

'Una società di società': Why Australia is a Federation*

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[La repubblica federativa] una società di società che ne formano una nuova, la quale si può ingrandire con altri associati¹.

It is commonplace these days to draw a distinction between aggregative and disaggregative federal systems². Aggregative systems come about when previously independent political communities agree to pursue a set of shared goals usually by establishing a set of shared institutions through which those goals will be pursued. Disaggregative systems come into being when a single political community decides in certain respects to relinquish the unified determination of its political goals in favour of a set of smaller political communities, the institutions of which it establishes. This commonplace distinction between aggregation and disaggregation helps us to understand both the similarities and the differences between classically aggregative federal systems, such as the United States and Switzerland, and disaggregative ones, such as Spain and Belgium. Thinking about

political systems in this way also sheds light on how we understand systems that are not ordinarily classified as federal, such as the aggregation of the Member States into the European Union³, and the dis-aggregation of political authority in the United Kingdom through processes of devolution to Scotland, Northern Ireland and Wales⁴.

But if the distinction between aggregation and disaggregation is illuminating, it can also be somewhat oversimplifying, for the categories of aggregation and disaggregation are like Weber's ideal types: they function as abstract conceptual forms to which particular empirical systems conform in varying degrees. Or, to put it another way: the sharpness of the distinction between aggregation and disaggregation depends upon a strict view of the *basis* upon which a collection of separate political communities *agree* to aggregate, or a single political community *decides* to disaggregate. Typically, this involves an ascription of "sovereignty" to the relevant constituent political community or communities. This



Sir Edmund Barton (1849-1920): Australian politician and judge, served as the first Prime Minister of Australia and became a founding justice of the High Court of Australia. (Photo from Wikipedia)

is relatively easy to assert in relation to the European Union, for despite the “transformative constitutionalisation” that is said to have occurred⁵, the Union is clearly founded upon a series of treaties between the Member States, the presupposition of which is the equal sovereignty of each state at international law⁶. But the matter is somewhat less straightforward in the case of the United States, where the original sovereignty of the constituent states is sometimes challenged by the view that independence from Britain was actually secured by them collectively as “the United States”⁷, and it is likewise somewhat difficult in the case of Switzerland, where the Constitution of 1848 was actually re-

jected by several Cantons and yet imposed upon them⁸. Similarly, the proposition that devolution in the United Kingdom derives simply from an exercise of sovereign legislative authority by the British Parliament, while plainly suggested by the legislative form of the devolution statutes, is undermined at least to some degree by the assertion of a kind of political sovereignty in the name of the Scottish people⁹. And again, similar observations can be made about the assertion of self-constituting authority by the ancient regions of Catalonia, the Basque Country and elsewhere in Spain¹⁰. It is even possible to consider decentralisation within Italy in a comparable light¹¹. No system is purely aggregative or disaggregative essentially because sovereignty itself is never pure; its purity can only be sustained as a narrow juristic doctrine that has only a “more or less” relationship to the actual exercise of political power and effective legal authority¹². It is in the complex relationship between law and politics¹³ that the aggregative and disaggregative dynamics of specific federal systems are characteristically embedded. Here, the particular characteristics of the Australian and Canadian federal systems are especially illuminating. For if the United States and Switzerland lie at one end of the aggregation/disaggregation spectrum, and Spain and Belgium at the other, Australia and Canada surely lie somewhere in the middle. For in formal juristic doctrine, both of the latter federations came into being as a consequence of Imperial statutes enacted by virtue of the sovereign authority of the British Parliament¹⁴. Yet both federal systems, and especially the Australian, came about as the result of activity and initiative within the constituent colonies¹⁵.

