

Electoral Reform as a Tonic for Referenda and Federalism: a Response to Professor Craven

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Moderate, conservative, republican

Professor Craven is one of Australia's leading moderate conservatives, at a time when immoderate conservatives and 'C' conservatives are the Colossi of politics, and Stentorians of the media. The Autumn 2005 pages of *APR* carried Craven's article from the Study in Parliament Group's 2004 conference on the 'Role of Parliament in Constitution Making and Constitutional Amendment'.

In that article, Craven examines the pros and cons of referenda and plebiscites, and pooh-poohs the idea of using plebiscites to resolve the Republican question. Craven, a republican-but-not-at-all-costs, attacks plebiscites as a Trojan horse for the direct-election model of republicanism.

In this rejoinder, I wish to lock swords with Professor Craven over the way forward on the Republic issue. But I will also reflect on two more pressing and substantive issues for constitutional design, both also dear to Craven. They are federalism, and the make up and role of the Senate. In each case I suggest tonics in the form of reform of referenda and electoral systems.

In relation to constitutional reform, I argue that Craven's rejection of plebiscites is driven more by his fear of a directly elected Head of State, than on principle. A neutral and democratic solution to the impasse over the Republic is the 'preferenda'. That is, a preferential vote on constitutional reform that offers people the chance to rank several proposals, rather than the traditional dualism of 'yes' / 'no'. Craven may be right to fear constitutional damage being done by thoughtless populism, but there is another electoral reform to counter that: we should adopt voluntary voting on constitutional referenda. This should please both those who fear populist reform and those who despair at ever achieving constitutional amendment — camps straddled by Professor Craven.

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In relation to constitutionalism more generally, the defining feature of Craven's public intellectualism and activism (yes, moderates can be activists!) is his passionate defence of a genuine federal-state balance, and his defence of parliamentary sovereignty. In the second part of this response, I float the possibility of a Senate elected on regionalised lines.

***'Preferenda' and Voluntary Voting on Constitutional Questions:
an alternative to endless plebiscites and antidote to nay-saying***

Preferenda (or multi-option referenda)

In rejecting constitutional plebiscites, Professor Craven does not rely on the lazy argument that they would cost a packet without guaranteeing constitutional closure. Instead, he takes aim at the potential for plebiscites to be conducted in a superficial manner. Yes, he concedes, direct democracy is, well, democratic. But this 'does not necessarily mean it is an exercise in *quality* democracy'. The 'non-dispositive character [of plebiscites tends] to promote a shallow, lackadaisical consideration of the issue', advantaging superficially appealing or populist proposals. A multi-option plebiscite allegedly compounds this problem, as public focus is diffused across several proposals, instead of focusing on a battle between the status quo and the challenger.¹

One can buy the first criticism, without the second. The Beazley-ALP proposal is for a series of three votes. A plebiscite on 'A Republic: yes or no?', followed by a plebiscite on 'Republic: direct election or appointment?', topped-off with a binding referendum between the status quo and more popular alternative. The most likely outcome of this proposal is boredom and apathy, rather than enlightenment or enthusiasm for constitutional debate. A series of plebiscites offers little.

But the opposition to multi-option voting *per se* is unfounded. One might as well say 'We need to keep minor parties off the ballot, so voters focus on the battle between Labor and Liberal'. Sure, too much choice can confound choice. But on what basis could Professor Craven argue that electors cannot sensibly rank the Head of State alternatives? Public discourse, after all, has winnowed them down to three essential options: 1. Keep the Crown and Governor-General. 2. Direct election of a non-executive President (a la Ireland). 3. Parliamentary Appointment. Electors can walk, across the road and chew gum at the same time. As consumers we rile against duopolistic restriction of choice, but that is precisely what the format of a 'yes' / 'no' constitutional referendum achieves.

Professor Craven's opposition to multi-option polling on constitutional issues leaves Republicanism in a stalemate. (Here I should declare my hand as a republican, who

¹ Greg Craven, 'Referenda, Plebiscites and Sundry Parliamentary Impedimenta' (2005) *Australasian Parliamentary Review* 20(1) at 81 and 84. Emphasis on the word 'quality' added by me.

is open to either republican option). In insisting on what mathematicians call 'pair-wise selection', Craven ensures that whatever model is put up can be blocked by an artificial majority of constitutional monarchists plus peeved supporters of the other republican model.

