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## ***NON-AGENDA***

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With the view of causing an increase to take place in the mass of national wealth, or with a view to increase of the means either of subsistence or enjoyment, without some special reason, the general rule is, that nothing ought to be done or attempted by government. The motto, or watchword of government, on these occasions, ought to be — Be quiet...Whatever measures, therefore, cannot be justified as exceptions to that rule, may be considered as *non-agenda* on the part of government.

*¾ Jeremy Bentham (c.1801)*

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### **The Seven Pointed Star**

**William Coleman**

**T**he grandest colonial building in Hobart is its Custom House. It is a magnificent vestige of the time colonies imposed tariffs on the import of commodities from each other. It was completed in 1903: two years after the Federation that abolished Tasmanian tariffs. That farcical Custom House might symbolise the befuddled state of Australian Federation.

Another reminder of the tragi-comedy of Federation is found in the impressive bearded face of George Adams, whose steely stare meets the eye in every Tattersalls' stall in Tasmania. In the 1890s Adams' lottery business had been driven out of Victoria, New South Wales, and Queensland by laws that had been contrived by the same sort of high-minded parsons who today preach against poker machines. In Tasmania Adams found a welcoming jurisdiction that saw lotteries as a pleasing source of revenue for a financially derelict polity. In 1897 — the same year as the University of Tasmania opened its door — the great oaken barrel of Tattersall was cranked for the first time. Assisted by one Mr Iken, Mr Adams himself, with a pair of tongs, removed the first number to be graced by the goddess Fortuna.

The Tattersall business thrived. It did so, not on the basis of Tasmanian sales, but largely on the sale of tickets through the post to persons residing in the five larger colonies. But Tattersalls' happy course was not long to remain unmenaced. The advent of federation allowed the frustrated adversaries of lotteries in Victoria, and elsewhere, to counter-attack using the new Constitution. The Constitution did not, of course, assign to the Commonwealth the power to make laws over gambling. But Section 51 did vest the Post Office in the Commonwealth. The means to cripple Adams in his Tasmanian lair lay there.

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*William Coleman is Senior Lecturer, School of Economics University of Tasmania.*

The newly established Commonwealth Post Office needed only refuse to deliver letters to Tattersalls' address to interrupt the flow of ticket orders from the mainland. And it did so. This action, however, proved insufficient. For some sly individuals had hit upon the underhand scheme of sending their lottery order to a third party in Hobart, who would then pass them on to Tattersall's. But the Post Office was not to be bandied with. It drew up a register of persons believed to be engaged in this nefarious traffic and simply banned them from receiving any letter, or other article whatsoever, through the Post. Mr Iken found himself struck-off completely incommunicado with the rest of the universe by such a Post Office edict. This Post Office policy was not repealed until a Tasmanian, Joseph Lyons, became Commonwealth Post-Master General in 1929.

In 2001 the Tattersalls-Post Office confrontation is repeated. But instead of lottery tickets it is now internet gambling. The Tasmanian Government, as always at the cutting edge of the exploitation of gambling revenue, had cleared a space for internet gambling, only to find the Federal Government using Section 51 powers to close it down. Will we have to wait until Jim Bacon becomes Minister for Communications, Information Technology and the Arts so that we may use a computer to do what we can already do by phone?

### **The Battle of Powers**

The above episode illustrates how the original vision of the Federation as a division of powers quickly deteriorated into a battle of powers. In this battle, the Commonwealth has made almost every advance.

- A large part of the States' revenue base has been dismantled and removed to the Commonwealth. Tasmania, for example, obtains 67 percent of its revenue from Commonwealth Grants. For New South Wales the figure is 51 percent. This 'imbalance' has more than a financial significance — the revenue of the state *is* the state, as Edmund Burke once observed. And a decline in regard will follow such a decline in the power of the States. Respect always circuits power — there is a courtier inside us all.
- Significant areas of law and policy, which remain with the States in other federations, have been removed to the centre (the welfare state from 1946, higher education from 1973).
- The High Court is an active organ of centralisation, such that the construction of a dam may now be seen to be part of the province of Commonwealth law making.
- A city of 310,000 has been constructed on the banks of the Molonglo so that the organs of Federal Government could be located at safe distance from where most Australians actually live.
- The States treat local government with exactly the attitude of the Federal Government for the States — derision.
- Public attitudes to Federation range from apathy to antipathy. And this, significantly, is a wholly bi-partisan apathy/antipathy. It is most floridly

expressed by Rodney Hall, an indefatigable author, prolific poet, and sometime novelist (*The Day We Had Hitler Home*), in his 1998 work, *Abolish the States! Australia's Future and a \$30 Billion Dollar Answer to our Tax Problem*.

