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One Nation, Two Federalisms: Rediscovering the Origins of Australian Federal Political Ideas

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Abstract

Federalism is usually described in Australian political science and history as representing one, coherent amalgam of ideas, first enunciated in Australia in the 1840s-1850s. At the same time, Australia experiences ongoing debate about the wisdom and applicability of federal ideas in their present geographic form, suggesting schisms not simply within Australian politics but within federalism itself, sufficiently deep to require a reconsideration of current federalist orthodoxy. This paper seeks to reopen debate about the origins and diversity of federal ideas in Australia by squarely attacking orthodox assumptions regarding their historical starting point and subsequent hegemonic character. The territorial separation of Van Diemen's Land from New South Wales in 1823-1825, the foundation of Port Phillip in 1835-1841 and other events reflected a significantly earlier reception of federal thought into Australia than previously described. Sometimes hinted at, but hitherto not analysed, this first federalism had a previously unappreciated level of support in British colonial policy and drew directly on Benjamin Franklin's 'commonwealth for increase' ideas of territorial change booming in America. While these discoveries entrench notions of the suitability of federalism in Australia, this original Australian federalism was quite different to the 'classic' or compact theory of federalism dominating Sydney and London ideas of the 1840s-1850s, the 1890s and the bulk of 20th century scholarship. In fact Australian political thought contains not one, but at least two quite distinguishable and sometimes conflicting ideas of federalism. By recognising Australia's first, more decentralist version of federal principle, the paper emphasises Australia's uniqueness in global history, exposes as a myth the assumption that Australian federalism grew purely out of a landscape of autonomous Australian colonial governments, and reveals that most colonies were formed in circumstances which presumed their long-term role as subnational units in a continental federation. This reappraisal of federalism's roots helps explain longstanding dissent over the territorial basis of Australian constitutionalism and aids the potential for a new reconciliation of federalism and regionalism in Australian political thought.

1. Introduction

When did federal ideas first begin to take shape in Australian political history, influencing the design and evolution of Australian political institutions? What was the basic theoretical content of these ideas and why, after many generations, do these questions even matter? This paper argues that both the timing and the content of Australia's reception of federalism are vitally important not only to the past, but the present and future of our political structures. This is not least because modern Australian political science and constitutional history have so far got these basic elements of our federal story – original timing and content – quite badly wrong. Whereas conventional scholarship currently records federal ideas as making their main debut in 1840s discussions in Sydney and London, a fresh and critical evaluation of the history of Australian political ideas reveals federalism to have made its entry at least 20 years earlier, in a manner that was more powerful and

which has continued to have powerful effects. The discrepancy is explained, for the most part, by the fact that these two different periods each saw the entry of a distinctly different type of federalism, only one of which has come to dominate our later analysis. This is despite the importance of both ideas, and the even greater importance that can now be properly attached to the ongoing and unresolved interplay between them.

The first part of the paper broaches the question of when federal ideas made their Australian debut by reviewing the conventional account of federal ideas as introduced in the 1840s, too early for parochial colonies as yet unready to mature into nationhood. The second part addresses unanswered questions about the adequacy of this conventional story, leading to a substantially new story based on a reanalysis of Australian constitutional history focusing on its territorial contents (Brown 2003). This story suggests that by the 1840s, core elements of British policy and colonial politics had already been driven by federal constitutional notions for quite some time, a chain of events with great significance for the evolution of modern federal principles on a global scale. The third part of paper further evaluates some Australian implications of these factual revisions, beginning with an examination of why the existence of an earlier body of federal ideas has so far gone largely unnoticed, and extending to an account of how Australia's first federalism evolved and continues to stand apart from the conventional story. This analysis leads to the conclusion that two distinct bodies of ideas were involved, with perhaps only the first, more marginalized version truly classed as 'federal'. The chapter concludes by suggesting three implications of this revised history for our contemporary understanding of Australian political attitudes and practices.

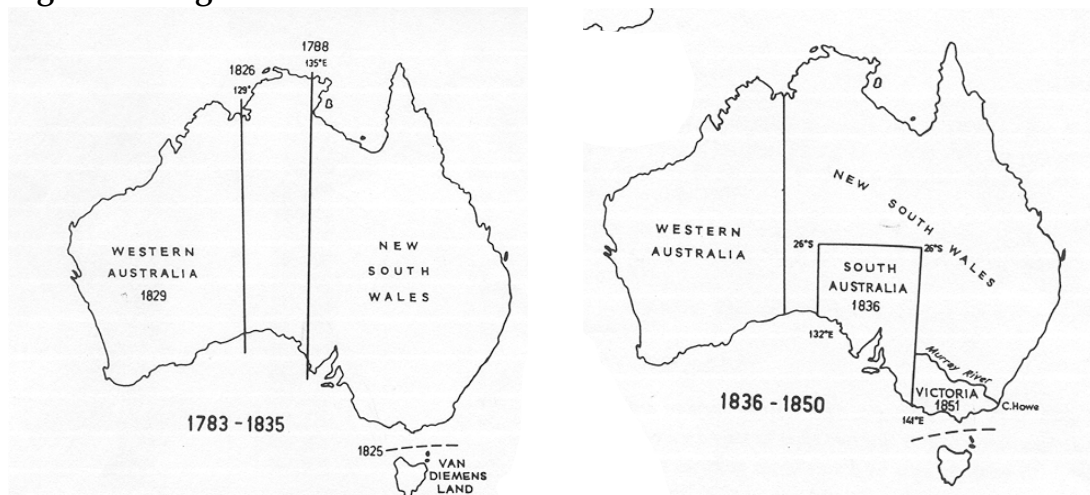
2. The Dating Game: When Did Australian Federalism 'Arrive'?

The conventional story: Sydney, free trade and Imperial consolidation

Our most familiar story of Australian federalism begins in the early 1840s, as convict transportation to New South Wales was abolished and free European settlement

accelerated. By this time there were four Australian colonies: Van Diemen's Land and South Australia had separated from NSW in 1825 and 1836, and Western Australia had joined the group in 1829 (*Figure 1*). Modern political science describes these subdivisions as inevitable, given that "a single hierarchical governing structure, suitable for the early prison administrations and Crown control of land settlement, was quickly found to be quite unsuited" to Australian geography" (Holmes & Sharman 1977: 12-14; also Sharman 1987: 42-3). Instead, as Holmes and Sharman continue in this account, a general "movement away from a centralised and tightly organised society of administrative officers towards freedom and decentralization" saw sovereign political authority "fragmented between six regional centres". New territories "broke from the mother colony" (Irving 1999a: 2) because, we presume, the mixture of British political theory and colonial needs produced no governance alternative.

Figure 1. Anglo-Australian boundaries 1783-1851



Source: Jeans (1972: 11), see also McLelland (1971) cf Macintyre (1999: 96).

