

# **THE NEED FOR AUSTRALIAN CONSTITUTIONAL THEORY**

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Our Australian Constitutional Theory project, which this conference launches, aims to ask fundamental questions about the nature of our polity and the constitution that provides the formal basis of its operation. It asks questions about the values that underlie it and the institutions that can make the realisation of those values possible. In a very fundamental way, we are asking of our constitution and our polity - What are you good for? What are we here for? How can we deal with the fact that any decent heterogeneous society will generate different answers on which reasonable people will reasonably differ? Finally, what is it to be a polity in an increasingly international world?

These were questions that were largely unasked because history and circumstance did not demand an answer. Australia was not forged through a struggle for independence or because of some great crisis which forced Australians to think through the basic principles behind their approach to governance.

The ingredients inherited from the United Kingdom and consciously selected from the United States were basically left to stand as they are with frequent, only partially justified, complaints that they do not mix. There has been no attempt to consider how appropriate those constitutional concepts, ideals and values are to the Australia of the late twentieth century. This is a major failing given the changes in the nature of society, politics and law and new problems that have arisen since those concepts, ideals and values were first formulated. There has been no concerted attempt to re-evaluate or to mould these concepts and ideals into a constitutional system of recognizable Australian form by modifying, refining or even discarding them where necessary and adding fresh elements suitable for Australia.

In this short paper, I would like to identify some of the questions we consider important, concentrating on those where the answers that would have been given 100 years ago are likely to be unsatisfactory now. I will then go on to emphasise the importance of developing Australian answers and avoiding the uncritical adoption of imported constitutional theory.

## **SOME ISSUES FOR THE NINETIES IN AUSTRALIAN CONSTITUTIONAL THEORY:**

### **Democracy**

Although the word democracy is one of the oldest words in the political lexicon, it is a very recent phenomenon in the West. Sir Samuel Griffith was working on the Australian constitution barely 100 years after the first experiments with universal adult male suffrage and before the vote had been extended to women, indigenous peoples and at a time when gerrymanders and property franchises for upper houses were still common. Our ideas about democracy have developed much since then and we have still to confront a number of important issues - such as the interaction between democracy and the market and the extent to which democracy is extended to other institutions in our society.

### **Rights**

Most of the drafters would have assumed that the Common Law provided the best protection of our rights and liberties. That view has been challenged over the last twenty years and many have advocated the importation of the US model of a written Bill of Rights and a constitutionally protected court to protect them. With *Australian Capital Television*<sup>1</sup> a new amalgam was

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<sup>1</sup> *Australian Capital Television Pty Ltd v Minister for Transport and Communications* (1989) 86 ALR 119.

suggested - that common law rights should be implied as already incorporated in our written constitution.

However, in debating the different means protecting rights, it is assumed that the rights to be protected are the traditional “negative rights” (which involve freedom from state interference) as found in the US Bill of Rights and the UN *International Convention on Civil and Political Rights*<sup>2</sup>. Little attention has been devoted to the last two hundred years of philosophical debate about the nature of rights and the perceived inadequacies of this limited conception of rights. The different conceptions of rights and the new “generations” of rights claims are almost completely ignored. (Economic, social and cultural are often referred to as “second generation rights” and group rights as “third generation rights”.) And different kinds of rights may need a different mix of institutions to realise these rights.

To confine the discussion of rights in Australia to traditional rights claims is to anchor the debate in the eighteenth century - 100 years in the wrong direction!<sup>3</sup>

## Federalism

Federalism is one issue which has generated theoretical discussion in Australia. It is often suggested that this does not fit in with the kind of representative democracy we have chosen. Sir Samuel Griffith in particular thought that “either representative government will destroy federalism or federalism will destroy responsible government”<sup>4</sup> - a view that gained wide

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<sup>2</sup> 1967 Rep.6 ILM 368.

<sup>3</sup> These themes are developed more fully in my essay “The Dimensions of Rights and their protection by Statute”, in C.J.G. Sampford and D.J. Galligan (eds) *Law Rights and the Welfare State*, London, Croom Helm, 1986, 170.

<sup>4</sup> B.M. Crommelin, “The Commonwealth Executive; A Deliberate Enigma” in G. Craven, (Ed.), *The Convention Debates 1891 to 1898; Commentaries, Indices and Guide*, Sydney, Legal Books, 1986.

currency in the aftermath of the 1975 dismissal of the Whitlam government.<sup>5</sup> Others thought that the mix was rather more successful at the time and since - a view that was generally held until the 1975 crisis. However, nearly twenty years later, that crisis seems more of an aberration than the start of instability. I have gone so far as to argue that the causes of the 1975 crisis did not lie in either the concept of federalism nor the institutions chosen at federation.<sup>6</sup> Furthermore, I have argued that the problem can effectively be handled even without constitutional change (desirable though a clarification might be).<sup>7</sup>

The nature and relationships between the kind of federalism and responsible government that is evolving in Australia will be a part of our work and the argument will be furthered in the monograph planned for the end of this project. However, I want to place our federalism in context by seeing it as one of the ways in which we recognize significant sub-groups within the polity and its constitution.

