PUBLISHED

Greg Taylor
The three Queenslands — Sir Samuel Griffith's 'ghost' draft for a Queensland federation
The University of Queensland Law Journal, 2020; 39(1):33-74

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Originally published at: https://law.uq.edu.au/research/publications/university-queensland-law-journal

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Permission received via email 4 June 2020

15 June 2020

http://hdl.handle.net/2440/125202

THE THREE QUEENSLANDS — SIR SAMUEL GRIFFITH'S 'GHOST' DRAFT FOR A QUEENSLAND FEDERATION

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From 1890 to 1892, Sir Samuel Griffith, as Premier of Queensland, promoted a scheme under which Queensland would itself have been divided into a federation of initially three provinces — North, Central and South Queensland — and then two provinces, North and South Queensland. This startling idea would certainly have changed the map of Australia, probably permanently. At least at some points, the idea was expressed that each province would enter the Australian federation as a separate State and the Queensland federal government would simply be dissolved upon federation. The Bill to divide Queensland into a federation of two provinces passed the lower House of State Parliament but was defeated in the nominee Legislative Council. It then fell victim to the change of government consequent upon Griffith's appointment as Chief Justice of Queensland, to the urgent problems presented by the economic depression, and even, from the conservative point of view, to the rise of labour in politics. Little has been known about this nearly successful plan until now. This article attempts to close that gap.

I BACKGROUND

In his monumental history of the drafting and passage of the Australian federal Constitution, Professor John Williams draws attention to what he calls, following Professor John La Nauze,[1] Sir

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For various forms of assistance in completing the research for this article, the author wishes to thank: John McLaughlin AM; Professor Horst Lücke AO; Peter Sheppard; Tania Shipp of the Queensland Department of Natural Resources, Mines and Energy; Professor John Williams; and the Queensland Parliamentary Library and Research Service. The usual caveat applies.

Throughout the events recounted here — from 12 August 1890 to 13 March 1893, to be precise — Sir Samuel Griffith QC was Attorney-General for Queensland, as well as its Premier and Chief Secretary. However, it would be tedious to refer to him by the style of 'Griffith A-G QC' throughout this article; the post-nominals should be taken as read.

In this article 'cl' designates clause numbers of the Bills; 'cll x/y' refers to cl x in the first Bill for three provinces, and cl y in the second Bill for two provinces. If only one clause number is given, the clause number was the same in both Bills, or the surrounding text shows clearly which of the two Bills is being referred to. If a section number follows after a semi-colon, it refers to the comparable provision in the Australian Constitution.

1 John La Nauze, *The Making of the Australian Constitution* (Melbourne University Press, 1972) 49 n *.

Samuel Griffith's 'ghost' draft of a federal Constitution for Queensland, and reproduces, from Hansard, the outline of an early version of the scheme.[2] If either scholar possessed a copy of the full Bill, there is no sign of it. The present author has, however, discovered both original Bills in several places,[3] and this article will be devoted to analysing the details of the scheme, public and official reaction to it, the reasons for its near success and eventual failure, and what it can tell us about Griffith — the centenary of whose death we mark this year — and the eventually successful plan for Australian federation.

Separatism in Queensland has, of course, a long history. Even today separatists are still sometimes heard from. Historians who have noticed Griffith's scheme for a federal Queensland or concerned themselves with the history of early separatism in Queensland have provided a number of explanations for its strength in the late 1880s and early 1890s.[4] One is the presence of strong leaders — above all 'a small, pale-faced intense Irishman named John Murtagh Macrossan'[5] (1833–91), Australian federationist, North Queensland separationist and long-serving MP for Townsville. Another is obvious from the map, namely, the vast size of Queensland

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2 John Williams, *The Australian Constitution: A Documentary History* (Melbourne University Press, 2005) 26–30. See also John Williams, 'Samuel Griffith and the Australian Constitution: Shaking Hands with the New Chief Justice' (1999) 4 *New Federalist* 37, 38–9 (with tables of proposed federal and provincial powers based on the 1891 parliamentary resolutions rather than the full Bills, which appeared only in 1892).

3 Evidently, however, Griffith's biographer discovered a copy; no claim is made here to first discovery: Roger Joyce, *Samuel Walker Griffith* (University of Queensland Press, 1984) 174 n 65. Although a historian of renown, he was, however, not a lawyer, and gives only an outline of the scheme.

Both Bills, that for three and that for two provinces, are in the records of Parliament House, Brisbane, and were supplied to the author by the Parliamentary Library. The first, three-provinces Bill was also published unofficially but in full by *The Rockhampton Herald* (28 June 1892) 6; (29 June 1892) 3; (30 June 1892) 6, and as a two-page, foldout supplement (not available on the Trove database at the time of writing) to *The Capricornian* (Rockhampton, 2 July 1892). Copies may also be found in the records of the Colonial Office: CO 234/53/257ff (AJCP 1945) (three provinces); CO 234/53/448ff (AJCP 1945) (two provinces); CO 234/54/159ff (AJCP 1946) (two-provinces Bill after Committee stage in Assembly). Finally, the Mitchell Library of the State Library of New South Wales holds, as Q342.94/Q, 'Collection of draft to final versions of the Bill to provide for the division of the Colony of Queensland into provinces and for the better government of the colony as so divided, with relevant associated returns to Parliament'. I am grateful to my friend Peter Sheppard, who looked at this collection in Sydney for me.

The United Kingdom National Archives also holds, according to its catalogue, two further items of relevance: CO 881/9/17, 19 (a memorandum and further correspondence between the Governor and the Colonial Office on the division of Queensland), but as these are not available in Australia, as far as I know, I could not consult them.

4 See, eg, Geoffrey Blainey, *A Land Half Won* (Macmillan, 1980) 198–203 ('*A Land Half Won*'); Geoffrey Blainey, *A Shorter History of Australia* (Random House, 2014) 100; Geoffrey Bolton, *A Thousand Miles Away: A History of North Queensland to 1920* (ANU Press, 1972) ch 9; Christine Doran, *Separatism in Townsville, 1884 to 1894: 'We Should Govern Ourselves'* (History Department, James Cook University of North Queensland, 1981) ('*Separatism in Townsville*'); Christine Doran, 'Separation Movements in North Queensland in the Nineteenth Century', in Brian Dalton (ed), *Lectures on North Queensland History — Third Series* (History Department, James Cook University of North Queensland, 1978) ('Separation Movements in North Queensland'); Ross Fitzgerald, *From the Dreaming to 1915: A History of Queensland* (University of Queensland Press, 1982) 289–95; Katherine McConnel, '"Separation is from the Devil while Federation is from Heaven": The Separation Question and Federation in Queensland' (1999) 4 (December) *New Federalist* 14; Robert Neale, 'The New State Movement in Queensland: An Interpretation' (1950) 4(15) *Historical Studies Australia and New Zealand* 198. What follows is taken largely from the above and additional footnotes refer only to specific points, quotations or especially relevant primary sources (eg, n 27).

5 Blainey, *A Land Half Won* (n 4) 199.

and the unfortunate location of its capital in one corner. There were all the usual complaints about neglect of the north by the south, insufficient or wasteful expenditure, general disregard of interests outside Brisbane, and the minority status of northern representatives in Parliament:[6] 'Brisbane always gets the lion's share of whatever is going',[7] as one contemporary pamphlet opposing Griffith's federalism-for-Queensland plan and favouring a completely separate northern colony complained. Climatic differences between south and north produced differences in economic structures, which in turn fuelled demands for political measures; north Queenslanders paid tariffs designed to protect industries present only in south Queensland while their own were unprotected, and north Queensland sugar growers led the charge for imported Pacific Island labourers, which was resisted in the south both on moral grounds as an incipient form of slavery and to preserve the racial purity of Australia. (On the other hand, the labour movement in the north tended to be decidedly unenthusiastic about competition for jobs from Pacific Islanders, although it could be mobilised for separation on other grounds.[8]) Griffith's government was especially vulnerable to northern resentment on the labour question given that it was he, in his first period as Premier (1883–88), who had secured a complete ban on Pacific Island labour, although he reversed it temporarily in the face of economic difficulties in February 1892, during his second term (1890–93).[9]

In the eyes of some, climatic differences even made a difference to society as a whole, with some people questioning whether Europeans could thrive in the tropics as well as they could in more temperate climates. Northerners continued to see themselves as frontiersmen long after Brisbanites had become urban sophisticates.

Some of these points applied also to central Queensland. However, it had no complications arising from the import of Pacific Island labourers, the desire for which fed both separatism and resistance to it;[10] yet, despite its also being quite distant from Brisbane, its claim to separate existence was always weaker. The separate province of Central Queensland — 'a fad of some old women and lunatics',[11] as Griffith's predecessor as Premier insultingly called it in Parliament — was in the initial scheme but was dropped from the plan for the federation of Queensland which passed the lower House of Parliament in 1892. One factor applied in central Queensland, however, just as much as in northern Queensland: residents of the two likely new capitals, Townsville and Rockhampton, were markedly more enthusiastic about the idea of separation than those elsewhere — the adult men of Charters Towers, for example, voted in a locally organised

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6 There were 45 southerners, 16 northerners and 11 from the central district.

7 Alfred Stephens, *Why North Queensland wants Separation* (North Queensland Separation League, 1893) 11. Significantly, this pamphlet was roundly attacked in a leader in *The Cairns Post* (15 March 1893) 2.

8 Doran, *Separatism in Townsville* (n 4) ch 5 contains an analysis of the workers' attitude to separation of north Queensland; see also below n 12.

9 *Pacific Island Labourers Act of 1880 Amendment Act 1885* (Qld) s 11; *Pacific Island Labourers (Extension) Act 1892* (Qld).

10 See, eg, Queensland, *Parliamentary Debates*, Legislative Assembly, 14 November 1890, 1417.

11 Queensland, *Parliamentary Debates*, Legislative Assembly, 13 September 1892, 1228.

referendum in 1890 against separation by 1220 votes to 894,[12] and on a visit to Herberton in May 1892, accompanied by a separationist MP, the Governor found that many residents were at least indifferent about whether they were ruled from Brisbane or Townsville; some preferred Brisbane, and there was no enthusiasm for separation.[13] A reporter visiting from Sydney found similar sentiments prevailing in Cooktown.[14] There was suspicion that Townsvilleans and Rockhamptonites were interested mostly in the increase in prestige that would result from the elevation of their cities to the status of capitals, and even simply in the rise of property values that they expected.[15] There was a distinct drop-off in enthusiasm for separation as one left Townsville and environs — in Cairns, for example.[16] In the elections of 1888 (for the Parliament that sat until the end of 1892 and thus was in session throughout the period during which the three-Queenslands scheme was live),[17] five anti-separationists were elected to Parliament from the north: two for Charters Towers, two for Burke, and one for Cairns.[18]

There were numerous possible responses to the real or imagined grievances behind separatism. The most thorough-going was the creation of a completely new colony or colonies — 'territorial separation' was the term used in the 1890s — and throughout the early 1890s this hard-line view was doggedly pursued in opposition to Griffith's plans, which, if realised, might well have resulted in a State of Northern Queensland joining federation in 1901. Another option was to do nothing; a further was decentralisation. This could be either of an administrative nature — as was provided for in one field of law by the *Real Property (Local Registries) Act 1887* (Qld), which divided Queensland for the purposes of the Torrens system into the three districts that would

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12 'Separation of Central and Northern Portions of Queensland', Queensland Parliamentry Papers (1891) I 1157, 1166–6 (where we also read that the few Chinese men qualified to vote for Parliament were excluded from voting in this poll); but see the Governor's comments at 1174; Doran, *Separation Movements in North Queensland* (n 4) 93. However, according to one of the MPs for the district (in Queensland, *Parliamentary Debates*, Legislative Assembly, 16 September 1891, 1078), this was because of hostility to black labour, and, if reassured on that point, the electors might have made a different decision.

13 CO 234/53/211f (AJCP 1945) — this was a secret despatch, and thus quite frank.

14 *Morning Bulletin* (Rockhampton, 8 November 1892) 3.

15 Queensland, *Parliamentary Debates*, Legislative Assembly, 23 October 1890, 1060; 17 September 1891, 1114; 2 August 1892, 859.

16 Doran, *Separatism in Townsville* (n 4) 30–1. Striking examples are referred to above n 7, and below n 180. The view of the Governor also was that the question of the location of the capital was a major obstacle to consensus on separation in northern Queensland: CO 234/51/112 (AJCP 1943).

17 It was only the following Parliament — that elected at the general elections of April and May 1893 — whose duration was limited to three years by the *Constitution Act Amendment Act 1890* (Qld) s 2; previously, five-year Parliaments were provided for.

18 Doran, *Separatism in Townsville* (n 4) 58 n 37. Multi-member electorates existed at this time; there were 60 constituencies and 72 members of the lower House. In CO 234/51/2722 (AJCP 1943), the Governor considers a report in *The Brisbane Courier* (6 July 1890) 6 accurate, according to which 23 of 31 newspapers published in northern Queensland are for separation and eight opposed — a clear majority, but also a substantial minority.

later be adopted for Griffith's first, three-provinces scheme[19] — or even financial, with separate accounts and appropriations for each part of Queensland.[20]

On top of all this was the possibility of action by the *deus ex machina* in London. After all, Queensland had itself been separated from New South Wales in 1859, and Victoria from New South Wales in 1851, by Imperial *fiat*. These separations had both taken place without the consent of the parent colony. On the other hand, by the 1890s the Colonial Office was reluctant in the extreme to take such drastic measures as overriding the Parliament of a self-governing colony and imposing separation on it.[21] Queensland, the last of the Australian colonies in time, had been established under the *New South Wales Constitution Act 1855* (Imp) ss 6 and 7 — the same statute that granted responsible government to New South Wales and thus necessarily passed before the inauguration of responsible government there. But given that northern and central members were both minorities in the Parliament of Queensland,[22] they naturally faced an uphill battle to persuade Parliament to consent to separation. Accordingly, the all-or-nothing ('territorial') separationists hoped that, if sufficient clamour were made and they could show that they would never receive a fair hearing in Brisbane, the Colonial Office might be convinced that they were a hopelessly oppressed minority and fly to their aid over the heads of Queensland's government and Parliament.[23]

They were encouraged in this delusion, probably unintentionally, by temporising statements from the Secretary of the State for the Colonies, Lord Knutsford, to the effect that their cause was to be dealt with by the Parliament of Queensland in the first instance and would not be taken up officially in London unless it had been shown convincingly that that body was indeed bent on oppressing a united pro-separation north and centre and could not be moved even by the strongest of cases. In the early part of the period under discussion the wonderfully Applebyean phrase was heard that 'the matter is not yet ripe for decision',[24] which meant that the Parliament

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19 Queensland, *Parliamentary Debates*, Legislative Assembly, 11 October 1892, 1508. The boundaries were soon amended by the *Central and Northern Districts Boundaries Act 1900* (Qld).

20 Such a Bill was introduced by Griffith's predecessor as Premier shortly before he lost office: Queensland, *Parliamentary Debates*, Legislative Assembly, 25 June 1890, 27.

21 As Lord Knutsford, then styled Sir Henry Holland, himself points out in 'Separation of the Northern Portion of Queensland (Further Correspondence Respecting the Proposal)', Queensland Parliamentary Papers (1887) I 417, 455–6.

22 See above n 6.

23 Indeed, although it is not germane to the present topic — given that I am not writing a general history of separatism in north Queensland — the view of Doran, *Separatism in Townsville* (n 4) 40, 50–1, is that a major strategic error of the separationists was an excessive concentration on the Colonial Office as a *deus ex machina* at the expense of building up support in north Queensland itself — a particularly grievous error given the Colonial Office's well-known policy of deferring to local opinion on virtually everything, which was in turn a lesson learnt from the revolt of the American colonies. By appealing direct to the nominal decision-making centre in London, the separationists undermined their cause both with it and in their own backyard; paradoxically, they underestimated their own power in the counsels of the Colonial Office.