The British authorities long had hopes that the Australian colonies would one day be united along federal lines¹⁶. Such a scheme had many advantages from an Imperial point of view. It would simplify the task of imperial administration; it would enable the colonies to be more efficiently organised into a common defence; and it would encourage free trade among the colonies. However, for a long time the political leaders of the several Australian colonies resisted these overtures. The reasons were several. When Australia was first settled by Britain in the late eighteenth century, British colonial interests were originally organised around the single colony of New South Wales, which at one point in time extended over approximately two-thirds of the entire Australian continent — a truly massive administrative unit, much larger than any single colony located anywhere in the world. Moreover, the entire colony was governed centrally from the major settlement at Sydney Cove. And because it was originally established as a penal colony, it was also governed autocratically. However, over the course of time, two important changes occurred. First, the colonies were increasingly occupied by free settlers, who resented being governed by an autocratic state, and demanded the right to self-government. Second, separate settlements were established in Port Phillip Bay (modern Melbourne), Moreton Bay (Brisbane), Swan River (Perth) and Adelaide. While Melbourne and Brisbane were still technically within New South Wales, they resented being governed from such a distance and demanded separation as independent colonies.

Parliamentary responsible government was accordingly granted to the five major

colonies (that is, all except Western Australia) in the 1850s¹⁷. By the mid-1860s, this included the power to amend their own constitutions¹⁸. Thus, when the British authorities began pressing for some form of federal union among the colonies around this time, it was understandably resisted by the colonists as being contrary to the principle of local self-government. Having recently acquired such powers of self-government, local politicians and voters were not about to acquiesce in the loss of those rights to a consolidated national government. Samuel Griffith, then Premier of the colony of Queensland, went so far as to say that the Australian colonies had been “accustomed for so long to self-government” that they had “become practically almost sovereign states, a great deal more sovereign states, though not in name, than the separate States of America”¹⁹. If the colonies were to be federated, it would have to be with their agreement and upon a basis that fully respected their autonomy. Rev Dr John Dunmore Lang, Head of the Presbyterian College in Sydney and a member of the N.S.W. Parliament — whom Charles Duffy said had “reared a generation of students destined to become public men” — fervently believed in a federation of the Australian colonies as “separate and independent communities” under “the law of nature and the ordinance of God”. Lang particularly derived inspiration from the American Union “as exemplified in the New England States”, a system under which the states enjoyed “complete independence; that is, the entire control of all matters affecting their interests, as men and as citizens, in every possible way”. Lang urged that the Australian colonies should “combine” into a similar form of federation in order to secure a

greater "weight or influence in the family of nations". He further desired that the constituent states not merely retain a "municipal independence" in "little matters", but should actively secure "the entire control of all matters affecting their interests"²⁰.

It was not until the 1880s, however, that an openness to federation began to consolidate among the colonies. At an inter-governmental meeting held in 1890, the colonial leaders agreed to the holding of a convention of delegates chosen by the colonial parliaments to negotiate the terms of a federal constitution for the colonies. This convention met in 1891 and, after long negotiations, formulated a draft constitution that was submitted to the colonial Parliaments for their consideration. However, in the minds of several political leaders, the time for federation had not yet arrived. A second convention was eventually held in 1897-1898 at which another draft constitution was formulated, again submitted to the Parliaments and eventually approved by the voters in referendums held in each colony. The British Parliament enacted the Australian federal constitution into law on this basis in 1900.

Federation was seen by the colonial leaders as a means to several ends. One was a more effective defence. Another was a guarantee of inter-colonial free trade. A third was to consolidate an emergent sense of Australian national identity. But underlying all of these rationales was a belief that a federal form of government would best enable Australians to participate in their own local self-government. The Australians were influenced in this respect by leading constitutional writers who undertook extensive studies of the existing federations of the day: James Bryce had written

