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Federalising Socialism Without Doctrine

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Abstract

The Australian Constitution is only partly 'liberal' (securing political and economic liberties); another part is 'socialist without doctrine' (empowering governments to own and operate vast public capital, while providing social insurance in a market economy). That mixture is common in modern advanced economies but was anomalous in the Anglophone constitutional tradition in 1901. Legislative power over 'old age and invalid pensions', 'railway construction' and 'conciliation and arbitration for the prevention and settlement of industrial disputes' was an accepted part of the incipient Federal scheme but repugnant to Anglophone constitutional orthodoxy of the 19th century. The integration of 'colonial socialism' into the Constitution created one of the longest-standing puzzles in Australian jurisprudence, the Surplus Revenue Case of 1908, and laid the foundations for federal dominance of the Australian economy. Understanding the enduring impact of colonial socialism in Australian constitutionalism sheds light on how Australia's distinctive political economy grew within a 'Washminster' system of government. It also provides principled guidance for future policy challenges that may require expansion of state involvement in the economy.

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I Introduction

A central debate in economic history is whether the 'Australian Settlement' has been 'either too powerful or not powerful enough'.[1] The outsized role Australian colonial governments had in their

1. Peter Lloyd, 'Analytical Framework of Australia's economic history' in Simon P Ville and Glenn Withers (eds), *The Cambridge Economic History of Australia* (Cambridge University Press, 2015) 52–69, 67. Major contributions are NG Butlin, 'Colonial Socialism in Australia', in H GJ Aitkin (ed), *The State and Economic Growth: Papers of a Conference held in October 1956 under the auspices of the Committee on Economic Growth* (New York: Social Science Research Council, 1959); CB Schedvin, 'Midas and the Merino: A Perspective on Australian Economic Historiography' (1979) 32(4) *Economic History Review* 542; HM Boot, 'Government and the Colonial Economies' (1998) 38(1) *Economic History Review* 74; L Frost, 'Government and the Colonial Economies: An Alternative View' (2000) 40(1) *Economic History Review* 71.

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economies compared with the Home jurisdiction and the United States is a core predicate of that debate. Colonial Australian governments built major capital assets, operated them for profit, exploited international bond markets for project-finance, were mass employers, labour market-regulators and provided the most generous social insurance in the Anglosphere. In turn, the populace cultivated an investor mentality and aspired to affluence, rather than utopian equality or re-distribution. That curious blend of state-direction within the market-system has long been labelled 'colonial socialism',[2] and was originally called 'socialism without doctrine' due to its highly pragmatic and anti-theoretical tone.[3] It created 'a regime of economy and society in which state-established institutions … directly regulated or publicly influenced the labour and finance markets'.[4] Enduring puzzles were left for both 'market liberals and state socialists'[5]: did state dominance retard or boost economic growth[6]; why did the market paradigm survive once workers could vote themselves wages and pensions[7]; and was the colonial period really 'socialist' if it was racist, affluent and chauvinistic?[8]

The relevance of debates about Australia's colonial socialism should be obvious to constitutional thinkers. If the colonial Australian economy was uniquely 'statist', compared to its juristic ancestors, then the nature of the 'constitutional state' in Australia immediately before Federation meaningfully diverged from 'Washminster' precedents.[9] Influential English jurists understood that split with classical liberalism. Dicey wrote that 'socialistic legislation and experiment have been carried to a greater length in Australia than in England'[10] and described (locally unremarkable) aspects of colonial government as types of 'evil'.[11] The same aversion to state involvement in economic conditions was dominant in US legal circles in 1900. Long after employee-safety legislation was normalised in the Australian colonies, the US Supreme Court (notoriously) invalidated 10-hour work-day legislation in reliance on constitutionalised ideas of contractual freedom from government intervention: 'the freedom of master and employee to contract with each other in relation to their employment, and in defining the same, cannot be prohibited or interfered with, without violating the Federal Constitution'.[12] The notions of *laissez-faire* that underpinned

2. See, eg, William Pember Reeves, *State Experiments in Australia and New Zealand* (Cambridge University Press, 2011) vol 2; FW Eggleston, *State Socialism in Victoria* (PS King and Son, 1932).
3. 'Demands on government are for practical concessions rather than declarations of principles. Western Europe is richer in theory, Australasia in practice': Albert Métin, *Socialism Without Doctrine*, tr Russel Ward (Alternative Publishing Co-operative Ltd, 1977) 180. Métin was a French socialist professor who visited Australia and New Zealand in the 1890s. Observing the implementation of state-centric socio-economics, he returned to France, became a national politician and eventually served as the Minister for Labour and Social Welfare (1913–1916). He could be understood as the 'Continental' James Bryce: cf Stephen Gageler, 'James Bryce and the Australian Constitution' (2015) 43(2) *Federal Law Review* 177; Blayden (n 22).
4. Lloyd (n 2).
5. Ibid.
6. Eg, Butlin (n 1); cf Frost (n 1).
7. Eg, Lloyd (n 1) 60-2.
8. Eg, Métin (n 3), 178–86.
9. That '[t]he Australian Constitution embodies two constitutional traditions. While modelled partly on the Constitution of the United States, it incorporates the British notion of responsible government' (Stephen Gageler, 'Foundations of Australian Federalism and the Role of Judicial Review' (1987) 17(3) *Federal Law Review* 162, 164), is a fundamental unit of thought for Australian constitutional jurists.
10. Albert Venn Dicey, *Lectures on the Relation between Law and Public Opinion* (Macmillan, 2nd ed, 1919) 387.
11. Ibid 292.
12. *Joseph Lochner, Plaintiff in Error v. People of the State of New York*, 198 US 45 (1905).

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those foundational accounts of early 20th century British and American constitutionalism relied on a severance of economic activity and state power that was alien to the Australian experience at Federation.[13] Thus, we have reason to revisit the idea that 'both the Thames and the Potomac flow into Lake Burley Griffin'[14] and think deeply about a third powerfully distinctive Australian idea of constitutionalism entrenched at Federation. This paper engages in that process of thought.

Part 1 describes three core legal and constitutional features of colonial socialism, guided by empirical findings of Australian economic history. First, from the 1860s, colonial governments owned and operated vast public-capital which required innovative constitutional arrangements including executive bodies which stepped outside orthodox ideas of public office grown in the Westminster tradition with potent powers to transact, hunt for yield and regulate the employment relationship. Secondly, colonial governments funded their public works and employment via their collective ('pooled') access to debt capital and foreign investment which they attracted using investor protections given by colonial legislatures which largely neutralised sovereign risk in the heavily indebted colonies. Finally, colonial governments provided universal public insurance programs, initially to public-sector workers and then universally through old-age pensions which required all arms of government to become welfare-distributing bodies: legislatures would set the terms for universal economic dignity, executive bodies superintended those programs and judiciaries resolved eligibility disputes. The model of constitutional statehood that emerged from the colonial phase was one of 'egalitarian state potency' which implied a vastly different balance of public and private authority to the constitutions administered in Washington or Westminster in 1900.

Part 2 explores how the distinctive constitutional model developed during the colonial period was entrenched in the *Constitution's* text and structure, then by the High Court in its resolution of the *Surplus Revenue Case* and finally by the electors via the 1910 Referendum. Substantive power to implement colonial socialist techniques at a federal level was unambiguous. The Commonwealth's explicit power to 'acquire', 'construct' and 'extend' railways, to legislate for 'lighthouses, lightships, beacons and buoys' and provide '[p]ostal, telegraphic, telephonic, and other like services' provided proof positive that the system of vast public capital, and regulation of labour markets, of the colonial phase could be nationalised.[15] Financial power to fund the colonial socialist model was less clear. The Commonwealth could 'borrow money', tax and spend,[16] but the compromises necessary to complete the drafting process, particularly concerning 'surplus revenue', left doubts about the Commonwealth's ability to replicate the financial model that funded the expansive public-sectors of the pre-Federation colonies. Ultimately, the High Court's intervention was required in the *Surplus Revenue Case* to ensure the Commonwealth could own and operate large capital assets and provide social insurance. The case concerned two staples of the colonial socialist heritage (maritime infrastructure and universal pensions), and the Commonwealth's arguments invoked the legal and constitutional novelties of pre-Federal Australian governments. Confirmed by both the High Court and the populace through referendum, the Commonwealth ended the first decade of Federation faced by no major constitutional barriers to implementing the state-dominant economic model developed in the colonial phase.

13. An elegant review of the core ideas and institutions of *laissez-faire*, close in time to Federation, can be found in Keynes' essay 'The End of *Laissez-Faire*' in John Maynard Keynes, *The Collected Writings of John Maynard Keynes, Volume IX, Essays in Persuasion* (Macmillan, 1972) 272.
14. George Winterton, *Monarchy to Republic: Australian Republican Movement* (Oxford University Press, 1986) 96.
15. *Australian Constitution* ss 51 (v), (vii), (xxxii)-(xxxiv).
16. *Australian Constitution* ss 51 (ii), (iv), 90, 81, 83.

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Part 3 concludes by sketching the radical difference in constitutional perspectives on the balance of state and economy in Australia (on the one hand) and the UK and US (on the other) and indicating future research streams. Both Anglophone ancestors of the *Australian Constitution* faced severe constitutional crises between 1900 and 1940 which arose from attempts to implement public investment and welfarist policies which were uncontroversial in Australia. The development of a social insurance system in the 'People's Budget' of 1909 caused an inter-cameral showdown that resulted in the *Parliament Act 1911* (1 & 2 Geo V c 13) stripping the House of Lords of its legislative power over public sector finances. That extreme institutional resistance to state-involvement in the economy was predicted (and encouraged) by Dicey as a constitutional battle of 'liberalism' against 'collectivism' in a world of 'parliamentary sovereignty': a constitutional perspective which had no clear analogue within the Australian experience of state-interventionist economic techniques at Federation. A similar pattern is identifiable in the constitutional controversies of Roosevelt's New Deal, in which judicial hostility to legislative roll-backs of *laissez-faire* provoked a 're-founding' of the American constitutional settlement. Compared to the popular and technical consensus of Federation-era Australia regarding social insurance and public works, both the type and intensity of the North Atlantic constitutional conflict are alien. The paper closes by mooting potential avenues of future inquiry within constitutional law and theory which may be aided (or not) by the proposed model of Australian egalitarian state potency.

The paper's analysis generates a number of intellectual yields.

Firstly, it sheds new light on the essential character of the *Australian Constitution*. Read through the lens of Australia's economic history, the text and structure entrench a model of constitutionalism within which the state is a potent, transacting, commercial entity (which creates and intervenes in markets) with a strong welfarist capacity (operating generous social insurance programs). Secondly, it makes sense of that vast jumble of constitutional provisions that appear to be simply 'machinery' or 'transitional', such as the transferral of railways, lighthouses, departments and funds between the new Commonwealth and States. True, they are machinery, but they are not trivial: they nationalised the system of regionalised colonial socialism and have no parallel in other written Anglophone constitutions, because no other early-20th century nation had to federate a socio-economic structure of such state dominance. Thirdly, the paper poses a solution to a long-standing doctrinal puzzle, the *Surplus Revenue Case*: why did the High Court sterilise the surplus revenue system and thereby entrench the Commonwealth's fiscal dominance over the States.[17] Rational justifications for that outcome appear in light of the colonial socialist heritage, particularly a need to cure the mismatch between the Commonwealth's legislative powers over public capital and social-insurance and its weakness in sovereign debt markets. Although the High Court's decision may have been partisan, it served a broader purpose of facilitating the transmission of the potent egalitarian model of constitutional statehood from the colonial era onto the national stage.

In each case, something unique emerges: a distinctively Australian constitutionalism, which is neither Washington nor Westminster. While Sawer was right to say that the *Constitution* 'is a blend

17. For scholarly discussion of that case, see Enid Campbell, 'The Commonwealth Grants Power' (1969) 3(2) *Federal Law Review* 221, 224-5; Enid Campbell, 'The Federal Spending Power: Constitutional Limitations' (1968) 8(4) *University of Western Australia Law Review* 443, 457; Alan Fenna, 'Commonwealth Fiscal Power and Australian Federalism' (2008) 31(2) *UNSW Law Journal* 509, 517; Gabrielle Appleby and Stephen McDonald, 'Looking at the Executive Power through the High Court's New Spectacles' (2013) 35(2) *Sydney Law Review* 253, 280; Anne Twomey, 'Post-"Williams" expenditure - when can the commonwealth and states spend public money without parliamentary authorisation?' (2014) 33(1) *University of Queensland Law Journal* 9, 10; Greg Taylor, 'On the Origin of Section 96 of the Constitution' (1997) 39(4) *UNSW Law Journal* 1438, 1441; Charles Lawson, 'Re-invigorating the Accountability and Transparency of the Australian Government's Expenditure' (2008) 32(3) *Melbourne University Law Review* 879.

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of federalism derived from the U.S.A. and responsible government derived from Great Britain',[18] it also entrenches an innovative Australian model of constitutional statehood built around state potency and socio-economic egalitarianism.