At the same time, according to Holmes and Sharman (1977: 12-14), not simply 'diversity in diversity' but "diversity in unity" was "the pattern of Australian government from its earliest settlement". By the early 1840s at least some colonial leaders were seeking institutional methods of rejoining the colonies for at least limited purposes. In 1842 the early NSW Legislative Council passed a law to ensure duty-free trade with Tasmania and New Zealand, seeking to ensure Sydney's role as

the colonial commercial trading hub, but this was disallowed as beyond its power. Support for the principle of a free-trade union became routine particularly in Sydney, leading in 1846 to an official proposal by the NSW Governor, Sir Charles Fitzroy, that a "superior functionary" such as a Governor-General should be appointed to ensure consistency in "all measures... affecting the general interests of the mother country, the Australian colonies, or their intercolonial trade" (quoted Wentworth 1956: 8-9). This proposal originated with the NSW colonial secretary Edward Deas-Thomson, earning him a title amongst some as "*par excellence* the Father of Australian Federation" (Cramp 1914: 123-6; see also Irving 1999a: 3-4, 24, 357-8, 430).

Thomson's proposal coincided with the return of the third Earl Grey to the colonial office, proponent of a Whig policy of Imperial free trade and supported by officials who had long struggled to devise a constitutional blueprint for long-term management of the Australian colonies. In 1847-1848 in the New Zealand and Australian Charters, and in 1849-1850 in the *Australian Constitutions Bill (No. 2)*, Grey's administration twice formally proposed a national or 'general' assembly of colonial legislators to take Australia forward (Earl Grey 1853: 317-23, 427-8; Egerton 1893: 284; Cramp 1914: 122-7; Ward 1958: 23; Melbourne 1963: 275-351; Sawyer 1969: 6-7; McMinn 1979: 92; McKenna 1996: 110-1).

Our conventional federal story continues that these first official proposals for intercolonial union were never realised because Australians were simply as yet unprepared to think nationally (e.g. McKenna 1996: 59). For example, we presume the people of Port Phillip were focused exclusively on achieving their own territorial separation, only developing their interest in national union quickly thereafter (Quartly 1999: 221-3). Britain's grants of responsible government in the 1850s placed what were now five (then six, with Queensland in 1859) separate territories on a path more away from federal union than towards it, creating "quasi-sovereign bodies, politically independent of each other" (Joske 1967: 34; Irving 1999a: 2). Finally, through the 1880s-1890s, the colonies' political maturation, nationalism and other

cultural developments finally brought the political and economic advantages of the earlier concepts of union. Had there been doubt in the 1840s-1850s that the nation should be federal, this was certainly gone by the 1890s – it became "hardly surprising, given the political history and geography of established self-governing colonies" that federalism provided the basis for the Australian nation (Galligan 1995: 32, 52-5; Sawyer 1969: 135, 179; Hirst 2000: 1; Saunders 2001: 133).

Questions raised by the conventional story

The theoretical content of the federal ideas represented in this story will be revisited below. What is important here is that despite its great familiarity, the story raises several questions that modern political science and constitutional history have left unanswered. It is generally a neat, linear story – in fact, it tends to represent the type of the teleological metanarrative or “forced march” of Australian history as progress towards nationhood, that we now often query (e.g. McCarty 1978: 104). Even accepting the story’s linear march, it has never provided much insight into where federal ideas suddenly came from in the 1840s, much as it has never dealt squarely with other possibilities – such as that federal ideas might also be located in the political experience of Indigenous Australia. Although we now accept Aboriginal and Torres Strait Islander frontiers and boundaries as representing "the continent's oldest political units" (Davis & Prescott 1992: xi), a decade after the High Court's *Mabo* decision (1992) we still have no substantial debate about the lessons of indigenous constitutional geography for post-colonial political structures, such as in the manner suggested by Iroquois influences on American federalism (Morris 2001: 293-4). If we regard the characteristic feature of “the federal form of 'national' decision-making” to be governance through “non-centralised networks” and “matrix-style processes” (Fletcher 1998: 36, citing Elazar 1997), a very new/old starting point for interpreting federal concepts may lie within our shores.

However even without reaching beyond European political culture, our conventional hegemonic story of a single, coherent body of federal ideas also has at least three

specific problems. First, the story rests on a factual presumption that British authorities were inclined against territorial fragmentation, but at a loss to prevent it. Is it likely that British and colonial ideas about constitutional structure were determined without *any* theories of alternatives, or even primarily by Australian conditions? British theories of constitutional decentralization may have been contested but were scarcely absent. Surely in light of North American events before, during and since the Revolution (1776-1783), British officials had second-to-none experience in the spatial dimensions of colonial politics; and surely American developments were also high in the minds of colonists sent or attracted to Australia. The foundation of the Australian colonies may have represented a new chapter, but not a *separate* one in the ongoing colonial story dominated by post-revolution America and Britain's efforts to retain Canada (Manning 1966). In later political theory, we know the key feature of American modern federalism (divided popular sovereignty) represented a massive watershed in European concepts of nationhood, recognised throughout the colonial world as the first "sustained and principled counter-argument" for local/regional as well as central/national "legal life" (Blomley 1994: 114; see e.g. Sawyer 1969: 1; Galligan 1981: 130; Watts 1996: 7). Do we really believe that Australia's territorial fragmentation to the 1840s was shaped purely as an interplay between centralist British officials and fledgling Australian communities, with neither conscious of the American federalism unfolding at the same time?

The second question raised by the conventional story is whether the early fragmentation of territory was really the product of a political "movement towards freedom and decentralisation" of the kind suggested by Holmes and Sharman, against the contrary inclinations of British officialdom. Van Diemen's Land was formally separated in 1825, under the 1823 *Act for better Administration of Justice in New South Wales and Van Diemen's Land, and for the more effectual Government thereof* (Melville 1835: 18; Clark 1962a: 341, 373-4; McMinn 1979: 18, 20; Lumb 1991: 19, 33). This came a quarter-century after Tasmania was discovered to be an island (1799) and 20 years after its settlement as a British military outpost (1803). Over that time

period, it achieved relative prosperity as a part of NSW, its European population growing to over 12,000 (more than 25% of the total) and enjoying greater political stability than Sydney – all without territorial autonomy (Greenwood 1955; Clark 1962b: 122-4; Ward 1987: 357; Blainey 1966: 76-7; Robson 1989: 84-94; Shaw 1989: 202-5). Both the next two subdivisions, for Swan River in 1829 and South Australia in 1834-1836, took place in British law *before* any settlement could give rise to *in situ* demands for greater autonomy. In the decades before 1842, was the chain of British territorial decisions really forced on officials against their original policy preferences or did it reflect a positive logic of its own?

