INTRODUCTION
At the National Australasian Convention held in Sydney in 1891, Andrew Inglis Clark observed:

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. 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.  

Inglis Clark was quoting Edward Augustus Freeman, Regius Professor of Modern
History at Oxford University, whose History of Federal Government in Greece and Italy,
first published in 1863, was the 'classic nineteenth century exposition' of the city-state
leagues of ancient Greece, and is still cited today by specialists in the field.  

Freeman, who succeeded William Stubbs to the Regius Chair, profoundly shaped
nineteenth century conceptions of federalism, although studies of Australian
federalism have tended to neglect his influence. While Freeman's reputation suffered
in later years, his earlier career was celebrated and revered. Thus Inglis Clark spoke

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anonymous referee for helpful comments on an earlier draft of this article.
1 Official Report of the National Australasian Convention Debates, Sydney, 11 March 1891, 243,
citing Edward Augustus Freeman, History of Federal Government in Greece and Italy (2nd ed,
1893) 2.
2 For example, J A O Larsen, Greek Federal States: Their Institutions and History (1968) 3; Max
Frenkel, Federal Theory (1986) 97; Sobei Mogi, The Problem of Federalism: A Study in the
3 Freeman is briefly mentioned in John Reynolds, 'A IClark's American Sympathies and his
Influence on Australian Federation' (1958) 32 Australian Law Journal 62, 64; F M Neasey,
'Andrew Inglis Clark Senior and Australian Federation' (1969) 15(2) Australian Journal of
Politics and History 1, 9; S R Davis, The Federal Principle: A Journey through Time in Quest of a
Meaning (1978) ch 2; James Thomson, 'Andrew Inglis Clark and Australian Constitutional
Law' in Marcus Haward and James Warden (eds), An Australian Democrat: The Life, Work
and Consequences of Andrew Inglis Clark (1995) 59.
4 H A Cronne, 'Edward Augustus Freeman, 1823–1892' (1943) 28 History 78, describes him as
'the Erasmus of the nineteenth–century reformation in English historiography'. Freeman's
for many of the framers of the Australian Constitution when he described Freeman as the 'eminent historian' who had 'studied the most closely, and written the most exhaustively on federal government'. Many other leading framers, such as John Quick and Robert Garran, relied on Freeman extensively, as did Richard Baker and Thomas Just. In one of their characteristic exchanges, Edmund Barton and Isaac Isaacs traded scholarship derived from Freeman's *Growth of the English Constitution*. A survey of citations in the Federal Convention Debates of the 1890s suggests that on issues of federalism Freeman was second in importance only to James Bryce. Edward Freeman is one of the forgotten doctors of Australian federalism.

So, where did the Australians derive their understandings about federalism, and how did they assimilate these ideas for their own purposes when drafting the Australian Constitution? In answer to the first question, much attention has rightly been given to James Bryce's classic *The American Commonwealth*, and in answer to the second question, attention has correctly been given, for instance, to John Quick and Robert Garran's magisterial *Annotated Constitution of the Australian Commonwealth* and William Harrison Moore's *The Constitution of the Commonwealth of Australia*. However, Bryce was not the only source of federal ideas, and Moore, Quick and Garran were not his only Australian interpreters. In a separate paper, I have sought to draw attention to the range of authors and sources that influenced Australian conceptions of...
In this article, I seek to explain how works such as these were interpreted by the Australians and adapted to their own purposes.

This article therefore begins in Part I with a survey and summary of the key sources on which the Australians relied. It then turns in Part II to a number of leading Australian writings with a view to explaining how federalism had come to be understood in Australia at the end of the nineteenth century. A number of works that were written specifically for the edification of delegates to the federal conventions are closely examined, as well as a range of other important Australian publications. Part III concludes with some remarks about the different perspectives about the idea of a 'federal commonwealth' that shaped the positions taken and arguments advanced by the framers of the Australian Constitution. It is hoped that this article will thereby illuminate our understanding of the convention debates and of the Constitution that emerged from that process.

I DOCTORS OF AUSTRALIAN FEDERATION

When towards the end of the nineteenth century Australians seriously addressed their minds to the problem of constructing a 'nation for a continent', there could be little doubt that a union of the several colonies would be specifically federal in form. The reasons for this were both practical and ideological.

In practical terms, colonial politicians and voters were concerned to maintain the rights of local self-government they had exercised since the 1850s. Samuel Griffith expressed the view of many when he observed, remarkably, 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.' In this context, the creation of a unitary nation-state of Australia was both impossible and unthinkable. As Griffith later affirmed, the 'essential' and 'preliminary' condition of federation was that:

the separate states are to continue as autonomous bodies, surrendering only so much of their powers as is necessary to the establishment of a general government to do for them collectively what they cannot do individually for themselves.


Official Record of the Debates of the Australasian Federation Conference, Melbourne, 10 February 1890, 10.

Only a compromise, along fundamentally federal lines, would suffice to integrate the separate colonies. The federating process, focused in a series of inter-colonial conferences and conventions, provided ample opportunity for the meticulous negotiations that would be necessary.

The theories and scholarship of the day reinforced the practical considerations. In the late nineteenth century, 'federation' was widely considered to be the best means by which separate peoples inhabiting extended territories could be united by a lasting political bond. As Manning Clark pointed out, 'federations had the warm approval of important writers on political theory' and were 'the fashion for communities in the New World.' Baron de Montesquieu and Alexis de Tocqueville had long since argued that confederations enjoyed the strengths, and avoided the weaknesses, of small, independent republics and large, consolidated empires. Leading contemporary authors like Edward Freeman could write of 'the absolute perfection of the Federal ideal.' Indeed, most of the American luminaries continued to think that federalism had been the correct choice for their own country, despite the ravages of the Civil War. And even while Americans were passing through the difficult post-war era, the federal ideal remained sufficiently attractive for the Canadians to adopt a more or less federal solution to their own intractable problems of cultural diversity. Given that the several Australian colonies inhabited a vast continent similar to the North Americans, they also looked to federal models when considering how a 'nation for a continent' might be established.

The leading federal models of the day were thus the United States and Canada, as well as Switzerland. Illustrious political scientists and constitutional lawyers, such as James Bryce and Albert Venn Dicey, had undertaken extensive studies of these systems. Distinguished legal historians, such as Henry Maine, Edward Freeman and Otto von Gierke, also drew attention to other important models, such as the 'leagues' of the ancient Greek city-states and the Holy Roman Empire, the latter as interpreted by Johannes Althusius in the early seventeenth century. Althusius's own theory of the

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15 See La Nauze, above n 9. Indeed, the several Enabling Acts passed by the colonial legislatures establishing the federal conventions stipulated that the Constitution must be federal in form.

16 C M H Clark (ed), Select Documents in Australian History 1851-1900 (1955) 443.


18 Freeman, above n 1, 1-3, 7-8.

19 Eg, Joseph Story, Commentaries on the Constitution of the United States with a Preliminary Review of the Constitutional History of the Colonies and States before the Adoption of the Constitution (5th ed, 1891), ch XLV.

20 British North America Act 1867, 30 & 31 Vict 1, c 3. On the state of Canada midway through the nineteenth century, see L P Lucas (ed), Lord Durham's Report, 3 vols (1912).


federative commonwealth—in which small political communities, at the scale of towns and cities, gradually covenant together to form progressively wider political communities at a regional, national and supra-national level—seems to have been forgotten for a time. But well-known luminaries as diverse as Thomas Jefferson, David Hume and Pierre-Joseph Proudhon had championed very similar, federalistic ideals and late in the nineteenth century Gierke, Bryce and Frederic Maitland were again drawing attention to Althusius's importance. Images and symbols such as these profoundly shaped late nineteenth century conceptions of federalism.

A Identifying the key sources

Among these and the many other sources, how do we identify those that most significantly influenced the Australians? A survey of citations in the Convention debates, the colonial Parliamentary debates, and in Australian books, articles and speeches outside those formal venues, is a starting point. A quantitative assessment of these materials confirms the United States, Canada and Switzerland to be the key models with the American pre-eminent among them, and Bryce, Freeman and Dicey to be the their leading expositors. The Australian framers also drew extensively on the opinions and commentaries on the American Constitution by notables such as James Wilson, John Jay, Alexander Hamilton and, especially, James Madison. The Federalist Papers, composed by the latter three authors, were decisively important in a number of respects. The framing of the American Constitution and the later development of American institutions was readily accessible through the primary sources edited by Jonathan Elliot and Benjamin Perley Poore, and was further explained by leading historians of the day, such as George Bancroft and John Fiske. The Australians also drew on a number of later writers, such as Alexis de Tocqueville, John Marshall, James Wilson, John Jay, Alexander Hamilton and, especially, James Madison.