Before moving to that analysis, some brief words on the scope of the paper's literatures and methods. The historical treatment draws on economic works which fall into various 'schools' of Australian economic history, which have been divided into 'analytical', 'orthodox' and 'radical', and is more concerned with their common empirical insights regarding the structure of colonial economies, rather than their points of analytic or normative difference.[19] The methodological approach taken to the casual line of law and the economy is only mildly 'functionalist'[20]; the paper's engagement with the High Court's reasons in the *Surplus Revenue Case* takes the role of judicial-interpretative choice seriously in structuring economic relationships.[21] No claim is made that the constitutional balance of state and economy fixed in 1901 is 'good, all things considered', but rather that such balance is distinct when compared to American and British national constitutional developments: a juridically significant split in political traditions. Finally, the paper seeks to contribute to the literatures concerning the role of constitutions in economic equality, the financial aspects of Federation and the emerging body of work concerning the *Australian Constitution's* distinctiveness in the Anglophone world.[22]

A *Part I: The Constitutional State under Colonial Socialism*

Describing Australia's pre-Federation economy as 'colonial socialism' was not an idiosyncratic label adopted *post hoc*. Scholars and political commentators, both domestic and foreign, writing around 1900 characterised the outsized role of the Australian governments in economic and social life as a type of 'colonial' or 'state' socialism.[23] Economic historians writing in the subsequent 120 years have followed that usage, relying on the outsized role played by the state in capital formation, credit acquisition and social insurance. Those learnings have not yet been linked to an analysis of legal structures and institutions to reveal the distinctive Australian model of statehood which emerged at Federation. This part undertakes that activity to explore the unique Australian model of constitutionalism which grew in the latter-19th century.

18. Geoffrey Sawer, 'The Case of Bank Nationalization' (1950) 32(3/4) *Journal of Comparative Legislation and International Law* 17, 18.
19. This is further sorted into further sub-categories and sub-methods of 'scientific', 'neoliberal', 'institutionalist', 'heterodox': Lloyd (n 1) 53–62.
20. Cf Robert Gordon, 'Critical Legal Histories' (1984) 36 *Stanford Law Review* 57.
21. Building on the work of the emerging Yale school of law and political economy: see, eg, Jedediah Britton-Purdy et al, 'Building a Law-and-Political-Economy Framework: Beyond the Twentieth-Century Synthesis' (2020) 129 *Yale Law Journal* 1784, 1833.
22. See, eg, Cheryl Saunders, 'Government Borrowing in Australia' (1989) 17(2) *Melbourne University Law Review* 187; Cheryl Saunders, 'The Development of the Commonwealth Spending Power' (1978) 11(3) *Melbourne University Law Review* 369; Rosalind Dixon and Julie Suk, 'Liberal Constitutionalism and Economic Inequality' (2018) 85 *The University of Chicago Law Review* 369; Ryan Goss, 'What Do Australians Talk About When They Talk About "Parliamentary Sovereignty"?' [2022] *Public Law* 55; Lynsey Blayden, 'Active Citizens and an Active State: Uncovering the 'Positive' Underpinnings of the Australian Constitution by Reference to Section 51(xxxv)' (paper on file with the author); William Partlett, 'Remembering Australian Constitutional Democracy' and 'Remembering Australian Constitution Power' (papers on file with the author).
23. See, eg, Reeves (n 2) 69 (Professor Reeves was Director of the London School of Economics 1908–1919); Métin (n 3); Eggleston (n 2).

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British settlement did not, of course, create Australia's first economic system. To the contrary, the British invasion of 1788 destroyed the pre-existing 'Aboriginal economy': 'a stably ordered system of decision-making that amply satisfied the wants of the people'.[24] The 'destruction of the Aboriginal economy and the decimation of its participants' resulted in a 'transfer of resources from losers to gainers' that should 'properly be seen as a takeover', rather than an acquisition, which was effected by violence and gross indifference to suffering.[25] Britain's destruction of the indigenous Australian economy did not, however, yield overwhelming economic success[26]; early attempts to implement military-controlled economies and then to replicate British models of public-private franchises failed to build a sustainably growing domestic economy.[27]

A prolonged period of growth was not achieved until the 1860s under conditions of vast government involvement in economic activities that historians term Australia's 'colonial socialist' phase. Let us explore three of its major features. The first feature was *public-capital dominance*: colonial Australian governments owned and operated the most valuable assets (particularly mass transport assets such as railways, ports, lighthouses and telegraphs) and were the largest single employers. The second feature was *public-credit pooling*: colonial governments funded their public works and employment via their collective ('pooled') access to debt capital and foreign investment which they obtained under preferential market-conditions achieved through sovereign guarantees. The third feature was *social insurance*: colonial governments provided public insurance programs via pension schemes, initially to public-sector workers and then universally through old-age and invalid pensions. The combination of those features was strikingly distinct to Australia's constitutional forebears.[28] In the Home jurisdiction and the US, the balance of economic power was reversed: the largest capital assets were privately held, the people who built and operated them were privately employed, funding for large infrastructure was mostly privately provided, public treasuries largely sold debt to finance defence spending not public works and universal pensions were non-existent.

The unique economic features of colonial socialism entailed innovative constitutional arrangements. Public-capital dominance required executive bodies which stepped outside orthodox ideas of public office

24. NG Butlin, *Economics and the Dreamtime: A Hypothetical History* (Cambridge University Press, 1993) 184. See also Boyd Hunter, 'The Aboriginal Legacy' in Simon P Ville and Glenn Withers (eds), *The Cambridge Economic History of Australia* (Cambridge University Press, 2015) 473.
25. Ibid 185.
26. Compared to the economic booms that followed European dispossession other indigenous populations: see, eg, Richard Garner, 'Long-Term Silver Mining Trends in Spanish America: A Comparative Analysis of Peru and Mexico' (1988) 93(4) *The American Historical Review* 898.
27. Butlin (n 1) 27–44.
28. Other British colonies were also developing state-supported socio-economic systems. New Zealand's colonial government had a relatively large position in the local economy and an old-aged pension system was implemented slightly earlier than either NSW or Victoria: see Reeves (n 2); Métin (n 3). Emerging research on the British Cape Colony indicates substantial public capital development and spending on social welfare in the latter 20th century: Abel Gwaindepi and Johan Fourie, 'Public Sector Growth in the British Cape Colony: Evidence from New Data on Expenditure and Foreign Debt, 1830–1910' (2020) 88(3) *South African Journal of Economics* 341; Abel Gwaindepi, 'State Building in the Colonial Era: Public Revenue, Expenditure and Borrowing Patterns in the Cape Colony, 1820–1910' (PhD Thesis, The University of Stellenbosch, 2018). Canadian colonial governments provided substantial funding for, but not direct public ownership or control of, major capital assets: Hugh GJ Aitken, 'Government and Business in Canada: An Interpretation' (1964) 81(1) *Business History Review* 4. Notwithstanding those comparators, the latter 19th century saw Australia ascend to the global apex of publicly owned/operated business operations: 'By 1890, the Australian colonies collectively operated by far the largest government-built, government-owned, and government-operated railway system in the world': Jonathan Pincus, 'Socialism in Six Colonies' in William O Coleman (ed), *Only in Australia: The History, Politics and Economics of Australian Exceptionalism* (2016, Oxford University Press) 166.

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and Departments of State which had grown in the Westminster tradition. Colonial parliaments created boards, commissions and agencies with potent powers to transact, hunt for yield and regulate the employment relationship. Public-credit pooling required financial innovation on the part of colonial legislatures and public liability rules which neutralised sovereign risk for foreign investors. Social insurance systems required all arms of government to become welfare distributing bodies: legislatures would set the terms for universal economic dignity; executive bodies superintended those programs and judiciaries resolved eligibility disputes. As with the underlying economic structure, those constitutional arrangements were outliers in the Anglophone world of the latter-19th century. The Australian model of a constitutional state that emerged from the colonial phase was one of 'egalitarian state potency' which implied a vastly different balance of public and private authority to the constitutions administered in Washington or Westminster in 1900.

B *Public-Capital Dominance*

A chief plank of the colonial socialist project was the government's dominant role in the ownership and operation of major capital assets. The most valuable types were transport networks: overland (railways) and maritime (ports, harbours, lighthouses) infrastructure.[29] Operated as ongoing enterprises, those high-yielding public works generated a vast public-employed workforce that enjoyed high-wages and secure jobs. Novel legal arrangements, with constitutional ramifications, were made to accommodate that combination of public capital and public employment.

Railway construction initially occurred on a generous public-franchise model: a group of investors would form a 'company' incorporated by statute to build railways, the members of that company would wholly own the assets and future revenues, while legislation would set safety and public interest standards for the resulting infrastructure.[30] By the latter-1850s, that model had morphed into one of absolute state-ownership and operation: the property of the private company was purchased by the colonial executive, vested by statute in a non-departmental public body which operated the railways, enforcing safety and efficiency rules while extracting profit.[31] Those 'independent statutory bodies' would become prominent and pervasive in Australian public administration.[32]

The extent of public funds necessary to purchase, expand and operate railways was enormous: between 1860 and 1900, public investment in capital stock stood at 7.6 per cent of GDP, 43 per cent of which was devoted to railway construction.[33] Railways were highly profitable assets in the UK

29. Colonial governments also owned and operated other infrastructure — 'telecommunications, water and sewerage, urban transit, and power supply': Henry Ergas and Jonathan Pincus, 'Infrastructure and colonial socialism' in Simon P Ville and Glenn Withers (eds), *The Cambridge Economic History of Australia* (Cambridge University Press, 2015) 222-44, 223.
30. Examples can be found in the *Sydney Railway Company Act 1849* (NSW); *An Act to Incorporate the Geelong and Melbourne Railway Company 1853* (Vic).
31. The paradigmatic example is the *Government Railways Act 1858* (NSW), which brought the Sydney Railway Company into public ownership and operation; incorporated the office of 'Commissioner of Railways', conferred broad contracting powers on the Commissioner; authorised the Commissioner to continue railway construction, compulsorily acquire land, and to collect 'tolls' (by voluntary transaction or compulsory extraction). For the same in Victoria, see *An Act to incorporate the Board of Land and Works and to vest in the said Board the Undertaking of the Geelong and Melbourne Railway Company and other property* 1860 (Vic).
32. Pincus (n 28) chapter 9.
33. Ergas and Pincus (n 29) 228, citing NG Butlin, *Investment in Australian Economic Development, 1861–1900* (Cambridge University Press, 1964) Tables 9 and 10. As explained below, most of that funding originated from the London capital market.

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and US,[34] but in both jurisdictions their construction throughout the latter-19th century was privately funded and operated (Figure 1).[35]

Maritime transport assets were also highly profitable which '[i]n contrast with Britain' were publicly owned and operated.[37] In 19th century England,[38] lighthouses were private assets which operated on a type of syndicated insurance model: mariners paid fees to owner-operators of lighthouses to defray the cost of navigating in dangerous seas. In colonial Australia, lighthouses remained highly profitable but were owned and operated by colonial governments and fees were paid under statutory order.[39] Wharves were initially privately owned, but promptly overtaken by colonial governments which could access cheaper capital (as explained below) to service ongoing maintenance costs.[40] Alike railways, non-traditional government bodies were created by statute to administer the growing stock of maritime transport assets, legally distinct to the departments of the colonial executive government but ultimately subject to their control, endowed with broad transacting powers, wide discretions, some criminal jurisdiction and charged with fee-collection which was returnable to the colonial treasury.[41]

The massive public capital owned and operated by colonial governments had hefty impacts on the colonial labour market. Between 1850 and 1890, the share of government employment in the labour market rose from 5 per cent to 12 per cent.[42] Workers running transport and communications infrastructure enjoyed high-wages which have been described as 'institutionalised rent-seeking'

34. For the UK, see RW Kostal, *Law and English Railway Capitalism 1825–1875* (Oxford University Press, 1997); for the US, see Floyd Mundy, 'Railway Bonds as an Investment Security' (1907) 30 *The Annals of the American Academy of Political and Social Science* 120.
35. Kostal explains that 'English railways were not beneficiaries of either direct or indirect financial subsidies by the state': Kostal (n 34) 6. US railways were constructed by private companies on public land which had been 'granted': Sean Kramer, 'Railroad Land Grants in an Incongruous Legal System: Corporate Subsidies, Bureaucratic Governance, and Legal Conflict in the United States, 1850–1903' (2017) 35(2) *Law and History Review* 391. While some American States provided financial support for the development of their railways in the early-19th century, no comparable system of public ownership, operation and control appeared until the private system's collapse in World War 1: (Carter Goodrich, *Government Promotion of American Canals and Railroads, 1800–1890* (Columbia University Press, 1960); Milton Health, *Constructive Liberalism: The Role of the State in Economic Development in Georgia to 1860* (Harvard University Press, 1954); Louis Hartz, *Economic Policy and Democratic Thought: Pennsylvania, 1776–1860* (Harvard University Press, 1948); Eugene Huddleston, *Uncle Sam's Locomotives: The USRA and the Nation's Railroads* (Indiana University Press, 2002).
36. Samuel Wadham and Gordon Wood, *Land Utilisation in Australia* (Melbourne University Press, 1964) 16.
37. Ergas and Pincus (n 29) 225.
38. The role of government in operating Irish and Scottish lighthouses was more complex, and English lighthouses were nationalised between 1832-36 at substantial cost to the treasury: see, generally, J Taylor, 'Private Property, Public Interest, and the Role of the State in Nineteenth-Century Britain: the Case of the Lighthouses' (2001) 44(3) *The Historical Journal* 749. Some have argued that it is overly simplistic to understand the ownership of lighthouses as 'private' before their acquisition by central government: David E Van Zandi, 'The Lessons of the Lighthouse: Government or Private Provision of Goods' (1993) 22 *Journal of Legal Studies* 47; cf Ronald Coase, 'The Lighthouse in Economics' (1974) 17 *Journal of Law and Economics* 357.
39. See, eg, *Harbours Act 1835* (NSW); Light-*Houses Act 1843* (NSW); *Light-House Dues Act 1847* (NSW).
40. '[B]y 1876, government took over all wharves'. The same pattern occurred in Victoria, Queensland, and Western Australia: Ergas and Pincus (n 29) 224-5.
41. See, eg, the 'Maritime Board of New South Wales' created by the *Navigation Act 1971* (NSW).
42. Boot (n 1) 93.

