

Centralising Dynamics in Australian Federalism

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The steady centralisation that is generally held to be a characteristic feature of Australian federalism has occasioned thorough description and regular comment but much less attempt at explanation or theorisation. This paper reviews the way we account for centralisation in federal systems in general and Australian federalism in particular. In doing so, it considers institutional and societal modes of explanation in the context of patterns of difference between the leading federations. It concludes that as far as those broader patterns, or secular trends, are concerned, there is no avoiding a societal explanation — one that highlights the balance between forces of modernisation and the existence of a “federal society”.

The Chief Justice of the High Court recently described Australia as “the incredible shrinking federation”, and posed the rhetorical question whether it is on a “voyage to a singular state”.¹ With some poetic licence, this captures a frequently observed reality: Australian federalism has travelled far from its original conception. *How* this has happened is well known; *why* it has happened is not always so clearly explained. Relatively little academic attention has been devoted to providing a theoretical perspective on the dynamics of Australian federalism.² This paper gives some attention to that question, considering the most obvious and widely adduced explanations including the design of the constitution; the pattern of judicial review; and the fiscal strength of the Commonwealth. It finds all of these unsatisfactory: either because they are inadequate, or because they are more logically seen as mechanisms rather than causes. It finds in conclusion that, at least as far as the broad trajectory of federal systems is concerned, there is no plausible alternative to the Livingstonian view that federalism “is a function not of constitutions but of societies”.³

Centralisation and its Mechanisms

As normally understood, centralisation is the process by which the national government in a federation increases its formal authority, its effective power, and/or its practical responsibilities *vis-à-vis* the constituent units. It is, to use K.C. Wheare’s phrase, the tendency for actions by the central government to “encroach upon the federal principle”.⁴ Constitutional amendment or favourable judicial interpretation may

¹ The Hon. Chief Justice Robert French, “The Incredible Shrinking Federation: voyage to a singular state?” in Gabrielle Appleby, Nicholas Aroney and Thomas John, eds, *The Future of Australian Federalism: Comparative and Interdisciplinary Perspectives* (Cambridge, 2012).

² Due in part to a preoccupation with normative disputes; see Alan Fenna, “Federalism” in R.A.W. Rhodes, ed., *The Australian Study of Politics* (Basingstoke, 2009), pp.146-59.

³ W.S. Livingston, “A Note on the Nature of Federalism”, *Political Science Quarterly*, Vol. 67, 1 (1952), p.88.

⁴ K.C. Wheare, *Federal Government*, 4th edn (Oxford, 1963), p.243.

increase the central government's formal authority; access to greater financial resources or compelling electoral mandates may increase its effective power; contribution to tasks in areas of sub-national jurisdiction represents an expansion in its practical responsibilities. Increases in authority and/or exercise of power provide the basis for expansion in practical responsibilities. However, they are not always a necessary condition: constituent units may simply cede responsibility. In addition, one must also distinguish processes that while, not equating to centralisation *per se*, and operating much more insidiously, likewise erode the federal nature of the union. Foremost among these is the practice of aligning or "harmonising" policies across a federation, a process that brings about a substantive "de-federalisation". In general, it is the phenomenon of "cooperative federalism". As Justice French has put it, "the cooperative federalism movement may be seen to overshadow expansive interpretations of Commonwealth power under the Constitution. [...] although cooperative and thus respecting the formal constitutional position of the states, it contributes towards centralisation".⁵

The process of centralisation does not mean the complete subordination of the constituent units. It means the advent of what Braun calls "centralized federations" (such as Australia or Germany) as distinct from less centralised ones (such as Switzerland) on the one hand, and "over-centralized" ones (such as Austria) on the other.⁶ In centralised federations, the constituent units retain important roles — particularly in respect of service delivery — and have continuing capacity to defend themselves and their interests.⁷ There are three main ways in which centralisation occurs: the augmentation of authority via formal constitutional amendment; the exercise of fiscal power; and expansive application/interpretation of existing powers. All three have been evidenced in the Australian system — though by no means equally. While there have been notable augmentations of Commonwealth power through constitutional amendment, those have been conspicuous for their rarity.⁸ As is well-known, what the Commonwealth has relied upon to great effect has been the directive use of its superior fiscal capacity⁹ and the expansive interpretation of its enumerated powers.

Explanations for Centralisation in Australian Federalism

One exception to the tendency for federalism to be discussed in descriptive or normative rather than explanatory terms is the work of Robyn Hollander and Haig Patapan, who build their account around a postulate of "pragmatic" adjustment.¹⁰ This

⁵ French, "Incredible Shrinking Federation", p.63.