The third question prompted by the conventional story is whether the ideas of intercolonial union that arose from 1842 really failed to take hold because Australians were unprepared to think nationally. Earl Grey's proposals for general government failed not due to Australian popular attitudes, but rather to the House of Lords' rejection of national institutions as a "rash and perilous innovation" (quoted McMinn 1979: 46-7). In Australia the proposed national elements of the British plans appeared to be routinely supported, with the NSW Legislative Council calling for their reintroduction when advising on responsible government in 1853 (NSW Legislative Council 1853c: 121-2; Wentworth 1956: 7, 10). The *Sydney Morning Herald* condemned the "huckstering notions of statesmanship" encouraged by the four stand-alone constitutions, as each colony proceeded to legislate and bid against the others "like rival tradesmen competing for custom" (SMH 1857 quoted Ward 1958: 465). Tasmanians argued explicitly that responsible government should include national as well as provincial structures (see SMH 1853a), just as Andrew Inglis Clark would later describe Australia's six regrettably separate constitutions as having produced "evil results" (Clark 1895 (2001): 108; Haward 1995: 52-3; Neasey 2001: 259). The new 1850s constitutions each sought to replicate "a form of Government based on the analogies of the British Constitution" (NSW Legislative Council 1853c; 1853b), but transparently these were not jurisdictions ever likely to be 'national' in stature. A group of Shoalhaven landowners stated the obvious when they petitioned the NSW

legislature for an intercolonial conference "to prepare one Constitution for Australasia":

[I]t appears to your Petitioners strange and unstatesmanlike, as well as a most unseemly and untoward system of patchwork legislation, that Australasia, comprising but four Colonies, Dependencies, not far distant from each other, peopled by the same race, British subjects too... shall be doomed to have no less than four Constitutions. The great study and aim of all practical British Statesmen is not only to have and preserve *one* British Constitution, but also to assimilate the local laws of England, Ireland, Scotland, and Wales, as being most conducive to [inter alia] the social and political harmony of the people (NSW Legislative Council 1853a; Cramp 1914: 128-9).

The purpose here is not to account for the constitutional outcome, but to note evidence that rather than embryonic in the 1840s-1850s, the concept of an Anglo-Australian nation may have already been established. After all, if colonial Australians weren't thinking of themselves as a future nation – loyal like British North America rather than revolting like the United States – what *were* they thinking? Apart from cooperative Lords, the missing component appeared to be an official mechanism for negotiating the reunion of what in 1850 remained only four colonies. The obstacles seemed to be less conceptual than related to political leadership, as the *Sydney Morning Herald's* correspondent on the constitution-making process moaned:

Oh, for a Washington, or a Franklin! – But we may sigh in vain (SMH 26 August 1853).

Together these questions provide a new departure point for investigating federalism's Australian origins, challenging the presumption that federal and national ideas only evolved in Australia from 1842. Mainstream constitutional scholarship has only rarely speculated on this possibility: Warden (1999: 191-3) has noted the peculiar strength of Tasmanian interest in America right from the island community's earliest days, while Irving (1999b: 2) has remarked cryptically that "the idea of joining the unwieldy Australian colonies together" seemed to have been "in

the minds of officials... even before the division of the colonies" began. If so, what did these interests and ideas entail *other than* some kind of federalism, and why has its evidence so long escaped us?

3. The New Story: Hobart, Imperial recovery and 'commonwealth for increase'

The questions raised in the previous part have a logical answer, providing a new understanding of when, how and why federal ideas began actively influencing the development of Australian institutions. They can be seen as having definitively arrived not just in proposals for intercolonial union from 1842 but in two earlier, more fundamental ways – in British colonial constitutional policy from at least 1822, and in the political behaviour and expectations of civilian colonists from much the same time.

Territorial fragmentation and British policy

True to the conventional story, the original British policy preference in Australia was for highly centralized administration. However this preference was not borne of any illusion that one centralized hierarchy represented an effective form of governance for civilian colonization, but of a deliberate policy to only found new colonies based on military rather than civil law after the American Revolution. For decades, the loss of the United States remained "a trauma the British could never forget" (Hyam 2002: 53). Colonial constitutional policy reacted by focusing in two directions: on retaining the loyalty of existing colonies, especially Canada; and limiting new settlements to strategic military posts, governed according to "the well established legal doctrine that in a conquered land the king's will was omnipotent", without the complex problems of civil rights or civil institutions (Egerton 1893: 258-60; Manning 1966: viii, 287-99). The establishment of NSW as a prison jurisdiction exemplified this course.

However all this changed after the Napoleonic Wars (1815) when British attention fell sharply on the question of how Imperial possessions were to be returned to profitability. One major result was the 1819-1823 colonial inquiry of J. T. Bigge, a

"landmark in Australian history" but also part of a broader debate on the management of the Empire (Manning 1966: 539, 525-40). The Bigge inquiry provided the conduit for the decision to end military rule and establish civilian government under the 1823 legislation, beginning with an independent civilian judiciary, separation of Van Diemen's Land from NSW and establishment of the first appointed Legislative Councils. Transportation continued but to encourage free settlement, convicts were removed into pastoral service or new remote penitentiaries. For NSW and its offshoot, the end of 35 years of military rule was part of the decision that Australia should cease to be "the mere resort of felons" (Bigge), begin its development as a proper colonial society and pay its own way.

Australia's civilian era began not in isolation, but in the direct context of what had happened and was now happening in Europe and North America. Some such as Sir Joseph Banks had always argued that Australia's destiny was to replace the opportunities lost in the first New World:

I see the future prospect of empires and dominions which now cannot be disappointed. Who knows but that England may revive in New South Wales when it has sunk in Europe? (Banks to Hunter 1797, quoted Manning 1966: 287)

The important element of the resumption of this path from 1823 was the fact that by this time, British colonial policy was not only keenly conscious of but keenly interested in the dynamics of modern federalism. With this knowledge, we can reappraise Australian events as indicating that British authorities were not 'forced' to accept an unwelcome territorial fragmentation, but rather deliberately instigated a policy of fragmentation in a manner fully consistent with a federal strategy.

The evidence for this conclusion is both general and specific. We often presume from later attitudes that Britain turned its back on post-revolutionary American democratic and territorial reforms. This was never the case; both in their efforts to retain Canada and continuing interest in the 'Great Experiment', British colonial

officials quickly responded to the revolution by reevaluating its causes and beginning to copy its lessons, still "intimately connected" to the growing republic in a "single Atlantic economy" (Hyam 2002: 54). Britain had also been shocked into recognizing the need for colonial 'nation' or dominion status within the Empire if it was to avoid further political losses. Britain could now not but engage with the idea of dominion nations, given this was a theory proposed by loyal American elites trying to prevent the 1776 declaration of independence but which British authorities had refused to recognize, leaving a standing reminder that London had only itself to blame (Jensen 1940: 108; Rossiter 1953: 306-8, 339-41). British North America was reconstituted as a 'national' colonial group almost immediately after the revolution. For example, Lord Dorchester was appointed in 1786 as Canada's first Governor-General, and quickly affirmed the need for a new approach since "the Policy which lost those great [American] provinces can not preserve these scattered and broken Fragments which remain" (1793, quoted Manning 1966: xiii, 36-7).

