# PRIMAVERA: A STUDY OF SOVEREIGNTY, FEDERALISM AND COLONIALISM IN CONFLICT

by

**Charles Bright**

*Sir Charles Bright, Chancellor of Flinders University, was a member of the Faculty of Law in 1960 and 1961 and from 1964-1975.*

Most of my cultivated readers are familiar with Botticelli's Primavera. It will be remembered that on a flowery mead, with a background of orange trees bearing ripening fruit, Aphrodite stands pensively. On her right are the three barefooted, diaphanously clad Graces, Aglaia, Thalia and Euphrosyne. Further right again, Hermes averts his gaze. On Aphrodite's left a black-a-vised Zephyr is clutching a frightened Chloris who is merging into Flora. Above Aphrodite, Eros is directing a shaft. It is springtime. The seeds have quickened into flower. The fruiting season is upon us.

The picture is usually described as being allegorical and I propose to treat it as a legal allegory. Aphrodite is constitutional law. Zephyr is a constitutional lawyer who moulds Chloris, the artless expression of law as contained in the constitutions, into Flora, the full-bodied statement of Crown limitations and human rights. Hermes and Eros are reserved for characterization by my readers: there are several suitable candidates among our founding fathers.

The object of this study is to devote some attention to the three Graces, for it is necessary to establish a rapport with them before approaching the feet of Aphrodite. Aglaia, Thalia and Euphrosyne disport themselves nimbly and move harmoniously, but, as we rename them Sovereignty, Federalism and Colonialism, they become elusive and oleaginous to the touch. They are still found in close association, but little is left of their harmonious co-ordination. Their attributes are not easily expressed in words, but we must try to do so.

Definitions of terms are always necessary but often impossible. A definition, according to the OED, states exactly what a things is or what a word means. But in the realm of constitutional law, to be exact and certain is to risk being out of date and wrong.

Sovereignty is the dominant concept. Federalism is a form of division of sovereignty, and colonialism is an attitude of mind affecting the application of sovereignty.

## Sovereignty

Sovereignty exists where political power is successfully asserted. In order to exercise power a ruler must be dominant in a territory. So Grotius, in 1633, denied that the Portuguese were sovereigns of Java and

the Moluccas. *"Quia dominus nemo est eius rei quam nec ipse unquam nec alter ipsius nomine possedit."*

It is necessary to analyze this matter a little more deeply. There is absolute sovereignty, limited sovereignty and divided sovereignty. The first is exemplified by the Queen in Parliament at Westminster. In the United Kingdom the Parliament can, as we were assured long ago, turn a white man into a black man and *vice versa*. No matter how contrary to the laws of God or of physics, a law duly passed by that Parliament is valid and operative. If it is couched in such obscure language as to be almost or quite unintelligible, it will in due course be explained and restated by the courts, ie transformed from Chloris into Flora. It will never be declared void on the ground that it is beyond power. There are two reasons for this. The first is that there are no prohibitions applicable to the Parliament — no rights that it cannot infringe. The second is that there is no competing body exercising power over the same persons. I omit EEC considerations.

Limited sovereignty sounds like a contradiction in terms. How can a political body be sovereign unless it can do as it wills? Yet in practice limited sovereignty has long existed. It is unrealistic to assert that early colonial governors, separated by a year from the source of their authority, did not in practice exercise in their executive councils some of the attributes of sovereignty. As the colonies progressed along the paths of self-government they acquired legislative power over an increasing number of topics. Their legislative assemblies were not mere agents of the Parliament at Westminster: within the limits of their conferred powers they were principals, exercising limited territorial sovereignty. There is nothing new in the concept of limited sovereignty as applied within British territories. It is as old as the Durham Report.[1]

Sovereignty must also be separated into its territorial and extra-territorial aspects. External sovereignty of nations depends for its operation on mutual respect for and acquiescence in the sovereignty of each by all. Failing such external respect and acquiescence, the claim of any nation to external sovereignty must depend on its ability to enforce the claim. It is an interesting distinction between India and Australia that in the acquisition and exercise of internal and external sovereignty or "nationhood", or at any rate of some fragments thereof, external sovereignty preceded internal sovereignty in India, whereas in Australia they came in reverse order.

