

## RETHINKING THE FEDERAL BALANCE: HOW FEDERAL THEORY SUPPORTS STATES' RIGHTS

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### Abstract

Existing judicial and academic debates about the federal balance have their basis in theories of constitutional interpretation, in particular literalism and intentionalism (originalism). This paper seeks to examine the federal balance in a new light, by looking beyond these theories of constitutional interpretation to federal theory itself. An examination of federal theory highlights that in a federal system, the States must retain their powers and independence as much as possible, and must be, at the very least, on an equal footing with the central (Commonwealth) government, whose powers should be limited. Whilst this material lends support to intentionalism as a preferred method of constitutional interpretation, the focus of this paper is not on the current debate of whether literalism, intentionalism or the living constitution method of interpretation should be preferred, but seeks to place Australian federalism within the broader context of federal theory and how it should be applied to protect the Constitution as a federal document. Although federal theory is embedded in the text and structure of the Constitution itself, the High Court's generous interpretation of Commonwealth powers post-Engineers has led to increased centralisation to the detriment of the States. The result is that the Australian system of government has become less than a true federation.

### I INTRODUCTION

Within Australia, federalism has been under attack. The Commonwealth has been using its financial powers and increased legislative power to intervene in areas of State responsibility. Centralism appears to be the order of the day.<sup>1</sup>

Today the Federal landscape looks very different to how it looked when the Australian Colonies originally 'agreed to unite in one indissoluble Federal Commonwealth',<sup>2</sup> commencing from 1 January 1901. The original Australian federation was premised on the significance and centrality of the States which was of utmost concern to the framers, as evidenced by their commentary at the Constitutional Conventions of the 1890's<sup>3</sup> and

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<sup>1</sup> Anne Twomey and Glenn Withers, A Report for the Council for the Australian Federation, *Federalist Paper 1 Australia's Federal Future: Delivering Growth and Prosperity*, April 2007, Executive Summary.

<sup>2</sup> Preamble, Commonwealth of Australia Constitution Act 1900 (UK), and section 3.

<sup>3</sup> These Conventions were:

The Australasian Federation Conference, held in Melbourne, commencing on 6 February 1890 until 14 February 1890. At the 1890 Conference the delegates resolved that Australia should federate, and

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that when they returned to their colonies they would seek to influence their respective governments to elect delegates to attend a further conference. For commentary on the 1890 Convention see Robin Sharwood, 'The Australasian Federation Conference of 1890' in Robin Sharwood (ed), *Official Record of the Proceedings and Debates of the Australasian Federation Conference 1890* (Legal Books, 1990), 465.

The National Australasian Convention held in Sydney, commencing on 2 March 1891 until 9 April 1891 where its delegates came up with a draft Constitution. It was intended that this draft would be presented to the people of each colony, however, the Parliaments of the colonies were reluctant to have a final draft imposed on them and were sceptical at accepting the work of a convention that was 'indirectly representative' of them. See John Quick and Robert Randolph Garran, *The Annotated Constitution of the Australian Commonwealth* (LexisNexis Butterworths, 1901), 143-144. See also JA La Nauze, *No Ordinary Act: Essays on Federation and the Constitution* (Melbourne University Press, 2001), 173; and Zelman Cowan, 'Is it not time?' The National Australasian Convention of 1891', in Patricia Clarke (ed) *Steps to Federation: Lectures Marking the Centenary of Federation* (Australian Scholarly Publishing, 2001), 26.

The Australasian Federal Convention 1897/8 where the people of each colony (with the exception of Queensland who did not attend) elected delegates to attend. This conference was held in several sessions. The First Session was in Adelaide on 22 March 1897 until 23 April 1897. During this session delegates came up with a new draft, which was however, substantially similar to that of the 1891 Convention. The Delegates then returned to their colonies so that the colonial legislatures could consider and debate the draft. See John Quick and Robert Randolph Garran, *The Annotated Constitution of the Australian Commonwealth* (LexisNexis Butterworths, 1901), 165-182. On 2 September 1897, the Delegates resumed the Convention in Sydney to consider and debate the amendments suggested by their respective Parliaments which amounted to 286 in total. Due to the number of amendments, the Convention proceeded to 'settle some of the most important questions' which could be categorised under four main areas: 'the financial problem, the basis of representation in the Senate, the power of the Senate with regard to money Bills, and the insertion of a provision for deadlocks'. However, by the time the Sydney session was adjourned on 24 September (due to the departure of the Victorian delegates for their general election) only half of the draft Constitution had been considered: See John Quick and Robert Randolph Garran, *The Annotated Constitution of the Australian Commonwealth* (LexisNexis Butterworths, 1901), 182-194. See generally JA LaNauze, *The Making of the Australian Constitution* (Melbourne University Press, 1972).

The next and final session of the Convention was scheduled for 20 January 1898 in Melbourne, and went until 17 March 1898. The Melbourne session had the extensive task of reviewing the whole of the draft Constitution thus far in order to come up with a final document that was agreeable to the Convention. On the final day of the Convention, 17 March 1898, it was resolved that the delegates would ensure that a copy of the draft would be made available to their voters, and many 'pledged themselves to its support': John Quick and Robert Randolph Garran, *The Annotated Constitution of the Australian Commonwealth* (LexisNexis Butterworths, 1901), 194-205.

Each of the colonies passed enabling legislation, with the exception of Western Australia who requested amendments. Despite the path toward federation being impeded by Western Australia, the British Government invited a delegation from the colonies to visit Britain, and to discuss and negotiate the Bill with the British Colonial Secretary with a view to achieving submission of the Constitution Bill to the British Parliament. Several changes to the draft were requested by the Colonial Secretary. However in the end, only one change to section 74 concerning appeals to the Privy Council was made. The Constitution Bill was introduced the Bill into the House of Commons on 14 May 1900. It passed through the House of Lords and Committee without any amendment, on 5 July 1900, and received Royal Assent on 9 July 1900. Finally, Western Australia passed an enabling Act on 31 May, which received Royal Assent on 13 June 1900. A referendum took place in Western Australia on 31 July 1900, and achieved a majority of 'yes' votes. This was followed by both Houses of Western Australian Parliament passing addresses to the Queen to pray that Western Australia be included as an

the text and structure of the Constitution they drafted. The premise of equality between the Commonwealth and the States and the role of the States in facilitating and consenting to federation in the first place was discussed by Callinan J in his dissenting judgment in *Work Choices*. His Honour stated:

The whole Constitution is founded upon notions of comity, comity between the States which replaced the former colonies, comity between the Commonwealth as a polity and each of the States as a polity, and comity between the Imperial power, the Commonwealth and the States. It is inevitable in a federation that the allocation of legislative power will have to be considered from time to time. Federations compel comity, that is to say mutual respect and deference in allocated areas.<sup>4</sup>

This ‘mutual respect’ between the Commonwealth and State governments was strictly safeguarded by the early High Court of Australia, who applied the reserved powers<sup>5</sup> and implied intergovernmental immunities doctrines<sup>6</sup> to give effect to the intentions of the framers and to protect the position of the States. The early High Court’s interpretation of the Constitution with a view to giving effect to the intentions of those who drafted it is known as ‘intentionalism’ or ‘originalism’.<sup>7</sup>

However, the federal landscape was irreparably altered by the High Court as a result of the *Engineers* decision<sup>8</sup> in 1920, where the High Court rejected the reserved powers and

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original state to the federation. The Queen signed a proclamation on 17 September 1900, proclaiming that the Commonwealth of Australia would commence on 1 January 1901: John Quick and Robert Randolph Garran, *The Annotated Constitution of the Australian Commonwealth* (LexisNexis Butterworths, 1901), 221-251. See also Geoffrey Sawer, *The Australian Constitution* (Australian Government Publishing Service, 1975), 22-23; and JA LaNauze, *The Making of the Australian Constitution* (Melbourne University Press, 1972), 248-269.

<sup>4</sup> *New South Wales v Commonwealth of Australia* (*Work Choices*) (2006) 229 CLR 1, 322.

<sup>5</sup> The ‘reserved powers doctrine’ was implied by the early High Court on the basis of the federal nature of the Constitution. It provided that the powers of the Commonwealth prescribed by the Constitution should be read narrowly so as not to detract from the power of the States ‘reserved’ by section 107 of the Commonwealth Constitution. See *Peterswald v Bartley* (1904) 1 CLR 497; *R v Barger* (1908) 6 CLR 41; *Huddart, Parker & Co v Moorehead* (1909) 8 CLR 330.

<sup>6</sup> The ‘implied intergovernmental immunities doctrine’, also called the ‘immunity of instrumentalities doctrine’, like the reserved powers doctrine was an implication based on the federal nature of the Constitution. It recognised that the Commonwealth and State governments were sovereign in their own rights and consequently, could not legislate so as to interfere with the operation of each other’s affairs. See *D’Emden v Pedder* (1904) 1 CLR 91 at 111 where the High Court stated, ‘When a State attempts to give its legislative or executive authority an operation which, if valid, would fetter, control or interfere with the free exercise of the legislative or executive power of the Commonwealth, the attempt, unless expressly authorised in the Constitution, is to that extent invalid and inoperative’; *Deakin v Webb* (1904) 1 CLR 585; *Commonwealth v New South Wales* (1906) 3 CLR 807; *Federated Amalgamated Government Railway & Tramway Service Association v New South Wales Railway Traffic Employees Association* (1906) 4 CLR 488 (*‘Railway Servants Case’*); *Baxter v Commissioner of Taxation (NSW)* (1907) 4 CLR 1087.

<sup>7</sup> For a discussion of the various types of constitutional interpretation generally see James A Thomson, ‘Principles and Theories of Constitutional Interpretation and Adjudication: Some Preliminary Notes’ (1981-1982) 13 *Melbourne University Law Review*, 597; For criticism of intentionalism/ originalism, see The Hon Justice Michael Kirby, ‘Constitutional Interpretation and Original Intent: A Form of Ancestor Worship?’ (2000) 24 *Melbourne University Law Review*, 1; For a more favourable approach to intentionalism/ originalism, see Jeffrey Goldsworthy, ‘Originalism in Constitutional Interpretation’ (1997) 25 *Federal Law Review* 1.

<sup>8</sup> *Amalgamated Society of Engineers v Adelaide Steamship Co Ltd* (1920) 28 CLR 129 (*‘Engineers’*).

implied intergovernmental immunities doctrines in favour of an expansive, rather than restrictive, characterisation of federal powers. This literalist approach, which requires the Constitution to be interpreted as a statute, applying ordinary principles of constitutional interpretation, resulted in the powers of the Commonwealth being interpreted generously.

The aftermath of *Engineers* was a series of High Court decisions in which Commonwealth powers continued to be interpreted expansively.<sup>9</sup> In fact, Craven described this winning streak as one which ‘must rival any win-loss ratio in the history of either professional sport or dubious umpiring.’<sup>10</sup> An attempt was made to undo some of the damage caused by *Engineers* in the *Melbourne Corporation* case<sup>11</sup>, but its principles have been watered down, and in practical reality have had limited success for the States.<sup>12</sup>

The High Court’s decision in *Engineers* has continued to have ramifications for the States up until the present time. The decisions in *Ha*<sup>13</sup> and *WorkChoices*<sup>14</sup> are examples of recent notable losses to the States, with *Ha* resulting in a revenue loss to the States of \$5billion per annum<sup>15</sup>, and *WorkChoices* resulting in the Commonwealth effectively taking the power to regulate employment away from the States, with 85% of employees now being brought under the Federal jurisdiction.<sup>16</sup> In *Work Choices*, the majority confirmed that the literalist approach from *Engineers* should be applied when interpreting the powers of the Commonwealth.<sup>17</sup> Hence, through its methods of interpretation, the High Court has shifted the federal balance from one that protects the

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<sup>9</sup> *Engineers* (1920) 28 CLR 129.

<sup>10</sup> Greg Craven, *Conversations with the Constitution: Not Just a Piece of Paper* (University of New South Wales Press, 2004), 78.

<sup>11</sup> *Melbourne Corporation v Commonwealth* (1947) 74 CLR 31 (*‘Melbourne Corporation Case’*). The Melbourne Corporation Principle was an attempt to undo some of the potential damage to the States that could result from the decision in *Engineers*. The principle has three limbs and acknowledges that, following *Engineers*, the Commonwealth can enact legislation that interferes with the affairs of the States provided that: (1) the Commonwealth legislation does not threaten the continued existence of a State/s; (2) discriminate against a State by singling it out by imposing a burden such as taxation, or some other control; or (3) ‘unduly’ interfering with the government of the State.

<sup>12</sup> The discrimination limb of the Melbourne Corporation Principle was applied in *Queensland v Electricity Commission* (1985) 159 CLR 193, but the High Court’s decision in *Austin v Commonwealth* (2003) 215 CLR 185 confirmed that discrimination alone was not enough to invalidate Commonwealth legislation on the basis of the Melbourne Corporation Principle. See for example Kirby J at 200 who stated, ‘The presence of discrimination against a State may be an indication of an attempted impairment of its functions.’ Although Kirby J was writing in dissent, he was in agreement with the majority’s reformulation of the Principle into two limbs. The Principle has only been successfully applied in several cases to invalidate Commonwealth legislation. These cases include: *Queensland v Electricity Commission* (1985) 159 CLR 193; *Austin v Commonwealth* (2003) 215 CLR 185; and *Clarke v Federal Commissioner of Taxation* (2009) 240 CLR 272.

<sup>13</sup> *Ha v New South Wales* (1997) 189 CLR 465 (*‘Ha’*).

<sup>14</sup> *Work Choices Case* (2006) 229 CLR 1.

<sup>15</sup> Twomey and Withers, above n 1, 34.

<sup>16</sup> *Work Choices Case* (2006) 229 CLR 1, 69, per Gleeson CJ, Gummow, Hayne, Heydon and Crennan JJ.

<sup>17</sup> *Work Choices Case* (2006) 229 CLR 1, 103, per Gleeson CJ, Gummow, Hayne, Heydon and Crennan JJ.

position and rights of the States to one that promotes, and indeed that has resulted in, centralisation.