Craven's opposition to multi-option polling looks suspiciously like the tactic he accuses both monarchists and direct-electionists of pursuing, namely wanting to rig the rules in favour of their preferred outcome. In his case, I take the preferences to be: 1. Parliamentary Appointment. 2. Status Quo. 10. Direct Election. I'm not necessarily cavilling with that particular ranking. But why not let everyone participate in the ranking? After all, it is how we run elections: via the preferential ballot. And whilst if we see someone voting 1. Socialist 2. Liberal 3. Labor, we smell a donkey, there is nothing irrational in any of the possible rankings of the three Head of State options.

The beauty of preferential voting is that it is agnostic to all of the options. Monarchists may argue it is designed to take away the advantage of the status quo. And so it is, to the extent that the status quo should have no institutional advantage, merely whatever goodwill it has by virtue of its history. Polls suggest the constitutional monarchy option is far from commanding a majority, a fact which threatens to erode respect for the relevance of the rest of the Constitution. But in any case, constitutional monarchists should welcome multi-option voting, since as their numbers dwindle, at least that form of voting guarantees them a say as to which republican option is the lesser evil.

Elsewhere I have floated the idea of having binding, multi-option referenda, or preferenda.² A preferendum is not just the rational way forward for the Republican question, but a more democratic option for all questions of constitutional reform. It does not usurp Parliament's role as the gatekeeper of constitutional options, but recognises there will be issues on which there is more than one reform option Parliament may want to leave to the people. In a sense, there is nothing new in this: local liquor options used to routinely offer a variety of different closing-times, and the 1977 national plebiscite over the national song/anthem, which chose *Advance Australia Fair* over a variety of alternatives, was run via preferential voting.

A preferendum would only lead to constitutional change if one of the reform options garnered majority support, after preferences, in a majority of states. Thus the preferendum respects the constitutionally entrenched double majority requirement, which is designed to give some insulation to the status quo.

² Graeme Orr, 'Preferenda: the Constitutionality of Multiple Option Referenda' (2001) 3 *Constitutional Law and Policy Review* 68. In a more embryonic form, see Graeme Orr, 'The Conduct of Referenda and Plebiscites in Australia: a Legal Perspective' (2000) 11 *Public Law Review* 117 at 126-7. My advocacy of 'preferenda' owes much to PJ Emerson's work through the de Borda Institute in Northern Ireland, *The Politics of Consensus* and *Beyond the Tyranny of the Majority* (1998). As Emerson argues, especially in conflictual societies, the 'preferenda' is infinitely preferable to the artificial dualism of 'yes'/'no' referenda.

Now is not the venue to descend into the detail of questions about the constitutional legality of preferenda.³ Suffice to say that nothing in the Constitution says that a Bill for constitutional reform cannot propose two or more options, one only of which is to be enacted if it receives majority support. The Constitution leaves the ‘manner’ in which referenda are to be taken to the Parliament, and the High Court has upheld preferential voting as an entirely legitimate method of majoritarian choice. The High Court has also endorsed the expedient of Bills for constitutional reform packaging or rolling-together several distinct reform proposals. Admittedly the High Court is staffed with constitutional nit-pickers rather than constitutional innovators, but it would take a bold High Court, after a nationwide vote that produced a reform result, to strike down something as inherently democratic as a preferential vote.

The safer route, of course, would be to explicitly enshrine the preferenda option in the Constitution. I can’t guarantee the nay-sayers wouldn’t sink a referendum on the topic, even though it is merely an issue of democratic process. But something in me doubts that Australians would say ‘no, we prefer less choice, not more’.

Sceptics of the preferendum idea will run to the Convention debates of the 1890s to show that the participants in those debates only spoke of ‘yes’ / ‘no’ referenda. But original intent is a poor substitute at the best of times, when literal and purposive approaches agree that preferenda are a legitimate option. And even if the purposive and literal approaches did not agree, original intent doesn’t resolve the question. The founding fathers lived in a time of tick-a-box voting, but that no more means the Constitution excludes preferenda than it mandates first-past-the-post voting.