As well as becoming reconciled with notions of colonial nationalism, so too British policy was by 1823 specifically keenly interested in the lessons American federalism presented for colonial development. America's economic growth was closely linked with and symbolized by the fact that in the half-century since independence, the thirteen United States had become 24, with the number still growing as old territory was subdivided and new territory acquired. Development was being directly supported and encouraged by the controlled roll-out of new state governments as territory was colonized and populated. The territorial fragmentation that long complicated American colonial development had been transformed by union into a positive good. In addition to its transformation of democratic principles, modern federalism carried this spectacular lesson in the spatial dynamics of colonial political economy. In 1852 William Gladstone confirmed that America was "the great source of experimental instruction, so far as Colonial institutions are concerned", while earlier the radical politician J. A. Roebuck was one of many to admire the American system of new state creation for its apparently automatic operation:

The whole thing was like a well-made watch – it went from [the start] and never ceased to go (Roebuck, quoted Hyam 2002: 54).

Moreover the sense of wonder with which British policymakers viewed American progress matched the fact that like a machine, the federal mechanism of new state creation had indeed been planned. American federation had not only seen many parts unite as a whole, but at the same time agree to create more of their own number. Like intercolonial union itself, this principle had been explored by American elites prior to independence, led by Benjamin Franklin's belief that a federal capacity to create new governmental units would facilitate more efficient colonial expansion. Franklin observed in his 1754 'Albany Plan' that "a single old colony does not seem strong enough to extend itself otherwise than inch by inch", and proposed that intercolonial union could solve this by working as a "commonwealth for increase" (quoted Beer 1993: 155-8, 354-5). On his theory the grouped colonies would use their central government to grow the wealth of all by securing territory presently unclaimed or unused, granting it to settlers, organising new constituent governments and ultimately admitting them to the Union under what became Article IV of the 1787 Constitution. In practice the mechanism's establishment in 1776-1787 was not as neat as might otherwise be assumed (Jensen 1940), but Franklin's principle proved highly effective for expanding the nation and its institutionalization provided one of "the sturdiest foundations of the federal system" (Glassner 1993: 155).

If British policymakers were by the 1820s thinking actively in federal terms, what is the evidence they acted on these thoughts in Australia? The desire to institute a similar process was visible in the very first decision to separate a new governmental jurisdiction – Van Diemen's Land. As we saw, this was not an *ad hoc* decision as much as one part of a conscious shift in British constitutional policy. In late 1823 the island's new Lieutenant-Governor, George Arthur, was dispatched from London with not only instructions for separation, but advice indicating where the territory

was intended to fit in the new constitutional era (Melville 1835: 20; Clark 1962a: 373). This advice came from James Stephen, the colonial office counsel of 10 years' standing and main architect of the 1823 Act, who was also soon to be permanent under-secretary for the colonies for almost 30 years (Crowley 1955: 49-50; Ward 1958: 22-9; Manning 1966: 77). Stephen advised Arthur to shape the new colony as:

one branch of a great and powerful nation, which must exercise a mighty influence for good or evil over a vast region of the earth... Christian, virtuous and enlightened (James Stephen 1823, quoted Clark 1962a: 373).

An "uncompromising legalist" (Pike 1957: 35), Stephen spoke with a clear view that the restarted colonial project was indeed about building a new British South Pacific nation, not least by resuming the territorial pattern of multiple colonies that had joined to form and grow in America. By definition, Van Diemen's Land was just the first of the necessary 'branches'. The constitutional intent that these branches were not simply to be stand-alone colonies but a national group was even confirmed by the style of Arthur's appointment. Despite the familiar belief that Van Diemen's Land was made "independent of New South Wales" (Melville 1835: 52) and that Arthur thereafter "dealt directly with... London" (Townesley 1991: 37), Arthur's technical commission was as constitutional junior to NSW Governor Ralph Darling, who retained commissions as "Governor-in-Chief to the island of Van Diemen's Land" and "Captain-General" of both colonies (see Melville 1835: 52; Wentworth 1956: 8). At least on paper, Darling was to Australia what Dorchester was to Canada – a Governor-General of the kind that, on the conventional story, was supposedly only mooted two decades later.

One immediate reason why the federal content of the British plan has escaped later history is that after separating Van Diemen's Land in 1825, British authorities did not appear to maintain quite the same strategy. The manner and form of the next territorial decision, to claim Western Australia in 1829, were largely incomparable, and the Swan River settlement itself was "almost accidental and largely unplanned"

(Statham 1981: 181-9). The subdivision of South Australia in 1834-1836 was ostensibly more consistent with a federal plan: its 1834 enabling Act authorised "a British province or provinces", the subcolonial term used in Canada, and a decade later British authorities were still describing the province as "part of Our said territory" of New South Wales (see McLelland 1971: 673; Howell 1986; Lumb 1991: 30). However these are events best explored elsewhere – for present purposes it is enough that they do not cloud the relative clarity of the original approach. Nor did ever-changing British policies mean that federal ideas were not also now at work within early Australian colonial expectations.

Territory and colonial federal expectations

Implicit in the idea of federalism as a colonization strategy descended from Franklin's 'commonwealth for increase', was that territorial subdivision was a 'bottom-up' political process as well as a 'top-down' one. Territorial fragmentation was intended to work as a colonial plan by attracting new settlers to the frontier with the offer of their own governmental jurisdiction, as well as creating local institutions to support its accelerated development. Franklin's commonwealth relied directly on the common desires of individual settlers for self-government and economic advancement. So too this 'settler-eye-view' of federalism can be seen at work not only in the separation of Van Diemen's Land but a decade later in the immediate campaign for the separation of Victoria.

The fact that British colonial authorities had clearly determined to separate Van Diemen's Land did not mean there was not also strong local desire for it. For example, not knowing that Arthur had already been despatched in late 1823 with instructions for the separation, an April 1824 meeting of "landholders, merchants and other inhabitants" in Hobart resolved to petition the King to "elevate Van Diemen's Land into a separate and independent Colony" as authorized by the 1823 Act (quoted Melville 1835: 20; Ellis 1933: 19-20; Clark 1962b: 122-4). Further, for the reasons noted by Warden (1999: 191-3), there is little doubt that like British officials, the Tasmanians

saw the new constitutional path of island and continent in terms directly comparable to the booming American union. From the outset, Anglo-Australia had been linked to American developments not simply through British policy but because its settlements fell directly under her orbit in a "Pacific economy" (Hyam 2002: 55). Hobart established an early role as a base for American traders and fishing fleets, producing myriad indications that American political experience had become a powerful influence by the 1820s (Melville 1835: 7, 160; Greenway 1972: 77-8; Robson 1989: 87, 93). With many of these fleets hailing from New England, it seems particularly likely that the Tasmanians saw their 1823-1825 separation from NSW, as Australia's first new colony, in comparable terms to the 1820 separation of Maine from Massachusetts – America's tenth new state (Banks 1973).