This paper seeks to consider the federal balance in a new light. Academic arguments about the federal balance are primarily premised upon these existing theories of constitutional interpretation – ‘intentionalism’ and ‘literalism’.<sup>18</sup> However, instead of debating which of these existing methods of constitutional interpretation should prevail, it is submitted that it would be judicious to go back a step, and look at the meaning of federalism itself, drawing upon federal theory. When federal theory itself is examined, it becomes evident that a true federal system is one in which the States are equal and sovereign<sup>19</sup>, participants, rather than being second rate agents of the Commonwealth. Hence, it is arguable that methods of constitutional interpretation have become irrelevant to determine whether federalism or centralism should prevail, and in any event, judges and academics cannot agree which of the methods of constitutional interpretation should be preferred.

This paper commences with outlining a basic definition of ‘federalism’, premised upon its key characteristics. This definition is then expanded upon, and supported by, an analysis of three key theoretical texts relied upon by the framers of the Constitution. These are: James Bryce’s, *The American Commonwealth*;<sup>20</sup> Edward A Freeman’s *History of Federal Government in Greece and Italy*; and Alexander Hamilton, James Madison and John Jay’s *The Federalist Papers*.<sup>21</sup>

This paper then discusses federal theory posited by theorists such as John Stuart Mill, A V Dicey, KC Wheare, KR Cramp, Pierre-Joseph Proudhon, Geoffrey Sawer, JA LaNauze, Daniel J Elazar, Greg Craven, and Nicholas Aroney to further explain these characteristics and emphasise the centrality of the States in a Federal system of government.

In addition, this paper then outlines the Federal nature of the Constitution, specifically how the structure and provisions of the Constitution establish a federal system, and the

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<sup>18</sup> Note: ‘Living Constitution’ is also a method of Constitutional Interpretation employed by the High Court. Justice Kirby was an advocate of this approach. See, for example (insert case name and quote). The Living Constitution method could be used to suggest that centralisation is more appropriate to meet the demands of modern society than federalism, which has become outdated.

<sup>19</sup> I have used the term ‘sovereign’ and ‘sovereignty’ throughout this paper to describe the power of the states in a federal system. By this terminology, I mean ‘supreme power’. To expand on this, both the Australian States and Commonwealth have ‘sovereign power’ in their respective jurisdictions. That is, the Australian federation is a system of ‘dual sovereignty’ in which the state and federal governments are autonomous in their own spheres and of equal importance. For a discussion of ‘sovereignty’ see Max Frenkel, *Federal Theory* (1986), 69-76.

<sup>20</sup> James Bryce, *The American Commonwealth* (MacMillan and Co, 1889). For a discussion of the role that Bryce’s, *The American Commonwealth*, played in the formation of the Commonwealth Constitution, see Matthew N C Harvey, ‘James Bryce, “The American Commonwealth”, and the Australian Constitution’ (2002) 76 *The Australian Law Journal* 362.

<sup>21</sup> Harvey, (at 366), identifies these sources as being frequently cited by the founders at the Melbourne Conference and the Constitutional Conventions: Bryce, 70 times, Freeman, 45 times; and Hamilton, Madison and Jay, 25 times.

central role of the States embodied in the Constitution. As part of this discussion, commentary from the Constitutional Convention Debates will be examined to highlight the intended central role and retention of constitutional powers of the states after federation that was translated into the final constitutional document by the framers. Whilst this material lends support to intentionalism as a preferred method of constitutional interpretation, the focus of this paper is not on the current debate of whether literalism, intentionalism or the living constitution method of interpretation should be preferred, but seeks to place Australian federalism within the broader context of federal theory and how it should be applied to protect the Constitution as a federal document.

This paper concludes with an examination of different models of federalism to show how Australia has departed from the true federal model prescribed by federal theory, in which the States are sovereign and have equal standing with the central (Commonwealth) government.

In summary, an examination of federal theory illustrates that a system of federal government in which the States are inferior to the Commonwealth, is something less than a true federation. It therefore follows that because federalism is the cornerstone of the Australian Constitution, the federal balance must be restored.

## II DEFINING FEDERALISM: WHAT IS A FEDERAL SYSTEM OF GOVERNMENT?

Many theorists have attempted to define federalism with reference to its key characteristics. For example, Sawer identifies the following characteristics as having to exist for a governmental system to be properly defined as ‘federal’. According to Sawer, federalism requires:

- (1) An independent country with a central government that has the institutionalised power to govern the whole of the country;
- (2) The country is divided into separate geographical regions which have their own institutions of government to govern in their particular regions;
- (3) The power to govern is distributed between central and regional governments;
- (4) The distribution of power between the central and regional governments is set out in a constitution and is rigidly entrenched by the constitution so that it cannot be amended by the central government or any region or regions;
- (5) The constitution contains rules to determine any conflict of authority between the centre and the regions. In most constitutions, the general rule is that the law of the central government will prevail;
- (6) The distribution of powers between the central and regional governments is interpreted and policed by a judicial authority. The judicial authority has the constitutional power to make binding decisions about the validity of legislation and government action, or where there is a conflict of the laws of the central and regional governments.<sup>22</sup>

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<sup>22</sup> Geoffrey Sawer, *Modern Federalism* (Pitman Australia, 1976), 1. Sawer also defines ‘federalism’ similarly in Geoffrey Sawer, *Australian Federalism in the Courts* (Melbourne University Press, 1967) 1, as having:

... three common features; first, the existence in a geographical area of several governmental units, one having competence over the whole area, the others over

Similarly, Lijphart has listed ‘five principal attributes’ of federalism as follows:

1. A written constitution which specifies the division of power and guarantees to both the central and regional governments that their allotted powers cannot be taken away;
2. A bicameral legislature in which one chamber represents the people at large and the other the component units of the federation;
3. Over-representation of the smaller component units in the federal chamber of the bicameral legislature;
4. The right of the component units to be involved in the process of amending the federal constitution but to change their own constitutions unilaterally;
5. Decentralized government, that is, regional government’s share of power in a federation is relatively large compared to that of regional governments in unitary states.<sup>23</sup>

Aroney discusses the complexity of pinpointing an exact definition of federalism. From a constitutional perspective, Aroney defines federalism as follows:

... the defining feature of a federal system is the existence of a ‘division of power’ between central and regional governments. The basic idea is that of a political system in which governmental power is divided between two territorially defined levels of government, guaranteed by a written constitution and arbitrated by an institution independent of the two spheres of government, usually a court of final jurisdiction.<sup>24</sup>

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defined parts of it, and sharing between them the power to govern; second, a relation between the governing units such that each has a reasonable degree of autonomy within its prescribed competence; third, an inability of any one unit to destroy at will the autonomy of the others.

Many more criteria could be added, such as: that each unit government should possess the means of exercising its competence without relying on instrumentalities of other units; that the area of competence of the unit governments should in each case be substantial; that the areas of competence should be judicially interpreted and adherence to them judicially enforced; that the possibilities of *de facto* coercion or inducement of one government by another should not be such as to impair in a substantial way the legal autonomy of the weaker unit.

Sawer’s ‘federal principles’ have been re-iterated by other constitutional law academics such as Irving who states:

A federation is a political system in which the power to make laws is divided between a central legislature and regional legislatures. The centre makes laws for the nation as a whole, while the regions make laws for their region only. Both sets of laws impact directly upon the lives of the citizens. The power of the centre is limited, in theory at least, to those matters which concern the nation as a whole. The regions are intended to be as free as possible to pursue their own local interests. Historically, federations have adopted written constitutions in which this division is described, and which include a means of settling disputes between the regions and the centre.

See Helen Irving (ed), *The Centenary Companion to Australian Federation* (Cambridge University Press, 1999), xix.

<sup>23</sup> Arend Lijphart, *Non-Majoritarian Democracy: A Comparison of Federal and Consociational Themes* (1985) in Daniel J Elazar, *Exploring Federalism* (The University of Alabama Press, 1991), 22-23.

<sup>24</sup> Nicholas Aroney, *The Constitution of a Federal Commonwealth; The Making and Meaning of the Australian Constitution* (Cambridge University Press, 2009), 17.

However, from a political science perspective, Aroney notes that this constitutional definition, whilst a good starting point, does not adequately explain how federalism operates in reality:

Rather than displaying a strictly defined distribution of responsibility between two or more 'co-ordinate' levels of government, federal systems tend in practice to resemble something more like a 'marble cake', in which governmental functions are shared between various governmental actors within the context of an ever-shifting set of parameters shaped by processes of negotiation, compromise and, at times, cooperation.<sup>25</sup>

In fact, Aroney argues that 'conceptualising federalism' is difficult and that the changing nature of the concept of federalism depends upon who is defining it.<sup>26</sup> This paper, although defining federalism from a constitutional viewpoint, aims to clarify some of this potential confusion by defining federalism with reference to its key characteristics, expanding upon what federal theory says about these characteristics, and finally, outlining different models of federalism in order to determine how the High Court has shifted the federal balance from one premised upon the equality of the States to one that has supported increased centralisation. As a result, this paper aims to provide a more complete picture of this 'marble cake'.

It is submitted that the following definition of a federal system of government can be derived from an examination of these definitions and is supported by works of various other constitutional and political theorists whose work will be discussed later in this paper. The following definition identifies four key characteristics of a federal system of government and highlights, as a central characteristic, the sovereignty and independence of the States in a Federation. It also highlights federalism's objective to protect and preserve the balance of power between the Federal and State governments. This paper contends that a Federal system of government can be defined with reference to the following four characteristics:

1. The constitution is written, and thereby difficult to alter, so its institutions and their powers cannot be easily interfered with;
2. The Constitution specifies, and thereby limits, the powers of the Commonwealth government, leaving the balance of 'unwritten' powers to

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<sup>25</sup> Ibid 18.

<sup>26</sup> Ibid 17. Further, Aroney argues that the constitutional definition does not take into account how power is allocated, and does not adequately explain the type of power that each level of government has. That is, are powers 'enumerated, residual, or reserved'? (at 18-19). In addition, Aroney argues that, the type of power allocated to each level of government tends to be determined by the manner in which the federal system of government came to be formed in the first place (at 19). Using this example, Australian federalism came about through a process of 'integration' (ie. by modifying the system already in existence) whereby the States agreed to allocate some of their existing powers to a central government. This led to the Commonwealth's powers being 'enumerated' and state powers being 'residual' (at 19). However, a different type of federal system could be formed by a process of 'disintegration' (at 19), where the current system of government is completely abandoned to start the new federal system of government afresh. This could result in a different division of powers between the central and regional governments. Aroney also argues that the constitutional definition of 'federalism' in terms of a division of powers, does not explain the difference between a 'federation' and a 'confederation' (at 19-20).



- the States. That is, specific legislative and other powers are divided between the Commonwealth and State governments;
3. The sovereignty of the Commonwealth and State governments is protected so they can exercise these powers free of interference from one another;
  4. The Constitution establishes an independent High Court of appeal to act as an independent constitutional ‘umpire’ to ensure that these powers are not transgressed or eroded. That is, it is the role of this court to maintain the ‘federal balance’ of power between the Commonwealth and State governments, including to determine the demarcation of any disputes between the two levels of government.

This paper will now expand on the commentary of key political and constitutional theorists, commencing with those relied upon by the framers of the Australian Constitution, with respect to these characteristics. This discussion will serve to illustrate how the States and the maintenance of States rights are central to any conceptualisation of federalism.

### III DEFINING FEDERALISM: THREE KEY TEXTS REFERRED TO BY FRAMERS

The four key characteristics of a federation identified above can also be found when reviewing three key constitutional texts that the framers of Australia’s Federal constitution examined and discussed in the various debates leading up to the formation of the Australian Constitution. The first, and most significant of these, is James Bryce’s *The American Commonwealth*.<sup>27</sup>

#### A *James Bryce: The American Commonwealth*

Following over 200 years since federation, governance by two levels of government – State and Commonwealth – is a familiar and every day concept to citizens and residents of Australia. However, at the time of the Melbourne Conference in 1890 (the first conference to discuss federation), the concept of federalism was largely unfamiliar to the Delegates, who were mostly British, Irish or Scottish and predominantly familiar with Britain’s unitary system of government.<sup>28</sup> As a consequence, the delegates primarily looked to Bryce’s, *The American Commonwealth*, for guidance as to the form that the new Constitution should take. In *The American Commonwealth*, Bryce detailed the American system of government, as a ‘Federation of States’<sup>29</sup>, in two volumes. In outlining this, Bryce provided detailed commentary about the operation of federalism in American government, and the importance of the States in the American federal system.

#### 1 *A written constitution that is difficult to alter*

<sup>27</sup> James Bryce, *The American Commonwealth* (MacMillan and Co, 1889).

<sup>28</sup> JA LaNauze, *The Making of the Australian Constitution* (Melbourne University Press, 1972), 12.

<sup>29</sup> Bryce, above n 27, 305.

As noted above, Bryce outlined the provisions, including institutions and powers, of the American federal system, established in its written constitution. Hence, there is somewhat of an assumption in Bryce's work as to the importance of specifying these in a form that was difficult to alter. Bryce did however, acknowledge that although it is possible to have a federation without a written constitution (such as the Achaean League), a written constitution serves as a 'fundamental document' which serves to 'define and limit the power of each department of government'.<sup>30</sup> In contrasting the (written) United States Constitution which can only be altered with the consent of the people, with the unwritten British Constitution which is instead subject to Parliament, Bryce pointed out the important role of a rigid constitution to 'safeguard the rights of the several states...[by] limiting the competence of the national government.'<sup>31</sup>

## 2 *Division of power between Federal and State governments*

Bryce noted that in a federal system of government, there is a 'distribution of powers'<sup>32</sup> between a central 'federal' government and state governments. These powers are categorised as 'Executive, Legislative and Judicial.'<sup>33</sup> Bryce noted that the central federal government and state governments<sup>34</sup> operate separately, but at the same time complement one another:

The characteristic feature and special interest of the American Union is that it shows us two governments covering the same ground, yet distinct and separate in their action. It is like a great factory wherein two sets of machinery are at work, their revolving wheels apparently intermixed, their bands crossing one another, yet each set doing its own work without touching or hampering the other.<sup>35</sup>

As part of the 'distribution of powers'<sup>36</sup> between the federal and state governments, Bryce noted that there are five classes of powers:

Powers vested in the National Government alone.  
Powers vested in the States alone.  
Powers exercisable by either the National government or the States.  
Powers forbidden to the National government.  
Powers forbidden to the State Governments.<sup>37</sup>

Firstly, powers that are exclusive to the national government, primarily relate to matters that pertain to the country as a whole, whereas exclusive state powers pertain to more everyday local governance issues. Bryce outlined the nature of these powers:

The powers vested in the National government alone are such as relate to the conduct of the foreign relations of the country and to such common national purposes as the army and navy, internal commerce, currency, weights and measures, and the post-office, with

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<sup>30</sup> Ibid 33, footnote 1.