Limited sovereignty connotes that sovereignty is divided between two centres of power. Divided sovereignty exists when a colonial legislature has some powers but not total power. In the British system the colony may share territorial sovereignty with the United Kingdom. It probably will not have any extra-territorial sovereignty. Sovereignty may also, as we shall see, be divided between political units of a territory, as in a federation.

The application of constitutional laws involves an understanding of the meaning and content of political power, particularly, in a former group of colonies, limited power. In a colonial situation power tends gradually (or sometimes explosively) to shift from an external ruling group to an internal group. Power in a federation is never vested absolutely in one

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1 Rumbold, *Watershed in India 1914-1922* (1979) 57, n17.

group. It may be, and usually is, shared between individual units in the group and a central unit. The former external ("imperial") ruling group may retain a residuum of power.

Power shifts, almost imperceptibly, with the passage of time. There may be no variations in the statutes and administrative procedures which are the sources of power and yet it may be obvious that the shift has occurred. I refer later to the extent to which sovereign power has drained out of the office of Governor.

## Federalism

Political power is exercised over people. The people of Australia are subject to two powers: the power exercised by or pursuant to the Parliament of the Commonwealth or that of a State. Each Parliament likes to call itself sovereign, and yet each is subject to limitations or restraints. These are by no means the same as the limitations imposed by geographical considerations. They are limitations with respect to control exerciseable over individual persons in the area. Moreover, there are some kinds of control over persons that are not within the power of either the Commonwealth or a State Parliament. No Parliament can trespass on rights granted by the Australian constitution. And there is a residuum of imperial power.

Any discussion, however slight, of political power inevitably leads to an argument as to the location of that power. In one sense it is true that ultimate political power is vested in all the people of a particular territory. In the existing Australian system "the people" can exercise their power only by a vote, including a vote at a referendum. The vote, in the case of an election, vests power in a ruling group in Parliament; in case of a referendum it authorizes or prohibits (but never directs) some form of legislative action. Even if "the people" become so aroused that they change the political system, the exercise of power, after a successful revolution, will vest in a new ruling group. I am not qualified to discuss these concepts in detail, nor is this the place to do so. I choose Parliament (whether Commonwealth or State) as the outward and visible body through and by which power is exercised.

Restrictions on power can be made effective in various ways. In Mexico a litigant can obtain from the Supreme Court an injunction restraining government officials from enforcing an invalid law against him. The law is not struck down: it still operates against persons not parties to the litigation. In the States of India constitutional instructions as to rights of citizens are not justiciable in the courts: those instructions are interpreted and applied by the State Parliament itself. But the usual method in a federation, since Marshall CJ, is to confer on the courts the power to declare that an Act contravenes for some reason a restriction on power and is therefore invalid. The reason may simply be that the laws of one Parliament have primacy over those of the other Parliament. Or perhaps the law is one which the Parliament is not authorised to pass by its basic grant of power, or is forbidden to pass by a restriction accompanying the grant.

The federal principle or system of political organisation is in the first place the division of sovereignty or power over citizens between two legislating authorities (with a rider that some forms of exercise of

sovereignty are forbidden to both) and in the second place a method of solving without civil war the disputes as to exercise of sovereignty that must inevitably arise. I said "legislating" authorities not executive authorities because in the main the executive derives authority from an Act of the legislature. I am not concerned here to discuss solutions to conflicts of powers that have been tried and found wanting. The doctrine of immunity of instrumentalities was one failed expedient. It was found to be like the Emperor Galba – *omnium consensu capax imperii nisi imperasset.* In a federation, the collective wisdom that is applied to present problems comprehends the failed expedients of the past. There is indeed a federal approach to problems. The solutions are not mere abstract legal interpretations of documents, despite the fact that they are stated in legalistic terms.