In addition to sources that were specifically concerned with American federalism, the framers also learned a great deal about Switzerland and Canada from authors such as Francis Adams and C D Cunningham, John Bourinot, Goldwin Smith and Charles Borgeaud. In turn, the English constitutional system, responsible government and the law of the British Empire were explained by Dicey, Walter Bagehot, Thomas Erskine May, W E Hearn, David Syme, Alpheus Todd and others. Knowledge derived from these sources supplemented the intimate knowledge the Australians had of the working of their own systems of responsible government. The Australians occasionally even cited 'classic' works of political philosophy, such as those of John Locke, Thomas Hobbes, James Harrington, Jeremy Bentham and John Stuart Mill.

The qualitative significance of these works and their substantive influence in Australia must be assessed in the light of the actual terms of debate over the Constitution. For present purposes, attention must especially be given to the particular works upon which the leading Australian protagonists chiefly relied for their central arguments about the meaning of federalism. While there were many outstanding figures among the Australian framers, it is arguable that the various approaches to federalism contending for incorporation into the Constitution were amply represented in the views of Andrew Inglis Clark, Samuel Griffith, Richard Baker, Edmund Barton, Alfred Deakin, John Quick, Robert Garran, Isaac Isaacs and Henry Bournes Higgins.

In turn, when it is asked what sources most critically influenced the conceptions of federalism adhered to by these key participants, the following writers (again) emerge: Hamilton, Madison, Jay, Bryce, Freeman and Dicey—as well as the neglected figure of John Burgess. As will be seen in Part II, works by these authors presented the most important theories of federalism that influenced the framers of the Australian Constitution.

Such writings of course embodied perspectives at least as diverse as the Australians themselves—as framers, politicians, lawyers, publicists, labour leaders and others involved in the public debate over federation. Each of the sources clearly had its own orientations, and the Australians used the sources in accordance with their individual priorities. What lessons on questions of federalism did these sources convey to the Australians?

B Lessons for Australian federalism

In order to explain the conceptions of federalism advanced by writers such as Madison, Freeman, Bryce, Dicey and Burgess, it is first necessary to consider the leading 'federal' models, and the principal lessons the Australians derived from them.

For the Australians, the United States of America was undoubtedly the paradigm of federations. Central to the lessons that it provided for the Australians were the
formative process by which the separate American states 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 provided an example of a non-Presidential model of executive government suitable to a republican federation, and it demonstrated how federalism could be integrated with direct, popular participation by way of referendum.

However, the United States and Switzerland were republics, 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. Canada's importance, therefore, was that it showed the Australians how a federal system could be adapted to an Imperial, monarchical and parliamentary system.

If these were the central ideas derived by the Australians from these constitutional models, what were the lessons to be drawn from Madison, Bryce, Freeman, Dicey and Burgess? Broadly speaking, the first three writers presented detailed empirical and historical accounts of federalism, and they did so in a manner relatively free from overt theorising. On the other hand, the latter two authors were more formalistic in approach, and Burgess in particular sought to advance a more rationalistic, a priori theory of federalism which was much less concerned to account for the empirical details of actual federations.

Of his many important writings, James Madison's famous Federalist No 39 was his most influential statement of the meaning of American federalism. While politically calculated to advance the ratification of the American Constitution, in this essay Madison presented to his readers a careful empirical analysis of the proposed Constitution. In particular, Madison closely analysed the way in which the Constitution had been ratified, the representative institutions adopted thereunder, the mode of the distribution of powers, the manner in which federal laws were executed and the method by which the arrangement could be formally amended.

In the context of the American debate over the meaning of federalism, Madison's analysis was a mediating one, more empirically precise than two alternative, more dogmatic, points of view. These two other points of view both maintained, following William Blackstone, that an imperium in imperio—a sovereign within the jurisdiction of another sovereign—was political heresy. There could only be one sovereign entity within a particular political system. However, the two points of view differed as to where they attributed this sovereignty. Those who were nationalistically inclined, such as James Wilson, John Marshall and Daniel Webster, held that sovereignty rested with the people of the nation as a whole, so that the Constitution derived from their authority and should be amended by that same authority. Others, like Luther Martin, Thomas Jefferson and John C Calhoun, were inclined to insist that sovereignty rested with each of the several states, which had compacted themselves into a confederation in which they retained ultimate sovereignty as separate polities.

32 For detailed references and a fuller discussion of these works, see Aroney, above n 11.
33 See, eg, James Madison, Federalist No 9 in Clinton Rossiter (ed), The Federalist Papers (1961); William Blackstone, Commentaries on the Laws of England (1765), vol I, 48-9; Chisholm v
Debate over the meaning of American federalism—before and after the formation of the Constitution—often adhered to this dichotomy, and the Australians were aware of its contours. However, these extreme views could not do justice to the empirical detail of the American Constitution, a scheme in which sovereignty, if it existed, seemed to be dispersed throughout the system. As Madison's analysis suggested, the Constitution therefore consisted of both 'compactual' and 'national' elements. His analysis, as will be seen, deeply influenced many of the Australians.

James Bryce's American Commonwealth presented the American system in terms fairly consistent with Madison's mediating analysis. While some of Bryce's dogmatic inclinations could not be suppressed, his empirical, descriptive approach presented America essentially as 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' \(^3^4\) Bryce was therefore critical of 'metaphysical' theories of sovereignty developed in the United States by those seeking to locate ultimate sovereignty in either the whole people or the peoples of the several states—namely the nationalist and compactualist approaches to American federalism. \(^3^5\) The American system seemed to embody some kind of imperium in imperio, and Bryce's account of American federalism tended to reinforce Madison's idea of a 'compound republic' consisting of both compactual and national elements.

Edward Freeman's History of Federal Government provided a similarly descriptive account of federalism. His classification system, derived from the renowned Swiss constitutional authority, J K Bluntschli, distinguished between staatenbund (confederation) and bundesstaat (federation) on the basis of whether or not the federal government had direct authority to execute federal laws against individuals. \(^3^6\) This contrasted with the approach of the equally prominent German scholar, Georg Jellinek, who distinguished between the two species of political system on the basis of whether 'sovereignty' inhered in the constituent states or the federation as a whole. \(^3^7\) Unlike Jellinek, Freeman was not dogmatically concerned to determine whether sovereignty inhered in the states or the nation. Like Bryce, his detailed historical accounts of the various federal systems of history brought out the same idea of a Commonwealth constructed out of constituent commonwealths, a 'federal commonwealth' having both compactual and national elements.

In his Introduction to the Study of the Law of the Constitution, Albert Dicey also acknowledged that classic federations, such as the United States and Switzerland, arose through the integration of constituent member states. However, the idea of sovereignty, derived from Dicey's famous thesis concerning the sovereignty of the British Parliament, led him to define federalism in more 'formal' and 'static' terms, as a system where 'the ordinary powers of sovereignty are elaborately divided' between the

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34 Bryce, above n 9, vol I, 12–15, 332.
36 Freeman, above n 1, 8–13, 69, 77–8, 156, citing J K Bluntschli, The Theory of the State, (D G Ritchie, P E Matheson and R Lodge trans, 1885 ed) 252–3.
37 Georg Jellinek, Die Lehre von den Staatenverbindungen (1882). Other important nineteenth century German scholars are discussed in Mogi, above n 2, pt III.
federal and state governments. For Dicey, the terms of this distribution of power are set out in a written constitution, which is enforced by a judiciary that is independent of both the federal and state governments. Thus while Dicey recognised the compactual origins of federations, his legalistic definition of federalism conceived of a theoretically consolidated body of sovereign power which is then divided, rather than of several mutually independent political communities that agree to a form of union in which particular powers are conferred on the federal government.