24 United Kingdom, *Parliamentary Debates*, House of Commons, 8 August 1890, 259 (Baron H de Worms, the junior Colonial Office minister — whose barony was Austrian); Lord Knutsford himself used the phrase 'not yet ripe for final consideration and decision': Queensland Parliamentary Papers, 1891, I 1157, 1189. The archives show that, unsurprisingly, the same line was taken behind closed doors in the minutes of the Colonial Office as in public; the

of Queensland had not yet had sufficient opportunity to take a stand on the question; in the absence of its stance, the Colonial Office would simply await developments. Later, as the denouement approached, Lord Knutsford made his own personal views quite clear and public in early May 1892:

> I should prefer to see Queensland in the same position as the Dominion of Canada. I should prefer to see three Parliaments, north and central and south, and one central Parliament — that is to say, I should prefer to see Queensland, as I said before, in the position of the Dominion of Canada. My personal opinion is that in that way the great colony would stand in a stronger position than if it had only the three separate Parliaments.[25]

Privately, his Lordship wrote to Griffith with essentially the same message: 'you know how heartily I uphold your view of provincial legislatures, but a united Queensland, against territorial separation'.[26]

But his Lordship added in the public forum that, if Griffith's Bill were rejected on the votes of southern members, things would appear in a different light and Imperial action would need to be considered — although he stressed that he was not making a promise on behalf of the Imperial government but only expressing his own personal ruminations.[27] These qualifications rather got lost in some press reports in Queensland, which made it sound as though there were only two options: the Griffith proposals or an outright division; if one failed, the other would follow.[28] This view encouraged the territorial separationists in their all-or-nothing mission.

A further element of uncertainty was that changes of government and/or colonial secretary in London might alter the Imperial government's view of the matter in any direction; however, when the Salisbury Conservative government fell in August 1892 and Lord Knutsford ceased to be Colonial Secretary, and the fourth Gladstone ministry — in favour of home rule for Ireland and thus conceivably more sympathetic to home rule for Townsville also[29] — took office, Griffith's scheme also was about to be extinguished, and the agitation for separation largely ceased for some years thereafter in view of the depression and financial crisis of the 1890s. There was also a

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question was one for Queensland itself initially and London would interfere only if there were an overwhelming case for doing so: CO 234/51/449f (AJCP 1943); CO 234/51/706f (AJCP 1944).

25 'Separation of Central and Northern Portions of Queensland (Further Correspondence Respecting)', Queensland Parliamentary Papers (1894) I 501, 505 ('Separation of Central and Northern Portions of Queensland').

26 Letter from Lord Knutsford to Samuel Griffith, 31 May 1892, Mitchell Library of the State Library of New South Wales, MSQ 188, 342 (also in State Library of Queensland, CY 3063). What prompted this statement by Lord Knutsford may appear only from Griffith's letter to him, which may not be extant or, if it is, only in England. Or there may have been nothing more in the private correspondence; his Lordship may be basing this statement on what he learnt from the official correspondence, to which of course I had access.

27 'Separation of Central and Northern Portions of Queensland' (n 25) 501, 505. At 502–3 the Secretary of State is reported by the Agent-General for Queensland to have added another condition: even if the Griffith scheme were rejected, before considering outright separation the Colonial Office would first be inclined to require the Parliament of Queensland to make arrangements regarding the division of and security for the united colony's debt.

28 *Telegraph* (Brisbane, 9 May 1892) 2 has his Lordship saying that if the Griffith scheme were rejected, 'the Imperial government would not delay taking action. He hoped, however, that the southern members would not force the Imperial government to take action.'

29 Compare Blainey, *A Land Half Won* (n 4) 196.

permanent bureaucracy behind Lord Knutsford — the Colonial Office — which was far less easily roused to change its view of the world. As well as being naturally reluctant to increase its workload by increasing the number of colonies in an already large empire, it was also populated by sticklers for constitutional principle and liable to be lobbied by the numerous creditors of Queensland who thought that a division of the colony might reduce the security of their debt.[30]

One reading of Griffith's federation-of-Queensland scheme is therefore that it was simply stalling until the issue died a natural death, an empty show put on in bad faith, ἵνα καὶ ποιέειν τι δοκέωσι ποιεῦντες μηδὲν.[31] Griffith was, after all, a long-standing and known opponent of territorial separation. As the movement for Australian federation gained strength, he was opposed to a complete split for a further reason: an extra stand-alone colony would make the hard task of federating even harder.[32] However, my reading of the materials is that Griffith was sincere in his proposals for a Queensland federation and not putting them forward as mere legerdemain. He was convincing in his advocacy[33] — even angry and disgusted when accused of bad faith[34] — and at one stage he hinted strongly at the government's resignation if the proposals were not passed;[35] he thought that something needed to be done to combat the evils of remote government while believing equally strongly that separation was in no one's interests. He thought of his scheme as a happy compromise that would satisfy all but the extremists and allow the benefits of autonomy to be enjoyed without the complications of full separation; leaving aside the Federation issue, these included the need to find some way for two colonies to guarantee the joint debt and the possibility of mutually hostile tariffs.[36] Importantly, Queensland would continue to be a single unit for the purposes of negotiating a continent-wide federation, and he

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30 See below n 116.

31 Herodotus, *Histories*, 4.139.1 — 'so that they might appear to be doing something while doing nothing'. Griffith, for his part, suspected some northern members of insincere support for his scheme, οὐ γὰρ δή, ὡς οἴκασι, ἐβούλοντο εἶναι ἐλεύθεροι (Herodotus, *Histories*, 3.143.2) — 'for they had indeed, it seemed, no desire to be free' — rather, they hoped that they would be able to go to London and obtain complete separation after its defeat, or merely feared that, if the demand for a separate province were satisfied, their victim status and platform would be taken from them: Queensland, *Parliamentary Debates*, Legislative Assembly, 13 September 1892, 1242; cf *The Brisbane Courier* (5 August 1892) 4; below n 195. Doran, *Separatism in Townsville* (n 4) 62–3, states that Griffith might have been led by nuances in Lord Knutsford's statements hinting at the possibility of action in London into formulating his federal-Queensland proposal; this, however, leaves out of account: Griffith's ability, through the Governor, to communicate officially with Lord Knutsford as needed and make objections that were bound to be taken into account; the private correspondence between the two men (eg above n 26; below n 198); Griffith's awareness that too much should not be read into every passing Colonial Secretary's choice of words and that inaction in Brisbane did not necessarily entail action in London; and the more obvious inspiration for federalism within Queensland in the concurrent continent-wide proposals.

32 Joyce (n 3) 173.

33 See, eg, below n 187.

34 Queensland, *Parliamentary Debates*, Legislative Assembly, 18 August 1892, 1020. Towards the end of the story, he also showed impatience at the interminable discussions: Queensland, *Parliamentary Debates*, Legislative Assembly, 29 September 1892, 1403.

35 Queensland, *Parliamentary Debates*, Legislative Assembly, 4 August 1892, 901; see also 3 October 1892, 1548; *The Brisbane Courier* (11 August 1892) 4; *Morning Bulletin* (Rockhampton, 11 August 1892) 4; Doran, *Separatism in Townsville* (n 4) 65.

36 Queensland Parliamentary Papers (1891) I 1157, 1173 [8], 1178 [15].

contemplated the 'intriguing possibility'[37] that the federal Queensland government might be dissolved on the attainment of federation and each province become a separate State of the Commonwealth. Griffith's mode of proceedings was also, as we shall see, too cautious and considerate of northern interests for the conclusion that it was all but a show; thus, for example, his first proposals did indeed provide for separate provincial tariffs, and it was only after securing the assent of the northerners to making this power federal that he changed the draft scheme in that direction.

From the point of view of separationists committed to territorial separation, the question was whether to accept the halfway house offered by Griffith and possibly remain partially under the thumb of Brisbane until such time, if ever, as an Australian federation were constituted, or whether to declare his proposals inadequate for their needs and make the best the enemy of the good by pursuing complete separation at the risk of getting nothing at all. Opinion even in Townsville was divided.[38] The North Queensland Separation League, at least, declared total victory imminent on the basis that the *deus ex machina* would shortly descend from London as their saviour and therefore rejected Griffith's proposals as 'incomplete, unjust, uncertain of duration and, whether continuing or ending, … dangerous and hostile to the legislative and representative rights and privileges of the north'.[39] Anti-separationists were also opposed to Griffith's Queensland federation in the typical alliance of two extremes against a proposed compromise.[40]

Although thus foolish and uncompromising — had the separationists compromised and lent their enthusiastic aid to Griffith, it is well within the bounds of possibility that there would today be a State of North Queensland — it has to be said that, in terms of timing, they had appalling luck. One reason for the rejection of the proposals by the Legislative Council in October 1892 was that the question should be before the electors in the general elections early in the following year; after the elections were held in April and May 1893, Griffith had become Chief Justice of Queensland and political attention necessarily switched to other matters such as the depression and financial crisis — so Parliament's rejection of the Bill in October 1892 did not lead the Colonial Office to take action after all.[41] Nor did the Parliament of Queensland ever take the matter up again for reasons that will be explored later.

II THE FEDERAL SCHEME

This Part contains an analysis of the chief features of the two Bills for the Queensland federation — the first providing for three provinces, introduced to Parliament on 23 June 1892

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37 Ross Fitzgerald, Lyndon Megarrity and David Symons, *Made in Queensland: A New History* (University of Queensland Press, 2009) 54. As a result, Nicholas Aroney, *The Constitution of a Federal Commonwealth: The Making and Meaning of the Australian Constitution* (Cambridge University Press, 2009) 157, raises the equally intriguing possibility that the three provinces might themselves have negotiated independently at the Federation conventions. I do not think that was the intention, however; see Byrnes S-G in Queensland, *Parliamentary Debates*, Legislative Council, 25 October 1892, 163. See further below n 151.

38 Doran, *Separatism in Townsville* (n 4) 62–4.

39 Queensland Parliamentary Papers (1891) I 1157, 1183; for their hopes of imminent victory, see ibid at 1180.

40 Thus both of the two sources referred to above n 7 — one an uncompromising separationist from Townsville, the other an anti-separationist newspaper — united in their rejection of the scheme.

41 Doran, 'Separation Movements in North Queensland' (n 4) 94–5.

and denied a second reading on 9 August in favour of a motion supporting a revised two-provinces scheme, and the second that provided for only two provinces (North and South Queensland), which was introduced on 18 August 1892, passed by the Legislative Assembly on 13 October and defeated in the Legislative Council on 27 October.

A *The Dignified Parts of the Constitution*

One thing that certainly stands out in both Bills is the unimaginative names of the provinces: North Queensland, Central Queensland (in the first Bill only), and South Queensland. This is not for want of alternatives: Albertland and Kingsland, for example, had been suggested as new names for new colonies.[42] Whether from a dislike of such suggestions or a desire to emphasise an underlying unity in the name, Griffith preferred more workaday alternatives. On the other hand, under both Bills (cl 3) the three or two provinces taken together would 'form one Colony or State … under the name of 'The United Provinces of Queensland' (would the abbreviation 'UPQ' have stuck?). Griffith declared in Parliament that he had reconciled himself to the word 'province' but continued to object to the word 'colony', which reminded one of a plantation,[43] and clearly decided to attempt a grander appellation, 'state', alongside the usual one. In both Bills the capitals were fixed until otherwise provided by law at Brisbane for both the central legislature and the southern province[44] and at Townsville in the north,[45] with Rockhampton being the proposed capital while there was a central province (cll 211/195).

Under the first Bill, as even today in Canada, a federal Governor in the federal capital was to appoint a Lieutenant-Governor for each province 'who shall have and may exercise in the Province, during the pleasure of the Governor, and subject to the provisions of this Act, such powers and functions as are assigned to him by this Act' (cl 81; s 2).[46] In relation to Royal assent to Bills, however, the Canadian model was not followed; provincial Bills were to be sent to London if reserved, and if already assented to locally they could not be disallowed by the Governor in Brisbane but only in London, although all provincial Bills were to be transmitted to London through the federal Governor and news of London's disallowance of a provincial Bill was to be routed through him also (cll 96–8). Leaving the final decision with London was perhaps an attempt to mollify the Colonial Office in London, which might have feared, for example, unacceptable legislation on Pacific Island labourers. In Canada, disallowance of provincial legislation was a federal function performed by the Governor-General, who also appointed the provincial

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42 Doran, *Separatism in Townsville* (n 4) 50; Raymond Evans, *A History of Queensland* (Cambridge University Press, 2007) 141.

43 Queensland, *Parliamentary Debates*, Legislative Assembly, 17 October 1890, 995; 20 November 1890, 1512.

44 However, Griffith contemplated that they might share the existing building because they would probably meet at different times: Queensland, *Parliamentary Debates*, Legislative Assembly, 4 October 1892, 1449–50.

45 An attempt to substitute Bowen was lost: Queensland, *Parliamentary Debates*, Legislative Assembly, 7 October 1892, 1503–4.

46 On this mode of citation, see above n *. Here the text shows that 'cl 81' refers to the first Bill only.

Lieutenant-Governors, and reservation was also to him (s 90 of its Constitution).[47] This avoided such crossing of wires. In summary, the Canadian provinces' relationships with the Crown were managed entirely from and through Ottawa almost as if they were colonies of an Ottawan empire in this respect.

As with the 1891 all-Australian proposal,[48] there was a provision in the first Bill (cl 119) requiring the provincial Lieutenant-Governors to communicate with the Queen (in reality the Colonial Office) through the Governor of the United Provinces,[49] further confusing matters as far as the Lieutenant-Governors' precise status, relationships and functions were concerned. Would there have been Royal instructions to the Lieutenant-Governors requiring certain types of Bills to be reserved, as existed well into the 20th century for the Australian State governors,[50] and, if so, who would have issued them — London, which decided on reserved Bills and disallowance, or Brisbane, which decided on appointments? If Royal instructions were issued in Brisbane, what would they have said about assent to Bills, and what practice would have grown up on that topic? Would it have been considered proper for the federal government to advise the Governor to seek the disallowance of a provincial Bill in London and for the Governor, if in receipt of such advice, to do so? Who was to exercise other Royal powers such as the Royal prerogative of pardon, recently the subject of a constitutional battle between Governor and Premier in Queensland in which matters had escalated alarmingly quickly,[51] and on whose advice?

In the second Bill with only two provinces, the Lieutenant-Governors disappeared for reasons to be mentioned shortly, and there was to be a single Governor only. It was, consequently, specifically provided that the Governor might take advice direct from one of the two provincial

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47 Then, of course, referred to as *British North America Act 1867* (Imp) 30 & 31 Vict, c 3; now simply the *Constitution Act 1867* (Can). The provinces in New Zealand were also subject to the same rule: disallowance was to be by the Governor (*New Zealand Constitution Act 1852* (Imp) s 29). The power of disallowance in Canada still exists but is now moribund; see, eg, Richard Albert, 'Constitutional Amendment by Constitutional Desuetude' (2014) 62 (Summer) *American Journal of Comparative Law* 641, 648–9, 660–9.

48 La Nauze (n 1) 73, pointing out that Griffith was decidedly in favour of making the Governor-General the sole official Australian means of communication with the Imperial authorities. See also Anne Twomey, *The Constitution of New South Wales* (Federation Press, 2004) 129–31.

49 Its precise wording was:

> Reference to the Queen to be made through Governor.
>
> 119. All references or communications required to be made by the Lieutenant-Governor of a Province to the Queen shall be made through the Governor of the United Provinces, and the Queen's pleasure shall be made known through him.

Intentionally or not, there is an obvious loophole here in the word 'required'.

50 There is an example in RD Lumb, *The Constitutions of the Australian States* (University of Queensland Press, 4th ed, 1977) 130–1. See now *Australia Act 1986* (Imp and Cth) s 9. Instructions to the provincial Lieutenant-Governors in Canada are issued by the federal Governor-General; in the present day, they are not very important and deal largely with procedural matters such as the taking of oaths, but that was not always so.

51 Justin Harding, 'Boots and All: The Benjamin Kitt Affair — Queensland's Constitutional Crisis, 1888' (2000) 17(5) *Journal of the Royal Historical Society of Queensland* 228; ID McNaughtan, 'The Case of Benjamin Kitt' (1951) 4(4) *Journal of the Royal Historical Society of Queensland* 535.

Executive Councils (cl 105).[52] This solution would have complicated matters still further; for example, the Governor could be advised by the federal government in Brisbane to withhold assent to a provincial Bill or to reserve it for London's verdict while provincial authorities advised him to assent to it personally without reference to London. Federal objection might be taken either to the contents of the Bill or to its allegedly exceeding provincial powers. The idea of a Vice-Regal office-holder with essentially three masters — the Imperial government with its world-wide interests, and two local governments each with a local, democratically legitimated and possibly conflicting mandate and world view, possibly on issues as sensitive as Pacific Island labour — would certainly have required delicate mutual accommodation at times, which had not been much in evidence in the recent dispute over the Royal prerogative of pardon. At no point did Griffith go into these problems.