### **Abolish the States**

One interpretation of this steady advance of centralisation is that it is the rational consequence of vastly increased communication and mobility. And here a relic of old Hobart may again be illustrative. Provoked by visiting French whalers, and the occasional presence of the Russian fleet in the South China Sea, various cannons were installed on the Derwent before 1870 to defend the capital of Van Diemen's Land. The Russian navy having failed to materialise, the cannons were never used apart from 'making a great noise on the King's Birthday' and firing a single shot at midday to allow the inhabitants of Hobart to set their clocks. But this shot at midday was at a different time from that at Fort Denison in Sydney, as '12.00' came at a different time in Hobart and Sydney. Indeed, 12.00 came at a different time in Melbourne and Brisbane too. For in Colonial Australia each colony defined 12.00 by the solar noon of its capital, and thereby each colony had a different time than the other. But with the establishment of cheap and reliable telegraphy this difference became, at least, inconvenient. As a consequence all the old colonial times were rolled into a neat, tidy and uniform Eastern Standard Time. 'Abolish the States!'

It may be further argued that this increased communication and mobility has spelt another doom on federalism through the decline in State consciousness. Thus it has been argued, in a similar vein, that local football declined because suburbs and towns do not mean what they did before, say, 1950. In those car-less days mobility was less, and what mobility there was (in terms of public transport) was highly structured; your locality limited you, and delimited you. Today that old structure of life has gone, and all is fluid. Victorian regional football, I read, is defunct. The VFL becomes the AFL. And Tasmanian football is in disarray, as players and fans turn their eyes to the AFL. 'Abolish the States!'

But the theory on which this account of the decline of federalism is based is a false one. This theory may be called the community theory in that it claims that a state government is for 'almost-nations'. This theory finds some popularity in polities composed of ethnic groups in unhappy political union (Belgium, Nigeria, and to some degree Canada). But the true impulse of federalism disregards any vision of the state (national or sub-national) as an expression of some cultural or ethnic identity.

In any case, the premise to which the false theory of federalism is applied is faulty; State consciousness remains real. One small proof of that is the decline in ratings of the ABC's *7.30 Report* after it ditched a State-by-State format in 1997, in favour of a 'national' format. A greater proof is the fact that the political preferences (over both party and personality) of the States are far from correlated — can one imagine a Beattie winning in Victoria?

And, more generally, no advance in communication has eliminated the significance of Australian geography. Australia is a big place. It is 3660 km from Cape York to South East Cape, almost exactly the same distance as Madrid to Bagdad. Scattered around this mass are five, and only five, distinctly large cities (each over a million) and one island. This natural and human geography gives a shape to lives that the Internet has not abolished. The six points of the star are based on this natural and human geography.

### **The Struggle Between Liberalism and Centralism**

I would argue that the extent of decline in Australian federalism is not found in material factors (for example, communications) but in 'ideal' factors. I would argue that the decline reflects the progress of the conflict between liberalism and various forms of anti-liberalism. For the debate over federalism is, in essence, just one front in the war between liberals and anti-liberals; it is one bout in the contest between those charmed by a vision of a "great state", and those who place their faith in a "referee state" that enforces the rules but doesn't play itself, and is working best if not noticed.

It is true that the defence of locality is often taken to be a conservative instinct, rather than a liberal one. Certainly, classic liberal theorists have neglected federalism. Thus J.S. Mill favoured a unitary state, although on utilitarian, rather than liberal, grounds. But in the Anglo-Saxon world 'conservatism' is so irrigated with liberalism that a 'conservative' defender of locality such as Edmund Burke would be better classified as a liberal-conservative.

The struggle over federalism is one front in the war between liberalism and its adversaries, since the great state favours centralism. Any government is more powerful the less competition it faces from other governments. This phenomenon is called 'monopoly power'. The opponents of federalism welcome centralisation as a means of monopolisation of government power, and therefore as a means to increase government power.