<sup>31</sup> Ibid 33.

<sup>32</sup> Ibid 306.

<sup>33</sup> Ibid 303.

<sup>34</sup> Ibid 29.

<sup>35</sup> Ibid 318.

<sup>36</sup> Ibid 306.

<sup>37</sup> Ibid 307.

provisions for the management of the machinery, legislative, executive and judicial, charged with these purposes.

The powers which remain vested in the States alone are all the other ordinary powers of internal government, such as legislation on private law, civil and criminal, the maintenance of law and order, the creation of local institutions, the provision for education and the relief of the poor, together with taxation for the above purposes.<sup>38</sup>

Secondly, powers that are concurrent (i.e. that can be exercised by both the Commonwealth and the States) include: certain legislative powers, with federal legislation prevailing over state legislation if there is a conflict of laws; taxation and judicial powers (that is, both federal and state courts).<sup>39</sup> If there is any doubt about whether a power belongs to the federal government, or state governments, the power is deemed to belong to the state governments unless the Constitution has specifically allocated it to the Commonwealth.<sup>40</sup> In other words, ‘... when a question arises whether the national government possesses a particular power, proof must be given that the power was positively granted. If not granted, it is not possessed.’<sup>41</sup>

Thirdly, powers that are ‘forbidden’ to *both* the federal government and the States include a constitutional prohibition on granting a ‘title of nobility’ at both state and federal level,<sup>42</sup> and the acquisition of public or private property by the federal government or the state without ‘just compensation’.<sup>43</sup> Other powers are only forbidden to either the federal or state governments. For example, the federal government is prohibited from giving ‘commercial preference’ to one state over another<sup>44</sup> and is constrained by ‘personal freedoms’ when enacting legislation such as freedom of religion, speech, public assembly and the right to bear arms.<sup>45</sup>

### 3 Sovereignty of the States

As part of the federal and state governments operating independently of one another, their powers are mostly<sup>46</sup> exercised without reference to, or interference with, one another:

The authority of the National government over the citizens of every State is direct and immediate, not exerted through the State organization, and not requiring the co-operation of the State government. For most purposes the national government ignores the States; and it treats the citizens of different States as being simply its own citizens, equally bound by its laws ...

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<sup>38</sup> Ibid 308-309.

<sup>39</sup> Ibid 309.

<sup>40</sup> Ibid 311.

<sup>41</sup> Ibid.

<sup>42</sup> Ibid 307; Art i. § 9; Art i. § 10.

<sup>43</sup> Ibid 307; Amendment v and Amendment xiv.

<sup>44</sup> Ibid 309; Art. i. § 9.

<sup>45</sup> Ibid 309-10; Art i. § 9; Amendment i and ii.

<sup>46</sup> Bryce details exceptions where there is some co-operation between the federal and State governments: see Bryce, above n 27, 312-313. For example, States choose two Senators to represent the State at a federal level.

On the other hand, the State in no wise depends on the National government for its organization or its effective working. It is the creation of its own inhabitants. They have given it its constitution. They administer its government. It goes on its own way, touching the national government at but few points. That the two should touch at the fewest possible points was the intent of those who framed the Constitution.<sup>47</sup>

Bryce emphasised the central nature of the States in the American federal system. For example, the States were concerned that they should not hand over too much power to the new central government. Specifically, Bryce noted ‘the anxiety of the States to fetter the master they were giving themselves...’<sup>48</sup> and explained that one of the objects of the founders ‘was to restrict the functions of the National government to the irreducible minimum of functions absolutely needed for the national welfare, so that everything else should be left to the States’.<sup>49</sup> This resulted in the States retaining their ‘original and inherent’<sup>50</sup> powers which are ‘prima facie unlimited’<sup>51</sup> except to the extent that the Federal Constitution has removed, restricted or re-allocated them to the National government. In fact, Bryce described the legislative powers of the States as being more extensive than those of the National government: ‘Prima facie, every State law, every order of a competent State authority, binds the citizen, whereas the National government has but a limited power: it can legislate or command only for certain purposes or on certain subjects’.<sup>52</sup>

Consequently, when the American Constitution was drafted, the founders ensured that the continued existence of the States was guaranteed. In the words of Bryce, the Constitution:

... presupposes the State governments. It assumes their existence, their wide and constant activity. It is a scheme designed to provide for the discharge of such and so many functions of government as the States do not already possess and discharge. It is therefore, so to speak the complement and crown of the State Constitutions, which must be read along with it and into it in order to make it cover the whole field of civil government ...<sup>53</sup>

The States were seen by Bryce as critical in the American federal system. They have their own separate and extensive powers that are uncompromised by those of the National government. The States work independently, and at the same time side by side with the Federal government, with each complimenting the existence of the other. The continued existence of the States is so imperative to the Federal system of government that it must be guaranteed by the Constitution:

A State is, within its proper sphere, just as legally supreme, just as well entitled to give effect to its own will, as is the National government within its sphere; and for the same reason. All authority flows from the people. The people have given part of their supreme authority to the Central, part to the State governments. Both hold by the same

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<sup>47</sup> Bryce, above n 27, 312.

<sup>48</sup> Ibid 306.

<sup>49</sup> Ibid 318.

<sup>50</sup> Ibid 311.

<sup>51</sup> Ibid.

<sup>52</sup> Ibid 324.

<sup>53</sup> Ibid 29-30.

title, and therefore the National government, although superior wherever there is a concurrence of powers, has no more right to trespass upon the domain of a State than a State has upon the domain of Federal action. "When a particular power," says Judge Cooley, "is found to belong to the States, they are entitled to the same complete independence in its exercise as is the National government in wielding its own authority."<sup>54</sup>

This raises the question of who will enforce this guarantee that the States will remain sovereign, independent, and retain the bulk of their powers after federation. This leads to a discussion of Bryce's commentary on the role of the courts to protect the federal balance mandated by a federal Constitution.

#### 4 *Independent Judicial Guardian of the Constitution*

Bryce stated that it is the role of the Courts to determine whether a statute passed by Congress exceeds the power granted to it by the Constitution.<sup>55</sup> Bryce noted that the courts are essentially the only body who can objectively determine whether constitutional powers have been transgressed because they are impartial.<sup>56</sup> Bryce stated:

It is therefore obvious that the question, whether a congressional statute offends against the Constitution, must be determined by the courts, not merely because it is a question of legal construction, but because there is no one else to determine it. Congress cannot do so, because Congress is a party interested. If such a body as Congress were permitted to decide whether the acts it had passed were constitutional, it would of course decide in its own favour, and to allow it to decide would be to put the Constitution at its mercy. The President cannot, because he is not a lawyer, and he also may be personally interested. There remain only the courts, and these must be the National or Federal courts, because no other courts can be relied on in such cases.<sup>57</sup>

In addition, Bryce noted that when an issue of inconsistency arises between a Federal and State law, the Constitution must provide for a means of resolution by specifying that the Federal law will prevail so far as it is inconsistent with the State law.<sup>58</sup> However, as indicated in the penultimate quotation, this rule regarding inconsistency is not an indication of central government supremacy, but instead, the most logical means of resolving conflict between the two levels of government.

In summary, an examination of Bryce's *The American Commonwealth* highlights the theory behind, and the central characteristics of a federal system of government. His commentary highlights the importance of the States in a federal system of government. The States' sovereignty, equality and continued existence are a critical, and fundamental part of federal theory.

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<sup>54</sup> Ibid 314. The concept of the autonomy of the State and Federal governments from interference with one another was recognised by the early High Court of Australia in the form of the doctrine of implied intergovernmental immunities: See above n 6.

<sup>55</sup> Bryce, above n 27, 242.

<sup>56</sup> Ibid.

<sup>57</sup> Ibid.

<sup>58</sup> Ibid 242-243.

The characteristics of a federal system of government identified by Bryce, and the necessary pre-eminence of the States in a federal system of government, have also been highlighted in the work of other theorists referred to, and relied upon by the founders of the Australian Constitution. These are discussed below, and include Edward A Freeman's work: *History of Federal Government in Greece and Italy*.

## B *Edward A Freeman: History of Federal Government in Greece and Italy*

As noted by Harvey,<sup>59</sup> the second most quoted text relied upon by the framers of the Australian Constitution was Edward A Freeman's *History of Federal Government in Greece and Italy*.<sup>60</sup> Freeman was an historian who described himself as 'a [sic] historian of Federalism.'<sup>61</sup> Before detailing the history and workings of the federal systems of government in ancient Greece and Rome,<sup>62</sup> Freeman discussed the concept of federalism generally. This discussion will now be outlined.

### 1 *A written constitution that is difficult to alter*

As noted above, Freeman's primary focus was the federal systems of government in ancient Greece and Rome. This was preceded by a discussion of the general characteristics of a federation, with a primary focus on federalism's division of power between two sovereign levels of government. His acceptance of a constitution being in a written, or at the very least in a form that is difficult to change, is evident from his evaluation of the United States as an example of a 'most perfect' example of a federation.<sup>63</sup>

### 2 *Division of power between Federal and State governments*

Freeman noted that 'federalism' is difficult to define. He stated, 'The exact definition, both of a Federation in general and of the particular forms of Federations, has often taxed the ingenuity both of political philosophers and of international lawyers.'<sup>64</sup> And further: 'Controversies may thus easily be raised both as to the correct definition of a Federal Government and also whether this or that particular government comes within the definition'.<sup>65</sup> Freeman stated that the nature of federalism is that it is essentially a 'compromise ... between two extremes'<sup>66</sup> and that:

A Federal Government is most likely to be formed when the question arises whether several small states shall remain perfectly independent, or shall be consolidated into a

<sup>59</sup> Matthew N C Harvey, 'James Bryce, "The American Commonwealth", and the Australian Constitution' (2002) 76 *The Australian Law Journal* 362.

<sup>60</sup> Edward A Freeman, *History of Federal Government in Greece and Italy* (MacMillan and Co, 1893).

<sup>61</sup> *Ibid* xiii.

<sup>62</sup> It is beyond the scope of this paper to summarise the history and workings of federalism in ancient Greece and Rome, as outlined by Freeman. Instead, this paper is concerned with defining federalism and the key characteristics of a federal government.

<sup>63</sup> Freeman, above n 60, 5.

<sup>64</sup> *Ibid* 1.

<sup>65</sup> *Ibid*.

<sup>66</sup> *Ibid* 13.

single great state. A Federal tie harmonizes the two contending principles by reconciling a certain amount of union with a certain amount of independence.

Despite the difficulty in defining a federal system of government, Freeman provided a basic definition of a 'Federal Government' as follows:

The name of Federal Government may ... be applied to any union of component members, where the degree of union between the members surpasses that of mere alliance, however intimate, and where the degree of independence possessed by each member surpasses anything which can fairly come under the head of merely municipal freedom.<sup>67</sup>

Freeman argued that there is a 'Federal ideal' where it is possible for federal government to work almost flawlessly: 'There is what may be called a certain Federal ideal, which has sometimes been realized in its full, or nearly its full, perfection...'<sup>68</sup> The conditions that Freeman said are necessary to achieve this Federal ideal provide some insight into defining the concept of federalism. These conditions are described in the following passage:

Two requisites seem necessary to constitute a Federal Government in its most perfect form. On the one hand, each of the members of the Union must be wholly independent in those matters which concern each member only. On the other hand, all must be subject to a common power in those matters which concern the whole body of members collectively. Thus each member will fix for itself the laws of its criminal jurisprudence, and even the details of its political constitution. And it will do this, not as a matter of privilege or concession from any higher power, but as a matter of absolute right, by virtue of its inherent powers as an independent commonwealth. But in all matters which concern the general body, the sovereignty of the several members will cease...A Federal Union, in short, will form one State in relation to other powers, but many States as regards its internal administration. This complete division of sovereignty we may look upon as essential to the absolute perfection of the Federal ideal.<sup>69</sup>

Later, Freeman summarises the definition: 'A Federal Commonwealth, then, in its perfect form, is one which forms a single state in its relations to other nations, but which consists of many states with regard to its internal government'.<sup>70</sup>

### 3 *Sovereignty of the States*

Freeman also emphasised the independence and sovereignty of both levels of government (state and federal) in a federation. He stated: 'We may then recognize as a true and perfect Federal Commonwealth any collection of states in which it is equally unlawful for the Central Power to interfere with the purely internal legislation of the several members, and for the several members to enter into any diplomatic relations with other powers.'<sup>71</sup>

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<sup>67</sup> Ibid 2.

<sup>68</sup> Ibid.

<sup>69</sup> Ibid 2-3.

<sup>70</sup> Ibid 7.

<sup>71</sup> Ibid 8.

Freeman expanded on the requirement of State sovereignty by identifying two classes of Federal Governments. Firstly, a Federal Government can be a ‘System of Confederated States’.<sup>72</sup> This means that the central government can issue directions to the State Governments as to how they must govern. Hence, the central government does not directly govern the people. Rather, it directs the States as to how to do this. The result is a lesser degree of state independence and equality.

The second class of Federal Government is a ‘Composite State’<sup>73</sup>, in which the central government directly governs the people in specified areas of responsibility, with the States having the sovereignty to deal with their own areas of responsibility. In summary, the State and Federal governments are ‘co-ordinate’ and at the same time ‘sovereign’.<sup>74</sup> Freeman advocated that this second class was the preferable form of federal government:

It is enough to enable a commonwealth to rank, for our present purpose, as a true Federation, that the Union is one which preserves to the several members their full internal independence, while it denies to them all separate action in relation to foreign powers. The sovereignty is, in fact, divided; the Government of the Federation and the Government of the State have a co-ordinate authority, each equally claiming allegiance within its own range.<sup>75</sup>

An obvious example of this is the Australian Federal system of government.