The evidence that Australian communities wanted territorial self-government, but still also saw it in terms of membership of a continental polity did not end with the separation of Van Diemen's Land. From 1835 the same 'bottom up' political dynamic was again clearly visible in events that lead ultimately to the creation of Victoria. The foundation of Port Phillip (Melbourne) showed all the signs that territorially-based colonial expansion as envisaged in Franklin's 'commonwealth for increase' was now widely expected in Australia. Port Phillip was born of a moving frontier, Tasmanian pastoralists having determined as early as 1827 that they wished to found runs on Bass Strait's northern shore (Roberts 1924: 205-7; Melbourne 1963: 331-2). After separation the north of the island quickly became a crowded colonial staging post, swelled by arrivals as Australia's first major port-of-call, as well as by refugees from less vibrant areas. In 1834 the Henty family – already refugees from Swan River – reembarked to found a pastoral run at Portland, and a year later John Batman's Port Phillip Association made a larger jump, forcing official grants and triggering a land rush with the American frontier tactic of 'buying' 600,000 acres from their Aboriginal owners (Greenway 1972: 85-6; Kociumbas 1992: 119-23, 179-90; Shaw 1989: 207-13). Not only did this tactic again demonstrate a direct American influence, but it also differed further from the normal NSW tradition of 'squatting' by extending beyond a

mere claim to property, to a claim to political territory. By March 1836 the Port Phillip Association's London supporters had also asked the colonial office to proclaim a new colony (Melbourne 1963: 331-4).

Federalism, in the sense of Franklin's 'commonwealth for increase' now appeared to be clearly in action in Australia. Superficially it may seem that the new Port Phillipians were simply acting out of pure parochialism. "All other political ideas" were to be secondary to their goal of territorial autonomy from that point until achieved in 1851 (McMinn 1979: 35; Priestley 1989), a description supporting the assumption that only *after* separation did they turn to ideas of federal intercolonial union. However this assumption denies the possibility that like their Tasmanian predecessors, many of the Victorians always saw colonial separation as fully consistent with, indeed as the *path* to an Anglo-Australian nation. Separation provided the building-blocks without which a strong federal nation could not exist. Separation was therefore itself a federal concept, in which local autonomy, development and nationhood (within Empire) all worked together. In Victoria this continued to be supported by American experience. The early Melbourne chamber of commerce reportedly remained dominated by Americans (Hyam 2002: 55). De Tocqueville's *Democracy in America* had just appeared and been immediately translated and distributed throughout the Empire, documenting federalism's elasticity and the smooth interaction of America's growing number of states "like companies of adventurers, formed to explore in common the wastelands of the New World" (de Tocqueville 1835: 295-7, 398; Blomley 1994: 120-1; Hyam 2002: 53; Patapan 2003: 3, 6).

If there was any doubt as to the currency of these concepts within Victorian separation thinking, it is dispatched by the entry into the Port Phillip separation campaign of the man who became its elder statesman, Sydney's John Dunmore Lang. In November 1841 Lang visited Port Phillip for the first time to raise money, but soon found himself regaling separationist audiences with his experiences from a recent 10-

week trip to the eastern United States. Having also just read de Tocqueville, Lang assured the people of Melbourne that their campaign accorded with the driving force of America's progress – its spontaneous division into small democratic states.¹ After providing such a strong theoretical justification for the contribution of self-government to Australian destiny, Lang's popularity at Port Phillip appeared to be sealed. With or without republicanism, Australians could and should have the benefits of federalism, and by the early 1840s many appeared to see themselves as already advancing firmly down that track.

The historical significance of Australia's first federalism

Several differences between this first Australian federalism as received in the 1820s-1830s, and the conventional concept normally described from 1842 are summarized below (Figure 3). However it is worth clearly stating perhaps the most fundamental theoretical distinction, since it highlights the potential global significance of what had already happened in Australia by 1842, hitherto unrealized. This difference is revealed by examining the 'mobilisational orientation' embodied in each set of ideas – a focus of analysis suggested by King (1982: 21-3, 75, 134-9) which involves comparison of federal approaches with reference to intended decentralization, centralization and 'balance'.

Using King's analysis, the basic mobilisational orientation in the formation of most 'classic' federal systems is one of partial centralization. The conventional federal archetype for Australian purposes has always been that of previously autonomous

¹ See Baker (1985: 165-80, 188-201, 290-304, 329-43). Lang is most noted for his republicanism (e.g. McKenna 1996; Irving 1999a: 391-2), but his role in territorial politics arguably had a more direct impact on Australia's constitutional development, was central to his endorsement as one of Port Phillip's first legislative representatives in 1843, Moreton Bay's in the 1850s and his later christening as Australia's "father of Decentralisation" (Ellis 1933: 48, 57). Significantly, as in 18th century America, Lang first expressed himself a federalist while also a loyalist, only turning republican after personal problems with the Colonial Office become irreconcilable. As a Scot he also drew frequently on the territorial tensions implicit in the British union to support his migration and decentralisation ideas, for example attacking NSW Governor Brisbane in 1823 for forgetting that "Scotsmen were born free, their civil and religious liberties having been won for them by the swords of their forefathers" (Baker 1985: 33-4).

political units agreeing to unite without relinquishing their previous identities. Thus the 'classic' federal idea has long been defined by the concept of a compact between existing jurisdictions, traced in European scholarship (accurately or otherwise) to the time of Ancient Greece (e.g. Freeman 1863: 72; Galligan 1981: 130; 1995: 39; Beer 1993: 223; Elazar 1997: 249). Standard definitions of federalism often focus on the *foedus* (Latin: treaty, agreement or compact) or *fidere* (trust) with which these formerly separate political communities divide and share their power using new federal constitutions (Kidd 1957; Riker 1975: 99; Holmes and Sharman 1977: 21; Walter and Huebsch 1978; Davis 1978; Harman 1992: 337). This is the archetype that routinely shapes discussion of Australian ideas of intercolonial union from the 1840s. Its mobilizational orientation is partial centralization because the focus is predominantly on the powers to be relinquished by constituent governments and entrusted to the central government.

American modern federalism matched this 'classic' archetype, but also extended beyond it in the two major ways already noted: by applying popular sovereignty to both constituent and central spheres of government; but more importantly by institutionalizing Franklin's principle that the new central authority should also be immediately concerned with structural decentralization. Franklin's 'commonwealth for increase' was based on the principle that both mobilisational orientations – centralization *and* decentralization – could work together. Arguably the greatest significance of Australia's first federal ideas was that their orientation was one of *decentralization first* with the explicit intent of creating a federal union *later*. In other words, perhaps for the first time in world history, the course followed in Australia tended towards the division of territory not for the purposes of creating new 'colonies', in the *ad hoc* manner of previous European experience, as much as for the deliberate propagation of new subnational units in a future nation.

Unlike previous undertakings, the new civilian Australia was directly comparable to the American west where great expanses of territory had been claimed and now

required subdivision into the states that would make a nation. As described by one later Central Queensland separationist, George Curtis, America's federal system was one engaged in "separating and federating the whole time" (QPD 1899: 35); this Australia could do too, but starting from scratch with one original jurisdiction, rather than 13-or-more. The decentralist 'Franklinesque' idea of federalism had an obvious potential to take deep root in Australia, given the timing, but never before in European history had it been tried from scratch. Consequently the fundamentally decentralist mobilisational orientation of this first Australian federal idea was quite distinguishable from the partial centralization of the 'classic' federal compact. Australia's first federalism was an experiment on an experiment, significant in terms of the global history of federal ideas, notwithstanding that Australian history has so far hidden this from view.