⁶ Dietmar Braun, "How Centralized Federations Avoid Centralization", *Regional and Federal Studies*, Vol. 21, 1 (2011), pp.35-54.

⁷ See the discussion in John D. Nugent, *Safeguarding Federalism: How States Protect their Interests in National Policymaking* (Norman OK, 2009) and Andrew Parkin, "The States, Federalism and Political Science: a Fifty-Year Appraisal", *Australian Journal of Public Administration*, Vol. 62, 2 (2003), pp.101-112, as well as the examples provided in Vijaya L. Ramamurthy, "Tied Grants and Policy Reform in Hospitals and Schools" in Paul Kildea, Andrew Lynch and George Williams, eds, *Tomorrow's Federation: Reforming Australian Government* (Leichhardt, NSW, 2012), pp.114-30.

⁸ Alan Fenna, "Adaptation and Reform in Australian Federalism" in Kildea, and Williams, eds, *Tomorrow's Federation*, pp.26-42.

⁹ Alan Fenna, "Commonwealth Fiscal Power and Australia Federalism", *University of New South Wales Law Journal*, Vol. 31, 2 (2008), pp.509-29.

¹⁰ Robyn Hollander and Haig Patapan, "Pragmatic Federalism: Australian Federalism from Hawke to Howard", *Australian Journal of Public Administration*, Vol. 66, 3 (2007), pp.280-97.

is an interesting idea and echoes the argument made some years ago about American federalism.¹¹

What Hollander and Patapan mean by the proposition that “pragmatic federalism” has predominated in Australia is that the respective roles and powers of the Commonwealth and the States have evolved in response to “pressing problems, specific policy agendas and the prevailing political dynamic, rather than by overarching conceptions of federalism derived from political theory or articulated in party ideology”. It is an intuitively attractive notion, but certainly in some regards clearly incorrect: the Labor party has had a strongly centralising “overarching conception of federalism” that has deeply influenced its practice over the decades since Federation. Indeed, Australia is remarkable among federations in having had its leading political party take an explicit stand against the very idea of a federal system. In other regards, the proposition is incontrovertible: Australia has experienced a long process whereby a substantial amount of pragmatic adjustment has occurred.

According to Hollander and Patapan, “pragmatic federalism explains important aspects of Australian federalism, especially the trend towards centralisation of authority”. If that is the case, it is clearly an important proposition. But does it really? As they subsequently concede, pragmatism “may account for why Australian federalism has changed; it does not explain, however, the centripetal character of Australian federalism”. Thus they are led to the real nub of their argument, which is that “the judiciary’s tendency to favour the Commonwealth accounts in large measure for the reason pragmatic federalism has become centralised federalism in Australia”.¹² Ultimately, then, the “pragmatic federalism” argument boils down to the same explanatory claim made earlier by Grewal and Sheehan: centralisation has occurred because the Constitution is an “incomplete contract” that the High Court has systematically interpreted in favour of the Commonwealth.¹³

Prima facie, the grounds for attributing decisive influence to the High Court are strong: federalism is articulated through the Constitution; the High Court exercises a unique power over the way that Constitution is interpreted; and since at least the Engineers case, “the High Court has proved adept at moulding the State-based system of government envisaged by the drafters into a more centralised version”.¹⁴ Judicial review has been characterised by “expansive interpretations of Commonwealth powers under the Constitution”.¹⁵ In addition, there are good reasons to think that while the drafters envisaged a decentralised system, they “had no practical experience in the

¹¹ See Parris N. Glendening and Mavis Mann Reeves, *Pragmatic Federalism: an Intergovernmental View of American Government* (Pacific Palisades CA, 1977), p.viii: “We write from a point of view — the view that American federalism is pragmatic. We believe that the intergovernmental relations within the system are constantly evolving, problem-solving attempts to work out solutions to major problems on an issue-by-issue basis [...]”

¹² Hollander and Patapan, “Pragmatic Federalism”, p.288.

¹³ Bhajan Grewal and Peter Sheehan, “Understanding the Evolution of Constitutional Federalism: the Case of Australia”, *Public Finance and Management*, Vol. 4, 4 (2004), pp.559-91.