When the Constitution was drafted, there were certain groups who were presumed to have different views that needed to be respected and represented. Those groups were the states, and in particular the politicians who represented them. Although the source of their own power may have had its predictable bias in the importance they placed on their constituencies, there was a strong basis for this view. The development of colonial Australia involved, in its simplest terms, a port, a city and a hinterland. The hinterland provided the agricultural and mineral wealth, the port provided the access to overseas markets and the city was the centre of politics, learning, law and government. This provided an incredibly strong impetus to regionalism. In

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<sup>5</sup> See, for example, C. Howard, and C. Saunders, "The Blocking of Supply and the Dismissal of the Government" in G. Evans, (ed.) *Labor and the Constitution*, Melbourne, Heinemann, 1976, 251-287 and B.M. Crommelin, "The Commonwealth Executive; A Deliberate Enigma" in G. Craven, (Ed.), *The Convention Debates 1891 to 1898; Commentaries, Indices and Guide*, Sydney, Legal Books, 1986.

<sup>6</sup> C.J.G. Sampford, "Responsible Government and the Logic of Federalism" 1990 *Public Law* 90.

<sup>7</sup> C.J.G. Sampford, "The Senate and Supply: some awkward questions" (1987) 13 *Monash University Law Review* 119.

general, all of these reinforced the strengths of the individual colonies. The exception was Queensland where those same combinations of factors supported the separatist movements in based around the other ports, especially Rockhampton and Townsville. They also had the power to make their voices heard.

Those groups still insist on being respected even though the perceived differences have largely disappeared - indeed, to a large extent they never really emerged.

However, we were a society of perceived differences then - the cleavage lines are different now. The states are not the only or necessarily the most important sub-group. Indigenous and immigrant peoples, Catholic and Protestant, capital and labour, men and women, European and Anglo Celtic immigrants, Asian and European immigrants are distinctions are cleavages that have loomed large at various times. Some of these cleavages could be handled within two party democracy - some were not, or barely at all.

This raises some large questions.

How do you deal with different sub-groups? In what way are they represented in the political process - through negotiation with the mainstream parties, through advisory processes within government (eg EPAC, the Women's Consultative Council), through proportional voting, through separate assemblies (eg the states, local government and, more recently, ATSIC), through reservation of seats in the Federal Parliament (as the Constitution requires for the states), or by some other means? How do you conceive of their rights? It also leads to a new question - how do you deal with the fact that the sub-groups in any important democracy are likely to change over time? To an extent, the party system with its ability to deal with different coalitions is an important and flexible response. However, the party system in single member constituencies will prove unsatisfactory to minorities with very strong views.

In this context it is interesting to see how the Senate, originally a states house, looks like becoming a house in which minority interests will have a

strong say. The House which was supposed to protect the states did not do so because most key differences of opinion crossed state lines.<sup>8</sup> However, through an accident of its franchise, it is better able to meet the demands of the new non-regional minorities than most, if not all, Australian institutions.

## Judging

One hundred years ago, there was a general assumption that judges found the law - an assumption that was only then being challenged by the antecedents of the American Realist movement like Oliver Wendel Holmes<sup>9</sup> and John Chipman Gray<sup>10</sup>.

We now know that judges do not find law. They are not intellectual detectives that find hidden gems in haystacks of the law reports. Nor do they make law in any simple sense. They *remake* law every time they interpret it. Understanding the means by which they do it and the effective limitations on the way they do it is one of the great questions of Jurisprudence.<sup>11</sup>

Where judges are interpreting a basic constitutional document that is virtually impossible to formally amend, the issue is that much more important than in interpreting statute law which can be changed by the legislature if they

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<sup>8</sup> The initial state based differences over free trade gave way to differences between capital and labour that dominated most of the twentieth century. One of the most interesting features of Australian democracy is how little regional difference there is in electoral support for the two major parties. Voting support rarely varies by as much as 5% between states. There is no comparison to the East/West divide in Canada or the North/South divide in the United Kingdom.

<sup>9</sup> "The Path of the Law" (1897) 10 *Harvard Law Review* 457.

<sup>10</sup> J.C. Gray, *The Nature and Sources of Law*, New York, Macmillan, 1921, 84.

<sup>11</sup> The way I pose this traditional question is as follows: "how is it that seven judges can hear the same arguments, read the same cases and statutes, come to seven different conclusions, *and feel compelled to do so.*" I have long felt that two of the most common views about judging - "six, or even seven, of them are wrong" AND "they make it up as they go along" - to be completely inadequate as failing to answer the question.

consider in hindsight that they did not intend the interpretation that the judiciary read into it.

