

Chapter Two

Union or unity? Anglo-Australian territorial theory to the 1840s

I see the future prospect of empires and dominions which now cannot be disappointed. Who knows but that England may revive in New South Wales when it has sunk in Europe?

Sir Joseph Banks to Governor Hunter, 1797 (quoted Manning 1966: 287)

2.1. Introduction

The Anglo-Australian territorial story begins in January 1788, when, albeit without the required "consent of the natives" (Nettheim 1993), the eastern half of Australia was proclaimed as a vast British possession. Pursuant to his commissions, Governor Arthur Phillip declared the colony of New South Wales to stretch from Cape York to South Cape, and the middle of the continent (135°E) to an undefined point in the Pacific (McLelland 1971: 672). Thus it remained for 37 years, until December 1825. Then suddenly, over a period of 18 years up to formation of Australia's first representative legislature in 1843-1846, four significant changes occurred. The British government separated Van Diemen's Land (later Tasmania) as its own colony, followed four years later by the addition of Western Australia (1829), five years later by a second subdivision of NSW to create South Australia (1834, founded in 1836), and in parallel, the birth of the Port Phillip district (founded 1835, declared 1839).

What triggered this sequence of territorial divisions, and what constitutional ideas did they reflect? As seen above, the idea that the British applied a coherent theory of territory to Australia has proved problematic, its logic difficult to find. In recent political science, the most common assumption is that British authorities first tried to manage NSW as "a single hierarchical governing structure", consistent with the unitary

structure of British government itself, but were "quickly" forced by Australian conditions to fragment "sovereign political authority" (Holmes & Sharman 1977: 12-14; Sharman 1987: 42-3). Thus a uniform need for separate territories was fundamental to Australian politics from the outset, forcing a positive departure from the British unitary tendency, and instead leading naturally, but only later, to federal ideas of an Australian nation. Moreover, in this process, it did not really matter how the divisions were drawn, because each territory was to generate and sustain its own political logic.

This chapter argues that Australian constitutional theories of territory probably began almost exactly the other way around. In some ways, the conventional story is right: from the outset, territorial fragmentation was consistent with federalism, and choices between unitary and federal approaches were fundamental. However, British authorities were not 'forced' to accept territorial fragmentation against their instincts, but more probably introduced federalism as a deliberate strategy. If this plan has previously been hard to pin down, it is because in the course of the first four territorial divisions, British colonial policy also swung back in the other direction, not away from but *towards* a more unitary territorial plan. This policy reversal is crucial to understanding a complex and increasingly contested chain of decisions. It becomes evident in the first part of the chapter, which begins with decisions in the early 1820s based on distinctly federal ideas, but which fell into conflict over the future of Port Phillip, unlike its predecessors in being very conspicuously *not* separated as its own colony. In the second part of the chapter, we find the reason why: over a crucial decade of Australian history (1836-1847), British policy was intently focused on a new, unitary territorial approach.

This reverse account of the arrival of territorial theory represents an entirely new starting point for the analysis of Australian debate. It also attacks four foundation stones of conventional constitutional history. First, it suggests that important theoretical principles informed the territorial formation of the colonies right from the outset; even if at times invisible, these principles confirm Australian decision-making was more than a mere *ad hoc* gaggle of colonies in the manner often assumed by favourable and critical history alike. Second, these colonies were not necessarily always assumed to be 'independent', and only destined to mature towards a common nationhood towards the end of the 1800s; rather, in much of the earliest British and Australian thinking, the entire colonial project was conceived as a 'national' one. Third, while it has been

rumoured that "the idea of joining the unwieldy Australian colonies together had been in the minds of officials... even before the division of the colonies" (Irving 1999a: 2), the earliest that federal ideas are usually recorded at work in Australia is not the 1820s, but rather towards the end of this period, in the 1840s in Sydney and London.

Finally, and most importantly, the two main early choices for the shape of the future 'nation' were not the diametric opposites we assume today – that is, not a choice between a centralised unitary system based on just one government, and a decentralised federation based on territorial subdivision. Rather, *both* constitutional models were predicated on active decentralisation, taking different but parallel forms. Indeed, if anything, it was the decentralised unitary model attempted by British authorities in the 1840s that sought the most comprehensive decentralisation of power across the colonies. Anglo-Australian territorial theory did not commence in a smooth, linear pattern, but a web of paradoxes, all open to challenge but crying out to be explored.

2.2. Towards a federal British dominion... or not (1815-1841)

Van Diemen's Land and civilian government (1815-1825)

The search for a better territorial explanation begins with the separation of Van Diemen's Land, because this first decision fits none of our later stereotypes. The island was settled by Europeans in 1803, as a military outpost of the Sydney prison colony, only the second such outpost after Norfolk Island. The site of the Derwent River settlement had little to do with natural suitability as an economic hub, on Sawyer's stereotype, because it commenced purely as a military post to forestall French interest in NSW's southern approaches, after confirmation of the existence of Bass Strait (1799). Indeed, its future might have been dubious were it not for its unauthorised takeover in 1804 by the refugees from its sister post at Port Phillip Bay – also clearly not yet a natural economic focus (Shaw 1989: 202-5). Even in Van Diemen's Land, when it did come to the economics of growing food, the 'natural' hub proved to be less Hobart than the better-located Tamar (Blainey 1966: 76-7; Robson 1989: 84-94).

The even bigger challenge of Van Diemen's Land for later constitutional history is that its legal separation did not come until December 1825, 22 years after its settlement.

Often associated with discovery of the island's geographic separateness, this in fact had little directly to do with it. Moreover, the island had achieved relative prosperity in its decades in NSW, enjoying comparative political stability and growing to over 12,000 Europeans, more than 25% of Australian colonists (Greenwood 1955; Clark 1962b: 122-4; Ward 1987: 357). There was little to indicate that nominal inclusion in the Sydney jurisdiction "quickly proved unsuitable" for good government in Van Diemen's Land, in the manner suggested by Holmes and Sharman.

Territorial change for Van Diemen's Land came not as a result of the colony's own population growth, economic change or political experience, as much as a shift in British colonial policy designed to guide all those things. The island's separation was authorised by the same legislation, in 1823, constituting NSW as a civilian jurisdiction for the first time (*Act for better Administration of Justice in New South Wales and Van Diemen's Land, and for the more effectual Government thereof 1823*: Melville 1835: 18; Clark 1962a: 341, 373-4; McMinn 1979: 18, 20; Lumb 1991: 19, 33). This new constitutional status was as recommended by the 1819-1823 colonial policy inquiry of J. T. Bigge, a "landmark in Australian history" but also part of a broader debate on the management of the Empire after the end of the Napoleonic Wars (1815) (Manning 1966: 539, 525-40). For NSW and its new offshoot, the end of 35 years of military rule was tied to decisions that Australia should cease to be "the mere resort of felons" (Bigge), and recommence on a civilian colonial path, receiving a full cross-section of excess population, generating raw materials, markets and investment, and paying its own way. Transportation was to continue, but to encourage free settlement, convicts would be removed into pastoral service or new remote penitentiaries.¹

There were four reasons why the shift in colonial policy translated into Australia's first territorial separation: economic, administrative, political, and constitutional. First, the new economic focus on free settlement required an ability for people and investment to be attracted directly to locations other than just Sydney – with separation came commercialisation, the Van Diemen's Land Company, and promotion of the island as an

¹ The new gaol investment came in Port Macquarie (opened 1821), Moreton Bay (1824), Norfolk Island (reopened 1825), Macquarie Harbour/Maria Island (1822/25) and Port Arthur (1830). For the constitutional shift generally, see Macintyre (1999a: 33-5, 71), Kociumbas (1992: 134-5, 156), Clark (1962a: 334-45), Pike (1957: 32-4), Rossiter (1953: 61).

"England with a finer sky" (see Clark 1962a: 373-4; 1962b: 13). Second, civilian government brought a need for specific public institutions to be made more proximate to their population, the priority being not legislative representation, but an independent local judge to declare civilian law and fairly resolve disputes. Third, in support of Holmes & Sharman's claim that territorial change reflected a political need, separation was not merely a 'top down' strategy devised by British authorities from above. By the time Bigge's inquiry was complete and the 1823 Act passed, "landholders, merchants and other inhabitants" were meeting in Hobart, petitioning King George III to use his new power to "elevate Van Diemen's Land into a separate and independent Colony" (April 1824; quoted Melville 1835: 20; Ellis 1933: 19-20; Clark 1962b: 122-4). Contrary to Holmes & Sharman's assumption, however, this first ever successful 'independence' demand was less a complaint against the unsuitability of the previous regime, than an endorsement of the agreed attractions of the new one. Territorial separateness itself, rather than any immediate improvement in political institutions, was deemed to be of considerable advantage.

