.
- 80. Electoral and Referendum Amendment Bill (No.2) 1998.
- 81. Conditional grants under s. 96 often have this character. See *The Australian*, October 9, 1990: Cabinet may force road laws on States.
- 82. In an interesting parallel development, Finn J of the Federal Court has held that a statutory research body has a 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.
- 83. Sharman, op. cit., 4.
- 84. Calabresi, op. cit., 777.
- 85. Bryce, op. cit., 314.
- 86. *Ibid.*.
- 87. Calabresi, op. cit., 777-78.
- 88. Tullock, op. cit., viii-ix.
- 89. Calabresi, op. cit., 778.
- 90. The Australian, August 29, 1990.
- 91. Steketee, op. cit., 195, 198-99.
- 92. Letter to Gideon Granger, Thomas Jefferson: Writings, op. cit., 1078.
- 93. Sawer, op. cit., 112.
- 94. Bryce, op. cit., 311.

- 95. Ibid., 314.
- 96. Calabresi, op. cit., 778.
- 97. Ibid...
- 98. C Friedrich, The New Belief in the Common Man, Boston, 1942, 135.
- 99. B Galligan, Politics of the High Court, St. Lucia, Queensland, 1987, 15,12.
- 100. Ibid., 25,251.
- 101. Britain's postwar nationalization 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.
- 102. Bryce, op. cit., 362.
- 103. Galligan, op. cit., 25.
- 104. Bryce, op. cit., 313.
- 105. Watts, op. cit., 22, emphasis added; Sawer, op. cit., 124.
- 106. Alan Wood, The Australian, August 2, 1994: Our Federation at a Crossroads.
- 107. W Kasper, Competitive Federalism: May the Best State Win, in G Walker, S Ratnapala, W Kasper, Restoring the True Republic, St Leonards, NSW, 1993, 55, 63.
- 108. Grossman, op. cit., 14.
- 109. Kasper, op. cit., 60.
- 110. PP McGuinness, The Australian, October 31, 1990: Federalism's Hypocrites.
- 111. See sub-heading 4 above.
- 112. Grossman, op. cit., 7.
- 113. Ibid., 11.
- 114. 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.
- 115. 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 just over a third of that level, even though the judge's real salary itself fell during the inflation of the '70s and '80s.
- 116. Calabresi, op. cit., 775; Grossman, op. cit., chs. 3 to 6.

- 117. *Ibid.*, 9-10. Vertical competition in federations can also improve governmental efficiency: A Breton, *Towards a Theory of Competitive Federalism*, 3 *European Journal of Political Economy*, Nos 1 and 2, 1987, 263-329.
- 118. Calabresi, op. cit., 779.
- 119. 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.
- 120. Tullock, op. cit., ch. 7.
- 121. Ibid., 95.
- 122. Ibid., 99.
- 123. Yearbook Australia 1997, Canberra, 1997, 34.
- 124. Could this be Australia's new Constitution? The Australian Business Monthly, November, 1992, describes Mr Ken Thomas's plan for 37 regions, each one under the direction of a kind of management committee.
- 125. K Coghill, MLA, *The Australian*, May 26, 1993: *Benefits may be illusory*; *OECD Economic Outlook* 53, June, 1993, Table R15, 215.
- 126. Bryce, op. cit., 3.
- 127. Kasper, op. cit., 67.
- 128. See e.g., S Joy, Unregulated Road Haulage: The Australian Experience, in Webb and McMaster (eds), Australian Transport Economics, Sydney, 1975, 383.
- 129. Kasper, *op. cit.*, 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.*, 8-9.
- 130. Bryce, op. cit., 300, 311.
- 131. Kasper, op. cit., 66-69.
- 132. Epstein, op. cit., 152-53.
- 133. R Revesz, Rehabilitating Interstate Competition: Rethinking the Race-to-the-Bottom Rationale for Federal Environmental Regulation (1992) 67 New York University Law Review, 1210; R Winter, Private Goals and Competition Among State Legal Systems (1982), Harvard Journal of Law and Public Policy 127.
- 134. J Simmons, *The Railway in England and Wales 1830-1914*, Leicester, 1978, 47; A Vaughan, *Railwaymen, Politics and Money*, London, 1997, 191-92; J Stover, *American Railroads*, Chicago, 1961, 154-56.

- 135. G Sturgess, *Taking Social Capital Seriously*, in A Norton, M Latham, G Sturgess, M Stewart-Weeks, *Social Capital: The Individual, Civil Society and the State*, St. Leonards, NSW, 1997, 49, 62.
- 136. 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, 1967, 155.
- 137. The number of people per million of population killed in war or civil strife in the twentieth Century was found by the sociologist PA 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, 1941, 212-17.
- 138. Galligan, op. cit., 25.
- 139. Amalgamated Society of Engineers v. Adelaide Steamship Co. Ltd (1920)28 CLR 129. The "Model T" metaphor is from Calabresi, op. cit., 779.
- 140. 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, (1997) 20 Harvard Journal of Law and Public Policy, 887.
- 141. 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.
- 142. Tasmania v. Commonwealth (1983)158 CLR 1; Victoria v. Commonwealth (1996) 70 ALJR 680.
- 143. Ha v. New South Wales (1997) 71 ALJR 1080.
- 144. An alleged crisis of tax evasion was the main pretext for the Australia Card proposal; see Walker, G, *Information as Power ....., op. cit.*. The card was not introduced, but little more was heard about the tax evasion crisis.
- 145. P Smith, *The Constitution: A Documentary and Narrative History*, New York, 1980, describes the tensions that appeared from the outset over central power (306, 471) that led Chief Justice Marshall to write in 1832 that "our Constitution cannot last" (394). By the 1850s the Union was in its "death throes" (425). The Constitution came under attack again in the early twentieth 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.