Analysing the proposal in the first Bill for Lieutenant-Governors appointed locally, the Colonial Office was further disturbed by the 'anomaly' of a Vice-Regal representative exercising Royal powers appointed otherwise than by the Queen (ie through it) — did it consider the Canadian provincial Lieutenant-Governors too insignificant to warrant notice? — and minuted: 'It is the first step towards elected governors.'[53] Elected governors had indeed been in contemplation as the scheme took shape late in 1890, and the superintendents of the former provinces of New Zealand provided an Empire precedent of sorts,[54] but evidently Griffith shrank from that and explained in Parliament that he thought a better class of man would be attracted by appointment than by election.[55] The separationist leader, JM Macrossan, however, had advocated in Parliament American-style active, elected governors.[56] How exactly this would have worked is anyone's guess; the elected superintendents alongside the elected provincial councils of New Zealand had led to all sorts of weird and wonderful innovations.[57] Furthermore, the Colonial Office should have realised that it was not any desire for elected governors, but rather its recent stance in refusing to provide the name of a proposed Governor to the government of Queensland[58] that must have made Griffith reluctant to propose vesting the power of appointing Lieutenant-Governors in it. At this stage of constitutional history, there was a real difference in vesting the power of appointment in London or Brisbane; it was not the case that Brisbane would even know

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52 Clause 107 of the first Bill had provided for the three provincial Lieutenant-Governors to be advised by the provincial Executive Council. In the second Bill, as we shall shortly see, the Lieutenant-Governors disappeared, leading to the provision mentioned in the text.

53 CO 234/53/253 (AJCP 1945).

54 *New Zealand Constitution Act 1852* (Imp) s 4. The provinces were eliminated by the *Abolition of Provinces Act 1875* (NZ). For a recent discussion of the causes of this, see Andre Brett, 'Did War Cause the Abolition of New Zealand's Provincial System?' (2015) 12(2) *History Australia* 165.

55 Queensland, *Parliamentary Debates*, Legislative Assembly, 20 November 1890, 1513; 15 September 1891, 1048–9.

56 Queensland, *Parliamentary Debates*, Legislative Assembly, 20 November 1890, 1525–6. Elected Lieutenant-Governors were also included in initial press reports of the scheme — eg *The Cairns Post* (5 November 1890) 2. Later, in Queensland, *Parliamentary Debates*, Legislative Assembly, 26 July 1892, 795, Griffith suggests having the Lieutenant-Governors approved by the Senate, as representing the provinces.

57 See, eg, WP Morrell, *Provincial System in New Zealand, 1852–76* (Whitcombe & Tombs, 2nd ed, 1964) 286–92.

58 Barbara Penny, 'The Blake Case' (1960) 6(2) *Australian Journal of Politics & History* 176.

in advance whom London proposed to appoint as Governor, let alone have any input into the question.

Griffith's first scheme, with its four paid Vice-Regal office-holders, two of them to be co-located in Brisbane, naturally also ran into criticism on the score of cost; his predecessor as Premier, BD Morehead, suggested that the scheme, with its multitude of Vice-Regal office-holders, Houses of Parliament, parliamentary officials and members of Parliament might make a good subject for Messrs Gilbert and Sullivan.[59] As a result the second Bill, with only two provinces, abandoned the idea of provincial Lieutenant-Governors. It was instead envisaged that the Governor of Queensland would reside for some portion of the year in the north[60] (cl 196 hinted at this by providing that he might exercise his powers, either federal or provincial, anywhere in Queensland) — a sort of Holyrood Week writ large; when not present in one province he was to be represented there simply by a deputy (cl 81) who would probably be an office-holder such as the Chief Justice.[61] As a sop to central Queensland, the second Bill nevertheless continued to provide for the appointment of Lieutenant-Governors if ever there were more than two provinces (cl 191); it was not just the cost, but also the greater ease of dividing the Governor's time when there were only two provinces that led to the abandonment of the initial idea of locally appointed Lieutenant-Governors.[62]

B *The Division of Powers*

Perhaps the most intriguing part of the three-Queenslands scheme is that Griffith did not adopt the American method for dividing powers but a method resembling the Canadian one — except that there was no express provision about the residue of unspecified subjects (leading to the occasional dispute about which level possessed the residue),[63] and the general principle was to allocate to each level concurrent rather than exclusive powers as in Canada.

In both versions of the Griffith scheme there was thus a federal list and a provincial list of powers, as there is today in Canada. The federal legislature — called, after the name of New Zealand's legislature from the period when New Zealand was divided into provinces, the General Assembly[64] — possessed, in both Bills, a long list of 40 powers, while the provincial list extended to only 18 items. This prompted complaints that the provinces would have too little power, which Griffith answered by reference to item 18 on the provincial list: 'generally, all matters affecting

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59 Queensland, *Parliamentary Debates*, Legislative Assembly, 13 October 1891, 1515; see also 27 October 1891, 1759. The comparison was changed to Lilliput in Queensland Parliamentary Debates, Legislative Assembly, 2 August 1892, 845.

60 Queensland, *Parliamentary Debates*, Legislative Assembly, 8 September 1892, 1211.

61 Queensland, *Parliamentary Debates*, Legislative Assembly, 6 October 1892, 1482, 1486. There would also have been a Chief Justice of the Supreme Court of North Queensland (cl 164) available for this task.

62 Queensland, *Parliamentary Debates*, Legislative Assembly, 7 October 1892, 1503.

63 Queensland, *Parliamentary Debates*, Legislative Assembly, 25 November 1890, 1606.

64 Queensland, *Parliamentary Debates*, Legislative Assembly, 29 September 1892, 1404. On the fate of this name, see *Constitution Act 1986* (NZ) s 14(2).

the internal affairs of the Province which are not assigned to the General Assembly' (cll 89 (18)/87 (18)). Not without justice, Griffith identified in those last words, more extensive on their face than their obvious model in s 92(16) of the Canadian Constitution,[65] the otherwise missing residue that, he thought, would lift provincial power to great heights. Several times he referred to the high proportion — about three-fourths, he thought — of Queensland legislation that would fall within the provinces' responsibilities and the low proportion of time that was presently taken up in the legislature discussing the items on the federal list.[66] A comparable federal power — 'generally, all matters affecting the United Provinces collectively' (cll 62(40)/61(40)) — received much less limelight.

The confidential analysis of the Colonial Office concurred with Griffith; it thought that, under his Bill, the central government would 'be practically wiped out' and that a larger measure of autonomy would accrue to the provinces of Queensland than was enjoyed by the provinces of Canada.[67] It noted also that there was no mention of New Guinea[68] and, in accordance with its long-held, if fluctuating, level of concern about settler disregard of Aboriginal rights,[69] that it would greatly prefer responsibility for Aborigines to be located in Brisbane rather than leaving them 'to the tender mercies of the provincial parliaments'.[70] As Aborigines were not mentioned on either list — the races power (cll 63(1)/62 (1)), like s 51(xxvi) before the 1967 amendment, excluded them specifically — the Colonial Office evidently considered, like Griffith, that the residue of unallocated powers lay with the provinces under cll 89(18)/87(18), as indeed it specifically stated in its minutes.[71]

Griffith's two lists were not expressed to be either exclusive or concurrent, but the final clause of both of his Bills (cll 220/204) made explicit the lack of any provision in the two lists for exclusivity; it was the equivalent of s 109 of the Australian Constitution.[72] No doubt some difficult questions of the scope of the powers and characterisation would have arisen with two presumably concurrent lists, but probably they would have been no more difficult than in Canada even though their two lists are lists of exclusive powers. Griffith's scheme did also contain a short list of federal exclusive powers (cll 63/62). With the addition of the races power, which I have analysed

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65 'Generally all Matters of a merely local or private Nature in the Province.' The Canadian provision has been described as a rival residue to the federal one, but has in practice proved to be unimportant: Peter Hogg, *Constitutional Law of Canada* (Thomson Reuters Canada, 5th ed, 2007) 504–5.

66 Queensland, *Parliamentary Debates*, Legislative Assembly, 26 July 1892, 792, 795; 8 September 1892, 1211. See also Byrnes S-G in Queensland, *Parliamentary Debates*, Legislative Council, 25 October 1892, 164.

67 CO 234/53/253 (AJCP 1945).

68 See, however, below n 146.

69 For an interesting and detailed account and analysis of the Colonial Office's concerns in an earlier era and how the settlers attempted to manage them, see Bain Attwood, 'Returning to the Past: The South Australian Colonisation Commission, the Colonial Office and Aboriginal Title' (2013) 34(1) *Journal of Legal History* 50. With regard to Queensland, in the 1890s such concerns also extended to the Pacific Island labourers. The generation that had cheered on the abolition of slavery in its youth had long since lost its grip upon the levers of power, but their successors remained imbued with the unforgettable triumph.

70 CO 234/53/254 (AJCP 1945).

71 CO 234/53/253 (AJCP 1945).

72 There was also an equivalent of covering cl 5 of the *Australian Constitution* asserting the supremacy of federal law over provincial law: see below n 87.

elsewhere in this journal,[73] these were essentially the same as in today's s 52 — including a provision for a federal territory for the seat of government (also in cll 208/192; s 122), which can have been intended only as a distant possibility, and then only if the coming Australian federation did not swallow up the Queensland federal government.

Looking down the principal, concurrent list of federal powers, one notices many familiar items — whether from the Australian or occasionally the Canadian constitutions.[74] One of them at least raises eyebrows given the last 120 years of constitutional interpretation: the federal power over 'external affairs and the relations of the United Provinces to the United Kingdom of Great Britain and Ireland and to the other Australasian colonies and provinces; but saving always the Queen's Prerogative' (cll 62(5)/61(5)). Given that there was also a provincial list, it may be questioned whether this power would have attained quite the importance it has under our current arrangements — but it is curious to see nothing of significance said in this respect in any of the debates on the scheme about Queensland's notorious attempt to annex New Guinea in 1883. In Griffith's scheme there was also noticeably no equivalent of the Canadian federal power (s 132) to implement 'the Obligations of Canada or of any Province thereof, as Part of the British Empire, towards Foreign Countries, arising under Treaties between the Empire and such Foreign Countries', which of course he might well have copied if desired.

In solving such crucial questions of the scope of the powers granted, the history of the Australian federation shows that the interpretative method adopted makes all the difference. In Canada, both central and provincial lists are largely exclusive, and, therefore, to make a long story short, most legislation must be characterised so that it fits under one or other list and a balance must be found where clashes exist between the two sets of powers. If such an approach had been adopted under the Queensland federation, the external affairs power must necessarily have been accommodated to the provincial list and (from the present-day perspective) cut back severely if the provincial list was not to be robbed of content. On the other hand, if such an approach was not taken and the Canadian either-or ('pith and substance') approach to characterisation were not adopted, perhaps on the basis that the main lists of powers were not exclusive but concurrent, things might conceivably have worked out pretty much as now on the external-affairs front — remembering, too, that Griffith had an inconsistency section favouring federal supremacy like s 109, which does not exist in Canada.

The only clue about the approach that Griffith himself favoured about such vital questions of interpretative method is in the capacity of the General Assembly to refer 'matters being primarily within the jurisdiction of' itself to the provincial legislatures (cll 89(17)/87(17)).[75] This word 'primarily' is curious. A matter was either among federal powers or not; how could it be 'primarily' so? There was an express incidental power (cll 62(39)/61(39)), but this probably is not

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73 Greg Taylor, 'Why Were Aborigines Originally Excluded from the Races Power?' (2018) 37(2) *University of Queensland Law Journal* 237.

74 Indeed, in the Australasian Federation Conference, 18 March 1891, 338–9, Griffith refers to his list for the Queensland scheme and makes it available to delegates. As in the 1891 draft of the all-Australian scheme, the paragraphs listing the powers in Griffith's Bills are numbered with ordinary, not Roman, numerals.

75 Clauses 62(38)/61(38) (s 51(xxxvii)) permitted references in the other direction.

the non-'primary' power, as it could simply have been referred to directly if it was. The word 'primarily' does, however, suggest that Griffith favoured the 'pith and substance' approach under which the 'true' or primary character not of a power or its scope, but of a law, must be determined, as in Canada, so that it falls under only one of the two lists — either, for example, trade and commerce (federal) or internal provincial affairs (provincial). That was, of course, also to be his approach in the famous early cases such as *R v Barger*,[76] even in the absence of a State list. He probably therefore favoured, or perhaps more accurately assumed, a balancing approach on the Canadian model to harmonise the two lists of powers.

In most respects the list of federal powers followed those in our s 51, with some historically obvious omissions such as s 51(xxxv) (which was added only after the demise of the Queensland scheme), although also with one addition: the substantive criminal law was to be federal (cll 62(30)/61(30)), an idea almost certainly taken from the Canadian Constitution (s 91(27)), but certainly a poignant one given that Griffith's next major legislative project — unlike this, a successful one — was to be the codification of Queensland's criminal law. Also probably taken from Canada was the idea that, while the criminal law itself was to be federal, the Queensland provinces would have responsibility for its administration (cll 89(14)/87(14)); under Canada's ss 91(27) and 9(14) the provinces are responsible for the constitution of the criminal courts.

A natural federal power is immigration and emigration (cll 62(33)/61(33); s 51(xxvii)). In the present context, making this power, along with the races power, federal meant that northern Queenslanders would not be able to admit Pacific Island labour off their own bat; it would remain a question for all of Queensland. This, alongside their concession on customs to be considered shortly, was cited as an important indicator of the willingness of the northerners to compromise.[77]

The provincial list was very obviously modelled upon the Canadian list, and indeed two proposed provincial powers — 'the borrowing of money on the sole credit of the Province' (cll 89(3)/87(3); Canada s 92(3)) and 'the establishment, maintenance and management of public and reformatory prisons' (cll 89(9)/87(9); Canada s 92(6)) were taken word for word from Canada's 1867 provincial list. Missing from the Canadian list in the Queensland version, however, are both 'the Incorporation of Companies with Provincial Objects' and 'the Solemnization of Marriage in the Province' (s 92(11), (12)) — in federal Queensland, marriage and divorce were to be wholly central responsibilities (cll 62(29)/61(29)). Queensland's federal corporations power, on the other hand, would have extended, like its early models in the draft all-Australian constitutions, only to 'the Status in the United Provinces of Foreign Corporations, and of Corporations formed in any Province or any part of the United Provinces' (cll 62(28)/61(28)). Presumably, therefore, the activities of corporations would have come under the general provincial power; for also on the provincial list in both Canada and Queensland may be found — a third and most important identical provision — 'property and civil rights in the province' (cll 89(5)/87(5); Canada s 92(13)).[78] The Queensland federal legislature's power over trade and commerce 'with other Countries [!],

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76 (1908) 6 CLR 41, 65.

77 Queensland, *Parliamentary Debates*, Legislative Assembly, 27 October 1891, 1765.

78 Griffith's commentary on its importance may be found in Queensland, *Parliamentary Debates*, Legislative Assembly, 26 July 1892, 795.

and among the several Provinces' (cll 62(8)/61(8)) would therefore have been a much more important source of federal power to regulate the economy than s 51(i) is today, overshadowed as it is by s 51(xx). It is also noticeable that here Griffith did not follow the Canadian approach of stating that all trade and commerce was within federal power (s 91(2)); in Canada, it is only by judicial interpretation that this apparently extensive power has been cut back and reconciled with provincial powers over local affairs;[79] such a procedure would have been far less necessary under Griffith's approach, and it has therefore the merit of greater transparency. A notable addition to the Canadian provincial list, and a testimony to the great importance of the Torrens system in Australian legal culture in general even then, as well as to Queensland's already decentralised lands titles registers,[80] is 'the registration of titles to land' on Griffith's provincial list (cll 89(7)/87(7)).