The fourth reason for territorial separation was that as part of its broader constitutional shift, the British government had already determined to do it. When the Hobart petitioners made their demand, their new Lieutenant Governor George Arthur was already en route from London with instructions for the separation (Melville 1835: 20; Clark 1962a: 373). Interpreting this constitutional rationale also requires a larger frame of reference than NSW. Often forgotten in Australian and world history alike, is that British officials were restarting a colonial process whose constitutional rules had been in limbo since the American revolution (1776-1783). Rebuilding a "new empire" in place of the old had long been a project of some like Joseph Banks, but for decades, this had been checked by the shock of the American loss, "a trauma the British could never forget" (Hyam 2002: 53; see also Egerton 1893: 258-9; Manning 1966: 287). Colonial constitutional policy had focused in two new directions: efforts to retain the loyalty of other existing colonies, especially Canada; and limiting all new settlements to the strategic military posts, governed according to "the well established legal doctrine that in a conquered land the king's will was omnipotent", of Australian experience (Manning 1966: viii, 293, 298-9; also Egerton 1893: 260).

In NSW and Van Diemen's Land, the end of military rule thus brought with it a backlog of constitutional options and issues, intelligible not only via Australian conditions but

Atlantic experience. Moreover, British policymakers' reevaluation of the American revolution, their efforts in Canada and their current relationship with the United States all meant that, over 30 years later, the constitutional influence of the 'Great Experiment' remained direct and ongoing. British and American development remained "intimately connected" in a "single Atlantic economy" (Hyam 2002: 54). In fact, the political success of American expansion was a source of policy fascination not just in Britain, but in the Australian settlements themselves, already also linked directly to America's orbit as part of a "Pacific economy" (Hyam 2002: 55). Hobart's strong early role as an American fishing and trading outpost produced myriad indications that, from the outset, American experience was a direct and powerful political influence (Melville 1835: 7, 160; Greenway 1972: 77-8; Robson 1989: 87, 93; Warden 1999: 191-3).

It is in this context that, when the freemen of Van Diemen's Land asked British authorities for territorial 'independence', following a script designed and approved by the new colonial office itself, Britain's Australian constitutional plan should be read as one with strong federal elements. George Arthur left London for Hobart in 1823 with specific advice about where the creation of Australia's second territorial jurisdiction fitted into the new British colonial policy era; that the new colony was to be:

one branch of a great and powerful nation, which must exercise a mighty influence for good or evil over a vast region of the earth... Christian, virtuous and enlightened. (James Stephen 1823, quoted Clark 1962a: 373)

The author of this advice, James Stephen, was the colonial office counsel of 10 years' standing and main legal architect of the 1823 Act, also soon to be permanent under-secretary and primary guardian of colonial policy for almost 30 years (see generally Crowley 1955: 49-50; Ward 1958: 22-9; Manning 1966: 77; Cell 1970: 9-15). An "uncompromising legalist" (Pike 1957: 35), Stephen spoke with an apparently clear view that the restarted colonial project was indeed about building a new British South Pacific nation, and rebuilding the opportunities lost in America. Even more importantly, the project involved resuming the basic territorial pattern of multiple colonies from which the American federal nation itself had sprung – by definition, Van Diemen's Land was just the first of the new 'branches' needed to form such a nation.

The idea that British policy began with the idea of a federal-style Australian nation clashes with three fundamental precepts of Australian history. However, in each case it

is no longer clear why these precepts should hold good. First, we customarily assume that British constitutionalism in Australia automatically began with Britain's own base constitutional heritage, that of a unitary nation with territorial divisions of 'sovereign' authority removed; and that it held to this heritage until positively forced to do otherwise. However, as we have already seen, the British decision to separate Van Diemen's Land appeared to come substantially on its own initiative.

Second, we often assume that, far from encouraging them, the American experience made British authorities particularly fearful of 'nationalist' tendencies in their colonies, particularly nationalism of a democratic strain. However, that assumption misreads the state of British policy revision at the time. American independence had forced Britain not to reject but to *engage* with the idea of 'dominion' nations forming within the empire. Dominion theory had been proposed by loyal American elites trying to prevent the 1776 declaration of independence, and Britain's failure to recognise it was a standing reminder that London had only itself to blame (Jensen 1940: 108; Rossiter 1953: 306-8, 339-41). The reconstitution of British North America as a more national group began almost immediately, even if as a primarily defensive response; Lord Dorchester, appointed in 1786 as Canada's first Governor-General, held no doubt that "the Policy which lost those great [American] provinces can not preserve these scattered and broken Fragments which remain" (1793, quoted Manning 1966: xiii, 36-7). Nor did the advance of American democracy necessarily alarm all British policymakers, particularly by the 1820s when democratic reform was a major domestic concern (Ward 1958: 22-3; Melbourne 1963: 342-6; McKenna 1996: 15, 17; Hyam 2002: 53-4). By 1828 the secretary of state for the colonies, William Huskisson, expressed no doubt that British colonies were destined to be "one day or other themselves free nations, the communicators of freedom to other nations" (quoted Egerton 1893: 258), identifying that the aim was no longer that of keeping colonies 'down', nor even necessarily formally in the empire, but keeping them friendly to British interests.

The third presumption against the possibility of an Australian federal plan at the outset, lies in the common belief that each new Australian colony was created as an autonomous unit, perhaps even its *own* future nation, its constitutional status defined solely by imperial membership. Thus Van Diemen's Land was made "independent of New South Wales" (Melville 1835: 52) and Governor Arthur thereafter "dealt directly with... London" (Townesley 1991: 37). Similarly, it is routinely held that no ideas about

formal intercolonial links predated the first subdivisions of NSW, because the first such 'federal' notions are usually dated to the 1840s, when Sydney officials proposed the appointment of an Australian Governor-General to regulate trade, followed by British ideas for an intercolonial general assembly in 1846-1850 (Cramp 1914: 122-7; Sawyer 1969: 6-7; Townsley 1991: 40, 193; McKenna 1996: 110-1; Irving 1999a: 2-3). However, this familiar chronology appears wrong, because the constitutional link supposedly only first canvassed in the 1840s was the legal reality at the base of George Arthur's 1823 commission. The status of 'Lieutenant Governor' had previously been unclear as a result of unplanned events in 1804 (Robson 1989: 83-5). However, even if only technically, Arthur's commission was as constitutional junior to NSW's new Governor Ralph Darling, who in 1825 proclaimed NSW to now be a "Sister Colony", but himself to be still the "Governor-in-Chief to the island of Van Diemen's Land" and "Captain-General" of both colonies (Melville 1835: 52; Wentworth 1956: 8).

In the terms cast by Australian history itself, there seems no reason to believe that the separation of Van Diemen's Land was *not* the first step in a prospective 'federal' arrangement. If so, two major new implications for constitutional theory flow. First, without it ever having been appreciated, Australia's colonial rebirth represented a unique development in world history. American nationhood had blossomed in the federation of 13 pre-existing colonial territories, and a Canadian nation might be safely predicted to do the same, but in both cases the original colonies had grown up first, as just that – colonial settlements planted in unrelated, often *ad hoc* territorial claims. Australia was different, more like the new American west where a great territory had been claimed and was now being subdivided into the colonies that would make a nation. For the first time, whether by design or default, the modern federal idea dramatised by America was now working *in advance* to inform the territorial structure of a whole nation. Never before had such an opportunity arisen in European colonialism.

Second, the British approach to the separation of Van Diemen's Land implied specific recognition of modern federalism as a strategy for colonisation. This was a federalism with a particular territorial orientation: not only the union of many parts in one whole but *first*, the decentralisation of population, economic activity and political institutions needed to create those parts in the first place. Importantly, this was not an accidental element of American federalism and not accidental in its reception into Australia. In the decades of intercolonial discussion that preceded American independence, loyal

elites had long explored the principle that union could facilitate more efficient colonial expansion in this way. In his 1754 'Albany Plan', Benjamin Franklin observed that "a single old colony does not seem strong enough to extend itself otherwise than inch by inch", but that an intercolonial union could solve this by working as a "commonwealth for increase" (quoted Beer 1993: 155-8, 354-5). On Franklin's theory, the grouped colonies could use their central government to secure the territory presently unclaimed or unused, grant it to settlers and organise new constituent governments, thereby contributing to everyone's wealth. This approach had helped make federalism more than a mere "convenient technique of constitutional organisation" in America, instead elevating it to an "article of faith" (Rossiter 1953: 306).