4. Australia's Two Federalisms: Understanding the Difference

Why has history neglected Australia's first federalism?

A number of issues need to be briefly addressed before conclusions can be drawn about the contemporary significance of Australia's original European federalism. First, how is it that this earlier and different arrival of federal ideas has so far escaped Australian history and political science? Here three explanations seem particularly pertinent.

As indicated above, British colonial policy does not appear to have adhered for very long to the 'Franklinesque' plan of subdivision with the expectation of nationhood. The details can be explored elsewhere; but colonial policy was descending into a period of "confusion and change without parallel" (Wentworth 1956: 11) or as described in London at the time, "indescribable ferment" (*Morning Chronicle*, quoted McKenna 1996: 35). By the late 1830s British policy had already turned distinctly away from its previous attraction to multiple territorial units on an American model, towards a principle that strong colonial government should be based less on federation than 'consolidation' (Knox 1971: 578). The major catalyst for this shift

came in 1840, with the forced reunification of Upper and Lower Canada as one province in response to the Quebec insurrection (Martin 1972: 54-74; McMinn 1979: 36; McKenna 1996: 29). Thereafter measures steadily followed aimed at consolidation of British North America, Australia, Canada and South Africa. To the extent this policy was informed by federal principles, its mobilisational orientation was again centralist, not decentralist in the Franklinesque sense. The earlier, brief approach was lost in the mists of time.

The second reason why Australia's first federalism has gone under-noticed is that it took political root in specific parts of Australia, which at the time were politically important but not politically dominant. Particularly prior to the influx of people and wealth that accompanied the gold rushes from 1851, political ideas demonstrated in locations such as Hobart or Melbourne were always less likely to be articulated and documented than those presented, for example, in official proposals emanating from Sydney or London. Whether the Sydney-London union plans of the 1840s-1850s were truly federal in nature is another issue, but to the extent they gave that appearance, they were certainly always destined to lodge more permanently and obviously among the raw material of later history than largely undocumented political behaviour in far-flung and fledgling settlements.

A third reason is related. Australia's later federal story, in and since the 1880s-1890s, has worked specifically against the idea that the original British subdivisions involved a conception of the colonies as 'mere' subnational units. There is a very good political reason. After 30-40 years of responsible government, the prime issue for Australian federalism was how to wrestle a national compact out of six substantially independent colonial legislatures. Those few decades were enough for a powerful myth to emerge, institutionalized by intercolonial negotiation itself, that none of these units had *ever* been intended to be anything other than independent – in other words that each was a potential nation-state in its own right, with no need to compromise unnecessarily for the sake of union. It was a rare colonial premier such

as Samuel Griffith who admitted that this was a rhetorical myth, and that the reality was that no existing colony could honestly claim its own permanent "feeling of Patriotism" or expect to stand "permanently distinct in the eyes of the rest of the world" (Griffith 1891: 72, 76; cf Parkes 1867, quoted Ellis 1933: 80; Dickson in QPD 1899: 344). Some political scientists even appear to believe that Britain's pre-1860 subdivisions were concerned with the "demarcation of nation-state boundaries" (Davis 1987: 22-3) when the evidence tells no such story. The possibility that early British policy and Australian experience always conceived the future Australia as one nation has long held little interest for many players in Australian intergovernmental relations.

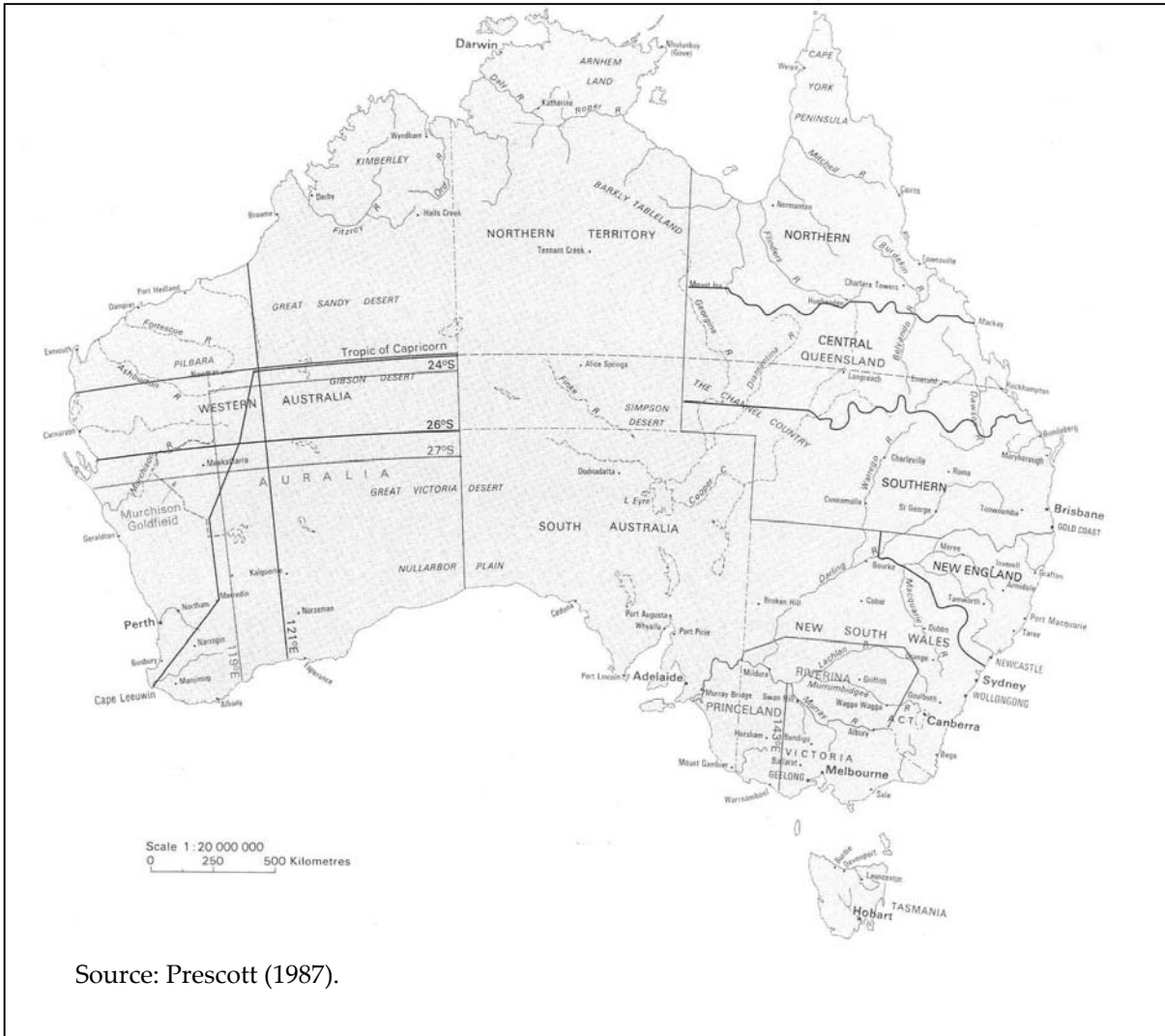
What became of the first federalism? A study in survival

The second obvious question is whether Australia's first federalism is more than an historical curiosity. From what we have seen, our conventional story appears to be an accurate description of federal ideas since at least the 1890s, and so to remain valid and sufficient for the purposes of understanding contemporary Australian federalism. Valid, yes; but not sufficient, because in truth our first approach to federalism has never gone away, and today remains highly relevant for understanding some of the great enigmas of Australian constitutional experience.