Griffith nowhere explains his decision to opt for the Canadian rather than the American system of division of powers in his Queensland scheme. In relation to the all-Australian scheme he stated that no list of State powers had been attempted; this 'would have been to begin with, unscientific, and, in the second place, it would have been impossible, because I do not think that anybody could attempt to enumerate them all'.[81] But he did not say in proposing the Queensland scheme in the following year why the 'unscientific' and possible had suddenly become 'scientific'[82] and possible. This omission is all the more curious given that Griffith noticeably deviated from the Canadian precedent in another important matter shortly to be looked at — and, indeed, declared that, had he followed the Canadians in that respect, he would not be proposing a true federation. Indeed, at one point Griffith is at pains to say that his three-Queenslands scheme is 'based quite as much upon the United States as upon the Canadian Constitution — rather more',[83] a claim that seems hard to justify, but was perhaps a politic one to make. For there is another reason why it is a pity that Griffith neither explained his reasons for adopting the Canadian model in the Queensland scheme nor proposed the Canadian system for the States of the Australian federation. In the 19th century, and indeed even in the early decades of the 20th, the anxiety was expressed that any definition of State powers in a Canadian-style list would effect an undue limitation of them and was therefore to be avoided in favour of an expansive undefined residue. It was sometimes even thought that a system that left only defined powers with the lower level was not a true federation; only if the local governments had undefined powers was federalism truly present![84] The true potential of the Canadian Constitution for permitting the provinces to exercise

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79 See, eg, Hogg (n 65) 123–7, ch 20.

80 See above n 19 and accompanying text.

81 Debates of the National Australasian Convention, 31 March 1891, 525. The obvious explanation would perhaps have been that the colonies already existed with virtually unlimited power, but the provinces of Queensland were to be created *ex nihilo*. Perhaps that was at the back of Griffith's mind, but it is not what he actually said.

82 Essays have been written on the idea that law could be made as certain as the natural sciences claim to be and thus 'scientific'. Here the temptation must be avoided.

83 Queensland, *Parliamentary Debates*, Legislative Assembly, 20 November 1890, 1526.

84 Notoriously, and by way of example, the Privy Council said something along these lines in *A-G (Commonwealth) v Colonial Sugar Refining* [1914] AC 237, 253. Griffith himself, indeed, although he normally attributed Canada's deficiency of the true federal essence to its lack of a Senate on the American model, mentioned its system for the

real power was at this time only just beginning to be realised.[85] We can now see, moreover, that, at least as the Australian Constitution is interpreted, it is actually the undefined residue that is most vulnerable to being eaten up by expressly granted powers. Our States might conceivably have retained more power if there were an actual list of their legislative powers as opposed to their receiving just 'the rest'.

Finally, it is worth noting that the Bill made no mention of judicial review of legislation. Just as with the Australian federal Constitution, however, this was 'axiomatic',[86] and it was unnecessary to mention in so many words in the formal constitutional document that, as its provisions were law,[87] legislation in excess of power would be treated as null and void by the courts. Griffith did nevertheless state this in the parliamentary debates.[88] He twice rebuffed, however, a proposal for advisory opinions on the ground that the meaning of a law could not be fully understood until it came to be applied.[89]

C *Governmental Machinery*

Unlike the Australian federal Constitution (s 106), but somewhat like the Canadian Constitution (ss 58–90), Griffith's Queensland federal constitution set out constitutions for each province, as well as for the federal level of government. This was inevitable given that three and then two provinces were to be created out of nothing; there were no pre-existing polities that could simply be left to operate largely as before. Accordingly, the federal Constitution for Queensland was really a new constitutional charter for the whole colony, and indeed both versions of the Bill (s 7 and Second Schedule) would have repealed all of the basic constitutional statutes in force in Queensland at that time, starting with the *Constitution Act 1867* (Qld).[90]

As already noted, there was to be a federal legislature called the General Assembly, consisting of a Senate and a House of Representatives. As with the continent-wide scheme, the

division of powers as a significant cause in *Notes on Australian Federation: Its Nature and Probable Effects* (Government Printer Brisbane, 1896) 7.

85 Hogg (n 65) 123–7; *The Brisbane Courier* (25 October 1890) 4; Greg Taylor, 'The Division of Power in Federal Systems: Comparative Lessons for Australia', in Gabrielle Appleby, Nicholas Aroney and Thomas John (eds), *The Future of Australian Federalism: Comparative and Interdisciplinary Perspectives* (Cambridge University Press, 2012) 98–103.

86 *Australian Communist Party v Commonwealth* (1951) 83 CLR 1, 262.

87 There were no separately numbered covering clauses in the Griffith drafts; however, there was (in cl 8) an equivalent of covering cl 5 — minus, for some reason, the provisions relating to British ships. Thus, the Constitution itself expressly claimed supremacy over all law and provided further that only federal laws made 'in pursuance of the powers conferred by this Act' (federal Constitution: 'under the Constitution') would be binding. That said nothing, however, about the amenability to review of provincial legislation.

88 Queensland, *Parliamentary Debates*, Legislative Assembly, 26 July 1892, 797; 7 October 1892, 1494.

89 Queensland, *Parliamentary Debates*, Legislative Assembly, 7 October 1892, 1493–4; 11 October 1892, 1506–7.

90 Needless to say, however, Griffith copied the 1867 document where there was no reason to deviate from it: Queensland, *Parliamentary Debates*, Legislative Assembly, 6 October 1892, 1489.

former was to contain an equal number of members — eight — for each province and the latter to be elected by population. The number of senators was remarkably high given that each Australian State received originally only six senators, but probably Griffith thought that the Queensland Senate would otherwise be too small. Griffith repeatedly declared, almost mantra-like, that the principle of equal representation in the Senate was essential to the existence of a true federation; the lack of one, he said, meant that Canada 'is not a federation at all',[91] and it followed also that 'responsible government under a federal constitution was an untried experiment'.[92] The Senate was to be a permanent indissoluble body whose members would be elected not by the people, but by provincial legislatures (as with the contemporary draft of the Australian Constitution);[93] once every three years each province would elect half its senators.[94] As the term of the provincial legislatures was also three years, no one legislature could ever elect more than half the senators.[95] In the later, two-province version of the Bill, there would thus have been eight senators representing North Queensland opposite eight representing South Queensland. This would have given the northerners a very powerful position, at least if united rather than divided along, for example, party lines; they could no longer have been outvoted by the north and centre working together. This was further emphasised by cl 66, added to the second Bill, under which all laws, except supply for the ordinary annual services, required for their final passage an absolute majority in the Senate[96] — nothing other than necessary supplies could have been passed without at least one northern vote in favour, even if all the southerners combined. Under cl 31 of both Bills, the balance of representation was to be maintained, as it is in today's federal Senate (s 23), by allowing the president a deliberative, but no casting, vote; if the votes were equal the motion was lost. There were no deadlock provisions comparable to the final Australian Constitution's s 57[97] — in other words, no way of overriding the veto of the indirectly

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91 Queensland, *Parliamentary Debates*, Legislative Assembly, 8 September 1892, 1208; see also 29 September 1892, 1402, 1407–8; 4 October 1892, 1434; Griffith, 'Queensland Federation and the Draft Commonwealth Bill', Queensland, *Parliamentary Papers*, 1899 (1) 107, 113; *The Brisbane Courier* (27 May 1899) 4.

92 Queensland, *Parliamentary Debates*, Legislative Assembly, 5 October 1892, 1457. Griffith repeated this point in relation to the continent-wide scheme in Griffith (n 91) 115; *The Brisbane Courier* (27 May 1899) 4.

93 There was also a similar proposal to that finally accepted for the all-Australian scheme, namely, that the senators should be directly elected; it was lost nine votes to 23: Queensland, *Parliamentary Debates*, Legislative Assembly, 4 October 1892, 1433–6. At 1440 we also find Griffith defending the election of the senators by the whole Parliament of South Queensland, including the nominee Legislative Council, because, he believes, it will help to reduce partisanship.

94 Clause 20 of both Bills contained a provision comparable to s 13 of the *Australian Constitution* under which the first senators were to be divided into long- and short-term senators to establish the initial rotation. See further below n 103.

95 Queensland, *Parliamentary Debates*, Legislative Assembly, 4 October 1892, 1446. Casual vacancies were the only possible exception here; cl 21 of both Bills was equivalent to the original s 15 of the *Australian Constitution*, permitting the provincial legislature to choose replacements and interim executive appointments if the legislature was not sitting.

96 Queensland, *Parliamentary Debates*, Legislative Assembly, 18 August 1892, 1017; 8 September 1892, 1210; Mitchell Library of the State Library of New South Wales Q342.94/Q, bundle 4 (copy of this amendment handwritten by Griffith). To prevent the abuse of this provision by 'tacking', cl 64(4) contained a provision similar to s 54 of the *Australian Constitution*. It is incidentally curious to find Griffith dividing his clause here into sub-sections. This is a convenience which was unfortunately not adopted in the *Australian Constitution* as originally enacted.

97 Which itself did not appear in the drafts until 1897.

elected Senate if it refused to pass a Bill sent up from the House of Representatives. At most that House could have hoped for change at the triennial Senate elections. Griffith had had his share of frustrations at the hands of the existing colonial upper chamber, the Legislative Council, but it was not an exact equivalent of his proposed Senate given that the Legislative Council was not even indirectly elected and was not a federal body. Unlike the nominated Legislative Council, though, the Senate could not even be 'swamped', that is, there was no way of adding extra members who might be more sympathetic to the government's views as a crude deadlock-breaking device.[98] Griffith no doubt reasoned that the Senate should have a strong position given its importance to his conception of federalism, and in relation to the Australian Constitution he went on the record in 1899 to doubt that s 57 would be much needed given that most topics would not cause divisions by colony but by party.[99]

The House of Representatives' make-up was modified in the two-province Bill so that a small bias was incorporated in favour of North Queensland and it would have one member for each 8,000 people; South Queensland was to receive one for each 10,000, giving 32 for it and nine for the north (cll 32, 35). The final draft of the Australian Constitution in 1891 also provided for representation on the same per-person basis, the measure being one per 30,000. In both Bills, races disqualified from voting were not to count (cll 34/33; s 25); Aborigines were not to be counted at all (cll 213/197; repealed s 127).[100] Clause 44 of both Bills preserved the existing franchise until it was altered by law, meaning — for now — no votes for women but plural voting, a disappointment for radicals who sometimes preferred electoral reform to separation without it.[101] Griffith saw nothing wrong with membership of both federal and provincial Parliaments, and therefore there was no prohibition on dual membership.[102]

Clauses 59/58 caused much debate. These clauses were borrowed by Griffith from France,[103] but suggested to his mind also by the precedent of Pring A-G QC,[104] and also possibly necessary,

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98 See further below n 111.

99 Griffith (n 91) 115; *The Brisbane Courier* (27 May 1899) 4. See also below n 184.

100 On this, see Greg Taylor, 'History of Section 127 of the Commonwealth Constitution' (2016) 42(1) *Monash University Law Review* 206.

101 *Worker* (Brisbane, 13 August 1892) 3. Both evils were remedied by the *Elections Acts Amendment Act 1905* (Qld). One of the amendments proposed in 1892 by (Sir) Charles Powers would have prohibited plural voting; his wish list is preserved in CO 324/54/61 (AJCP 1946). However, he moved only a fraction of his amendments: Queensland, *Parliamentary Debates*, Legislative Assembly, 5 October 1892, 1463.

102 Queensland, *Parliamentary Debates*, Legislative Assembly, 8 September 1892, 1211; 13 September 1892, 1234; 29 September 1892, 1406; 6 October 1892, 1485–6, 1487 (possibly even dual ministerial offices). See also above n 44. Even today the prohibition, at federal level, is purely statutory: *Commonwealth Electoral Act 1918* (Cth) s 164.

103 Queensland, *Parliamentary Debates*, Legislative Assembly, 26 July 1892, 792. It is, of course, the third French republic that is in question. Its *Constitutional Law on the Relations of the Public Powers* of 16 July 1875 provided, in art 6 that 'the ministers shall have entrance to both chambers, and shall be heard when they request it': translated in Walter Fairleigh Dodd (ed), *Modern Constitutions* (University of Chicago Press, 1909) 292. It is also interesting to observe that art 6 of the French third republic's *Law on the Organisation of the Senate* of 24 February 1875 provides, as did cl 20 of both Bills, and as does s 13 of the Australian Constitution, for the senators to be divided into classes for allocating the longer and shorter terms; in France, however, the division was to be made by lot.

104 Queensland, *Parliamentary Debates*, Legislative Assembly, 5 October 1892, 1454, 1470. Pring A-G QC had held ministerial office although he had not been able to find a seat in Parliament. There was no such constitutional

he thought, for the as yet 'untried experiment'[105] of a federal constitution under responsible government, which was, he considered, uncertain of success.[106] The clauses permitted ministers who were not members of a House of Parliament to attend its sittings and take part in debate (there was added by amendment: only at the invitation of the House).[107] As with the 1891 draft of the continent-wide scheme and in accordance with Griffith's personal views,[108] there was no equivalent of the third paragraph of s 64 requiring ministers to sit in Parliament; therefore, in the United Provinces ministers might have been appointed from outside Parliament and introduced into it as, in essence, non-voting members.

In the provinces, there was to be a body known simply as 'the Legislature' (cll 84/82). A small blow for autochthony was struck by the alteration of the provision in the first Bill (cl 88) that privileges in the provincial legislatures should equal those of the Commons to a conferral upon them in the second Bill (cl 86) of the privileges of the Parliament of Queensland.[109]

The Legislature of South Queensland was to consist of two Houses, one elected and one appointed like Queensland's existing Legislative Council (cll 120–46/117–44). The Legislative Council of South Queensland would consist initially of 'the Members of the Legislative Council of Queensland who at the time of the constitution of the United Provinces are ordinarily resident in the Province of South Queensland' (cll 121/118),[110] and all members would hold office for life unless they ceased to attend for two sessions or the constitution of the province were altered, suggesting an elective House as a possibility for the future (cll 123/120). There was an unlimited power of augmenting the numbers vested in the (Lieutenant-)Governor (cll 122/119), meaning that the Crown would be faced with the usual dilemma about whether to follow advice if the government advised 'swamping' an allegedly obstructive majority of nominees.[111] The southern Legislative Assembly was of course elected, like the single chamber of the other provincial legislature(s), again on the same franchise as for Queensland until it was altered by law (cll 134, 152, 169/132, 151), for a three-year term (cll 132, 150, 167/129, 148).[112] That was the same as the term of office of senators; how this would have worked out in practice is anyone's guess, but the cycles would inevitably have become disjointed and it may be that this provision would have

requirement under the *Officials in Parliament Act 1884* (Qld). An attempt to insert such a requirement into Griffith's second Bill failed: Queensland, *Parliamentary Debates*, Legislative Assembly, 5 October 1892, 1470–2.

105 See above n 92.

106 Griffith (n 91) 115; *The Brisbane Courier* (27 May 1899,) 4; and see Griffith (n 84) 19.

107 Queensland, *Parliamentary Debates*, Legislative Assembly, 5 October 1892, 1458.

108 See in particular the interesting exchange between him and Deakin in Debates of the National Australasian Convention, 5 March 1891, 83.

109 Queensland, *Parliamentary Debates*, Legislative Assembly, 29 September 1892, 1406.

110 Three of them would have been put out of work by this provision: Queensland, *Parliamentary Debates*, Legislative Assembly, 6 October 1892, 1490. The three members of the Legislative Council from outside South Queensland are named by Doran, *Separatism in Townsville* (n 4) 117 n 89. One was from Rockhampton and would have been saved from compulsory redundancy under the two-provinces scheme.

111 Queensland, *Parliamentary Debates*, Legislative Assembly, 4 October 1892, 1443, 1445. For further details about the dilemma, see, eg, Justin Harding, 'Ideology or Expediency? The Abolition of the Queensland Legislative Council 1915–22' (2000) 79 (November) *Labour History* 162.

112 See, further, above n 17.

made for longer Parliaments as governments hung on until an election of senators was possible. On the other hand, both other provinces/the other province received single-chamber legislatures (cll 147, 164/145), despite Griffith's stated preference for two Houses. A Canadian precedent for this difference between the provinces was close at hand; in this era Ontario had a single-chamber, but Quebec a bicameral legislature. Again it was provided only that provincial ministers should be 'capable' of sitting in the provincial legislatures (cll 102/100); there was no requirement upon them to do so, and Griffith thought that it would be a good thing at least to have the choice of non-parliamentary ministers; the last word, he said, had not been spoken on forms of government.[113] It was, therefore, not merely the supposedly untried experimental nature of federal responsible government that led him to the view that options should be left open in this respect, for at provincial level no such complications existed. On another occasion Griffith pointed out that the British constitution itself was constantly in flux and there was no reason to think that its present state would be frozen in aspic forever.[114] There was, finally, no indication, either in the Bill or in any parliamentary debate, of the title to be borne by the chief ministers of the provinces — not a minor detail given that it was still quite common at this stage to refer to the head of the colonial government as the Prime Minister of Queensland.[115]

D *Finance, Tariffs and Trade*

It was not merely the usual squabbles over money that made these topics particularly difficult for the separationists. With Australian federation allegedly approaching, a further set of customs barriers was the last thing that anyone needed. But those in favour of separation desperately wanted their own tariff, not merely, as we have seen, to counter what they saw as the difficulties created for them by a tariff created by southerners to protect southern industries, but also as a source of revenue as it was in every other colony — there was no income tax in Queensland at this point and it would hardly have built support for separation to promise the introduction of one. Yet a further complication was posed by the fact that separation threatened to reduce the security of Queensland's many creditors, who had counted on the backing of the entire financial base and taxation potential of the united colony in lending a total of about £28,000,000 to its government,[116] about eight times its annual revenue.

