Constituent power in Australia

by Nicholas Aroney and Erika Arban

Abstract: *Potere costituente in Australia* – This article offers an account of the constituent power from which the Australian Constitution derives its origin and its legitimacy, supplemented by occasional comparisons with the constituent power associated with the emergence of the Italian regional state in the 1948 Constitution, using the theory of constituent power elaborated by Mortati as the theoretical lens. It is argued that, unlike the Italian experience, the constituent power as manifested in the Australian case is profoundly plural and federal in nature. These plural foundations have had a significant impact on the design and structure of the Australian Constitution.

Keywords: Constituent power; Australia; Federalism; Italy; Mortati

1. Introduction

The Australian Constitution is contained in a statute of the British Parliament, the *Commonwealth of Australia Constitution Act 1900*. Although the Constitution attributes its legal force to the British Parliament, the Preamble to the Constitution Act of 1900 recounts its origin in a compact among the people of the six self-governing Australian colonies, rather than in a decision of the British authorities. Importantly, the Preamble recounts that the people of the colonies had themselves 'agreed to unite in one indissoluble Federal Commonwealth', despite the fact that the new federation was to be formed 'under the Crown of the United Kingdom of Great Britain and Ireland'. This compacting agreement to establish an Australian federal commonwealth was secured following two federal conventions at which representatives of the colonies negotiated the terms of the Constitution and agreed to support its submission to the British government for enactment into law, subject to its approval in a series of popular referendums held in each colony. Accordingly, while formally a statute of the Imperial Parliament, in substance the Australian Constitution is the result of a federating compact between the people of several mutually independent, self-governing colonies, the constituent states of the Commonwealth of Australia. Under the federal system thus established, the Commonwealth is granted certain specified legislative powers, while the states continue to exercise the general legislative powers they possessed prior to federation, subject to the Constitution (secs 51, 52, 106, 107). In the words of James Bryce—one of the most significant influences on the Australians—the result was 'a Commonwealth of commonwealths, a

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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'.[1]

This mode of constitutional formation differs fundamentally from the process by which the Italian Constitution of 1948 was established, where the Constitution was promulgated by a Constituent Assembly designed to represent the Italian people as a whole. This continues to be the case in Italy despite the very important constitutional reform of 2001, which established a distribution of powers between the State and the Regions (Art 117) somewhat resembling the distribution of powers established by the Australian Constitution. The Australian and Italian cases thus present two very different modes of constitutional formation and reform, one premised on an agreement among the people of a plurality of distinct political communities, the other premised on the agreement of the singular people of the nation as a whole. And yet, both systems establish a federal (or federal-like) distribution of legislative competences that is guaranteed by the constitution and enforced by the courts.

This article is structured as follows. Part 2 begins by describing the British settlement of the Australian continent and the dispossession of Indigenous peoples in the late eighteenth and early nineteenth centuries. Part 3 explains the constitutional origins of the Australian colonies and their emergence as self-governing political communities possessing significant powers of constitutional self-determination. Part 4 recounts the federal conference and federal conventions through which representatives of the Australian colonies designed and drafted a proposed constitution for approval by the people of the colonies. Part 5 describes how the proposed constitution was submitted to referendums held in each of the colonies and then formally enacted into law by the British Parliament. Part 6 outlines the capacity of the Australian people, organised in their respective states, to amend the Constitution and recounts how Australia became increasingly independent of the British government and parliament over the course of the twentieth century. Part 7 concludes by identifying the locus and nature of the constituent power in Australia, the significance of which is explained through a brief comparison with the Italian system.

2. British settlement (1777-1842)

In 1768, Captain James Cook embarked on an expedition with instructions from the British monarch to see whether a 'Continent or Land of great extent' might be discovered in the southern waters of the Pacific Ocean. His instructions stated that if he was to discover this mysterious continent *Terra Australis Incognita* he was 'with the Consent of the Natives to take Possession of Convenient Situations in the Country in the Name of the King of Great Britain', and if he found the country to be uninhabited, he was to 'take Possession for his Majesty by setting up Proper Marks and Inscriptions, as

[1] J. Bryce, *The American Commonwealth*, New York, 2nd ed, 1889, 12-15, 332. See, further, N. Aroney, *The Constitution of a Federal Commonwealth: The Making and Meaning of the Australian Constitution*, Cambridge, 2009.

first discoverers and possessors'.[2] (National Library of Australia, 1768). Although he was not the first European to do so, Cook did discover such a continent and, despite having encountered several groups of indigenous inhabitants, considered them to be existing in a 'pure state of nature', and so proceeded to claim possession of the eastern coast of Australia on behalf of King George III.[3]

The dispossession of Australia's indigenous peoples of their traditional lands has been the subject of discussion in several cases. As to its legality, the High Court has persistently held that the original acquisition of territory by Captain Cook on behalf of the British Crown was a sovereign 'act of state' the validity of which cannot be challenged by the courts of that state.[4] According to the Court, this requires the conclusion that there can be no continuing indigenous sovereignty, even in the North American sense of a 'domestic dependent nation'[5], nor any parallel indigenous law-making capacity apart from that which might be conferred by Parliament.[6] In *Mabo v Queensland (No 2)*, however, the High Court held that, despite the acquisition of British sovereignty over the Australian continent, the common law recognises the existence of pre-existing native title which, provided it has not been extinguished by some inconsistent grant of property, gives rise to legally-enforceable rights. As Brennan J declared in that case, upon settlement the common law 'became the law of the land, protecting and binding colonists and indigenous inhabitants alike and equally'.[7] Nonetheless, the territorial sovereignty claimed by the British Crown remained incompletely realised for many years after it was first asserted, but it was increasingly exercised from the 1820s.