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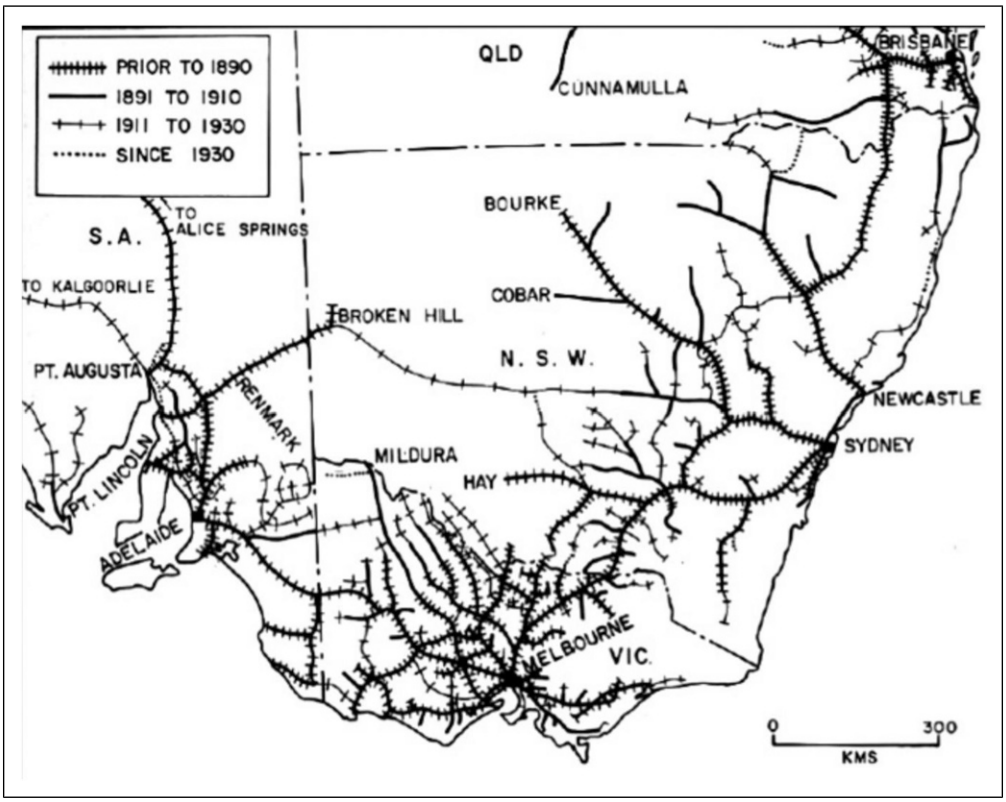


Figure 1. Australian overland infrastructure (regional railways and years of construction).[36]

under conditions of a 'strong labour' movement.[43] Compared to private businesses, public enterprises were vastly larger employers,[44] allowing governments to influence 'labour markets by taking responsibility for labour bureaus, by providing public works to support employment when times were slack, and by enacting factory legislation. The effect was to maintain a high floor to real wages and to keep labour markets tight in almost every year from 1860 to 1891'.[45] To be sure, progressive labour-regulation of the pre-Federation era was multi-causal,[46] but public employment in the government enterprises of the socialist public capital dominance was a powerful driver.

(i) Public-Credit Pooling. None of the colonial socialist infrastructure and its support for public employment could have been achieved without the use of colonial treasuries as intermediaries for

43. Ergas and Pincus (n 29) 243.
44. 'By 1900 the New South Wales Government Railways employed more than 14 000 workers at a time when most large enterprises would have counted their workforce in hundreds … By 1910 the asset value of Victorian Railways was nearly six times that of the largest private non-financial firm': Simon Ville, 'Colonial Enterprise' in Simon P Ville and Glenn Withers (eds), *The Cambridge Economic History of Australia* (Cambridge University Press, 2015) 208.
45. Boot (n 1) 93.
46. See, generally, Andrew Seltzer, 'Labour, Skills and Migration' in Simon P Ville and Glenn Withers (eds), *The Cambridge Economic History of Australia* (Cambridge University Press, 2015) 178.

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foreign investors hunting for yield in the Australian colonies. So much was obvious to contemporaneous observers[47]:

> …the State took up the work of providing transport, and of borrowing great sums to build railways, road and bridges…Government with a partial grip of the soil and a complete grip of the land-transport, held a position too commanding for any private capitalist to challenge. It could borrow money much cheaper in London than any colonial financiers – which is mainly why it undertook the public works.

Economic historians have since agreed that offshore debt capital imported via colonial treasuries drove the colonies' outsized public capital formation. Maddock explains that the [t]he London market...became the natural source of capital for Australian government borrowers'.[48] Colonial governments sometimes borrowed directly from the Bank of England (then still a dividend-paying private bank) but also floated their debt on the wholly private markets.[49] By the end of the 19th century, investment in Australia 'absorbed a high proportion, of the order of a third to a half, of total net British lending overseas'.[50] By 1890, the colonial governments were acting in concert as a debtors' union, all using the same investment bank 'Nivison & Co.' which, by 1890, 'came to act as agent for all Australian governments, eliminating contention and the need for external underwriting'.[51] This 'superior ability of the [colonial] government[s] to raise capital, particularly in London… prompted the original transfer' of major infrastructure to public ownership in the latter-19th century.[52]

Borrowing on the London capital market vastly overshadowed local debt issues Figure 2[53]:

London investors were hungry for colonial yields for two (related) reasons: high rewards and low risks. Rewards were high because railways, ports and lighthouses were highly profitable, irrespective of public ownership.[54] More importantly, North Atlantic investors saw the Australian colonies as low risk[55]: risk premia between 1870 and 1913 averaged 0.56 per cent on Australian colonial debt compared to

47. See, eg, Reeves (n 2) 62; Edward Shann, *An Economic History of Australia* (Cambridge University Press, 1948) 289.
48. Maddock notes that '[a]ccess to that market was enhanced as the London Stock Exchange refined its rules for colonial offerings and legal changes made it easier for United Kingdom trustees to invest in Australia': Rodney Maddock, 'Capital Markets' in Simon P Ville and Glenn Withers (eds), *The Cambridge Economic History of Australia* (Cambridge University Press, 2015) 267-86, 273.
49. 'Colonial governments had ceased to use Australian banks as their London agents even before the depression, for they could obtain better terms using the Bank of England and the London and Westminster Bank': DT Merrett, 'Capital Markets and Capital Formation In Australia, 1890–1945' (1997) 37(3) *Australian Economic History Review* 181, 188.
50. Butlin (n 1) 34.
51. Maddock (n 48).
52. Butlin (n 1) 40. Major public purchases of transport infrastructure (especially railways) were funded by colonial debt issues: see, eg, *Railway and other Public Works Loan Act 1858* (NSW); *Melbourne and Geelong Railways Act 1862* (Vic).
53. Bernard Attard, 'New Estimates of Australian Public Borrowing and Capital Raised in London 1849–1914' (2007) 47(2) *Australian Economic History Review* 155, 167.
54. Mass-transport infrastructure was high-yielding in the UK itself and other British colonies, but the capital itself (and income-streams) remained private. Butlin describes the preferred Canadian approach of colonial 'government guarantee of interest or capital' rather than full public ownership and operation: Butlin (n 1) 39. British railway companies, even when given a statutory monopoly, were still considered 'private' for the purposes of emerging public liability rules: John Smith Chartres, *The Public Authorities Protection Act, 1893: (56 & 57 Vict. c. 61)* (1912, Butterworth & Co) 10.
55. Australia's colonial socialist financial markets were not risk-free. They suffered from the 'animal spirits' that drive destructive Minsky-cycles of financial exuberance, Ponzi finance and collapse: see Maddock (n 48) 274, tracing the 1880s property bubble fuelled by speculative capital inflows from Europe that almost destroyed the local private financial system: of 64 deposit-takers in 1891, 53 had closed by 1893; only 9 of 28 banks stayed continuously open. It is possible that colonial financing practices exacerbated those cycles: Shann (n 47) 289–315.

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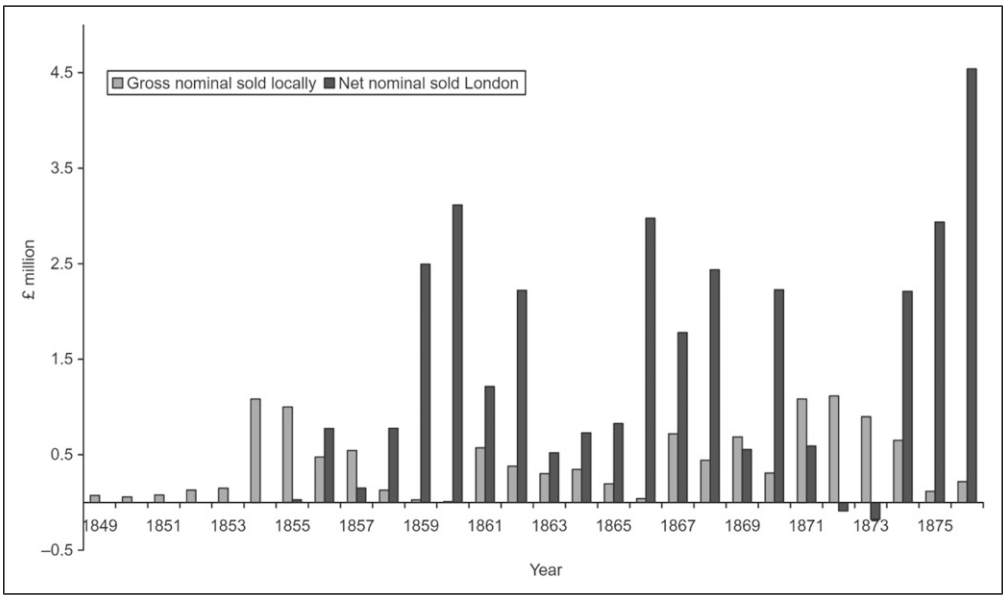


Figure 2. Nominal values of colonial government debentures sold in Australia and London, 1849-76(£m).

0.83 per cent in South Africa, 1.73 per cent in Argentina and 1.94 per cent in Japan.[56] Structural features of colonial governments significantly reduced their credit-risk. Public treasury scoping of infrastructure projects provided '[l]ong-term planning of government capital formation' and parliamentary processes of supply and appropriation provided 'long-term authorisation of expenditures'.[57] 'Governments themselves invested' in public accounts and audit institutions which supplied investors with 'systematic information gathering and publication' of government-run assets.[58] British Governors oversaw public works with a 'watchful eye'.[59] Each of these structural feature neutralised the (otherwise hefty) default risk premium, given that '[b]y 1890 the Australian colonists had accumulated more public debt per capita than residents of any other country or colony in the world'.[60]

In terms of constitutional structure, there were two major elements of investor protection that offset the crushingly large debt burden. The first was risk pooling through statutory borrowing:

56. Ergas and Pincus (n 29) 235, citing M Obstfeld and AM Taylor, *Global Capital Markets: Integration, Crisis and Growth* (Cambridge University Press, 2004) 210-3. Before the financial crises of the 1890s, sovereign risk for NSW debt was only 0.25 per cent.
57. Butlin (n 1) 50. I am indebted to Will Partlett for reminding me of this point.
58. Ergas and Pincus (n 29) 235.
59. Ibid.
60. Lance E Davis and Robert E Gallman, *Evolving Financial Markets and International Capital Flows: Britain, the Americas, and Australia, 1865–1914* (Cambridge University Press, 2001) 473.

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'bundling claims against a broad range of assets' leading to 'economies of scale and scope'[61] which thrilled London's investor community.[62] One type of credit pooling was directly imported from the UK. The colonial constitutions of the 1850s followed the British precedent of consolidating fiscal revenues as security for loans of private financiers.[63] Under that system, colonial customs and excise receipts flowed into 'consolidated funds' which were collateral pools for offshore debtholders[64]: thus the local reliance on indirect taxes (customs/excise) supported inward debt-capital investment.