### **Rule of Law**

The rule of law constitutes a very fine ideal - laws should be, as far as possible, public, prospective, clear, stable, made according to established procedures, and applied without bias by independent courts to which citizens should have access. If it can be achieved, it makes laws more effective because it allows citizens to take the law into account in making and remaking their life plans - avoiding those things that are discouraged and doing those things that are encouraged. At the same time this allows citizens a greater degree of autonomy.

However, one of the most fundamental difficulties with the concept is that the law which was envisaged as "ruling" was very different from that which we now conceive. We now know a lot more about the difficulties of making laws clear, the difficulty in maintaining "stability" of texts of indeterminate reference, the inevitability of bias, the costs of access to justice and the difficulties of reaching the public with any more than the crudest understanding of the law and its rationale.

As our ideas about law have changed, so we must reassess what the "rule of law" might involve. Some might see the rule of law as made irrelevant by changes wrought by legal theory in our view of law. Others might see it as a still valuable ideal - but one in need of redefinition.

These are questions about institutions - not just about rules.

The lawyer's object of study and expertise, their stock in trade, is found in rules and arguments derived from rules. Accordingly, they are likely to see the answers to questions like those raised above primarily in terms of rules and principles - of justice perhaps, and of law for certain. Even if lawyers are prepared to look beyond the law, the rule or principle tends to be seen as either *the* answer or the *core* of the answer.

However, constitutional law is ultimately about the institutions through which we govern ourselves, institutions which realise and/or frustrate<sup>12</sup> the rules and principles we may determine for our governance.

The difficulty in shifting focus to the institutions which we must consider is compounded by a general blindness to the importance of institutions in Anglo-American law. As I have argued elsewhere<sup>13</sup>, our culture's emphasis on individuals means that we often fail to appreciate the nature, possibilities and realities of institutions.

We create institutions to concentrate people and resources to achieve shared ends. Therein lies the great strength of institutions. But it is also the source of our greatest concerns about them:

- institutions are subject to stagnation as they fail to further those ends;
- institutions are subject to capture as new members seek to use the concentrations of people, resources and power for their own ends; and
- these concentrations of power may threaten the rights and autonomy of individuals.

This does not mean that we should assume that public institutions will *always* fail. Nor that they will always fall prey to rent seekers (as claimed by public choice theory), Canberra centrists, the money power, or the military industrial complex. Most importantly of all, it does not mean that state institutions are by nature antithetical to the freedom of individuals. This latter prejudice still leads some constitutional lawyers to see public law as about the limitation of state power<sup>14</sup>.

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<sup>12</sup> Generally both.

<sup>13</sup> See C.J.G. Sampford, "Law, Institutions and the Public Private Divide" (1992) 20 *Federal Law Review* 185.

<sup>14</sup> If that were the point of public law it would be easily fulfilled by banning the state!

It merely means that we must seek to design and re-design our institutions so that they are more likely to serve the needs, desires and interests of citizens.

The centrality of institutions to constitutional theory provides an important reason for its interdisciplinarity. Legal and political philosophers can offer deeper insights into the theoretical issues raised by the project. Historians can offer an understanding of the way that those institutions developed. Sociologists can place those institutions within the workings of contemporary society. In particular, political scientists can offer their insights into power and the institutions through which it is organised.

### **THE ROLE OF THEORY**

In advocating the development of Australian constitutional theory, I am not suggesting that constitutional theory can provide answers to all our constitutional problems. Although some theories have purported to provide universal answers and their misguided followers have attempted to put them into practice<sup>15</sup>, theory must perform a more modest role.

Theories purport to offer coherent structured answers to one or more of the important questions about their subject matter<sup>16</sup>. Constitutional theories attempt to answer questions about the kind of constitution and basic politico-legal institutions we have, the values they further and their relationship to other elements of our polity and society. Answering such basic questions for ourselves is necessary before we can realistically evaluate the kind of institutions we have and the kinds of changes which we might consider desirable to them.

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<sup>15</sup> A fault as much attributable to extreme Marxists and extreme free marketeers.

<sup>16</sup> That is how I interpreted "legal theory" in C.J.G. Sampford and D.A.R. Wood in "Theoretical Dimensions' of Legal Education - a response to Pearce" (1988) 62 *Australian Law Journal* 32.

In advocating this kind of role, I am specifically eschewing and warning of the excesses or mistakes into which theory laden work can fall.

(1) Theory can be dominated by simple and simplistic ideas which provide an important insight into the subject matter but which are incapable of dealing with the complexities of that subject matter.

(2) Much legal theory is imported from other disciplines and responds to the fashions in those disciplines - Marxism, free market economics, analytical philosophy, linguistic philosophy, post modernism. These theories may have much to offer, but their uncritical application does no service to the theory or to the law. The answers to questions about one social phenomenon as conceived by another discipline may or may not have relevance to questions about constitutions.