#### 4 *Independent Judicial Guardian of the Constitution*

As noted above, Freeman’s primary concern was with the division of powers and sovereignty of the two respective spheres of government by way of introduction to federalism in ancient Greece and Rome. However, there is reference in Freeman’s work, as noted in the quotation above, of both spheres of government being ‘subject to a common power in those matters which concern the whole body of members collectively’.<sup>76</sup> This could be interpreted as referring to the Constitution itself, but undoubtedly, an independent body must exist in order to enforce and interpret this ‘common power’ and any disputes between the two spheres of government.

It is evident from the above examination that the key characteristics of federalism, identified by Freeman, and premised upon the rights and sovereignty of the States, mirror those identified by Bryce in *The American Commonwealth*. Once again, these characteristics can be seen in another text relied upon by the framers of the Australian Constitution, Alexander Hamilton, James Madison and John Jay’s *The Federalist Papers*.

#### C *Alexander Hamilton, James Madison and John Jay: The Federalist Papers*

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<sup>72</sup> Ibid 8-9.

<sup>73</sup> Ibid 9.

<sup>74</sup> Ibid .

<sup>75</sup> Ibid 11-12.

<sup>76</sup> Ibid 2.



The concept behind *The Federalist*, commonly referred to as *The Federalist Papers*, was formulated by Hamilton who ‘had in mind a long series of letters or essays defending the proposed Constitution.’<sup>77</sup> The Constitution in question was the first draft of the American Constitution agreed upon by 40 delegates from 12 States at the Federal Convention held between 25 May 1787 and 17 September 1787. *The Federalist Papers* were intended to answer criticisms of the proposed new Constitution, including a discussion of the ‘dangers of disunion and the advantages of a stronger union’,<sup>78</sup> the powers of the federal government, its relationship with the states, and the checks and balances on the new federal government’s powers set out in the Constitution.<sup>79</sup> The aim of *The Federalist Papers* was to ‘aid in securing the ratification of the Constitution’<sup>80</sup> by the states.

There has been considerable debate as to who of Hamilton, Madison and Jay wrote the specific papers that comprise *The Federalist Papers*.<sup>81</sup> However, each was adequately qualified to write on the merits of the new federal system of government. Hamilton was the third member of the New York delegation to the Federal Convention in Philadelphia in 1787. He enlisted John Jay, a lawyer in New York who had held the position of Secretary of Foreign Affairs, and later first Chief Justice of the United States, before eventually becoming Governor of New York.<sup>82</sup> Hamilton also enlisted Madison, who had held public office in Virginia for 11 years, together with being one of the most outspoken members at the Federal Convention.<sup>83</sup>

The main focus of *The Federalist Papers* was on the advantages of a federal system of government, as opposed to the characteristics of one. However, some of the key characteristics of a federal system of government are identified in *The Federalist Papers* in the course of this discussion.

#### 1 *A written constitution that is difficult to alter*

Federalist Paper 53 noted the importance of having a constitution that is difficult to alter, particularly by the central government. Although, Madison, who is attributed as its author,<sup>84</sup> did not expressly state the need for a written constitution in a federal system, it is evident from his comments about the unwritten British Constitution being subject to Parliament, rather than the people through a process of amendment that is difficult to achieve:

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<sup>77</sup> Benjamin Fletcher Wright, ‘Introduction’ in Howard Mumford Jones (ed), Alexander Hamilton, James Madison and John Jay, *The Federalist* (The Belknap Press of Harvard University Press, 1972), 7. This text is also commonly known as *The Federalist Papers*.

<sup>78</sup> *Ibid* 7.

<sup>79</sup> *Ibid*.

<sup>80</sup> *Ibid* 11.

<sup>81</sup> *Ibid* 8-9. Specifically, the authorship of 49-58 and 62-63 is unknown. Also Hamilton claimed he wrote 18-20 jointly with Madison, yet Madison claimed sole authorship of these: see page 9.

<sup>82</sup> *Ibid* 7.

<sup>83</sup> *Ibid* 7-8.

<sup>84</sup> *Ibid* 67.

The important distinction so well understood in America, between a Constitution established by the people and unalterable by the government, and a law established by the government and alterable by the government, seems to have been little understood and less observed in any other country. Wherever the supreme power of legislation has resided, has been supposed to reside also a full power to change the form of the government. Even in Great Britain, where the principles of political and civil liberty have been most discussed, and where we hear most of the rights of the Constitution, it is maintained that the authority of the Parliament is transcendent and uncontrollable, as well with regard to the Constitution, as the ordinary objects of legislative provision.<sup>85</sup>

Hence, as this quotation illustrates, constitutional powers that are difficult to alter ensure that the balance of power between the Federal and State governments is protected, in particular from the Federal Parliament, who may be tempted to centralise power allocated to the States.

## 2 *Division of power between Federal and State governments*

Federalist Paper 39, ‘Republicanism, Nationalism, Federalism,’ attributed to the authorship of Madison, also outlined some foundations and characteristics of a federal system of government. It described how, in a federal system, there are two levels of government, State and Federal, that co-exist, but have distinct areas of responsibility:

... the local or municipal authorities form distinct and independent portions of the supremacy, no more subject, within their respective spheres, to the general authority, than the general authority is subject to them, within its own sphere. In this relation, then, the proposed government cannot be deemed a *national* one; since its jurisdiction extends to certain enumerated objects only, and leaves to the several States a residuary and inviolable sovereignty over all other subjects.<sup>86</sup>

This point was re-iterated again by Madison in Federalist Paper 51 when he said of the division of powers between the state and federal governments:

In the compound republic of America, the power surrendered by the people is first divided between two distinct governments, and then the portion allotted to each subdivided among distinct and separate departments. Hence a double security arises to the rights of the people. The different governments will control each other, at the same time that each will be controlled by itself.<sup>87</sup>

Madison’s comments that the two spheres of government ‘control each other’ refers to the checks and balances created by a federal system in which distinct (and thereby limited) powers are allocated to the Federal government. This is enhanced by the sovereignty of each sphere, and the existence of an independent judicial umpire to police alleged transgressions between the two levels of government. These are discussed in the following sections.

## 3 *Sovereignty of the States*

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<sup>85</sup> Alexander Hamilton, James Madison and John Jay, *The Federalist* (The Belknap Press of Harvard University Press, 1972), 365. This quotation is discussed in Fletcher Wright, above n 78, 7-8.

<sup>86</sup> Hamilton, above n 85, 285.

<sup>87</sup> *Ibid* 357.

In Federalist Paper 39, Madison also identified the necessary sovereignty and equality of the States, and their importance in agreeing to the creation of a federal government in the first place:

Each State, in ratifying the Constitution, is considered as a sovereign body, independent of all others, and only to be bound by its own voluntary act. In this relation, then, the new Constitution will, if established, be a *federal* and not a *national* constitution.<sup>88</sup>

Hence, the Federal government is not allocated to a status that is superior to that of the States. In agreeing to federate, the States have agreed to be constitutional equals with the federal government, with both levels having sovereignty over their own allocated powers.

#### 4 *Independent Judicial Guardian of the Constitution*

Madison also noted, in Federalist Paper 39, that in a federal system, it is necessary to have an impartial ‘tribunal’, established by the federal constitution, to determine disputes between the central and regional governments:

It is true that in controversies relating to the boundary between the two jurisdictions, the tribunal which is ultimately to decide, is to be established under the general government. But this does not change the principle of the case. The decision is to be impartially made, according to the rules of the Constitution; and all the usual and most effectual precautions are taken to secure this impartiality.<sup>89</sup>

In summary, although *The Federalist Papers* sought to espouse the merits of the new draft United States Constitution, they outline some of the key aspects of federalism: a rigid Constitution that delineates power between two levels of government (State and Federal) that co-exist and yet have sovereign areas of responsibility, and the need for a tribunal to resolve disputes and ensure that the balance of power is maintained between the two jurisdictions, as opposed to a central Parliament being the final arbiter.

## IV DEFINING FEDERALISM: ADDITIONAL THEORETICAL COMMENTARY

### A *A Written Constitution That Is Difficult To Alter*

A key feature of a federal system of government is that governmental institutions and powers are set out in a written constitution that is difficult to alter, and impossible for the Federal Government to alter alone. The use of a written constitution to define and maintain the federal balance in a federation has been identified by many key theorists. Dicey, for example, wrote of ‘the supremacy of the Constitution’.<sup>90</sup> He wrote that a ‘leading characteristic’ of federalism is the existence of a written constitution<sup>91</sup> that is

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<sup>88</sup> Ibid 283.

<sup>89</sup> Ibid 285.

<sup>90</sup> A V Dicey, *Introduction to the Study of the Law of the Constitution* 8<sup>th</sup> ed (MacMillan and Co, 1926), 140.

<sup>91</sup> Ibid 142.

the ‘supreme law of the land’<sup>92</sup> where ‘every power, executive, legislative, or judicial, whether it belong to the nation or to the individual States, is subordinate to and controlled by the constitution’.<sup>93</sup> Cramp also observed this supremacy, noting that for a federal system to work properly, it is necessary to have a written constitution that sets out the allocation of these powers, and which is ‘supreme’, rendering any legislation or action outside these set powers constitutionally invalid.<sup>94</sup>

This written constitution should also be ‘rigid’ or ‘inexpansive’<sup>95</sup> so that it can only be altered by a supreme authority ‘above and beyond’ the legislature,<sup>96</sup> or in other words, in a ‘body outside the Constitution.’<sup>97</sup> Dicey noted that the Federal Parliament cannot alter the Constitution, but the Constitution can limit the powers of the Federal Parliament:

A federal constitution is capable of change, but for all that a federal constitution is apt to be unchangeable. Every legislative assembly existing under a federal constitution is merely a subordinate law-making body, whose laws are of the nature of by-laws, valid whilst within the authority conferred upon it by the constitution, but invalid or unconstitutional if they go beyond the limits of such authority.<sup>98</sup>

Sawer’s definition of federalism (as a series of ‘basic federal principles’) was noted at the beginning of this paper. In this definition, Sawer noted that a key ‘federal principle’ was that the division of state and federal powers should be set out in a constitution.<sup>99</sup> This is taken up by other commentators, such as Singleton et al who state that ‘federalism’ is ‘...a division of powers between the national (federal) government and the states .... Such a division had to be recorded in a detailed, written constitution.’<sup>100</sup>

In summary, a written constitution, in which the parameters of State and Federal powers are rigidly set out and difficult to alter, ensures that the balance of power between the two levels of government is maintained, so that the States are protected from any Federal attempts to usurp their power or make them in any way subordinate.

## B *Division of Power Between Federal and State Governments*

A discussion of federalism’s requirement of a written constitution leads us to a discussion of what must be contained within it. Federal theory specifies that a written

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<sup>92</sup> Ibid 140.

<sup>93</sup> Ibid.

<sup>94</sup> KR Cramp, *State and Federal Constitutions of Australia* (Angus & Robertson Ltd, 1913), 116-117.

<sup>95</sup> Dicey, above n 90, 142-143.

<sup>96</sup> Ibid 142-143.

<sup>97</sup> Ibid 145.

<sup>98</sup> Ibid 145-146.

<sup>99</sup> Geoffrey Sawer, *Modern Federalism* (Pitman Australia, 1976), 1.

<sup>100</sup> Gwynneth Singleton, Don Aitkin, Brian Jinks & John Warhurst, *Australian Political Institutions* (Pearson Longman, 8<sup>th</sup> ed, 2006), 31.

federal constitution distributes power between the central and regional governments. In doing so, it will frequently list, and thereby limit, the powers allocated to the central government. Hence, in delineating these powers, the written constitution provides for a federal balance of power that must be maintained between the two levels of government.

This balance of power has been identified by numerous theorists, such as Dicey, who noted that a key characteristic of federalism was ‘the distribution among bodies with limited and co-ordinate authority of the different powers of government.’<sup>101</sup> Dicey said of this distribution of powers between the federal and state governments:

The distribution of powers is an essential feature of federalism. The object for which a federal state is formed involves a division of authority between the national government and the separate States. The powers given to the nation form in effect so many limitations upon the authority of the separate States, and as it is not intended that the central government should have the opportunity of encroaching upon the rights retained by the States, its sphere of action necessarily becomes the object of rigorous definition.<sup>102</sup>

Dicey also noted that federalism balances the interests of the nation as a whole with the rights of the states by dividing power between the two levels of government in accordance with local and national issues:

... the method by which Federalism attempts to reconcile the apparently inconsistent claims of national sovereignty and of state sovereignty consists of the formation of a constitution under which the ordinary powers of sovereignty are elaborately divided between the common or national government and the separate states. The details of this division vary under every different federal constitution, but the general principle on which it should rest is obvious. Whatever concerns the nation as a whole should be placed under the control of the national government. All matters which are not primarily of common interest should remain in the hands of the several States.<sup>103</sup>

LaNauze also acknowledged the division of powers between the central and regional governments in his text *The Making of the Australian Constitution*. LaNauze outlined an early definition of a federal system of government, or ‘federation’, as those debating whether Australia should federate in the 1840’s would have understood it. He stated that a ‘federation’ was: ‘... a system of government in which a central or ‘general’ legislature made laws on matters of common interest, while the legislatures of the member states made laws on matters of local interest’.<sup>104</sup> Wheare also noted that federalism allows the states to deal with local issues that are relevant to them, whilst leaving national issues to the central government:

Federal government exists, it was suggested, when the powers of government for a community are divided substantially according to the principle that there is a single independent authority for the whole area in respect of some matters and that there are

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<sup>101</sup> Dicey, above n 90, 140.

<sup>102</sup> Ibid 147.

<sup>103</sup> Ibid 139.

<sup>104</sup> La Nauze, above n 28, 4.

independent regional authorities for other matters, each set of authorities being co-ordinate with and not subordinate to the others within its own prescribed sphere.<sup>105</sup>

Further to powers being allocated between the two spheres of government in terms of local and national importance, federalism also limits the centralisation of power. Proudhon<sup>106</sup> wrote of how federalism serves to limit central powers: ‘... in a federation, the powers of central authority are specialized and limited and diminish in number, in directness, and in what I may call intensity as the confederation grows by the adhesion of new states’.<sup>107</sup> In fact, Proudhon described the federal government as ‘subordinate to the states’,<sup>108</sup> and notes that the ‘essence’ of a federal system of government ‘... is always to reserve more powers for the citizen than for the state, and for municipal and provincial authorities than for central power ...’<sup>109</sup>

The observation that federalism limits the power of the central government so as not to detract from that of the states was also noted by Dicey who described, ‘The tendency of federalism to limit on every side the action of government and to split up the strength of the state among co-ordinate and independent authorities ...’<sup>110</sup>

In summary, federal theory dictates that centralised power is defined and limited. This means that the central government can only act within the constraints of the power

<sup>105</sup> KC Wheare, *Federal Government* (Oxford University Press, 1967), 35.