Another type of colonial credit pooling was novel and focused explicitly on pooling capital assets, rather than fiscal receipts. Colonial parliaments enacted separate *Loan Acts* to raise project-finance for capital works which linked specific bond-lines to specific public assets. A representative example is the *Public Works Loan Act 1881* (NSW) 45 Vict, c 22 which authorised 'the Government to borrow' £1million 'for the following several purposes'[65]:

RAILWAYS—			
For providing Additional Rolling Stock...	£500,000	0	0
HARBOURS AND RIVERS NAVIGATION—			
Towards completing Darling Harbour Wharf and extending the Railway to the deep waters of Port Jackson including compensation for land &c. resumed	500,000	0	0
TOTAL	£1,000,000	0	0

The statute tailored the securities tendered to offshore investors, providing for the sale of 'debentures…in the form of funded stock in…London' and transfer of the debentures to be recorded 'in accordance with regulations made or approved by the Committee of the [London] Stock Exchange or adopted by the Bank of England'.[66] Funds received from bond sales were 'to be placed to a separate credit to be called 'The General Loan Account' and withdrawals could only occur with permission of the Governor (appointed by and responsible to, London).[67]

The second element of foreign-investor protection was a highly innovative system of public liability rules which largely neutralised sovereign risk for foreign investors in colonial public capital. At common law,[68] the Crown was immune from suit subject to a discretionary action ('the petition of right') which guaranteed a disappointed counter-party no financial redress.[69] Applying this system to the 'Crown' which had dispossessed the landmass of Australia presented an obvious block to foreign investment:

61. Ergas and Pincus (n 29) 235. This type of credit-pooling could also be called 'securitization': see, eg, Kenneth C Kettering, 'Securitization and Its Discontents: The Dynamics of Financial Product Development' (2009) 29 *Cardozo Law Review* 1553, 1556; Jonathan C Lipson, 'Re: Defining Securitization' (2012) 85 *Southern California Law Review* 1229, 1257; Joseph C Shenker and Anthony J Colletta, 'Asset Securitization: Evolution, Current Issues and New Frontiers' (1991) 69 *Texas Law Review* 1369, 1370-88.
62. '[B]etween 1883-1890 – the Australian colonies absorbed over one-half of total British net overseas investment': Davis and Gallman (n 60) 472.
63. See, eg, *New South Wales Constitution Act 1855*, 18 & 19 Vict, c 54, s 53; (*Western Australia Constitution Act 1890*, 53 & 54 Vict, c 26, s 72.
64. Will Bateman, *Public Finance and Parliamentary Constitutionalism* (Cambridge University Press, 2020) 49–50.
65. *Works Loan Act 1881* (NSW) 45 Vict, c 22 Preamble, s 1.
66. ss 1, 2, 5.
67. ss 7, 11. A particularly potent investor protection was specified for any person 'who shall forge fabricate or counterfeit … a stock certificate' — 'the extreme punishment applicable to the law to the crime of forgery': s 9.
68. Which applied until 1860, when the UK passed legislation for statutory petitions of right which had already been provided by colonial legislation from 1853.
69. Bateman (n 64) 71; Paul Finn, *Law and Government in Colonial Australia* (Oxford University Press, 1987) chs 1 and 6.

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lending the colonial Crown funds for project-finance risked giving money to an entity which could neither be sued for failing to construct and operate the public asset or sued for default of the debt.[70]

The solution to that problem of investor-risk in the colonial socialist project was to create a public-liability system that ensured colonial governments would be liable for non-performance of commercial obligations though the ordinary judicial process, supervised by British authorities. From the 1860s, 'claims against the government' legislation was enacted which applied standard property law concepts to colonial governments.[71] South Australia and NSW passed the first of such legislation in the 1850s,[72] which empowered the Governor to approve actions against the 'Colonial Government'[73]: sidestepping unresolved questions of the 'Crown's' legal personality and amenability to suit.[74] Both South Australian and New South Wales *Claims Against the Government Acts* also ensured that judgment debts against colonial government could be easily paid,[75] another unclear matter under British law.[76] Additionally, colonial governments could reassure investors that 'claims against them could be pursued through to the Privy Council'[77]: reserving ultimate decisions on sovereign-risk for political and legal authorities in London.[78]

(ii) Public-Social Insurance. The public capital dominance and public-credit pooling of the colonial socialist period were not driven by utopian social policy, but capital efficiency. Social insurance, in the form of universal old-age pensions, represented a divergence from that model. Even the sceptical and doctrinaire Métin described the first Australian old-age pension as 'really tending towards socialism'.[79] Alongside private pension arrangements,[80] the UK government had paid pensions for centuries to holders of aristocratic/venal offices,[81] while the US government had expanded pension coverage to soldiers and their families. Latter-19th century proposals within the British Empire for old-age pensions were largely based on contributory-models were which really forms of

70. No such problem applied in the UK where major infrastructure was privately funded and where the Bank of England (not the 'Crown' for liability purposes) stood between the Treasury and private bond market, thus neutralising the counterparty risk of sovereign lending.
71. A masterful account of the technicalities of this legislation can be found in Finn (n 69) 141–60.
72. *Claims Against The Government Act 1853* (SA) 6 Vict 17; *Claims Against Government Act 1857 No 11a* (NSW) *('Claims Against Government Act* (NSW)*')*.
73. A representative example is taken from s 2 of the *Claims Against Government Act* (NSW) (n 72). Awkward legal fiction was required to make the system of public liability function: to avoid colonial judges presiding over the 'Crown', the Governor was required to 'name some person or persons to be a nominal defendant in the matter'.
74. And those were deeply contested questions of common law in the latter-19th century: see FW Maitland, 'Crown as Corporation' (1901) 17(2) *Law Quarterly Review* 131.
75. As Finn explains, the precise scope of claims against the government legislation was contested throughout the colonial phase, particularly regarding tort claims, but it was clear that actions in debt and contract fell within their scope: Finn (n 69) ch 6.
76. Bateman (n 64) 71.
77. Ergas and Pincus (n 29) 235.
78. This was part of a broader Imperial finance system that in which 'colonies tended to enjoy lower borrowing costs … [because] they were not seen as independent political entities that set their own policies and controlled their own assets': Jamie Martin, *The Meddlers: Sovereignty, Empire, and the Birth of Global Economic Governance* (Harvard University Press, 2022) 70. See also Olivier Accominotti, Marc Flandreau and Riad Rezzik, 'The Spread of Empire: Clio and the Measurement of Colonial Borrowing Costs' (2011) 64(2) *Economic History Review* 385.
79. As opposed to 'so many other government instrumentalities in Australasia: from a distance it is socialism; from close at hand it is quite simply a colonial expedient': Métin (n 3) 165.
80. 'Railway superannuation' schemes were prominent examples of private pension schemes: Terence R Gourvish, 'A British Business Elite: The Chief Executive Managers of the Railway Industry, 1850–1922' (1973) 47(3) *The Business History Review* 289, 307.
81. See WD Rubinstein, 'The End of 'Old Corruption' in Britain 1780-1860' (1983) 101(1) *Past & Present* 55.

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government mandated 'thrift', requiring minimum working years and 'good character' standards before 'deserving poor' could access retirement benefits, often mostly below subsistence levels.[82] The first step away from that parsimonious attitude to life-cycle dependence insurance was taken in New Zealand via *Old-age Pensions Act 1898* (NZ) which created a scheme for universal non-contributory old-age pensions.[83] That relatively generous scheme formed the basis of Australian development of universal invalid and old-age pensions.[84]

By 1900, two types of pensions could be drawn in Australia, both associated with colonial socialist conditions: pensions related to public sector employment and universal old-age pensions. Public sector employment itself provided a type of pension, simply on account of the wages and retirement benefits payable to the bulk of public sector works. Such programs are notable in size from the 1890s. An example appears in the *Victorian Railways Commissioners Act 1883* (Vic) which required that 'every officer and employee holding office in the Railway Department at the time of the passing of this Act shall be entitled to compensation or retiring allowance'.[85] Public employment also served as a proxy for unemployment insurance[86]:

> New South Wales, like every other Australian Colony, is annually troubled and burthened by an 'unemployed' difficulty. Every winter the Government is under the unsatisfactory necessity to provide, or rather to create, more or less useless occupations for large numbers of men, as an excuse for the payment of money to keep them and their families from starvation.

In addition to manipulating the government's labour-wage bargain, a universal, non-contributory, old-age pension was proposed in NSW on explicitly humanitarian grounds. The parliamentary report which recommended the legislation stated the basic position: 'pension should be granted as a right, not as charity, and it should not be seen as in any way humiliating to those who receive it'.[87] It rejected British contributory models (which penalised the poor and women) and drew on Continental European practice for inspiration.[88] Writing in 1902, Reeves describes the broad acceptance of those principles in the parliamentary debate on Australia's first universal pension legislation. In the Lower House, '[r]ightly or wrongly, national thrift was not a word to conjure with in Sydney…Of direct opposition there was almost none. The Upper House, if not enthusiastic, was benevolent. Seldom, indeed, has a striking, novel, and expensive social reform been adopted with so little hesitation and amid so harmonious a chorus of blessings and good wishes'.[89] Funding for the scheme was recommended via mining royalties and profits from agricultural use of Crown Lands 'with the State, instead of private individuals, as a progressive landlord'.[90]

82. For the history, see Pat Thane, 'Non-contributory versus insurance pensions 1878–1908', in Pat Thane (ed), *The Origins of British Social Policy* (Croon Helm London, 1978) 114.
83. E Rogers, 'A 'most imperial' contribution: New Zealand and the old age pensions debate in Britain, 1898–1912' (2014) 9(2) *Journal of Global History* 189.
84. It was influential (but not decisive) in British debates: see ibid.
85. s 72: see the consideration in *Victorian Railways Commissioners v Brown* (1905) 3 CLR 316.
86. JC Neild, 'Report of the New South Wales Commissioner on Old Age Pensions, Charitable Relief and State Insurance in England and on the Continent of Europe' (1 October 1898) 460.
87. Métin (n 3) 169 quoting Neild (n 86).
88. Neild (n 86) ch 1, particularly 11–22.
89. Reeves (n 2) 289.
90. Neild (n 86) 459-60. The 'pioneer' of the NSW Pension Act was a parliamentarian with 'personal experience of the actuarial work of life-insurance business': Reeves (n 2) 281.

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The NSW pension was vastly expensive and generous relative to its period. It contained racist exclusions ('asiatics' and 'indigenous natives') but otherwise male and female residents of NSW for 25 years were eligible by default once they turned 65.[91] Early-life criminal offences were not disqualifications, nor was persistent unemployment.[92] The base quantum of £26 would have covered average annual spending on food, beverages, dwelling, fuel/light, entertainment and medical attendance.[93] People receiving private pensions were ineligible for pension and the base quantum was reduced by other income sources, as well as large property holdings.[94] Payments under the Act were protected from the vicissitudes of the political process by standing appropriation.[95] Victoria quickly followed with its own *Claims for Old-Age Pensions Act 1900* (Vic), which largely mimicked the NSW legislation.[96] The absence of institutional resistance to those universal pension programs was striking, given that attempts to implement far less generous programs in the UK caused the constitutional crises which fundamentally remodelled the UK Parliament through the *Parliament Act 1911*,[97] as is discussed below in Part III.

(iii) Egalitarian State Potency. The Australian model of the constitutional state which emerges from the colonial socialist period is distinct in the Anglophone world. Executive governments were large business-operating entities which used their size and scale to acquire bulk-financing on international debt-capital markets, while providing vast public employment and generous social insurance. Legislatures innovated to support the potent executive with novel forms of public office, smoothed disputes in the public labour markets with conciliative industrial institutions and backstopped investor confidence by enacting innovative public liability regimes. Judiciaries applied the traditional common law, but accepted parliamentary innovations, and were the outpost of an Imperial system of investor protection which ensured executives' access to cheap foreign credit despite large deficits.

Those features of the colonial constitutional state supported a political economy that rotated around a dominant public sector with strong compassionate tendencies: compared to the UK and US, they were markedly more 'egalitarian'.[98] Importantly, however, colonial socialism was not driven by class struggle or ideas of common humanity. Indeed, European socialists commented that 'Australasia has contributed little to social philosophy but she has gone further than any other land whatever along the road of social experiment'.[99]

> 'On both sides equally, the poverty of theoretical notions is astonishing to anyone accustomed to European polemics. One hears from the employers simply affirmations of inflexible resistance to change, based on the defence of their profits. There is no argument whatsoever, only declarations of war….On the other side theoretical arguments are no better, or rather, they simply do not exist: people ignore or run away from them. The word 'socialist', pleasing to many European reformers because of its philosophical and general connotations, displeases and perturbs Australasian workers by its very amplitude. One of them whom I asked to sum up his programme for

91. *Old-Age Pensions Act 1900* (NSW) ss 9, 51.
92. Ibid s 9.
93. Timothy Coghlan, *A Statistical Account of the Seven Colonies of Australasia, 1899–1900* (William Applegate Gullick, Government Printer, 8th issue, 1900) 419.
94. *Old-Age Pensions Act 1900* (NSW) ss 4, 5, 9.
95. Ibid s 46.
96. And was followed by the *Old-Age Pensions Act 1900* (Vic).
97. 1 & 2 Geo 5, c 13.
98. Those features were not present in *all* the Australian colonies, but they were core parts of the constitutional models of New South Wales and Victoria which were overwhelmingly the most populated and powerful colonies immediately before Federation.
99. Métin (n 3) 180-1.