In 1823 the success of Franklin's idea was at the forefront of thinking about federalism. In the half-century since American independence, the thirteen United States had become 24, the number still growing as old territory was subdivided and new territory acquired. In Hobart, the South Pacific base of New England (U.S.) fishing fleets, the colonial destiny was directly comparable with the 1820 separation from Massachusetts of Maine, America's 23rd state (Banks 1973). This active decentralism was also high in British thinking. In later political science, the decentralist advantage of modern federalism would become a static description, the standing political benefit of a division of sovereignty in which national and state governments both drew authority from the people (Sawer 1969: 1; Galligan 1981: 130; Watts 1996: 7). Divided sovereignty was a historical watershed for European concepts of nationhood, introducing the first "sustained and principled counter-argument" for not just central, but local "legal life" (Blomley 1994: 114). To British policymakers, however, the decentralist advantages were more immediate and tangible, less a body of principles than political economy in action. As late as 1852 William Gladstone continued to describe America as "the great source of experimental instruction, so far as Colonial institutions are concerned", while J. A. Roebuck admired the system of new states for its apparently automatic operation:

The whole thing was like a well-made watch – it went from that moment [in the 1780s] and never ceased to go (Roebuck 1849, quoted Cell 1970: 89-90; Hyam 2002: 54).

Britain's 1823 decision to embark on a new phase of Australian colonisation, with only two small settlement nodes on the fringe of a vast undeveloped territory, came against the background of this powerful federal model. Stephen's 'great and powerful nation'

harked directly to a specific, actively decentralist or 'Franklinesque' idea of federalism with an obvious potential to take deep root in Australia, but which had never been tried before from scratch. Whatever its implications for Australian history, however, the unappreciated novelty of the attempt equally appeared to involve some potential for problems. Whether the British colonial office had a clear idea of the shape and method for achieving its new 'commonwealth for increase' is highly uncertain, since its next rounds of territorial decisions tell no such clear story.

Swan River and the Tordesillas Lines (1494-1829)

Van Diemen's Land had two major advantages over the vast bulk of territory to which Britain's new colonial policy had to apply: a viable colonial community already established, and an unambiguous natural boundary. The next two British territorial divisions, Western Australia (1829) and South Australia (1834), had the benefit of neither. However apparently sophisticated, Britain's new constitutional project in Australia faced challenges on some basic matters. In 1823, when separation of Van Diemen's Land was authorised, the western half of 'New Holland' was not yet even in British possession. Far from falling in line with a prospective national blueprint, the allocation of territory in Western Australia was shaped by a series of administrative defaults, flowing from the simple task of acquiring the land.

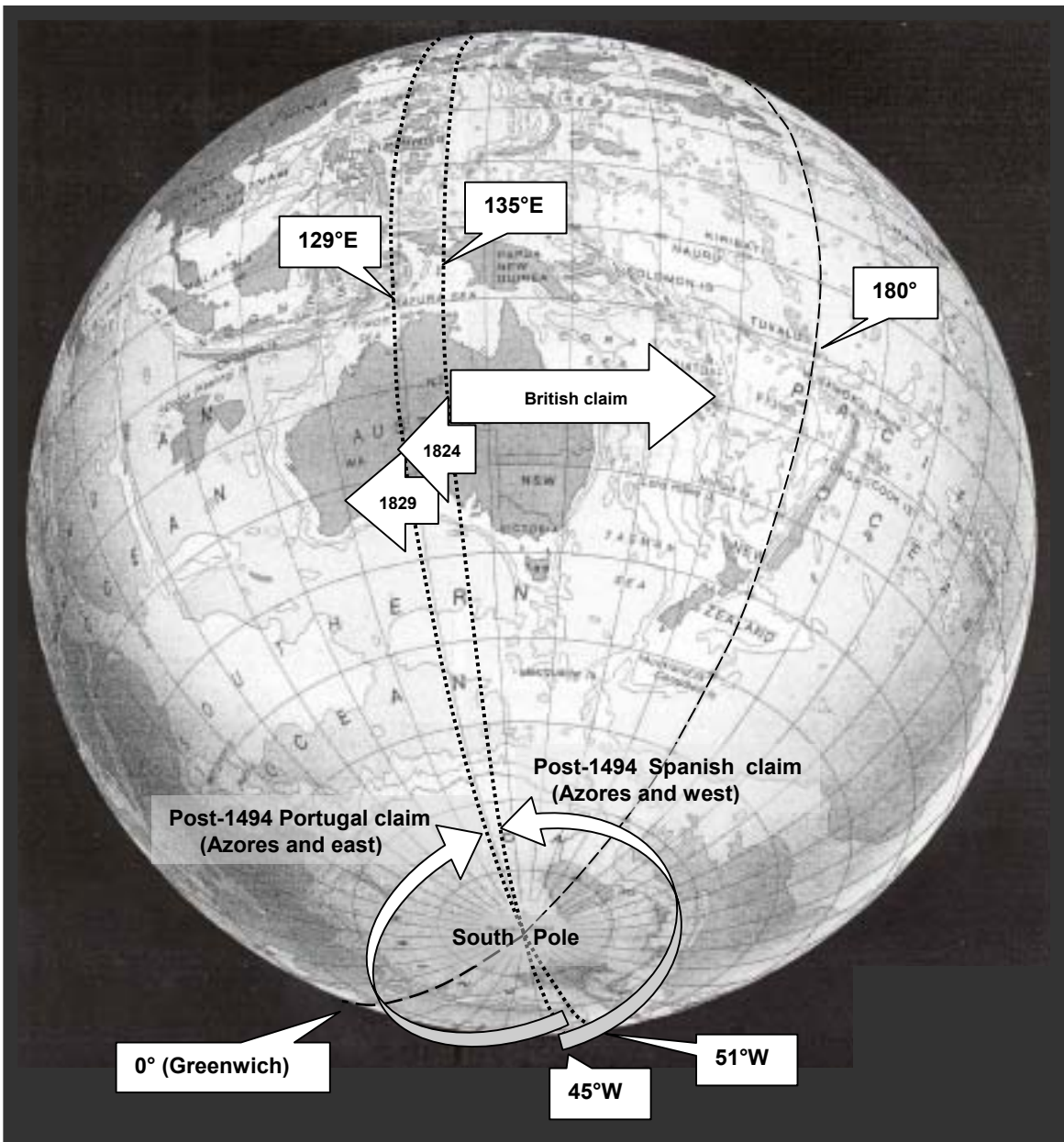
The sequence of acquisition is well described. In 1824, engaged in a last race with Holland, France and America to secure strategic trading locations, Britain extended its Australian military outposts to Melville Island and Coburg Peninsula on the extreme north coast, and declared a 700-kilometre extension of NSW (from 135° to 129°E) to cover them (Battye 1924: 73; Gammage 1981: 530-1; Ricklefs 2001: 185; Cameron 1989; Lumb 1991: 36-41; figure 1). In 1826 a further convict camp was established at King George's Sound (Albany), but not until Captain James Stirling's successful campaign for a civilian settlement at Swan River was a full claim justified. In 1829 the final third of the continent was declared legally British, with the line at 129°E dividing the new territory and the old (Blainey 1966: 25, 84-8; Statham 1989; Kociumbas 1992: 121). However, Western Australia was 25 million hectares in size, more than 50 times the size of Van Diemen's Land. If this was intended to be a single colony on any comparable model, the logic was hard to find. Indeed, the 'imaginary' line dividing the

territories is often assumed to have been chosen arbitrarily, creating a major later conflict between two notions: on one hand, that 129°E was probably as good a line to use as any other; and on the other, that the boundary has no legitimacy at all.

In fact the demarcation of the new territory was not determined by constitutional policy, but rather a default outcome created by two factors. The first factor was the process of acquisition itself, controlled not by the colonial office but the Admiralty. Contrary to many assumptions, the longitudes used to complete the territorial claim were not random, but had existed in European geopolitics for 300 years. Since the early 1500s, they had been recognised as lines separating the colonial interests of Spain and Portugal after their 1494 Treaty of Tordesillas (McIntyre 1977; Gammage 1981; Fitzgerald 1982: 37-41; Ward 1987: 87-8). First made in the Atlantic, the division was agreed to lie on a north-south line 370 leagues west of the Azores, Spain receiving exclusive rights to the western half of the world and Portugal to the east. Brazil's discovery led to a contest over the location, leading to two Atlantic lines depending on the preferred datum point, and when these lines were assumed to be operating on the other side of the world, their antimeridians switched from defining a zone of contest to a 'gap' (**Figure 7**; cf Gammage 1981). Other events and treaties rendered the problem moot, but in 1788 the British Admiralty brought the original Tordesillas lines back into play, defining its first claim by reference to Spain's lapsed interest (135°E) because this justified a vast legal claim while minimising provocation to either Portugal (still at Macao and East Timor) or its more important colonial successor, Holland.² Forty years later, with Britain ascendant in Europe and East Indies alike, it was equally consistent and convenient to expand the claim using Portugal's own original line (129°E).