The concept of the 'sovereign state' played an even more significant role in John Burgess's theory of federalism, as set out in his Political Science and Comparative Constitution Law. Dicey had certainly claimed that the Parliament of the United Kingdom was 'sovereign', but he did not generalise to all political systems. Burgess, however, dogmatically insisted that there must be a 'sovereign authority' in every political society. Dicey had admitted that the classic federations had arisen when constituent states agreed to unite, and that the terms of this agreement involved a division of power between the states and the federation. But for Burgess, a federation arises when a sovereign, unitary nation-state decides to distribute the powers of sovereignty among regional and central governing institutions. Following Jellinek, he therefore considered that there were only two kinds of 'federal' system: a sovereign, unitary nation-state that happens to divide governmental power between two levels of government ('federation'), and a loose association of separate states that retain their individual sovereignties ('confederation').

However, Burgess's insistence on a fundamental distinction between federation and confederation along the lines of sovereignty posed difficulties when it came to explaining the institutional details of actual federations. Features of the American and Swiss constitutions that pointed back their compactual origins, such as the special status of the states recognised in both the Senate and the amending formula, were incomprehensible, and had to be dismissed as 'relic[s] of confederalism', and undemocratic 'error[s]'. Burgess could not account for many of the institutional details that led a more empirically inclined Madison to conclude that the American Constitution was a 'composition' of both compactual and national elements.

These leading sources of Australian ideas about federalism—Madison, Bryce, Freeman, Dicey and Burgess—thus presented markedly different accounts of federalism, each with its particular implications for the emergent Federal Commonwealth of Australia. It remains now to examine the Australian appropriation of these sources.

II AUSTRALIAN APPROPRIATIONS

It has been said that the assortment of approaches to federalism adopted by the Australians are well represented by leading figures such as Inglis Clark, Griffith, Baker, Barton, Deakin, Quick, Garran, Isaacs and Higgins. These individuals relied on the various conceptions of federalism canvassed in the previous section, they contributed significantly to the Australian debate, and their writings and speeches are

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38 See Dicey, above n 21, 135, 141, emphasis added.
39 John William Burgess, Political Science and Comparative Constitutional Law, 2 vols (1890).
40 Ibid, vol I, 90, 107, 142–5, 151–4; vol II, 49, 115. The latter explanation was cited in Quick and Garran, above n 6, 415–6.
important both as statements of their own views and as influences on others. Among them, Baker, Just, Quick and Garran wrote 'handbooks' of reference specifically for the edification of delegates to the Conventions of 1891 and 1897-8, and Inglis Clark, Quick and Garran published important commentaries on the Constitution. Isaacs and Higgins are also important, not so much because their views were embodied in the Constitution, but because they often articulated the antithetical views to which the dominant theses had to respond. A kind of synthesis emerged among the various views.

In the remainder of this article, works by Just, Inglis Clark, Baker, Quick, Garran, Isaacs and Higgins are surveyed in order to identify the way in which the various 'models' of federalism and 'interpretations' thereof were appropriated by the framers of the Australian Constitution. Space precludes a detailed discussion of a number of other very important Australian works, but in my view the writings addressed in this article are sufficiently representative to provide a fair survey of the key influences and perspectives on questions of Australian federalism.41

Before taking this further, however, an important distinction must briefly be noted. Many of the writings analysed herein were produced in an effort to 'inform' the delegates to the Federal Conventions and thereby influence the content of the Constitution as drafted. However, there were other texts written specifically as part of the debate over the 'ratification' of the Constitution Bill by referendum, and there were others that advanced interpretations of the Constitution after its enactment into law. Each of these kinds of text is—in its own way—relevant to my objective of identifying the ways in which federalism was understood by those who were most influential in the drafting of the Constitution. However, each text must be interpreted in the light of its particular context and objectives, as I endeavour to do in what follows.

A Thomas Just

One of the important studies of federalism written specifically for the edification of delegates to the Federal Convention of 1891 was Thomas Just's Leading Facts Connected with Federation (1891). Just probably compiled Leading Facts on the instructions of the Tasmanian Attorney-General, Andrew Inglis Clark,42 so the sources reproduced by Just are of utmost significance.

Just provided his readers with an extended description of the United States Constitution, together with shorter descriptions of the constitutional systems of Canada, Switzerland, Mexico and the Leeward Islands. He drew on a wide variety of materials,


42 La Nauze, above n 9, 23. On Inglis Clark, see Part II (B) below.
including official dispatches, reports, statistics, statutes, conference proceedings and extracts from newspaper articles, scholarly journals and books. He also provided an extensive bibliography in which many of the crucial authors appeared, including Bryce, Dicey, Freeman, Adams and Cunningham, Poore, Bancroft, Fiske, Smith, and Todd.\(^{43}\)

Leading Facts was not only descriptive. It contained a number of statements of political principle and practical necessity, and the extracts that it reproduced were organised in a way that was apparently calculated to guide the reader in a certain direction. Most conspicuous among these were a number of extracts from The Federalist Papers. In Just's presentation, they seemed to provide appropriate guidance on almost all important issues relating to Australian federation, apparently on the premise that 'the Constitution of the United States was framed under similar circumstances to those which should mark the formation of the Constitution of United Australasia.\(^{44}\)

This was a remarkable claim for Just to make, given that the Australian colonies were still subject to Imperial sovereignty. That republican implications may have been intended is suggested by Just's reproduction of the arguments of John Dunmore Lang, Head of the Presbyterian College in Sydney and Member of the NSW Parliament. Lang—whom Charles Duffy said had 'reared a generation of students destined to become public men'—fervently believed that the Australian colonies should be accorded 'complete independence' as 'separate and independent communities' under 'the law of nature and the ordinance of God'. As presented by Just, Lang derived inspiration from the 'American Union as exemplified in the New England States', where 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 likewise 'combine' into a federation in order to secure a greater 'weight or influence in the family of nations'. However, he also desired that the constituent states should not merely retain a 'municipal independence' in 'little matters', but 'the entire control of all matters affecting their interests'.\(^{45}\)

Just was centrally concerned to explain how the American example could instruct the Australians, and he did so by posing three important questions: (1) 'How [should] the question [of federation] ... be approached'? (2) What are the possible 'modes of federation'? (3) What is the true 'character of the American Constitution'? In answering these questions, he sought to integrate the leading ideas of the Federalist Papers with current discussions about federalism within the Australian colonies. In so doing, he introduced his Australian readers to the views of Baron de Montesquieu, Alexander Hamilton, John Jay and James Madison, and sought to show how their perspectives could be applied to Australian conditions.

\(^{43}\) Just, above n 6, 83-103, 110-14.

\(^{44}\) Ibid 33. On Just's use of The Federalist, see ibid, 33-4, 37-8, 44, 49-7. Peter Onuf, 'Reflections on the Founding: Constitutional Historiography in Bicentennial Perspective' (1989) 46 William and Mary Quarterly 341, 365, warns that The Federalist had only limited impact on the debate over the ratification of the US Constitution. But, of course, the work soon took on a significance much greater than its contemporary influence.

\(^{45}\) Ibid 35-7, reproducing John Dunmore Lang, The Coming Event, or Freedom and Independence for the Seven United Provinces of Australia (1870). See also Charles Gavan Duffy, My Life in Two Hemispheres (1898) 145-7; Quick and Garran, above n 6, 92.
Commencing with Alexander Hamilton's Federalist No 1 and John Jay's Federalist Nos 2 and 4, Just underscored the advantages of 'one strong government' that is able to 'move on uniform principles of policy' and to 'harmonise, assimilate, and protect the several parts and members' of a federal commonwealth, extending 'the benefits of its foresight and precautions to each'. According to Just, the need in Australia for a government of such 'efficiency' and 'rigour' arose from the fact that into the 1890s, inter-colonial negotiations and arrangements had regularly broken down in the face of the requirement that decisions be made unanimously and executed separately in each colony. Reproducing papers by William Foster, Agent-General for New South Wales, and a reply published by the Sydney Morning Herald, Just presented an analysis of the decision-making rules that had led to this problem, and proposed an alternative set of rules that should prevail under a more rigorous and efficient federal government.

Fearing excessive centralisation, Foster had been concerned that if majority vote was adopted at a federal level 'the interests and feelings of remote and insignificant portions of the [proposed] Federation' would be 'sacrificed to those of the dominant majority'. The Herald replied that federation rested on an 'agreement among a group of coterminous Colonies'; and that questions of 'common concern' would be addressed by 'joint action', while 'purely local matters' would remain 'exclusively under the jurisdiction of the Colonial Legislatures'. Moreover, the Herald argued, inter-colonial conferences had failed because 'the minority ... are not bound by the decisions of the majority' and the 'decisions of the majority are not binding on their respective legislatures'. In the same way, federation would fail unless majority vote was adopted 'in matters of common concern.' In short, the 'almost hopeless condition of unanimity' must, under federation, be replaced by 'majority'.