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> me replied: 'My programme! Ten bob a day!' I dare not affirm that this answer is typical, but it reflects an attitude of mind very common among Antipodean workers: they see their own interests so clearly and pursue them so persistently that they fear anything which might make their aims even seem less clear-cut.[100]

The world of political ideas remained stapled to British concepts and theories, despite their infelicity.[101] This accounts for invocations of concepts like 'liberalism' during the Conventional Debates to describe social insurance projects which grated against contemporaneous understanding of constitutional liberalism.[102] Emerton quotes a neat illustration of that phenomenon in Barton's interjections at the Melbourne Convention in 1898: 'the want of foundation of accusations against this [draft Constitution] Bill on account of its alleged illiberal character' is evidenced by such 'very important further powers' as 'the power to legislate with reference to invalid and old-age pensions … [and] for the appointment of courts of conciliation and arbitration in industrial disputes which extend beyond the limits of one state'.[103] As explained in Part III below, universal old-age pensions and a state-governed wage system were both antithetical to orthodox constitutional accounts of liberalism, particularly in Britain and the US, in 1900.

Differences of opinion with European socialists were not simply rhetorical. Colonial Australians did not appear to seek radical re-distribution, but aimed for material comfort and had an investor mentality. Compared with working classes in Europe, '…the Australia worker…is a free spender. He does not agonize over the cost of an article or a pleasure he wants: he does not grudge any treats to his family, and so what is left over from his living expenses over goes on pleasure or on luxury goods'.[104] Additionally, surplus earnings were not solely devoted to consumption but were invested: 'There is no evidence to support [the belief that protective legislation tends to make the worker improvident]: on the contrary savings bank deposits and payments to mutual benefit societies continue to increase every year'.[105] Thus, the potent egalitarian colonial state model produced citizens who aimed for the acquisition of property rights and the institutional foundations, particularly strong judiciaries, for their security. Nor did the colonial phase see an eradication of private entrepreneurship: to the contrary, private capital formation was enabled and boosted by the vast subsidies provided by publicly funded and owned 'business enterprises' which '[i]n terms of capitalisation and labour force…towered over private enterprise'.[106]

Finally, perhaps most significantly, the colonial socialist model was not premised on ideas of human solidarity and equality. Commitment to the British Empire, its military model and its racist policies was widespread. Métin recorded an example of the contradictions this created[107]:

100. Métin (n 3) 180–1.
101. 'It is to England that most well-read and intellectual of Antipodean reformers turn to seek theoretical bases for their laws, when they take the trouble to support practical considerations with abstract ideas': Métin (n 3) 179–80.
102. *Official Report of the National Australasian Convention Debates, Third Session* (Melbourne, 17 March 1898) 2468, quoted in Patrick Emerton, 'Ideas' in Cheryl Saunders, and Adrienne Stone (eds), *The Oxford Handbook of the Australian Constitution* (Oxford University Press, 2018) 155.
103. Ibid.
104. Métin (n 3) 186.
105. Ibid.
106. Ville (n 44) 208.
107. Ibid 190. Métin also described the absence of pacific sensibility in the Australian labour-movement: '[a]t the time of my visit pacifist sentiment was by no means as widespread or as rapidly increasing among Australasian workers as it is among European ones': ibid 191. 'Australasians are for the most part enthusiastic supporters of *Greater Britain*, of colonial expansion and even wars of conquest. I may report in this connection a small but characteristic fact. In the great industrial city of Melbourne two statutes stand in front of Parliament House: one is in honour of General Gordon [*of Khartoum*] and the other of the achievement of the eight-hour day. The first, I was told, symbolised particularly resentment of Gladstone, the peace minister, who hesitated too long about sending reinforcements to Khartoum': ibid 190.

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> It is true that several labour organisations have protested recently against colonial expansion, or rather against one of its results: they complained that the financial supporters of conquest were at the same time the greatest exploiters of black labour and therefore enemies of the European worker. Even in this form the motions of protest were passed only with difficulty and were by no means unanimous.

Métin was confused by that fusion of institutional traditionalism and innovation, noting that '…the worker…would not like parliament to be elected on a property qualification as in Great Britain, but he manifests utterly unequivocal attachment to the monarchy and the most profound reverence for the sovereign and the royal family'.[108] Those anecdata need to be qualified by recent historical scholarship explaining the distinctiveness of pre-Federation Australian politics and constitutionalism.[109] Partlett has explained how 'the federation movement was heavily influenced by radical Chartist ideas of a constitution that limited parliamentary power on certain fundamental principles'.[110] Those ideas led to radically different conceptions of egalitarian democratic government in Australia, compared to the Home jurisdiction: the 'distinctive Australian tradition combined trust of parliament with a constitutional guarantee that the people could control the parliament through the vote'.[111] Blayden explains how many of those civil and political innovations were 'institutional and regulatory in character' and bolstered the development of a 'political culture…. [that] can be seen as not only "majoritarian" but also "bureaucratic"'.[112] In combination with the socio-economic features of colonial socialism, those electoral and regulatory institutions 'enabled a form of progressive or social liberalism to take a firm hold in the decades prior to Federation'.[113] While the political thought of pre-Federation Australia is still being explored, it is clear that the major break from imperial fidelity did not occur until well into the 20th century: confirming the unique 'zero-doctrine' character of Australian colonial socialism.

C *Part II: Nationalising Colonial Socialism*

The *Constitution* achieved economies of scale not just by creating a 'single market' (eradicating interstate economic competition), but also by 'nationalising' the unique legal features of the colonial socialist state. Legislative power was explicitly conferred on the Commonwealth to engage in the development of overland and maritime public transport assets, and to provide invalid and old-age pensions. Exactly how those substantive projects could be funded was unsettled. General fiscal power (to tax, spend and borrow) was given to the Commonwealth but its capacity to invest profits from public capital for infrastructure and social insurance programs was unclear due to compromises made during drafting negotiations. Matters came to a head in the *Surplus Revenue Case* where the High

108. Ibid 189.
109. Some important contributions include: Hugh Collins, 'Political Ideology in Australia: The Distinctiveness of a Benthamite Society' (1985) 114(1) *Daedalus* 147; John Hirst, *The Sentimental Nation: The Making of the Australian Commonwealth* (Oxford University Press, 2000); Helen Irving, *To Constitute a Nation* (Cambridge University Press, 1999); Paul Pickering, 'The Oak of English Liberty: Popular Constitutionalism in New South Wales, 1848–1856' (2001) 3(1) *Journal of Australian Colonial History* 1; Paul Pickering, 'Ripe for a Republic: British Radical Responses to the Eureka Stockade' (2003) 34 *Australian Historical Studies* 69; Paul Pickering, 'A Wider Field in a New Country: Chartism in Colonial Australia', in Marian Sawer (ed), *Elections Full, Free and Fair* (Sydney, 2001) 28–44; John Williams, *The Australian Constitution: A Documentary History* (Melbourne University Press, 2005).
110. Partlett, 'Remembering Australian Constitutional Democracy' (n 22).
111. Ibid.
112. Blayden (n 22) citing Judith Brett, *From Secret Ballot to Democracy Sausage* (Text Publishing, 2019) 2.
113. Ibid.

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Court confirmed the Commonwealth's arguments that it should have the same financial capacity as the colonial socialist governments, a conclusion accepted by the constituent power through a subsequent referendum.[114] Thereby, the colonial socialist model of egalitarian state potency was federalised.

(i) Scale-Effects of Federation. Capacity to own and operate the vast public capital built by the colonies was explicitly given to the Commonwealth. Ownership of the most valuable public assets (railways) was not transferred outright, but the Commonwealth was given power to acquire those assets for fair value with the 'consent' of their State-government owners.[115] Few States chose divestment, but the framers' choice to provide that bespoke legislative power shows that the national government was built with capacity to own and operate the vast overland transport networks built by the colonial governments. More importantly, the Commonwealth was given explicit legislative power to 'construct' and 'extend' railways on the Australian landmass[116]: providing textual proof-positive that the federal government was designed to carry on the public-capital dominance of the colonial states.

Profitable maritime and communications assets were simply 'transferred' outright to the Commonwealth. State 'departments' responsible for '[p]osts, telegraphs, and telephones' and 'lighthouses, lightships, beacons, and buoys' were transferred to the Commonwealth.[117] Following that departmental shift, '[a]ll property of the State of any kind, used exclusively in connexion with the department, shall become vested in the Commonwealth' and any property used for a mixed purpose could be compulsorily acquired for a value fixed by the federal parliament.[118] The Commonwealth was also given explicit power to fix conditions in markets in which public capital dominated. Special provisions were inserted to clarify that Commonwealth legislative power over 'trade and commerce' encompassed public-sector operated overland and maritime transport infrastructure.[119] Power over those assets can be understood through the lens of 'trade and commerce' not simply because they facilitated private trade but also because they were yield-generating for their government owners.[120]

Notoriously, the Commonwealth obtained power to regulate labour markets, and the first serious disputes regarding the conciliation and arbitration power concerned government employees

114. *The State of New South Wales v The Commonwealth* (1908) 7 CLR 179 ('*Surplus Revenue Case*').
115. *Australian Constitution* s 51 (xxxiii): 'The acquisition, with the consent of a State, of any railways of the State on terms arranged between the Commonwealth and the State'.
116. Ibid s 51 (xxxiv): 'Railway construction and extension in any State with the consent of that State'.
117. Ibid s 69: 'On a date or dates to be proclaimed by the Governor – General after the establishment of the Commonwealth the following departments of the public service in each State shall become transferred to the Commonwealth: —Posts, telegraphs, and telephones: Naval and military defence: Lighthouses, lightships, beacons, and buoys:'.
118. Ibid s 85: 'When any department of the public service of a State is transferred to the Commonwealth –(i.) All property of the State of any kind, used exclusively in connexion with the department, shall become vested in the Commonwealth; but, in the case of the departments controlling customs and excise and bounties, for such time only as the Governor-General in Council may declare to be necessary: (ii.) The Commonwealth may acquire any property of the State, of any kind used, but not exclusively used in connexion with the department; the value thereof shall, if no agreement can be made, be ascertained in, as nearly as may be, the manner in which the value of land, or of an interest in land, taken by the State for public purposes is ascertained under the law of the State in force at the establishment of the Commonwealth: (iii.) The Commonwealth shall compensate the State for the value of any property passing to the Commonwealth under this section; if no agreement can be made as to the mode of compensation, it shall be determined under laws to be made by the Parliament: (iv.) The Commonwealth shall, at the date of the transfer, assume the current obligations of the State in respect of the department transferred'.
119. Ibid s 98: 'The power of the Parliament to make laws with respect to trade and commerce extends to navigation and shipping, and to railways the property of any State'.
120. Ibid.

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operating capital assets owned by State governments.[121] Finally, the Commonwealth was empowered to provide public-social insurance on a national level. Authority to legislate for '[i]nvalid and old-age pensions' was an anomalous provision within the national constitutions of the Anglophone world in 1900.[122] It permitted the new federal polity to provide public insurance against life-cycle dependency events to an entire nation.[123]

In each of those cases, substantive legal power was given to the Commonwealth to continue the colonial socialist modes of statehood operated by the defunct colonies, but the financial plumbing to support the Commonwealth's action as an owner-operator of public capital and social insurance provider was far less clear.

(ii) Nation-wide Credit-Pooling. Although financial pundits emphasised the beneficial scale-effects of Federation on Commonwealth bond prices,[124] foreign inward investment costs for the Commonwealth would be presumptively higher than the colonies unless the new federal polity could recreate the structural features of the colonial socialist phase that neutralised risk-premia for offshore investors. Explicit legislative power was conferred to 'borrow money on the public credit of the Commonwealth',[125] but the *Constitution* provided no clear machinery to empower the new federal polity to achieve the same public-credit status as the colonial treasuries. Importantly, while a 'consolidated revenue fund' was created by s 81, it was not automatically charged with debt-servicing costs: a major divergence from the investor-protecting practice of the colonial constitutions,[126] the *British North America Act 1867* and the original UK legislation which stapled debt-servicing costs to national tax revenue.[127]

Basic elements of investor protection were, however, entrenched. Power was conferred to make 'laws conferring rights to proceed against the Commonwealth'[128] which was exercised through the *Claims Against the Commonwealth Act 1902* (Cth) which copied the innovative colonial models and required that judgment be given 'as in an ordinary case between subject and subject'.[129] That

121. Ibid s 51 (xxxv).
122. The *British North America Act 1867,* 30 & 31 Vict, c 3 ('*British North America* Act') provided no express legislative power (federal or provincial) for pensions, although it did make some limited provision for social welfare via provincial education and health powers: ss 92(7), 93.
123. To understand what is meant by 'life-cycle dependence', see Avner Offer, *Understanding the Public-Private Divide: Markets, Governments and Time Horizons* (2022, Cambridge University Press) 88: 'In the course of the life cycle every person goes through periods when they cannot provide for themselves. Infancy and childhood, motherhood, education, illness, unemployment, disability, and old age are all time-consuming and costly. How to provide for people when they cannot earn? Social institutions help: family, charity, mutual assistance, or insurance associations (i.e., "clubs", which provide benefits only to members), employers, legal trustees and fiduciaries, governments, house property, financial companies, insurance payouts, and tort awards. Money can be laid aside for future contingencies. But finance alone cannot provide'.
124. 'The conversion of a great part of the multifarious existing [colonial] loans into one great uniform stock itself amounts to something, for the British market loves a huge uniform stock which lends itself to market operations on a vast scale:' James Edmond, *A Policy for the Commonwealth* (Bulletin, 1900) 19–20.
125. *Australian Constitution* s 51 (iv).
126. See above n 64.
127. *British North America Act 1867* (30 Vict, c 3) s 104; *Act of 1787* (27 Geo III, c 13) ss 52–53.
128. *Australian Constitution* s 78: 'The Parliament may make laws conferring rights to proceed against the Commonwealth or a State in respect of matters within the limits of the judicial power'.
129. *Claims Against the Commonwealth Act 1902* (Cth) ss 2, 3.