² Why did this account of the line go consistently unrecognised in Australian history until the late 1970s – e.g. Crowley (1960: 2), Clark (1962a: 11, 78-9), Blainey (1966: 95), McLelland (1971: 672-3) and Learmonth (1973b; 1973a)? The explanation seems to be that the Admiralty was playing with double cards, Cook having already followed orders in 1770 to claim the land based on 'discovery'. With this as the public position, British authorities had little incentive to advertise its awareness of the previous history of the 1788 line (McIntyre 1977; Gammage 1981). On Dutch displacement of Portuguese claims from the 1590s, and British entry into East Indian affairs from the early 1600s, reentry in the late 1700s, and ascendancy from 1811 to the 1824 Treaty of London, see Ricklefs (2001: 26-34, 76-77, 144-50, 185).

Figure 7. Treaty of Tordesillas Lines 1494-1829



Source: Drawn by author.

The history of the line at 129°E, being so logical in a geopolitical sense, highlights that this was also a logic that ceased when the role of the Admiralty ceased – when the claim to the final third of the continent became 'legal'. It was not a boundary reflecting any particular logic for how the territory should be treated once acquired. Nor was a new colonial office logic supplied, because when provision for "His Majesty's Settlements" and geographic limits were legislated in 1829 and 1831, it was not clear that a 'colony' of similar status to NSW and Van Diemen's Land had even been authorised (McLelland 1971: 676; Lumb 1991: 36-41). Particularly unclear was how much of the territory was intended to be the legal jurisdiction of the new Swan River. In 1831 the first overland

expedition to Albany concluded with a proclamation that it now lay within the new settlement, a move that only seemed to place the status of further regions in doubt (Crowley 1960: 9). Over the decades, British governments would affirm their fear of allowing such vast territory to fall permanently to the one small colony by continuing to reserve various northern controls (Crowley 1960: 48, 64-8; Forrest 1996).

The second factor shaping this territorial default, therefore, was the simple fact that the colonial office imposed no more concrete policy direction. For all the talk of a new empire, colonial authorities' interest and abilities in actually founding new settlements were extremely weak. In this instance formal legal acquisition was only completed because of the political decision to approve Stirling's proposal. Implicit in the proposal was an extra need for Swan River *not* to be part of the existing NSW, because it was intended to be qualitatively different, an entirely convict-free environment for making fortunes that were respectable and civilised (Pike 1957: 38-9; Crowley 1960: 2-7, 17-8; Blainey 1966: 90-1; Kociumbas 1992: 119-23). However, beyond the general requirement for an area to supply large grants of land around Swan River, there was no territorial plan. The confused outlook was emphasised by the unattractive terms on which the colonial office allowed the proponents to proceed, insisting they carry the cost but refusing to grant the traditional private vehicle of a chartered company; refusing to inject public funds, but supplying no alternative investment strategy (Crowley 1960: 4, 6). In the final analysis, Swan River was conspicuous for being "almost accidental and largely unplanned" and rather than booming it languished (Statham 1981: 181-9). When a second trading colony of 'Australind' (Bunbury) was attempted between 1839 and 1842, it failed from similar "indecision and lack of confidence at the London end" (Bolton 1989: 149; see also Roberts 1924: 154-6).

In the absence of any other positive rationale, the imaginary line at 129°E would gradually harden into a discrete jurisdiction in political reality. However, the history of the territory as an acquisition, not an 'allocation', highlights the contrast between the realities of settlement and the British government's ostensibly grand colonial plan. Constitutionally, far from being conceived as a branch of a new British 'commonwealth for increase', Western Australia was a vast and directionless entity. By default the British had recreated exactly the type of huge, undercapitalised and unproductive territorial problem that in America, Franklin's federalism had been designed to solve.

Land of the inland sea: South Australia (1829-36)

From its parallel conception to Swan River in 1829, to settlement in 1836, South Australia demonstrated further constitutional paradoxes. With the entire continent now nominally possessed by Britain, there was no danger of further allocations of territory being shaped purely by geopolitical default. However, whereas Van Diemen's Land was long settled by the time of separation, and the plan to found Swan River had at least been derived from discovery of an ostensibly suitable place, South Australia was something new again: a colony looking for a place in which to happen. Territory was set to become a more vital ingredient than ever before, because in response to Swan River, E. G. Wakefield's National Colonisation Society was founded on a new utilitarian theory for the alienation of land. The result was a more detailed economic and institutional model, in which the proponents' requests for a chartered company were again refused, but a compromise found in the form of an experimental Colonisation Commission, governmental in nature but largely under the proponents' control (Egerton 1893: 288-9; Pike 1957: 52-66, 221; Crowley 1960: 12). This raised its own political difficulties, but compared to Swan River proved broadly effective.

On paper, this plan for a new colony was also far clearer constitutionally. There were multiple reasons why a new allocation of legally autonomous territory was required, above and beyond those already applying in Van Diemen's Land and Swan River, because in addition to their new land system, the colonists were united by an even higher aspiration to create a "paradise of dissent" (Pike 1957). Demonstrating this intended political difference from the outset, Wakefield's group made clear that it would be a society "most favourable as to morality", as opposed to the "pre-eminently vicious" one found in the convict colonies (1832, quoted Pike 1957: 61; Melbourne 1963: 223, 245). When the plan received legislative authorisation in 1834, the parliament appeared to bless this destiny through its first-ever promise of an Australian representative legislature at a population of 50,000 (1834 Act, s.23, see Howell 1986; Lumb 1991: 30). Further, this vital new phase of the colonial project appeared to reassert a larger territorial formula, and not just through its plan to influence its neighbours' economic and political direction. The 1834 Act authorised establishment of "a British province or provinces", the term used in Canada but now only for the first time in Australia, with renewed federal implications. Moreover, as with Van Diemen's Land, there was formal

indication that this status involved less than total territorial separation. Although it was clearly administratively independent, the province would be described by British authorities for its first 10 years as still officially "part of Our said territory" of New South Wales (see McLelland 1971: 673).

While South Australia's constitution appeared to suggest the return to a more coherent territorial approach, however, the approach itself was far from clear. Most elements were not consistent with anything that had gone before. In fact, the coherence was largely illusory, for two reasons again going to territorial allocation and official attitudes. For the first time, there was a total absence of planning in the selection of the territory itself. Against the biophysical logic of Van Diemen's Land, and the powerful if irrelevant geopolitical logic of Western Australia, the great irony of the otherwise well-planned South Australia was a territorial logic that was truly imaginary. The site was chosen without real inspection, and the jurisdiction's boundaries drawn on pure speculation. The momentum for a site – any site – had begun when Wakefield began enlisting subscribers without a known location. Surmise about south-west NSW turned to a frenzy when, in late 1830, accounts reached London of Charles Sturt's 1828-1829 descent of the Murray River, and Sturt himself backed the suitability of areas he had never visited, maintaining faith in a great inland sea (Pike 1957: 52-5, 62; Davies 1989: 161). The frenzy continued, with subscribers clamouring, and pastoralists from Van Diemen's Land reportedly ready to start seizing the land. None of this could be blamed on the colonial office, because from June 1831 it argued repeatedly for information that was never obtained, and for this and other reasons objected to the final 1834 legislation (Pike 1957: 57-68, 174-9; Howell 1986; Baker 1997: 108). The proponents' case defied all the standards of the day, including only whatever supportive anecdotes were to be found and suppressing the rest. The first experiences of the surveyor-general, Colonel William Light, confirmed in 1836 just how uninformed the siting had been (Dutton 1960: 168-98; cf Gibbs 1984: 16-21; Davies 1989: 165-72).

The second illusion of South Australia, therefore, was that the constitutional contents of the 1834 legislation reflected any official colonial policy at all. In fact, this time the colonial office was not merely ambivalent or uncertain about the plan, but substantially opposed. The territory owed its life solely to the vigorous party-political pressure brought to bear by its proponents, and although guaranteed to have major impacts on the way territory was conceived and managed, in itself it reflected little if any official

theory at all. The underlying policy stand-off was not just the product of the proponents' lack of research, but rather official reconsideration of the whole principle of territorial separation. This was a reconsideration soon demonstrated by Port Phillip, which was resettled in 1834-1835 just ahead of South Australia, but would take 16 long years to achieve territorial parity.