¹⁴ George Williams, “Cooperative Federalism and the Revival of the Corporations Law: Wakim and Beyond”, *Company and Securities Law Journal*, Vol. 20 (2002), pp.160-71. Some would argue that it has been inexplicably and indefensibly so; see James Allan and Nicholas Aroney, “An Uncommon Court: how the High Court of Australia has undermined Australian Federalism”, *Sydney Law Review*, Vol. 30, 2 (2008), pp.245-94.

¹⁵ French, *Incredible Shrinking Federation*, p.63.

operation of a federal system”¹⁶ and may not have done a particularly effective job of writing that vision into law.

Nonetheless, Hollander and Patapan are making a bolder claim than specialist observers of the High Court have been willing to put their money on. Brian Galligan refrained from making any such claims in his landmark study of judicial review in Australian federalism, merely a somewhat elliptical observation about the congruence between judicial review and underlying developments. “The Court’s interpretive method modified the constitutional system to keep pace with Australia’s national development and integration”.¹⁷ Geoffrey Sawer had earlier expressed an even less supportive view. “The dynamics of Australian federalism derive almost entirely from the political process, not from the law.”¹⁸ There is good reason why both Sawer and Galligan eschewed any conclusion that the High Court has been determinant. None of the High Court’s centralist interpretation can be taken as demonstrating causality. For one thing, Courts do not initiate or execute; they merely pass judgement on issues brought before them. That means they are better positioned to play a retarding role — which they have done in a number of federations at earlier points in time — than a leading role. Moreover, even in that retarding role, there are definite limits to their effectiveness: courts are not well-positioned to resist determined governments backed by public opinion. The US Supreme Court was rolled by the New Dealers in 1937 and has almost entirely abandoned any attempt to impose constraints on Congress ever since.¹⁹ This represented a sea-change in American federalism.²⁰ And in those federations where the central government has been kept much more within its jurisdictional limits — notably Switzerland and Canada — it has not been due to constraints imposed by the judiciary.²¹ The failure of the US Supreme Court to protect the States against Congress after 1937 led Wechsler to argue in a much-cited article that American federal design — which, of course, is also in crucial ways Australian federal design — never really envisaged the Court playing much of that role anyway and the onus was always intended to be on the “political safeguards” of federalism rather than any supposed judicial ones.²²

¹⁶ Leslie Zines, “The Federal Balance and the Position of the States” in Gregory Craven, ed., *The Convention Debates 1891–1898: Commentaries, Indices and Guide* (Sydney, 1986), p.75.

¹⁷ Brian Galligan, *Politics of the High Court: a Study of the Judicial Branch of Government in Australia* (St Lucia Qld, 1987), p.250.

¹⁸ Geoffrey Sawer, *Australian Federalism in the Courts* (Carlton, 1967), p.6.

¹⁹ William E. Leuchtenburg, *The Supreme Court Reborn: the Constitutional Revolution in the Age of Roosevelt* (New York, 1995).

²⁰ Edward S. Corwin, “The Passing of Dual Federalism”, *Virginia Law Review*, Vol. 36, 1 (1950), pp.1-24; John Joseph Wallis and Wallace E. Oates, “The Impact of the New Deal on American Federalism” in Michael D. Bordo, Claudia Goldin and Eugene N. White, eds, *The Defining Moment: the Great Depression and the American Economy in the Twentieth Century* (Chicago IL, 1998), pp.155-80.

²¹ In the period when the Judicial Committee of the Privy Council (JCPC) reigned supreme over the Canadian Constitution — viz., *British North America Act 1867* — it was strikingly supportive of federalism. However, it has been convincingly argued that in doing so the JCPC was merely bringing the *BNA Act* into line with the realities of Canadian society and Canadian federalism. See Alan C. Cairns, “The Judicial Committee and its Critics”, *Canadian Journal of Political Science*, Vol. IV, 3 (1971), pp.301-345.

²² Herbert Wechsler, “The Political Safeguards of Federalism: the role of the states in the composition and selection of the national government”, *Columbia Law Review*, Vol. 54, 4 (1954), pp.543-60. Wechsler seemed to have rather unrealistic expectations of how effective those political safeguards would be.

Theories of Centralisation

One of the limitations of the judicial review thesis is the difficulty it has accounting for Australian peculiarity. Much discussion around dynamics of federal systems is cast in general or universalising terms — and this is indeed how it should be since there must be a range of tendencies and dilemmas common to the general phenomenon. After all, Australian federalism is not the only one to have been radically centralised over the last century. “The overall trajectory of United States federalism since 1789 has been toward centralization and, since about 1968, toward coercive federalism as well” — a development another scholar has described as the “implosion of American federalism”.²³ Likewise, modern German federalism has experienced a substantial degree of centralisation in its short history.²⁴ In the first instance, then, any theoretical claim about the dynamics of federal systems should explain the general tendency.