Griffith's initial proposal was for customs duties to be within the sphere of the provinces, provided that duties could not

> be imposed upon goods which are the natural products of any province, nor collected upon goods passing from one province to another province by land, but the amount payable by one province to

113 Queensland, *Parliamentary Debates*, Legislative Assembly, 26 July 1892, 792.

114 Queensland, *Parliamentary Debates*, Legislative Assembly, 5 October 1892, 1471.

115 Denis Murphy, 'The Premiers of Queensland' (1978) 10(3) *Journal of the Royal Historical Society of Queensland* 87, 88.

116 Queensland, *Parliamentary Debates*, Legislative Assembly, 20 November 1890, 1511; Fitzgerald (n 4) 295.

> another province in respect of such last-mentioned goods shall be from time to time determined by commissioners appointed for that purpose.[117]

However, the customs revenue raised under provincial legislation was to be received by the federal government and used to pay the interest on the national debt, with the surplus — 'I am sure there will be a surplus',[118] said Griffith — to be paid to the provinces according to an agreed statutory formula.[119] Surely the result of this, which Griffith could hardly have overlooked, would have been to encourage the provinces to keep their tariffs as low as possible — Queensland was already a high-tariff colony with, perhaps, some room for lowering its tariffs[120] — and to look to other forms of taxation that they did not have to surrender the fruits of and which they could spend on their own account in accordance with the wishes of their voters. This was, after all, the period when some colonies were beginning to experiment with income taxes. However, Griffith's plan at this point was certainly a neat and strikingly innovative combination of provincial autonomy to tax as required by local needs while also meeting central needs for revenue along with the need to convince the Colonial Office that Queensland's creditors were secure.

In the final Bills the surplus of federal revenue over expenditure was to be returned to the provinces in proportion to the amount of revenue raised in them,[121] and it was indeed provided that it would be necessary to find out which goods entered Queensland in one province but were later exported to another so that the latter province received the credit (cll 202/184; s 93(i)). This was perhaps not as difficult as it sounds to us, given that goods on board a ship could simply be left on the ship until unloading occurred, and there were few north-south railways then; there was no railway between Brisbane and Cairns, for example, for another 30 years.[122] As goods could be taken by ship between coastal towns, the railway system mostly concentrated on east-west lines connecting the inland with a port. On the other hand, monitoring some remote borders and tracking goods manufactured with taxable raw materials in one province but then sent to another might have been difficult or disproportionately expensive.[123]

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117 Queensland, *Parliamentary Debates*, Legislative Assembly, 11 November 1890, 1331.

118 Ibid 1516.

119 Ibid 1331.

120 See Greg Taylor, 'On the Origin of Section 96 of the Constitution' (2016) 39(4) *University of New South Wales Law Journal* 1438, 1449.

121 See, further, Queensland, *Parliamentary Debates*, Legislative Assembly, 7 October 1892, 1494.

122 It was built under the *North Coast Railway Act 1910* (Qld). This also explains Griffith's federal power in cll 62(35)/61(35): 'the control of Railways so far as the Railway systems of the several Provinces compete with one another'. This was not usually the case, as most went east-west. It is not clear, however, how the judgement about the existence of competition was to be made, or what level of competition was necessary beyond the trivial or minimal. Griffith seems to have thought that there was little to no competition when he drafted his Bill and the power was largely prophylactic: Queensland, *Parliamentary Debates*, Legislative Assembly, 26 July 1892, 794. Otherwise, 'the construction and management of railways' was a provincial power (cll 89(11)/87(11)).

> This comparison also leads me to remark upon the curious fact that in the federal list there was promiscuous capitalisation, while in the provincial one hardly any words except proper nouns and the first word in each paragraph were capitalised — thus, 'railways' was capitalised in one list and not in the other. Capitalisation was even removed from provincial powers taken from the Canadian provincial list.

123 The government was obviously aware of this difficulty: Queensland, *Parliamentary Debates*, Legislative Assembly, 16 September 1891, 1081. There are also a few papers on this question in Queensland State Archives, item no 861756.

Griffith declared himself uncomfortable with the proposal for provincial customs powers, and asked the northerners whether they would do without them.[124] By the time the Bills were drafted,[125] the northerners had conceded this power also and the provinces were prohibited from levying customs duties (cll 89(2), 199/87(2), 181). The federal government was not to impose internal customs duties, for 'trade and intercourse' throughout Queensland were to be 'absolutely free' (cll 201, 62(9)/183, 61(9); s 92). Unfortunately there were no explanations shedding any light on what exact meaning this infamous phrase was intended to have; attention concentrated on the northerners' concession of the power to levy tariffs, perhaps in itself a significant clue to what this phrase was intended to signify: a lack of internal tariffs and little if anything more.[126]

Clause 206 and Fifth Schedule/cl 188 and Fifth Schedule of the two Bills provided for the public debt to be apportioned between the federal government and the provinces; essentially, the latter took over the debt from local public works while the former received everything else. The provinces were to indemnify the central government for their shares of the debt with interest; at the last minute a clause (189) was introduced into the second Bill providing for the two provinces to pay to the federal government, as assurance for the indemnity, all of their pastoral lands revenue, a third of their railways revenue and any other revenue prescribed by federal law. This naturally caused bitter, even unparliamentary, protests from the northerners in particular, to the effect that the provinces would be starved of funds.[127] This clause was most obviously in the interests of the British creditors of the colony who could be relied upon to contact the Colonial Office in case of the remotest threat to their interests; it is even conceivable that one or other of those creditors or bureaucrats was behind the new clause. In its analysis of the Bill the Colonial Office had thought the debt provisions 'ingenious' but insufficient; it would have preferred the whole debt to remain with the federal government and only the charge for it to be apportioned to the provinces.[128] Just in case the message to creditors was missed, however, there were also two express federal powers over Queensland's contractual obligations and its public debt, to which was added in the second Bill, also at the last minute but without opposition,[129] 'the adjustment of accounts between the several Provinces, and between the United Provinces and the Provinces respectively' (cll 62(6), (7)/61(6), (7)).

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124 In Queensland, *Parliamentary Debates*, Legislative Assembly, 20 November 1890, 1514–15, he seems contented with the proposal, but changes his mind after the Australasian Federal Convention of 1891; see below n 184. Interestingly, about six weeks before his death, JM Macrossan, the principal separatist leader in northern Queensland, stated at the Australasian Federation Conference in Melbourne (12 February 1890, 69) that 'my idea of Federation is that the general government will have the sole power of raising money by any mode or system of taxation'.

125 That is, only after the appearance of 'absolutely free' in what became s 92, which accordingly was the model for these words in the Queensland scheme, not the other way around. According to La Nauze (n 1) 55, 63, these were almost certainly Griffith's own words.

126 The same conclusion is reached on different evidence by Sir Robert Garran, *Prosper the Commonwealth* (Angus & Robertson, 1958) 107.

127 Queensland, *Parliamentary Debates*, Legislative Assembly, 7 October 1892, 1496–503; 13 October 1892, 1544.

128 CO 324/53/253f (AJCP 1945).

129 Queensland, *Parliamentary Debates*, Legislative Assembly, 12 October 1892, 1524.

E *Judiciary*

Griffith's judicial proposals can be summarised shortly. It is, first of all, of interest that there was no formal 'investment' of judicial power — no section proclaiming that the judicial power was vested in Courts, such as has been productive of so much litigation under the federal Constitution over the last 120 years. Rather, in the manner of a State constitution,[130] the Queensland federal constitution simply declared that the jurisdiction of all Courts continued as before (cll 181, 191, 192/163, 173, 174). There was no sign of any distinction between federal and provincial jurisdiction; it would appear that Griffith considered that the single system of Courts already in existence would administer both types of law without difficulty or the need for any special provisions.

While three provinces were proposed, the Bill provided that there should be one Supreme Court for both South and Central Queensland until the latter province legislated otherwise; it would initially consist of the Judges of the Supreme Court of Queensland resident at Brisbane (cl 185) — there were no Judges based at Rockhampton then.[131] In both Bills there was to be a separate Supreme Court of North Queensland consisting at first of the Judges resident at Townsville (cll 186/167).[132] The constitutions of the Supreme Courts were to be a provincial matter (cll 89(14), 182/87(14), 164); however, the appointment of their Judges was to be a provincial matter in the first Bill (cl 184) but a federal one in the second (cl 166). Interest attaches to the provisions for an appeals Court given that the want of one, except in distant London, was part of the impetus towards Australian federation. However, Griffith's solution was not particularly striking or insightful: there was to be a Supreme Court of the United Provinces of Queensland as an appellate Court, although the draft did suggest it might hear second appeals from a provincial appeals Court (cll 62(36), 188/61(36), 169). The first Bill had simply left the constitution of the all-Queensland appeals Court up to a later statute (cl 189), but the second Bill provided specifically that this Court consisted simply of all the Judges of the provincial Supreme Courts unless some other provision were made (cl 170); this question, like some others, became simpler when there were only two provinces.[133] No attempt, of course, was made to limit appeals to the Privy Council.

There were the usual provisions about the removal of Judges, but the second Bill supplemented this by a curious provision: with the advice of both the provincial and federal executive councils, but without any parliamentary proceedings, the Governor might suspend a Judge — for how long is not stated; presumably it could be indefinite — and appoint a replacement (cl 166). With surprisingly little debate, this addition was accepted on the assurance of Griffith that it 'was conceivable that a Judge might become insane, and he thought no-one

130 Eg, *Constitution Act 1975* (Vic) s 85 (3).

131 The position of Central Judge was first created in 1895: Justice Bruce McPherson, *The Supreme Court of Queensland 1859–1960: History, Jurisdiction, Procedure* (Butterworths, 1989) 209–10.

132 At this time there was a quasi-separate branch of the Supreme Court of Queensland at Townsville (Bowen until 1889): McPherson (n 132) 197–9; reunion was effected by Griffith CJ and Byrnes S-G in 1895: ibid 212 (and see at 208).

133 Queensland, *Parliamentary Debates*, Legislative Assembly, 18 August 1892, 1017.

would say that a power of suspension ought not to exist. Of course it would only be exercised in cases of great emergency.'[134] As there was a general power of removal (also cl 166), which would have covered incapacity by reason of insanity, this is very odd and can have been accepted only thanks to Griffith's very great personal authority on such topics. It should also be recalled, though, that the *Colonial Leave of Absence Act 1782* (Imp) at this time provided a means for the executive to remove Judges permanently,[135] which was most famously employed to get rid of Boothby J in South Australia who did not live to pursue the appeal to the Privy Council that the Act allowed as a safeguard.[136] I think it unlikely, however, that his case — although it had certainly been famous when it occurred a quarter of a century earlier — was present to anyone's mind at this time and place. Was Griffith's remark rather intended as a side-swipe at the increasingly injudicious and radical views emanating from the Chief Justice of Queensland, Sir Charles Lilley?[137]

F *Miscellaneous Matters*

The Queensland constitution contained a few human rights, as we might now call them, most of which were modelled upon those to be found in the 1891 draft of the continent-wide constitution. Thus, cll 114/112 denied to the provinces, although (like the contemporaneous draft of what was to become s 116) not to the federal legislature, the power to make laws 'prohibiting the free exercise of any religion'. Clauses 115/113 (s 117) contained the prohibition on discrimination by the provinces against 'citizens of other provinces', but continued by saying that a province might not 'deny to any person, within its jurisdiction, the equal protection of the laws'. This Americanism, however, was also to be found in the 1891 all-Australian draft. Nevertheless it is interesting that this proposal survived, without any comment or objection at all, the parliamentary process in Queensland despite its later fate in the continent-wide scheme, especially given that it was the hobbyhorse not of Griffith but of Andrew Inglis Clark A-G.[138] On the other hand, the right to a jury trial on indictment (cll 195/177; s 80) was deleted in Parliament with virtually no debate and no objections because Griffith wished the provinces to have a free hand in the matter.[139]

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134 Queensland, *Parliamentary Debates*, Legislative Assembly, 6 October 1892, 1493.

135 See also Christine Wheeler, 'The Removal of Judges from Office in Western Australia' (1980) 14(3) *University of Western Australia Law Review* 305, 314–16.

136 See, eg, John Williams, '[Mr] Justice Boothby: A Disaster that Happened', in George Winterton (ed), *State Constitutional Landmarks* (Federation Press, 2006) ch 1.

137 John Bennett, *Sir Charles Lilley: Premier 1868–1870 and Second Chief Justice 1879–1893 of Queensland* (Federation Press, 2014) chs 15–17. In Western Australia in 1888, the Governor had unsuccessfully attempted to suspend Onslow CJ, but not even the Governor claimed that this was caused by anything like insanity: John Bennett, *Sir Alexander Onslow: Third Chief Justice of Western Australia 1883–1901* (Federation Press, 2018) ch 7.

138 John Williams, '"With Eyes Open": Andrew Inglis Clark and our Republican Tradition' (1995) 23(2) *Federal Law Review* 149, 175–8.

139 Queensland, *Parliamentary Debates*, Legislative Assembly, 6 October 1892, 1494. This right, while it existed, was to be a right applying only in provincial Courts, while the substantive criminal law, as already noted, was a federal matter. Therefore, the provincial Courts must indeed have been intended to be responsible for trials under the federal criminal law as part of the single judicial system.

Amendment of the Constitution was to be largely a matter for the ordinary legislatures, as was usually the case with State constitutions; there was no attempt at entrenchment of any sort or at any level.[140] Clauses 62(4)/61(4) were federal powers to adjust the federal-provincial distribution of legislative responsibilities, but only with provincial consent (presumably unanimous; how this consent would be signified was not specified). The provinces had power to amend the constitutions of their legislatures but, unlike the Canadian provinces,[141] only within the parameters set by the Bills (cll 89(1)/87(1)) — thus, the introduction of a second House, for example, or the conversion of the South Queensland upper House to an elective body, would have been beyond their local powers. There was also a capacity for the provinces to refer powers to the federal legislature and vice versa without a formal constitutional amendment, as already noted.[142] As we shall also see, Griffith intended that the Bill should be backed by an Imperial enactment, which would, presumably, have given very considerable powers of amendment to the local (in this case, Queensland's federal) legislature, as had been done in similar cases in the past.[143] Some minimal level of entrenchment would surely have been needed, however, for otherwise the division of powers itself could simply have been swept away by the General Assembly. It does not appear that any thought was given to the exact shape of the provisions required to avoid such a possibility while still retaining freedom of amendment. Griffith certainly never argued for any degree of entrenchment.

Federal power also extended to creating new provinces, a matter of particular importance after the deletion of Central Queensland in the second Bill; but any alteration of the extent of existing provinces required their consent, an obvious obstacle for the central Queensland separationists, which Griffith perhaps could have done more to reduce (cll 62(2), (3), 207, 209, 210/61(2), (3), 190, 193, 194; ss 121, 123, 124). There were also the occasional vague references to a fourth province, in the Gulf country, for example.[144] Outside the existing limits of Queensland, new provinces could have been added without the need for any consent on the part of the other provinces, and Griffith occasionally referred to the possibility that his Queensland federation might be so attractive to others, 'by the force of example, if by no other force',[145] that they would clamour to join.[146]

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140 Of course, Imperial oversight was preserved via the disallowance provisions. In Queensland, *Parliamentary Debates,* Legislative Assembly, 20 November 1890, 1515, Griffith suggests that the provinces could change to elected Lieutenant-Governors, but omits this qualification.

141 Until 1982, they had the power to make 'Amendment[s] from Time to Time, notwithstanding anything in this Act, of the Constitution of the Province, except as regards the Office of Lieutenant Governor' (s 92(1)). The power is now found in the *Constitution Act 1982* (Can) s 4.