The penal colony of New South Wales was established by an Imperial Order in Council of 6 December 1786.[8] The governing powers of the Governor were largely autocratic. The Governor had power to make rules or orders that had binding force. He could declare martial law. He could make grants of land as he saw fit. He appointed his military officers to be judges of the early criminal and civil courts established in the colony. There was no formal executive council that provided him with advice and no representative assembly to give expression to the views of the general population.[9] Apart from the Governor's humanitarian self-restraint, the only substantial limitation on the 'discretionary gubernatorial rule' which he exercised consisted in his accountability to the British government and to the general principles of British law operating within the colony.[10] The

[2] Secret Instructions for Lieutenant James Cook Appointed to Command His Majesty's Bark the Endeavour, 30 July 1768, National Library of Australia (UK).
[3] *Kaurareg People v Queensland* [2001] FCA 657, 3.
[4] *New South Wales v Commonwealth (Seas and Submerged Lands)* (1975) 135 CLR 337, 388; *Mabo v Queensland (No 2)* (1992) 175 CLR 1, 31.
[5] *Coe v Commonwealth (No. 2)* (1993) 118 ALR 193, 199-200.
[6] *Yorta Yorta v Victoria* (2002) 214 CLR 422, 443-4.
[7] *Mabo v Queensland (No. 2)* (1992) 175 CLR 1, 37.
[8] For a discussion, see D. Neal, *The Rule of Law in a Penal Colony: Law and Power in Early New South Wales*, Cambridge, 1991, ch. 2.
[9] A. C. Castles, *An Australian Legal History*, Sydney, 1982, 108, ch 3.
[10] R. D. Lumb, *Australian Constitutionalism*, Sydney, 1983, 38-9.

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territory over which the Governor's authority theoretically extended was also vast. At its height, the colony of New South Wales extended to approximately two-thirds of the Australian continent.[11] Although additional settlements were soon established, they were all originally ruled by the Governor and his provincial administration located in Sydney.

3. Self-governing colonies (1842-1890)

Under pressure from emancipated convicts, free settlers and their native born children, this gradually changed. There were increasing demands for the recognition within the colony of traditional British rights and liberties, such as trial by jury and representative government.[12] A Legislative Council for New South Wales, appointed by the King, was instituted in 1823,[13] reconstituted in an expanded form in 1828,[14] but did not include locally-elected representatives until 1842.[15] Through the same period, the settlements at Hobart (1803), Moreton Bay (1824), Swan River (1829), Port Phillip Bay (1835) and Holdfast Bay (1836) were established as independent colonies: Van Diemen's Land in 1825, Western Australia in 1829, South Australia in 1836, Victoria in 1851 and Queensland in 1859. The territories of all these colonies except Western Australia were at one time a part of New South Wales.

A general motivating goal behind these constitutional developments was a desire for 'local self-government', a principle which suggested that the colonists should be able to govern themselves through representative institutions and that these institutions should be local to each settlement.[16] When local self-government was ultimately secured mid-way through the nineteenth century, it accordingly involved at least four basic elements: the separate establishment of each colony, the institution of elected legislative assemblies, the conferral of parliamentary responsible government, and the grant to each colony of the capacity to amend its own constitution.[17] By the 1850s each of the Australian colonies had its own bicameral legislature, consisting of a lower house elected on a limited franchise and an upper house which was either also elected or consisted of members nominated by the Governor. By that time, every colony except Western Australia was also granted responsible government, which meant that the powers of the Governor were ordinarily exercised on the advice of Ministers who had the

[11] A. C. V. Melbourne, *Early Constitutional Development in Australia*, Brisbane, 1963, 107.
[12] P. Cochrane, *Colonial Ambition: Foundations of Australian Democracy*, Melbourne, 2006.
[13] *New South Wales Act*, 1823 (UK).
[14] *Australian Courts Act*, 1828 (UK). Compare *Western Australia Act* 1829 (UK), establishing a similar Council for Western Australia.
[15] *Australian Constitutions Act (No 1)* 1842 (UK), under which 12 members of the Legislative Council were appointed by the Queen and 24 were elected by the inhabitants of the colony.
[16] N. Aroney, *Constitution of a Federal Commonwealth*, quot., ch. 5.
[17] W. G. McMinn, *A Constitutional History of Australia*, Melbourne, 1979, 35.

confidence or support of the lower house of the colonial legislature.[18] Most of the colonies also secured at this time the power to amend their own constitutions—a capacity that was later extended to all British colonies possessing representative legislatures by the *Colonial Laws Validity Act 1865* (UK).[19] Western Australia, although established as a separate colony in 1829, did not obtain a bicameral legislature and responsible government until 1889/90.[20]

It was in this context that the Australian colonies began seriously to consider the possibility of federation, particularly from 1890 onwards. This status of the six colonies as self-governing and self-constituting political communities was the fundamental presupposition upon which they agreed to federate in 1901, under a Constitution which they each played an equal part in debating, drafting and approving.

4. Federal conventions (1890-1898)

Although the British authorities had urged the Australian colonies to federate as early as 1847,[21] the idea was resisted by local political leaders who were more concerned to establish the rights of each colony to its own local and independent self-government.[22] They generally insisted that a federation of the colonies, if it were to occur, would have to be a local initiative, without any 'meddlesome interference' from England, as a former Premier of Queensland put it.[23] Early proposals by New South Wales which claimed a certain pre-eminence for the 'mother colony' were thus rejected by the other colonies on the ground that each would have to join as an 'equal contracting partner'.[24] The path forward would have to be initiated and agreed to by the political leaders of all of the colonies.

An important step was taken in 1883 when a conference of colonial premiers approved a bill for the establishment of a Federal Council of Australasia. The bill was enacted into law by the British Parliament in 1885,[25] but New South Wales never attended meetings of the Council, and it fell into disuse. It was not until 1889, when the Premier of New South Wales, Henry Parkes, gave a famous speech in favour of federation near the

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[18] R. D. Lumb, *The Constitutions of the Australian States*, Brisbane, 1991, chs. 1, 2. The key legal documents included *Australian Constitutions Act (No 2)* 1850 (UK), *Constitution Act* 1855 (NSW), *New South Wales Constitution Statute* 1855 (UK), *Constitution Act* 1855 (Vic), *Constitution Act* 1855–56 (SA) and Order in Council, 6 June 1859 (Qld). See also *Constitution Act* 1867 (Qld).