<sup>106</sup> Proudhon was a French political theorist, most often described as an ‘anarchist’ due to his socialist views with respect to economics and property. He fled to Belgium in 1858 after writing *De la Justice* for which a French Court handed him a prison sentence. During this exile Proudhon became concerned about the Italian Nationalist Movement and began to write about the evils of centralisation and the benefits of federalism to protect individual liberty. For further background to Proudhon, see Richard Vernon, ‘Introduction’ in P-J Proudhon, *The Principle of Federation* (University of Toronto Press, 1979).

<sup>107</sup> P-J Proudhon, *The Principle of Federation* (University of Toronto Press, 1979), 41. Proudhon has used the term ‘confederation’ in this quotation. It should be noted that he does not distinguish the terms ‘federation’ and ‘confederation’. That is, he is using the terms interchangeably here.

<sup>108</sup> Ibid 61.

<sup>109</sup> Ibid 45. A parallel can be drawn here with the ‘principle of subsidiarity in European Union law. If a matter does not fall within the exclusive competence of the community and can be better resolved by the individual countries that comprise the European Union (Member States), the central authority (Community) should *not* intervene, so that these matters can be resolved at a local level.

Consequently, there is a correlation between the principle of subsidiarity and definitions of federalism. Both are premised upon notions of ‘states rights’. Specifically, both are concerned with retaining state power and control over local issues. In fact, the principle is reproduced in the Australian Constitution in section 107 which ‘reserves’ state powers after federation: ‘Every power of the Parliament of a Colony which has become or becomes a State, shall, unless it is by this Constitution exclusively vested in the Parliament of the Commonwealth or withdrawn from the Parliament of the State, continue as at the establishment of the Commonwealth, or as at the admission or establishment of the State, as the case may be’. Similarly, the 10<sup>th</sup> amendment to the United States Constitution provides, ‘The powers not delegated to the United States by the Constitution, nor prohibited by it to the States, are reserved to the States respectively, or to the people.’

For a discussion of the principle of subsidiarity, together with further scholarly references, see Gabriël Moens and John Trone, *Commercial Law of the European Union* (Springer, 2010), 27-28.

<sup>110</sup> Dicey, above n 90, 151.

allocated to it by the constitution, with all remaining residual power being left to the States. It can therefore be said that the States retain the bulk of the powers they possessed prior to federation, and that their powers are more numerous than those of the central government.

### C Sovereignty of the States

As this paper has outlined so far, federalism allocates powers between two separate spheres of government, federal and state. Crommelin noted: ‘Federalism required two levels of government, each complete in itself, operating directly upon the people, with limited powers, without the capacity alone to alter the allocation of powers.’<sup>111</sup>

This distinct allocation of powers requires each level of government to operate autonomously - free from interference from the other. Hence, each level of government is intended to be sovereign in their own sphere. This sovereignty and importance of the states was noted by Galligan who acknowledged: ‘... the essence of federalism is the division of political power and government institutions between two levels of government, both of which are sovereign in limited fields and neither of which is subject to the other in certain core areas.’<sup>112</sup>

The intention of the States to retain their powers and sovereignty after federation and to remain on an equal footing with each other and the central government was also explained by Proudhon:<sup>113</sup>

Federation, from the latin *foedus*, genitive *foederis*, which means pact, contract, treaty, agreement, alliance, and so on, is an agreement by which one or more heads of family, one or more towns, one or more groups of towns or states, assume **reciprocal and equal commitments** to perform one or more specific tasks, the responsibility for which rests exclusively with the officers of the federation.<sup>114</sup>

It is submitted that the key descriptor of Commonwealth-State relations in a federal system of government is ‘reciprocal and equal’. Hence, one of the central features of federalism is the striking of a balance between state and central power whilst protecting the sovereignty of each. In the words of Proudhon:

... the contract of federation has the purpose, in general terms, of guaranteeing to the federated states their sovereignty, their territory, the liberty of their subjects; of settling their disputes; of providing by common means for all matters of security and mutual prosperity; thus, despite the scale of the interests involved, it is essentially limited. The authority responsible for its execution can never overwhelm the constituent members; that is, the federal powers can never exceed in number and significance those of local or provincial authorities, just as the latter can never outweigh the rights and prerogatives of man and citizen.<sup>115</sup>

<sup>111</sup> Michael Crommelin, ‘The Federal Model’ in Gregory Craven (ed), *Australian Federation Towards the Second Century* (Melbourne University Press, 1992), 33, 36.

<sup>112</sup> Brian Galligan, ‘Australian Federalism: Perceptions and Issues’ in Brian Galligan (ed), *Australian Federalism* (1989), 2, 3.

<sup>113</sup> See generally Proudhon, above n 107.

<sup>114</sup> Ibid 38. My emphasis is in bold.

<sup>115</sup> Proudhon, above n 107, 39-40.

In fact, Craven argued that the ‘crucial importance’ of the States as constitutional equals with the central government is often overlooked by academic commentators. He argues:

To discuss the federal system as if it consists merely of a series of disparate impediments to the exercise of general power by the Commonwealth, rather than as involving the complex interaction between two essentially complete governmental structures is a mistake that is too often made. Australian federalism is comprised of the operations of and relationships between two systems of government: its study necessarily involves a consideration of the place of each of these systems in their own right, and not merely as an adjunct to the other.<sup>116</sup>

Ware, who wrote about the nature of American federalism, discussed the division of powers between the central government and the states, and their respective equality and sovereignty: ‘By the federal principle I mean the method of dividing powers so that the general and regional government are each, within a sphere, co-ordinate and independent.’<sup>117</sup> Cramp also noted this division: ‘it [federalism] seeks to retain the sovereignty for the States in matters of provincial interest, and establish a national sovereignty in matters of a national significance’.<sup>118</sup> Further, Cramp emphasised that, in a federation, State sovereignty is retained:

It differs from other systems of government in attempting to bring together under a political bond a number of States without sacrificing their individuality. The States still retain their separate existence and independence in some particulars, though they surrender their powers to a central government in matters that affect the Federated States in common. Thus we have sovereign powers existing within a sovereign power, and neither can encroach on the sovereignty of the other.<sup>119</sup>

In a similar vein, Elazar defined federalism as ‘a comprehensive system of political relationships which has to do with the combination of self-rule and shared rule within a matrix of constitutionally dispersed powers’<sup>120</sup> in which power is ‘non-centralised’ with the power to govern ‘diffused among many centres’.<sup>121</sup> This sharing of power, according to Elazar, is premised upon mutual respect and understanding between the two levels:

The term ‘federal’ is derived from the latin *foedus*, which, like the Hebrew term *brit*, means covenant. In essence, a federal arrangement is one of partnership, established and regulated by a covenant, whose internal relationships reflect the special kind of sharing that must prevail among the partners, based on a mutual recognition of the integrity of each partner and the attempt to foster a special unity among them.<sup>122</sup>

Elazar expanded on this notion of sharing of power whilst maintaining sovereignty that is central to defining federalism:

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<sup>116</sup> Gregory Craven, ‘The States – Decline, Fall, or What?’ in Gregory Craven (ed), *Australian Federation: Toward the Second Century* (Melbourne University Press, 1992), 49, 49.

<sup>117</sup> KC Ware, *Federal Government* (Oxford University Press, 1967), 10.

<sup>118</sup> Cramp, above n 94, 115.

<sup>119</sup> *Ibid* 105-106.

<sup>120</sup> Daniel J Elazar, ‘Viewing Federalism as Grand Design’ in Daniel J Elazar (ed), *Federalism as Grand Design: Political Philosophers and the Federal Principle* (University Press of America, 1987), 1.

<sup>121</sup> Daniel J Elazar, *Exploring Federalism* (The University of Alabama Press, 1991), 34.

<sup>122</sup> *Ibid* 5.



Federal principles are concerned with the combination of self rule and shared rule. In the broadest sense, federalism involves the linking of individuals, groups and polities in lasting but limited union in such a way as to provide for the energetic pursuit of common ends while maintaining the respective integrities of all parties. As a political principle, federalism has to do with the constitutional diffusion of power so that the constituting elements in a federal arrangement share in the processes of common policy making and administration by right, while the activities of the common government are conducted in such a way as to maintain their respective integrities. Federal systems do this by constitutionally distributing power among general and constituent governing bodies in a manner designed to protect the existence and authority of all.<sup>123</sup>

In summary, even basic definitions of federalism are premised upon the independence, sovereignty and importance of the states as constitutional equals to each other, and more significantly, to the central government. In these definitions, the states occupy a place of equality, and are by no means subordinate to the central government. Hence, the balance between the two levels of government must be maintained in a true federation.

#### D *Independent Judicial Guardian of the Constitution*

This raises the question of how the federal balance must be maintained, or rather, who is responsible for doing so. Federal theory requires the existence of an independent judicial body to ensure that the sovereignty of each level of government (that is, the federal balance) is maintained and not transgressed by either level of government. Hence, as noted by Dicey, a key characteristic of a federal system of government is ‘the authority of the Courts to act as interpreters of the Constitution.’<sup>124</sup> To be more specific, federalism requires a judicial body to determine disputes about the demarcation of powers.<sup>125</sup> Consequently, this judicial body acts as ‘a guardian of the Constitution’<sup>126</sup> in ensuring that the federal balance is not transgressed.

John Stuart Mill commented on the role of the courts in maintaining this federal balance:

... the more perfect mode of federation, where every citizen of each particular state owes obedience to two governments, that of his own state and that of the federation, it is evidently necessary not only that the constitutional limits of the authority of each should be precisely and clearly defined, but that the power to decide between them in any case of dispute should not reside in any of the governments, or in any functionary subject to it, but in an umpire independent of both ...<sup>127</sup>

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<sup>123</sup> Ibid 5-6.

<sup>124</sup> Dicey, above n 90, 140.

<sup>125</sup> Cramp, above n 94, 116.

<sup>126</sup> Ibid 117-118.

<sup>127</sup> John Stuart Mill, ‘Of Federal Representative Governments’ in Dimitrios Karmis and Wayne Norman (eds), *Theories of Federalism: A Reader* (Palgrave MacMillan, 2005), 165, 167. This ‘umpire’ is a supreme court, empowered by the constitution to make final decisions about the powers of the state and federal governments, including disputes between them, or between these governments and citizens (at 168-169).

According to Dicey this federal supreme court must have the authority to interpret the constitution, and to hand down independent judgments.<sup>128</sup> Dicey noted that an independent federal court would prevent bias in favour of either level of government. For example, the independence of the constitutional court would prevent state judges from interpreting the constitution with a view to preserving the rights of the states, and would also prevent ‘judges depending on the federal government’ from interpreting the constitution in favour of the federal government.<sup>129</sup> This ‘guardianship’ role is therefore fundamentally important and when the High Court adopts a centralist agenda, contrary to the text, structure and provisions of the constitution, (that is, when the High Court fails to interpret Federal powers with a view to maintaining the federal balance), the power and sovereignty of the States is significantly compromised.

## V THE FEDERAL NATURE OF THE COMMONWEALTH CONSTITUTION

The fundamental and pivotal role of the States in the Australian federation is evident from an examination of the structure and provisions of the Commonwealth Constitution. As noted by Kirby J in his dissenting judgment in *Work Choices*:

It is impossible to ignore the place envisaged for the States in the *Constitution*. Reference is made to that role throughout the constitutional document. It is the people of the several states who ‘agreed to unite in one indissoluble Federal Commonwealth’. Both in the covering clauses and in the text of the *Constitution* itself, the federal character of the polity thereby created is announced, and provided for, in great detail.<sup>130</sup>

The provisions and structural aspects that provide for a federal balance are discussed below, starting with the preamble. However, prior to this discussion, it should be noted that there was much commentary about ‘States Rights’ from the Convention debates, in particular the Sydney session of the Australasian Federal Convention in 1891, which supports the prevailing view of the centrality of the States. Before noting some of the specific commentary in this regard, it is important not to overlook the diversity of views of the delegates who attended the Constitutional Conventions. This is summarised by Sawyer as follows, writing of the Constitutional Conventions generally:

The main political divisions at the Conventions were between liberals and conservatives, between State-righters and centralisers, and between ‘small-Staters’ and ‘big-Staters’. However ... to an important degree an overwhelming majority of the delegates at all stages were State-righters. It was federation they aimed at, and furthermore, a federation in which there was a strong emphasis on preserving the structure and powers of the States so far as consistent with union for specific and limited purposes. Few consistently advocated outright unification.<sup>131</sup>

Despite this diversity, an examination of the debates illustrates the sentiment amongst the delegates that the federated States should retain their powers unless it was absolutely necessary to transfer them to the Commonwealth, and that the States would have a

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<sup>128</sup> Dicey, above n 90, 140, 155.

<sup>129</sup> Ibid 155.

<sup>130</sup> *Work Choices Case* (2006) 229 CLR 1, 226.