Putting these points together, Just apparently sought to show that it was necessary to have a strong federal government in which the will of the majority prevailed, but that such a government must first be formed with the consent of each of the several colonies as independent bodies politic. As the Herald had maintained, a federation comes into being by unanimous agreement of the constituent bodies politic, and they agree to confer limited functions on a central government that makes its decisions by majority rule, but the remainder of their constituent and governmental powers are retained.

Just also felt it important to draw the attention of his Australian readers to Hamilton's famous discussion of Montesquieu's classic definition of the 'Confederate Republic'. As reproduced by Just, Montesquieu had said:

> It is very probable that mankind would have been obliged, at length, to live constantly under the Government of a single person, had they not contrived a kind of constitution that has all the internal advantages of a Republican, together with the external force of a Monarchical, Government—I mean a Confederate Republic.

This form of Government is a convention by which several smaller States agree to become members of a larger one, which they intend to form. It is a kind of assemblage of societies, that constitutes a new one, capable of increasing by means of new associations till they arrive at such a degree of power as to be able to provide for the security of the united body, .... As this Government is composed of small Republics, it enjoys the internal happiness of each, and with respect to its external situation, it is possessed, by means of the association, of all the advantages of large Monarchies.

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46 Ibid 34, 38-41.
A Republic of this kind, able to withstand an external force, may support itself without any internal corruption. ... As this Government is composed of small Republics, it enjoys the internal happiness of each, and with respect to its external situation, it is possessed, by means of the association, of all the advantages of large Monarchies.[47] In Montesquieu's day, political reflection suggested that large, territorial monarchies had the advantage of external security, but they also suffered the internal disadvantage of a tendency to despotism, whereas the small republic had the advantage of a virtuous citizenry actively participating in the government, but suffered the external disadvantage of susceptibility to assimilation by larger powers. Montesquieu suggested that the advantages of each might be secured in what he called the confederate republic.

Hamilton commented on this idea in Federalist No 9. As reproduced by Just, Hamilton proposed that the 'definition' of a 'Confederate Republic' or 'Federal Government' was 'an assemblage of societies' or 'an association of two or more States into one State'. So long, Hamilton maintained, that the 'separate organisation of the members be not abolished', but rather exists 'by a constitutional necessity for local purposes', then despite their 'subordination' to an additional 'general authority' or national government created for specific purposes, the scheme remains 'an Association of States or a Confederacy'. Indeed, Hamilton pointed out, the proposed United States Constitution treated the states as 'constituent parts' of the Union, allowing them 'direct representation in the Senate' and leaving them with 'certain exclusive and very important portions of the sovereign power'.[48] In this sense, Thomas Just used Montesquieu and Hamilton to present the idea that federation is essentially an 'assembly of States' which is at the same time itself a 'State', and in which the several states are constituent members, entitled to separate representation in the institutions of the federal government and an exclusive sphere of 'sovereign' power over their own internal affairs.[49] On this foundation, Just then turned to James Madison's famous description of the true 'character of the American Constitution' in Federalist No 39.[50] Madison sought there to address the argument of Antifederalists that the proposed Constitution was not genuinely 'federal' in character, but amounted to a national 'consolidation' or a unitary nation-state. He responded that, in truth, there were both 'federal' (meaning 'compactual') and 'national' aspects in the Constitution, and that all things considered, it was 'neither a national nor a federal Constitution, but a composition of both'.

Madison's exposition began with an analytical division of the Constitution into five essential components. As reproduced by Just, Madison observed:

In order to ascertain the real character of the Government, it may be considered in relation to the foundation on which it is to be established; to the sources from which its


[49] Despite Hamilton's personal preference for a fully consolidated national government, he was at pains in the Federalist Papers to present the distinctively federal features of the proposed Constitution so as to avoid the criticisms of anti-federalists that the Constitution was not genuinely 'federal'.

ordinary powers are to be drawn; to the operation of those powers; to the extent of them;
and to the authority by which future changes in the Constitution are to be introduced.\[51\]

In approaching the question in this way, Madison brought greater conceptual clarity to
the observations of Montesquieu and Hamilton. Madison’s ‘foundation on which it is
established’ concerned the ‘formative basis’ of the Constitution, the process by which
the Constitution was ratified and came into force. By ‘the sources from which the
ordinary powers of government are to be derived’ Madison meant the representative
institutions adopted for the federal government, namely the House of Representatives,
the Senate and the Presidency. The ‘operation of those powers’ had to do with the
direct authority of the federal government over individual citizens, an important
feature of the proposed Constitution that distinguished it from the Articles of
Confederation (1781), under which ‘federal’ decisions had to be separately enforced
by each state. Madison’s reference to ‘the extent of them’ had to do with the supremacy
of the federal government within its ‘sphere’ of ‘enumerated objects’, in contrast to the
‘residuary and inviolable sovereignty over all other objects’ enjoyed by the several
States—in short, but less accurately, the so-called ‘division of powers’ between the
federation and the states. Finally, the ‘authority by which future changes ... are to be
introduced’ referred to the means of ‘amendment’ of the federal Constitution. Unlike
other writers on federalism, then and now, Madison focused equally on the five
aspects: formation, representation, operation of federal power, ‘division’ of power and
amendment.

Just made clear that Madison had identified both ‘national’ and ‘federal’
characteristics in these aspects of the system, and had concluded that the proposed
Constitution was best understood as ‘a composition of both’.\[52\] Just decided, however,
only to reproduce the first part of Madison’s analysis, his examination of the formative
basis of the federation, followed by Madison’s general conclusions on the entire
scheme.

On the question of the foundation of the proposed Constitution, Madison concluded
that the proposed Constitution was fully ‘federal’ in character. In coming to this
conclusion, he noted that the Constitution was to be ‘founded on the assent and
ratification of the people of America’, but he pointed out that ‘this assent and
ratification is to be given by the people not as individuals composing one entire nation,
but as composing the distinct and independent States to which they respectively
belong.’ Drawing these two aspects together, it appeared that the Constitution rested on
the ‘assent and ratification of the several States, derived from the supreme authority in
each State—the authority of the people themselves’. Madison could conclude that the
Constitution rested on a ‘federal’, rather than a ‘national’ basis, precisely because the act
of ratification was by ‘the people as forming so many independent States’, rather than
the people ‘as forming one aggregate nation’.\[53\]

In support of this conclusion, Madison pointed out that a fully ‘national’
Constitution would derive its authority from an expression of ‘the will of the majority of
the whole people of the United States’, expressed either through a majority of
individual voters or perhaps through a majority of states as representing the voters of
the nation. However, he insisted, this approach had not been adopted. The Constitution

\[51\] Madison, above n 33, 243-4, as cited by Just, above n 6, 38.
\[52\] Ibid.
\[53\] Ibid.
would not arise 'from the decision of a majority of the people of the Union; nor from that of a majority of the States', but from the 'unanimous consent of the several States that are parties to it,' expressed 'not by the legislative authority', but by 'the people themselves'. Indeed, he went so far as to say that '[e]ach State in ratifying the Constitution is considered as a Sovereign body, independent of all others, and only to be bound by its own voluntary act.' It was clear, Madison concluded, that the Constitution would, if established, be fully 'federal', and not 'national', in terms of its foundation.

However, when it came to an analysis of the other aspects of the proposed Constitution, Madison observed important 'national' characteristics, as well as a number of continuing 'federal' ones. His ultimate conclusion, as reproduced by Just, was that:

The proposed Constitution, therefore, even when tested by the rules laid down by its antagonists, is in strictness neither a National nor a Federal Constitution, but a composition of both. In its foundation it is Federal, not National; in the resources from which the ordinary powers of the Government are drawn, it is partly Federal and partly National; in the operation of these powers it is National, not Federal; in the extent of them again it is Federal, not National; and finally, in the authoritative mode of introduction amendments, it is neither wholly Federal nor wholly National.

It must be noted that Madison used the terms 'federal' and 'national' as they were used in his time and place. By contrast, current usage furnishes us with at least three categories: 'confederation', 'federation' and 'unitary state'. Madison's 'federal' and 'national' generally correspond with the current ideas of confederation and unitary state, whereas his 'combination of both' neatly fits the current conception of federation.