At the same time, federal systems differ substantially in the degree to which they have experienced such centralisation or succumbed to those general tendencies. Thus a theory of centralisation must also be able to account for that variation. Meeting that requirement, an explanation of federal dynamics in Australia needs to explain not just why federalism is centralising in this case, but why it is *so* centralising. To some extent this allows us to use the comparative method to do some theory testing.

The Thesis of Fiscal Centripetalism

Given that financial resources are fundamental to the capacity of governments to execute their tasks in an autonomous way, and given that central governments so often seem to have superior financial resources, one cannot avoid considering the thesis of fiscal centripetalism. Indeed, in a federation with such an acute degree of vertical fiscal imbalance, it is the most logical starting point for any analysis of the Australian case. “Fiscal centralism has been the engine powering the Commonwealth’s dominance and its expansion of jurisdiction into major policy areas of health, education, and welfare since World War II.”²⁵ According to “Popitz’s Law”, federalism is undermined by the inherently greater fiscal capacity of the central government and the consequent ability of that government to extend its policy influence deeper and deeper into areas of sub-national jurisdiction.²⁶ As proposed, this tendency is ineluctable and universal — and clearly in defiance of Alexander Hamilton’s blithe reassurance in *Federalist* 32 that “the individual States should possess an independent and uncontrollable authority to raise their own revenues for support of their own wants”.

²³ John Kincaid, “The Rise of Coercive Federalism in the United States: dynamic change with little formal reform” in Appleby, Aroney and John, eds, *The Future of Australian Federalism*, p.158. Robert F. Nagel, *The Implosion of American Federalism* (New York, 2001). With some exaggeration, Feeley and Rubin go so far as to declare that “the United States no longer has a federal system”; Malcolm Feeley and Edward L. Rubin, *Federalism: Political Identity and Tragic Compromise* (Ann Arbor MI, 2008), p.125.

²⁴ See, for instance: Hartmut Klatt, “Centralizing Trends in West German Federalism, 1949–89” in Charlie Jeffery, ed., *Recasting German Federalism: the Legacies of Unification* (London, 1999); Arthur Benz and Jörg Broschek, “Germany: federalism under unitary pressure” in John Loughlin, John Kincaid and Wilfried Swenden, eds, *The Routledge Handbook of Regionalism and Federalism* (Abingdon, 2013 forthcoming).

²⁵ Brian Galligan and John S. F. Wright, “Australian Federalism: a prospective assessment”, *Publius*, Vol. 32, 2 (2002), p.155.

²⁶ Johannes Popitz, “Der Finanzausgleich” in Wilhelm Gerloff and Franz Meisel, eds, *Handbuch der Finanzwissenschaft*, Vol. 2 (Tübingen, 1927), pp.338-75.

It is a powerful proposition, with a good deal of supporting logic and evidence. The problem, though, is that the evidence is not universal: federal systems vary too much in how centralised they have become.²⁷ Thus, while it meets the first criterion, *viz.*, a hypothesis in respect of common tendencies, it falls short on the second criterion, *viz.*, a theory of why those tendencies are manifested so differently in different federations.

The Modernisation Thesis

Equally universalising, but more broadly based, is what we might term the “modernisation thesis”. For Geoffrey Sawer, it was clear that although the Anglo federations began with a co-ordinate conception, centralising developments were too strong to resist. The initial co-ordinate design very soon evolved into “cooperative federalism”, and eventually an “integrated federalism” will take hold.²⁸ Sawer pointed to the tendency for taxing powers and growing economic responsibility to favour the central government. In his commentary on the universal tendency to centralisation, Wheare highlighted in addition “the growth of the social services and the mechanical revolution in transport”.²⁹ Others pointed to the emergence of an integrated national economy out of formerly independent local autonomies.³⁰ In general, the modernisation thesis holds that changing economic and social conditions fundamentally undermined the localism on which these federations were established. I have elsewhere argued that such deep secular trends confront all federal systems, most evidently in those of the United States, Canada and Australia, where the division of powers was predicated on a pre-industrial conception of what was logically and practically local (most domestic tasks) and what was national (common market and external relations).³¹