[19] On the extent of colonial legislative power, see Chs. 3 and 10.

[20] *Constitution Act* 1889 (WA); see, also, *Constitution Act* 1899 (WA).

[21] J. M. Ward, *Earl Grey and the Australian Colonies*, Melbourne, 1958.

[22] J. Quick, R. R. Garran, *The Annotated Constitution of the Australian Commonwealth*, Sydney, 1901, 2, 99-100.

[23] *Letter from C. Lilley to C. Gavan Duffy*, 7 November 1870, *Papers of Sir Charles Gavan Duffy* (State Library of Victoria). Lilley was Premier of Queensland (1868–1870) and Chief Justice of the Supreme Court of Queensland (1879–1893); Duffy was Premier of Victoria (1871–1872).

[24] N. Aroney, *Constitution of a Federal Commonwealth*, quot., 138-45.

[25] *Federal Council of Australasia Act* 1885 (UK).

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border of New South Wales and Queensland, that the cause of federation received the support it needed. Declaring that the time for a union of the colonies had come, Parkes proposed that the legislatures of each colony should appoint delegates to attend a convention to draft a constitution under which the colonies might federate.

The Australasian Federation Conference, held in Melbourne in 1890, was the first opportunity for colonial leaders to debate in some detail the kind of federation that might be formed. At the conference, Andew Inglis Clark, a delegate from Tasmania, forcefully maintained that the Australians should follow the lead of the United States Constitution, which had been drafted and agreed to by representatives of each of the constituent States and therefore presupposed their equal status as independent, self-governing, and self-constituting political communities. A true federation, he argued, would ensure that each local legislature remained sovereign within its own sphere, the federation would be granted only limited powers, and the federal legislature would necessarily consist of two houses, one of which represented the constituent states on an equal basis. Samuel Griffith agreed, observing that the Australians had been 'accustomed for so long to self-government' that they regarded themselves as having become 'practically almost sovereign states', indeed 'a great deal more sovereign states, though not in name, than the separate states of America'.[26]

The conference of 1890 agreed to a proposal of Alfred Deakin that the colonial legislatures should appoint delegates to a National Australasian Convention empowered to 'consider and report upon an adequate scheme for a Federal Constitution'.[27] This convention was held in 1891 in Sydney. It was composed of delegates nominated by the Australian legislatures, as well as representatives from New Zealand. Each Australian colony was equally represented, and the representation was bipartisan: the delegates included both conservatives and liberals, protectionists and free traders. Only the emergent labour party was not directly represented, for it would be another decade before representatives of labour interests were routinely elected in substantial numbers to the Australian legislatures.

The convention of 1891 began by debating a series of resolutions proposed by Henry Parkes and then proceeded to draft a Constitution Bill for eventual consideration by the colonial legislatures.[28] Parkes' resolutions were concerned to ensure that: (1) the powers, privileges and territorial rights of the colonies would remain intact except as was agreed to be necessary to form a federal government; (2) trade and intercourse between the federated colonies would be absolutely free; (3) the federal parliament would consist of a senate and a house of representatives, the former consisting of an equal number of members from each colony, and the latter to be elected by districts formed on a population basis; (4) a federal court would be established constituting a high court of appeal for the whole of Australia; and (5) the federal executive government would be responsible to

[26] *Official Record of the Proceedings and Debates of the Australasian Federation Conference*, Melbourne, 1890, 10.
[27] *Ibidem*, 261.
[28] *Official Report of the National Australasian Convention Debates*, Sydney, 1891, 23.

the lower house of the federal parliament. There was general agreement about these resolutions, except on two points. On one hand, a large number of delegates questioned whether in a genuine federation the executive government should be responsible only to the lower house of the federal parliament, given that it is in the upper house that the states are particularly represented. On the other hand, a different group of delegates questioned whether the states should be equally represented in the Senate, arguing that this was inconsistent with the idea of a national democracy governed by elected representatives of the people of the federation as a whole. These two distinct visions of the kind of federation that Australia would become went to the heart of the debate over the design of the Australian Constitution. They were competing visions that had deep roots in Western political and constitutional thought.

Two delegates, Inglis Clark and Charles Kingston, came to the Convention of 1891 with draft constitutions. After debating Parkes' resolutions, a drafting committee consisting of Griffith, Inglis Clark, Kingston and later Edmund Barton, prepared a Constitution Bill which reflected many, but not all, of the structural ideas and fundamental principles contained in Inglis Clark's draft. These included: (a) distinct chapters separately establishing the legislative, executive and judicial branches of the federal government; (b) the principle that the states would continue to exercise general legislative and governing powers subject only to the specific responsibilities conferred upon the federation; and (c) the principle of equal representation of the states in the federal upper house. Ultimately, the federal convention approved a Constitution Bill that broadly gave effect to these principles.

The Constitution Bill of 1891 did not receive a warm reception in the colonial parliaments, and the momentum towards federation stalled until, at an informal 'People's Convention' held at Bathurst in 1895, John Quick proposed that a second convention be held, this time to be elected directly by the voters of each colony, on the understanding that each legislature would commit itself to submitting the resulting draft constitution to the voters in a referendum and, if so approved, present it to the British authorities for enactment into law. A federal convention on this basis was indeed held between 1897 and 1898, with successive sittings in Adelaide, Sydney and Melbourne. As in 1891, the convention began by debating a series of fundamental resolutions, this time prepared by Barton, the acknowledged leader of the convention. The convention ultimately produced a draft constitution, whose basic structure and principles were largely similar to those of the draft of 1891 except that the senate was to be directly elected by the voters of each state rather than chosen by the state legislatures, and the constitution itself could be amended by a referendum in which a majority of people of the entire federation and a majority of people in a majority of states approved the proposed change. This draft constitution was eventually approved by the voters in each Australian colony and duly enacted into law by the British Parliament in 1900. The Commonwealth of Australia came into being as a federation on 1 January 1901.