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temporary legislation was required to ensure that Commonwealth operators of communications infrastructure could be sued and expired upon the enactment of the *Judiciary Act 1903* (Cth).[130] Foreign investors' offshore rights, in the capital markets that mattered, remained protected by the Privy Council's oversight of the Australian judiciary.[131] The controversial qualifications to Australia's judicial sovereignty to ensure that (limited exception aside) 'this Constitution shall not impair any right which the Queen may be pleased to exercise by virtue of Her Royal prerogative to grant special leave of appeal from the High Court to Her Majesty in Council' were (notoriously) inserted against the wishes of local Australian framers, due to extensive 'lobbying'[132] in Australia and London by business groups wishing to avoid a devaluation of their colonial assets.[133]

Notwithstanding those investor protections, two major ambiguities remained in the Commonwealth's financial potency.

First, the terms on which the Commonwealth could finance its owner-operator responsibilities were radically uncertain due to the nebulous legal resolution of 'the financial question'.[134] As a customs union, Federation would make the colonies' populations richer through fiscal harmonisation and tariff liberalisation[135]: hence the transferral of customs and excise taxes to the Commonwealth and prohibitions on differential taxation in the *Constitution*.[136] That model caused an acute problem for colonies which relied on indirect taxes to protect their domestic industry, as cash-pools for daily expenditure and collateral pools for creditors.[137] Federation required politicians to make inter-temporally rational decisions: in the short-run State governments would lose their financial advantages; but, in the long-run, their inhabitants would become richer. Solving that risk/reward calculation nearly destroyed the federal project but the insertion of a complex set of revenue-sharing provisions allowed the drafting process to conclude. They functioned in stages.[138] First, the

130. The Postmaster-General (also a Senator) was being sued for his operation of communications infrastructure that had been transferred by the States at a value of around £12million: Commonwealth, *Parliamentary Debates*, Senate, 9 October 1902, 16668 (Richard Edward O'Connor, Postmaster-General and Senator).

131. 'British capital is, and it is to be hoped will continue to be, largely invested in these colonies. It appears, therefore, to be a perfectly reasonable demand on the part of the mother-country, that any British subject feeling himself aggrieved by the decision on his civil rights of a local court shall, if the case be of sufficient importance, have his right of final appeal to an Imperial tribunal. However fair colonial judges and juries may have shown themselves, it is inevitable that persons resident in the United Kingdom, or in other colonies, who should find themselves worsted in litigation before a colonial court from which there was no appeal, would, in many cases, both feel and express a doubt that justice had not been done them, and would be ready to impute the decision against them to local prejudice and favoritism. … It is to be expected that the proposed measure, if ever carried must have a prejudicial effect on the financial interests of these colonies. The confidence with which investments of all sorts are now made in Australasia by people at home must be largely due to the knowledge that rights of property will be dealt with here by the Law Courts on British principles of justice, and subject to final review by one of the highest English courts': James Stellios, *The Federal Judicature: Chapter III of the Constitution* (LexisNexis Butterworths, 2nd ed, 2020) 16-7, quoting Letter from Mr. Justice Richmond, of the Supreme Court of New Zealand to Sir Henry Parkes.

132. For a potted history of that provision, see Chief Justice Murray Gleeson, 'The Birth, Life and Death of Section 74' (Speech, The Samuel Griffith Society, 14 June 2002).

133. Stellios (n 131).

134. Stephen McLeish, 'Money' in Cheryl Saunders and Adrienne Stone (eds), *The Oxford Handbook of the Australian Constitution* (Oxford University Press, 2018) 784, 786.

135. Sir John Quick and Robert Garran, *The Annotated Constitution of the Australian Commonwealth* (Angus & Robertson, 1901).

136. *Australian Constitution* ss 69, 88, 90, 92.

137. This treatment of the taxation policies of the pre-Federation colonies is necessarily simplified. For a deeper examination which avoid simplistic arguments about 'free trade' or 'protectionism' in colonial tax policy, see Peter Lloyd, 'The First 100 Years of Tariffs in Australia: the Colonies' (2017) 57(3) *Australian Economic History Review* 316.

138. See, generally, McLeish (n 134).

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Commonwealth was clearly obliged to pay 75 per cent of its 'net revenue' from customs and excise taxes to the States until 1910.[139] Secondly, from 1901-1905, the Commonwealth was required to create a federal balance sheet which credited States with all revenues collected inside that State and debited States for the Commonwealth's costs in operating transferred colonial departments and the 'State's per capita share of other Commonwealth expenditure': the 'balance' was to be paid to each State.[140] Thirdly, and most problematically, from 1906-onwards, the *Constitution* provided that 'the Parliament may provide, on such basis as it deems fair, for the monthly payment to the several State of all surplus revenue of the Commonwealth'.[141] None of the relevant terms ('may provide', 'deems fair', 'surplus revenue') were clearly defined in the *Constitution* or the Convention Debates. In that way, the 'surplus revenue' provision provided no fixed guidance for any government in the Federation regarding how the fiscal revenue could lawfully be distributed. Exactly how and why the Commonwealth would operate valuable public assets and social insurance programs if it was required to remit all operating profits to the States was unclear.[142]

The second financial ambiguity concerned access to sovereign debt. The new Commonwealth would be a competitor against the States in London's capital markets and it would have a far-weaker bargaining position due to its smaller collateral base (even with transferral of maritime and communications infrastructure) and limited fiscal power. Additionally, as a new and national government it would not enjoy the reflexively low-risk premium given to dependant-colonies,[143] and had no established machinery for sovereign debt management. Those weaknesses in the federal polity's borrowing capacity can be seen in the Commonwealth's first major sovereign debt experiment: the *Naval Loan Act 1909* (Cth). This odd piece of legislation followed part of the colonial precedents by expressly authorising flotation in London and specifically appropriating the loan proceeds to 'the initial cost of a Fleet Unit for the purpose of the Naval Defence of the Commonwealth'.[144] The Act diverged from the colonial practice in other ways which revealed the Commonwealth's weakness as a sovereign borrower, most visibly in its (bizarrely strict) offshore-investor payment clause.[145] To further convince investors of its credit, the Act created a sinking fund to be credited annually with 5 per cent of outstanding debt until the loan matured, with proceeds paid personally to officers of the House of Representatives, the Senate and the Executive to be held on trust.[146] The most revealing concession to the Commonwealth's shaky credit was the debt's interest rate: set by the Act at 3.5 per cent, which was 0.5 per cent higher than NSW bonds. One reason for the Commonwealth's worse credit was explained by the Treasurer on the Bill's reading: compared to the former-colonies, the Commonwealth had not yet built up a portfolio of yield-generating assets to collateralise its debt.[147]

The Commonwealth's uncertain balance-sheet position created obvious conflicts with the recognition, elsewhere in the text, of the potent egalitarian state model. The High Court resolved the

139. *Australian Constitution* s 87.
140. Ibid ss 89, 93.
141. Ibid s 94.
142. Cheryl Saunders, 'Government Borrowing in Australia' (1989) 17(2) *Melbourne University Law Review* 187, 188-9.
143. Martin (n 78).
144. *Naval Loan Act 1909* (Cth) ss 10, 13(1).
145. 'Whenever, by the final judgment, decree, rule, or order of any Court of competent jurisdiction in the United Kingdom, any sum of money is adjudged or declared to be payable by the Government of the Commonwealth in respect of any Inscribed Stock, the Commonwealth shall forthwith pay that sum out of any funds, in the hands of the Commonwealth in the United Kingdom': ibid s 13(2).
146. Ibid ss 8, 9.
147. 'There could not be better credit … than that offered at the present time by New South Wales, which pays every penny of interest on the whole of its loans out of the proceeds of the works constructed with those loan moneys': Commonwealth, *Parliamentary Debates*, House of Representatives, 3 December 1909, 6977 (Sir John Forrest, Treasurer).

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first major conflict resoundingly in favour of financial empowerment in the *Surplus Revenue Case*[148] thereby setting the course for the nationalisation of the colonial socialist heritage.

(iii) Judicial Power and Socialism without Doctrine. The *Surplus Revenue Case* has largely been analysed as a simple dispute between the Commonwealth and the States. On that account, the Commonwealth sought to hide its surplus revenue from the States by squirreling it away in trust accounts,[149] and the High Court, without strong reasons, endorsed that behaviour, setting the 'vertical fiscal imbalance' in train.[150] While the case certainly did empower the Commonwealth at the expense of the States, it has a significance beyond internecine federal conflict. The *Surplus Revenue Case* resolved critical problems with translating colonial socialist technique to the new federal polity, the role of the judiciary in solving those problems and confirmed, via the referendum which confirmed its result, support from the constituent power for the nationalisation of the potent egalitarian state model developed pre-Federation.

The *Surplus Revenue Case* was triggered by the legislative creation of a system of public investment funds for public capital works and social insurance.[151] A set of 'Trust Accounts' was created by the *Audit Act 1906* (Cth) for the purposes of building defence infrastructure, paying pensions and facilitating the Commonwealth's domestic and international payments. Trust accounts could be credited with money voted by parliament, but also with revenue generated by assets built using the trust funds. Money in trust accounts could only be spent on the listed purpose and the Treasurer could invest any positive balances in fixed income securities or bank accounts. Those trust funds were national investment accounts for infrastructure and social insurance: they contained accumulations of fiscal receipts for future investment projects.

Eighteen-months later, the Commonwealth parliament enacted the world's first national universal (non-contributory) invalid and old-age pension legislation[152]: replicating the progressive NSW model by providing public social insurance to people over 65 years or 'permanently incapacitated for work by reason of accident…or by being an invalid'.[153] Payment of pensions would occur out of money 'appropriated by Parliament for the purpose'.[154] On the same day, legislation authorised payment of £750,000 out of consolidated revenue, and appropriation, for the purpose of the 'Trust Account…known as the Invalid and Old-age Pension Fund…for Invalid and Old-age Pensions'.[155] Later that day, a further Act authorised payment and appropriation of £250,000 'for the purposes of the Trust Account known as the Harbor and Coastal Defence (Naval) Account…for Harbor and Coastal Defence (Naval) purposes'.[156] Three days later, the *Surplus Revenue Act 1908* (Cth) entered into force, providing that credits in those pension and infrastructure trust 'shall be deemed to be [Commonwealth] expenditure'[157] and their underlying appropriation 'shall not lapse

148. *Surplus Revenue Case* (n 114).
149. See ibid; Twomey (n 18); Taylor (n 18); Saunders (n 131).
150. Fenna (n 18).
151. *Audit Act 1906* (Cth).
152. *Invalid and Old-Age Pension Act 1908* (Cth).
153. Ibid ss 15, 20.
154. Ibid s 53.
155. *Old-Age Pension Appropriation Act 1908* (Cth) s 2.
156. *Coastal Defence Appropriation Act 1908* (Cth) s 2.
157. Ibid s 4(4)(d).

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nor be deemed to have lapsed at the close of the financial year for the service of which it was made'.[158] That legislation was designed to exploit the textual ambiguity in s 94 ('the Parliament may provide, on such basis as it deems fair, for the monthly payment to the several State of all surplus revenue of the Commonwealth.') by 'providing' that fiscal receipts held in trust were 'debited' from the amount of annual 'revenue' for calculation of a 'surplus'.