(3) Much constitutional theory is imported from other countries - especially England and the United States. It is natural for us to look at such theories - given the common elements in our constitutional history and the conscious derivation of some of our institutions from those countries. However, we should remember that we should be asking our questions about our institutions and seeking appropriate answers to them. The answers that others derived to their questions about their institutions may not be readily applicable. I would like to devote the rest of this paper to a product warning on some recent theoretical imports.

### **PRODUCT WARNING ON THEORETICAL IMPORTS:**

During the 1980s, Australia suffered from the fact that too many people were buying imported goods rather than looking for good local products that met local needs. This is not to deny the value of high quality imports that suit local conditions and stimulate local manufacturers to improve their game. But we must always beware the flashy, well marketed import with a good label that may be of little use in Australia. There has been a similar problem with ideas. Although Australians have played an important role in the

international exchange of ideas, we have recently bought a lot of ideas whose heavy marketing has managed to disguise the fact that they not only do not work in Australian conditions but have proved disastrous in their home markets. Nowhere is this more apparent than in economic theory where English and American orthodoxies were heavily promoted by those who would benefit from their adoption. Although not all could predict just how disastrous these orthodoxies would prove in their home countries it was long apparent that the British and American economies were not going to be the success stories of the 1980s.

Australian constitutional theory is in its infancy and does not have the influence to do the kind of damage inflicted by American-influenced economists. Nonetheless, one of the most striking features of some recent writing is the primacy given to American constitutional ideas. Not only were these ideas consciously favoured at the expense of English ideas which had long been a part of the Australian constitution; they were also preferred to attempts to forge new Australian ideas that integrate the diverse parts of that heritage in a uniquely Australian way. This first became apparent to me at a symposium that was organised by my collaborator on this project (Brian Galligan) in 1990 on the eve (as it turned out) of that year's federal election. These thoughts are in response to the interaction generated by the exchanges that took place there.

### **The Primacy of Federalism:**

Everyone agrees that the Australian constitution involves a mix of federalism and responsible government. Several of the contributors rightly criticise past tendencies to minimise and denigrate federalism because it did not fit in with a straight English model of unitary government, parliamentary sovereignty and strong versions of responsible government.

Unfortunately, some of the essays have become mirror images of those they criticise - depicting a constitution constructed around principles of

federalism and/or limited government and marginalising responsible government.

James Warden seeks to interpret the constitution according to a theory of federalism which he constructs from the ideas and arguments deployed by the framers, or rather “the majority [who] won most of the crucial divisions in the committees against the liberal nationalists” in whose minds “protection of states’ rights was foremost”.<sup>17</sup> For him “the point of the constitution, as it was to be written, and the motivations of the majority of the framers, was to protect the small states within the empowered Commonwealth”<sup>18</sup> indeed, “the design of the Constitution is built around the Senate”!<sup>19</sup>

Sharman sees Australia as a “compound republic” designed to disperse power in order to preserve individual liberty and governmental responsiveness via federalism, bicameralism and entrenched constitutions. Responsible government is depicted as the piece that did not fit this otherwise coherent image.<sup>20</sup> Indeed, he sees responsible government emerging late in English constitutional development as a deviation from an earlier tradition of limiting the executive.<sup>21</sup>

Galligan and Uhr describe Australia as a “federal democracy” with its institutions of government being “essentially” federal.<sup>22</sup> Federalism is “its central organising principle of government”<sup>23</sup> and is “the most important part”

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<sup>17</sup> James Warden “Federalism and the Design of the Australian Constitution”, Paper presented to the Federalism Research Centre’s Conference on Australian Constitutional Theory, Parliament House, Canberra, March 1990, 2.

<sup>18</sup> *Id* at 8.

<sup>19</sup> *Id* at 13.

<sup>20</sup> “In sum, it is the so called British parliamentary tradition that is the problem, not our indigenous political institutions” C.Sharman, Presidential Address, Australasian Political Studies Association Conference, UNSW, 26th September, 1989, 11.

<sup>21</sup> *Id* at 9.

<sup>22</sup> Brian Galligan and John Uhr, “Australian Federal Democracy” Paper presented to the Federalism Research Centre’s Conference on Australian Constitutional Theory, Parliament House, Canberra, March 1990, 4.

<sup>23</sup> *Id* at 7.

of the "Australian story" and "central to the character of Australian democracy".<sup>24</sup> Responsible government is only grudgingly acknowledged. It is seen as something that "emerged very early in the life of the Commonwealth",<sup>25</sup> that "complicates"<sup>26</sup> the basically federal constitution rather than being acknowledged as designed in from the very beginning.