142 See above n 75.

143 Eg, *Victoria Constitution Act 1855* (Imp) ss 4, 6.

144 Queensland, *Parliamentary Debates*, Legislative Assembly, 27 October 1891, 1771.

145 Queensland, *Parliamentary Debates*, Legislative Assembly, 8 September 1892, 1211.

146 New Guinea was one proposal: Queensland, *Parliamentary Debates*, Legislative Assembly, 20 November 1890, 1513; another, not by Griffith, was the Northern Territory (*The Morning Bulletin* (Rockhampton, 7 September 1892) 5. See also Queensland, *Parliamentary Debates*, Legislative Assembly, 26 July 1892, 793 (perhaps even New South Wales!); 27 September 1892, 1365; Legislative Council, 25 October 1892, 166.

In the three-provinces scheme, the coastal boundaries between the north and centre would have been at the mouth of the Kolan River, north of Bundaberg, and between centre and north at Cape Palmerston, south of Mackay; in the two-province version the boundary between north and south would again have been at Cape Palmerston (cl 6 and First Schedule in both Bills).[147] In terms of population, South Queensland would have started with nearly 300,000 people, the centre nearly 50,000, and the north a bit less than 100,000.[148]

III RISE AND FALL OF THE QUEENSLAND FEDERATION

The genesis of the federation-of-Queensland proposal is to be found in an initiative taken by Griffith himself only a few weeks after beginning his second term as Premier in August 1890. In a major policy speech in Parliament he stated that, just as he lost government two years earlier, he was about to propose a division of Queensland into a federation. It 'is too large for efficient administration' and obstacles to autonomy for the north would be 'very greatly removed' if only the 'black labour' question were settled,[149] which it then — apparently — finally was by the cessation of recruitment at the end of that same year, 1890, as decreed by Parliament at Griffith's urging in 1885, during his first term as Premier.[150] On the achievement of Australian federation the federal government in Brisbane would simply be dissolved.[151] In his view, the questions of a Queensland federation and a continent-wide federation could be considered in tandem.[152] Thereupon, Macrossan, the northern separation leader, took the initiative and moved in the Legislative Assembly for complete separation, with the question of a capital for northern Queensland resolved with a newly founded city like Washington. Macrossan argued that this was preferable as, in his view, Griffith's federation-of-Queensland scheme would not provide sufficient autonomy for his people. Indeed, if a subordinate province were set up he would advocate for it to declare itself unilaterally separate from Queensland. On the other hand, the northern anti-separationists[153] opposed the proposal.[154] Macrossan's motion was lost and an amendment proposed by Griffith in favour of his federal scheme passed. Reflecting upon this debate, a leader in *The Brisbane Courier* praised Griffith's 'nobility and generosity of sentiment' to the skies and

147 As is pointed out in Queensland, *Parliamentary Debates*, Legislative Assembly, 13 September 1892, 1227, there seem to be considerable errors in the descriptions of the boundaries even in the second Bill, and accordingly I have not attempted to trace them precisely. No map was located. The main parliamentary debate on the topic is in Queensland, *Parliamentary Debates*, Legislative Assembly, 11 October 1892, 1508–20. See further above n 19.

148 Queensland, *Parliamentary Debates*, Legislative Assembly, 20 November 1890, 1517.

149 Queensland, *Parliamentary Debates*, Legislative Assembly, 16 September 1890, 531; see also 17 October 1890, 994–5.

150 See above n 9.

151 See above n 37. Strangely, however, Griffith seems to forget this idea in Queensland, *Parliamentary Debates*, Legislative Assembly, 17 September 1891, 1124. Perhaps this was a mere slip. See also above n 37.

152 Queensland, *Parliamentary Debates*, Legislative Assembly, 16 September 1890, 532.

153 See above n 18.

154 Queensland, *Parliamentary Debates*, Legislative Assembly, 17 October 1890, 984ff; 23 October 1890, 1059–60.

asked: 'What more, then, does the most ardent separationist desire?'[155] They would receive both autonomy and, in time, the larger measure of independence of an Australian State. On the other hand, in Rockhampton *The Morning Bulletin* doubted Griffith's sincerity, thinking his scheme just another attempt to cause delay and avoid separation altogether.[156]

At this point the separationists caucused and asked Macrossan, representing the north, and Archibald Archer MP, long-serving member for Rockhampton, representing the central separationists, to work with Griffith on his proposed federal scheme, partly in good faith — if that is not a contradiction in terms! — and partly lest they be accused of rejecting a reasonable offer and thereby forfeit their claims to consideration of their cause by the Colonial Office, which was all-powerful in theory but reluctant to act in practice. We read in numerous newspaper reports, and in Griffith's own brief account,[157] of this meeting on Thursday 30 October 1890 between Griffith, Macrossan and Archer, followed by a meeting of the separationists of both hues without Griffith. Allegedly, the separationists remained confident that the Colonial Office would take their side but thought it politic to show their willingness to compromise and accept Griffith's scheme, which involved customs legislation by the provinces but free trade among them,[158] the provinces becoming states when Australia federated, and even a suggestion for elected Lieutenant-Governors with a veto power over Bills like the American President's. They also agreed not to raise any questions of Pacific Island labour.[159] Even *The Daily Northern Argus* in Rockhampton was mollified, although it continued to prefer full separation, and, of course, all-or-nothing separationists rejected the scheme entirely.[160]

Griffith duly introduced an outline of his proposals into the Legislative Assembly with commendable speed on 11 November 1890,[161] taking care that they were preceded by a rider that they were preliminary only and subject to further consideration. Even so, the lists of federal and provincial powers that took up the lion's share of the resolutions he moved — there was no Bill yet — were very largely in the shape of the two Bills of 1892, with the exception, already noted,[162] of a provision in these resolutions, as distinct from the Bills, for provincial customs duties. Another variation from the final scheme was that the general rule was to be for two Houses in each province. The resolutions stated that Vice-Regal representatives, federal and provincial, were to be appointed, as was customary.

A pause for consideration occurred, during which, it would seem, the northern and central attitude hardened.[163] A fortnight later on 24 October, Griffith made a plea for his proposals to be

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155 *The Brisbane Courier* (25 October 1890) 4.

156 *The Morning Bulletin* (Rockhampton, 12 October 1890) 4; (27 October 1890) 4.

157 Queensland Parliamentary Papers (1891) I 1157, 1182.

158 There is an obvious contradiction here. See above n 117, for Griffith's draft of a solution.

159 *The Times* (London, 14 November 1890) 5; *The Daily Northern Argus* (Rockhampton, 3 November 1890) 3; *The Cairns Post* (5 November 1890) 2. Later reports toned this down and said that Griffith had not agreed to any details and particularly not to the idea of elected Lieutenant-Governors: *The Week* (Brisbane, 8 November 1890) 16. See also Queensland, *Parliamentary Debates*, Legislative Assembly, 20 November 1890, 1499.

160 *The Daily Northern Argus* (Rockhampton, 4 November 1890) 2.

161 Queensland, *Parliamentary Debates*, Legislative Assembly, 11 October 1890, 1330–31.

162 See above n 119.

163 *The Brisbane Courier* (27 November 1890) 4.

considered as 'a friendly act', not as 'a fresh act of hostility and animosity', for otherwise there would be 'no hope'.[164] He was to be immediately disappointed; Macrossan, at whose urging the scheme had been developed, now thought that it was too late for such half-hearted measures, for the people of the north were 'determined to have separation pure and simple'.[165] Newspaper reviews were also discouraging.[166] Hume Black, MP for Mackay and a strong separationist, gave voice to the separationists' delusions that an appeal to the Imperial government would be enough to see them safely separated.[167] And a few days later, Archibald Archer, undeterred, brought forward a motion in the Legislative Assembly for the complete separation of central Queensland — 'a most unfriendly motion to the government', said Griffith, 'as meeting the friendly proposals of the government in the most unfriendly spirit, and as meeting the government with a direct negative before they can bring their proposals before the House'.[168] The motion for total divorce was, however, duly lost by 19 votes to 34, with some northerners such as Messrs Sayers MP, Rutledge MP (both Charters Towers),[169] Hodgkinson MP (Burke), and Wimble MP (Cairns) voting against.

Debate resumed on Griffith's scheme on 20 November 1890, at around the time that the opening of the first Australasian Federal Convention was fixed for March 1891 and after he and the separationists had publicly made up after an unusually frank and public spat over the course of proceedings in Parliament.[170] On behalf of his northern tribe, Macrossan rejected the scheme in the debate as offering insufficient legislative and financial autonomy and held out for the *deus ex machina*.[171] Both separation leagues, northern and central, continued to advocate for full separation, declared their own total victory in London imminent and rejected Griffith's proposals also.[172] Wrapping up inconclusive parliamentary debate on the topic for 1890, an annoyed Premier said that he would not have brought the proposals forward at all had he known that Macrossan & Co would oppose in Parliament what they had urged him outside it to bring forward, and that he was 'quite certain' that those were the only proposals for autonomy that the separatists would see 'for many, many a long year'.[173] Evidently they neither believed him nor considered that Griffith might have better sources of knowledge about the attitude of the Colonial Office than they did.

This realisation did, however, finally penetrate many northern skulls towards the end of 1890 and start of 1891 as the full implications of the phrase uttered in London, 'not yet ripe for

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164 Queensland, *Parliamentary Debates*, Legislative Assembly, 24 October 1890, 1108.

165 Ibid.

166 *The Capricornian* (Rockhampton, 15 November 1890) 17; *The Daily Northern Argus* (Rockhampton, 13 November 1890) 2; *The Morning Bulletin* (Rockhampton, 17 November 1890) 4; Doran, *Separatism in Townsville* (n 4) 63.

167 Queensland, *Parliamentary Debates*, Legislative Assembly, 24 October 1890, 1109.

168 Queensland, *Parliamentary Debates*, Legislative Assembly, 14 November 1890, 1422.

169 See above n 18.

170 Queensland, *Parliamentary Debates*, Legislative Assembly, 19 November 1890, 1498; 20 November 1899, 1499.

171 Queensland, *Parliamentary Debates*, Legislative Assembly, 20 November 1890, 1524–30.

172 The documents embodying their stance at the end of 1890 may be seen in Queensland, *Parliamentary Papers* (1891) I 1157, 1190ff. See also above n 39.

173 Queensland, *Parliamentary Debates*, Legislative Assembly, 25 November 1890, 1616.

decision',[174] and Griffith's persuasive powers exercised their influence. In January, *The Times* carried a report to the effect that Griffith's proposals had been well received on his northern tour.[175] At the start of June 1891, the final seal was put on the change of attitude when a letter from Lord Knutsford (whose officials at least certainly read *The Times*),[176] was published in Queensland. In that letter, his Lordship stated that Griffith's proposals had not been abandoned and would offer many of the benefits of complete separation without most of the complications.[177] All this gave new impetus to the proposals.[178] They were announced as part of the government programme at the opening of the fourth session of Parliament on 30 June 1891,[179] by which time the 1891 continent-wide convention had also assembled and come up with its own draft Constitution — and JM Macrossan had died, depriving the northerners of their outstanding leader. *The Cairns Post*, trying on the mantle of Carlyle, commented:

> Townsville, whom alone the scheme was devised to benefit, turned a shy and cold shoulder to it; and the mastermind, who recognised its advantages, and who might have guided the corner-allotment patriots [hoping for an increase in land values] to a right way of thinking, is dead.[180]

Accordingly, the show was rolled out again, and Griffith introduced his resolutions into the Legislative Assembly on 15 September 1891[181] — little changed from the previous year even though the Australasian Federal Convention had intervened.[182] He already had a private written pledge from a dozen northern members to support the resolutions in principle.[183] Griffith stated that he had continued with provincial customs duties only to keep faith with the northerners, would prefer a common federal tariff as in the all-Australian proposal, and hoped that agreement could be reached on the same rule for the Queensland scheme. In return for an anticipated

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174 See above n 24.

175 *The Times* (London, 10 January 1891) 5. *The Times* kept a very watchful eye on the separation movement, partly due to interest in it in England (from creditors, relations of people in Queensland, former colonists, etc) and partly thanks to Flora Shaw, who spent some time in the early 1890s in Australia. See, eg, her letter in *The Times* (9 February 1893) 13, and in Flora Shaw, *Letters from Queensland* (Macmillan, 1893) ch 6.

176 This is not speculation — references to its contents are occasionally found in the Colonial Office's files, eg, CO 234/51/406 (AJCP 1943).

177 Queensland, *Parliamentary Papers* (1891) I 1157, 1189; this letter was also published in many newspapers such as *The Brisbane Courier* (6 June 1891) 5.

178 CO 234/52/158 (AJCP 1944) (Governor informed by Griffith that 'nearly all the members representing constituencies in northern and central Queensland' back his proposal 'subject to discussion on matters of detail'); *The Capricornian* (Rockhampton, 13 June 1891) 18; *The Morning Bulletin* (Rockhampton, 25 September 1891) 4; Queensland, *Parliamentary Debates*, Legislative Assembly, 13 October 1891, 1520 (quotation from *The Townsville Herald*); Doran, *Separatism in Townsville* (n 4) 63–4.

179 Queensland, *Parliamentary Debates*, Legislative Council, 30 June 1891, 1.

180 *The Cairns Post* (4 July 1891) 2 (minor errors of expression corrected).

181 Queensland, *Parliamentary Debates*, Legislative Assembly, 15 September 1891, 1045–6.

182 There were some. For example, it was no longer stated that two Houses should be the norm at provincial level, and there were various adjustments, none of major importance, to the list of federal powers in particular. This is the first time that the phrase 'so far as the Railway systems of the several Provinces compete with one another' (see above n 122) appears, for example.

183 Letter from Hume Black MP to Samuel Griffith, 15 July 1891, Mitchell Library of the State Library of New South Wales, MSQ 188, 121–2 (also in State Library of Queensland, CY 3063).

concession on this point, his resolutions now specifically provided that the federal upper House should contain an equal number of representatives from each province[184] — perhaps the only major change since the previous year and one that was welcomed by the separatists,[185] but probably, given the importance we have seen him attaching to this point, his intention all along. Making a virtue of necessity, Griffith pointed out that the existence of three rather than just two provinces would at least prevent the types of stalemates that had paralysed the dual Province of Canada (1840–67).[186] In response to the various objections urged and queries raised during debate, Griffith, whose father lay dying as he spoke, delivered a reply that was praised by several observers as one of the best speeches they had ever heard,[187] and the House voted on 17 September 1891 to discuss the proposals in detail in Committee by the fairly narrow margin of 31 to 23 votes.[188] Only one northern member voted against, the radical MP for Burke, John Hoolan — who, entirely in character, had delivered a speech in the debate that verged on a rant. The remaining 22 votes against, in the House of 75,[189] came from southerners.[190]

When debate resumed (Sir) Hugh Nelson declared the proposals 'premature' and moved to close debate down[191] — a matter of some future importance given that he was to be Premier from October 1893 to April 1898. Yet progress was still made: Griffith declared himself satisfied that the northern and central members had agreed to accept an all-Queensland tariff.[192] But when it came to the crunch on 28 October, the House rejected the resolutions embodying Griffith's scheme by 28 votes to 33 (among whom were only one northern and one central member).[193]

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184 Queensland, *Parliamentary Debates*, Legislative Assembly, 15 September 1891, 1047–8. In the following year, one of the separationist leaders appears to be dissatisfied with this proposal, as he doubts that the upper House will ever exercise its power of veto: Queensland, *Parliamentary Debates*, Legislative Assembly, 2 August 1892, 848–9.

185 *The Capricornian* (Rockhampton, 12 September 1891) 17.

186 Queensland, *Parliamentary Debates*, Legislative Assembly, 15 September 1891, 1047. See also Queensland, *Parliamentary Debates*, Legislative Assembly, 3 August 1892, 879. In 1867, the Province of Canada was divided into Ontario and Quebec.

187 *The Daily Northern Argus* (Rockhampton, 23 September 1891) 3; (24 September 1891) 2; *Queensland Times, Ipswich Herald and General Advertiser* (19 September 1891) 2.

188 Queensland, *Parliamentary Debates*, Legislative Assembly, 17 September 1891, 1126.

189 See, further, above n 6.

190 *The Daily Northern Argus* (Rockhampton, 19 September 1891) 5 has a handy analysis of the vote by region. In *The Morning Bulletin* (Rockhampton, 7 September 1892) 5, a well-informed observer states that their motives were not hostility but apathy, combined with a dislike of the idea sometimes expressed by the northerners that they would use the scheme as but a stepping stone to full autonomy.