The first Port Phillip District (1834-41)

The founding of Port Phillip as the continent's fourth major zone of settlement, and its treatment in British policy, showed that appearances in political economy and constitutional reality were two different things. On one hand Port Phillip's foundation was living proof that the type of territorially-based colonial expansion envisaged in Franklin's federalism could indeed work in Australia. Unlike Swan River and South Australia, struggling to attract a flow of investment and population direct from Britain, Port Phillip was born of a moving frontier within Australia itself. As disclosed by the Wakefieldians, pastoralists in Van Diemen's Land had applied since as early as 1827 to found runs on the northern shore of Bass Strait (Roberts 1924: 205-7; Melbourne 1963: 331-2). Their requests were also an indicator of the separated jurisdiction's rapid growth. Within a decade, Hobart had emerged as "a sort of Australian Dublin in cultural matters" (Townsend 1976: 1) and the role of Tasmania's north coast as Australia's first major port-of-call was making it positively crowded – a major colonial staging post swelled by arrivals, as well as refugees from less vibrant areas looking for new ones. This was the basis of Port Phillip's founding. In 1834 the Henty family – among the earlier Swan River refugees – reembarked with cattle and sheep to found a pastoral run at Portland (Kociumbas 1992: 119-23, 179-90). In 1835 John Batman's Port Phillip Association made a larger jump, forcing official grants and triggering a land rush by using the American frontier tactic of 'buying' 600,000 acres from their Aboriginal owners (Greenway 1972: 85-6; Shaw 1989: 207-13).

Superficially, the Port Phillip Association's behaviour looked like simple 'squatting', involving the same self-interested disregard for official land districts displayed by pastoralists since declaration of Sydney's 'limits of location' in 1829 (Egerton 1893: 286-7; Roberts 1924: 187-90; Melbourne 1963: 180, 275-301, 391; McMinn 1979: 32-3, 50; Diamond 1990: 63). In fact, the territorial behaviour that founded Port Phillip

was more fundamental, for its signs that Anglo-Australian politics now contained a distinctive constitutional tradition. 'The frontier' has long been regarded as "a peripheral rather than a central theme" in Australian history, with the spread of colonial settlement rarely analysed for the relationship between spontaneous forces and official plans (Harper 1963; see also McNaughtan 1955; Young 1966; Kidd 1974; Fitzgerald 1982: 47-53, 114-5; cf Greenway 1972: 121-40; Reynolds 1981). However, we already know that a decade earlier, the dramatic expansion of the American frontier must have been high in the thoughts of the freemen of Van Diemen's Land, a process intimately tied to the construction of new territories and states which their own separation paralleled. So too, their 1835 jumping of Bass Strait exhibited not just an economic but a political claim in two ways: first, by making retrospective authorisation of their land grants a priority, including their direct copying of American tactics; but more importantly, because they immediately asserted the need for a formal new political community. By March 1836 the Port Phillip Association's London supporters had asked the colonial office to proclaim a new colony (Melbourne 1963: 331-4).

Federalism, in Franklin's specifically decentralist sense as introduced earlier, now appeared clearly to be in action in Australia. Again this idea confronts assumptions of Australian history, including those already reviewed; for example, we tend to assume that the citizens of Port Phillip achieved territorial separation *first* in 1851, and only developed their strong interest in federalism promptly thereafter (Quartly 1999: 221-3). However, our knowledge that "all other political ideas" were secondary to territorial autonomy at Port Phillip, from the 1830s until finally achieved (McMinn 1979: 35; Priestley 1989), does not mean that the separation goal did not also carry federal ideas. Even at its most basic, Port Phillip separationism suggested that Australia now had a self-repeating political dynamic. As settlement expanded, so it was apparently now manifest to at least some communities that they should receive their own territory.

In fact, we also know the Port Phillip goal was more than that – that this dynamic was also a federal concept in which separation, development and nationalism worked together. We know it not just from the apparent continuation of Tasmanian precedent, but continued direct reception of American influences. The early Melbourne chamber of commerce was reportedly dominated by Americans (Hyam 2002: 55). In 1835 de Tocqueville's *Democracy in America* appeared and was immediately translated and widely distributed throughout the empire (Blomley 1994: 120-1; Hyam 2002: 53;

Patapan 2003: 3, 6). Uncertain about the morality but otherwise awed by the economic and political effects of the frontier, the book marvelled at federalism's almost natural elasticity, with America's growing number of states working smoothly "like companies of adventurers, formed to explore in common the wastelands of the New World" (de Tocqueville 1835: 295-7, 398). Most dramatic was the decentralist federalism displayed in the entry into the Port Phillip separation campaign of the man who became its elder statesman, Sydney's John Dunmore Lang. In November 1841 Lang visited Port Phillip for the first time to raise money, but soon found himself regaling separationist audiences with his experiences from a recent 10-week trip to the eastern United States. Having also just read de Tocqueville, Lang assured the people of Melbourne that their campaign accorded with the driving force of America's progress, its spontaneous division into small democratic states.³ Lang's popularity at Port Phillip appeared to be sealed.

The decentralist federalism not just implicit, but explicit in Port Phillip's foundational years underscored an apparently undeniable logic: that this booming region should now be granted territorial autonomy. Not only was it self-evident in the minds of its new residents; it was difficult to see how British authorities, having just granted vast territory to the struggling Western and South Australians, would *not* extend a new colonial division to Port Phillip. It is here, in Port Phillip's treatment in British policy, that a more fundamental shift in British decision-making becomes apparent. On one hand, British authorities had immediately begun treating the settlement "as a separate unit": appointing its own police magistrates and a judge, directing that it follow the new South Australian land policy rather than that applying in Sydney and making initial efforts to keep it convict-free, all measures that history to date suggested separation was more than justified (Melbourne 1963: 269-72, 331-4). However, when an official decision on Port Phillip came in 1839, it was *not* to separate Port Phillip as a discrete

³ See Baker (1985: 165-80, 188-201, 290-304, 329-43). Lang is most noted for his republicanism (e.g. McKenna 1996; Irving 1999a: 391-2), but his role in territorial politics arguably had a more direct impact on Australia's constitutional development, was central to his endorsement as one of Port Phillip's first legislative representatives in 1843, Moreton Bay's in the 1850s and his later christening as Australia's "father of Decentralisation" (Ellis 1933: 48, 57). Significantly, as in 18th century America, Lang first expressed himself a federalist while also a loyalist, only turning republican after personal problems with the Colonial Office become irreconcilable. As a Scot he also drew frequently on the territorial tensions implicit in the British union to support his migration and decentralisation ideas, for example attacking NSW Governor Brisbane in 1823 for forgetting that "Scotsmen were born free, their civil and religious liberties having been won for them by the swords of their forefathers" (Baker 1985: 33-4).

'colony', 'settlement' or 'province' on any existing variant, but to declare a new territorial creature again: a 'district' headed by a 'superintendent', Charles La Trobe. Defined by another imaginary line, the 36th parallel, this district was still legally part of NSW.

As we have already seen, constitutional policy since Van Diemen's Land had lurched in uncertain directions, not necessarily easily read by colonial Australians. 'District' status was promptly read by many as simply an interim step, on an inevitable path to colonial status. After all, La Trobe remained the only colonial officer besides the Governor and judges to have a legislatively prescribed salary; he seemed to be a clear case of the Governor you have when not having a Governor, and Port Phillip the colony you have when not having a colony. On a more critical retrospective, however, the 1839 decision confirmed what the previous two territorial decisions had only indicated: that British territorial policy was in turmoil. Instead of following its own apparent precedent for a 'great and powerful nation', British policy had headed down multiple territorial paths with no common arrival points, creating a diverse but so far inconsistent constitutional patchwork. However proven the performance of American decentralist federalism, as acknowledged in British colonial policy, the territorial autonomies on which it relied appeared to have become problematic. To understand this, we first need to understand what had caused such a shift and whether British decisions were now beginning to reflect an alternative constitutional strategy.

2.3. Towards a unified British dominion... or not (1836-1847)

In the course of the 1830s, British colonial policy-makers had indeed become concerned about how best to allocate territory in the colonies, determining that while American decentralist federalism clearly worked well, they needed a new constitutional strategy that worked better. The new theory argued that while existing colonial groups should still be welded together into national dominions, colonisation and decentralisation need not be reliant directly on territorial subdivision, but rather pursued by devolving responsibility onto 'district councils' free of legislative trappings. On this plan, colonisation could be supported more flexibly and efficiently, while promoting a national legislative jurisdiction with an appropriate sense of unity, and allowing government to develop along something closer to a traditional British unitary lines.

By reverting from federal towards unitary theory in the midst of Australia's development, this sequence in British policy is the reverse of that often assumed in later Australian political science. Nevertheless, indications of the new trend had already emerged, as we have seen, in the idea that the South Australian 'province' should be regarded as still part of NSW, and the Port Phillip 'district' definitely so. Whereas in those decisions the new framework was far from explicit, in this part we find it was highly developed, pursued over a 10 year period through three phases of policy proposals. Only after these attempts were exhausted, in 1847, did the colonial office re-endorse subdivision as a constitutional strategy, freeing the way for separation of Port Phillip. The importance of the decentralised unitary plan has frequently gone undiagnosed, disguised by assumptions of separation's inevitability, the prominent conflict that erupted in Sydney from 1840 over constitutional reform and the fact that much of the British thinking was again being shaped in North America. Understanding these issues is key to understanding the meaning and the fate of the model.