5. Ratification and Enactment (1898-1901)

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It has been noted that the preamble to the *Commonwealth of Australia Constitution Act 1900* (UK) attributes the origin and legitimacy of the Australian Constitution to an agreement between the people of the constituent colonies to be united into one indissoluble federal commonwealth.[29] The Australians derived the idea of an agreement between constituent states from many contemporary writers on the subject of federalism, including James Madison, James Bryce, Edward Freeman and Albert Venn Dicey.[30] These writers taught the Australians that a genuinely federal system is founded upon a treaty-like agreement among constituent states.[31] Andrew Inglis Clark, for example, prepared an influential draft constitution which was accompanied by a memorandum which explained that the proposed constitution was premised on a 'voluntary union' among 'independent communities', and that this made certain features of the proposed constitution virtually inevitable, such as the delegation of a limited number of specific powers to the federal parliament, the reservation of all other powers to the constituent states and their people, and the equal representation of each state in one of the houses of the federal parliament.[32]

There were a small number of delegates who did not agree. Rather than conceive the federation to be predicated on the agreement of the colonies, two influential Victorian delegates, Isaac Isaacs and Henry Bournes Higgins, argued that it should be founded on the consent of the Australian people as a whole. Higgins thus advocated that the Constitution should be ratified ultimately by a national referendum and he reasoned about the design of the Constitution in a manner that was premised on the sovereignty of the people of the entire nation, without regard to the distinct political communities into which they were grouped politically.[33] Drawing on A.V. Dicey and John Burgess,[34] he maintained that in every political community there must exist some institution or body in which 'ultimate sovereignty' is located.[35] According to Higgins, while the 'theoretical sovereignty' of the British Parliament had to be acknowledged, 'practical sovereignty' in Australia 'ought to rest with the Australian people' as a whole.[36] Following John Locke,[37] Higgins further argued that popular sovereignty must mean majority rule,[38] and he understood this to require that a majority of the

[29] See also *Commonwealth of Australia Constitution Act* 1900 (UK), covering clause 3.
[30] N. Aroney, *Constitution of a Federal Commonwealth*, quot., ch. 3.
[31] See, eg., J. Bryce, *The American Commonwealth*, quot., vol. I, 12-15, 17-22, 332; A. V. Dicey, *Introduction to the Study of the Law of the Constitution*, London, 1897, 137-8, note 1.
[32] A. I. Clark, *Australian Federation (Confidential)*, Hobart, 1891.
[33] H. B. Higgins, *Essays and Addresses on the Australian Commonwealth Bill*, Melbourne, 1900, 11; *Official Record of the National Australasian Convention Debates, Sydney*, Sydney, 1897, 259–60, discussed in N. Aroney, *Constitution of the Federal Commonwealth*, quot., 130–33, 211–12, 218–21.
[34] A.V. Dicey, *Introduction*, quot.; J. W. Burgess, *Political Science and Comparative Constitutional Law*, Boston, 1890.
[35] H. B. Higgins, *Essays and Addresses*, quot., 9.
[36] *Ibidem*, 9.
[37] J. Locke, *Two Treatises of Government*, Cambridge, 1960 [1689], §96.
[38] H. B. Higgins, *Essays and Addresses*, quot., 72.

people of Australia as an entire nation should play a decisive role in the ratification of the Constitution, in the election of members of the federal Parliament, and in any decision to amend the Constitution.[39]

Higgins' arguments could not overcome the unavoidable reality that the Australian colonies were mutually independent self-governing communities that had long been exercising local powers of constitutional self-determination. Federation would therefore have to depend on the consent of the people of each colony. As Griffith had observed in Melbourne in 1890, the colonies had been 'accustomed for so long to self-government', they had 'become practically almost sovereign states'.[40] Federation would therefore have to depend on 'public opinion in the different colonies' and there was no point in formulating 'abstract resolutions' about the kind of federation to be established 'unless effect will be given to them' by the colonial legislatures.[41]

Those who wished to establish a relatively centralised federal system had to yield to this reality. Alfred Deakin, a leading delegate from Victoria, observed at the Adelaide sitting of the second federal convention:

[It is] not merely a question as to which form can be most logically deduced from certain premises which may or may not be generally accepted; it is a question between equal contracting parties, as to the terms and conditions on which they will enter the Federation.[42]

The framers of the Australian Constitution thus recognised that a genuinely federal system would have to be created, meaning a system which acknowledged the fundamentally constitutive role of the colonies, expressed in the distribution of governing authority, the construction of the representative institutions of the federal government and the procedures by which the Constitution could be changed in the future. As such, the formative process, and the constitutional principles that it presupposed, informed the deliberations and shaped the institutions created by the Constitution. Having come into being through a federal compact among pre-existing, self-governing colonies, the Constitution established a federal commonwealth consisting of co-existing federal and state institutions of government, the jurisdiction of which were carefully defined and limited. The Commonwealth's power was confined to particular topics (secs 51, 52, 106, 107); the federal Parliament was designed to represent and be accountable to both the people of the States and the people of the federation as a whole (secs 7 and 24); and the Constitution itself could only be altered with the consent of the people of the Commonwealth and the peoples of the States (sec 128).

[39] *Ibidem*, 11.
[40] *Official Record of the Proceedings and Debates of the Australasian Federation Conference*, quot., 10.
[41] *Ibidem*, 8.
[42] *Official Report of the National Australasian Convention Debates, Adelaide*, Adelaide, 1897, 650.

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6. Amending power, dominion status and constitutional patriation

By agreeing that the Constitution could be amended by majorities of the people of the Commonwealth and the people of the States (sec 128), the Australians constructed a federation in which the people of each State were committed to a Constitution that could be amended against their will. However, even this was subject to the requirement that any change to the representation of each State in the federal Parliament or to the territorial boundaries of a State would have to be approved by the people of that State. These qualifications on the amendment power reflected the principle that the federation rested on the consent of every constituent State.