There are also restraints on the executive which we choose to state in mystic terms as those exerciseable by or against the Queen in right of the Commonwealth or the Queen in right of the State; mystic because they are mysterious, not fully understood and not stated in absolute terms, but in terms that change with time, place and circumstance. The prerogative writs are the vehicles for some of these: in adjudicating on such a writ a Court may restrain acts thought to be unfair, sometimes timidly saying that the Crown, as embodied in some executive officer, "ought not" to act in a certain way. Again, the reserve powers of the Crown, which have come in for a lot of attention since 1975, can obviously be used to cut off executive action, although any such exercise seems likely, in political terms, to be the last exercise of its kind. For example, the Governor of South Australia has a printed and public set of instructions issued to him when he assumes office. One of these instructions authorises him not to act on the advice of his Executive Council if he disagrees with it. In terms of apparent power it is the brightest jewel in the gubernatorial crown. Can anyone doubt that if, in some future controversy between Governor and Executive, the Governor chose to act on that instruction, the result would be the withdrawal of the instruction? Like some other branches of the prerogative it may be regarded as valid provided it is held available for use but never used. And, finally, what powers, other than advisory powers, are vested in the Foreign and Commonwealth Office in relation to Australians?

Constitutional law in a unitary system like that of the United Kingdom or New Zealand concerns itself mainly with structure of government – who are the active agents in the process where the exercise of power is centred; what are the channels of power? Bagehot distinguished the active from the ornamental (he calls them respectively "the efficient" and "the dignified") and Crossman brought him up to date. It is unfortunate that the Americans when they drew up their constitution were so attracted to French political philosophy, in particular to Montesquieu, that they laid emphasis on the separation of powers. It is even more unfortunate that those who drafted the Australian Constitution were infected from the same source. For while it is convenient that legislative, executive and judicial powers should be distinguished from each other and exercised by appropriate persons, it is highly distasteful that they should give rise to demarcation squabbles. There is nothing which makes the theory of separation of powers more appropriate in a federal than in a unitary system and it is in my opinion a pity that the theory has had such sway. But the theory does not connote any division of sovereignty, for, in a unitary system, whether the whole power of the State is

exercised by a single absolute monarch, or by a committee whose members exercise various functions in rotation, or by a group whose members are each restricted to one branch of power, the sovereign power itself is not divided as it is in a federal system.

I do not think that the dominating position of a strong Prime Minister, or the authority of a cabal of ministers where there is a weak one, alters the concept that Parliament is the perceived source of political power. The power of the Prime Minister or the cabal extends only to executive, not legislative, action and if it is in breach of the law the courts ought to say so and their rulings ought to be respected. To state what the law shall thenceforth be on any topic is the function of the Parliament as interpreted by the courts and as administered by the executive. That is not a full summary of the situation, nor is it meant to be. I seek only to identify the Parliament as the body in which power may be said to reside. We may look before the parliamentary exercise of power to the people, and after that exercise to the executive, but for the purposes of this paper the Parliament itself is, as I said earlier, a sufficient embodiment of political power.

Federal systems usually connote a group of political entities whose citizens agree to a withdrawal of certain powers which are then vested in a central political entity. Any citizen in any of the combining entities is thus subject to two sovereignties, and the total sovereignty is divided. How the powers are divided, and which set contains the residual powers, are irrelevant to the concept. Usually the combining entities have lived separately for a period and built up a local loyalty in their citizens. So South Australia had its own English Governor, its own Agent-General in London (the nearest the Australian colonies ever got to diplomatic representation abroad), its own executive council and so on. The Commonwealth Government was not at first regarded as a superior entity; it was thought of rather as a kind of useful quango created as an instrument of all the six colonies. If that statement is considered extravagant it at least corresponds to the concept of a federal system as sold to a lukewarm Australian public.

It is not essential that the combining entities should have had a previous independent existence. India is an example of a country where the States and the central power came into existence at the same time and derived their authority from the same group of documents.[2] Nor is a declaration of constitutional rights a measure applicable only to a federation. It is quite possible to entrench rights in a unitary form of constitution, as South Australia has done in its provisions for resubdivision of electoral boundaries. The Statute of Westminster was a voluntary abrogation of rights by the United Kingdom Parliament. Such an abrogation is the equivalent of a grant.