The centralising process in Australian federalism is a manifestation of what Paul Peterson has shown is more widely typical of the evolution of federal systems: they have proven functionally adaptive.³² The theory of fiscal federalism has long promoted the idea that certain functions are best executed at the sub-national level while other functions inherently require overarching national responsibility. Notably among the latter are redistributive taxation and social welfare. In addition to being a prescriptive model, Peterson pointed out, this also turns out to be empirically or descriptively accurate. By and large, the United States has settled into an effective division of responsibilities whereby Congress has assumed chief responsibility for redistributive policies and programs while the States focus on local economic development.³³ Much the same tendencies would seem to have been at work in Australia, with the Commonwealth assuming responsibility for redistributive taxation and spending and the States focusing on service delivery and local economic development. This has clearly been at the heart of the centralisation in Australian federalism through the

²⁷ “Therefore one can safely drop the hypothesis that government centralization is a somehow inevitable destiny of all nations [...]” Charles B. Blankart, “The Process of Government Centralization: a constitutional view”, *Constitutional Political Economy*, Vol. 11, 1 (2000), p.31.

²⁸ Geoffrey Sawer, *Modern Federalism* (London, 1969), p.64.

²⁹ Wheare, *Federal Government*, p.238.

³⁰ J.A. Corry, “The Federal Dilemma”, *Canadian Journal of Economics and Political Science*, Vol. 7, 2 (1941), pp.215-228.

³¹ Alan Fenna, “The Malaise of Federalism: comparative reflections on Commonwealth–State relations”, *Australian Journal of Public Administration*, Vol. 66, 3 (2007), pp.298-306; “The Division of Powers in Australian Federalism: subsidiarity and the single market”, *Public Policy*, Vol. 2, 3 (2007), pp.175-94.

³² Paul E. Peterson, *The Price of Federalism* (Washington DC, 1995).

³³ *Ibid.*, p.50 and *passim*.

twentieth century, beginning with the passage of the *Invalid and Old-Age Pension Act* in 1908; accelerating with the uniform tax legislation in 1942, wartime social policy, and the social services amendment of 1946; and culminating in the modernising initiatives of the Whitlam government 1972–75. Over that time, the States have maintained their preoccupation (albeit not exclusive) with economic growth and development, a preoccupation that has come to be known as “developmentalism”. The “contradictory logics” of social citizenship’s equal treatment principle and federalism’s diversity principle mean that the modern welfare state is fundamentally at odds with federalism. In this clash, it is almost always federalism that comes out worst.³⁴ As John Kincaid puts it, federations have succumbed to a change in focus “from places to persons”.³⁵ And the impact has been felt not only in the most obvious cases, but in the more robustly “federal” federations such as Canada.³⁶

The adverse consequences of modernisation for federalism extend beyond economic and social policy; they also encompass values. It is not just the welfare state that is anathema to federalism, it is also the modern world’s commitment to universalism in human rights. One of the most important modernising developments since the Second World War has been the “rights revolution” and the problem with this for federalism is that the autonomy of constituent units in a federation was historically in no small part about their right to diversity in social practices. Parliament’s passage of the *Human Rights (Sexual Conduct) Act — Section 4* in 1994 represented the end of one such case of federal diversity in Australia.³⁷

As this illustrates, globalisation only accentuates modernisation’s upward pressure on federal systems. There has been suggestion that “an increasingly globalized world will likely see a reduction in the role of national government. This should continue to favor federalism and the states”.³⁸ If anything, the opposite seems closer to the truth: the Commonwealth’s constitutionally privileged role in external affairs and its unique position to speak and act for the entire federation almost inevitably mean that the globalising forces dominating this phase of modernisation have promoted, and will continue to promote, centralisation.

Institutional Safeguards of Federalism?

The problem faced by the modernisation thesis, as with the fiscal centripetalism thesis, is that the putatively universal tendency is not universally manifest. These tendencies may, nonetheless, be real and universal — but varyingly affected by mitigating or countervailing factors. What are those countervailing factors?

One such countervailing factor is presumably institutional design. As we have already noted, for instance, Bhajan Grewal and Peter Sheehan attributed blame for the Australian situation not just to the baneful influence of the High Court, but to the open texture of the Constitution those judges have been charged with interpreting. And,

³⁴ See Keith Banting, “Social Citizenship and Federalism: is a federal welfare state a contradiction in terms?” in Scott L. Greer, ed., *Territory, Democracy and Justice: Regionalism and Federalism in Western Democracies* (Basingstoke, 2006), pp.44–66.