While not specifically reproduced by Just, Madison continued that a 'federal' government will 'derive its powers' from the states 'as political and co-equal societies', and these will be equally represented in that government, whereas a 'national' government will be composed of representatives of the people of the entire nation. Since the proposed Constitution provided for the representation of the peoples of the states in the Senate, the people of the nation as a whole in the House of Representatives, and the representation of both in the means by which the President was elected, Madison concluded that the representative institutions were partly federal

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54 Ibid.
55 Ibid.
56 Madison used the terms 'as understood by the objectors'; he did not address 'the accuracy of the distinction' between 'federal' and 'national'; ibid 243.
58 For similar modern analyses, see Kenneth Wheare, Federal Government (1967) 1; Maurice Vile, The Structure of American Federalism (1961) 1; Carl Friedrich, Trends of Federalism in Theory and Practice (1968) ch 2; Sawer, above n 27, ch 1.
and partly national. Next, for Madison, a 'federal' government will 'operate' only on the States in their 'political capacities'; its laws will not operate directly on individual citizens, but only through the states, whereas the laws of a 'national' government will be directly enforced against individuals by the federal government. Since the proposed Constitution provided for the latter, it was 'national' in this respect. Further, a 'federal' system will be marked by a limited jurisdiction over 'certain enumerated objects only', the several states retaining a 'residuary and inviolable sovereignty over all other objects', whereas a 'national' government will have supreme legislative jurisdiction over 'all persons and things' without limitation. Because the proposed federal legislature was given legislative power over only limited topics, the Constitution was 'federal' in this respect. Finally, for Madison, a 'federal' constitution will only be amended with the 'concurrence' of each and every State, that is, unanimously, whereas the amendment of a truly 'national' constitution will rest with the 'majority of the people' of the nation as a whole. However, since the Constitution could only be amended by special majority, the rule was neither one of unanimity nor of simple majority, and therefore neither federal nor national, but a combination of both.  

The implicit lesson for Just's Australian readers, it seems, was that an Australian federation should be similarly 'partly federal, partly national', a 'combination of both' or, as Joseph Story later explained, 'a compound republic'. While Just did not reproduce the entirety of Madison's analysis, a number of Australians later cited Hamilton, Madison and Story on the American 'compromise' between 'pure federation' and 'national union', using their writings to support equal representation in the Senate and proportional representation in the House as appropriate to a compound republic. As will be seen, Quick and Garran systematically used Madison's analysis to identify the national and federal features of the Australian Constitution.  

In the remainder of Leading Facts, Just included a brief sketch of the events which led to the formation of the American federal and state constitutions. He described the representative structure of the federal government and the use of counties as the basis of apportionment. He also reproduced opinions concerning the appropriate powers to be 'transferred to the Federal Parliament from the Colonial Legislatures'. The American model, interpreted in the light of Madison's No 39, loomed large in his analysis.  

B Andrew Inglis Clark  
Andrew Inglis Clark wrote one of two influential first drafts of an Australian federal constitution for the 1891 Convention. It is not unlikely that Just's book set forth the basic perspective from which Inglis Clark's draft was prepared, but a confidential
memorandum written by Inglis Clark himself elaborated the reasoning that lay behind the drafting.\textsuperscript{66}

In the memorandum, Inglis Clark adhered to his well-known preference for the American over the Canadian model of federalism. However, he also drew attention to Switzerland, which, he said, 'presents several unique and very instructive features in the purely democratical organisation of society'.\textsuperscript{67} He pointed out that in contrast to the later Canadian model, the American federation was 'brought about by the voluntary union of thirteen independent communities', and that this made 'inevitable' the scheme by which 'a limited number of specific powers' were 'delegated' to the federal government, while the powers 'not delegated' were 'reserved' to the states and to the people. In Australia, he argued, while the colonies were not 'sovereign', yet they performed more functions than the American states had done, and he therefore followed the American scheme in its federal aspects. In particular, what he called the 'provinces' were to be equally represented in the Senate, whereas the House of Representatives was to be 'chosen by the people of the provinces strictly on the basis of population'. Specific powers were delegated to the federal legislature, with all powers not delegated remaining 'vested in the provincial parliaments'. The federal judiciary was, following the American example, distinct from the provincial judicial systems, but with the 'innovation' of a general appellate jurisdiction to replace the Privy Council. Moreover, unlike the Canadian system, the State Governors were appointed separately from the federal government, this being 'essential to secure the independence of the provincial governments.' However, the draft Constitution presumed a continuance of cabinet government and dependency on the Empire, and the Canadian model provided appropriate guidance in these respects.\textsuperscript{68}

While Inglis Clark considered that the 'dependency' of the Australian colonies on the Imperial Crown posed an obstacle to adopting a fully republican system in Australia, he wondered whether 'the united intelligence of the [forthcoming] Convention [might] be able to suggest some method of meeting the difficulty'.\textsuperscript{69} In fact, Inglis Clark expressed severe reservations about responsible government. He favourably discussed the American system, but particularly suggested that the Swiss system of a federal executive council was 'an example which might be followed', quoting Edward Freeman to the effect that the 'negative wisdom' of the Swiss Government might be preferable to both the British and American systems.\textsuperscript{70}

In his later book, Australian Constitutional Law (1901), Inglis Clark looked back on the Constitution that had been enacted into law by the Imperial Parliament. In this work, he elaborated extensively on the nature of federalism and the features of the newly formed Australian Constitution. A V Dicey had said that, in essence, 'federalism means legalism and the supremacy of the Judiciary in the Constitution', and Inglis Clark seemed to agree. He stated:

The federal form of political organisation exists whenever a number of separately organised communities are embraced in one comprehensive community and the whole

\textsuperscript{66} Inglis Clark, above n 5. Inglis Clark's draft is reproduced in Reynolds, above n 3.
\textsuperscript{67} Ibid 1.
\textsuperscript{68} Ibid 2-6.
\textsuperscript{69} Ibid 6.
\textsuperscript{70} Ibid 5-7, citing E A Freeman, 'Presidential Government' in Historical Essays, First Series (4th ed, 1886).
Field of legislative and executive authority is definitely divided between the legislative and executive organs of the larger and comprehensive community on the one hand, and the legislative and the executive organs of each of the component communities on the other.71

Federalism, according to Inglis Clark, is a system where several ‘separately organised communities are embraced in one comprehensive community’. Consequent to this scheme, there is, following Dicey, an elaborate ‘division’ of legislative and executive power between the comprehensive and component communities. Unlike Dicey, however, Inglis Clark did not refer to a division of the ‘original powers of sovereignty’. The central question of federalism, Inglis Clark thought, is how to unite a number of separate political societies into a composite society in a manner that preserves the ‘collective and corporate life of each State’. The American and Australian solution was to define the boundaries of the two sets of political communities, to create a dual citizenship and, most importantly, to give a majority of the component communities and the majority of the composite community ‘concurrent powers of veto’ over proposed legislation and proposed constitutional amendments. In Inglis Clark’s view, the formative concern to preserve the constituent states led to a system of federal representation and federal amendment.72

C Richard Baker

Accompanying Thomas Just’s Leading Facts was Richard Chaffey Baker’s Manual of Reference, also written for the 1891 Convention, later joined by Baker’s Federation and The Executive in a Federation, written for the 1897-8 Convention.73 Baker was a conservative member of the Legislative Council of South Australia and an important delegate at both Federal Conventions. In the Manual, his objective was to seek guidance ‘from the study of existing Federal Constitutions and their working’, by undertaking ‘a comparison of the provisions’ of the American, Canadian, Swiss and South African constitutions. The Manual included schedules containing the Quebec Resolutions, the Canadian Constitution, the American Constitution and the South African Union Act 1877. His schedule of books cited indicates the sources on which he drew and to which he directed his fellow delegates. They included Adams and Cunningham, Bagehot, Bluntschli, Bourinot, Bryce, Dicey, Freeman, Smith, Hamilton, Madison, Jay, Kent, Montesquieu, Story, Tocqueville and Webster.74

71 Andrew Inglis Clark, Studies in Australian Constitutional Law (1901, reprinted 1997) 3. Inglis Clark also gave significant weight to the judgments of John Marshall, Chief Justice of the United States Supreme Court, 1801–1835.