extensively about the United States, John Bourinot about Canada, and Adams and Cunningham about Switzerland²¹. Another important scholar, Edward Freeman, who undertook a close study of the federations of the ancient Greek city states, wrote of "the absolute perfection of the Federal ideal" and observed that "the full ideal of Federal Government... in its highest and most elaborate development, is the most finished and the most artificial production of political ingenuity"²². Distinguished historians such as Henry Maine and Otto von Gierke also drew attention to a kind of "federalism" even within the Holy Roman Empire and the current German Empire²³. Moreover, celebrated political writers like Baron de Montesquieu and Alexis de Tocqueville had long argued that federalism enjoyed the strengths, and avoided the weaknesses, of small, independent republics and large, consolidated empires²⁴. And luminaries as diverse as Thomas Jefferson, David Hume and Pierre-Joseph Proudhon had championed very similar, federalistic ideals²⁵. Images and symbols such as these profoundly shaped Australian conceptions of federalism²⁶. For the Australians, the United States Constitution was undoubtedly the paradigm of federal constitutions²⁷. When prominent writers like Bryce, Freeman and A.V. Dicey wrote about federalism and the federal state, it was the American system that they pre-eminently had in mind. And as Bryce taught the Australians, the American Constitution embodied neither a loose compact league nor a unitary national government, but rather 'a Commonwealth of commonwealths, a Republic of republics, a State which, while one, is nevertheless composed of other States even more essential to its existence than it is to theirs'²⁸.

Central to the lessons that the American Constitution presented to the Australians were the formative processes by which the separate American states had integrated themselves into a "federal republic", the institutions that enabled the peoples of the states and the people of the nation to be represented in the federal legislature, the manner in which federal legislative power was distributed, and the means by which the entire arrangement could be amended. The Swiss Constitution reinforced these lessons, for it showed that these aspects of the American system could be reproduced elsewhere. Switzerland also contributed ideas of its own. In particular, it provided an example of a non-presidential model of executive government suitable to a federation, and it demonstrated how federalism could be integrated with direct, popular participation by way of referendum. As it happened, the Australians would reproduce many of the most conspicuous features of the American and Swiss Constitutions, including the general structure of the federal legislature (the Senate and House of Representatives) and the pattern of distributing only specific powers to the federal legislature, as well as the peculiarly Swiss idea of the dual referendum as the stipulated mechanism for ratifying constitutional amendments. The United States and Switzerland were, however, republics²⁹, and the Australians recognised that a federation of the Australian colonies would have to be instituted under the Imperial Crown and the authority of the Parliament at Westminster. The Australians naturally drew on their own political experience when it came to the exercise of representative and responsible government within the context of the British Empire. Canada's importance,

however, was that it showed the Australians how a specifically federal system might be adapted to a monarchical and parliamentary system operating within the British Empire.

The Australians thus made use of a wide variety of fundamental ideas, some of them derived from a rather eclectic range of sources. In order to understand and make use of these models, the Australians had to rely on a wide range of works that explained their intricacies. Each interpreter of federalism injected into his description of each system his own particular orientations, conceptions and theories. As far as ideas about federalism were specifically concerned, a close analysis of the debates in the federal conventions of the 1890s as well as the writings of the most influential participants in the debate about federation³⁰ suggests that the most significant influences upon the Australians were the writings of James Madison, James Bryce, Edward Freeman, A.V. Dicey and John Burgess.

Madison in particular, in his celebrated *Federalist No. 39*, presented the Australians with an analysis of the United States constitution which emphasised five interlocking characteristics³¹. First, he emphasised, the proposed constitution was founded upon a genuinely "federal" agreement among the peoples and governments of the several constituent states, expressed through ratifying conventions held in each of the states. Secondly, Madison observed that the representative institutions of the American federation combined two principles: that of the representation of the states as "co-equal societies" in the Senate, and that of the representation of the people of the United States as a whole in the House of Representatives. Relatedly, the President

would be chosen through an electoral college in which voting power would be apportioned partly among the states again as co-equal societies and partly in proportion to the national population. Thirdly, Madison pointed out that the powers of the federal government were limited to specific topics, while the powers of the states were original and plenary, subject only to validly enacted federal laws. Fourthly, the reach of federal laws was unique among federal systems at the time, for they applied directly to the citizens, and did not rely upon the states to apply or enforce them. Lastly, the amendment clause was likewise a "compound" of "federal" and "national" elements in so far as it required, neither a national majority, nor a unanimous vote of the states, but a special majority of the states, expressed through the state legislatures or state conventions.