191 Queensland, *Parliamentary Debates*, Legislative Assembly, 13 October 1891, 1511.

192 Queensland, *Parliamentary Debates*, Legislative Assembly, 13 October 1891, 1520–1. This was the result of statements by Messrs Black and Archer earlier in that same debate (at 1511–2 and 1513).

193 Queensland, *Parliamentary Debates*, Legislative Assembly, 28 October 1891, 1796.

Figure 1 — After Parliament metaphorically poured cold water on Griffith's federation plans at the end of 1891, one cartoonist imagined it being poured literally on to him on the floor of the Legislative Assembly[194]

Some separationists rejoiced. At last, having made two great concessions on coloured labour and the tariff, they would have the evidence they needed to convince Lord Knutsford & Co that the south would never give them self-government and the *deus* would have to fire up its now somewhat rusty *machina*.[195] But evidently Griffith had other plans: he asked the MP for Mackay, Hume Black — at least, according to that gentleman — to bring in next year a new resolution for only two provinces, omitting Central Queensland, and said he was working on a Bill of his own.[196] Griffith himself stated in a report to the Governor at around this time that the deletion of the central province would indeed result in success for the scheme,[197] and received another personal letter from Lord Knutsford stating:

> I much regret that your Bill was not passed, as it appeared to me to be a most fair and reasonable solution of the difficulty. It is difficult to form a strong opinion here, but after a very careful perusal of

194 *The Boomerang* (Brisbane, 7 November 1891) 1.

195 *The Daily Northern Argus* (Rockhampton, 30 October 1891) 2 (which on 17 October 1891, at 4, had been honest enough to say that ardent separationists had been disappointed by the first vote on 13 October, as it deprived them of the evidence needed); *The Northern Miner* (Charters Towers, 30 October 1891) 3.

196 *The Morning Bulletin* (Rockhampton, 12 November 1891) 5.

197 'Separation of Central and Northern Portions of Queensland' (n 25) 501, 501.

> the debates I came to the conclusion that if you had confined the scheme to the North, you might have fairly hoped to carry it.[198]

Finally, a central delegation to London in May 1892 met with the same cool reception as before. It was on this occasion that Lord Knutsford expressed the view that Queensland would be best governed with similar institutions to those of Canada, but that if another attempt to pass Griffith's scheme failed, consideration would be given to total separation.[199]

In May 1892, as the third and final attempt was about to start, *The Brisbane Courier* commented that separationists' arguments 'have been greatly strengthened by the evaporation of the Federation spirit that passed over Australia last year, and by the policy of practical repulsion which has succeeded the enthusiasm for theoretical union'.[200] (The phrase 'practical repulsion' probably refers to Griffith's decision, announced in February 1892, to allow Pacific Island labour again in Queensland,[201] which caused an outcry in the southern colonies. Only a few days after those words were written, for example, the Victorian Parliament passed a resolution protesting against the decision.[202]) Many separationists thought their best chance of success might come with a federal Parliament for the whole continent, in which the southern Queenslanders would be a tiny minority;[203] but certainly, if such an arrangement were not imminent, as it did not appear to be in May 1892, that was no reason to postpone action. *The Brisbane Courier* accordingly urged all southerners to awake 'from the torpor that has hitherto characterised our community upon this unpopular subject' — for in five years' time, it predicted, Queensland would either be divided into provinces or utterly dismembered.[204] It apparently did not see the status quo as a viable option.

On 26 July 1892, Griffith rolled out what was to be his last attempt with another masterly and convincing second-reading speech in which he quoted at length Lord Knutsford's statements promising action if Queensland did not deal with the matter and referred to the fact that almost all southern members had voted against the provincial scheme last year, while the vote for it from the two new provinces was solid — something that would impress the Colonial Office. Despite all the reasons not to proceed with the three-provinces scheme and the moves towards deleting central Queensland after the previous year's defeat, Griffith still came out in this speech in favour of three provinces with no obvious sign of the reservations on that point that he must have felt.

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198 Letter from Lord Knutsford to Samuel Griffith, 13 February 1892, Mitchell Library of the State Library of New South Wales, MSQ 188, 240–2 (also in State Library of Queensland, CY 3063).

199 See above nn 25, 27.

200 *The Brisbane Courier* (20 May 1892) 4.

201 See above n 9.

202 Victorian Parliamentary Debates, Legislative Assembly, 25 May 1892, 156–64. Attempts, made at about the same time, to organise an inter-colonial conference on the topic, as one affecting all Australia, foundered on Griffith's own opposition (*The Argus* (Melbourne, 2 June 1892) 5; (9 June 1892) 5). It may well be that Griffith, with his federalist hat on, was not displeased about the identification of a topic on which single colonies were powerless to control other colonies' actions and joint action would be needed.

203 There is an analysis of northern Queensland's attitudes to Federation with further references in McConnel (n 4); Kay Saunders, 'The North Comes In! The 1899 Referendum Campaigns in North Queensland' (1999) 4 (December) *New Federalist* 7.

204 *The Brisbane Courier* (30 May 1892) 4.

And this time he had a Bill to offer, not just resolutions; he gave the second-reading speech for what I have called the first Bill, that for three provinces.[205] (Sir) Hugh Nelson, among others, was again opposed and gave the leading speech in reply to the proposals; he objected strongly to the threat of intervention from London as a motive for action.[206]

Much opposition was in evidence to the claims of central Queensland to provincial status,[207] and one central separationist speculated that the shearers' strike of 1891 might have caused some of his central colleagues to develop cold feet about their own province lest it be dominated by socialists.[208] Archibald Archer, the leader of the central separationists, was in London lobbying the *deus ex machina* and other assorted deities,[209] and Griffith himself scolded the central separationists for the weakness of their show.[210] On 9 August 1892, by the convincing margin of 38 votes to 19, the House denied a second reading to the Bill and supported the idea of two provinces only.[211] Griffith explained to the Governor, and through him to the Colonial Office, that the House could hardly have acted otherwise with only one member from the centre speaking in favour of such a province and three decidedly opposed to it.[212] Needless to say this produced unparliamentary fury and wild allegations of betrayal and conspiracies from the disappointed advocates of central Queensland.[213] In Rockhampton, a monster indignation meeting was held for which the whole town closed its doors, 'down even to the Chinese storekeepers' as one newspaper put it,[214] and in the evening one of the three offending parliamentarians, James Crombie MP (for Mitchell), was burnt in effigy accompanied by a solemn procession bearing the banner 'Burn the Traitor Crombie' and the town band playing the 'Dead March' from *Saul*.[215]

Promptly at the end of the following week, Griffith introduced the second Bill for two provinces only, despite the incongruity and danger of deadlock inherent in a federation of two components only.[216] He indicated that he had found it possible to dispense with the Lieutenant-Governors, but further, more radical changes, such as a joint legislature for all Queensland consisting simply of the members of the provincial legislatures, now only two in number, had proven unworkable. If the government were defeated in the joint body, for example, and elections became necessary, which of the two provincial legislatures should be dissolved?[217] What we now

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205 Queensland, *Parliamentary Debates*, Legislative Assembly, 26 July 1892, 786ff.

206 Queensland, *Parliamentary Debates*, Legislative Assembly, 2 August 1892, 839–43; see also at 849–50; 4 August 1892, 894; Legislative Council, 27 October 1892, 177.

207 For example, by Griffith's predecessor as Premier in Queensland, *Parliamentary Debates*, Legislative Assembly, 2 August 1892, 845.

208 Queensland, *Parliamentary Debates*, Legislative Assembly, 3 August 1892, 873; see also 27 September 1892, 1364.

209 Queensland, *Parliamentary Debates*, Legislative Assembly, 9 August 1892, 915.

210 Ibid 918.

211 Ibid 934.

212 CO 324/53/499f; 'Separation of Central and Northern Portions of Queensland' (n 25) 501, 507.

213 Eg, Queensland, *Parliamentary Debates*, Legislative Assembly, 8 September 1892, 1212–15.

214 *The Daily Northern Argus* (Rockhampton, 9 August 1892) 5.

215 *The Morning Bulletin* (Rockhampton, 9 August 1892) 5.

216 See above n 186.

217 Queensland, *Parliamentary Debates*, Legislative Assembly, 18 August 1892, 1016–17; 8 September 1892, 1208; see also 13 September 1892, 1226.

know as the 'West Lothian' problem also made it impossible to have a parliament for North Queensland but nothing for the south, for then the northerners would have votes on purely southern subjects in the federal legislature although not themselves subject to the laws they passed.[218]

On 13 September 1892, the Bill convincingly received its second reading.[219] It passed through committee on 11 October[220] and two days later was read a third time, passed the Assembly and was sent to the Council.[221] Among others, Hume Black MP from Mackay voted against it because of his belief that insufficient financial autonomy was offered to the north by it.[222] But *The Brisbane Courier* celebrated the Bill's near-certain passage into law and lavished praise upon Griffith.[223]

Yet, only a fortnight later, the nominee Legislative Council, after only a few days' debate, rejected the scheme by nine votes to 17.[224] Every man voting was a southerner; none of the three northern and central members was present.[225] The charge against it was led by (Sir) Augustus Gregory, 'the retired explorer and Surveyor-General, … a formidable and wily defender of last ditches',[226] who claimed that the Bill infringed s 9 of the existing Constitution,[227] given that it provided for the alteration of the Legislative Council and had not been passed by two-thirds of all the members of the Assembly. This was true, if only because so many members had been absent; the votes in favour had been more than double those against, but not two-thirds of the total number of members. As a result, members opposing the Bill considered, it was not properly before them at all. Byrnes S-G countered in the Council with the argument that s 9 merely prevented the Governor from assenting to the Bill without the requisite majority; it did not prevent the Council from considering it.

However, more substantive points were also made. Some of them might legitimately have been dealt with in Committee and become the subject of compromises with the people's representatives in the lower House, but fundamental objections were also urged. One point was that the Council objected to its own extinction and did not think its proposed provincial substitute in South Queensland a worthy successor. On the other hand, a surprising objection came from one or two Councillors. These nominees were opposed to the system of nomination to the upper House and did not wish to see it further reinforced by the Bill. Some of the proposed federal powers, such as to coin money and conduct external affairs, seemed beyond the capacity of a colony — very probably there were memories of the attempted annexation of New Guinea in

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218 Queensland, *Parliamentary Debates*, Legislative Assembly, 18 August 1892, 1017; 8 September 1892, 1209.

219 Queensland, *Parliamentary Debates*, Legislative Assembly, 13 September 1892, 1246.

220 Queensland, *Parliamentary Debates,* Legislative Assembly, 11 October 1892, 1524. What is instructive in the Committee's consideration of the Bill is incorporated above in my analysis of it.

221 Queensland, *Parliamentary Debates*, Legislative Assembly, 13 October 1892, 1554.

222 See above n 126. The less kind interpretation was that stated above n 31.

223 *The Brisbane Courier* (15 October 1892) 4.

224 Queensland, *Parliamentary Debates*, Legislative Council, 27 October 1892, 188. Preceding debates are: 25 October 1892, 162–7; 26 October 1892, 167–74; 27 October 1892, 174–88. Given the small compass of these debates and the constant intermingling of points made in them, pinpoint citations are not provided in what follows.

225 Doran, *Separatism in Townsville* (n 4) 117 n 89.

226 Geoffrey Bolton and Duncan Waterson, 'Queensland', in Helen Irving (ed), *Centenary Companion to Australian Federation* (Cambridge University Press, 1999) 103.

227 *Constitution Act 1867* (Qld) s 9, first proviso.

1883. Central Queenslanders' sympathisers naturally lamented the disappearance of that province. Several members declared the system expensive, requiring further taxation, cumbersome and complicated; years would be spent untangling the division of powers between the federal and provincial levels, and it might even discredit the higher cause of Australian federation. The creation of any further territorial subdivisions, in fact, might have the same effect. It was pointed out that modern technology such as the telegraph had made it possible to govern vast areas much more easily than when Queensland itself had been created. Finally, and perhaps decisively, the public should have a chance to make their views known upon the Bill at the forthcoming elections; an unelected upper House would be far less likely to stand in the way of the popular House with a freshly conferred mandate on the topic, and so the rejection of the Bill could be seen as more a question of a postponement until after the elections than an outright refusal forever.

The need for the public to have its say was a curious argument for a nominee chamber to adopt; but that need had also been repeatedly raised in its more natural home, the Legislative Assembly,[228] and it was the line adopted by, for example, *The Brisbane Courier*,[229] 'an able and earnest supporter of the three-provinces scheme'.[230] It was a particularly good point not only because the Bills involved fundamental constitutional change, but also because the Parliament of 1888–93 was to be Queensland's last five-year Parliament; it had itself legislated that future Parliaments were to last only three years,[231] and thereby in a way confessed its own unsuitability to make such changes without reference to the people. Griffith's answer was to say that the electors should have something concrete on which to pass judgement, but also finally to concede the point fully and insert provisions postponing the scheme's operation until after the imminent general election with the intention that the scheme could simply be cancelled if rejected by the electors.[232] The rejection of the Bill by the Council was accordingly anything but final, provided that the electors could be persuaded to endorse it at the forthcoming elections; if the will was there, a way could then still be found. (In 1893, the second Irish home rule Bill was passed by the Commons but defeated in the Lords, but this did not spell the end of the Home Rule movement for Ireland either.)

Accordingly, *The Brisbane Courier* pleaded for renewed action soon after the general elections to forestall Imperial intervention,[233] and some separationists still thought Griffith's scheme their best bet as 1892 closed.[234] The new Secretary of State for the Colonies in the fourth

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228 Queensland, *Parliamentary Debates*, Legislative Assembly, 27 October 1891, 1751–52; 3 August 1892, 877; 4 August 1892, 899, 906; 9 August 1892, 920–1, 930; 8 September 1892, 1217; 13 September 1892, 1232, 1235; 22 September 1892, 1341, 1345 (the future Powers J, on behalf of youth), 1350; 27 September 1892, 1369.

229 See, eg, *The Brisbane Courier* (16 August 1892) 4; (19 September 1892) 4.

230 *North Queensland Register* (Townsville, 21 December 1892) 18. *The Brisbane Courier*'s line appears to have wavered occasionally, however, as witness its leader of 8 August 1892, 4.

231 See above n 17.

232 Queensland, *Parliamentary Debates*, Legislative Assembly, 27 October 1891, 175; 27 September 1892, 1356–60; 25 October 1892, 1457.

233 *The Brisbane Courier* (11 November 1892) 4.

234 *North Queensland Register* (Townsville, 21 December 1892) 9, 18.

Gladstone ministry, the Marquis of Ripon, confirmed this realistic view in February 1893 to yet another deputation to the *deus ex machina*; until the elections were held and there was a new Parliament in place that took a stand on the matter, the *deus* would continue to apply only the brakes on his *machina*.[235] The officials in the Colonial Office also hoped for a revival of the scheme, as it would head off further agitation for separation (and thus pestering of themselves).[236] Griffith cabled Queensland's Agent-General in London (for transmission to the *deus*'s office) to the effect that the Bill would be re-introduced after the elections,[237] but by this time it was an open secret that he would be the next Chief Justice of Queensland and the value of this promise was therefore heavily discounted.[238]

Griffith also had an answer — indeed, two somewhat inconsistent answers — to the contention that his Bill was illegally before the Council. One was that his Bill did not change the Legislative Council's constitution but rather abolished it entirely.[239] This was ingenious but unconvincing,[240] so much so that it seems something of a fault in advocacy even to proffer such an argument unless it was meant as a mere face-saver for those who wished to support the Bill despite legal quibbles. His other line was better and incidentally offers an insight into Griffith's plans if Parliament had passed the Bill: he doubted (although on what precise basis he never quite said) that any majority of the Queensland Parliament was competent to pass the Bill alone, and, thus, as had happened with other Australian colonial constitutions,[241] he would advise the Governor to reserve it and ask the Imperial Parliament to cure any defects or excess of power by the simple expedient of passing a short Act authorising the Queen to assent to it and make it law; at the very least, this was the more proper and constitutional course.[242] Lord Knutsford and the Colonial Office appeared willing to take this course, if the Bill had ever been passed and reserved as stated.[243]

IV AFTERMATH AND CONCLUSION

235 'Separation of Central and Northern Portions of Queensland' (n 25) I 501, 514. The Governor also agreed with the idea of delaying action until after the forthcoming elections: CO 234/54/421f (AJCP 1946).