This principle of individual State consent was further expressed in several other ways. The first was the capacity of each individual State to refer additional legislative powers to the Commonwealth if it so wished (s 51(xxxvii)). The second was even more fundamental. Recognising that full Australian independence from Britain would require a local capacity to exercise the 'sovereign' powers of the British Parliament to legislate for Australia, a provision was included that gave the Commonwealth Parliament, acting at the request or with the concurrence of the State Parliaments, to exercise any power which at the establishment of the Constitution could only have been exercised by the British Parliament (sec 51(xxxviii)). The conferral of such a power was extraordinarily significant because it potentially brought to an end the need to turn to the United Kingdom for fundamental constitutional change.[43] Although the power was vested in the Commonwealth, because the foundation of the Constitution was a compact between the States, the clause stipulated that the power could only be exercised 'at the request or with the concurrence of the Parliaments of all the States directly concerned'. As Griffith explained:

> after the federal parliament is established anything which the legislatures of Australia want done in the way of legislation should be done within Australia, and the parliament of the commonwealth should have that power. It is not proposed by this provision to enable the parliament of the commonwealth to interfere with the state legislatures; but only, when the state legislatures agree in requesting such legislation, to pass it, so that there shall be no longer any necessity to have recourse to a parliament beyond our shores …[44]

The significance of this clause is difficult to underestimate. Firstly, it conferred the 'sovereign' legislative powers of the British Parliament upon the Australian legislatures and it did so in a manner that shared those sovereign powers among the Commonwealth and the States, requiring them to exercise the power only with the consent of the legislature of every affected jurisdiction. Secondly, while this did not bring the powers of the British Parliament to an end, it anticipated such an eventuality.

At an Imperial Conference held in 1926, the British government and the the political leaders of the colonies unanimously agreed to a statement,

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[43] *Official Report of the National Australasian Convention Debates, Sydney*, Sydney, 1891, 490-91.

[44] *Ibidem*, 524; 490.

commonly known as the Balfour Declaration,[45] which acknowledged and declared that the self-governing colonies, now called 'Dominions', were:

> autonomous Communities within the British Empire, equal in status, in no way subordinate one to another in any aspect of their domestic or external affairs, though united by a common allegiance to the Crown, and freely associated as members of the British Commonwealth of Nations.[46]

The statement further acknowledged that the Governor-General of each such Dominion was not a representative or agent of the British government but of the Crown, responsible to act on the advice of the government of the Dominion concerned. A few years later the British Parliament enacted the *Statute of Westminster 1931*, which affirmed that no statute of the Parliament would henceforth apply to a Dominion unless the Dominion had requested and consented to its enactment, that no law of a Dominion would be void or inoperative on the ground that it is repugnant to the law of England or to a British statute, and that each Dominion Parliament would have the capacity to repeal or amend any British statute which applied to the Dominion.[47] While the *Statute of Westminster* applied immediately to Canada, Ireland and South Africa, it did not apply to Australia, New Zealand or Newfoundland until adopted by them. In 1942, the Australian Parliament enacted the *Statute of Westminster Adoption Act*, which gave the *Statute of Westminster* retrospective operation from 3 September 1939, to coincide with the beginning of the Second World War.

The next major step came in 1968, when the Commonwealth Parliament passed a law which significantly limited the range of cases that could be appealed to the Privy Council from decisions of the High Court, by requiring, in effect, that such appeals must not involve the interpretation of the Constitution or a law of the Parliament and must not arise from the decision of a State Supreme Court exercising federal jurisdiction.[48] In 1975, even this limited range of appeals from the High Court to the Privy Council was abolished.[49] Of even greater moment, in 1986, the British, Commonwealth and Australian State parliaments cooperated in the enactment of a series of statutes, known as the *Australia Acts 1986* (UK and Cth),[50] which terminated the capacity of the British Parliament to legislate

[45] The declaration was drafted by the Inter-Imperial Relations Committee of the Imperial Conference under the Chairmanship of Lord Arthur Balfour (1848–1930), a former Prime Minister, Foreign Secretary and at the time Lord President of the [Privy] Council.

[46] Inter-Imperial Relations Committee, *Report*, *Proceedings and Memoranda* (Imperial Conference, 1926).

[47] *Statute of Westminster* 1931 (UK), ss 2, 4.

[48] *Privy Council (Limitation of Appeals) Act* 1968 (Cth.).

[49] *Privy Council (Appeals from the High Court) Act* 1975 (Cth.).

[50] See P. C. Oliver, *The Constitution of Independence: The Development of Constitutional Theory in Australia, Canada, and New Zealand*, Oxford, 2005; A. Twomey, *The Australia Acts 1986: Australia's Statutes of Independence*, Annandale, 2010.

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for Australia altogether and ended all remaining avenues of appeal to the Privy Council, such as directly from a decision of a State Supreme Court.[51]

The passage of the *Australia Acts* was a profoundly important milestone in Australia's constitutional development.[52] It prompted members of the High Court to reconsider the fundamental nature of the Australian Constitution and the implications that this might have for its interpretation. Even though the Australian Constitution is still contained in a British statute, several High Court justices have suggested that its legitimacy, if not also its legal validity and bindingness, must now be understood to rest upon its acceptance by the Australian people.[53] In one such case, *McGinty v Western Australia*, it was argued that the democratic foundations of the Constitution necessarily imply that both Commonwealth and State electoral boundaries must be constructed so that each electorate contains an approximately equal number of voters in order to ensure that all voters have equal 'voting power'. In considering this argument, a majority of the High Court pointed out that the Constitution provides not only for a system of representative democracy, but for a federal democracy in which the people of each State are equally represented in the Senate notwithstanding the vastly different populations of the States. This 'adaptation' of the principles of democracy to federalism, it was pointed out, means that the Constitution cannot be conceived to rest upon an abstract principle of equality of voting power, for in relation to the Senate voters in Tasmania have substantially greater 'voting power' than those in New South Wales, and yet this is a legitimate and important feature of the federal system.[54] It was also pointed out, in response to the argument that the legitimacy of the Australian Constitution rests in its acceptance by the Australian people, that there are several features of the Australian Constitution and the *Australia Acts* which point to the role, not only of the people and governing institutions of the Commonwealth as a whole, but of the peoples and governing institutions of the constituent States. In particular, it was noted that, consistently with s 51(xxxviii) of the Constitution, the Commonwealth version of the *Australia Act* was enacted following the request and consent of the Parliaments of the Australian States and can only be amended with that consent. Moreover, as has been seen, the Australian Constitution can only be amended with the agreement of a majority of people in a majority of States, and changes to the boundaries of a State or of its representation in the Commonwealth Parliament can only be altered with the agreement of the people of that State.[55] It was pointed