Federalism, by contrast, goes with a diminished state, a dispersion of power, pluralism, or, if you like, 'democracy'. Not 'democracy' in the sense of a Rousseauian General Will of 50 percent plus 1 ruling all: that sort of democracy is an enemy of federalism. But democracy in the sense of a sharing of power. I would be willing to venture a 'Law' such that federalism correlates with democratic pluralism. Here are a few conforming instances of the law:

- *Brazil.* Brazil's political history consists of an alternation between centralization and decentralization - centralizing tendencies peaked under the "New State" of the strong man Getúlio Vargas (1937-45), and peaked again under a series of military governments from 1964 to 1985. It was the return to civilian government in 1985 that occasioned a resurgence of local and regional autonomy.
- *South Africa.* In the second half of the 19<sup>th</sup> century various attempts at contriving a federal South Africa were made. The new Union of South Africa

of 1910 destroyed her old provinces, and created a unitary South Africa that established Afrikaner hegemony (in a racist variant of the 50 percent plus 1 rule), and all that flowed from that. It was the creation of democracy in 1993 that saw the recreation of provincial legislatures.

- *France*. This country epitomises the Rousseauian vision of democracy that equates any opposition, or counterweight, to the power state as a form of rebellion. It was quite logical therefore that in 1790, amidst the political foundation of modern France, the provinces were dismembered into powerless ‘Departements’. It was also quite logical that in 1793 the Jacobins stigmatised as the ‘Federalist Rebellion’ the revolt of moderates in Lyons, Toulon and Marseille against Jacobin oppression, on the grounds that the insurgency menaced the unity and power of the new French state.
- *Russia*. The great democratic figure in Russian history, Boris Yeltsin, gave Russia what it had never had: a federal structure. This consisted of the division of Russia into about 80 *oblast* with locally elected governors and legislatures, and the creation of a Russian upper house (based on the German Bundesrat) in which governors approved or rejected legislation. The first act of the pseudo-Tsarist restorationist Vladimir Putin in his campaign to suffocate Russian democracy was not to close down opposition media (as he did), or to ban minor political parties (as he did), or to restore Stalin’s National Anthem (as he did): it was to crush Russian federalism. Soon after his electoral victory in 2000 the upper house was neutered, some honest but trouble-making governors were deposed on fraudulent corruption charges, and, displacing governors, seven ‘gauleiters’ were appointed by Putin to enforce his will in their allocated satrapy.

Britain may seem an exception to the correlation between pluralism and federalism, in that it is a pluralistic polity, but (until recently) a unitary state. The Scottish parliament was abolished in 1707, and the Irish Parliament in 1800. However, the Act of Union of 1707 at least preserved Scottish law and courts (which meant a good deal when the Statute Book grew only very slowly). And the end of the Irish Parliament was hardly evidence of pluralism or democracy — it was strongly contested in Ireland and largely achieved by bribing the required number of Irish MPs.

This link between federalism and liberalism suggests federalism has atrophied in Australia in the 20<sup>th</sup> century because liberalism has atrophied in the 20<sup>th</sup> century. The story of Australian governance in the 19<sup>th</sup> century consisted of the dispersion and localisation of power — from its original concentration in Whitehall, it spread to the governor, from the Governor to Legislative Council, and from NSW to various other colonial parliaments. The 20<sup>th</sup> century, in keeping with its anti-liberal spirit, saw a dense concentration of power.

One mournful explanation of the contrast of liberalism of 19<sup>th</sup> century Australia with the illiberalism of 20<sup>th</sup> century Australia is that 19<sup>th</sup> century Australia was a British colony, while 20<sup>th</sup> century Australia was not. ‘While Australia began as an inherently illiberal penal colony, the fact that it was a

*British* penal colony is significant ... Britain established many of the institutions we now think of as liberal ... As a British colony ... Australia was fortunate to inherit these liberal institutions... but the fact that liberal institutions were adopted through imitation rather than historical struggle or deep understanding is perhaps one reason [why] ... on the quite liberal foundations of the Constitution the early federal governments built the so-called 'Australian Settlement' containing several illiberal elements' (Norton, 2001, pp230-1).

### **Federalism: More than a Matter of Utility**

The upshot is that the case for federalism is not simply a utilitarian consequence of federalism — it has a basic element that is more 'moral' or 'ideal'. Once we appreciate the case for federalism is not simply utilitarian we need not seek to justify its formations in terms of utility. We need not find a utility in the curious variegation of State laws. We need not find a utility, for example, in the fact that in some States priests may be cross-examined in court about statements made in the Confessional, while in other States they may not.