Sydney versus Port Phillip

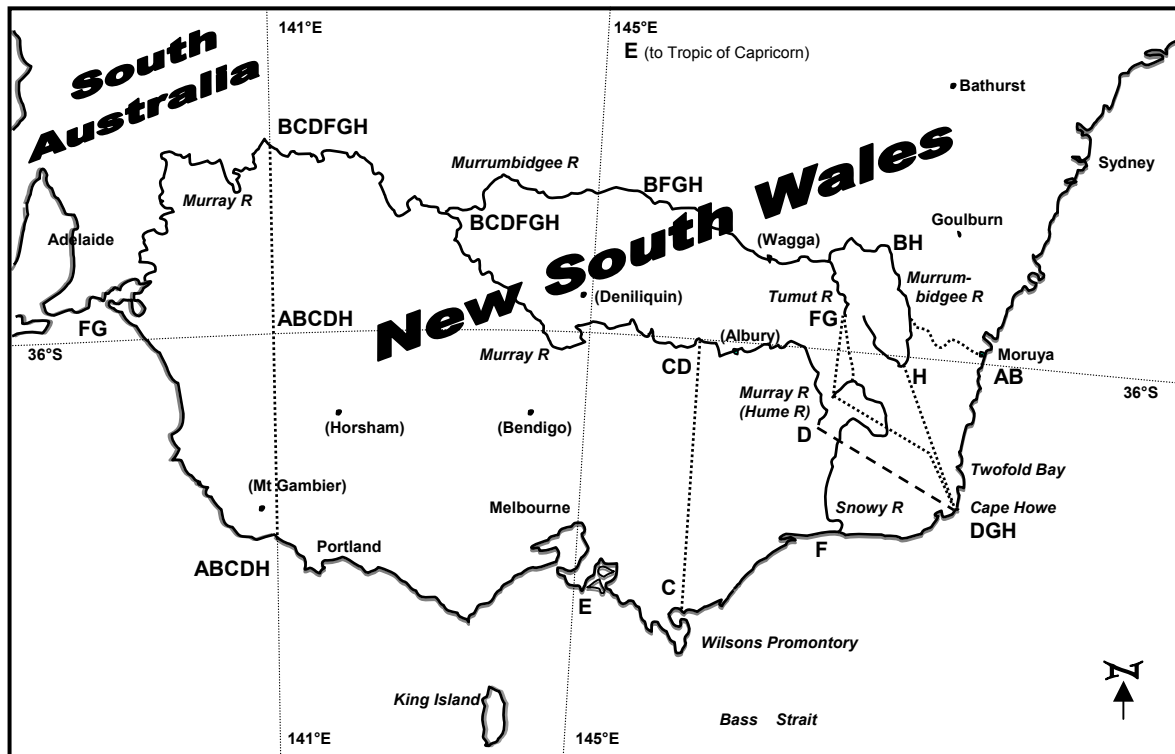
Port Phillip's passage to separation from 1835 to 1851 is recognised as slow, but nevertheless is presumed in Australian constitutional history to have been inevitable. The delay is not usually blamed on any substantive problem in British colonial policy, but rather the backlog of political issues that had been building up regarding the future of the original convict colony. From early 1840 Port Phillip's prospects became directly embroiled in political conflict with Sydney pastoral and commercial interests, through its association with a larger range of colonial land, labour and emigration policy reforms. The land conflict was not new – the British government had been attempting retrospective systemisation of land policy in the Sydney districts since 1829, with the threat of the new South Australian approach quickly recognised in the *Sydney Morning Herald's* warning that NSW was about to be reduced to a "mere provincial appendage" of her younger "more vigorous sister" (1837, quoted Pike 1957: 147). In early 1840 the conflict intensified when a suite of reforms was announced, finally including plans for a first representative legislature in NSW, but also terminating the transportation of free convict labour and extending the South Australian land system under a new Land and Emigration Commission (Roberts 1924: 102-15; Melbourne 1963: 246, 254-78).

The conflict between Sydney interests and the colonial office immediately played out, among other things, as a territorial battle over the size of the Port Phillip district. In the December 1840 land instructions proclaimed by NSW Governor Sir George Gipps, the new Commission described decentralisation of land administration as "indispensably necessary", pointing out that NSW's area continued to exceed "the whole of the states of the American union" (quoted Melbourne 1963: 253). The new instructions extended the Port Phillip land district from the 36th parallel to a more natural boundary along the Murrumbidgee and Murray Rivers (**Figure 8**). Defended in Melbourne as "commensurate with its growing importance" (March 1841), the new boundary was vigorously assaulted by Sydney and London conservatives as part of the larger colonial office plan to help the "land-jobbing South Australians" injure the original colony (*SMH* December 1840, quoted Ellis 1933: 43; Melbourne 1963: 334-6).

The debate faded after the land instructions were cancelled for various reasons in late 1841, but a new pattern had been set which would dominate separation politics for the next 150 years. Sydney views had not been a significant issue in any of the previous decisions, leaving territorial allocation a question lying principally between the colonial office and the colonists. From this point, it would always be Sydney opposition that received primary blame for Port Phillip's frozen territorial status, with separationists presuming that the colonial office was sympathetic but constrained in its ability to act (Melbourne 1963: 283-356; McMinn 1979: 35; Garden 1984: 63-8).

In fact the complexity of the new three-way debate between Port Phillip, Sydney and the colonial office substantially masked an underlying reality. While Sydney pastoralists were adamant that their land systems should not be encroached upon, they accepted, rather than opposed, the idea that a new colony would be formally separated. In London, squatter representatives such as Edward Macarthur fought off the Whigs' 1840 idea that NSW might be restricted to the already obsolete 'limits of location', and argued for Port Phillip's land district boundary to be pushed back as far as possible (Figure 8: C), but did not actually argue that Port Phillip should not be separate.

Figure 8. The Eight Boundaries of the Port Phillip District 1839-1850



Source: Drawn by author based on references below and in text.

Legend (Letters above indicate location of each boundary, as listed below)

A	Nov 1839	First official District boundary issued to Supt La Trobe	36°S and 141°E	(Patterson 1962: 215).
B	Dec 1840	Official southern land district of NSW	Sthn limit of location, Murrumbidgee, Murray R to 141°E	(Melbourne 1963: 254, n.4)
C	1841	Proposed revised boundary, Edward Macarthur, London	Wilson's Promontory to Murray.	(Melbourne 1963: 335, n.4)
D	1842	Official revised district boundary, NSW Constitution Act	Cape Howe to source of Murray to 141°E	(see also Ellis 1933: 43)
		(Endorsed as colonial boundary by Governor George Gipps April 1846, Constitution Act 1850).		
E	1843	Proposed limits of NSW, Surveyor-General Mitchell	145°E to the Tropic of Capricorn	(Ellis 1933: 30).
F	1846	Proposed boundary of new Port Phillip colony, Dr Palmer, Mayor of Melbourne	Cape Howe, Mt Imlay, Kosciusko, Tumut, Murrumbidgee, Murray Rivers, to Southern Ocean	(Melbourne 1963: 338-340).
G	1846	Proposed colonial boundary, Superintendent La Trobe	Snowy, Tarculla, Murrumbidgee, Murray Rivers to Southern Ocean	(Melbourne 1963: 338-340).
H	1850	Proposed corrected official boundary, Thomas Mitchell	Cape Howe to nearest source of Murray River (Murrumbidgee), to 141°E.	(Ogier 1902; 1905; 1912; Ellis 1933: 23, 37-41)

Nevertheless, when the British government redetermined the territorial question, the result was the same as in 1839. The *NSW Constitution Act 1842* granted the Port Phillip district six of its own seats in the new two-thirds elected representative legislature, but denied the colonists' requests on both area *and* separation. In line with the squatters' demands, the Monaro and Riverina⁴ were returned from the southern to the central district, with a new boundary replacing those of 1839 and 1840, now running "from Cape Howe to the nearest source of the River Murray, and thence the course of that river to the Eastern boundary of the province of South Australia" (1842 Act, ss.2, 51: see Patterson 1962; Melbourne 1963: 265, 278, 337-8; Lumb 1991: 12, 34). Less clear however is why Port Phillip again missed out on colony status, with the Act ruling out territorial subdivision of NSW south of the 26th parallel. The answer lay not in the Sydney political campaign, but in the colonial office, where a powerful mixture of political and economic imperatives had intensified plans for an alternative territorial approach not only in Australia, but in North America.