Voluntary voting for referenda

The second change to electoral systems needed to improve the consideration of constitutional amendments is voluntary voting at referenda. That should appeal to those, such as Professor Craven, who fear populist reform as much as they decry the barrier to reform erected by opponents building a coalition of ‘nays’ based on apathy and ignorance. Craven writes that ‘confusion’ is the ‘napalm’ of the nay-sayers. He bears the scars of the successful napalming of the 1999 Republican Referendum by the unholy alliance of constitutional monarchists and direct-electionists.

Craven neatly compares the nay-sayers’ tactic with that of the criminal defence lawyer who muddies every argument, then reminds jurors that the prosecution must convince them beyond a reasonable doubt.⁴ There will always be reasonable doubts in institutional design. But short of creating a dictatorship, or enshrining a rule like ‘strangle all blue eyed babies at birth’, institutional design is not akin to sending an

³ As to which, see Orr ‘Preferenda’, *ibid.*

⁴ Craven, above n 1, 83, restating his argument in *Conversations with the Constitution*, below n 14, 232–3.

individual to gaol. Institutional design does not have an all-or-nothing aspect to it. It is about balancing the rules of the game of power.

Arch-conservatives are happy, when it suits them, to claim that the status quo, merely because it is the status quo, is entitled to maximum deference. The double majority requirement is a concession to that position. Thomas Brennan defended the double majority as a virtuous impediment to reform, arguing that a constitution, 'was not intended to be capable of alteration by every gust of passion, or in response to every catch cry, or at the suggestion of every legislative medicine-man.'⁵

Professor Craven, fearing the 'lemon' of bad constitutional reform more than he anticipates an oasis of constitutional perfection, shares some of that deference. But deference to the existing constitutional structure is, as Craven has eloquently argued, no substitute for reason. The corollary of 'if it ain't broke, don't fix it' must be 'if it needs repair, work on it'.

In *Conversations with the Constitution*, Craven briefly touches on the idea of voluntary voting at referenda, but dismisses it in a humorous aside. As long as we embrace compulsory voting at elections, he says, voluntary referenda would be 'like dressing up for take-away, but wearing thongs to the Savoy.'⁶ Neither food nor fashion, however, is an apt metaphor.

Why are elections 'take-away', but constitutional reform a trip to a five-star hotel — save on the basis of frequency?⁷ Elections are the staff of political life, and as they say in the classics, human beings are *zoon politikon*. It is not unreasonable to expect everybody to turn up at the polls, for a host of reasons. Yes, many citizens express apathy or antagonism to politics. But just as a dog knows the difference between being kicked and being tripped over, so everyone, regardless of education or attention to political debate, has a sense of whether 'things are better (or worse) than they were three years ago'. Elections are seasonal rituals, which draw us together, and may even bind us as a community.⁸ Elections are the manner in which, in democratic practice, we all cede power to our representatives. And in practical terms, the legitimacy of government requires a high turnout. These are all good reasons for compulsory voting at elections.

But referenda or constitutional reform lack these essential features. Not everyone is capable of understanding constitutional issues. Such issues do not neatly resolve

⁵ Thomas Brennan, *Interpreting the Constitution: a politico-legal essay* (MUP, 1935) 320. Oddly we don't hear conservatives arguing for super-majorities to impede the reform of state constitutions: presumably this is explained by the (traditional) conservative fear of centralism.

⁶ Craven, *Conversations*, below n 14, 229.

⁷ Actually, federal elections are only twice as common as federal referenda: Graeme Orr, 'The Conduct of Referenda and Plebiscites in Australia', above n 2 at 118. The current figure is now 41 federal elections and 19 referenda days.