NSW sued the Commonwealth, contending that the *Constitution* prevented the federal government from accumulating fiscal receipts for future public capital formation and social insurance projects. Formally, the case turned on whether public money paid from the Treasury under a statutory appropriation into a statutory trust account had been 'expended'[159] and could be excluded from any 'surplus revenue'.[160] NSW argued, by analogy with private sector accounting practices,[161] that money which remained inside the public sector at the end of a financial reporting cycle had, definitionally, not been 'expended' and was 'surplus'. The State also invoked supposed constitutive intentions, alleging that '[t]he States did not intend that large spending powers should be given to the Commonwealth' and that '[n]o power to accumulate revenue for several years was intended to be given'.[162]

The Commonwealth countered that it was given unique powers by the *Constitution* which 'cannot be effectively executed unless there is also a power to set aside large sums of money for future expenditure': offering as examples 'bounties, borrowing, defence, State banking, and immigration'.[163] More importantly, the Commonwealth argued that 'before Federation' colonial governments created statutory 'trust accounts' for investment projects treated funds in statutory trusts 'as expenditure'.[164] The Commonwealth used that colonial socialist heritage as the foundation for their preferred interpretation of s 94 (money is 'expended' when 'appropriated'): 'that is a natural meaning of the word " expenditure" in connection with Government accounts and the establishment of a system of constitutional government'.[165] The Commonwealth argued that 'the Parliament is invested with the same powers of appropriation for specific purposes as are the State Parliaments in respect of their revenue'[166]: thus making a claim to having inherited the same state model, at least regarding financial potency, from the colonial governments. Ultimately, the Commonwealth argued

158. Ibid s 5. The Act also declared that '[t]he provision made by section ninety-three of the Constitution in relation to the crediting of revenue, the debiting of expenditure, and the payment of balances to the several States, shall continue until the commencement of this Act and no longer': ibid s 3.
159. Within the meaning of ibid s 89: 'Until the imposition of uniform duties of customs—The Commonwealth shall debit to each State—(a) The expenditure therein of the Commonwealth incurred solely for the maintenance or continuance, as at the time of transfer, of any department transferred from the State to the Commonwealth; (b) The proportion of the state, according to the number of its people, in the other expenditure of the Commonwealth. The Commonwealth shall pay to each State month by month the balance (if any) in favour of the State'.
160. *Surplus Revenue Case* (n 114). Except Isaacs J at 200, all parties and judges appeared to accept that the meaning of 'surplus revenue' in s 94 depended on the meaning of 'expenditure' in s 89: 191 (Griffith CJ), 193 (Barton J), 197-8 (O'Connor J), 205-6 (Higgins J).
161. 'The relation of the States and the Commonwealth in respect of surplus revenue bears a close analogy to that of principal and agent, and the duty under sections 89 and 93 of paying to the States is the same as that of an agent who is directed to pay to his principal the balance of his receipts over expenditure on account of the principal': ibid 183.
162. Ibid 181-2. Other than an ambiguous reference to Quick and Garran, this submission was based on assertion only.
163. Ibid 184.
164. Ibid 185, citing the statutory trusts created for public land sales: *Land Act 1869* (Vic) s 42, *Land Act 1884* (Vic) s 78, *Land Sales by Auction Fund Act 1891* (Vic) s 2; infrastructure development (*Public Works and Closer Settlement Funds Act 1906* (NSW)); and debt retirement (*Railway Loan Redemption Act 1889* (NSW).
165. *Surplus Revenue Case* (n 114) 185.
166. Ibid.

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that accumulation of fiscal receipts were necessary to develop, operate and own large capital assets and social insurance schemes.

It was clear during oral argument that the States' private-sector accounting argument faced strong headwinds. Justice O'Connor immediately raised the quandary they posed for the federal government's capacity to develop a public capital base: 'In your view, if the Parliament desires to spend £2,000,000 on warships and not to pay for them out of one year's revenue, it could not before purchasing set aside a yearly sum out of revenue until the amount was made up, but would have to borrow the money?'[167] Plaintiff's counsel's response indicated the farcical consequences of its argument '[e]ither that or pay in instalments'.[168]

The High Court's unanimously upheld the constitutionality of the system of national investment established through the 'trust account' legislation. The case is often cited for simple propositions that once 'appropriated' by legislation, Commonwealth money stood outside the concept of 'surplus'.[169] While a technically correct summary of the case, none of the judges rested their reasoning on that abstract proposition[170]: all judges reinforced their reasoning by reference, expressly or implied, to the features of the colonial socialist state.

Central to Griffith CJ's reasons (the most austere of the Court) was his understanding that government's core functions include long-term enterprises involving extensive financial obligations: 'the operations of government are continuous and extend over long periods…the word 'surplus', used in such a connection, must therefore be read in a sense which recognizes this condition and gives effect to it'.[171] Justice O'Connor more explicitly linked the need for an expansive meaning of 'surplus', and 'expenditure', to a model of constitutional government which was (both) a major actor in the financial system and involved in public investment. In rejecting the State's argument, he said[172]:

> The impossibility of carrying on the operations of government under such a system are too obvious to need further comment, and the interpretation which would lead to that result must be rejected… it is only by adopting the wider meaning … [which is] natural and appropriate in adjusting financial relations between Commonwealth and States under a system of parliamentary government, that full effect can be given to the Constitution…the Commonwealth is entitled in accordance with well recognized methods of public finance to accumulate revenue to be paid out later in the execution of some Commonwealth power.

The 'well recognized methods of public finance' and the 'system of parliamentary government' must be references to the colonial legislation concerning public works and social insurance legislation raised by the Commonwealth's counsel in argument.[173]

Other judges relied explicitly invoked the need to effectuate the Commonwealth's substantive legislative powers, particularly concerning infrastructure development and debt finance. Justice Higgins explicitly invoked the impossibility of constructing major public capital if the 'trust

167. Ibid 182.
168. Ibid.
169. Eg, Lawson (n 17) 882–883, and variations on that theme: *Pape v Federal Commissioner of Taxation* (2009) 238 CLR 1 at [78]; *Wilkie v Commonwealth* (2017) 263 CLR 487, at [70].
170. For which there was no meaningful historical precedents: on the function of 'appropriations' see Bateman (n 64) 123-96.
171. *Surplus Revenue Case* (n 114) 189-90.
172. Ibid 198-9.
173. Ibid 199.

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account' system were invalidated: 'If this claim is right, the Commonwealth Parliament has no power to provide out of its revenue in fat months for expenditure which it foresees in the near future say for naval defence, or for financial assistance to a State (under s 96 of the Constitution); and the power of the Commonwealth Treasurer in making financial arrangements must be grievously crippled'.[174] The latter reference to the Treasurer's power to make 'financial arrangements' would have included the power to acquire debt capital, raised in argument by the Commonwealth.[175] That imposing a strict operational-cost limitation on the Commonwealth would 'grievously cripple' such a power, again, only makes sense when one recalls the enormous role of foreign investor credit arrangements in building the version of Australian statehood that emerged from the colonial phase. Justice Barton adverted to the same consideration when reasoning that the 'the construction contended for is plainly unreasonable…it would have the effect of dislocating the whole financial system… Are the hands of the Commonwealth to be tied thus against the interests of all concerned'.[176]

Justice Isaacs' reasons brought each of those features together. From the outset of his reasons, Isaacs J emphasised the link between maintaining a rational system of investment funds and the Commonwealth's role as a developer of public capital:

> [s]urplus revenue means free revenue, that is, not marked out by Parliament as required by the Commonwealth for carrying out purposes lawfully resolved upon. In this instance Parliament, having thought it necessary that Harbor and Coastal Naval Defences should be undertaken for which £250,000 would or might be required, a perfectly lawful purpose.[177]

He then relied heavily on an expansive understanding of constitutional statehood to reject the State's argument explaining that it would undercut the 'creation and maintenance of the Commonwealth' as a 'scheme of government…proceeding for the effectuation of its purposes on traditional lines of parliamentary and responsible government' which included those hallmarks of colonial socialism: public-credit pooling (acquiring 'debt' and paying 'a judgment') and public social insurance ('an Act conferring bounties or old-age pensions').[178]

Ultimately, Isaacs J rested his decision on a view of the *Constitution* that permitted the Commonwealth the same economic capacity as recently transformed colonial governments[179]:

> Undertakings decided upon by the Commonwealth may from their nature require deliberation as to final form, and if, before actual commitment to details, time for consideration is taken, can it reasonably be said, that although the cost is fixed, and the required money expressly appropriated to the purpose, that money is still in the eye of the law 'surplus revenue' distributable perforce among the States? This would leave the Commonwealth with its purpose bare and barren, and incapable of fulfilment until fresh means were sought. It is no answer to say other moneys would probably reach the Treasury, because they may be needed for other purposes. The argument, if acceded to, would probably either drive the Commonwealth to hasty and ill-considered action so as to actually disburse its revenue, in satisfaction of its purposes, or else compel it to find fresh ways and means, possibly burdensome.

174. Ibid 203.
175. Ibid 185.
176. Ibid 195-6.
177. Ibid 200.
178. Ibid 201-2.
179. Ibid 203.

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With perfect hindsight the *Surplus Revenue Case* certainly facilitated the growth of Commonwealth government power over the States.[180] Viewed in its period, it performed an equally momentous but less partisan function: it confirmed that the new federal polity would have the same financial capacities which were integral to pre-Federation colonial socialist models. What Saunders has described as the 'emergent link between borrowing and revenue distribution' was patent in the dual proposals for constitutional alteration presented to electors in the 1910 referendum.[181] Two amendments were proposed: the first to permit the Commonwealth to assume State Debts (incurred post-Federation); and the second to un-wind the Court's decision in the *Surplus Revenue Case*. The first proposal passed and the second was rejected, securing the Commonwealth with the full panoply of financial powers necessary to implement the potent egalitarian constitutional model developed in the colonial phase.

D *Part III: Australian Constitutionalism and Egalitarian State Potency*

From the conclusion of the surplus revenue referendum, it was clear that the model of egalitarian state potency built during the colonial phase could be implemented on a national level. The degree to which that model differed from Australia's North Atlantic constitutional ancestors, the UK and USA, was revealed over the next two decades. Attempts to implement policies and institutions that fitted comfortably within the Australian traditions provoked enormous political conflicts and led to constitutional transformations in Westminster and Washington. Between 1911 and 1935, the House of Lords was stripped of its legislative power over public finance and the US constitutional tradition was significantly 're-founded' in the face of social insurance and public works programs. On both sides of the North Atlantic, similar doctrinal arguments and institutional techniques were in play: all of which were alien to the contemporaneous Australian experience. This concluding part presents a provisional sketch of that divergence of Washminster and Australian constitutional lineages and flags a set of topics for future academic inquiry.

(i) The People's Budget and Westminster Constitutionalism. The British constitution was transformed in the 20th century's first decade by the violent parliamentary dispute that arose from legislation designed to fund social insurance (old-age pensions) and public capital (naval infrastructure). Between 1908 and 1910, British Cabinets formulated plans to provide universal old-age pensions and win a growing arms race, to be funded by significant increases in taxation in the form of land-value taxes.[182] Compared to the generosity of contemporaneous Australian public sector expansions, the proposals contained in the 'People's Budget' were modest, but they were vetoed by business and aristocratic elites in the House of Lords on the basis of conflict with liberal values of private property protection.[183]

180. But only once combined with the far-later rulings in the first and second uniform tax cases which deprived the States of their independent taxation base: *South Australia v Commonwealth* (1942) 65 CLR 373; *Victoria v Commonwealth* (1957) 99 CLR 575; Saunders (n 131); Campbell, 'The Commonwealth Grants Power' (n 18); Enid Campbell, 'The Federal Spending Power: Constitutional Limitations' (n 18); Twomey (n 18).

181. Saunders (n 22) 188.

182. See, generally, Bruce Murray, *The People's Budget 1909/10* (Clarendon Press, 1980); Ian McLean, *What's Wrong with the British Constitution* (Oxford University Press, 2010) ch 4. For a list of 'welfare state' offerings provided by the British central government around the time of the People's Budget controversy: see, Martin Daunton, *Wealth and Welfare: An Economic and Social History of Britain, 1851–1951* (Oxford University Press, 2007) 534-5.

183. Those issues of domestic British politics were joined by the Imperial question of Irish 'Home Rule' and landmark legislation to de-colonise Britain's first colony was the first Act passed by the unicameral Westminster parliament under the *Parliament Act 1911*: *Government of Ireland Act 1914* (4 & 5 Geo 5, c 90) (*'Parliament Act 1911: Government of Ireland Act 1914'*).

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The inter-cameral conflict was resolved by the Cabinet inviting the King to re-constitute the Lords with more progressive members until the upper house passed the gridlocked social insurance and public works legislation. Rather than being inundated with progressive members,[184] the Lords agreeing to enact the *Parliament Act 1911* (1 & 2 Geo 5 c 13). The preamble of that Act recited that 'whereas it is intended to substitute for the House of Lords as it at present exists a Second Chamber constituted on a popular instead of hereditary basis, but such substitution cannot be immediately brought into operation'. The first operative provision of the Act striped the un-elected Lords of their legislative power over money bills:

> (1) If a Money Bill, having been passed by the House of Commons, and sent up to the House of Lords at least one month before the end of the session, is not passed by the…Lords without amendment within one month after it is so sent up to that House, the Bill shall, unless the House of Commons direct to the contrary, be presented to His majesty and become an Act of Parliament on the Royal Assent being signified notwithstanding that the House of Lords have not consented to the Bill.[185]

Thereafter, the centuries old Westminster Parliament was reduced, when it mattered, to a unicameral body.

The vociferous institutional reactions to the People's Budget appear inexplicable, until one reviews the orthodox constitutional ideology of the period. Dicey, the unrivalled constitutional theorist of British *laissez faire*,[186] viewed later-19th century political claims for an economically interventionist and re-distributive government as the end-point on a constitutional journey from liberalism to 'collectivism' or 'socialism'. He did not argue that such a development was desirable, preferring to depict progressive taxation,[187] trade-unionism and old-age pensions as types of 'evil'[188]: the latter being a particularly odious type of society-wide institutionalised corruption.[189] Those 'definite socialistic formulas'[190] were objectionable on classic liberal grounds:

> The beneficial effect of State intervention, especially in the form of legislation, is direct, immediate, and, so to speak, visible, whilst its evil effects are gradual and indirect, and lie out of sight….State inspectors may be incompetent, careless, or even occasionally corrupt, and that public confidence in inspection, which must be imperfect, tends to make the very class of persons whom it is meant to protect negligent in taking due measures for their own protection; few are those who realise the undeniable truth that State help kills self-help.[191]

Those views describe an entirely alien landscape from the vantage point of Australian constitutionalism in 1911, in which it was accepted by constitutional text, judicial authority and referendum that all levels of the federal government were empowered to own and operate public assets for profit and provide progressive social insurance. Yet, Dicey is still treated as a starting point for Australian constitutional analyses and understood as expressing 'prototypical' views about the

184. 'The swamping of the Lords with Liberal peers was not required, so no Lord Baden-Powell, Lord Thomas Hardy, nor Lord Bertrand Russell were then created': McLean (n 183) 94.
185. *Parliament Act 1911: Government of Ireland Act 1914* (n 184) s 1.
186. And staunch opponent of the Parliament Acts: McLean (n 173) 98.
187. Including progressive taxation (a 'gigantic evil'), trade-unionism and universal old-age pensions: ibid 13, 292, 366.
188. Ibid 13.
189. Dicey liked the word 'evil', calling taxation a 'gigantic evil': ibid 13, 292.
190. Ibid 212.
191. Ibid 257.