[51] See, generally, *Sue v Hill* (1999) 199 CLR 462; *Fitzgibbon v HM Attorney*-General [2005] EWHC 114 (Cth.). For more detail, see N. Aroney et al., *The Constitution of the Commonwealth of Australia: History, Principle and Interpretation*, Melbourne, 2015, ch. 10.
[52] G. Lindell, *Why is Australia's Constitution Binding? – The Reasons in 1900 and Now, and the Effect of Independence*, in 16 *Federal L. Rev.* 29 (1986).
[53] *Australian Capital Television Pty Ltd v Commonwealth* (1992) 177 CLR 106, 138; *Theophanous v Herald & Weekly Times Ltd* (1994) 182 CLR 104, 171, 173; *McGinty v Western Australia* (1996) 186 CLR 140, 230; see, also, *Joosse v Australian Securities and Investment Commission* (1998) 159 ALR 260, 264.
[54] *McGinty v Western Australia*, quot., 236–40, 243–5, 266–7, 269–78, 291–2.
[55] *Ibidem*, 274-5.

out that Australia's Constitution thus rests upon principles that are not only democratic, but also thoroughly federal in character.

7. Constituent power in Australia. Brief comparison with Italy

These developments have led to renewed discussion within Australia about the nature and locus of constituent power within the legal system.[56] The question is complicated by the existence of several fundamental constituent instruments: principally the *Commonwealth of Australia Constitution Act 1900* (UK), which contains the Commonwealth Constitution, and the *Australia Acts 1986* (UK and Cth), which are premised on the *Statute of Westminster 1931* (UK) and the *Australia Acts (Request) Acts 1985*, enacted by each of the Australian States, as well as the *Constitution Acts* of each of the States, which are statutes that can be amended by ordinary State legislation except to the extent that special 'manner and form' provisions require special legislative precedures, which can include passage by absolute or special majorities, or approval in popular referendums. In such a complex system, where is constituent power located? Is it in the people of the Commonwealth as a whole, in the peoples of the Australian States, or in some combination of people and peoples? What is the significance of the role of the Imperial, Commonwealth and State legislatures in the enactment of these constitutional statutes, as well as in their amendment? Are there different constituent powers for each of the Commonwealth and the State Constitutions, or are they integrated into a single constitutional order in which there is ultimately only one constituent power? And has the locus of constituent power shifted over time?

What makes these questions doubly challenging is that much depends on how constituent power is itself conceived.[57] Is it a primordial, pre-legal power, or a power that can only be exercised through institutions that must already be constituted? Does it involve the exercise of a singular, instantaneous, untrammelled act of will, or the exercise of more complex, prolonged and constrained decision-making process? Is it essentially a power vested in an singular people, or can it be vested in a plurality of peoples? These are highly contested questions, to which many different answers have been given.[58] Some argue that the constituent power (or 'sovereignty')[59] is vested ultimately in the Australian people as a whole. Others ascribe it to the peoples of the States, either individually or collectively. Yet others argue that, whatever may be said of the political power of the people, the legal power to make and unmake the Australian Commonwealth and State Contitutions remains vested in the legislatures, although such changes must often also be accompanied by popular approval through referendums. Given these complexities, others argue that the very

[56] E.g. G. Duke, C. Dellorat, *Constituent Power and the Commonwealth Constitution: A Preliminary Investigation*, in 44(2) *Sydney L. Rev.*, 199 (2022).
[57] *Ibidem*, 202-207.
[58] *Ibidem*, 207-214.
[59] In Australian discourse, including in several High Court decisions, the preferred terminology is 'sovereignty', not 'constituent power': *ibidem* 201, 207.

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concept of constituent power poses a question that cannot be answered, and that it may be better to dispense with the concept entirely.[60]

One of the difficulties is that the framers of the Australian Constitution did not reflect on the constitution-making process in terms of the language or the theory of constituent power. On the contrary, they were more decisively influenced by the theory of sovereignty advanced by A.V. Dicey, who distinguished between the 'legal' sovereignty vested absolutely in the British Parliament and the 'political' sovereignty exercised by the people through the electoral process.[61] Although the term 'state' was used to designate the constituent units of the Australian federation, the term did not carry the full connotations with which it was associated in continental state-theory.[62] Only a small minority of the framers of the Australian Constitution, such as Higgins and Isaacs mentioned *supra*, as well as John Quick and Robert Garran, conceived their task of constitution-making in terms shaped by such theories.[63] Accordingly, the Australians generally did not conceive their task as one of creating a 'state', or even a 'federal state'; rather, they deliberately used the term 'commonwealth', and indeed, 'federal commonwealth', to designate the type of polity they were seeking to establish.[64] Nonetheless, they aimed to create a body politic through which the Australian people(s) would exercise independent powers of self-government, at both federal and state levels, and they treated the peoples of the Australian colonies as the proper repository of the power to approve and give legitimacy to the federal constitution they were proposing.[65]

All this sharply contrasts with the Italian experience, where the work of the Constituent Assembly in 1946-47 was profoundly influenced by continental theories of constituent power and state formation, especially as articulated by Costantino Mortati.[66] A thorough analysis of Mortati's theory of constituent power, and the intertwined theory of the material constitution that he elaborated a few years prior, are beyond the scope of this contribution. It is nonetheless worth mentioning some key conceptual points. Mortati understood constituent power to concern the very first formative moments of a state.[67] He distinguished between *proper* and *improper* constituent power, the former referring to the activity of actual state formation, whilst the latter referred to the constitution amending process, as regulated and described in the constitution.[68] In practice, he