Madison's account of the logic of the American system had a profound influence upon the Australians. They saw in it a principled conceptual model that could readily be adapted to Australian circumstances. Although there was certainly disagreement over the details, there was a strong consensus among the framers of the Australian constitution that the federation would have to be founded upon the unanimous consent of the people of each of the constituent states, and that this principle of ratification by the people of each state should be carried through into the institutions of the federation, including the bicameral structure of the Parliament, the configuration of legislative, executive and judicial power, and the process for amendment of the constitution as a whole. Here, the American model was profoundly influential, but not without important qualifi-

cations. The Swiss model of a referendum was thus adopted both for the ratification of the constitution and its future amendment: ratification required unanimous referendums in each state; and amendment would require a majority of voters in the nation as a whole as well as a majority of voters in a majority states³². Likewise, the Canadian model of adapting federal institutions to a British Imperial context and the Westminster tradition of parliamentary responsible government was adopted³³, but again not without adaptation, for the Canadian model was seen as too centralist and not federalist enough. In particular, the Australians insisted that the constituent colonies should be regarded as self-constituting "states", and not merely as subordinate "provinces"³⁴, and that the Senate, representing the people of the states³⁵, should have near-equal powers with the House of Representatives, including the power to refuse supply to the government³⁶. This was a power that potentially involved the capacity to bring down a government: a fact that the framers recognised³⁷, and which the Senate actually exercised in 1975 in controversial circumstances³⁸.

In constructing a federal system of this kind, the Australians deliberately wished to preserve the capacity of the people of the states to participate in their own local self-government – first, in their localities³⁹; secondly, in their respective states; and thirdly, through the institutions of the federation as a whole. For, as John Cockburn saw it: "local government, self government, and government by the people are analogous terms... [C]entralization is opposed to all three, and there can be no government by the people if the Government is far distant from the people"⁴⁰. On

this view, federation would strengthen this capacity at each level of government and enable Australians secure increasing political and constitutional independence from the United Kingdom. This was recognised by key leaders of the time. One of them, Andrew Inglis Clark, thus observed that he and others

knew what they were doing. They went to work with their eyes open; and he claimed part of the responsibility, or glory, or whatever they might call it. They told the Convention what they were doing, and it agreed with them. He had quoted Sir Samuel Griffith's words at the Convention, and surely they did not shirk the question. They did not hold anything back. They faced the position that they were going in for absolute legislative independence for Australia as far as it could possibly exist consistent with the power of the Imperial Parliament to legislate for the whole Empire when it chose⁴¹.

There were, as a consequence of this general outlook, four important categories of legislative powers that were dealt with under the new constitution. The first category concerned the original, plenary powers of the constituent states. The general principle was that these powers would continue⁴², subject only to a small number of topics that were to be exclusively vested in the federal parliament, such as the governance of federal territories and federal government departments⁴³. The second category concerned those powers that would be transferred to the federal government and parliament. They included the power regulate such things as interstate trade, banking, insurance, trading and financial corporations and intellectual property⁴⁴. A third category concerned matters that would enable the new federation to operate as an independent government; these included powers to impose taxes, borrow

money, determine expenditure and make financial grants to the states⁴⁵. Fourthly, the federation was vested with powers necessary to enable it to function, in due course, as an independent government in the world; these powers included defence and external affairs, and went so far as to include the exercise all of the powers of the British Imperial Parliament in relation to Australia⁴⁶. When the federation legislated in these fields, its laws would prevail over any inconsistent state laws⁴⁷, but apart from this, the underlying principle was that the people of the states would continue to regulate and govern themselves as before⁴⁸.