Nevertheless, mundane utilitarian arguments can be advanced in favour of federalism. The remarkable centralisation of decision-making at a point remote from where the majority of Australians live simply cuts governance off from a considerable fund of human capital. A good number of Australians who would usefully staff the organs of central government do not wish to move 1000 kilometres to reside in Canberra.

On a more theoretical level, a federal structure helps ensure that *potential* Pareto improvements of Commonwealth become *actual* Pareto improvements. Let us suppose, for example, that blocking the damming of the Franklin River was a potential Pareto improvement — the gains of the winners were sufficiently large, making possible the compensation of the losers with winners still remaining better off. It was federalism that ensured that losers were actually compensated.

### **The Disutility of Federalism?**

But utilitarian arguments against federalism can also be advanced.

The most naive utilitarian argument against federalism turns on the benefits of uniformity. The naivety of this argument does not lie in the presumption that uniformity has benefits. Uniformity *does* have benefits — a State line between Albury and Wodonga, or between Coolangatta and Tweed Heads, can be an encumbrance. The naivety lies in the presumption that the benefits from uniformity require some central authority to impose them. The truth is that these benefits can be, and have been, secured by agreement between independent authorities. Thus, the joys of Eastern Standard Time were not brought by a wise edict from a nation building state, but by the agreement of colonial legislatures in 1894-5. Nor was the agreement unique. American Eastern Standard Time, that replaced a multiplicity of local and company times, was purely a creation of US railway industry. Government was not involved, although within days of its

introduction on 18 November 1883 seventy percent of schools, courts and local governments had adopted it as their official time. Congress did not ratify the Standard Time until 1918 (Blaise, 2000, p.104).

A more plausible utilitarian objection federalism turns on the notion of 'unproductive competition'. Thus it is objected that the States compete to see which can contrive the most satisfying donation of their citizenry's income to multinational car makers. Or, they compete to see which can reduce death duties to zero fastest. But this case against the unproductive competition of federalism is overstated. The States have never been as nearly as generous with public income to the car industry as the Federal Government has. And I suspect the best way to give some political incentive to reducing Australia's unjust and penal income tax rates is to restore income tax powers to the States —let a little income tax competition bloom. Joe DeMaggio left the high income taxes of California for the lower income taxes of Florida. That sort of interstate emigration might give an incentive to State governments to lower tax rates. We see some sort of tax competition in the matter of payroll tax.

The truth seems to be that utility does not suggest any strong superiority of one level of government over the other. The States do their best to wreck economic reform, but it is Federal legislation that begot the Foreign Investment Review Board, and promptly introduced the White Australia Act after Federation. The States baulked at restricting guns, but it is the Federal Government that wrecked aboriginal employment in the pastoral industry with Commonwealth Arbitration legislation.

State legislation does not have more or less utility than Federal legislation — it just has a different source. State legislation is more sensitive to material interests, while Federal legislation is more sensitive to ideal (or ideological) interests. Thus, State legislation in land use accommodates developers, while Federal legislation accommodates environmentalists. This difference turns on the fact that material interests are local, while the ideal interest is national or global. Thus, the material interest in favour of developing/destroying rainforest is restricted to a few farmers or hoteliers. The ideal interest encompasses millions, or hundreds of millions, of persons across the country and the world who are disturbed at the threat to the habitat. Within a State the material interest will often outweigh the ideal interest. But as the unit of governance extends, more ideal interests are included in the electoral franchise, and the electoral balance tips towards the ideal interest.

Thus, whether State legislation is better than Federal legislation, or vice versa, would seem to turn on whether material motives are better than ideal motive. And that is hard to judge. 'Ideals' can be noble. They can also be extremely evil. I suspect that State legislation is more likely to glow in mediocrity, and Federal legislation to achieve both grander heights and more dismal depths.

## Federalism: A Hopeless Case

The foundation of federation on liberal ideals, rather than directly upon utilitarian advantage, suggests that the restoration of federalism is, in one sense, hopeless. Federalism is sickly in Australia because the breath of the true spirit of liberal democracy is so sickly in Australia. As long that spirit is enfeebled no operation on the federal polity can restore life to federalism. But one may still imagine what changes a reinvigorated federal spirit may make to Australian federalism.