<sup>131</sup> Geoffrey Sawyer, *The Australian Constitution* (Australian Government Publishing Service, 1975), 23.

central role in the new Commonwealth. This sentiment is also summarised by Craven as follows:

The central purpose of most if not all the founding fathers was the creation of a strictly limited central government subject to the absolute condition that the government so created did not unduly impinge upon the powers of the States. Given a choice between a centrally dominated federation and no federation at all, most of the founding fathers would undoubtedly have had little difficulty in accepting disunity as the lesser of two evils.<sup>132</sup>

The commentary from the Sydney Session of the Australasian Federal Convention of 1891 is laden with examples of the delegates concern to protect the rights and powers of the States. For example, Sir Henry Parkes, in his discussion of his resolution ‘That the powers and privileges and territorial rights of the several existing colonies shall remain intact, except in respect to such surrenders as may be agreed upon as necessary and incidental to the power and authority of the National Federal Government’ stated:

I think it is in the highest degree desirable that we should satisfy the mind of each of the colonies that we have no intention to cripple their powers, to invade their rights, to diminish their authority, except so far as is absolutely necessary in view of the great end to be accomplished, which, in point of fact, will not be material as diminishing the powers and privileges and rights of the existing colonies. It is therefore proposed by this first condition of mine to satisfy them that neither their territorial rights nor their powers of legislation for the well being of their own country will be interfered with in any way that can impair the security of those rights, and the efficiency of their legislative powers.<sup>133</sup>

These views were also reiterated by Mr Thomas Playford (of South Australia), who has also attended the Australasian Federal Conference of 1890, later in the debates who said, ‘... we should most strictly define and limit the powers of the central government, and leave all other powers not so defined to the local legislatures.’ He continued on to say that it was necessary to ‘... lay down all such powers as are necessary for the proper conduct of the federal government, and not interfere with the slightest degree with any other power of the local legislatures.’<sup>134</sup> This sentiment was also expressed by Mr Philip Oakley Fysh, of Tasmania, who expressed the importance of State Parliaments retaining their legislative powers over local issues in a discussion of the word ‘surrender’ in Parkes’ resolution:

... it will be absolutely unnecessary to ask the people of these colonies to surrender to the dominion parliament anything which can best be legislated for locally – anything which cannot be best legislated for by a central executive. Now, these may be far embracing words, but every man who runs may read in connection with an opinion of this kind, because he himself will be able as well as any of us to detect what it is that is best discharged locally...He must know that, in connection with the various developments of his own province, there can be no interference by an executive which will sit 1,000 miles away, and which cannot, except in regard to some individual members thereof, have so close an identity with the work in which he is engaged, or

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<sup>132</sup> Craven, above n 116, 49, 51.

<sup>133</sup> Sir Henry Parkes, *Official Record of the Debates of the Australasian Federal Convention, Sydney, 1891*, 4 March 1891, 1:24.

<sup>134</sup> Mr Thomas Playford, *Official Record of the Debates of the Australasian Federal Convention, Sydney, 1891*, 13 March 1891, 1:328.

such a knowledge of the necessities which surround the country in which he is living, as those who represent him in the local parliaments. I believe, therefore, that we may limit our explanation of the term 'surrender' to these very few words, and that the people may at once feel sure that this Convention is unlikely to ask them to give up any important right; but that its purpose will be to continue in all its harmony, in all its prestige, the position of the local parliaments, and that the dominion parliament, the great executive of the higher national sphere at which we are to arrive, will not in any way detract from it.<sup>135</sup>

Alfred Deakin, of Victoria, also a veteran of the Australasian Federation Conference of 1890, speaking of this same resolution by Parkes' also noted that State powers should be interfered with as little as possible, and that Federal Parliament's legislative powers should be defined:

The first of these establishes beyond doubt the sovereignty proposed to be conserved to the several colonies of Australasia, subject to the limitations and surrenders which will appear set out in detail in the constitution proposed to be adopted for the federal parliament. Subject to the express terms of that constitution, every liberty at present enjoyed by the peoples of the several colonies, and every power of their legislatures, and every potentiality which is within their constitutions remains with them and belongs to them for all time ... This is the postulate that to the several colonies should be left all possible powers and prerogatives, defined and undefined, while the federal government itself, however largely endowed should have a certain fixed and definite endowment within which its powers may be circumscribed.<sup>136</sup>

Deakin expanded on this later on in the debate, by clarifying the fact that the Federal Parliament's legislative authority should be restricted to limited subjects:

It is not a question of establishing a federal legislature, which is to have unlimited authority. The federal government is to have a strictly limited power; it is not to range at will over the whole field of legislation; it is not to legislate for all conceivable circumstances of national life. On the contrary, its legislation is to be strictly limited to certain definite subjects. The states are to retain almost all their present powers, and should be quite able to protect their own rights.<sup>137</sup>

And later still, Deakin reiterated the point again that a system of federal government would, by its nature, intrinsically protect States' rights, whilst at the same time providing for the best interests of the Australian nation as a whole:

The argument which I have endeavoured to maintain from the beginning of this debate has been that, while there are certain state rights to be guarded, most of those rights, if not all of them, can be guarded by the division of powers between the central government and the local governments. The states will retain full powers over the greater part of the domain in which they at present enjoy those powers, and will retain them intact for all time. But in national issues, on the subject of defence, as people who desire to have their shores defended, and to see their resources developed by means of a customs tariff and a customs union – on these questions there are no longer state rights

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<sup>135</sup> Mr Philip Oakley Fysh, *Official Record of the Debates of the Australasian Federal Convention, Sydney, 1891*, 4 March 1891, 1:42.

<sup>136</sup> Mr Alfred Deakin, *Official Record of the Debates of the Australasian Federal Convention, Sydney, 1891*, 5 March 1891, 1:70.

<sup>137</sup> *Ibid* 1:79-80.

and state interests to be guarded in the constitution, but the people's interests are one, and they call upon us to deal with them as one.<sup>138</sup>

The view that State powers should be retained as much as possible after federation, and the acknowledgment that this would be necessary to secure the acceptance of the States to federation, was expressed by Mr Richard Chaffey Baker, of South Australia:

... I am sure we must all agree that there can be no union of these colonies unless upon such terms as there are set forth – that there shall be no surrender of any right, or power, or privilege, except such as is admitted to be absolutely necessary for the good government of the union as a whole. And if we should formulate any scheme which would invade the rights and privileges of the several states, I am sure it will be in vain that we shall go back to our respective colonies and ask them to accept the scheme and join the union.<sup>139</sup>

This view was also taken up later in the debates by Mr Charles Cameron Kingston, of South Australia, who stated:

... I think we shall do well to emphasise the fact that we are dealing with autonomous states, who have long enjoyed the blessing of self government, and who should not be asked – and who, if asked, would not be likely to accede to the request – to sacrifice any of their existing powers other than those which it is absolutely necessary should be surrendered in the national interest. I hope we shall set clearly before us the fact that a national government should be strictly limited to dealing with subjects in which the interests of the community as a nation are involved. I hope that in our proceedings we shall feel that it is our duty, in approaching the several colonies, as we shall require to approach them at the conclusion of the deliberations of this convention, to state in precise language that which we desire they should surrender for the benefit of the nation. I hope, also, that we shall make no request for a surrender which cannot be justified on the score of the requirements of the national interest.<sup>140</sup>

Later, Mr Duncan Gillies of Victoria, made similar comments. Specifically, he noted that federation should be brought about through minimal interference with the existing powers of the States:

... we must bear this in mind, that the powers that it is proposed should be given to the federal parliament are reduced to the smallest possible compass, with the object of not disturbing in the slightest degree the right to legislate on all subjects which has been granted to the several parliaments throughout this continent. We disturb that power as little as possible; and the range of the subjects which the states will have to discuss and determine is scarcely interfered with, and not interfered with in any degree that will affect their legal rights and interests.<sup>141</sup>

The role of the Senate in the protection of States Rights, and as a means by which the States would be directly involved and represented in the Federal Parliament, was discussed by Mr Arthur Rutledge of Queensland:

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<sup>138</sup> Ibid 1:383.

<sup>139</sup> Mr Richard Chaffey Baker, *Official Record of the Debates of the Australasian Federal Convention, Sydney, 1891*, 6 March 1891, 1:117.

<sup>140</sup> Mr Charles Cameron Kingston, *Official Record of the Debates of the Australasian Federal Convention, Sydney, 1891*, 9 March 1891, 1:153.

<sup>141</sup> Mr Duncan Gillies, *Official Record of the Debates of the Australasian Federal Convention, Sydney, 1891*, 11 March 1891, 1:231.

... the voice of the States, as distinct states, with separate claims and separate interests, shall be heard with equal emphasis and with equal effect in a second chamber, which may be called the senate or the council of states, or by whatever other name it may be designated. I do not think that we ought for a single moment to attempt in what we do here to obliterate in any degree the individuality of the States which, taken as a whole, are to form the great federation of Australasia. To endeavour to do that – to destroy the individuality of the States – seems to me to strike at the very root of the leading principle of federation, and if we are to have a federation that shall be something of which we could be proud – if we are to have a federation that shall satisfy the aspirations of the people of the several colonies whom we are here to represent – we must have a federation that will recognise that principle in the fullest and most marked degree.<sup>142</sup>

The Senate was also acknowledged, by Dr John Alexander Cockburn, of South Australia, to protect against centralisation, this protecting the States' interests, and of upholding democracy:

... the principle of federation is that there should be houses with co-ordinate powers – one to represent the population, and the other to represent the states. We know the tendency is always towards the central authority, that the central authority constitutes a sort of vortex to which power gradually attaches itself. Therefore, all the buttresses and all the ties should be the other way, to assist those who uphold the rights of the states from being drawn into this central authority, and from having their powers finally destroyed...it is only when you have state rights properly guarded, and safeguard local government, that you can have government by the people. Government at a central and distant part is never government by the people, and may be just as crushing a tyranny under republican or commonwealth forms as under the most absolute monarchy...I maintain that unless the state rights are in every way maintained – unless buttresses are placed to enable them to stand up against the constant drawing toward centralisation – no federation can ever take root in Australia. It will not be a federation at all. It will be from the very start a centralisation, a unification, which, instead of being a guardian of liberty of the people, will be its most distinct tyrant, and eventually will overcome it.<sup>143</sup>

The concern of the delegates overall to retain States' rights and sovereignty is consequently reflected in the structure, form and provisions of the Federal Constitution which took effect on 1 January 1901. The following part of this paper illustrates how the federal system established by the Commonwealth Constitution is premised upon the equality of the Federal and State governments.

#### A *The Preamble*

The federal nature of the Commonwealth Constitution is at first evident in the preamble to the Constitution which declares that the *States* have agreed to the formation of a central government:

Whereas the *people of New South Wales, Victoria, South Australia, Queensland; and Tasmania*, humbly relying on the blessing of Almighty God, have *agreed to unite in*

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<sup>142</sup> Mr Arthur Rutledge, *Official Record of the Debates of the Australasian Federal Convention, Sydney, 1891*, 9 March 1891, 1:145.

<sup>143</sup> Dr John Alexander Cockburn, *Official Record of the Debates of the Australasian Federal Convention, Sydney, 1891*, 3 April 1891, 1:707-708.

*one indissoluble Federal Commonwealth* under the Crown of the United Kingdom of Great Britain and Ireland, and *under the Constitution* hereby established ...<sup>144</sup>

The desire and consent of the States to form a federation, whilst maintaining their independence was also noted by Dicey:

The Commonwealth is in the strictest sense a federal government. It owes its birth to the desire for national unity which pervades the whole of Australia, combined with the determination on the part of the several colonies to retain as States of the Commonwealth as large a measure of independence as may be found compatible with the recognition of Australian nationality.<sup>145</sup>

Hence, in the words of Sawyer: ‘The Constitution is on its face federal and is so described in the Covering Clauses’.<sup>146</sup>

Upon reading further, clause 9, which contains the Constitution in full, commences by setting out the paper division of the Constitution. Of significance is ‘Chapter V’ entitled ‘The States’. An examination of Chapter V shows that the States continued to play a vital role in governance post-Federation. Chapter V, and its key federal provisions will now be discussed.

## B *Saving of State Constitutions and State Powers*

Chapter V commences with section 106 which provides that after Federation, State constitutions will continue to have force. Hence, the Constitutions of the States, being their fundamental and ultimate source of power are protected. In their discussion of this provision, Quick & Garran cite Sir Henry Parkes from the Sydney Convention in 1891 whose comments on section 106 emphasise the sentiment of the States that their constitutional and legislative powers should be retained as fully as possible after federation:

I, therefore, lay down certain conditions which seem to me imperative as a ground work of anything we have to do, and I prefer stating that these first four resolutions simply lay down what appear to me the four most important conditions on which we must proceed. First: ‘That the powers and privileges and territorial rights of the several existing colonies shall remain intact, except in respect to such surrenders as may be agreed upon as necessary and incidental to the power and authority of the National Federal Government’. I think that it is in the highest degree desirable that we should satisfy the mind of each of the colonies that we have no intention to cripple their powers, to invade their rights, to diminish their authority, except so far as it is absolutely necessary in view of the great end to be accomplished, which, in point of fact, will not be material as diminishing the powers and privileges and rights of the existing colonies. It is therefore proposed by this first condition of mine to satisfy them that *neither their territorial rights nor their powers of legislation for the well being of*

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<sup>144</sup> Preamble, Constitution. Emphasis added. Western Australia is absent because it delayed in passing an enabling Act and Referendum to approve the final draft of the Constitution Bill. However, it did so prior to Proclamation of the new Commonwealth by the Queen, hence Western Australia was able to be admitted as an original State of the new Federation. This is discussed later in this paper.

<sup>145</sup> Dicey, above n 90, 529-530.

<sup>146</sup> Geoffrey Sawyer, *Australian Federalism in the Courts* (Melbourne University Press, 1967) 121.

*their own country will be interfered with in any way that can impair the security of those rights, and the efficiency of their legislative powers.*<sup>147</sup>

Parke's comments reveal his strong conviction that the impact of Federation on the States and their constitutional and legislative powers should be minimal. This is also evident from section 107 which provides that the powers of State Parliaments shall remain, except for those that have been reallocated to the Commonwealth Parliament by the Commonwealth Constitution on federation. Quick and Garran's comments on this provision are also indicative of the centrality of the States under the new Federal Constitution:

The Parliament of each State is a creation of the Constitution of the State. The Constitution of each State is preserved, and the parliamentary institutions of each State are maintained without any structural alteration, but deprived of power to the extent which their original legislative authority and jurisdiction has been transferred to the Federal Parliament.<sup>148</sup>

Section 108 in Chapter V, further provides that State laws existing at the time of federation, will continue to have force after federation, and can even be amended or repealed by a State, if they have not been made exclusive to the Commonwealth, and if the Commonwealth has not enacted the same law. It is evident from these provisions that great care was taken by the framers to make interference with State constitutions, State law making powers, and State executive powers as minimal as possible. Hence, it could be said with a strong degree of certainty that: 'The Constitution was intended to preserve a wide area of governmental authority for the States ...'<sup>149</sup>

As indicated by Quick and Garran in the preceding quotation, and by Sawyer in his basic federal principles (discussed above), it is essential for the efficient working of the federal system that there is a provision in the Constitution outlining a procedure to determine any conflict that may arise between State and Federal laws.<sup>150</sup> This is dealt with by section 109, also in Chapter V, which provides that if there is inconsistency between a Commonwealth and State law, the Commonwealth law will prevail to the extent of the inconsistency. Whilst the *Engineers* majority pointed to this as evidence of Federal supremacy over the States,<sup>151</sup> it is submitted that this is the most logical way of resolving the inconsistency between these conflicting laws, and is not in itself an indication of federal supremacy. This view is also supported by the fact that if the inconsistent Commonwealth legislation is repealed or amended so that it is no longer

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<sup>147</sup> Sir Henry Parkes, Convention Debates, Sydney, 1891, 24 cited in John Quick and Robert Randolph Garran, *The Annotated Constitution of the Australian Commonwealth* (1901), 930. My emphasis added.