The Canada problem (1836-1840)

In British North America, questions about the management of colonial territory had begun to be resolved in a different way to those in Australia. As seen earlier, the initial British approach had been to substantially 'federalise' the remaining American colonies, but this was not limited to the creation of a Governor-General and future dominion. In the constitutional reconstruction of 1791, it was determined that the best prospect of retaining the major province, Canada, was to separate it into two provinces within the group: Upper and Lower Canada. Almost ever since, French-speaking Lower Canada had been a political problem, and in a reverse trend to that operating in Australia, the 1820s saw increasing British proposals to put the Canadas back together. In 1836, the Gosford Commission was appointed to devise a new constitutional formula, with Gipps as one of its three members, but its mixed results were rendered out of date when armed revolts in Lower Canada in 1837-38 prompted a more decisive British reaction (Martin

⁴ Monaro (originally Maneroo) and Riverina were later terms, 'Riverina' being the name coined by Lang in 1856 for the area between the Murrumbidgee and Murray Rivers following the Spanish-named 'Entre Rios' region of South America (Ellis 1933: 71). Generations of debate over legal entitlement to the Riverina nevertheless dated from this decision: see Garden (1984: 68), Ogier (1902; 1905; 1912) and Ellis (1933: 23, 37-41).

1972; McKenna 1996: 29). That reaction was total reunification of the Canadas under a single colonial legislature, in the *Union Act* of 1840.

The Canada problem galvanised the British consensus that it had been a mistake to separate the Canadas in the first place. Particularly when the primary problem appeared to be a territorially-discrete cultural minority, the experience provided a direct reminder that federalism aside, Britain's own constitution had been built on a territorial strategy for welding disparate populations into one powerful nation. Britain was not just any kingdom, but the *United Kingdom* of England, Scotland, Ireland and Wales. Endorsing and popularising Canadian reunion, Lord Durham's famous 'report' of 1839 argued that the constitutional answer to the fracture was clearly the principle of legislative union "found perfectly efficacious in Great Britain" (quoted McMinn 1979: 36; Martin 1972: 54-74). A unitary legislature allowed all to be fairly represented, but ensured unity by allowing the majority to prevail on national matters – in Britain the English, and in North America, English-speaking Upper Canada.

In Australia, the resolution of the Canada problem was read not for its territorial implications, but for the principles of colonial responsible government set out in Durham's report (Melbourne 1963: 261, 310-28, 383-6; Irving 1964: 194; McMinn 1979: 31, 48; McKenna 1996: 29-30). The accuracy of this reading is open to debate, not only because Durham's advice was not as well-received officially as often assumed, but because his argument that a unified legislature would be competent to exercise far greater power was part of the argument for territorial reunion, not necessarily a goal in itself (Martin 1972: 69). In fact, in contrast with Canada, it was not the minority Australian provinces that were the source of political difficulty, but rather the majority Sydney squattocracy – suggesting even more clearly that official resistance to separation was not a squatter victory, nor intended to disadvantage the Port Phillip community, but more likely intended to preserve Port Phillip's scope to help check NSW's defective political culture. In any event, though apparently invisible in Sydney and Melbourne, growing British policy questions about the role of multiple colonies had received a definitive answer. Gone from the dominant colonial policy was the American federal idea that multiple territories made for constitutional strength, because particularly in America, it had become difficult to keep all of them within the empire. Gone too, therefore, was sympathy for colonisation based on Franklin's decentralist federal model, at least to the extent that the base colonial unit within each dominion

needed to remain that of the traditional separate colony. Decentralisation remained an intrinsic goal of colonial development and the federal territorial path remained one alternative, but it was no longer the preferred one.

The Stephen unification model (1836-1847)

In London, Stephen's colonial office had been working on a new Australian constitutional path since 1836, in parallel with its efforts to find a new Canadian formula. The immediate political and economic imperatives for an alternative Australian strategy were different, but in colonial policy the basic territorial issues were directly related and between 1840 and 1847, the revived unitary principle brought them to a common point. The first of Stephen's three attempts to introduce his model began in 1838, in parallel efforts in all existing mainland colonies: in NSW, in a Constitution Bill successfully negotiated with NSW spokesmen but which languished pending the decision on convict transportation (Melbourne 1963: 237); and in the establishment of Australia's first formal representative institutions, not as legislatures but as town trusts and councils in Western Australia (1838) and at Adelaide (1839) (Pike 1957: 39, 241; Larcombe 1961: 31; Chapman & Wood 1984: 22-3; cf Crowley 1955: 54).

In Stephen's model, the establishment of local institutions provided the key to two major problems. In NSW, new constitutional arrangements were long overdue but confounded by political issues: neither the preponderant ex-convict population (emancipists) nor the self-interested squatter elite (exclusives) were sufficiently mature to take over colonial legislation, particularly with transportation still in progress (Ward 1958: 22-9). Alongside this ran a more complex economic problem, intimately territorial: the unmet demand for services and infrastructure to support the spread of civilian settlement, little of which could realistically be funded from London. In North America, village and town organisations had sprung up early on settlers' own resources, but NSW's military history had left a strange environment in which all public services remained dependent on the Crown. Despite the European population having more than doubled each decade since 1820, early efforts to establish local institutions had failed (Egerton 1893: 312-3; Larcombe 1961: 7-31; Melbourne 1963: 181-90, 274, 293-319; McNeill 1997: 18-9). Without local institutions, the risk to territorial fragmentation was practically unlimited, with hundreds of colonies needed to provide the necessary

services; and yet in NSW, the civic calibre did not yet exist to constitute the legislature of even one.

Stephen's model met these problems not simply with a comprehensive system of local governments, but a two-tiered structure in which a colonial legislature could then be constituted by secondary election of the 'cream' of the first. His plan aimed to satisfy the principle of a wide democratic franchise, to be supplied at the local level, both to ensure the quality of the pooled legislative talent and to hold it to account. Logically, the new 'district councils' should also be able to satisfy many of the political and administrative demands otherwise set to sustain infinite calls for colonial separation, as was occurring at Port Phillip. In the first phase however, the strategy had mixed success. The Western Australians were struggling to survive and could barely support even the first tier. The South Australians successfully established the first tier, but financial difficulties suspended debate about the second (Pike 1957: 39, 241). The NSW Bill remained in limbo, but in May 1840 Gipps introduced a local government Bill into the still-appointed NSW legislature, despite having objected to Stephen's plan prior to the decision on Canadian union. Gipps eventually withdrew the Bill amid conflict between the exclusives and emancipists over the franchise, forcing him to instead begin trying to slowly issue individual charters (Melbourne 1963: 188-9, 231-56).

Stephen's second and most major attempt came in the *NSW Constitution Act 1842* – the British law which so conspicuously declined to separate Port Phillip. Instead, its proposal was a detailed system of district councils as the new base unit of territorial organisation. Gipps was able to issue a multitude of council charters and the system quickly showed signs of working at Port Phillip, where councils formed at Melbourne (1842) and Geelong (1849) would prove to be the only ones to survive (Larcombe 1961: 16-33; Power et al. 1981; Bowman 1983: 166; Chapman & Wood 1984: 23-4; Finn 1987: 79). However, in the Sydney districts and any other prospective communities the attempt failed. By late 1845, all but one council was financially defunct, the new majority-elected legislative council having used its power to deactivate the crucial rating power on which they depended. The scheme had fallen victim to the new NSW exclusive-emancipist alliance, campaigning against any local rates as 'taxation without representation', now meaning 'taxation without responsible government'. Even by the

liberal appointee Robert Lowe, the offending rating power and new councils were attacked as "hell-hounds of confiscation" (see Larcombe 1961: 30; McMinn 1979: 37).

The NSW legislators' campaign was a sign of much to come. Nevertheless, Stephen was not yet defeated, joining with Gipps to evaluate the model and concluding in January 1846, that the mistake in 1842 had been to break the legislature's electoral dependency on the "municipal institutions designed to keep it in check" (quoted Melbourne 1963: 319). In the third and final attempt, Stephen tried to wind back the clock and reestablish the secondary election nexus, in the 'Australian Charter' despatched by the colonial secretary-of-state, the third Earl Grey, in July 1847 (Ellis 1933: 32-33; Hartwell 1955: 68; Larcombe 1961: 12; Melbourne 1963: 275-353, 388). The Charter updated Stephen's scheme with Grey's plans for simultaneously creating a free-trade national union, reclassifying each of the existing four colonies as 'provinces', whose secondarily-elected legislatures would then choose further delegates to the national assembly (Egerton 1893: 284; Ward 1958: 23; McMinn 1979: 92). Grey abandoned the final attempt in early 1848, after the Governor of New Zealand, Sir George Grey, rejected an equivalent scheme for his colony sent seven months earlier, quickly followed by predictable Sydney attacks on the local institutions as "cumbersome and expensive" (Wentworth, quoted Melbourne 1963: 344-51). Stephen retired, returning just once in 1850 to plead the case for district councils as a member of the Privy Council Committee on Trade and Plantations, but the attempt was over (Earl Grey 1853: 317-23, 427-8).