Federalism is an attitude of mind, a view of the appropriate division of powers between the combining political entities and the new central entity. This is the debatable land, forever fought over by rival claimants motivated usually by considerations of money. A cynic would say that provincial politicans incite fears of central power-usurpation in order to entrench themselves into a situation in which they themselves may be

2 Unless the stultified Government of India Act 1935 can be regarded as extending its effect into the period of independence.

able to continue to exercise as much power as possible. This may be glorified as local patriotism. But my cultivated readers will be familiar with the definition of patriotism expressed by Dr Johnson to Boswell on 7 April 1775. Any form of federal constitution must necessarily create wide areas of overlapping power. Emotions are easily stirred when it comes to exercising powers in the overlapping areas. Some citizens will invoke "the spirit of federalism" in aid of an argument for greater control from the centre. This is not an argument for abolishing the federal system and substituting a unitary system. It assumes the continuance of a federal system and the continued exercise of many powers by the States. It directs its weight in the main on the overlapping area. I say "in the main" because it also relates to certain functions which are created by State statutes but funded by Commonwealth money – eg universities. There is a good deal to be said for a view that the government which pays the piper and, for the most part, calls the tune, should also provide the legislative support for an institution. On the other side, the spirit of federalism is invoked by those who see the States as legitimate and the Commonwealth as an interloper. With inflation continuing, and with the Commonwealth controlling the growth taxes which provide the funds, it is hard to see the States winning that argument, whatever the Commonwealth Constitution may say, and whatever the founding fathers meant to say.

So the word "federalism", like "democracy" and a few other words in common use, can be and is used as a support for any argument in the field. Any Australian constitutional assembly, no matter what the arguments, can be accurately described as permeated by the spirit of federalism so long as no substantial body of delegates advocates transferring all sovereignty either to the States or to the Commonwealth.

## Colonialism

So far I have not discussed the third Grace, that ungainly girl Colonialism. Presumably the word relates in some way to a colony, but the attribute called "colonialism" is not isochronous with the colony itself. How and when a colony starts, what its distinctive attributes are, and when it becomes something else, are questions "wrapped in mystery". Any general discussion becomes obscure at once. Does there have to be a "mother country" and, if so, must the mother country have continued sovereign rights in the colony? I would say "No" to both questions, although I concede that those attributes are often present. As to when a colony starts, I refer to New South Wales in its first 20 to 30 years. Who were the colonists? Not the prisoners surely, for they had no urge to settle in the new country. Not the members of the army, for they were in the country only in the course of duty. Not the Aborigines, for reasons too painful to be discussed. There was a handful of free civilians, but at the beginning they were, in the main, parasitic on the penal settlement and in many cases hoped for a short stay in Australia while they made their fortunes, and for "a long happy retirement in England".[3]

Lord Bathurst certainly did not regard the settlement at Port Jackson as a colony. In his first letter to Bigge of 6 January 1819 he speaks of

3 Wright, *The Cry for the Dead* (1981) on the state of mind of squatters.

administering the settlements there "as fit receptacles for convicts", and in his second letter of the same date he says, "You are aware of the causes which first led to the formation of settlements in New Holland; as they were peculiar to themselves, these settlements cannot be administered with the usual reference to those general principles of colonial policy which are applicable to other foreign possessions of His Majesty. Not having been established with any view to territorial or commercial advantages, they must be considered as receptacles for offenders, in which crimes may be expiated at a distance from home ... So long as they continue destined by the legislature of the country to those purposes their growth as colonies must be a secondary consideration." Even in the free settlements many migrants expected to make their fortunes and return home. Only later did necessity or choice dictate that they should remain in Australia. So there was in these settlements too, a transitory element.[4]

Australia, after an uncertain start and an intrusion of reluctant convicts and their keepers, gradually came to present a picture of six groups of free colonial settlers, supplemented in four of the groups at various times by large penal establishments. South Australia must not be too smug here, for its rulers did their level best in the 1860's to get Indian coolie labour. It was the Government of India which rejected their efforts.

There is a strong element of fantasy in constitutional practice, especially in countries which have not changed their written constitutions in relevant respects for many years. There is also an etiquette. Consider the position of Governor. Every statute of South Australia records that it is enacted by him. Every proclamation is made by him in his Executive Council. It is a breach of etiquette for Ministers to stay away, except by permission or when absent from Adelaide, from Executive Council. It is bad manners for a Minister to announce that he will issue some order: he should say that he will advise the Governor to do so. In other words, we perpetuate in fantasy what was once the situation in fact.[5] Most remarkable is the Royal Real Presence. The Governor represents the Queen. In the early days of the Colony of South Australia it was the practice to put at the head of court orders, "In the presence of The Queen herself", or a similar phrase. Boothby J was enchanted with this practice, which might have surprised the young Queen Victoria if it had come to her notice. There are many other fantasies and etiquettes which are obvious once one starts looking for them. And although we do not nowadays say that Her Majesty is present when she is not, we are constantly reminded of her by other surviving forms of words.