<sup>148</sup> John Quick and Robert Randolph Garran, *The Annotated Constitution of the Australian Commonwealth* (LexisNexis Butterworths, 1901), 933. Quick and Garran continue on to comment that State powers will be lessened as the Federal Parliament enacts more and more legislation. They note (at 933) that these powers can be classified as 'exclusive' or 'concurrent'. These classes will be discussed later in this paper.

<sup>149</sup> Sawyer, above n 131, 87.

<sup>150</sup> Sawyer, above n 99, 1.

<sup>151</sup> *Engineers* (1920) 28 CLR 129, 155, per Knox CJ, Isaacs, Higgins, Rich and Starke.



inconsistent, the State law will ‘revive’ if it has not been repealed.<sup>152</sup> Hence, section 109 does not operate to completely invalidate the State law.

C *Limiting the number of federal legislative powers and the residual powers of the States*

In addition to the provisions of Chapter V which provides for the continuance of State Constitutions, legislative powers and laws, the framers of the Constitution limited the powers of the Federal Parliament by specifically listing them. Section 51 sets out a list of matters that the Federal Parliament can legislate with respect to.<sup>153</sup> If the Federal Parliament legislates on any matter not listed in section 51, or otherwise authorised by the Commonwealth Constitution, it will be beyond the legislative power of the Commonwealth Parliament, and unconstitutional. By listing, and thereby limiting, the Federal Parliament’s legislative powers, the framers left the power to legislate on all other topics to the States, thus giving the States a far greater scope of legislative power. Dicey noted how the Constitution delineates the division of power between the Commonwealth and the States, with the States having ‘indefinite’ powers:

... the Constitution itself...fixes and limits the spheres of the federal or national government and of the States respectively, and moreover defines these spheres in accordance with the principle that, while the powers of the national or federal government, including in the term government both the Executive and the Parliament of the Commonwealth, are, though wide, definite and limited, the powers of the separate States are indefinite, so that any power not assigned by the Constitution to the federal government remains vested in each of the several States, or, more accurately, in the Parliament of each State.<sup>154</sup>

In addition, upon reviewing the matters listed in section 51, it is evident that many of the matters concern subjects that pertain to, or affect, the nation as a whole, and are therefore best left to the Federal Parliament as a matter of consistency and practicality. In the words of Quick and Garran, these powers ‘are of such a character that they could only be vested in and effectually exercised by the Federal Parliament’.<sup>155</sup> These subjects include trade and commerce with other countries<sup>156</sup>, borrowing money on the public credit of the Commonwealth,<sup>157</sup> defence,<sup>158</sup> currency,<sup>159</sup> immigration and emigration<sup>160</sup> and external affairs,<sup>161</sup> to name a few. The listing, and therefore limiting of, Federal Parliament’s legislative power is indicative of the framer’s intention that the bulk of legislative power would remain with the States after federation.

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<sup>152</sup> Sawyer, above n 146, 142.

<sup>153</sup> There were originally 39 matters that the Federal Parliament could legislate with respect to. This was increased to 40 in 1946 with the insertion of 51(xxiiiA).

<sup>154</sup> Dicey, above n 90, 530.

<sup>155</sup> John Quick and Robert Randolph Garran, *The Annotated Constitution of the Australian Commonwealth* (LexisNexis Butterworths, 1901), 934.

<sup>156</sup> S51(i).

<sup>157</sup> S51(iv).

<sup>158</sup> S51(vi).

<sup>159</sup> S51(xii).

<sup>160</sup> S51(xxvii).

<sup>161</sup> S51(xxix).

Some of these enumerated powers appear quite broad in scope, for example, ‘external affairs’ in section 51(xxix). However, some powers are expressly limited to ensure that the States retain sovereignty over their internal affairs. Quick and Garran provide the example of the trade and commerce power in section 51(i). They state that although the power allows the Parliament to legislate with respect to ‘trade and commerce’, the power contains ‘words of limitation’, namely, ‘with other countries, and among the States’ so that the Federal Parliament cannot legislate with respect to a State’s internal trade and commerce (that is, intra-state trade and commerce).<sup>162</sup> Such words of limitation protect the sovereignty of the States from interference from the Federal Parliament in their internal operations, or in this case, intra-state commerce. Quick and Garran also give the example of the taxation power in section 51(ii) with words of limitation ‘so as not to discriminate between States or parts of States’, noting its importance in a federal system:

So the condition annexed to the grant of taxing power is, that there must be no discrimination between States in the exercise of that power. This, again, is not a limitation for the protection of private citizens of the Commonwealth against the unequal use of the taxing power; it is founded on federal considerations; it is a part of the federal bargain, in which the States and the people thereof have acquiesced, making it one of the articles of the political partnership, as effectually as other leading principles of the Constitution.<sup>163</sup>

Other examples of words of limitation to prevent interference by the Federal Parliament in the internal affairs of the States include: ‘Banking, other than State Banking’ in section 51(xiii); ‘Insurance, other than State insurance’ in section 51(xiv); and ‘Conciliation and arbitration for the prevention and settlement of industrial disputes extending beyond the limits of any one State’ in section 51(xxxv).

#### D *Exclusive and Concurrent Powers*

A discussion of exclusive and concurrent powers is necessary to explain how the Constitution contemplates the reallocation of federal and State powers to operate after federation in order for the State and Federal governments to successfully co-exist. When federation occurred on 1 January 1901, the powers of the federal and State governments could be classified as ‘exclusive’ or ‘concurrent’. Quick and Garran explain the distinction:

In the early history of the Commonwealth the States will not seriously feel the deprivation of legislative power intended by the Constitution, but as Federal legislation becomes more active and extensive the powers contemplated by the Constitution will be gradually withdrawn from the States Parliaments and absorbed by the Federal Parliament. The powers to be so withdrawn may be divided into two classes – “exclusive” and “concurrent”. Exclusive powers are those absolutely withdrawn from the State Parliaments and placed solely within the jurisdiction of the Federal Parliament. Concurrent powers are those which may be exercised by the State Parliaments simultaneously with the Federal Parliament, subject to the condition that, if there is any conflict or repugnancy between the Federal law and the State law relating

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<sup>162</sup> Quick and Garran, above n 155, 510.

<sup>163</sup> Ibid.

to the subject, the federal law prevails, and the State law to the extent of its inconsistency is invalid.<sup>164</sup>

The language used by Quick and Garran in this quotation may appear to some to suggest that a gradual ‘deprivation’ of State power was contemplated as acceptable and inevitable. However, it is submitted that Quick and Garran are merely describing the reallocation of powers that must necessarily occur after Federation in order for the federal system to work. The analysis below seeks to explain and expand on this further.

As Quick and Garran explain in the quotation above, 13 of the 39 powers in section 51 were specifically created by the Constitution and were exclusively vested in the Commonwealth Parliament.<sup>165</sup> Section 52 also gives exclusive powers to the Commonwealth Parliament. Hence, the Constitution specifically provides that the States cannot legislate on these topics from the time of federation. The 23 remaining powers, which, prior to federation were in the domain of the State Parliaments were ‘concurrent’ as at the time of federation. In other words, State legislation on these matters would continue to be valid until the federal Parliament enacted inconsistent legislation which would trigger the operation of section 109.<sup>166</sup> The operation of exclusive powers, and concurrent powers that became exclusive to the Federal Parliament by virtue of the enactment of inconsistent legislation, left a balance of powers, which Quick and Garran describe as ‘residuary legislative powers’ to the States, which they define as follows:

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<sup>164</sup> Ibid 933.

<sup>165</sup> Quick and Garran note that these powers include:

- (iv) Borrowing money on the public credit of the Commonwealth;
- (x) Fisheries in Australian waters beyond territorial limits;
- (xxiv) The service and execution throughout the Commonwealth of the civil and criminal process and the judgments of the courts of the States;
- (xxv) The recognition throughout the Commonwealth of the laws, the public Acts and records, and the judicial proceedings of the States;
- (xxix) External affairs;
- (xxx) The relations of the Commonwealth with the islands of the Pacific;
- (xxxi) The acquisition of property on just terms from any State or person for any purpose in respect of which the Parliament has power to make laws;
- (xxxiii) The acquisition, with the consent of a State, of any railways of the State on terms arranged between the Commonwealth and the State;
- (xxxv) Conciliation and arbitration for the prevention and settlement of industrial disputes extending beyond the limits of any one State;
- (xxxvi) Matters in respect of which this Constitution makes provision until the Parliament otherwise provides;
- (xxxvii) Matters referred to the Parliament of the Commonwealth by the Parliament or Parliaments of any State or States, but so that the law shall extend only to States by whose Parliaments the matter is referred, or which afterwards adopt the law;
- (xxxviii) The exercise within the Commonwealth, at the request or with the concurrence of the Parliaments of all the States directly concerned, of any power which can at the establishment of this Constitution be exercised only by the Parliament of the United Kingdom or by the Federal Council of Australasia;
- (xxxix) Matters incidental to the execution of any power vested by this Constitution in the Parliament or in either House thereof, or in the Government of the Commonwealth, or in the Federal Judicature, or in any department or officer of the Commonwealth. See John Quick and Robert Randolph Garran, *The Annotated Constitution of the Australian Commonwealth* (1901), 933.

<sup>166</sup> Quick and Garran, above n 155, 933.

The residuary authority left to the Parliament of each State, after the exclusive and concurrent grants to the Federal Parliament, embraces a large mass of constitutional, territorial, municipal and social powers ...<sup>167</sup>

These residuary State powers, as described by Quick and Garran above, are ‘plenary’ and thus unlimited in scope,<sup>168</sup> and are only subject to limited restrictions.<sup>169</sup> So although the Constitution does remove some areas of power originally allocated to the States, and creates some new powers in favour of the Commonwealth, the States received a mandate, post-federation to legislate over a far wider range of topics than the Federal Parliament. Hence, the States retained the bulk of legislative power after federation.

#### E *State representation in Federal Parliament: the Senate as a States House*

Adequate representation for the States, and the protection of States’ Rights after federation was specifically incorporated into the composition of the Houses of Parliament by the framers by the creation of the Senate. Chapter I, Part II, entitled ‘The Senate’ the framers made specific provision for State representation in the Federal Parliament. Section 7 provides that ‘The Senate shall be composed of Senators for each State, directly chosen by the people of the State ...’ Thus, Parliament’s upper house was designed to specifically represent the people of each State, and consequently, the interests of each State. Dicey also commented that the composition of Parliament serves to protect the rights of the States, and to give the States ‘a large amount of legislative independence’:<sup>170</sup>

The Parliament of the Commonwealth is so constituted as to guarantee within reasonable limits the maintenance of States rights. For whilst the House of Representatives represents numbers, the Senate represents the States of the Commonwealth, and each of the Original States is entitled, irrespective of its size and population, to an equal number of senators.<sup>171</sup>

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<sup>167</sup> Ibid 935.

<sup>168</sup> *Union Steamship Co of Australia Pty Ltd v King* (1988) 166 CLR 1.

<sup>169</sup> Quick and Garran list examples from powers requiring consent by the Federal Parliament before a State may exercise that power. These include: section 91 provides that a State may only grant an aid or bounty on the production or export of goods with the consent of Federal Parliament. Another example can be found in section 114, which provides that a State cannot raise or maintain naval or military forces, or tax property of the Commonwealth, without the consent of the Federal Parliament. See Quick and Garran, above n 155, 936.

Quick and Garran also note examples of where the Constitution restricts State powers. These include: Section 51(xxxii), which, in providing that the Parliament can legislate with respect to the control of railways with respect to transport for the naval or military purposes of the Commonwealth, restricts State control of railways to that extent; Similarly, section 98 allows the Federal Parliament to make laws about State railways in connection with the trade and commerce power; Section 90 restricts the power of the States with respect to taxation by making the ability to levy duties of customs and excise exclusive to the Federal Parliament; and section 92 restricts the States and Commonwealth from restricting freedom of interstate trade and movement. Quick and Garran, above n 155, 936.

<sup>170</sup> Dicey, above n 90, 530-531.

<sup>171</sup> Ibid 530.

Quick & Garran, in their commentary on section 7, note the Senate's central role in protecting and representing State interests:

The Senate is one of the most conspicuous, and unquestionably the most important, of all the federal features of the Constitution ... It is the chamber in which the States, considered as separate entities, and corporate parts of the Commonwealth, are represented. They are so represented for the purpose of enabling them to maintain and protect their constitutional rights against attempted invasions, and to give them every facility for the advocacy of their peculiar and special interests, as well as for the ventilation and consideration of their grievances. It is not sufficient that they should have a Federal High Court to appeal to for the review of federal legislation which they may consider to be in excess of the jurisdiction of Federal Parliament. In addition to the legal remedy it was deemed advisable that Original States at least should be endowed with a parity of representation in one chamber of the Parliament for the purpose of enabling them effectively to resist, in the legislative stage, proposals threatening to invade and violate the domain of rights reserved to the States.<sup>172</sup>

In fact, Dicey takes this further, emphasising the paramountcy of the Senate over the House of Representatives. His description below could arguably be said to endorse a view of the Senate as superior, and hence the interests of the individual States that make up the federation as preferential to, any notion of centralised power:

The Constitution, further, is so framed as to secure respect for the Senate; the longer term for which the Senators are elected and the scheme of retirement by rotation, which will, in general, protect the Senate from a dissolution, are intended to make the Senate a more permanent, and therefore a more experienced, body than the House of Representatives, which can under no circumstances exist for more than three years, and may very well be dissolved before that period has elapsed; then too the senators will, as the Constitution now stands, represent the whole of the State for which they sit.<sup>173</sup>

Hence, the Federal Constitution contemplates that the Senate is a 'States House'.<sup>174</sup> The Senate was not only designed to ensure adequate representation for the States in the Federal Parliament, but was also seen as an essential requirement for the Australian federal system to function effectively in order to prevent encroachment by the Commonwealth on the powers of the States. Barton noted the importance of the Senate in protecting the interests of the States at the Adelaide Convention Debates:

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

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<sup>172</sup> Quick and Garran, above n 155, 414.