⁸ See Graeme Orr, 'The Ritual and Aesthetic in Electoral Law' (2004) 32 *Federal Law Review* 424, especially at 433–41.

into 'are things better or worse than they were in 1901', but assume a matrix of understandings of institutional context. These are much subtler questions than: 'Do you trust Bloggs MP to be returned as your representative for a few more years?' They may, I fear, be off the radar of subtlety given the present mass media. (Although I make that last comment at the risk of admitting to being a grump, entering middle-age. Was there ever a nirvana of citizen engagement? Not if the Home Affairs Minister in 1915, in a debate on compulsory voting, is to be believed:

There should be more solid reading and less reading of scrappy magazine rubbish. Twenty-five years ago more solid reading was done ... There is no excuse for any elector to decline to vote on the ground that he is not familiar with the question submitted to him.⁹

Yes I am a lawyer. But no, it is not elitist to recognise that constitutional illiterates should not be forced to make decisions on the shape of the Constitution. Putting educational or wealth restrictions on the right to vote is elitist: voluntary voting in contrast closes no-one out from referenda. Certainly it is no more elitist than comparing constitutional referenda to a night at the Savoy and elections to a quick feed. Professor Craven is realistically sceptical of the idea of mass inoculations, via civics education, as an antidote to constitutional ignorance. I doubt he wants folk who prefer eating with their hands having to decide which knife to use at the Savoy.

When Professor Craven, supporting compulsory voting at referenda, quips that the 'first principle of constitutional democracy and successful corporate fraud is to implicate everybody', the joke may be on him. We rightly celebrate the fact that Australia's Constitution was subject to approval at the polls. But if our nation's constitutional legitimacy lies in any *actual* act of popular sovereignty, it rests shakily. Only a bare majority of eligible electors turned out.¹⁰ And of course, most women and indigenous people were by law ineligible to vote, because it was felt they were not independent or political enough to vote. Neither of those statistics, however, disqualifies the 1890 polls as acts of democracy.

In any event, whilst you might want everyone to have their say on a new constitution, the originary moment when a draft constitution is put to the voters of a fledgling nation is a different kettle of fish from the typically piecemeal questions of constitutional amendment. Not one of the 42 referenda since Federation has proposed truly ground-breaking reform.¹¹ Not even a proposal for a directly-elected

⁹ Mr Archibald MHR, Parliamentary Debates, House of Representatives, 8/9/1915, p 6690.

¹⁰ 52% according to George Williams, 'The High Court and the People' in Hugh Selby (ed.) *Tomorrow's Law* (Federation Press, 1995) 271 at 286–7.

¹¹ The most significant were the packages of extra powers proposed by Canberra in 1911 and 1944. But their import was that they were cumulative 'power grabs' — none of the extensions to Commonwealth jurisdiction were, taken individually, particularly earth-shattering. Indeed the High Court, through stealthy interpretation, has found ways to extend many of the powers in question. For a full list of referenda and results, see Tony Blackshield and George Williams, *Australian Constitutional Law and Theory: commentary and materials* (3rd edn, Federation Press, 2002) 1303–08.

but essentially titular President would break that tradition of piecemeal, rather than root and branch reform proposals. (Indeed the question which came closest to shaking Australia to its roots was conscription in world war one. That was resolved by plebiscites, not binding referenda.) One can make a case, for legitimacy's sake, that an entirely new constitution should be considered under compulsory voting, but not every proposal to fine-tune or modernise the document.

Comparisons with 1901 are unhelpful for another reason. The draft Constitution was essentially a 'take-it-or-leave-it' option. People voted it up or down, depending on how badly they wanted Federation. There was no consideration at the polls — as opposed to the 'elites' at the Conventions — of the Constitution on a clause by clause basis. Yet short of putting a re-codification or total constitutional rewrite to the people, the clause by clause option is all we have if we accept that improvements must be made. As long as we play into the hands of the water-muddiers and nay-sayers by insisting that the apathetic and uninterested will decide constitutional referenda, we may as well treat debates about constitutional reform as moot. Voluntary voting — and preferenda — meet Professor Craven's twin fears of populist reform, on the one hand, and roadblocks to reform, on the other.

It is an historical oddity that compulsory voting was to be trialled at referenda before it was to be considered at elections at the federal level in Australia. The *Compulsory Voting Act 1915* (Cth) was to be applied to referenda (on Commonwealth powers and possibly conscription) slated for late 1915, but which did not eventuate. Labor government members confessed compulsion was an experiment, with one Senator admitting they were 'trying it on the dog first'. This pet analogy came back to haunt the government through the debates on the Bill; Liberals like Senator Millen pointing out that compulsory voting should not be gambled with when the fundamental law of the Constitution was at stake.