³⁵ John Kincaid, “De Facto Devolution and Urban Funding: the priority of persons over places”, *Journal of Urban Affairs*, Vol. 21, 2 (1999), p.158.

³⁶ E.g., Peter Graefe and Andrew Bourns, “The Gradual Defederalization of Canadian Health Policy”, *Publius*, Vol. 39, 1 (2009), pp.187–209.

³⁷ “(1) Sexual conduct involving only consenting adults acting in private is not to be subject, by or under any law of the Commonwealth, a State or a Territory, to any arbitrary interference with privacy within the meaning of Article 17 of the International Covenant on Civil and Political Rights.”

³⁸ Galligan and Wright, “Australian Federalism”, p.166.

indeed, federal systems are premised on the logic of binding compromise, laying down in a rigid constitution a set of rules and institutional structures designed to maintain the terms of the original bargain. Quite conceivably, some federations are more successful in that regard than others, some institutional frameworks more effective than others. This encompasses the way the federal structure and the central government are designed. Both Dicey and Wheare, for instance, speculated that the presidential form of government, with its separation of powers, is conducive to federalism by virtue of the roadblocks in places in the way of central government action.³⁹ Others have argued similarly.⁴⁰

There is certainly a case to be made that deficiencies of design left Australia's federal system devoid of the necessary institutional safeguards. These design errors included a division of powers relying on the manifestly unsuccessful single list approach; an elective rather than delegative upper house; the granting of a coercive spending power to the Commonwealth; the prohibition on State "excise" taxes; the absence of a federalism clause; a centrally-controlled constitutional court; and a centrally-controlled amending procedure. From this perspective, the problem has not been that of the constitution being an "incomplete contract", as Grewal and Sheehan propose, but of being a rather badly drawn one.

All this is probably true, but how much explanatory significance does it have? Enquiries into the "safeguards" of federalism generally conclude that even the most conducive design, the most watertight constitution, is not going to do the trick. For Filippov, Ordeshook and Shvetsova, this is because relying on constitutional devices "fails to address the issue of enforcement". Institutional efficacy depends on the actors who operate those institutions, and in this view, that means political parties.⁴¹ Similarly, while extolling the virtues of a web of structural, political and judicial safeguards, Jenna Bednar concludes in a recent book that these provide no guarantees. For her, it really depends on the people. "When the public values federalism, the federation is truly robust."⁴²

Political Safeguards of Federalism?

When Hamilton, Jay and Madison were defending the proposed US Constitution against the criticism that it would consolidate excessive powers in the hands of the central government, they focused less on possible institutional safeguards and more on the political ones. In *Federalist* 15, for instance, Hamilton put forward the idea that political associations of this nature suffer from an "excentric tendency in the subordinate or inferior orbs, by the operation of which there will be a perpetual effort in each to fly off from the common centre". In *Federalist* 17 he argued that no danger of encroachment existed because local matters offer but "slender allurements" to national politicians. Meanwhile, in *Federalist* 46, Madison argued that the citizenry would have a much greater attachment to their respective State governments because of

³⁹ A.V. Dicey, *Introduction to the Study of the Law of the Constitution*, 10th edn (London 1959), p.171; Wheare, *Federal Government*, p.81.

⁴⁰ Jenna Bednar, *The Robust Federation: Principles of Design* (Cambridge, 2009); Bradford R. Clark, "Separation of Powers as a Safeguard of Federalism", *Texas Law Review*, Vol. 79, 6 (2001), pp.1321-1458.

⁴¹ Mikhail Filippov, Peter C. Ordeshook and Olga Shvetsova, *Designing Federalism: a Theory of Self-Sustainable Federal Institutions* (Cambridge, 2004), pp.187-90.

⁴² Bednar, *The Robust Federation*, p.219. I discuss her argument further in "Form and Function in Federal Systems", *Australian Journal of Political Science*, Vol. 46, 1 (2011), pp.167-79.

their roles in local administration. Were there to be “ambitious encroachments” on State powers, a “general alarm” and unified resistance would result.

“Profoundly unrealistic” is how one commentator has described these arguments,⁴³ and it is impossible to imagine that they were not at least in part disingenuous. Nevertheless, they were presumably seen as being plausible. If Madison was correct in suggesting a reliance on the collective resistance of the States to centralisation, then we may have some grounds for arguing that failure to mount such resistance explains the high degree of centralisation in Australia. Indeed, this is an argument made by Grewal and Sheehan, who see the States as having “unwittingly contributed to the ascendancy of fiscal centralization in Australia” because of their “mutual mistrust”.⁴⁴ The problem here lies in the assumption that there is something distinctive about Australia in this respect. The reality is that Madison was hopelessly wide of the mark: effective collective action by the constituent units is far too rare to be relied upon in any federal system. One must look elsewhere to account for what might protect federalism and what explains Australia’s development path.