The dominating group in each Australian settlement was, or became, the free colonial group. The break-up of New South Wales, and the eventual grant by the United Kingdom Parliament of responsible government to all six colonies, acted as a recognition and a reinforcement to each of its status as a self-governing colony. The antipathies between the six, and the colonial attitude of veneration for the "mother-country", had the effect of cementing each colony to the

4 See Bright, "John Bray in Context" (1979) 7 Adel LR 7.

5 In this respect we merely reflect English usage. Palmerston's celebrated quarrel with Queen Victoria was caused by his practice of making foreign policy statements in the Queen's name and informing her afterwards.

United Kingdom more firmly than they were cemented to each other. That effect is taking an unconscionable time a-dying.

Colonialism is an attitude of mind. In Australia it may be regarded as a dilution of that other attitude of mind, federalism. For colonialism in Australia looks to the ties with the mother country as central, whereas federalism regards the union of the six colonies as central. I cannot here analyse in detail the nature of colonial ties. In my opinion they tend to cause people in the colony to downgrade their own attributes (except the attribute of unquestioning loyalty to the mother-land) and to look at the rest of the world through the eyes not of persons in Australia but of persons living in England. The colonials were and are in a cultural sense adjectival. Let me take an example with which lawyers will be familiar. *Ex hypothesi,* to a colonialist, English judges are better than Australian judges. So some Australian judges find that the opinion of an undistinguished English judge is a powerful support for their judgment on a somewhat related topic. Let me not be thought to condemn English judges: many of them are as good as most Australian judges and some are better. But the colonialist view would attribute to them superiority merely because of the label.

Colonials were not helped to a greater cultural self-sufficiency by the barely disguised feelings of superiority expressed by and on behalf of some English Governors and especially their wives. Lady Tennyson (1898-1901) and Lady Russell (1914-1919) rejoice in their letters when the uppity colonials take a reverse. Such attitudes must necessarily have rubbed off onto the vice-regal entourage and its authorised "list". One of the interesting exercises in Australian colonial history is to delineate the gradual diminution of the powers exercised by Governors in the political machine. Yet there has not for many years been any significant change in the language by which the powers of a Governor are expressed. It may be that the extent of colonialism varies directly with the perceived real powers of the Governor.[6]

The gradual realisation by Australians of the attitude of cultural superiority exhibited or believed to be exhibited by many English persons towards them has powerfully affected opinion in Australia. "Colonial" used to be a term of commendation: it is now one indicating inferiority.[7] It is still used freely in newspapers in England to denote any Australian citizen. I doubt if the term when so used is anything more than a label. Perhaps the habit will cease, as has happened with respect to citizens of the United States. We are, after all, a very young country. But while few Australians wish to be called colonials the attitude of mind called colonialism still flourishes, and causes the six States to be still regarded as colonies. No one doubts, I hope, that Australia is, looked at as a whole, an independent sovereign State. Yet paradoxically, it is, in many ways, a State made up of six colonies. In this connexion it must be remembered that the Aborigines were never colonials or infected by colonialism. To them the colonists were invaders. Aboriginal territories had no relationship to colonial boundaries.

6 The hypothesis would find little support in Queensland or Western Australia if some recent legislation in those States reflects public opinion.

7 Contrast "sturdy colonial settler", "colonial wine" and "colonial poet".

## The Australian Federal Structure

There are two ways of looking at Australia:

(1) as six colonial-type States with a central government performing for the sake of convenience, some common duties;

(2) as one country in which, for geographical and administrative reasons, sovereignty is divided between the central government and the State governments.

I must declare myself firmly in favour of the second view. I believe that that view embodies the desirable basic approach to the resolution of constitutional disputes.