<sup>173</sup> Dicey, above n 90, 530.

<sup>174</sup> The operation of the Senate has become dominated by party politics so that Senators vote in accordance with party politics, rather than in the interests of their States. See Sawyer, above n 146, 150. It is submitted that the actuality of the Senate becoming less of a 'States House' in modern politics does not detract from the intention of the framers, and the provision in the Constitution, that the Senate should be fundamental in ensuring State approval to federal legislation and the protection of State interests against encroachment by the central government.

called the Federation will more nearly approach the unified or ‘unitarian’ system of government. We cannot adopt any form of government the tendency of which will be, as time goes on, to turn the constitution toward unification on the one hand, and towards a loose confederacy on the other. We must observe that principle, or else we do not observe the charge laid upon us by the enabling Act, which lays on us the duty to frame a ‘Federal’ Constitution under the Crown. So, therefore, I take it there must be two Houses of Parliament, and in one of these Houses the principle of nationhood, and the power and scope of the nation, as constituted and welded together into one by the act of Federation, will be expressed in the National Assembly, or House of Representatives, and in the other Chamber, whether it is called the Council of the States, the States Assembly, or the Senate, must be found not the ordinary checks of an Upper House, because such a Chamber will not be constituted for the purposes of an Upper House; but you must take all pains, not only to have a Parliament consisting of two Chambers, but to have it constituted in those two Chambers in such a way as *to have the basic principle of Federation conserved in that Chamber which is representative of the rights of the States; that is that each law of the Federation should have the assent of the States as well as of the federated people.* If you must have two Chambers in your Federation, it is one consequence of the Federation that *the Chamber that has in its charge the defence of State interests will also have in its hands powers in most matters coordinate with the other House.*<sup>175</sup>

Barton’s concluding statements are informative. They emphasise that the central role of the Senate is to ensure that every Commonwealth law must be approved by the States. This means that the States would play a central role in approving the enactment of legislation for the nation, and in doing so, would be able to protect their own interests.

#### F *The High Court of Australia*

The Commonwealth Constitution establishes the High Court of Australia in section 71, whose Justices are, in the words of Dicey, ‘intended to be the interpreters, and in this sense the protectors of the Constitution.’ The High Court is, in this sense, a Constitutional referee empowered to strike down any law that transgresses the authority conferred on both the Federal and State Parliaments by the Constitution. This point is noted by Quick and Garran:

The High Court, like the Supreme Court of the United States, is the ‘guardian of the Federal Constitution;’ that is to say, it has the duty of interpreting the Constitution, in cases that come before it, and of preventing its violation. But the High Court is also – unlike the Supreme Court of the United States – the guardian of the Constitutions of the several States; it is as much concerned to prevent encroachments by the Federal Government upon the domain of the States as to prevent encroachments by the State Governments upon the domain of the Federal Government.<sup>176</sup>

Thus the Constitution provides that the High Court is pivotal in maintaining the federal balance of power between the Commonwealth and the States in the Australian federal system of government. Its existence is a further acknowledgment by the framers that State powers must not be diminished after federation and that the federal balance must be preserved and maintained so as to avoid centralisation of government power.

<sup>175</sup> Mr Edmund Barton, Adelaide Convention Debates, 21-23, cited in Quick and Garran, above n 155, 417. My emphasis added.

<sup>176</sup> Quick and Garran, above n 155, 725.

## VI DIFFERENT TYPES OF FEDERALISM: WHAT HAS THE AUSTRALIAN SYSTEM OF GOVERNMENT BECOME?

Federal theory and the Federal Constitution itself which took effect from 1 January 1901, both envisage the States as sovereign participants on an equal footing with the Federal Government. However, the result of the High Court's decision in *Engineers* was to reject this premise of the equality of the States and to interpret the Constitution in a manner that has resulted in increased centralisation of powers. Thus, Australia is no longer the Federation that it once was. The question then becomes, what type of federation does Australia now have?

It is necessary to examine the various types of federalism, or rather variations on the federal model to assess how the High Court's interpretation of the Constitution post-*Engineers*, has displaced the federal balance and Australia's position as a true federation. This section will commence by distinguishing a federal system of government from a unitary one, and from a 'confederation'. This will be followed by a discussion of Sawyer's 'stages of federalism', namely co-ordinate, co-operative and organic federalism. As well as highlighting the central role and sovereignty of the states in a true federal system, this analysis will serve to assess the type of federation (if it can be described as one at all) that the Australian system of government has become.

### A Unitary government

Firstly, a 'unification of states', or in other words, a unitary system of government, differs from a federation. In his influential work *Introduction to the Study of the Law of the Constitution*, Dicey outlines the key features of a federal system, in order to contrast it with the 'unitary' system of government in Britain.<sup>177</sup> In summary, the differences between the two systems of government were described by Dicey as follows:

Unitarianism, in short, means the concentration of the strength of the state in the hands of one visible sovereign power, be that power Parliament or Czar. Federalism means the distribution of the force of the state among a number of co-ordinate bodies each originating in and controlled by the constitution.<sup>178</sup>

Therefore, in a unitary system, the states have surrendered their powers to a central body and have therefore lost their sovereignty. The states can only exercise powers that the central government has delegated to them, with the corollary being that the central government can also take these powers away.<sup>179</sup>

### B Confederation

Cramp noted that the classification of a system of government is dependent upon the amount of power allocated to the central government.<sup>180</sup> One classification is known as a 'confederation' or 'Staatenbund' in which the federal government has limited power

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<sup>177</sup> Dicey, above n 90, 134-135. The first edition of this text was published in 1885.

<sup>178</sup> Ibid 153.

<sup>179</sup> Cramp, above n 94, 110.

<sup>180</sup> Ibid 107.

and acts at the direction of the States.<sup>181</sup> To put it simply, in a confederation the central government is ‘weak’ and has ‘limited powers’, and state governments have ‘a high level of autonomy’.<sup>182</sup>

In a confederation, the central government is ‘selected by, and communicates with, the governments of the various provinces’.<sup>183</sup> It has little or no control over making the states comply with its laws, or to remain with the union if they disagree with the actions of the federal government.<sup>184</sup> An example, given by Cramp, of a confederation is that of the United States prior to 1787.<sup>185</sup> Cramp concluded that, as a result of the lack of autonomy of the central government, this can hardly be described as a proper federal system.

Mill, like Cramp, disclaimed this type of federalism as inefficient because internal conflict could result from a lack of agreement between states, with the federal government, or other authority, having no power to dictate to the states to resolve any conflict: ‘A union between the governments only is a mere alliance, and subject to all the contingencies which render alliances precarious’.<sup>186</sup>

### C *League of States*

Cramp also discussed the concept of a ‘league of states’, as differing from a federal system of government. In a ‘league of states’ there is no central government. Instead, the states act by collective agreement, with the consequence that any state can withdraw from the league at any time if they disagree with the majority of states.<sup>187</sup>

### D *Stages of Federalism*

Three ‘stages of federalism’ were identified by Sawyer and assist in determining the current placement of the Australian system of government within the federal spectrum. These ‘stages’ are ‘co-ordinate federalism’ (also known as ‘dual federalism’<sup>188</sup>), ‘co-operative federalism’ and ‘organic federalism’.<sup>189</sup> It is submitted that the Australian Constitution establishes a system of co-ordinate federalism, in which the central and state governments are equal. In practice, the Australian federal system also contains aspects of co-operative federalism in terms of mutual co-operation between the two levels of government. However, Australia has moved towards a system of organic federalism (that is, centralisation) in which the federal balance has been distorted by the

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<sup>181</sup> Ibid 108.

<sup>182</sup> Gwynneth Singleton, Don Aitkin, Brian Jinks & John Warhurst, *Australian Political Institutions* (Pearson Longman, 2006), 31.

<sup>183</sup> Cramp, above n 94, 107.

<sup>184</sup> Ibid 108.

<sup>185</sup> Ibid.

<sup>186</sup> John Stuart Mill, ‘Of Federal Representative Governments’ in Dimitrios Karmis and Wayne Norman (eds), *Theories of Federalism: A Reader* (Palgrave MacMillan, 2005), 165, 166-167.

<sup>187</sup> Cramp, above n 94, 110.

<sup>188</sup> Sawyer, above n 99, 51.

<sup>189</sup> Ibid 98.



High Court's failure to fulfil its obligation to maintain the federal balance, as mandated by the Constitution and the federal theory it is premised upon.

## 1 *Co-ordinate federalism*

'Co-ordinate federalism' involves each of the states and central government being equal to one another. That is, there is an 'absence of *formal subordination* of the units to one another.'<sup>190</sup> However, Sawyer pointed out that most often it will be the states that are equal to one another, with the central government occupying a more influential position because of its 'actual wealth, military strength, prestige, [and] influence'.<sup>191</sup> More specifically, Sawyer defined 'co-ordinate federalism', which was the model preferred by the founders of the Australian Constitution, and requires the:

... centre and regions respectively to be completely equipped for the business of government, without part in each other's affairs, and engaging in areas of activity so defined that while conflict might occur – to be judicially resolved – there could be no question of the policy of one being guided by reference to the policy of the other.<sup>192</sup>

In other words, co-ordinate federalism is premised upon the independence and sovereignty of the states and central government from one another:

The Australian Founders intended to create what has come to be called a "co-ordinate" federal system, in which the two sets of authorities – central and regional – would act independently of each other, in relation to topics so defined as to reduce to a minimum the possibility of overlap or collision. On such assumptions, the necessity and opportunity for co-operation between centre and regions would be small.<sup>193</sup>

Thus, both the central and regional governments are independent and sovereign in their respective areas – the states do not dictate to the central government, and vice versa. A consequence of this is that citizens are subject to both laws of the central government, and their state.<sup>194</sup>

## 2 *Co-operative federalism*

'Co-operative federalism' occurs when the various governments in a federal system co-operate with one another on joint projects or issues.<sup>195</sup> However, Sawyer noted the correlation between co-ordinate federalism and co-operative federalism. Specifically, if there is not equality of 'bargaining strength' between the parties there is less 'co-operation' and more likely 'domination', often by the centre over the regions. For example, Sawyer stated, 'The situation may arise in which a region cannot say "no" to *some* sort of scheme such as the centre proposes, yet it has a good deal of bargaining capacity as to the details.'<sup>196</sup>

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<sup>190</sup> Ibid 98. The italics are Sawyer's.

<sup>191</sup> Ibid.

<sup>192</sup> Ibid 51-52.

<sup>193</sup> Sawyer, above n 131, 34.

<sup>194</sup> Cramp, above n 94, 109.

<sup>195</sup> Sawyer, above n 99, 101. See also Sawyer, above n 131, 93-95 for a discussion of co-operative federalism.

<sup>196</sup> Sawyer, above n 99, 102. The italics are Sawyer's.

### 3 *Organic federalism*

The final type of federal system identified by Sawyer was ‘organic federalism’<sup>197</sup> which Sawyer defined as follows:

Organic federalism is federalism in which the centre has such extensive powers, and gives such a strong lead to regions in the most important areas of their individual as well as their co-operative activities, that the political taxonomist may hesitate to describe the result as federal at all. Taking a lead from the discussion of co-operative federalism, one may say that the organic stage begins to develop as the regions lose any substantial bargaining capacity in relation to the centre.<sup>198</sup>

Cramp also described this type of federal system under the name of ‘Federation’ or ‘Bundesstatt’. In such a Federation, the central government:

... may have very complete and far reaching powers, enabling it to legislate and to administer its own laws, and within certain limits to be independent of State control; whilst the States, shorn of the powers which are transferred to the Federal Government, are to that extent restricted in their sovereignty. Moreover, the Federal lawmakers and administrators receive their office, not from the State governments, but directly from the people – though, as will be shown later, a proportion of the representatives are commissioned to safeguard State interests.<sup>199</sup>

Due to the High Court’s adoption of a literalist approach to constitutional interpretation, Australia has moved from a system of co-ordinate federalism, premised upon the equality of the States with the central government, to a system of ‘organic federalism’. It is submitted that ‘organic federalism’ is currently the most apt description of what the Australian federal system has now become – a system in which the central government has far reaching powers to the detriment of the States whose powers are necessarily diminished.

## VII CONCLUSION

It is evident from this paper’s discussion of federal theory that a central characteristic of a federal system of government is the prominence, sovereignty and independence of the States from each other and from the central government. This sentiment, to preserve state power, sovereignty and equality, was incorporated by the framers into the Australian Constitution and is evident from the convention debates and the text and provisions of the Constitution itself. The importance of the States in a federal system was summarised by The Hon Richard Chaffey Baker, a delegate from South Australia, on the third day of the Sydney Convention in 1891:

Now, what is a federation? Does a federal system consist in delegating to the central authority certain powers and functions, and in delegating to the legislatures of the states certain other powers and functions? I think not. I think a federation consists in a great deal more than that. A federation, as it appears to me, consists in the fact that the

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<sup>197</sup> Ibid 104.

<sup>198</sup> Ibid.

<sup>199</sup> Cramp, above n 94, 108-109.

compact made between the constituent states who wish to enter into that federation provides that not only shall the legislatures of the different states be supreme concerning the powers which have been delegated or left to them, but that they shall also have a voice as states concerning the powers which are delegated to the federal government.<sup>200</sup>

What is required is a change of perspective with respect to the Federal balance. The High Court must return to federal theory itself to restore the balance between State and Central power that a true federalism requires. Only then will the States have the chance to retain the voice and the equality that the *Engineers* High Court displaced.

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<sup>200</sup> *Official Record of the Debates of the Australasian Federal Convention*, Sydney, 6 March 1891, 1:111 (Richard Chaffey Baker). This quotation refers to the representation of the States in Federal Parliament by virtue of the Senate.