72 Ibid 4-13, 359, 369–70. The argument was not dissimilar to Calhoun, above n 33. Compare Garran, above n 6, 132. Clark even argued that ordinary Commonwealth laws should be passed only with a majority of Senators in a majority of States: Michael Roe, ‘The Federation Divide Among Australia’s Liberal Idealists: Contexts for Clark’ in Haward and Warden (eds), An Australian Democrat: The Life, Work and Consequences of Andrew Inglis Clark (1995) 95.


74 Baker, above n 26, 5, 7–8, 19.
Although the *Manual* was professedly intended only to provide information and reference to relevant authorities, its choice of references and its organisation provide an insight into the structure of Baker's reasoning about federalism. In particular, he began with the 'mode of formation' of the four constitutions, he next considered the organisation of the executive and legislature, then the allocation of powers, and finally the ratification of the Constitution and the use of referenda. The similarity to Madison's analytical scheme and the structure of the American Constitution is notable. This structure apparently shaped Baker's ultimate conclusions, although he expressed a number of views in the *Manual* that he later modified.

Baker rejected John C Calhoun's theory that the Constitution 'is a compact to which the States were parties in their sovereign capacities', seeming to favour Daniel Webster's argument that the Constitution derived from 'the people of the United States'. However, Baker also recounted the ratification of the American, Swiss and Canadian constitutions in a way that showed that ratification was secured on a 'state-by-state' basis, contrary to Webster's contention and in accord with Madison's analysis. Baker also rejected Walter Bagehot's arguments against co-equal houses in a federation, citing James Kent to the effect that the American Senate involved the recognition of the 'separate and independent existence' of the States. At this early stage, Baker also favoured responsible government, but he would soon conclude that the consolidating tendencies of responsible government were inconsistent with equality of representation of the States in a powerful Senate.

Baker's overriding objective was that the 'powers of self-government' enjoyed by 'the Australian people' might be 'increased', and that the exercise of those powers might 'be delegated partly to a National or Federal Government and partly to the present Provincial Governments'. As such, local self-government, state independence and state equality—expressed in the formative basis, representative structures and amending formula of the constitutions under discussion—emerged as key principles. The representation of the people of the nation in the House of Representatives, and the equal representation of the people 'as citizens of the States' in a Senate of 'at least co-equal power', were therefore of 'the very essence' of federation.

Baker adopted J K Bluntschli's distinction between federation and confederation—on the criterion of direct central executive authority over individuals—and not Georg Jellinek's all-embracing 'sovereignty' criterion. Those of Baker's readers who agreed, could thereby avoid the problem of identifying an ultimate locus of 'sovereignty' within the proposed Australian federation. As will be seen in the later discussion of Quick, Garran, Higgins and Isaacs, those who adopted the concept of sovereignty as a necessary analytical device were forced to choose between the 'compactualist', state-soverignty views of Calhoun and the national-soverignty views of Webster—and

75 Ibid 26; cf Baker, above n 73, 12.
76 Baker, above n 26, ch 17.
78 Ibid 43-6.
79 Ibid, Preface of May 1, 1891 (entitled 'First Preface', apparently incorrectly).
80 Ibid 33; Baker, above n 73, 3.
81 Baker, above n 73, 3-5, 10, 19.
82 Baker, above n 26, 31, citing Bluntschli, above n 36. Samuel Griffith, above n 14, 5, also adopted Bluntschli's approach.
most of them chose the latter. However, the actual Constitution that emerged was, in terms of Madison's analysis, partly federal and partly national; it was not possible to say whether the nation or the states were sovereign, for the Constitution was a 'combination of both' federal and national elements. Bluntschli's approach enabled this more accurate, mediating perspective to be adopted.

If Inglis Clark had asked whether there might be some way of adapting the conciliatory federal executive of Switzerland to Australian circumstances, Baker's Executive in a Federation sought to provide an answer to this question. In this work, Baker explained why he now favoured a federalized executive council on the Swiss model, and sought to show how it might be adopted in Australia.\(^\text{83}\) The 'true line of federation', he argued, is an 'equilibrium' between 'centralisation and decentralisation'. This equilibrium was maintained in the United States and Switzerland, but distorted by a 'strong national force' in Canada and by a 'strong local force' in Germany.\(^\text{84}\) Baker was therefore critical of the draft constitutions that had emerged thus far from the Conventions of 1891 and 1897-8 because, while they maintained an appropriate 'equilibrium' as regards the federal legislature, the notion of executive responsibility only to the House of Representatives was a 'radical defect'. Following James Bryce and Alpheus Todd, he was critical of both responsible government—as a consolidating element—and the American separation of powers—as a disintegrating element that weakened governmental responsibility. On the contrary, Baker supported an executive responsible to both houses of the legislature as embodying the strengths and avoiding the weaknesses of the American and the British systems.\(^\text{85}\) He also favoured election of the Senate in the manner decided by each state legislature in order to place some constraint on the gradual accretion of federal power that would be likely, but he accepted that the direct election of Senators by the people of each state would be 'consistent' with 'true Federation'.\(^\text{86}\)

While Baker was not entirely successful at the Convention of 1897-8, his forceful arguments ensured that more extreme nationalist views of others like Isaacs and Higgins did not prevail either. In particular, while in principle the Convention finally came down on the side of responsible government, the hesitations of Baker, John Gordon, John Alexander Cockburn and others produced the compromise over the powers of the Senate contained in s 53 of the Constitution.\(^\text{87}\)

\(^{83}\) Baker, above n 6, 3, 11. Adams and Cunningham, above n 21, 273-4, had praised the Swiss executive system. See also Baker, above n 73, 19.

\(^{84}\) Ibid 5-8. In the late nineteenth century, the formally centralist features of the Canadian Constitution seemed to outweigh the inherently pluralistic nature of Canadian society and the emergent interpretations of the Privy Council that were enhancing the independence and powers of the Canadian Provinces vis-à-vis the Dominion.

\(^{85}\) Ibid 12, 17-9, citing Bryce, above n 9, vol I, 155-60 and, apparently, Alpheus Todd, Parliamentary Government in the British Colonies (1880).

\(^{86}\) Baker, above n 73, 17-8.

D John Quick and Robert Randolph Garran

Dicey, it has been noted, had a considerable influence on the Australian framers. A young Robert Garran, writing The Coming Commonwealth in 1897, came substantially under Dicey's spell, as had John Quick in his earlier Digest of Federal Constitutions of 1896.

In these early works, both Quick and Garran argued that federalism aims to reconcile 'national unity' with 'state rights', in order to bind 'a group of States into a Nation without destroying their individuality as States'. The solution, echoing Dicey, is to divide 'the functions of government and the attributes of sovereignty between a central national government and a group of local state governments', creating a 'two-fold sovereignty ... within the limits of the same territory'. As Garran put it, the 'essential characteristics' of federal government are:

(1) The supremacy of the Federal Constitution. (2) The distribution, by the Constitution, of the powers of the Nation and the States respectively. (3) The existence of some judicial or other body empowered to act as 'guardian' or 'interpreter' of the Constitution.

A system of judicial review is accordingly necessary, against the continental tendency to treat such matters as merely 'administrative'. In the absence of judicial review, 'the superior sanctity of the Constitution is ineffectually guarded' in Switzerland, thought Garran.

In 1901, Quick and Garran published their magisterial Annotated Constitution. Combining impressive erudition and a 'sufficiently detached view of the history and drafting' of the Constitution, Quick and Garran authoritatively recounted the making of the Constitution, explaining its key concepts and glossing its specific provisions. When discussing topics such as 'The People', 'Federal Commonwealth', 'Commonwealth', 'Sovereignty', 'States' and 'The Constitution', they canvassed a variety of viewpoints, reproducing substantial excerpts from a wide range of learned writers.

However, Quick and Garran were active participants in the debate over the Constitution, and their commitments affected their commentary. While they cited a range of authors, they usually favoured the nationalist interpretations of John W Burgess. It was only in spite of this bias that their historical account of the making of the Constitution quite accurately recounted what Madison would have identified as the genuinely 'federal' formative processes by which the Australian federation came into being. The Annotated Constitution as a consequence neatly embodied an unresolved tension between the strictly compactual and nationalist conceptions of federalism.