I do not think that we have done very well in Australia in the division of sovereignty. The industrial jungle, the refusal by States to yield up the small residual role that they now play in family relations, the extraordinary dual system of crown priorities in company windings up, the arguments in State and Commonwealth courts on demarcation of jurisdiction, the complications in the field of finance and the indirect controls exercised by the Commonwealth over activities carried on pursuant to State power are but a few of the many cases in which sovereignty, federalism and colonialism continue to collide and conflict. A federation is a difficult enough political creation at the best of times. The phrase, "checks and balances", was formerly much in vogue but is inexact. The word "checks" emphasizes the notion of obstacles to the exercise of power, tangible obstructions which divert power from its course. The word "balances" comes nearer. Metaphors are usually dangerous, but perhaps we may think of some manifestation of forces in tension, as in a ship's masts and sails. The political forces in a federation are centrifugal, with the States tugging at and yet bound by the cords which tie them to the centre, and the other cords which tie them to each other. These various forces create a balanced condition of tension which gives, or ought to give, stability to the whole structure.

The structure is complicated enough but reaches its own state of equilibrium. This is the equilibrium found in the United States or in India. Australia on the other hand is in a somewhat unstable equilibrium, for it is subject to another force, external to itself — the residual force of colonialism. It is also subject to an ambiguity which lies at the heart of power. Let me deal with each of these in turn.

In a simple federation, power is divided between central and provincial governments. Except to the extent that there is a constitutional prohibition, what the centre cannot do the provinces can do, and vice versa. Between them they are invested with the totality of power. If there is a dispute as to where power lies, the constitutional courts solve the dispute. But, for historical reasons, that is not the whole picture in Australia. It is not true, to start with, that at the date of federation all political power was vested in the six States and the Commonwealth.

Immediately prior to federation the six colonies were invested with such powers as had been granted to them by the Parliament at Westminster and were subject to the Royal prerogative as exercised by the Governor. On some topics they could legislate at will; on some other topics they could agree on a Bill but that Bill could not become an operative Act until it had been referred to London for the royal assent (which was not always forthcoming); on some other topics they had not

even qualified legislative power. Immediately after federation the States retained such of their pre-federation powers as had not been taken away from them and vested in the Commonwealth. They received no additional powers. There are two consequences which interfere with the application of federal tensions.

The first of these consequences is that Bills which formerly went to London for the royal assent still follow the same course.[8] When a Bill is reserved, one must assume that the consideration given to it in London is more than a mere ritual of delay. If there is *some* chance that the Bill will not be assented to one must ask why. It could be on moral or religious grounds as happened with the early Bills to permit marriage with the sister of a deceased wife. Or it could be on other grounds of "ought" or "better not". Or it could be on grounds of presumed transgression of limits of power. In fact I believe that the royal assent has not been refused to any Bill for many years.[9] There is no legal requirement specifying whether, in considering the Bill, the relevant officials should act on the advice of English or of Australian advisers. If the matter were referred to advisers in Australia I believe that those advisers would usually be consultants to the Governor-General, not to a Governor. Whatever the process, it is clearly not an application of federal forces and tensions. If the likelihood of the royal assent being refused is, as I believe, diminishing, this factor also contributes to uncertainty and instability in the political structure. A Bill which ought to have been reserved for royal assent but was not so reserved is probably not valid after being assented to by the Governor. A Bill which has received royal assent can still be declared invalid if the courts consider it to be beyond power.

The second consequence also rests on historical foundations. Suppose there is a challenge to a State Act, based on alleged want of power. In such a case, whether or not the Bill has been reserved for and has received the royal assent, the decision as to power need not remain within the federal system, as it does in the case of an inter se question. It can go to the Privy Council for final adjudication.[10] That is surely a