Galligan and Uhr omit one extremely important element of Australian democracy - the election of the executive through the operation of responsible government. Although the election is in formal terms a little indirect, via the election of MHRs and the vice-regal appointment of Prime Minister and Cabinet, the whole political process is motivated by and directed to that end. Indeed, Galligan and Uhr see politicians, media and public as preoccupied with it. However, I would not put these phenomena (and the people involved) down to the greater "excitement" of electoral competition but to the central importance of the composition of the federal executive in our constitution. Federalists who emphasise (and decry) the strength of the executive should be the first to agree on this importance.

I must say that I found the attempt to marginalise responsible government on the very day before the 1990 federal election bizarre. Everyone in that room knew full well that the most important and direct consequence of the voting on the next day would be the choice of a Prime Minister on the basis of the number of seats won in the lower House of Federal Parliament.

The explanation lies in the largely independent roles that federalism and responsible government play in the constitution. As Warden points out, the federalism debated and adopted was largely concerned with the powers of the state and federal units and the relations between them. This allowed the units to operate according to the version of responsible government with which they were familiar and felt comfortable - subject only to such modifications as were necessary to accommodate the fact that the units did not stand by

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<sup>24</sup> *Id* at 11.

<sup>25</sup> *Id* at 18.

<sup>26</sup> *Id* at 10.

themselves but as part of a federation. In fact such modifications were few. Even when they adopted a “federal” Senate the conventions refused to weaken responsible government despite being told that it was incompatible with federalism (something which I argue is perfectly defensible as a matter of practice and theory).<sup>27</sup>

For those who concentrate on the convention debates, and the text they left behind, federalism seems to predominate. However, responsible government has always been the predominant feature of the way that those units actually operated.

### **Limited Government and the Diffusion of Power:**

Several writers find, at the heart of our constitution, principles of limited government, checks and balances, and the diffusion of power for the purpose of protecting human rights. For Galligan and Uhr, “the constitution is basically one of institutional divisions and checks on power.” In most cases this is associated with American federalism citing Ostrom's theory of a “compound republic” in which “governmental power is dispersed among a number of rival agencies, agreement among which is necessary for authoritative action”.<sup>28</sup> Some seem to fall into the logical trap of assuming that because federalism supposedly performs certain functions in conjunction with other elements of the American Constitution it will perform the same function here despite being mixed with different elements. However, Sharman also claims support for limited government within Australian colonial traditions of written constitutions, strong upper houses and judicial review.

The problems facing this line of Australian constitutional theorising are both historical and philosophical.

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<sup>27</sup> In fact the continuity is highlighted by the way that the Senate has operated more like a state upper house than a senate in any other country - with the 1972 and 1975 aberrations closely resembling the rogue periods of the Victorian Legislative Council.

<sup>28</sup> C.Sharman, *above* n.20 at 6.

Until very recently, Australia had no tradition of limiting government for the purpose of protecting human rights. The colonial and commonwealth governments were certainly limited by their creators. But the purpose was to preserve the power of those creators rather than defend the liberty of their common subjects. Limitations on colonial government were designed to protect the power of the British government and its local representatives. Colonial upper houses were explicitly created to protect property owners from the unreliable decisions of the more democratically elected lower house. The attempted limitation of the Commonwealth to protect state power was one of the most explicit themes of the federation process and federal/state conflicts ever since. State premiers have sought to preserve the power of their governments, frequently at the expense of their citizens. No better example could be given than Mr Bjelke-Petersen, that profoundly illiberal premier who was an implacable opponent of commonwealth power, especially when it was used to secure human rights, equal opportunity and indigenous land rights. The Australian tradition has been to argue over the division of power among governments rather than to limit all governments in order to increase individual liberty.

Constitutional theorists who find such principles in the Australian constitution are reflecting American traditions rather than Australian ones. The underlying thesis appears to incorporate a worrying logical slide:

1. Part of our constitution incorporates American federalism;
2. American federalism is one part of the American theory of limited government;
3. Therefore Australian federalism is part of an Australian theory of limited government;

However, both constitutions are mixtures and we should not suppose that a theory that makes coherent their particular mixture could make our different mixture coherent.<sup>29</sup>

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<sup>29</sup> The indirect way in which it is introduced is transparent in the arguments of Sharman and Galligan/Uhr. After pointing out that we have an American model of federalism Sharman says that it "is often noted" that "the federalism of the United States is part

Philosophically, the eighteenth century ideal of limiting government for the purpose of protecting human rights is fundamentally flawed and is rejected even by prominent American liberals like Ronald Dworkin.<sup>30</sup> As a general goal, limiting government promotes what Dworkin calls “liberty as license” rather than specified liberties that are the subject of human rights. Even if governments are limited only insofar as their actions would infringe those specified rights, this can only protect “negative liberties”. Rights in any fuller sense may require state intervention to protect individuals from the exercise of non-state power or to provide the resources necessary for the exercise of their human rights.<sup>31</sup>

In particular it should be emphasised that the limitation of state power inevitably makes other forms of power more valuable. This is one of the reasons why it is so popular with those who hold such power and why J.K. Galbraith is constantly warning us to be wary of their praise (and the funding) which so frequently accompanies it.