Pursuant to this fundamental principle of local self-government, it was expected that the states would continue to be political communities in which their respective peoples would participate in their own self-government and that the limited powers granted to the Commonwealth would be recognised. For the first twenty years of the federation this principle was largely respected⁴⁹. The High Court, under the leadership of three leading framers, Samuel Griffith, Edmund Barton and Richard O'Connor, interpreted the scope of federal legislative powers in a way that ensured that the general competences intended to be reserved to the states were preserved. However, in 1920 a watershed occurred. A new group of judges, led by Isaac Isaacs and Henry Bournes Higgins (both of whom had been among the framers but had been consistently outvoted during the federal conventions), reversed the Griffith-Barton-O'Connor approach by giving interpretive priority to federal powers in a way that deliberately excluded any consideration of the original and general powers reserved to the states⁵⁰. The consequences of this fun-

damental shift in method has led over the last ninety years to a gradually expanding field of federal legislative power, mostly at the expense of the states. Thus, the external affairs power, originally understood to concern the regulation of matters that were inherently external in nature, has been extended by the High Court to include the contents of any international treaty that the Australian national government happens to enter, whatever the topic⁵¹. The power with respect to trading and financial corporations, originally understood to concern only corporations whose predominant purposes were trading or financial, and to encompass only the regulation of the trading and financial activities of those kinds of corporations, has been extended to the regulation of any corporation which engages in a sufficiently significant degree of trading or financial activities, and also to extend to any activities of such a corporation, including its internal relations with its employees⁵². The examples can be multiplied. Only in certain specific areas has the High Court resisted this tendency — and here its efforts are to be commended. Recently, it held that the spending power of the federal government is in principle limited to topics upon which the federal parliament has legislative power and has legislated⁵³. This has led to the conclusion that a range of federal spending programs have been unconstitutional, and that the federal government will need to cooperate with the states in order to pursue those financial policies in the future. It is not clear where this latter line of cases will lead, although it is significant that in the very most recent decision, the Court referred to the regulation of schools as a matter that properly falls within the provenance of the states—an observation that, if

generalised to the interpretation of federal legislative powers generally, could help to rebalance the Court's interpretation of the constitution. However, the prospects that this might occur are not great. In order to see a better rebalancing of the federation, the states themselves need to be more assertive in their relationships with the federal government.

One radical means to this latter end, the author has argued, is for the state governments themselves to initiate a process by which the state constitutions would be submitted to the their respective peoples for ratification and approval by referendum⁵⁴. While there are no present prospects of this happening in the foreseeable future, such an initiative has the potential to reinvigorate the role and constitutional standing of the states within the federation. This is because, at present, only the federal constitution has been popularly ratified, and the democratic foundations of the federation have been one of the underlying reasons why the High Court has given interpretive priority to the powers of the federation in preference to those of the states. While the interpretive implications of such a change cannot be predicted with absolute certainty, if the state constitutions were ratified by their respective peoples, it would give the Court reason to consider the states as locations of constitutional, democratic self-governance at least as fundamental to the federation as the government of the federation as a whole. And to do so would be to recover, at least to some degree, the original understanding and intention of the framers of the constitution, which was to create what Montesquieu called a '*società di società*'⁵⁵ and what Bryce said amounted to 'a Commonwealth of commonwealths,

a Republic of republics, a State which, while one, is nevertheless composed of

other States even more essential to its existence than it is to theirs⁵⁶.

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¹ Ch.-L. de S. de Montesquieu, *De l'esprit des lois*, translated as *Lo spirito delle leggi*, with an introduction by R. Deranthé, Milano, Rizzoli, 1989, Pt. II, Bk. IX, ch. I, p. 283 – quoted by L. Lacchè, 'Un italiano a Ginevra, alla ricerca della patria comune', in P. Rossi (edited by), *Per la Patria comune*, Manduria, Piero Lacaita Editore, 1997, p. XII.

² Eg, K. Lenaerts, *Constitutionalism and the Many Faces of Federalism*, in «American Journal of Comparative Law», vol. 38, 1990, p. 205.