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'essence' of Australian constitutional principles.[192] Let us not forget that Dicey himself was aware of the gulf between British and Australian practice and remarked that 'socialistic legislation and experiment have been carried to a greater length in Australia than in England'.[193] This awareness of the large gap between British and Australian constitutional practice is also evidenced, in more neutral terms, in the work of Dicey's intellectual counter-point, FW Maitland.[194] No constitutional re-ordering was required to implement social-insurance or public capital growth programs in Australia because the constitutional model had been built to accommodate those types of state directed economic activity. What Australia achieved by consensus constitutional formulation, could only be achieved in Diceyan Britain through extreme constitutional conflict.

(ii) New Deal Re-Founding Washington Constitutionalism. A similar gulf appears between the models of US and Australian constitutionalism of the early 20th century. Again, a defining constitutional conflict ('moment')[195] arose from welfarist policies twinned with vast public works programs: the Supreme Court's opposition and then capitulation to Roosevelt's New Deal policies.

Reflecting the vastly different scale and size of economic and social disorder in 1930s America, New Deal policies were rolled-out on multiple fronts: first monetary and financial, then public works programs and finally universal social insurance.[196] At each step, constitutional obstacles appeared. The Supreme Court decision which upheld the validity of legislation suspending the Gold Standard (required to increase deficit spending to a major financing vehicle of New Deal programs, the Reconstruction Finance Corporation)[197] was a single-judge majority resolved on the basis of exigent circumstances, rather than principle.[198] The New Deal's flagship economic regulatory legislation, the *National Industrial Recovery Act*,[199] was twice found invalid for impermissible delegation of legislation authority to the executive branch.[200] Alongside these staples of federal socio-economic reform, the Supreme Court also invalidated State labour protection laws and (provocatively) Roosevelt's termination of economic officials on constitutional grounds.[201]

192. *Garlett v Western Australia* [2022] HCA 30 [128], [129] (Gageler J); *Murphy v Electoral Commissioner* [2016] HCA 36, [75]-[76] (Gageler J).
193. Ibid 387.
194. Maitland (n 73) 140.
195. Bruce Ackerman, *We the People: Volumes I (Foundations) and II (Transformations)* (Belknap Press, 1991 and 1998 respectively).
196. See, generally, Ellis Hawley, *The New Deal and the Problem of Monopoly*: *A Study in Economic Ambivalence* (Princeton University Press, 1966); Robert Himmelberg, *Origins of the National Recovery Administration* (Fordham University Press, 1976); Arthur Schlesinger, *The Coming of the New Deal – The Age of Roosevelt* (Boston: Houghton Mifflin Company, 1959).
197. Mainly, the *Gold Reserve Act 1934* Pub L No 73–87, 48 Stat 337.
198. *Perry v United States*, 294 US 330 (1935) 360–361: 'I am not persuaded that we should needlessly intimate any opinion that … interpose[s] a serious obstacle to the adoption of measures for stabilization … There is no occasion now to resolve doubts, which I entertain, with respect to these questions. At present, they are academic' (Stone J, concurring).
199. *National Industrial Recovery Act,* Pub L No 73-67, 45 Stat 195 (1933).
200. *Panama Refining Co v Ryan*, 293 US 388 (1935); *ALA Schechter Poultry Corp v United States*, 295 US 495 (1935). Whether analogical public-industrial programs would have passed constitutional muster in Australia is a difficult question, made more complex by the Australian judiciary's comparatively permissive attitude towards delegations of legislative power: *Victorian Stevedoring & General Contracting Company Pty Ltd v Dignan* (1931) 46 CLR 73 at 101: 'a statute conferring upon the Executive a power to legislate upon some matter contained within one of the subjects of the legislative power of the Parliament is a law with respect to that subject, and…the distribution of legislative, executive and judicial powers in the Constitution does not operate to restrain the power of the Parliament to make such a law'.
201. *West Coast Hotel Co v Parrish*, 300 US 379 (1937); *Humphrey's Executor v United States*, 295 US 602 (1935).

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Faced with those constitutional obstacles, Roosevelt relied on a similar institutional strategy to the British cabinet in 1911[202]: he threatened to increase the number of judges on the Supreme Court until it accommodated his vision for a more economically interventionist state.[203] While academics debate whether the eponymous 'switch in time that saved nine' was a direct result of Roosevelt's high-stakes threat,[204] the Court's timely shift to an accommodative posture led to major victories for 'second' New Deal legislation: including, germane to the comparison with Australia, the financial framework of universal social security.[205]

In comparative perspective, a striking feature of American constitutionalism in the 1930s was the immense constitutional conflict and re-structuring required to implement state-economic interventions. In addition to the political and social dimensions of New Deal conflicts, constitutional ideas were invoked as conclusive arguments against the roll-out of social insurance, public capital development and public employment. Unlike the UK, the principal constitutional impediment was not parliamentary; judicial doctrine entrenched *laissez-faire* conceptions of non-state intervention in economic relationships. Remodelling that doctrine required the threat of fundamental institutional transformation, creating a 'new economic order',[206] and, in the hindsight of latter legal scholars, effected a 're-founding' of basic constitutional norms.[207]

Compare those ructions with the Australian experience. A constitutional model of a potent egalitarian state accreted during the colonial phase which was then drafted into the federal constitution. The first major judicial conflict concerning that model turned on which government (federal or State) had the financial capacity to carry out long-run investment projects, not whether such projects were *in toto* unconstitutional. The judiciary facilitated the nationalisation of social insurance and public capital development and the electors approved that outcome through referendum. In comparison with the USA, early 20th century Australian constitutionalism was not a viable field of battle to contest the balance of states and markets because a process of popular and technical consensus approved that balance in favour of an interventionist and compassionate state with an outsized role in a market economy. That conclusion does not imply a total absence of constitutional dispute over government intervention in commercial behaviour. The early High Court did strike down federal anti-trust legislation on constitutional grounds and three referenda failed to

202. Roosevelt drew inspiration from the earlier British experience as recorded in the diaries of his Secretary of the Interior (Harold Ickes): '[Roosevelt] had a good deal to say about what the Supreme Court is likely to do on New Deal legislation. As once before in talking to me, he went back to the period when Gladstone [sic] was Prime Minister of Great Britain and succeeded in passing the Irish Home Rule Bill through the House of Commons on two or three occasions, only to have it vetoed by the House of Lords. Later, when Lloyd George's [sic] social security act was similarly blocked, Lloyd George went to the King, who was in favour of the bill, and he asked Lloyd George whether he wanted him to create three hundred new peers', quoted in McLean (n 183) 43.

203. The famed *Judicial Procedures Reform Bill of 1937*.

204. Ackermann (n 196) 290-1; G Edward White, *The Constitution and the New Deal* (Harvard University Press, 2002); Marian C McKenna, *Franklin D. Roosevelt and the Great Constitutional War: The Court Packing Crisis of 1937* (New York: Fordham university Press, 2002).

205. *Steward Machine Company v Davis*, 301 US 548 (1937) (upholding the validity of legislation imposing taxation on failure to contribute to unemployment insurance funds); *Helvering v Davis,* 301 US 619 (1937) (upholding the validity of payments and taxation deductions for social security programs as lawful spending for the general welfare).

206. Roosevelt, quoted by Alan Brinkley, *The End of Reform*: *New Deal Liberalism in Recession and War* (New York: Alfred A Knopf, 1995) 40, 290, cited in Ackermann (n 196) 298.

207. See, eg, Ackermann (n 196) 269–71.

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insert explicit legislative power to regulate monopolies and oligopolies into the *Constitution*.[208] Even then, the Australian judiciary did not create the same absolute prohibitions as the US Supreme Court: the federal limitations in *Huddart Parker* left the States free to create their own anti-trust law, while the *Lochner*-era doctrine prohibited all arms of government from impeding on private law contracts.

(iii) Potent Egalitarian Statehood in Retrospect. If accepted as a useful analytical device, greater scholarly work would be required to understand how the model of potent egalitarian statehood developed after the *Surplus Revenue Case*. That exercise would require a discrete analysis of individual heads of legislative power and their limitations, in light of the features of the colonial socialist state. At a doctrinal level, it would involve the complex question of the interaction of discrete constitutional provisions with broader constitutional ideas, a process Australian lawyers understand as involving 'implications'.[209] Hard questions arise which cannot be answered in the general case: for example, whether the meaning of 'property', 'acquire' or 'just terms' s 51(xxxi) is expanded or narrowed by references elsewhere in the text and structure to the Commonwealth's power to own and operate valuable assets for public benefit?

In a more socio-legal mode, historical work would be required to examine whether and how ideas of constitutional statehood developed during the colonial socialist phase maintained their normative pull on judges and electors throughout the 20th and 21st centuries. Wary of the labour-intensiveness of that process, some preliminary observations are offered on some higher-profile cases. *Attorney-General (Vic) ex rel Dale v Commonwealth* (the '*Pharmaceutical Benefits Case*')[210] provides a complex case-study in authorising the Commonwealth to fund social insurance, while preventing it from regulating the commercial relationship between end-users and providers of medical service providers. Tentatively, this could be understood as consistent with the colonial socialist heritage insofar as the government was empowered to fund the provision of welfare, but prevented from substituting the market-based system. The same observation applies to *Bank of New South Wales v Commonwealth* (the '*Bank Nationalisation Case*').[211] The potent egalitarian state that emerged from the colonial period relied heavily on the existence of private financial markets, and enticed them with public protections, rather than co-opting them through legislative fiat. The 1947 bank-nationalisation legislation sought to disrupt a prime mover of the colonial socialist economy: institutional debt markets. In that sense, the High Court's constitutionalised antipathy to Chifley's scheme was not a sharp break from the pre-Federation political economy.[212] *Victoria v the Commonwealth and Hayden* (the '*AAP Case*') is also, prima facie, consistent with the potent egalitarian model insofar as it facilitates public-social insurance and public capital creation and

208. Core provisions of the *Australian Industries Preservation Act 1906* (Cth) (Australia's 'Sherman Antitrust Act') were struck down as beyond the power to make laws with respect to corporations in *Huddart, Parker & Co Pty Ltd v Moorehead* (1909) 8 CLR 33 and referenda seeking to reverse that decision were rejected by electors in 1911, 1913 and 1919.

209. For some of the opportunities and challenges of this approach, see Adrienne Stone, 'Australia's Constitutional Rights and the Problem of Interpretive Disagreement' (2005) 27(1) *Sydney Law Review* 29; Jeffrey Goldsworthy, 'Originalism in Constitutional Interpretation' (1997) 25(1) *Federal Law Review* 1.

210. (1945) 71 CLR 237.

211. (1948) 76 CLR 1.

212. The *Bank Nationalization Case* raises a particularly complex comparative point, as the Australian bank nationalisation scheme shared common policy drivers with earlier US and UK central bank nationalisation programs, but the Australian monetary system was complicated by membership of the 'Sterling Zone' (Catherine R Schenk, *The Decline of Sterling: Managing the Retreat of an International Currency 1945–1992* (Cambridge University Press, 2010) ch 2–3) and the absence of a clearly defined domestic central bank.

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avoids erecting judicial obstacles to those functions.[213] The hardest series of cases to fit within the model of constitutionalism that emerges from the colonial socialist phase are also the most distant in time: the *Combet, Pape* and *Williams* line of authority.[214] Those decisions draw heavily on Diceyan ideas of statehood which appear to sever them from the distinctively Australian model of statehood entrenched in the *Constitution*. They envision a Commonwealth executive kept 'controlled' by a robust Parliament, citing pre-Federation British arrangements in support and appear largely unaware of the sizeable gulf that had grown between Australia and the Home jurisdiction by the time of the Convention Debates. Although the durability of that line of doctrine is unclear,[215] its existence illustrates that future questions of Australian constitutionalism cannot be answered by simple invocation to the model of the potent egalitarian state entrenched at Federation.

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213. (1975) 134 CLR 338.
214. *Combet v The Commonwealth* (2005) 224 CLR 494; *Pape v Federal Commissioner of Taxation* (2009) 238 CLR 1; *Williams v Commonwealth* (2012) 248 CLR 167; *Williams v Commonwealth (No 2)* (2014) 252 CLR 416.
215. Cf *Wilkie v Commonwealth* (2017) 263 CLR 487.

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