[60] *Ibidem*, 214-226.
[61] A.V. Dicey, *Introduction*, quot., ch. 14.
[62] N. Aroney, *The Influence of German State-Theory on the Design of the Australian Constitution*, in 59 *Int. and Comp.L. Quart.*, 669 (2010).
[63] *Ibidem*, 681, 687, 694.
[64] N. Aroney, *Imagining a Federal Commonwealth: Australian Conceptions of Federalism, 1890-1901*, in 30(2) *Federal L. Rev.*, 265 (2002); N. Aroney, *A Commonwealth of Commonwealths: Late Nineteenth-Century Conceptions of Federalism and Their Impact on Australian Federation, 1890-1901*, in 23(3) *J. of Leg. Hist.*, 253 (2002).
[65] N. Aroney, *Constitution of a Federal Commonwealth*, quot. 164-167.
[66] C. Mortati, *La Teoria del Potere Costituente*, in M. Goldoni (ed.), *Costantino Mortati, La Teoria del Potere Costituente*, Macerata, 2020.
[67] *Ibidem*, 34.
[68] *Ibidem*, 43-47.

continued, the distinction between proper and improper constituent power may not be always so clear, since the constituent activity and the activity of constitutional amendment may appear in hybrid form.[69] He considered state formation to be primary, autonomous, and original in nature, based on the idea that an exercise of constituent power in its fullest sense involves the self-creative act by which a given legal order comes into being. Strictly speaking, such a creative act takes place over a territory in which there is no pre-existing political organisation. By contrast, Mortati maintained that a *derived* mode of state formation entails that one order replaces a pre-existing one.[70]

As for the exact moment a state is formed, Mortati argued that a new state is created when the changes brought to a constitutional system impact its very foundations, meaning when an organisational principle is replaced with another, or when there is a rupture with the pre-existing legal order.[71] Mortati also elaborated on the relationship between the old and the new legal order, and characterised it in terms of incompatibility, in the sense that the new legal order cannot be traced back to the previous (older) one.[72] Mortati also drew attention to the different, and more pluralistic, manifestations of constituent power that occur in federations. For him, a federal state emerges from the combined exercise of the sovereign will of several states, which participate in the formation of the federation as autonomous political entities, and continue to exist as such even after the establishment of the federal state, since they ensure for themselves a constitutional status that places a permanent legal limit on the actions by the central government.[73]

In the final part of his theory, Mortati engaged with the concept of the *people* as holders of popular sovereignty and, therefore, of constituent power. In this sense, the people are all those individuals who have a natural capacity of actively participate in the life of the state.[74] However, during the constituent initiative, he proposed that constituent power is taken away from the people, as it belongs to smaller groups (who nonetheless represent the people).[75]

A few years before engaging with the theory of constituent power, Mortati had developed his understanding of material constitution.[76] Again, a thorough discussion of his very sophisticated theory is beyond the scope of this contribution. Here, it suffices to say that the debate on the *material* constitution – as opposed to the *formal* constitution – is an old one, at least in continental European constitutional theory. In brief, the formal constitution generally refers to all the provisions included in a (written) constitutional text. Material constitution, on the other hand, refers to all

[69] *Ibidem*, 45.
[70] *Ibidem*, 46.
[71] *Ibidem*, 51-52.
[72] *Ibidem*, 52.
[73] *Ibidem*, 65.
[74] *Ibidem*, 91.
[75] *Ibidem*, 94-95.
[76] C. Mortati, *La Costituzione in Senso Materiale*, 1998 [1940], Milano.

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social and institutional ideas shared by the political forces in power at a given moment.[77] In other words, besides constitutional provisions, for Mortati there is an institutional organisation which results from the will of political forces and from the beliefs of the social groups: the real constitution would thus be the one existing in society, and not the abstract collection of constitutional norms.[78] As Rubinelli explains, Mortati's understanding of the relationship between constituent power (understood as "the social and political configuration of forces from which the state's legal system arises") and sovereignty (which describes the "sources of authority internal to the legal system") closely resembles the dichotomy between material and formal constitution.[79] In other words, both the material constitution and constituent power comprise "a concrete material element — depending on concrete social relations — as well as of an essential content that sets the direction (…)—for the formal constitutional structure".[80] Furthermore, both are at the origins of a legal system and oversee its changes.[81]

The Australian constitution-making process was realised not through an instantaneous exercise of constituent power, but through a complex procedure involving several discrete steps.[82] It was also a process that was *derived*, possibly in Mortati's sense,[83] to the extent that the new federal commonwealth was composed of pre-existing self-governing colonies, whose constitutions and powers continued under the federal constitution (secs. 106, 107), as well as to the extent that it was the British Imperial Parliament that enacted the *Commonwealth of Australia Constitution Act 1900* and was widely understood to be the ultimate 'legal' source of the Constitution, even though its 'political' source was understood to be the Australian people organised into their respective constituent States.[84] The process was also profoundly 'federal' in Mortati's sense,[85] insofar as the new Australian Commonwealth (which was deliberately called a 'federal commonwealth') came about through an agreement among the several constituent states, all of which participated in the formation of the federation as autonomous entities and continued to exist as self-governing political communities, thus posing a legal limit to the action of the newly-formed federal state. In this respect, Mortati was notably ambiguous as to whether the constituent parties of a federation are the 'states' or the 'peoples'.[86] The Australian case offers important empirical information on this point, because the federating process was agreed to by the governments, legislatures *and* peoples of the constituent states, as well as by the Imperial authorities. At the time, the agreement of the peoples, expressed through referendums held

[77] P. Caretti, U. De Siervo, *Diritto Costituzionale e Pubblico*, Torino, 2014, 50.
[78] A. Catelani, *Costantino Mortati e le Costituzioni Moderne*, in *Dir. e Soc.* (2010), 309.
[79] L. Rubinelli, *Costantino Mortati and the Idea of Material Constitution*, in *Hist. of Pol. Though.* (2019), 533.
[80] *Ibidem*, 541.
[81] *Ibidem.*
[82] C. Mortati, *Teoria del Potere Costituente*, quot., 42.
[83] *Ibidem*, 46-47.
[84] N. Aroney, *Constitution of a Federal Commonwealth*, quot., 176-180.
[85] C. Mortati, *Teoria del Potere Costituente*, quot., 62, 65.
[86] *Ibidem*, 65.