The Home Affairs Minister, Mr Archibald, offered several weak responses.¹² He claimed he'd never heard of an election or proposal in which there were insufficient distinctions between the options to excite ordinary voters. (He obviously did not anticipate proposals such as the 1967 nexus question or the 1984 co-operative interchange of powers question). To electors who didn't understand constitutional intricacies, Archibald had two ripostes. First, 'vote the man'. That is, do whatever the politician you most admire tells you to. And second, as quoted above, give up 'scrappy magazine rubbish' for more 'solid' reading.

My argument for voluntary voting at referenda is based on principle. I doubt it would lead to a huge drop in turnout such as to cast doubt on the legitimacy of any vote: compulsory voting at elections will continue to habituate many voters to turnout. A practical problem, I confess, would be the potential for a parliamentary majority to game the system by holding a referendum at election time, or separately,

¹² Most likely Labor wanted to trial compulsory voting at the proposed 1915 referenda since it had twice been rebuffed on the extension of powers in voluntary referenda in 1911 and 1913.

depending on predictions of the effect on turnout between lukewarm supporters and opponents. For that reason, I'd advocate also having an 'undecided' or 'don't care either way' box on referenda ballots. Such votes presently don't count in determining referenda majorities, and have not since at least a ruling in 1910.¹³

Federalism, parliamentary sovereignty and the role of the Senate

Federalism — and the challenge of the new centralism

Through both academic work and commentary as a public intellectual, Professor Craven offers a spirited defence of a particular constitutional orthodoxy. For Craven, this orthodoxy rests on parliamentary sovereignties. The plural is no typo, for Craven cares passionately about what journalistic shorthand misleadingly calls 'state's rights'. He does so aware that:

[t]here can be few things less fashionable than Australian federalism, and most of these live at the bottom of stagnant ponds. To admit a devotion to the Australian states is to court instant social death ...¹⁴

(Social death of course does not stalk Greg Craven. Whilst the rest of us who evolved in the turgid ooze of legal academia strain for the odd lame joke or to shake the surly bonds of anal-lytical prose, Craven is the drollest of commentators. His *Conversations with the Constitution* is as much a tour-de-wit and celebration of metaphor, as it is a pamphleteering essay on Australian constitutionalism. But I digress: this is not a book review of *Conversations*.¹⁵)

Craven's defence of his version of constitutional orthodoxy is conducted against the backdrop of what he sees as two competing tendencies. The first is the nightmarish visions of hyper-centralists, who would see every aspect of Australian life ruled from Canberra. The second is the apparently noble dream of bill-of-rightists, who would see every aspect of Australian life ruled by judges. To old-timers, all this is quite ironic. Once upon a time, leftists were the centralists, and Tories revered judges as the true guardians of established and classical liberal values. How have these positions reversed?

Traditional labourites would not 'trust the judges' further than they could throw the collected volumes of the *All England Reports*. When class push came to shove, as even Churchill conceded, background and upbringing would out, and one knew on which side of any key issue the common law judges would come down. Today, the

¹³ Under advice of the Commonwealth Attorney-General to the electoral authorities: see Australian Electoral Commission, *Scrutineers Handbook: a Handbook for Scrutineers at the 1999 Referendum* (AEC, 1999) para 6.8. For more on referenda law, see Orr, above n 2.

¹⁴ Greg Craven, *Constitutions with the Constitution: not just a piece of paper* (UNSW Press, 2004) ch 3.

¹⁵ But if you care about or teach law or politics in Australia and you've not read a copy, social, intellectual and cultural death will deservedly consume you.

judicial gene pool has broadened, making things less predictable, but two revolutions in education have caused 'progressives' to look for judicial champions. First, legal education teaches students to critique law and see it as an arm of social engineering, rather than just a mechanical enterprise. The second is in the role that universities (and the 'quality' press) now play in inculcating socially reformist values.