Federal Society

By throwing up her hands and declaring that in the end it is public support that really determines how the system fares, Bednar was merely begging the question of what makes the public value federalism. As Sawyer pointed out, generally they don’t — at least not for its own sake.⁴⁵ Federalism is valued when it is perceived as being a useful means to other ends. Most importantly this occurs when federal units represent distinct cultural communities. The fact that units may differ in their cultural composition is in itself largely incidental;⁴⁶ the issue is whether cultural identities are politically constitutive. The fundamental and obvious difference between the decentralised federations Switzerland and Canada on the one hand and the more centralised ones Australia, the United States and Germany on the other is the existing of “distinct societies” in the former.⁴⁷ In a similar way, the United States retained its strongly federal character as long as it was divided between distinct cultural communities. “A major impediment to centralisation for the first 180 years of United States history was the *de facto* bi-communal character of American federalism wherein the South, in a manner similar to such regions as Catalonia, Flanders, and Quebec, defended states’ rights against national power.”⁴⁸ The “vestigial” nature of federalism in the US today reflects the reality that now “the American people [...] have a unified political identity”.⁴⁹ It is the desire to defend one’s cultural particularity that provides the crucial counterweight to centralisation. And in today’s world, the basis for identity that really counts in federalism is language.⁵⁰ Identity politics is not the only driver of federalness;

⁴³ Nagel, *Implosion*, p.9.

⁴⁴ Grewal and Sheehan, “Understanding the Evolution of Constitutional Federalism”, p.583.

⁴⁵ Sawyer, *Modern Federalism*, pp.186-7.

⁴⁶ A reality that some authors have tried hard to get around; see, for instance, Nicholas Aroney, Scott Prasser and Alison Taylor, “Federal Diversity in Australia: a counter narrative” in Appleby, Aroney and John, eds, *The Future of Australian Federalism*, pp.272-99.

⁴⁷ Jan Erk, *Explaining Federalism: State, Society and Congruence in Austria, Belgium, Canada, Germany, and Switzerland* (London, 2007).

⁴⁸ Kincaid, “The Rise of Coercive Federalism in the United States”, p.158.

⁴⁹ Feeley and Rubin, *Federalism*, pp.125 and 115.

⁵⁰ Jan Erk and Edward Koning, “New Structuralism and Institutional Change: federalism between centralization and decentralization”, *Comparative Political Studies*, Vol. 43, 3 (2010), pp.353-78.

chronic conflicts of economic interest also contribute.⁵¹ It is clear, for instance, that centrifugal pressures in the Canadian federation come not just from Québec, but also from persistent economic conflict between “the West” and the centre.⁵²

Australia does not have, and never has had, a federal society. It is this fact that led William Riker to ask “why they bother with federalism in Australia” at all.⁵³ Nor does it have the high degree of regional differences in economic structure that inject such a strong centrifugalism into Canadian politics. Australia is a federation because it was formed out of then relatively autonomous political communities on a large continent who shared a strong sense of national identity,⁵⁴ not because there were culturally distinct communities seeking to protect their particular ethnic, religious or linguistic identities. Galligan may be correct in seeing this lack of federal difference as in some ways a blessing. “Federalism works best for countries like Australia that are uniformly liberal, democratic and have only incidental cultural and sociological differences that are not regionally based.”⁵⁵ This is an understandable view, particularly if one accepts Feeley and Rubin’s claim that real federalism is an exercise in “tragic compromise”.⁵⁶ Chronic mistrust or hostility between different national communities co-habiting one state is unpleasant, and if sufficiently extreme, dysfunctional or potentially terminal. However, this does not avoid the fact that without centrifugal tensions there is little to slow the march of centralisation.