As we have seen, the nature of Port Phillip separationism from the late 1840s, born of the Tasmanian crossing, appears to suggest that by the 1840s had a self-replicating regional political dynamic. Within this dynamic, as settlement expanded so it became manifest to some communities that they should receive their own legal territory, and that this was consistent with the national goal. This Franklinesque or decentralist federal tradition clearly continued. It was prosecuted to conclusion by the Victorians in 1851 (Melbourne 1963: 283-356; McMinn 1979: 35; Garden 1984: 63-8). It was then repeated over the next 120 years by the people of New England, southern Queensland, the Riverina, central and north Queensland, and many other

regions with varying success (Ellis 1933; Neale 1950; Kidd 1974; Belshaw 1982; *Figure 2*).

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



The principle that Australian governance should entail an active program of territorial decentralization returned with force in the 1890s federation movement, stated famously by Queensland’s colonial secretary, John Macrossan, when he observed in the foundational Melbourne Federation Conference that “those people who are actually the strongest separationists are the most ardent of federationists” (Melbourne Conference 1890: 12 February 1890, 72; see Parkes 1892: 580-613; Bolton & Waterson 1999; de Garis 1999; Irving 1999b: 141-2, 191, 197). The federal result included constitutional provisions (Chapter VI: New States) whose importance was

such that the federation vote in at least one state (Queensland) almost certainly turned on that issue alone (Brown 2001).

Australia's first federalism did not end with Federation; rather, the struggle to see this idea operationalised has continued as a major albeit misunderstood theme of Australian politics for most of the 20th century. Its course includes much of the *raison d'être* and the first 50 years of life of the Country (now National) Party, particularly under the original leadership of Earl Page (Graham 1966; Ward 1985: 207). Until as late as the 1960s, when the NSW New England statehood referendum was held, it was routinely remembered that federation had been based around its first as well as later conception (e.g. Wood 1933: 232-3; Nicholas 1951; 1952b: 95ff). Most recently Geoffrey Blainey has maintained the call for an answer to this perceived major unsolved problem of constitutional history, concerned that "in at least one sense, federalism has failed.... For a land of this size we do not have enough states" (Blainey 2000; 2001).

The rediscovery of Australia's first federalism also reaches beyond a semantic squabble between different shades of pro-federal politics. It stands to help explain a much broader sense of popular discontent with the centralization and perceived inflexibility of the post-1901 federal system, also evident in repeat debate about whether, as an alternative, a more effective decentralized political structure might be achieved by entirely *abolishing* the states (see e.g. Crisp 1978: 23ff; Galligan 1995: 91ff; Macphee 1994a; 1994b; Hall 1998; Hurford 1998). The relationships between these superficially inconsistent ideas must await other fora; suffice to say that even Earl Page, the new state advocate, openly endorsed 'unification' as an equally valid path to federal reconstruction (Page 1917; 1963: 382-3). If we accept as Galligan (1995: 61) does that "so long as Australia has a federal system there will probably be critics calling for its abolition," we need to understand that such criticism continues to be derived not simply from those who would advocate clearly non-federal

constitutional alternatives, but from a broad body of federalist thinking that is represents the oldest federal principle in Australian experience.

Reviewing Australia's second federalism: how 'federal' is it?

Finally, to approach an understanding of the difference between Australia's first federalism and that of the conventional story, the latter requires some brief scrutiny. We have identified that federal ideas of the 1820s-1840s drew on American experience (real and perceived) in a way that emphasized its decentralist orientation. To what extent can this really be validly distinguished from the ideas canvassed by Sydney and London officials from the 1840s, and underpinning intercolonial negotiations in the 1890s?

The answer provides further insight into the fractured state of Australian political theory, because further comparison of these ideas provokes a serious question as to whether those ideas conventionally described as 'federal' in the 1840s-1850s really satisfy that description. For example, the mere suggestion of an intercolonial Governor-General in 1846 did not, contrary to conventional analysis, represent a 'federal' proposal – simply a vaguely nationalist one. There was nothing about a step towards central government administration that *per se* defined it as federal, particularly when a purely administrative institution. Similarly Sydneysiders' prime goal of a free trade union was itself not necessarily federal, being concerned less with shared authority than with reversing the effects of territorial separation in favour of their trading supremacy.

The same doubt surrounds much of the institutional detail of Earl Grey's two proposals for a 'general' (not 'federal') assembly in 1848-1850, which appeared to be particularly attractive to NSW legislators for the very reason that it offered significant recentralisation of Sydney control. Grey's proposed assembly was to be constituted by the four provinces sending national delegates in proportion to population – at that time, promising that 'old' NSW would swamp Port Phillip's influence at the same time as the latter was supposedly granted territorial 'autonomy'. The national powers were also massive by later standards, including not just trade but control over public lands, which to the South Australians defeated

much of the purpose for their existence (Pike 1957: 414-6; Ward 1958: 113-37, 179-82; McMinn 1979: 46-7). The problem was again not these colonies' unpreparedness to think nationally but rather their fear of such a recentralised structure. Had Grey's proposal survived in its original form, it would have pushed any definition of federalism to its limit, coming close to simple territorial reunification. In retrospect we can now see why – as in Canada, the British government remained interested in consolidating Australia into a more manageable dominion and was no longer concerned with its subnational structure (see Ward 1958: 41-3; Knox 1971: 578; Martin 1972: 9, 43, 61, 71-4). This was a form of federalism with little regard for decentralisation but aimed at as much centralization as possible. Similarly there were ample signs in the 1890s that Sydney remained interested in little but free trade, and Britain in little but completing the original plan for Imperial consolidation. Federal values were nowhere to be seen when the British government pronounced in 1903 that Australia had been successfully reconstituted as "a single entity and no longer six separate States in the family of nations under the Crown" (see Peden et al. 1929: 19; Nicholas 1952b: 55-6).