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8 In the last five years the following is a record of Bills reserved:
Constitution Act Amendment Bill (No 5) 1975 —
Reserved 23 October 1975 — Royal Assent Proclaimed 22 January 1976 — Act No 122 of 1975.
Governor's Pensions Bill 1976 —
Reserved 4 March 1976 — Royal Assent Proclaimed 1 July 1976 — Act No 29 of 1976.
Boating Act Amendment Bill 1978 —
This Bill is somewhat unusual in that it was assented to by the Governor on 7 December 1978. However, section 2(2) of the Act provided that "This Act shall not come into operation until Her Majesty's pleasure thereon has been publicly signified in this State".
On 1 November 1979, a proclamation was published in the Government Gazette, notifying Royal Assent to the Boating Act Amendment Act 1978, and fixing 1 November 1979 as the day on which the Act shall come into operation — Act No 108 of 1978.
Constitution Act Amendment Bill 1981 —
Reserved 18 June 1981 — Royal Assent Proclaimed 8 October 1981 — Act No 63 of 1981.
Governor's Pension Act Amendment Bill 1981 —
Reserved 18 June 1981 — Royal Assent Proclaimed 8 October 1981 — Act No 64 of 1981.
Constitution Act Amendment Bill (No 2) 1981 —
Reserved 17 December 1981 — Royal Assent Proclaimed 8 April 1982 — Act No 32 of 1982.
The author is indebted to the Clerk of the Legislative Council for supplying this information.

9 Certainly no reserved Bill has failed to attract the royal assent during the last five years. Matrimonial causes has become a Commonwealth legislative responsibility and this has reduced the number of reserved Bills.

10 Electoral Boundaries case: *Gilbertson* v *SA* (1977) 14 ALR 429.

major intrusion into the federation's judicial processes. For we started off with the hypothesis that an inherent feature of the judicial system in a federation was a constitutional court which gave a final adjudication whenever there was a dispute as to power and the distribution of power.

The argument used to be frequently advanced, and is still not altogether forgotten, that the Privy Council is a protection to the States. Inherent in the argument are the following concepts:

(1) The States are in need of protection against the Commonwealth.

(2) The High Court cannot be trusted to act impartially or is otherwise not a competent tribunal.

Those who adhere to the argument are in my opinion still living in a colonial afterglow. They think of their State as a separate colony menaced by an external enemy, not as a unit in a single country. Such attitudes cannot be changed by reasoned persuasion, for they are rooted in chauvinism. One can only disagree and hope that time will prove them or their opponents wrong.[11]

I referred to an ambiguity. In the federation of the United States the Governor of a State is the active central figure exercising the executive power of the State. He needs legislation to authorise certain courses, especially those involving expenditure of funds. He can veto legislation within prescribed and understood limits. He can be restrained from acting unconstitutionally and he can be ordered to do whatever his duty requires him to do. How different is the Australian situation? The Governors have gradually, as I have indicated, lost the reality of power to the ministerial executive. But the extent of their remaining powers is full of doubt. For historical reasons (largely petty and State-chauvinistic ones) they would not be likely to seek advice from the Governor-General. Indeed, their own Ministers would be likely to advise them not to do so. Just as the continued existence of the Privy Council as a constitutional court in issues as to State powers is an intrusion into the judicial power of the federation, so the doubt as to the powers of Governors causes confusion in the executive stability of the federation. Furthermore, even if one assumes that Governors retain some political powers, one may also surmise that the extent of those powers is still diminishing. Uncertainty as to the rate of diminution leads to uncertainty as to the continued existence of specific powers in the hands of Governors. Is their rate of decline uniform in all States? Can the unchallenged exercise of some power by a Governor in one State establish the continued right to exercise that power by a Governor in another State? Perhaps we may see sooner or later, how a Ministry copes with a Governor who, like Captain Hindmarsh, has forgotten that he is no longer on the quarter deck. *Ce sera magnifique, mais ce ne sera pas le fédéralisme.*

If, as seems at present probable, the "one indissoluble Commonwealth" survives its first century, it is likely to gather strength as it goes along.

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11 The sentiments expressed in the argument are alive and well in several States. Several State ministers have recently expressed the hope that where there is an apparent conflict between Canberra and a State the Queen will act on the advice of her United Kingdom ministers — see (1981) 55 ALJ 360, 701, 829, 893; (1982) 56 ALJ 316. I am indebted to Mr David Smith for these references.

This will occur if the forces of colonialism diminish, if gaps are filled in the legislative powers of the States, if the federation is allowed to function as a self-correcting mechanism without external intrusion (however well meant), and if Governors and the Governor-General, except as clearly defined by statute, are seen to have a dignified and honorific role and to express, like the Queen in the United Kingdom, the will of the party in government.