Finally, and most fundamentally of all, the ideal of limited government misses the *point* of having governments. If the sole point of government were to protect individuals (or the colonies) from the abuse of commonwealth power, then the simplest solution would be to have no federation at all.<sup>32</sup> The

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of a constitutional scheme which rests on what Ostrom has called a compound republic” (“Australia as a compound republic” p. 6). Galligan and Uhr suggest that the hybrid quality of the Australian Constitution ought to encourage commentators to devise new evaluative frameworks adapted from the standards of federal constitutionalism identified by Madison (p. 19).

<sup>30</sup> See discussion in C.J.G.Sampford and D.Wood “Rights, Justice and Taxation” in W.Sadurski, (ed) *Ethical Dimensions of Legal Theory: Poznan Studies in the Philosophy of the Sciences and the Humanities*, Amsterdam, Rodopi, 1991.

<sup>31</sup> Indeed, I have long argued that the realisation of liberal values that demand for all human beings the rights to do the actions which are the subject of human rights requires state action. For a full discussion of this see C.J.G.Sampford “The Dimensions of Rights and their protection by Statute”, in C.J.G.Sampford and D.Galligan (eds) *Law Rights and the Welfare State*, 170.

<sup>32</sup> See C.J.G Sampford, “Law, Institutions and the Public Private Divide” (1992) 20 *Federal Law Review* 185.

point of federation was to create institutions that were capable of achieving certain ends and to give them the power to achieve those ends. To be sure, the framers tried to avoid giving any more power than was needed and wanted to ensure that such powers would be used for those designated purposes. However, these goals are a corollary of the creation and empowerment of Commonwealth institutions and should not be seen as their *raison d'être*. The conferring of power was the logically prior act: confining the power to that necessary for the purpose of the conferral was logically derivative. In a very real sense these are not separate issues at all. There is only one issue - how to give government exactly the right amount of power for the purposes the government is intended to fulfil.

Sharman acknowledges the positive aspect of constitutional theory in praising Maddox's "two competing themes of constitutionalism, ... the need to limit government power by checking and dividing it and ... the need for government to have adequate power to implement the collective wishes of its citizens."<sup>33</sup> However, even here he inverts the logical order and his own exposition deals almost exclusively with the former. There are doubts over whether they should be logically separated. However, if there is a competition between "getting things done" and stopping the government doing undesirable things, there can be little doubt that it was *via* responsible government that the framers expected governments to get things done and that it was part of the rationale of federalism to ensure that federal bodies at least are confined to those given powers. Thus the error of down-playing the positive side of constitutional theory is related to and reflects the error of down-playing responsible government.

These are not mistakes made by the drafters of the constitution. They realised that what they were doing was creating institutions. They wanted the institutions to fulfil certain purposes and gave them the strength to enable them to do so. They could not have seen their primary responsibility as limiting these institutions as this would have negated. They chose highly

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<sup>33</sup> C.Sharman, *above.n.20* at 2.

effective ways of achieving those purposes - considerable money power, responsible government. They certainly wanted those institutions to do no more than fulfil those purposes - retaining as much power as possible within the states. However, they attempted to build these into the design of the positive powers given to federal institutions rather than a system of limitations.<sup>34</sup>

Australia has a proud tradition of furthering human rights. However, it is a tradition of institutional action to further rights rather than institutional restraint to prevent interference with rights. At the federation, and for the thirty years that followed, Australia and its antipodean neighbour, led the developed world (of which they were then leading examples) in respecting human rights. They ensured wider suffrage, pensions, minimum wages, and the limitation of regional difference (through the Grants Commission). At the same time the United States Supreme Court was striking down legislation limiting the hours of work which the Harvester judgement was providing for the adequacy of minimum wages. Rights were supported by the legislature, the Arbitration Court and the Arbitration Commission - and various other commissions from the Grants Commission to the Human Rights Commission, the Equal Opportunities Commission, the Senate Standing Committee on Legal and Constitutional Affairs, and the various State departments which have to scrutinize Queensland bills to avoid the political flak that may arise if they are seen to breach the Legislative Standards Act 1992 (Qld). Even now, when the High Court recognizes the embedded mistake of terra nullius<sup>35</sup>, the actual provision of land rights for the majority of indigenous people is through legislation<sup>36</sup>. This is not to say that rights are, in any sense, perfectly protected by this more institutional approach or that some judicially enforced

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<sup>34</sup> Of course, it must be said that they did their job too well. They made institutions which could make a nation out of Australia and gave them the powers to achieve that goal. As those federal institutions succeeded in those goals, being an Australian came to be more important than being a member of a state, shifting the centre of political power and debate to the Commonwealth at the expense of the states.