An emphasis on the identity variable is also consistent with the rather basic fact, seemingly ignored in many of the arguments canvassed above, that these federal systems are democracies. As such, they presumably evolve in the direction the people want them to. If a national identity prevails over any regional identities, encroachments will be “vote winning exercises” for political parties contesting national elections.⁵⁷ Australia’s un-federal realities have been reflected in the party system, where no explicitly regional party has contested federal elections and where a classic European-style dichotomy between social-democratic and conservative parties, Labor and ‘non-Labor’, has always prevailed. Galligan made an important point when he noted that Australia is quite unlike its two main comparator federations in this respect.⁵⁸ This reflects peculiarities of Australia’s political economy and early processes of class formation as well as the weakness of competing cleavages. The Labor Party has successfully promoted a centralising vision of national social citizenship openly or implicitly at odds with federalism. In so far as the non-Labor parties have promoted federalism and resisted centralisation that has not reflected commitment to federal diversity but rather attachment to a system of government that conveniently provided

⁵¹ As Aroney, Prasser, and Taylor argue in “Federal Diversity in Australia”.

⁵² Garth Stevenson, *Unfulfilled Union: Canadian Federalism and National Unity*, 5th edn (Montreal and Kingston, 2009).

⁵³ William H. Riker, *Federalism: Origin, Operation, Significance* (Boston, 1964), p.113.

⁵⁴ John Hirst, *The Sentimental Nation: the Making of the Australian Commonwealth* (Melbourne, 2000).

⁵⁵ Brian Galligan, “Federal Theory and Australian Federalism: a political science perspective” in Brian Galligan, ed., *Australian Federalism* (Melbourne, 1989), p.51.

⁵⁶ Feeley and Rubin, *Federalism: political identity and tragic compromise*.

⁵⁷ Joan Rydon, “Frustrations of Federalism”, *Australian Quarterly*, Vol. 47, 4 (1975), p.102.

⁵⁸ Galligan, *Politics of the High Court*, p.26.

an obstacle to Labor's efforts to extend public control over the economy and expand the social wage.⁵⁹

Conclusion

Australian federalism has been subject to an enormous amount of centralisation since it commenced operation a century ago. This does not mean that the States have lost or are about to lose their important political and administrative roles or constitutional status. But it does mean that the role of the Commonwealth in areas of State jurisdiction has steadily expanded and that local autonomy and difference is steadily diminished through harmonisation and coordination. Analyses of Australian federalism have focused less on explaining its trajectory than on describing its features and debating its value. In so far as theoretical claims about causality have been advanced they have more often than not attributed a decisive role to the High Court. As this paper has shown, this is understandable but nonetheless mistaken. The High Court has certainly been obligingly cooperative in the centralisation process, but it cannot be held responsible. There have been much deeper forces at work in federal systems, forces universal in nature but not universal in effect. Here I have used the umbrella term "modernisation" to cover the wide range of developments in economy and society that fundamentally challenge the localist basis on which the first generation federations were established. In those cases where an underlying "federal society" continues to exist, a powerful counterweight retards their centralising effect. Galligan has asserted that "federalism is neither a function of societal differences nor primarily a matter of institutional arrangement", but it is not clear what else there might be.⁶⁰

It is entirely to be expected that Australia would be one of the more thoroughly centralised federations. Is it possible that more prophylactic constitutional drafting or a less compliant High Court would have significantly retarded centralisation? That can only really be answered through a rather speculative counterfactual thought experiment, but it seems unlikely given the political demand for national direction. However, there is much else to explain and account for in the way federal systems work and evolve than just the secular trends; and factors of design, happenstance and process are undoubtedly important in those contexts.

Finally, is it possible to inject some analytic content into the idea of "pragmatic federalism"? If much of the centralisation in Australian federalism appears to have occurred "pragmatically" it is because the tensions of a federal society have been absent and adjustment to changing needs and conditions has thus been able to occur relatively smoothly. Even so, adjustments have often been far from smooth and mutualistic. In all federations there are those changes that excite little conflict, changes that can usefully be characterised as pragmatic and problem-solving, but they will be characteristic of some periods and some sectors more than others.

⁵⁹ Brian Galligan and David Mardiste, "Labor's Reconciliation with Federalism", *Australian Journal of Political Science*, Vol. 27, 1 (1992), pp.71-86; cf. Andrew Parkin and Vern Marshall, "Frustrated, Reconciled or Divided? The Australian Labor Party and federalism", *Australian Journal of Political Science*, Vol. 29, 1 (1994), pp.18-39. See also Robyn Hollander, "John Howard, Economic Liberalism, Social Conservatism and Australian Federalism", *Australian Journal of Politics and History*, Vol. 54, 1 (2008), pp.85-103.

⁶⁰ Galligan, "Federal Theory and Australian Federalism", p.50.

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