Conversely, and perversely, conservatives, or rather Conservatives, are now the new centralists. Howard is not just the new Whitlam. John Howard's lieutenants are the new Lionel Murphies, at least in a methodological sense. Consider how Tim Fischer prayed for a 'C' conservative on the High Court, and the bountiful Lord obliged, not once, but twice: ergo Justice Ian Callinan and Justice Dyson Heydon. Or consider how senior Liberal Minister Tony Abbott, in the pages of the new *conservative* journal, has renounced his parliamentary attack on Paul Keating's centralist tendency. Mr Abbott once believed Australia had 'a perfectly good system of government provided each tier minded its own business'. But that was the voice of callow youth, Minister Abbott now says, as he seeks to extend his own power.¹⁶

Professor Craven condemns this new centralism as a betrayal of the Liberal Gods, Deakin and Menzies: it is a victory for short-term 'policrats' over the liberal tradition of federalism as a system of checks and balances on the tendency to excess of governmental power.¹⁷ To Messrs Howard (tax, now industrial relations), Abbott (health, abortion), Nelson (education) and Ruddock (defamation), the ends justifies the means.

Scientists warn us that when the earth's magnetic poles flip, we may just be frazzled. When legal and political verities flip, Professor Craven seems to warn, expect similar nasties.

Of Barnaby Joyce and an institutionally regionalised Senate

Where does Parliament fit in all this? Centre-stage, Craven hopes. With it lies the job of balancing rights claims and utility. The High Court, of course, may have forsaken judicial athleticism. But it is hard to see how, even under the immensely studious moderacy and restraint of Chief Justice Gleeson, it will wind-back eighty years of centralising judgments, unless it is willing to bear accusations of judicial re-activism in upsetting the apple-cart of established precedent. A truly moderate High Court, for example, would declare the planned 'nationalisation' of labour law

¹⁶ See Tony Abbott MHR, A Conservative Case for Federalism, (2005) *the conservative: a journal of reform* (issue 1) 4–5. <<http://conservative.com.au>>

¹⁷ 'Policrats' is a Cravenism — see the op-ed piece in *The Australian*, 1/3/2005, republished on *Online Opinion* as 'Betrayal of Menzies — eschewing federalism' <<http://www.onlineopinion.com.au/view.asp?article=3093>>

a step-too-far and a misuse of the power to regulate corporations.¹⁸ But in doing so, it would throw into doubt much that is bi-partisan and pragmatic in current federal labour law, such as enterprise bargaining between corporate employers, their workforces and unions as an alternative to industry-wide awards.

So, in the main, the job of restraining federal Parliament lies with federal Parliament. Or rather, Parliament needs to draw lines in the sand in front of itself and a rampant Executive. But how might this be achieved in the face of iron-fisted party-discipline, and a perversion of Westminster politics that goes beyond Presidentialism and approaches the Führer-principle? Professor Craven admires the ‘rich, reassuring [if] faintly ridiculous air of British history’ that imbues parliament as an institution.¹⁹ But as befits a constitutional conservative — and realist — he sees neither a need to nobble parties nor to hobble the Executive with excessive checks and balances (the American answer). If Parliament is to heal itself and the body politic, it must be understood that what goes on inside the party room is at least as important as the outcomes in the chamber. The revolt, if it is to occur, must come through backbenchers becoming, if not leaders, then something more than pure followers.

Thus Professor Craven, in the pages of *The Australian Financial Review*, recently paid tribute to Senator Barnaby Joyce, the media dubbed ‘rogue Senator’ from the Queensland Nationals. Whilst not necessarily endorsing Joyce’s policy positions (or waverings), Craven expressed admiration, indeed thanks, for Joyce’s strength in defining his role as representing his state.²⁰

Many have been impressed with Senator Joyce’s independent spirit and, perhaps more importantly, his willingness to engage in public deliberation. In return, the Senator has attracted suitors from all corners of the political landscape. This may not last, of course, as Barnaby is not the blank slate on which can be projected every critique of unwise or excessive government policy. But he does present a sincerity of political deliberation that recalls both the Australian Democrats and One Nation movements at their best, before they imploded.