in each colony, was considered to be at least politically necessary, while the agreement of the colonial governments and legislatures was not only politically but also legally necessary, as they alone had the legal capacity to authorise and facilitate the federating process, just as the enactment of the *Constitution Act* by the British Parliament was necessary as it alone had the acknowledged legal authority to 'unite' the colonies into a federal commonwealth.[87] Notably, as Mortati observed,[88] there are pragmatic reasons why the popular will cannot be expressed unanimously but rather by majority will, but on this point the Australian case offers both confirmation and further specification, because while the referendums held in each Australian colony were ultimately determined by majority vote, the federation itself was premised on the unanimous agreement of every constituent state, in the sense that any colony that did not agree to federate would not have been compelled to do so.[89]

Mortati's further observation about federations also seems to hold true of the Australian case, namely that their entry into the federation brought about a change in their 'legal nature' insofar as they became constituent 'elements' of a federation in which the newly-formed federal institutions represent both the 'people' of the entire federation as well as the 'peoples' of the constituent states, exercising their own independent powers of governance in each case.[90] Intriguingly, an even more radical transition appears to have occurred when the power of the British Parliament to legislate for Australia was abdicated in 1986, a change effected through enabling legislation eancted by all of the Australian Parliaments and predicated on an agreement among the British, Commonwealth and State governments. That such an enormous change to the foundations of the constitutional order could occur in a manner that did not require approval by the people of the Commonwealth and the States as a formal amendment to the Constitution (pursuant to sec 128) is indeed remarkable, even though it can be interpreted as consistent with the locus of constituent power remaining unchanged insofar as it involved the exercise of a power expressly conferred by the Constitution (sec 51(xxxviii)) the terms of which had been approved by the people of each constituent colony in the 1890s. On such an interpretation, there was no absolute rupture with the pre-existing legal order, because the altered legal order can still be traced back to the same ultimate foundations insofar as they unfolded through institutional processes prescribed by the original legal order, predicated on the unanimous consent of the governments, legislatures and peoples of the

[87] *Commonwealth of Australia Constitution Act* 1900 (UK), covering clause 3: 'It shall be lawful for the Queen, with the advice of the Privy Council, to declare by proclamation that, on and after a day therein appointed, not being later than one year after the passing of this Act, the people of New South Wales, Victoria, South Australia, Queensland, and Tasmania, and also, if Her Majesty is satisfied that the people of Western Australia have agreed thereto, of Western Australia, shall be united in a Federal Commonwealth under the name of the Commonwealth of Australia.'
[88] C. Mortati, *Teoria del Potere Costituente*, quot., 98-99.
[89] N. Aroney, *Constitution of a Federal Commonwealth*, quot., 41-63, 181-184.
[90] C. Mortati, *Teoria del Potere Costituente*, quot., 66.

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Australian states, and not through some *de novo* act of self-creation or revolutionary rupture with the past.[91]

In federalism doctrine, Australia represents an example of a *coming together* federation, that is, a federation that emerged from the coming together under a federal constitution of previously sovereign or otherwise self-governing political communities (similarly to the United States, Switzerland and to a certain extent Canada, among others).[92] Conversely, Italy is commonly regarded as an instance of *holding together* regional state, one that has become such by an incremental decentralisation of a once unitary state (as was the case with Belgium or Spain, among others).[93] As a result, constituent units in each scheme (ie. the Australian states and the Italian regions) played opposite roles during the constituent phase: the six self-governing and self-constituting Australian colonies exercised an equal role in the drafting, debating and approval of the Commonwealth constitution of 1901, while the Italian regions did not exist as autonomous political units until 1947,[94] meaning that they were *created* by the 1947 constitution and therefore could not contribute to its formation. Furthermore, the 1948 Italian Constitution was promulgated by a Constituent Assembly designed to represent the Italian people as a whole, and this continues to be the case despite the very important constitutional reform of 2001, which established a distribution of powers between the State and the Regions (Art 117) somewhat resembling the distribution of powers established by the Australian Constitution. The Australian and Italian cases thus present two very different modes of constitutional formation and reform, one premised on an agreement among the people of a plurality of distinct political communities, the other premised on the agreement of the singular people of the nation as a whole. And yet, both systems establish a federal (or federal-like) distribution of legislative competences that is guaranteed by the constitution and enforced by the courts.

The two countries thus exhibit very different institutionalisations of the constituent power, but to a similar end, namely, the constitutional establishment of distribution of powers. In this context, it makes sense that the Italian central government should be called 'the State' and the more local governments 'Regions', while in Australia the regional governments are called 'States' and the central government is called 'the Commonwealth' and designated a 'federal commonwealth'.

To conclude, the colonial/imperial background to the establishment of the Australian Constitution, and the highly pluralised process through

[91] *Ibidem*, 57, 59-61.
[92] F. Palermo, K. Kössler, *Comparative Federalism. Constitutional Arrangements and Case Law*, London, 2017, 45.
[93] *Ibidem*.
[94] This claim needs to be nuanced. In fact, four special regions already existed in Italy before the enactment of the constitution. In 1944, a High Commissioner and a Consultative Council were created in Sardegna, followed by similar offices in Sicily, where a statute of autonomy was also enacted. In 1945, the autonomy of Valle d'Aosta was recognised, while the 1946 "De Gasperi-Gruber Agreement" provided for forms of territorial autonomy for the German-speaking minority in South Tyrol. Friuli Venezia Giulia, on the other hand, became a special region in 1963.

which the governments, legislatures and peoples of the Australian states agreed to the formation of the federal commonwealth, represents a very interesting lens through which we can explore the complex and varied nature of constituent power, especially when compared with a more unitary understanding of the concept as it has developed in Italy.

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