88 Garran, above n 6; Quick, above n 26.
89 Garran, above n 6, 15–6; cf Quick, above n 26, 10–14.
90 Garran, above n 6, 23–4.
91 Ibid 80, cf 15–6, 65–6, 75–6, relying on Dicey, above n 21.
92 Quick and Garran, above n 6. See also Quick, above n 26; John Quick, Legislative Powers of the Commonwealth and the States of Australia with Proposed Amendments (1919); Robert Garran, Prosper the Commonwealth (1958).
93 Geoffrey Sawer, 'Foreword', Quick and Garran, above n 6, v.
Quick and Garran placed the Australian Constitution into the context of the colonies and confederations of history. They began with the 'freedom' of Greek city-states, which they compared to the more subordinate Roman coloniae. The Greek cities were 'autonomous political communities', 'free and sovereign commonwealths' enjoying 'unfettered right[s] of self-government'. But while autonomous in principle, they occasionally formed leagues which resembled 'something like' federal unions.\footnote{Quick and Garran would almost certainly have been drawing on Freeman, above n 1.} Quick and Garran also discussed modern European colonisation. They contrasted the 'unspeakable outrages' and 'unutterable ruin' spread by Spanish, Portuguese and French colonisation, with the 'charters of freedom' and germs of 'representative self-government' carried by English colonists, particularly to North America.\footnote{Ibid 9–11. The 'superiority' of the British Empire was a recurrent theme.} However, Quick and Garran's emphasis was on the charters granted to the colonies; they overlooked the autochthonous covenants by which the American colonists asserted a self-constituting capacity to form independent bodies politic and ecclesiastic.\footnote{Ibid 11–18. On the latter, see Donald Lutz, Colonial Origins of the American Constitution: A Documentary History (1998).}

Quick and Garran appreciated the corporate dimensions of representative government. Echoing Freeman, they observed that the House of Commons derived its name from the term communitates and that the representative system had been constructed out of the self-governing towns, hundreds, and shires of England. However, Quick and Garran also noted that the 'reform' of malapportioned electorates in the nineteenth century had introduced an individualistic conception of representation.\footnote{Quick and Garran, above n 6, 305–8.}

In one sense, the underlying tension in Quick and Garran's thought lay between the principles of Imperial sovereignty and autonomous self-government.\footnote{Quick had said that a 'political federation' was a 'permanent union' of 'political communities' which nevertheless preserved their 'local independence, local self-government and internal sovereignty'.\footnote{Quick, above n 26, 10.} Yet Quick and Garran often placed the emphasis on the authority of the Imperial Parliament and interpreted the Constitution in that light.} A second tension in Quick and Garran concerned the compactual and national conceptions of federalism. Their familiarity with the process by which the Australian federation had been formed drew them towards the first approach, while their theoretical commitments drew them in the opposite direction. Scholars such as Bryce and Freeman, in their historical orientation, partially reinforced the former tendency, but Dicey and particularly Burgess had the decisive influence. This is especially seen in Quick and Garran's discussion of sovereignty and federalism; it is also reflected in their comments on a number of substantive provisions in the Constitution.

Explicitly following Austin, Dicey and Burgess, Quick and Garran held that a 'clear conception of the meaning of "sovereignty" is the key to all political science', and that 'true political science seems to point to the conclusion that sovereignty is incapable of legal limitation'. Sovereignty, they said, is the 'most essential attribute of a State—that
is, of an independent political community. It is that 'original, absolute, unlimited, universal power over the individual subject and over all associations of subjects.' The sovereign is that 'person, or determinate body of persons' which possesses such power. It is the 'supreme organic unity', the 'ultimate legislative organ', whether it be the British Parliament or the body of electors under the American Constitution 'organised under the Constitutional provision for the amendment of the Constitution'.

Thus when discussing the recital in the Preamble to the Australian Constitution that the people of the colonies had agreed to unite, Quick and Garran noted that it was the Enabling Acts passed in several of the Australian colonies that in fact provided for the 'popular' process of the referendum held in each colony—features that Madison would have called 'federal' in character. However, Quick and Garran traced the idea of the 'sovereignty' of the people to the specifically nationalistic interpretation of James Wilson, who affirmed that 'there is, and of necessity must be, a supreme absolute and uncontrollable authority', and that it resides in 'the people'. Quick and Garran elided the fact that a nationalistic conception of sovereignty was inconsistent with the actual role of the colonial legislatures in setting up referendum processes in each colony.

The amendment process under s 128 of the Australian Constitution (as well as art V of the United States Constitution) posed a further problem for the nationalist interpretation. Under both schemes, the representation of the people of a state in the federal legislature cannot be altered without their specific consent. Can a determinate sovereign be identified in such a context? Austin engaged in extended verbal gymnastics to identify one, whereas Burgess and Willoughby simply held that any purported limitation on the power of the nation could be disregarded as inconsistent with its sovereignty—and Quick and Garran seemed to agree. However, revealing the tension in their thought, they recognised that the 'legal organisation and structure' of a 'sovereign' institution may in practical terms restrain the exercise of its powers. In this respect they differed from Burgess and Willoughby, who had rejected all such restraints. Perhaps Quick and Garran's intimate involvement in the drafting of s 128, or perhaps their recognition of the ultimate sovereignty of the Imperial Parliament, led them to recognize the effectiveness of the fifth paragraph of that section.

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101 Quick and Garran, above n 6, 325.
102 Burgess, above n 39, vol I, 52.
103 Quick and Garran, above n 6, 325.
104 Ibid 324–8, citing Burgess, above n 39, vol I, 51-2; Westel Woodbury Willoughby, An Examination of the Nature of the State: A Study in Political Philosophy (1896) 214; Dicey, above n 21, 66, 137; John Austin, Lectures on Jurisprudence (5th ed, 1911), vol I, 253. An earlier edition of Austin was of course cited.
105 See Australasian Federation Enabling Act 1895 (NSW); Australasian Federation Enabling Act (South Australia) 1895 (SA); Australasian Federation Enabling Act 1896 (Vic); Australasian Federation Enabling Act (Tasmania) 1896 (Tas); Australasian Federation Enabling Act 1896 (WA).
106 Ibid 285-7, 290–92 (calling him 'John Wilson').
108 Quick and Garran, above n 6, 326. They were aware that Dicey had not proposed a universal theory of sovereignty; they also noted that the 'historical school' of jurisprudence had pointed to 'communities in which no sovereign can be discovered': ibid, 325.
This was Quick and Garran's approach to sovereignty. What was their approach to federalism? In an important discussion of the idea of a 'Federal Commonwealth', they began by observing that the federal idea 'pervades and largely dominates the structure of the newly-created community, its parliamentary executive and judiciary departments.' But just what was this 'federal idea'? In the words 'shall be united', they found an unambiguous indication that the federation was 'neither a loose confederacy nor a complete unification, but a union of the people considered as citizens of various communities whose individuality remains unimpaired'. The Australian Commonwealth was clearly a federation, a Bundesstaat or composite state. On 'indissolubility', they forcefully drew attention to the 'disastrous doctrines of nullification and secession' advanced by Jefferson, Hayne and Calhoun, on the 'fatal and insidious' basis that the American Union 'was merely a compact among the States'. Against this, Quick and Garran understood federation to be based on a constitution, rather than a treaty, adopting Story's interpretation. Did this mean that Quick and Garran fully adopted the nationalist position, that the federation was based on the consent of the people as a whole?

When discussing the idea of a Federal Commonwealth, Quick and Garran systematically used Madison's analysis in Federalist No 39 to identify the national and federal features of the Australian Constitution, specifically in its formative, representative and amendment aspects. This much would suggest that they were likely to adopt an accurate and mediating view of Australian federalism and to avoid the extremes indicated by the compactual and national approaches. However, they were also influenced by Burgess, and distinguished between a 'union of states' and a 'federal state'. As to the former:

The primary and fundamental meaning of a federation (from the Latin fœdus, a league, a treaty, a compact; akin to fides, faith) is its capacity and intention to link together a number of co-equal societies or States, so as to form one common political system and to regulate and co-ordinate their relations to one another.

Moreover, as to the 'federal state':

the word 'federal' is applied to the composite state, or political community, formed by a federal union of States. It thus describes, not the bond of union between the federating States, but the new State resulting from that bond. It implies that the union has created a new State, without destroying the old States; that the duality is in the essence of the State itself that there is a divided sovereignty, and a double citizenship. This is the sense in which Freeman, Dicey and Bryce speak of a 'Federal State'; and it is the sense in which the phrase 'a Federal Commonwealth' is used in this section and in the preamble of the Australian Constitution.