Reevaluating the Stephen model

Stephen's constitutional model has been poorly recognised in Australia. Its various iterations are generally regarded as disparate attempts to introduce some scheme of local government into NSW; only a few even suggest the attempts were connected (Ward 1958: 41-2; Larcombe 1961: 25-6; McMinn 1979: 42). The dominant view, stated in Melbourne's *Early Constitutional Development*, is that the final Charter reflected Stephen's "ideal system of colonial government", but that 1847 presented "merely the first" chance for him to pursue it; earlier plans for local government are assessed as an unrelated "sop" (1838) and the product of Gipps' genuine but "academic" commitment to local institutions (1842)(Melbourne 1963: 342-6, 232-6, 323). Further,

historical scrutiny of the 1847 Charter has been dominated by the assumption it was a 'federal' proposal, and therefore not possibly related to any alternative British constitutional theory – an assumption to be revisited in the next chapter. Revisiting Stephen's efforts in context, we find instead a coherent strategy for rebuilding Australian colonial structures on a constitutional path aligned less with federalism, and more with British unitary traditions. The effort commenced in response to Australian political and economic challenges, viewed through a general search for new empire-wide principles, but became a more intense and explicit concern in light of empire-wide problems.

The rediscovery of Stephen's model has three significant implications for later understanding of Australian territorial theory. First, it reaffirms the extent to which Australian colonial politics tended to be reading constitutional policy decisions without full appreciation of their theoretical background. In April 1846 when the plan's second failure led Gipps to recommend in favour of Port Phillip's separation, he was assumed to be bending to the inevitable rather than acting with reluctance; contemporary politics and history alike overlooked that the first principle he had to explain away in his official advice was the policy of avoiding "dismemberment of any colony which, like New South Wales, may be of a size hereafter to become a nation" (quoted Melbourne 1963: 253, 337-8). Simultaneously, local institutions worked in Port Phillip and were successfully attacked in NSW, but in both cases without apparent consciousness of what, constitutionally, was trying to be achieved.

Second, although Stephen's model was built on unitary principles, aimed at minimising and reversing territorial fracture in favour of legislative jurisdictions of larger size and greater unity, it was very different to the stereotype of British unitary systems assumed by later Australian political science. As we saw earlier, it is generally presumed that early British unitary structures were highly centralised and thus, having quickly proved impractical in Australia, had already been abandoned. Consequently, it has escaped orthodox analysis that Australia was ever subject to a comprehensive unitary scheme of this kind. Stephen's model not only confirms that the assumed sequence in British policy is wrong, but that British unitary principles themselves were not necessarily tied to that centralised stereotype. The new colonial office approach was not a mere copy of British constitutional systems transplanted into Australia, based on feudal patterns and archaic traditions, but a modernised, progressive version, custom-made for perceived

colonial circumstances. Even sympathetic historians of unitary ideas date the earliest decentralised unitary blueprints in Australia to Australians themselves, in the late 19th century (Crisp 1990: 49). Here we see that just as federal ideas were active earlier than assumed, British policy makers were working with parallel approaches in the 1830s-1840s. While Stephen's model was intended to minimise and reverse territorial fracture, it still provided actively for political and economic decentralisation – if anything *more* actively than territorial separation seemed able.

Thirdly, a broader understanding of Stephen's model provokes careful scrutiny of its most conspicuous feature: its failure. Alongside modern assumptions that unitary principles were alien or inadequate, we find conventional explanations of these efforts as having failed because their planned local institutions were unnecessary or impractical. However, as we have seen, these institutions worked in places – simply not the places with an existing record of opposition to direct taxation, and whose political leaders made a point of killing them off. Particularly in their 1842 iteration, the district councils were destroyed not because they could not work, but because it appeared they probably *would*, challenging the power of the existing legislators and fragmenting their demand for responsible government (Melbourne 1963: 291, 297-301; McMinn 1979: 38). These responses owed much to previous British policy neglect and poor political judgment, but attacks on the local institutions as impractical had the ring of rhetoric in a more complex battle. For example, James Macarthur supported the original 1838 model, and in 1841 gave assurances that there could be "no objection" to local governments if "placed under the control of... a true legislature in the British sense of the word" (quoted Melbourne 1963: 258-9), but still helped ensure none ever came to pass. The major obstacles to Stephen's model appeared specific to the political culture of the early NSW legislature, which Stephen's new constitutional approach was itself trying to address but in which political and economic decentralisation seemed to have no deep or lasting resonance. These problems proved to be a 'catch 22' beyond the British capacity to break.

The failure of decentralised unitary plans did not necessarily mean there was policy consensus that multiple colonies were better. Instead, it revealed that different communities held different ideas about how territory should be constituted. Those seeking political autonomy used the new unitary institutions where they could, but did not perceive them as replacing the major goal of territorial separation already

established. They carried on in a manner consistent with a federal destiny, without realising this had ever been at issue, indeed without recognition that the decade-long hiatus in territorial decision-making reflected any fundamental policy problems. Meanwhile, the Sydney squatter elite fought to maximise its own position, opposing both types of decentralisation, federal *or* unitary. The demise of Stephen's unitary approach model, therefore, did not necessarily mean the victory of a comprehensive federal alternative. In colonial office thinking, there was a conscious choice between federal and unitary approaches, but in Anglo-Australian politics these ideas were insufficiently conceptualised to be operating in direct competition.

2.4. Conclusions: so rich, yet so poor

An understanding of the general territorial logic of Australia's early divisions seem to have escaped us because there wasn't one – rather, there were many logics, in a state of transition and indirect conflict. From 1823 into the 1840s, each territorial decision was different, sometimes reflecting coherent constitutional ideas but never the same one, and on some occasions clearly confused. Contrary to later hopes that the division of territory must have reflected a linear constitutional progression, British policy commenced as if relatively certain, but quickly lost that certainty and ultimately underwent substantial transformation. Some major boundaries determined in this period were 'imaginary lines', but these were most open to later attack not as necessarily arbitrary or illogical in themselves (only in South Australia's case was this clearly so), but as symbols of the deeper policy incoherence. Moreover, Australia's formative territorial politics were still descending into a period of "confusion and change without parallel" in its history (Wentworth 1956: 11), or as described in London at the time, one of "indescribable ferment" (*Morning Chronicle*, quoted McKenna 1996: 35).

Through this apparent chaos nevertheless ran two continuous threads of constitutional theory, appearing in a reverse order to that customarily assumed. From 1820 these ideas focused first on a federal strategy of political and administrative decentralisation, and then from 1836 shifted back towards a unitary one. Both ideas appeared decades earlier than often later presumed, both predicated on Australia's evolution into a British dependent nation. Further, although these ideas were in the process of being recognised as different political traditions in the wake of the American revolution, both theories

were distinctive for their strong common focus on decentralisation, directed to the practical imperatives of a new, rapidly growing political economy and the spatial extension of new institutions in support of European colonisation. At the same time, far from being uniform, the manner of reception of each of these ideas into Australian politics was different, not only overall, but in different places. Encouraged by the initial British policy, American decentralist or 'Franklinesque' federalism represented such a strong, contemporary colonial precedent that it took hold very quickly in new Australian settlements, particularly where they had sprung from earlier ones in 'frontier' fashion. There was clearly a problem brewing, however, with dominant political attitudes in the older Sydney central districts, which from at least 1837 took an increasingly defensive stance against the federal-style approach. Following on its heels, the unitary alternative showed itself similarly capable of putting down roots in new settlements, and remained consistent with the call for 'true' British constitutional structures, but was never fully tested because Sydney district support for it, too, was withheld.

The questions caught in the policy shift between Australia's first two major territorial theories were not whether Australia should be developed as a nation, nor whether such a nation also required territorially-defined subnational structures – rather, it was what type of nation, based on what type of subnational structures, according to what territorial formula. By the mid-1840s the partial attempt at one strategy followed by failure of another left these questions fundamentally unanswered. The outcome in political theory was a rich mix of constitutional ideas aimed at realising common goals, but which remained poorly conceptualised in Australian politics. The practical outcome was that a quarter-century after it began, the search for a coherent plan for the subnational allocation of Australian territory – on either model – had come to a grinding halt.