³ R. Schütze, *From Dual to Cooperative Federalism: The Changing Structure of European Law*, Oxford, Oxford University Press, 2009.

⁴ S. Tierney, *Federalism in a Unitary State: A Paradox Too Far?*, in «Regional & Federal Studies», vol. 19, n. 2, 2009, p. 237.

⁵ J. Weiler, *The Transformation of Europe*, in «Yale Law Journal», vol. 100, 1991, p. 2403.

⁶ B. de Witte, *Rules of Change in International Law: How Special Is the European Community?*, in «Netherlands Yearbook of International Law», vol. 25, 1994, p. 299.

⁷ In fact, throughout the revolutionary era claims to independence were made by the American states both jointly and severally. See, eg. C.S. Wood, *The Creation of the American Republic, 1776-1787*, Chapel Hill, University of North Carolina Press, 1969, p. 355; J.N. Rakove (edited by), *Interpreting the Constitution: The Debate over Original Intent*, Boston, Northeastern University Press, 1990, p. 2. The

balances of power between Britain and the American colonies are in certain important respects better understood as "negotiated authorities": J.P. Greene, *Negotiated Authorities: Essays in Colonial Political and Constitutional History*, Charlottesville, University Press of Virginia, 1994.

⁸ J.-F. Aubert, *Traité de Droit Constitutionnel Suisse*, Neuchâtel, Ides et Calendes, 1967, pp. 30-32.

⁹ Stephen Tierney, "We the Peoples": Constituent Power and Constitutionalism in Plurinational States, in M. Loughlin and N. Walker (edited by), *The Paradox of Constitutionalism*, Oxford, Oxford University Press, 2008, p. 229.

¹⁰ C. Colino, *Constitutional Change without Constitutional Reform: Spanish Federalism and the Revision of Catalonia's Statute of Autonomy*, in «Publius», vol. 39, n. 2, 2009, p. 262.

¹¹ M. Keating and A. Wilson, *Federalism and Decentralisation in Italy*, Paper presented at the PSA Conference, Edinburgh, 2010.

¹² Thus, in relation to the founding of the American federation, Michael Zuckert has pointed out that among the framers "[t]here were some – notably Luther Martin on the federal side, Hamilton and perhaps Gouverneur Morris on the national side – who clung to the view that sovereignty must reside somewhere, in one government or the other. These few delegates insisted that one or the other must be sovereign, but the main thrust of the delegates' thought was away from such a drastic either/or. Madison, both at the Convention and later, felt that too much was made of the ab-

stract issue of sovereignty [...] 'a compleat supremacy somewhere is not necessary in every society'". See M. Zuckert, *Federalism and the Founding: Toward a Reinterpretation of the Constitutional Convention*, in «Review of Politics», vol. 48, 1986, p. 166.

¹³ See N. Aroney, *Politics, Law and the Constitution in McCawley's Case*, in «Melbourne University Law Review», vol. 30, n. 3, 2006, p. 605.

¹⁴ *British North America Act 1867; Commonwealth of Australia Constitution Act 1900*.

¹⁵ The next section in this article draws extensively from N. Aroney, *The Constitution of a Federal Commonwealth: The Making and Meaning of the Australian Constitution*, Cambridge, Cambridge University Press, 2009, chs. 3 and 4. Those studying the origins of the Australian constitution should also consult J.A. La Nauze, *The Making of the Australian Constitution*, Melbourne, Melbourne University Press, 1974, and H. Irving, *To Constitute a Nation: A Cultural History of Australia's Constitution*, Cambridge, Cambridge University Press, 1997.

¹⁶ A.J. Brown, *One Continent, Two Federalisms: Rediscovering the Original Meanings of Australian Federal Ideas*, in «Australian Journal of Political Science», vol. 39, n. 3, 2004, p. 485.