- *The Senate.* The current method of electing the Senate is a means of representing sectional opinion, not 'State opinion'. Thus, Tasmania returns Bob Brown (8.7 percent of Tasmanian vote in 1996) and Brian Harradine (7.9 per cent of the Tasmanian vote in 1998). To ensure that the Senate reflects the balance of opinion in a State, election to the Senate should be on a 'winner takes all' basis, so that (after the distribution of preferences) the ticket with a majority of votes would get all senators. This gives a useful incentive for all senators to actually chase votes as part of chasing pre-selection from their own sect. Winning the balance of opinion in a State would now become a priority.
- *State borders.* Section 129 of the Constitution makes provision for the revision of borders by legislation of Parliament, subject to the approval by referendum of the States in question. If a State line between Albury-Wodonga makes for a genuine problem then let the border be redrawn.
- *Canberra.* The identification of Canberra with Federation would be dissolved. There would no longer be the presumption that a 'National' Library, 'National' Gallery, and 'National' Museum should be located Canberra, as if the whole purpose of their location was to maximise the difficulty of the median Australian to use these institutions.<sup>1</sup>
- *The Australian Capital Territory.* The ACT should be 'Vaticanised'. All of it should be incorporated into New South Wales, save for a few square kilometres encompassing the Parliament, and Old Parliament, the High Court, and (perhaps) the Lodge. 'Abolish the ACT!' This would prevent the ACT becoming a serious constitutional anomaly.
- *Local Government.* The third tier of Federation should be given some constitutional significance. Local government is at present the creature of State Governments. A true federal spirit would make it less so. Ultimately, there might be a constitutional provision that the units of local government be altered only with the approval of a majority of the electors in the unit.

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<sup>1</sup> Milton Friedman: 'In general, Canberra gives the impression that it is overgrown and much too big for Australia. Australia has a population of about fourteen million, roughly comparable to the population of the state of Illinois. Canberra and the Parliament House ought to be comparable with Springfield, whereas they put on all the pretensions of equality with Washington, D.C' (Friedman and Friedman, 1998, p.442). (Friedman visited Australia in 1981).

All these proposals have problems, some contingent and some more theoretical.

For example, the proposal to elect the Senate on a winner takes all basis is costly to the representation of marginal shades of opinion (for example Brown and Harradine), and tends towards a Rousseauian democracy of the General Will. This tendency is objectionable. Having only every second half-senate election done on the basis of winner takes all might moderate this tendency.

In any revision of State borders by referendum the area affected by the proposal may approve of it, but the areas outside may not. What then is the proper outcome? The democratic sentiment would appear to recommend the proposal be implemented. But is there not a prisoner's dilemma issue here? Is it not possible that each given area might find it advantageous to secede, but that if all do all will be worse off? Are not the 'indissolubility' provisions of a federal constitution (such as Australia has) an attempt to secure against 'free riding secession' by making the contract binding?

The Vaticanisation of the ACT would need to surmount the Constitutional provision that requires the 'seat of government' to be in a Territory at least 100 square miles in area. It would also need to surmount potential opposition from inhabitants of Canberra affronted by a loss of control of their city.<sup>2</sup> A partial answer may lie in special legislation that would assign to 'Canberra in News South Wales' more powers than the standard 'City Council' of New South Wales receives.

## **Conclusion**

Federation in Australia is an unloved inheritance, probably doomed, and saved from present extinction only by expediency. In this respect a parallel can be drawn between federation and the monarchy, another unloved, ill-fated but expedient inheritance.<sup>3</sup> But there is a significant difference. If we put aside important questions of practicality, the division over monarchy and republic is, I would venture, largely a matter of sentiment. The divisions between monarchists and republicans are, therefore, unaccountable and, to a large degree, unarguable. But behind the struggles over federalism there lies a far more universal, telling and deeper division; a division between liberalism and various forms of anti-liberalism — between those who invest their confidence in a great central organising power, and those who mistrust it.

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<sup>2</sup> In truth, the inhabitants ACT may not regret this loss of control. A majority of ACT electors voted against self-government in 1978. Self-government was imposed in 1988 by Commonwealth legislation.

<sup>3</sup> Centralism and Republicanism coincide in the rhetorical stress on nationalism. Thus the Centenary of Federation saw certain Republican commentators disparage the Federation movement of 1901 as monarchist and not truly Australian.

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