Federation in the 1890s included a serious attempt to reconcile these two Australian concepts of federalism. However a final indicator of the distinctiveness of these ideas in their original 1840s-1850s form was that rarely, if ever, do we find primary evidence of either Australian or London officials explicitly calling them 'federal'. If anything by the 1850s 'federal' appeared to be a term once again treated with official disdain. A dramatic confirmation of the distance between these ideas came in the NSW Legislative Council in August 1853, when William Charles Wentworth – the lead supporter of the lapsed British plans for a general assembly – had this to say of those communities petitioning for new colonies in the style of Tasmania and Victoria:

[The northern representatives] assumed that the separation of the northern districts was a right, but he (Mr Wentworth) protested against the colony being split up into as many separate governments as people chose to imagine would suit their convenience. ... [He] thought they had too many separations already. The

only result of this miserable policy would be that a series of petty, paltry, insignificant, states would be created which would necessitate the creation of a federal Government and end inevitably in the overthrow of the British throne. ... If he had had his way, that brilliant province of Victoria, which was growing up so democratic, would never have been separated at all. ... Was this colony merely to be a sucking nurse to these young states till they could toddle alone, and take care of themselves, and then to part with them? (SMH 1853b; cf Ellis 1933: 54; Fitzgerald 1982: 112)

Far from seeing his own ideas as 'federal', Wentworth appeared to quite accurately reserve this description for those seeking constitutional decentralization. Just as importantly, his dismissal of the idea showed an obliviousness to the logic of the first tradition, presuming the answer to his 'sucking nurse' question to be 'no' when in fact, on the original British rationale and that of Franklin's 'commonwealth', it had always been 'yes'. The dominant conceptions of intercolonial union in Australian politics seemed by the 1850s to have become as disinterested in decentralist reform as in the British political leadership. This lesson squarely confirms that different groups of Australians were set to operate for quite some time with different concepts of federalism, confirming the key distinctions between these concepts as suggested in Figure 3.

Figure 3. Key Distinctions of Australia's Two Federalisms

	Australia's First Federalism	Australia's Second Federalism
Period	From 1820s	From 1840s
Source and route of ideas	American federal experience, via British colonial policy and directly.	American federal, British unification and Canadian 'consolidation' experience, via British colonial policy.
Political character	British progressive.	British conservative.
Commencement locations	Hobart, Melbourne.	Sydney.
Mobilisational orientation (King 1982)	Major decentralization followed by partial centralization.	Partial centralisation.
Key manifestations	Colonial separation and new state movements; 20 th C Federal Reconstruction Movements.	Australian federation/unification movements generally.
Present at Federation?	Yes (Chapter VI).	Yes.
Balance achieved?	No (no substantial territorial decentralization since 1859).	No (centralization discredited as surrogate for decentralization).

4. Conclusions: A New Approach to Old Enigmas

This paper has argued that contrary to the conventional story of Australian federalism, ideas about federal structures did not originate in the 1840s-1850s but rather substantially earlier, in different places and with different contents. Moreover the distinctions between these ideas make Australian events more significant in the global history of federalism, given that Australia's first federal ideas were related directly to the unique new decentralist components of American federalism, and have continued to survive, notwithstanding that they ceased to be dominant. From these factual revisions, we have already identified that the distinction between Australia's first and second federalisms offers a significant point of departure for better understanding vexed issues of Australian constitutional debate. We can extend these into three conclusions regarding the lessons of this new federal story for contemporary political debate.

Revising the myth of Australian 'non-theoretical' pragmatism

The first conclusion to be drawn from this new story is that both British colonial

policy and Australian communities were dealing with theoretical options regarding the continent's constitutional development far earlier than assumed. This stands in contrast to a federal discourse supposedly only commenced in the 1840s around fundamentally pragmatic or utilitarian issues, such as how a common administration might assist with Sydney's control of trade, and supposedly resumed in the 1890s as a negotiation between colonial legislators with "little inclination for political theorising" (Galligan 1995: 46; Warden 1992: 143).

Australian constitutional scholarship has recently begun to question this stereotype of non-theoretical pragmatism, for example labeling it a "click go the shears" approach to constitutional design, dominated by the importation of precedents "shorn" of historical context and consequently forgetful or "undertheorised" when it comes to maximizing either comparative or local political experience (Williams 1999; 2001). Even more recently Patapan has attacked whether the account of our broader theoretical track-record as "egalitarian and materialistic, eschewing theory and history for pragmatic solutions" is actually true (Patapan 2003: 15). Instead he suggests that our self-image of Australian political thought as "at best... derivative, at worst non-existent" may be a self-perpetuating cycle in which we sustain our own forgetfulness by discouraging the idea that theory exists. The rediscovery of our real experience of federal theory supports this revision by revealing a richer, more intricate and more significant resort to ideas and abstract possibilities than our conventional self-images have so far recognised.

Understanding Australians' 'love-hate' relation with federalism

As Galligan has noted when resigning himself to the prospect that sections of Australian society seem destined to permanently criticize federalism, Australians' memory and understanding of their own federal experience is often "schizophrenic" (Galligan 1995: 9). To date however, our best efforts to explain this have been limited to recognizing the potential implicit tensions between majoritarian (and implicitly centralist) traditions of British responsible government and the (implicitly

decentralist) structural divisions of American federalism, albeit already supposedly married in the "dual constitutional culture" created by the 1890s constitutional design (Galligan 1995: 46-51; Warden 1992: 143).

From a closer analysis of federal ideas we now find that the tensions may not be so simple – if ideas of federalism are themselves internally riven, then rather than having two traditions in tension, Australian politics may in fact have at least three. Australians' enigmatic 'love-hate' relationship with the federal system they supposedly democratically endorsed in 1898-1900 may therefore have something to do not only with British unitary principles, but perceived inadequacy with our dominant interpretation of federalism itself. Australians have always looked to federalism not simply for one 'mobilisational orientation' as described by King, nor simply to institutionalize the territorial framework of the colonial status quo. Rather Australians seem always to have been in search of *both* a high level of national unity *and* serious political decentralization. In principle this was what Australia's first federalism sought to emulate, with increasing frustration since the 1850s, but with a residual potential should it ever again be recognized that this different dual orientation describes a valid federal political theory aimed at valid political goals.

Towards a reconciliation of federalism and regionalism

The recognition of Australia's two federalisms has its final significance in opening the way to a new dialogue, within our existing political traditions, aimed at reconciling the theoretical problems associated with the almost unfathomable relationship in current Australian political science between federalism and subnational regionalism. In theory, we continue to define our federal system as "a union of separate and semi-autonomous regional parts... a political system in which the power to make laws is divided between a central legislature and regional legislatures" (Irving 1999a: v, xix; Sawer 1969: 1; Holmes & Sharman 1977: 10; Harman 1992: 336). However scholars are immediately forced to qualify the application of this definition to Australia, as a federation comprised not of regions in

any organic sense but rather of largely synthetic "state-regional" units (Holmes & Sharman 1977: 34-101, 172-80; Galligan 1986: 245-55; Sharman 1987: 42-3; Gerritsen 1988: 148-150; Hodgins et al. 1989: 49, 50).

Empirical evidence in at least some parts of Australia suggests that a majority of citizens would prefer and expect a federation that recognizes something closer to their 'real' regions (Brown 2002a; 2002b). There is a strong case for further research and debate about what exactly this might look like, but with regionalism reviving as a key feature of politics, it is clearly inadequate that our supposedly region-friendly federal system should be relegated to the broom cupboard because it has become theoretically incapable of evolving towards its own definitional ideal. By reminding us of our original expectations about the decentralist potential of federal ideas, the rediscovery of Australia's first federalism stands to contribute much to the search for a political system in which nationalism and regionalism are effectively reconciled. Here then our own earliest history of ideas continues to show its relevance for future constitutional development.

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