¹⁷ See *Australian Constitutions Act (No. 2) 1850 (U.K.)*, and the discussion in W.G. McMinn, *A Constitutional History of Australia*, Melbourne, Oxford University Press, 1979, chs. 2-3; A.C.V. Melbourne, *Early Constitutional Development in Australia*, Brisbane,

- University of Queensland Press, 1963, Pt. V, ch. VI and 443-445; R.D. Lumb, *The Constitutions of the Australian States* (5th ed.), Brisbane, University of Queensland Press, 1992, chs. 1-2, and ch. 4.
- ¹⁸ *Colonial Laws Validity Act* 1865 (UK).
- ¹⁹ *Official Record of the Proceedings and Debates of the Australasian Federation Conference*, Melbourne, Government Printer, 1890, p. 10.
- ²⁰ T. Just, *Leading Facts connected with Federation*, Hobart, The Mercury Office, 1891, pp. 35-37, reproducing J. Dunmore Lang, *The Coming Event, or Freedom and Independence for the Seven United Provinces of Australia*, Sydney, J.L. Sherriff, 1870.
- ²¹ A.V. Dicey, *Introduction to the Study of the Law of the Constitution* (5th ed.), London, Macmillan, 1897; J. Bryce, *The American Commonwealth* (3rd ed.), London, Macmillan, 1893; J. Bourinot, *A Manual of the Constitutional History of Canada*, Montreal, Dawson, 1888; F.O. Adams and C.D. Cunningham, *The Swiss Confederation*, London, Macmillan, 1889.
- ²² E.A. Freeman, *History of Federal Government in Greece and Italy* (2nd ed.), London, Macmillan, 1893, pp. 1-3, and pp. 7-8. Freeman continued: "It is hardly possible that federal government can attain its perfect form except in a highly refined age, and among a people whose political education has already stretched over many generations".
- ²³ H.S. Maine, *Ancient Law: Its Connection with the Early History of Society, and its Relation to Modern Ideas*, London, John Murray, 1861, p. 109; Freeman, *Federal Government*; J. Bryce, *The Holy Roman Empire* (4th ed.), London, Macmillan, 1895.
- ²⁴ Montesquieu, *Spirit of Laws* cit.; A. de Tocqueville, *Democracy in America* (1835-1843), London, Oxford University Press, 1959.
- ²⁵ Letter from Jefferson to Cabell (2 February 1816); D. Hume, *The Idea of a Perfect Commonwealth* (1777), in *Essays, Moral, Political, and Literary*, Indianapolis, Liberty Fund, 1987; P.-J. Proudhon, *The Principle of Federation* (1863), Toronto, University of Toronto Press, 1979.
- ²⁶ For more detail, see N. Aroney, *A Commonwealth of Commonwealths: Late Nineteenth-Century Conceptions of Federalism and Their Impact on Australian Federation, 1890-1901*, in «Journal of Legal History», vol. 23, n. 3, 2002, pp. 253; N. Aroney, 'Althusius at the Antipodes: The Politica and Australian Federalism', in F. Carney, H. Schilling and D. Wyduckel (edited by), *Jurisprudenz, Politische Theorie Und Politische Theologie*, Berlin, Duncker & Humblot, 2004, p. 529; N. Aroney, *The Influence of German and Swiss State-Theory on Late Nineteenth Century British, American and Australian Conceptions of Federalism*, in «International and Comparative Law Quarterly», vol. 59, 2010, p. 669.
- ²⁷ Sir Owen Dixon, Chief Justice of the High Court of Australia, 1952-1964, observed that the American Constitution was for the Australians an "incomparable model" which both "fascinated" them and "damped the smoldering fires of their originality": O. Dixon, *The Law and the Constitution*, in *Jesting Pilate*, Melbourne, Law Book Co, 1965, p. 44.
- ²⁸ Bryce, *The American Commonwealth* cit., vol. I, pp. 12-15, and p. 332.
- ²⁹ See J. Hutson, *The Sister Republics: Switzerland and the United States from 1776 to the Present*, Washington, Library of Congress, 1991.
- ³⁰ I refer here to the published records of the Australasian Federation Conference and Federal Conventions held in 1890, 1891 and 1897-1898, and include the Hansard records of the Imperial Parliament and the several colonial legislatures, as well as the numerous Australian books, articles and speeches published outside these formal venues.
- ³¹ J. Madison, *Federalist No. 39* (1788), in C. Rossiter (edited by), *The Federalist Papers*, New York, New American Library of World Literature, 1961.
- ³² Australian Constitution, section 128.
- ³³ The conventions of parliamentary responsible government were obliquely recognised in the requirement that a Minister of the Crown could not hold office for a period of more than six months without holding a seat in the parliament: Australian Constitution, section 64.
- ³⁴ Commonwealth of Australia Constitution Act 1900, section 6.
- ³⁵ Australian Constitution, section 7.
- ³⁶ Australian Constitution, section 53.
- ³⁷ *Official Report of the National Australasian Convention Debates*, Sydney, 2 March to 9 April, 1891, Sydney, Acting Government Printer, 1891; reprinted Sydney, Legal Books, 1986, pp. 442-444; H.B. Higgins, *Essays and Addresses on the Australian Commonwealth Bill*, Melbourne, Atlas Press, 1900, pp. 16-17; J. Bryce, *Studies in History and Jurisprudence*, 2 vols., Oxford, Clarendon Press, 1901, vol. I, pp. 515-518.
- ³⁸ L.J.M. Cooray, *Conventions, the Australian Constitution and the Future*, Sydney, Legal Books, 1979.
- ³⁹ Albeit that local government was then, as now, regarded as a creature of the states.
- ⁴⁰ *Convention Debates*, Adelaide, 1897, pp. 338-339.
- ⁴¹ J. Reynolds, *A.I. Clark's American Sympathies and his Influence on Australian Federation*, in «Australian Law Journal», vol. 32, 1958, p. 66.
- ⁴² Australian Constitution, sections 106 and 107.
- ⁴³ Australian Constitution, section 52.
- ⁴⁴ Australian Constitution, section 51(i), (xiii), (xiv), (xx), (xxviii).
- ⁴⁵ Australian Constitution, sections 51(ii) and 96.
- ⁴⁶ Australian Constitution, section 51(vi), (xxix), (xxxviii).