<sup>35</sup> *Mabo v Queensland (No 2)* (1992) 175 CLR 1.

<sup>36</sup> *Native Title Act 1993* (Cth).

limitations on government may not provide an important part in the “rights regime” Australians are building to protect the rights of citizens. However, the adequacy of limited government as a protector of human rights is hardly established.

Whether or not academic writers prefer the limited government or institutional support means of realising human rights, it is the latter that has been, and has largely remained, the Australian method. Australian constitutional theory needs to recognize that.

### Original Intent:

The American product for which Greg Craven appears to be the self-appointed Australian distributor<sup>37</sup> is original intent theory. There is no room in this piece to go into the philosophical problems of original intent as a theory of textual interpretation. Modern literary interpretation and especially theories of legal interpretation have down-played authors and original intent and emphasised the way that interpretations are contemporary, contested, and dependent on the values and assumptions of the interpreter and/or the community of which he or she is a part.<sup>38</sup> Thus the *intent* often proves to be that of the interpreters - as is the *originality*! Of course, for those Americans whose economic ideology comes from the late eighteenth century the appeal of interpreting their constitution according to the intentions of eighteenth century liberals is obvious - perhaps a little too obvious for the niceties of academic discourse! In this paper, I will confine myself to a few comments.

Probably the most important reason why I am not an original intenter is that I believe in the gradual improvement of human knowledge, the refinement in values and the possibility of learning from experience. Thus I generally

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<sup>37</sup> “Original Intent and the Australian Constitution - Coming Soon to a Court Near You?” (1990) 1 *Public Law Review* 166.

<sup>38</sup> See, for example, R.Dworkin “Law as Interpretation” (1981-2) 60 *Texas Law Review* 327 and Stanley Fish “Working on the Chain Gang - Interpretation in Law and Literature” (1981-2) 60 *Texas Law Review* 551.

find twentieth century ideas and theories more compelling than eighteenth and nineteenth century ones and am loath to burden any society with the latter.

Another reason is to be found in one of the ideas associated with the rule of law. Citizens should be governed by stated intentions incorporated in texts rather than the unlegislated intentions of those who drafted them. This is not to say that texts can be so certain as to operate without interpretation or that interpretation can or should be uncontested. But the interpretation should be of the text rather than of the minds of those who created it.<sup>39</sup>

It may seem ironic to find original intenters falling foul of rule of law arguments. But there is an even greater irony that original intent theorists like Craven are among the most likely to criticise the founding fathers for creating the supposed contradiction between responsible government and federalism. One wonders how they can be so insistent on being tied to the intentions of such obviously fallible (and possible schizoid) men. I have to admit to a healthy disrespect for the wisdom of the framers and the value of their creations, but I am prepared to look seriously at what they sought to achieve and whether their creation can be made to work in theory and practice.

### **Constructing an Original Intent for a Constitution:**

There are special problems in determining the original intent of the Australian Constitution due to the necessity for compromise, the democratic input and the possibility and actuality of amendment.

With ordinary legislation, the intention of the majority, or the majority party, can serve as the basis for interpretation because all that is necessary to pass legislation is a majority of the relevant legislative houses. However,

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<sup>39</sup> This is reflected in developments in legal theory. When laws were seen as commands, it was natural to look at the commander and the wish his command conveyed. However, when texts are created by complex procedures by multiple persons over time. This is one of the reasons why legal interpretation has focussed on the judge and the interpreter rather than the sovereign legislator just as literature has concentrated on the reader rather than the author.

getting a majority in the convention was not enough - the various states had to be persuaded to join. The constitution was a compromise and it is not appropriate to interpret a compromise according to the wishes of one party to the compromise (for example, the majority whose first concern was to protect the states<sup>40</sup>). That approach gives greater weight to the views of that side and skews the compromise in their favour in ways that might have led others to reject the compromise. Of course it is at this point that Warden repeats one of the traditional arguments for emphasising federalism and a strong Senate - that without it the smaller states would not have joined the union. However, as I have pointed out elsewhere,<sup>41</sup> the most reluctant state of those crucial to federation was New South Wales (I do not include Western Australia because, as the actual wording of the constitution attests, federation would have gone ahead without it). It was the concessions intended to weaken the Senate made at the 1899 Premiers conference that finally persuaded the reluctant New South Wales to join.