But Professor Craven is guilty of thinking wishfully aloud if he takes Senator Joyce’s claim to represent his state’s interests at face value. One doesn’t need to re-read Pitkin on Representation to know that that term is tremendously malleable. The good Senator himself must, when he repairs from Canberra to take counsel from the Queensland Nationals, or his community of St George, must know that the claim to represent ‘Queensland’ is mere rhetoric. Joyce represents — brilliantly — a regional constituency and an avowedly sectoral party. His policy positions on

¹⁸ After all, attempts to unshackle federal power over labour relations were rejected repeatedly at referenda in the first half of last century: see James Macken, *Australian Industrial Laws: the constitutional basis* (LBC, 1980) 85–7, 258–9.

¹⁹ Craven, *Conversations with the Constitution*, above n 14, 87.

²⁰ Greg Craven, ‘An Innocent Abroad’, *The Australian Financial Review*, 26/8/2005, 82.

Telstra and student unions are motivated to protect vulnerable rural and regional interests. Indeed his back-flipping on Telstra was a classic piece of sectional deal-making, and doubtless we will see more fancy footwork as the logs roll on. But the bulk of Queenslanders, living in outer city suburbs, may wonder why the same attention is not paid to their communities, services and universities, and if not, why the less wealthy in such suburbs should cross-subsidise ‘the bush’.

It is not easy to see how the Senate could ever be a State’s House, short of Senators caucusing by state rather than party. Senator Joyce might, it is conceivable, reject the forthcoming industrial relations bill on the grounds of a single principle: conserving state jurisdiction. But breaths should not be held on that one. The Joyce approach more likely suggests a Senate mutating into a set of regional representatives. This will horrify those who disliked the manner in which Labor-men-turned-independents, Senators Harradine and Colston, used their brief balance of power. But to others, a regionalised Senate is a perfectly feasible model and indeed the traditional basis for electing state Legislative Councils.

Such a reform could be achieved without touching the Constitution, for that document explicitly envisages a regionalised Senate.²¹ It is an imperfect solution to the question of the Executive gorilla, of course. Regionalism might act as a fillip to encouraging a more diverse and free-thinking Senate, at a time when both ALP and Liberal Senate tickets are sometimes heavy with apparatchiks. It might also re-vivify Senate elections. At present, Senators, especially in the larger states, coast through campaigns on the party label on their leader’s coat-tail. But it cannot guarantee that parties will not pick, and electors choose, party hacks.

The Constitution does present two problems of institutional design to a regionalised Senate. One is the constitutional prohibition on regional boundaries cutting across State borders.

The other, more serious, is that since each State is guaranteed equal representation, the number of Senators per region would be problematic. Odd numbers — say 7 + 5 — may be preferable to avoid the crude sharing of seats between the two major parties. But mapping this onto metropolitan and non-metropolitan parts of a State may tax the principle of one-vote, one-value. Although that principle was ignored in the founding fathers’ mandate of equal Senate representation per state, it has applied within States, by virtue of the tradition of state-wide electorates.

Regional constituencies may also make it harder for minor-parties to win seats, and the Senate’s revivification as a House of Review in past decades has owed much to the move to PR even if it is ‘semi-proportional representation’. A regional Senate would need to face a full election — not a half-Senate election — each term,

²¹ With emphasis added, section 7 of the Constitution begins: ‘The Senate shall be composed of senators for each State, directly chosen by the people of the State, voting, *until the Parliament otherwise provides*, as one electorate’.

to ensure the contestability of seats. But surely the Constitutional rule that Senators should enjoy double the term of Representatives, and be a 'permanent' House, is an archaic conceit.

It may be objected that a regionalised Senate would sandwich a fourth layer of representation between local government, and State and federal governments. To the extent they champion checks and balances, and would like to see the Senate represent geographic interests as well as be a diverse House of Review, it would be odd for constitutional conservatives to make that objection. Such an objection is really just the chestnut, 'Australia is over-governed' in a new guise. A regionalised Senate would add no more politicians to the payroll.

I am dreaming of course. Neither major party, least of all their leaders, would embrace reform that weakened them, or rather weakened their ability to dictate the national agenda and their party's positions. But in the hopeful spirit of Cravenism, we should have 'conversations with the Constitution' even if we have to imagine a revolution in Realpolitik to envisage amendments to it. ▲