- ⁴⁷ Australian Constitution, section 109.
- ⁴⁸ See Aroney, *Constitution of a Federal Commonwealth*, chs. 9 and 10.
- ⁴⁹ For more detail on these points, see J. Allan and N. Aroney, *An Uncommon Court: How the High Court of Australia Has Undermined Australian Federalism*, in «Sydney Law Review», vol. 30, 2008, p. 245; N. Aroney, *Constitutional Choices in the Work Choices Case, or What Exactly Is Wrong with the Reserved Powers Doctrine?*, in «Melbourne University Law Review», vol. 32, n. 1, 2008, p. 1.
- ⁵⁰ *Amalgamated Society of Engineers v Adelaide Steamship Co Ltd* (1920) 28 CLR 129.
- ⁵¹ *Commonwealth v Tasmania* (1983) 158 CLR 1.
- ⁵² *New South Wales v Commonwealth* (2006) 229 CLR 1.
- ⁵³ *Pape v Commissioner of Taxation* (2009) 238 CLR 1; *Williams v Commonwealth* [2012] HCA 2.
- ⁵⁴ N. Aroney, *Popular Ratification of the State Constitutions*, in P. Kildea, A. Lynch and G. Williams (edited by), *Tomorrow's Federation: Reforming Australian Government*, Sydney, Federation Press, 2012, p. 210.
- ⁵⁵ Montesquieu, *Lo spirito delle leggi* cit., p. 283.
- ⁵⁶ Bryce, *American Commonwealth* cit., vol. I, p. 332.