The picture is further complicated by the role of the electorate in approving the original constitution and in deciding whether to amend it or not. Even if Craven is justified as taking the intention of the convention delegates for the intention of the electorate in 1900, how do we determine their intention for later amendments? Do we look at the intention of the commonwealth parliament? States rightists should shudder at the thought of basing the interpretation of any part of the constitution in the mind of the anti-Christ (or, rather, anti-States - a far worse moral failing). Or do we look to the electorate? If the intentions behind the amendment are antithetical to the intentions of the framers, how do we construct a coherent interpretation of the constitution as a whole. Even if the amendment is rejected, expressing a re-affirmation of the existing constitution, is this a re-affirmation of the constitution as it was originally intended to operate or as it currently operates and is currently interpreted?

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<sup>40</sup> See J.Warden, discussed above.

<sup>41</sup> See C.J.G.Sampford "The Senate and Supply: Some Awkward Questions" (1987) 13 *Monash University Law Review* 119.

Craven's use of arguments based on (unstated) theories of democracy is highly selective. The democratic nature of the original constitution is emphasised as is the rejection of changes to it. However, Commonwealth legislation that falls foul of that Constitution (and much more of it would inevitably do so if Craven's interpretations were adopted) is also passed by a democratically-elected legislature. Craven plays down criticisms of the flawed nature of pre-federation democracy, characterising such attempts as anachronistically imposing "some democratic ideal" on the last part of the nineteenth century and insisting that they are the most recent and most democratic expression of the will of the Australian people available. Even if one passes over the rather crude cultural relativism implied in this comment, it still rather misses the point. Those who reject original intent are not trying to impose our democratic ideals on the late nineteenth century: it is rather too late for that. They merely do not want inferred late nineteenth century ideals being used to interpret the Constitution and override the current results of our democratic process. Make no mistake if commonwealth legislation is invalidated by the original intent of the Constitution, the parliaments elected according to late twentieth century democratic ideals are being trumped by the democratic ideals of the late nineteenth century that are being imposed on the late twentieth century and parliaments elected according to late twentieth century ideals.

The usual reply to this points to refusal of the Australian electorate to make substantial changes to the Constitution. This implies an endorsement according to the less anachronistic democratic values of today. However, the question is whether the rejection of amendments really does imply an endorsement and whether our flawed democratic processes work better in referenda or election campaigns. There is intense concentration on the promises of governments and on their performance. Referenda are relatively infrequent and the alternative choices are subject to far less media scrutiny at the time and even less scrutiny as to the consequences of the choice made. Of course, defenders of the current Constitution like to portray the constant rejection of amendments as representing the wisdom of the Australian electorate (a view that is apparently not shared by those mounting a good deal

of the “no” cases who apparently operate on the principle that mendacity is the best policy). However, the other view is that change is just difficult for reasons unforeseen by the founders. I would suggest that it would be just as hard to formally change a more centralist constitution into our current one as it is to change the Constitution we currently have. To those who say that the people would change the constitution into a more centralist one if they wanted to, one could retort that if people do not like the way the High Court interprets the constitution, they could change that by constitutional amendment. In referring to an analogous argument, Craven rediscovers the difficulty of constitutional change.

Perhaps that is why Craven ultimately seeks constitutional change through changes in the interpretive practices of the High Court rather than formal amendment. This is exactly why he criticises those who changed the effect of the constitution by literalist interpretation in the 1920s and progressivist interpretation in the 1980s rather than through referenda. However, at least the principles of the *Engineers' case*<sup>42</sup> and the currently emerging approach of the High Court are home grown theories rather than American imports.

None of this is to suggest that we should ignore the contemporary views, especially those of the actual drafters, as to what was intended by the constitution in whole or part. Although the meanings of a text are inevitably those given to it by the audience at the time it is read rather than that given to it by the authors at the time it is written, attempts to discover the latter are highly useful. Just as a later audience may find a meaning that was unintended and highly attractive to the author, so may a later audience gain insights into the text by finding out, as far as is possible, the meaning, purpose and context of the authors. It also provides wonderful rebuttal points to those original intenders most intent on forcing their own intent on the statute. This is precisely what I have attempted to do in showing that the drafters clearly wanted both federalism and responsible government in their

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<sup>42</sup> *The Amalgamated Society of Engineers v The Adelaide Steamship Company Limited and Others* (1920) 28 CLR 129.

constitution and most felt that the two were compatible - though they did not exactly see how.<sup>43</sup>

### **GENERATING AUSTRALIAN CONSTITUTIONAL THEORY**

In warning against theoretical imports, I do not wish to suggest some kind of intellectual autarchy. Perusal of the list of questions posed reveal some issues that should be on the agenda of every modern society - and should remain there. However, when we reach the institutional questions, the need for Australian solutions that address the kind of society and institutions we have developed, become apparent. Once we have done that, we may well find that we have some important insights to offer to constitutional theorists in other countries. However, we would not advocate their thoughtless export any more than we would the thoughtless import of those from the United States or the United Kingdom.

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<sup>43</sup> See C.J.G. Sampford, *above* n.6.