236 CO 234/54/83 (AJCP 1946).

237 See also *The Cairns Post* (29 December 1892) 2.

238 *The Times* (London, 15 November 1892) 5; *Daily Northern Argus* (Rockhampton, 17 November 1892) 4; see also 'Separation of Central and Northern Portions of Queensland' (n 25) 501, 513.

239 Queensland, *Parliamentary Debates*, Legislative Assembly, 9 August 1892, 913; 6 October 1892, 1490.

240 The Colonial Office may have expressed its own disagreement with this idea, had matters ever pushed it to take a stand: CO 234/54/114 (AJCP 1946).

241 Eg, *Victoria Constitution Act 1855* (Imp).

242 Queensland Parliamentary Debates, Legislative Council, 20 November 1890, 1529; 25 November 1890, 1596; 15 September 1891, 1052; 26 July 1892, 790; 27 September 1892,. 1371; 6 October 1892, 1488; 'Separation of Central and Northern Portions of Queensland' (n 25) 501, 513; see also Byrnes S-G in Legislative Council, 27 October 1892, 186–7.

243 Lord Knutsford to Samuel Griffith, 31 May 1892, Mitchell Library of the State Library of New South Wales, MSQ 188, 343 (also in State Library of Queensland, CY 3063); CO 234/53/388 (AJCP 1945). While some doubt about Griffith's argument on the two-third majority point is expressed in the series of minutes at CO 234/54/210ff (AJCP 1946), I do not think anyone would have doubted the Imperial Parliament's capacity to pass the Act suggested.

Griffith did indeed become Chief Justice in 1893 and his scheme was never revived. There are a number of reasons for this. Obviously, Federation was shortly to engulf the whole continent and it meant that, thereafter, agitation would be directed into creating new States of the Commonwealth, not making Queensland itself federal. But at the start of 1893 that was still a long and very uncertain eight years off,[244] and in the meantime the scheme fell flat primarily because it had not captured public imagination.[245] As Professor Edward Shann put it in his classic *Economic History of Australia*, 'Griffith's new plan was dropped because no-one but its author was interested enough to comprehend such complexities'.[246] An adjective often applied to the scheme shortly after its demise was 'cumbersome'.[247] When reading such reactions to the Griffith scheme it is important to remember that no one in Australia had any experience of operating the novel and complicated system of federalism at this point, and indeed within living memory the most conspicuous achievement of the world's first modern federation had been to collapse into an unspeakably bloody civil war. Griffith's scheme did not possess the boldness and simplicity of full separation and also, of course, was not for those who saw no reason for separation in any shape or form at all. It acquired a further set of enemies once the central province had been eliminated.

Indeed, in reading the parliamentary debates and public commentary on the scheme while it was still alive, one comes across numerous complaints that there was too little interest in it both inside and outside Parliament — no passion and few at the debates, as if no-one ever really expected it ever to happen.[248] Startling innovations, such as Clark A-G's American-style due process clause, or the provision for the indefinite suspension of judges by the executive, were approved with barely a word spoken on them. Nor is this mere hindsight, but the perceptions of people at the time. In the general election campaign of 1893, a search of the newspapers also reveals Griffith's scheme to be far less prominent in stump speeches than its importance to the regions, the variety of options available and its far-reaching consequences would lead one to expect. In Barcaldine, for example — a setting that did admittedly suggest many other possible topics of discussion — one candidate, a local lawyer named Fitzgerald who was a few years later to receive the honour of being Attorney-General in the world's first Labour government, concluded his hustings speech and was then asked what he thought of separation. Apologetically,

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244 See, eg, the quotation from *The Brisbane Courier*, above n 200.

245 Bolton (n 4) 206.

246 Edward Shann, *Economic History of Australia* (Cambridge University Press, 1948) 256.

247 Queensland, *Parliamentary Debates*, Legislative Assembly, 15 September 1893, 767, 772 (twice), 774; *The Brisbane Courier* (8 December 1892) 4 ('cumbrous', as on 15 October 1892, 4; 1 April 1893, 4). It is also telling that, in the House's debates on central separation on 23 and 25 August 1893, Griffith's scheme was barely mentioned. It is only occasionally mentioned afterwards: eg, Queensland, *Parliamentary Debates*, Legislative Assembly, 16 September 1897, 875.

248 Queensland, *Parliamentary Debates*, Legislative Assembly, 25 November 1890, 1594–5 (but see at 1608, where 'a more lively tone' has developed); 16 September 1891, 1061, 1068; 28 October 1891, 1782; 2 August 1892, 849, 852; 3 August 1892, 868; 8 September 1892, 1218; 22 September 1892, 1342; 27 September 1892, 1374; 29 September 1892, 1402–3 (thrice); *The Queenslander* (Brisbane, 30 July 1892) 225; *The Daily Northern Argus* (Rockhampton, 19 September 1891) 4; *The Brisbane Courier* (27 July 1892) 4; (14 September 1892) 4.

he said that he had completely forgotten the topic and his intention to give the audience the benefit of his opinions on it, although he then proceeded to do so.[249]

After a short interlude of some months under Griffith's former coalition partner Sir Thomas McIlwraith,[250] the new Premier was (Sir) Hugh Nelson (October 1893–April 1898), an opponent both of continent-wide federation and of any form of separation within Queensland. Clearly no assistance could be expected from him. To make matters even worse, a tremendous depression and financial crisis then engulfed Queensland (as it did the rest of Australia, to varying degrees), and both Lord Ripon and Nelson himself rebuffed all attempts at constitutional change as most inopportune given the economic crisis.[251] By the time the crisis was over and Nelson had moved on, Australian federation was well within sight again and effort was naturally devoted to it instead. At almost the last minute, at the 'secret' Premiers' conference of January and February 1899, there was added to s 7 of the federal Constitution a provision enabling Queensland to be divided … for the purpose of Senate elections only.[252] Nothing else specifically for northern Queensland separationists appeared, and high hurdles in Chapter VI on 'New States' were set up against them,[253] possibly as the result of still more tactical blunders on their part[254] — in this case, spending too much time in Brisbane arguing fine points about the make-up of Queensland's delegation to the Federal Convention rather than sending a delegation of some sort from Queensland as quickly as possible to take part in, and try to exert some sort of separationist influence over, the actual drafting of the federal Constitution under which the fate of their cause would soon fall to be decided.[255]

A further factor that deterred some separationists from attempting to resurrect the three-Queenslands scheme is the labour movement's stunning successes in northern Queensland in the

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249 *The Western Champion* (Barcaldine, 11 April 1893) 8; see also *The Western Champion* (Barcaldine, 2 May 1893) 3.

250 A small amount of work on some form of scheme for the division of Queensland appears to have continued fitfully under him until August 1893 and may be found in Queensland State Archives, item no 861756. Nothing, however, occurred in Parliament.

251 'Separation of Central and Northern Portions of Queensland' (n 25) 501, 535, 565. This line continued to be taken also under later Imperial governments; see 'Separation of Central and Northern Portions of Queensland — Further Correspondence', Queensland Parliamentary Papers (1898) III 823; 'Correspondence in relation to the Separation of Central and Northern Queensland', Queensland Parliamentary Papers (1899) I 121.

252 But see now *Commonwealth Electoral Act 1918* (Cth) s 39, replacing *Senate Elections (Queensland) Act* 1982 (Cth) s 2.

253 It is unnecessary to say more on this topic, as an excellent analysis both of the history of these provisions, with especial reference to Queensland, and of their current meaning and significance has recently been published: Anna Rienstra and George Williams, 'Redrawing the Federation: Creating New States from Australia's Existing States' (2015) 37(3) *Sydney Law Review* 357. See, further, above n 203. It is also remarkable that in his major speech on the proposed federal Constitution (Griffith (n 91) 118; *The Brisbane Courier* (27 May 1899) 9), Griffith devoted only two brief and uninformative sentences to the possibility of new States.

In passing, it may also be noted that the new Constitution's provisions also marked the death of the *deus*, or at least the final decommissioning of his *machina*, for by reason of them the Colonial Office clearly lost all practical responsibility for subdividing Australian colonies, notwithstanding the theoretical permissibility of paramount force legislation from Westminster. This is quite in accordance with Griffith's programme of ensuring that Australian matters were handled in Australia, which also produced provisions such as s 51(xxxviii): Debates of the Australasian Federation Conference, 31 March 1891, 524.

254 See above n 23.

255 Bolton and Waterson (n 226) 107.

1893 general elections; some (but not all) more conservative separationists found their ardour for autonomy as a labour-led province — a possibility after the successes of 1893 — distinctly cooling. (Conversely, if enthusiasm among labour men went up a notch, this effect seems to have been quite moderate.[256]) As well as all the rhetoric about socialism, anarchy and so on, sugar interests, for example, could rightly fear that a labour government in power in Townsville would mean a faster end to cheaper Pacific Islander labour than was otherwise to be expected.[257] While a provincial government could not have forced the Pacific Islanders to leave, its powers would have been amply sufficient for measures such as raising their wages so high that there would no longer have been any financial benefit in employing them in preference to Europeans.

Despite the complexity of the scheme, which could not have been significantly diminished given its nature, one can only admire Griffith's inventiveness and the apparently endless creativity of his intellect. After March 1891, he was not, admittedly, working entirely without help, for the first National Australasian Convention of 1891 had met and enabled him to test out various ideas with colleagues and the public, thereby enriching his own thinking with others' suggestions — most notably, perhaps, Clark A-G's due process clause. Nevertheless, the origins of the three-Queenslands scheme pre-date that conference, and it is a testament to Griffith's originality that he conceived it as an innovative solution to the agitation for separation (and it was also good drafting and debating practice for the successful effort at federating that was to come).[258] The mature three-Queenslands scheme blended Canadian and American elements along with the occasional idea from other countries and some of Griffith's own innovations, such as his two different sets of Vice-Regal arrangements and the rules about tariffs, into a substantial and workable scheme that was adapted to Queensland's unique needs and also — here the circle was most cleverly squared — ensured that Australian federation was advanced rather than retarded if separatism triumphed in Queensland.

Griffith showed his awareness that constitutionalism in general, and its British expression in particular, was not a set of unalterable semi-divine commandments but rather a set of constantly developing principles. He was not dogmatic but open to a variety of solutions, on the customs point, for example, and to some innovations, such as the idea of non-parliamentary ministers and allowing them to speak in the House. He did not impose his own ideas on questions such as whether each province was to have a unicameral or bicameral Parliament.

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256 See above n 8.

257 'Separation of Central and Northern Portions of Queensland' (n 25) 501, 515–16, 521 (contra), 539 (also contra), 564; Queensland, *Parliamentary Debates*, Legislative Assembly, 15 September 1893, 770; Doran (n 3) 66–7, 82–3; Doran, 'Separation Movements in North Queensland' (n 4) 96; Fitzgerald (n 4) 296; Neale (n 4) 211; above n 208. On the other hand, Blainey, *A Land Half Won* (n 4) 201–3 sees the failure of the secessionist movement as 'probably a turning point in our history' because it prevented the possible emergence of a separate colony that might have been dominated by sugar interests (rather than labour interests), stayed out of the Commonwealth to preserve black labour, and ultimately become a majority non-white colony or dominion with a privileged white enfranchised class. This sort of thing was exactly what labour interests in North Queensland and White Australia's supporters on the rest of the continent feared if sugar triumphed over labour. It was also the fear of liberal statesmen such as Sir Samuel Griffith, who saw that such an arrangement under which one race ruled over another was not sustainable; see his 'The Coloured Labour Question in Australia' (1892) 1 *Antipodean* 13.

258 Bolton and Waterson (n 226) 95.

Nevertheless, Griffith had his own blind spots. His Senate was carefully structured to ensure exactly equal power for each province — down to the provision in the second Bill that an absolute majority was needed for all measures beyond the ordinary appropriations — and he even expressed the view that his plan otherwise would not have constituted a true federation, but merely a Canadian-style semi-federation.[259] Griffith conceived of the safeguards of federalism as primarily political and not judicial. While he mentioned in passing the existence of judicial review, far more attention was given to the Senate as the protector of the northern province in particular against the numerical might of the south. Griffith did not grasp that a polity, once in existence and faced with a competing centre of power, would naturally attempt to aggrandise its own powers and that political safeguards were accordingly likely to be insufficient. Secondly, Griffith utterly failed to recognise the crucial role of judicial methods of interpretation in determining the extent of granted powers. No doubt the author of the implied immunities and reserved powers doctrines came to see the error of his ways on these points when a Federation was actually created and he was its principal judge faced with laws that a vigilant States' house would never have passed and a minority of dissenting judges insisting on very different interpretative methods from his own.

Most importantly, perhaps, in designing and explaining his scheme Griffith showed no serious awareness of the fact that, as the northern leader JM Macrossan, of all people, put it in the 1891 Australasian Convention, 'the influence of party will remain much the same as it is now, and instead of members of the Senate voting, as has been suggested, as States, they will vote as members of parties to which they will belong'.[260] In fact, there were already indicators on the horizon that the influence of party would not remain the same, but rather would grow considerably — most notably, the rise of labour candidates heralding the development of the modern disciplined political party over the following two decades. The same point was made by others at around this time, most famously by Alfred Deakin.[261] But it appears to have escaped Griffith.

Indeed, not merely the imminent rise of the modern party system but the very idea that class, ideological, religious or ethnic interests might cut across those of geographical location appears at first sight to have escaped Griffith entirely. But, although one is sometimes tempted to think so, the Premier who first banned and then, in a startling reversal, again permitted Pacific Island labour in Queensland,[262] cannot possibly have failed to notice that northern labour men, even if separationists, had very different priorities from the bosses and landowners, and geography was not the key to all political differences.[263] Perhaps he thought merely that geographical location was the proper or most obvious organising principle for resolving such

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259 See above n 91.

260 Debates of the National Australasian Convention, 17 March 1891, 434.

261 Debates of the National Australasian Convention, 15 September 1897, 584. Referring to Griffith's (three-province) scheme specifically, *The* Sydney *Bulletin* (23 July 1892) 6 feared that, with three tory governments in power provincially, 24 tory senators 'will be fastened on the shoulders of the people as senators'. See also *The Brisbane Courier* (1 October 1892) 4.

262 See above n 9.

263 See also above n 99, although note that this was in 1899 and the realisation might have dawned on Griffith in the meantime.

disputes if they could be resolved locally (in our own day, this thought has acquired a label: subsidiarity). He needed, however, to take much more seriously influences on political standpoint beyond mere geography, given that so many of those influences weakened the geographical determinants of political views that his scheme was designed to cater for and protect.

It is true that the election of the senators by the provincial legislatures instead of by the people would have promoted geographical location at the expense of other interests somewhat; unless commanding a majority in (one House of) the provincial legislature, labour interests would presumably be unable to have any senators elected — but this thought throws light upon another glaring omission in the Griffith scheme: at no time was any in-depth consideration given to the method of selecting senators,[264] and in particular to ensuring that a government, particularly in the single-House province(s), could not simply steamroll through its own cronies as senators. Griffith said merely, and rather naively, that he 'did not know anything in history which tended to show'[265] such a possibility! This sort of statement goes beyond mere demonstrative optimism and rhetorical appeals to the better angels of our nature. His view that the appointment as opposed to election of Lieutenant-Governors would attract a better class of man also sounds somewhat naive; although it is true that Australians have generally been extremely well served by their State Governors, the opportunities and temptations for kicking inconvenient colleagues upstairs to a doubly subordinate vice-vice-regal role would be legion, and the fact that the appointment would be made locally in Brisbane would have eliminated one important formal control — the authorities in London[266] — as well as the informal control constituted by the need to be able to propose a name to the Monarch with a straight face.

Griffith's scheme was built for a type of gentlemanly politics that was going out of fashion as he spoke. For him, politics was a matter of principle just as much as power. But that was not everyone's way of playing the game.

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264 Indeed, cl 18 of both Bills, being in about the same form as the first paragraph of s 9 of the Australian Constitution, specifically left this question to the legislatures themselves. See also above n 93. I am, however, referring here to electoral methods such as simple majority, proportional representation and so on, not to whether the upper House was involved.

265 Queensland, *Parliamentary Debates*, Legislative Assembly, 4 October 1892, 1435.

266 See further above n 58.