However, following Burgess:

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110 Quick and Garran, above n 6, 292. Warden, above n 9, 105, argues that Quick and Garran falsely attributed the Virginia Resolutions to Jefferson so that Madison would not be associated with the compact theory.
111 They therefore interpreted the amending process solely as a matter of Diceyan rigidity, ignoring the federal structure of the amending process: Quick and Garran, above n 6, 314–7; but see 988–95, discussed below.
112 Ibid 333.
113 Ibid.
In recent years it has been argued that the word 'federal' is inappropriately and inexacty used when applied to a State or community; that there is no such thing as a federal State; that if there is a State at all it must be a national State; that anything short of the principal attribute of statehood and nationhood, viz: sovereignty, is a mere Confederacy; and that 'federal' can only be legitimately used as descriptive of the partition and distribution of powers which is peculiar to a federal system. Federal, it is said, is properly applied to denote a dual but co-ordinate system of government, under one Constitution and subject to a common sovereignty.\(^\text{114}\)

In these definitions, we meet with a series of important distinctions. The first definition of 'federation' is compactual: it focuses on the formative process. The second definition is more Diceyan: it is concerned with the product or outcome of that process, a 'division of powers'. The third definition is much more strongly nationalist: it totally rejects any necessary connection between the formative process and the outcome. It insists on a unitary sovereignty and drives a rigid dichotomy between federation and confederation, defining federation solely by reference to the division of powers.

Quick and Garran were caught in the tension between these definitions. They accepted the standard distinction between federation and confederation in terms of the criteria already noted: co-ordinate federal and state governments having executive power over individuals.\(^\text{115}\) But they were diffident in their use of Madison's categories of 'national' and 'federal', using them first in terms of the formative conception, and secondly in terms of Burgess's idea of sovereignty.

Quick and Garran were certainly aware of these tensions. They recognised with Bryce that 'America is a Commonwealth of commonwealths', a State which is composed of other States essential to its existence.\(^\text{116}\) But on the other hand, Dicey had understood the federal state to be a 'contrivance intended to reconcile national unity and power with the maintenance of State rights'\(^\text{117}\) and Burgess had completely rejected Bryce's idea: a 'federation is merely a dual system of government under a common sovereignty.'\(^\text{118}\)

While expressing a preference for Burgess's more 'recent' approach, Quick and Garran had to recognize important compactual dimensions, just as Madison's analysis had drawn attention to the ratification by the people of the several states. Quick and Garran's care in doing justice to the institutional complexity is seen in the following passage:

The combined operation of the federal and national principles of the Constitution is illustrated in the manner in which it was prepared, viz., by a Convention in which the people of each colony were equally represented; and in the method by which it was afterwards submitted to the people of each colony for ratification or rejection. The Federal Convention was not a body composed of delegates elected by the people of Australia, as individuals, forming one entire community. ... On the other hand, there is,

\(^{114}\) Ibid 333-4 citing Burgess, above n 39, vol I, 79; vol II, 18, and mentioning The Federalist, Freeman, Dicey and Bryce, without specific reference. Quick and Garran also distinguished a fourth sense in which 'federal' was 'descriptive of the organs of the central and general government.'

\(^{115}\) Quick and Garran, above n 6, 334.

\(^{116}\) Bryce, above n 9, vol I, 12, 15, cited in Quick and Garran, above n 6, 370.


\(^{118}\) Ibid 371, summarising Burgess, above n 39.
in part, a recognition of the national principle, by the Constitution being founded on the will of the people, and not on the mandate of the provincial legislatures.\footnote{119} 

Following Wilson, they believed that the 'will of the people' was 'suggestive of a consolidating and nationalising tendency.'\footnote{120} But following Madison, they also noted the 'conspicuous' fact that the people voted as 'provincial voters, a majority being required in each colony to carry the Constitution in that colony.'\footnote{121} Quick and Garran were conscious of the control over the process of drafting and ratification exercised by the colonial legislatures, noting that artificial statutory majorities had been required by some. The federation was therefore a union of states as 'corporate' entities; but it was also a union 'of people'.

These facts could not easily be accommodated to Burgess's radically nationalistic definition of federalism. While Quick and Garran were otherwise exhaustive in their analysis of the federal and national features of the Constitution, the telling omission was that they did not attempt a nationalistic explanation of the formative process; its very nature precluded it. The nationalistic approach thus forcefully testified to its own inadequacy as an explanatory theory, particularly when it came to the foundation of the system.\footnote{122}

Following Madison, Quick and Garran also understood the representative structures of the Australian Commonwealth to be partly national and partly federal, and understood these federal aspects of the representative structure to be derived from the formative basis of the Constitution.\footnote{123} Having concluded that 'there was an expression of popular suffrage and State sanction united in the method in which the adoption of the Constitution was secured', in relation to the representative structure they pointed out:

The Commonwealth as a political society has been created by the union of the States and the people thereof. That the States are united is proved by the words in clause 6, which provide that the States are 'parts of the Commonwealth'; that they are welded into the very structure and essence of the Commonwealth ... This is a federal feature which peculiarly illustrates the original and primary meaning of the term, as importing a corporate union. ...

As the Commonwealth itself is partly federal and partly national in its structure, so also is its central legislative organ the Parliament. Each original State is equally represented in the Senate ... The Senate derives its power from the States, as political and co-ordinate societies, represented according to the rule of equality ... In this manner the States become interwoven and inwrought into the very essence and substance of the Commonwealth, constituting the corporate units of the partnership.\footnote{124}

Despite these very important acknowledgments of the Madisonian analysis, Quick and Garran concluded—on balance, it seems—that the 'true ideal of federalism', or at least the 'drift of the development of the American Constitution', was as described by

\begin{footnotes}
\footnote{119} Quick and Garran, above n 6, 335-6.
\footnote{120} Ibid 336.
\footnote{121} Ibid, citing Madison, above n 33.
\footnote{122} See Quick and Garran, above n 6, 339–40.
\footnote{123} See ibid 417, citing Convention Debates, above n 5, 23 March 1897, 21–3 (Edmund Barton). However, Quick and Garran also contrasted the 'partly federal, partly national' character of the Swiss and American federal executives with the more 'national' system of responsible government in Australia.
\footnote{124} Quick and Garran, above n 6, 336-7.
\end{footnotes}
Burgess\(^\text{125}\) However, instead of invoking Burgess's idea of the sovereignty of the nation-state, Quick and Garran pointed to the overarching 'sovereignty' of the Parliament at Westminster. Thus, in the last pages of their commentary, they observed that the Imperial Parliament might choose to overrule the special guarantees of the territorial and representational integrity of the states in the fifth paragraph of s 128. They concluded:

[M]any profound political thinkers are of opinion that federalism ... is but a transitory form of government, midway between the condition of confederacy and that of a single sovereignty over a combined population and territory\(^\text{126}\)

Why did they adopt this conclusion? While it is not possible to be certain, it appears that they accepted a rigid dichotomy between the compactual and national definitions of federalism and—even though neither account could fully account for the facts—they simply opted for one over the other. They were also attracted to this approach because it accorded with 'the more modern scope of the word\(^\text{127}\)Moreover, they treated the unitary sovereignty of the Imperial Parliament as the key integrating factor\(^\text{128}\)It may be, as their discussion of 'the evolution of nationalism' shows\(^\text{129}\) that Quick and Garran were also drawn to Burgess for pragmatic reasons: the national powers of the American federation had waxed since the Civil War. But while the general course of the nineteenth and twentieth centuries has certainly been in that direction, in our day, the prospects of the nation-state are not so clear-cut.

E Isaac Isaacs and Henry Bournes Higgins

If Quick and Garran felt the tension between compact and nation, the nationalistic interpretation of federalism found its most complete expression in the views of Isaac Isaacs and Henry Bournes Higgins\(^\text{130}\)Figures such as these insisted that theirs was the 'true federalism'\(^\text{131}\)For Higgins it began with an insistence, following John Locke, that the body politic is essentially unitary in nature and that in 'practical' terms, 'sovereignty' ought to rest with 'the Australian people'. As a consequence, equality of representation in the Senate was not an 'essential' of federation; it had actually created an 'entrenched oligarchy' in the United States\(^\text{132}\) Furthermore, the American

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\(^{125}\) Ibid 335-42, citing John William Burgess, 'The Ideal American Commonwealth' (1895) 10 Political Science Quarterly 404. See also Quick and Garran, above n 6, 988.

\(^{126}\) Quick and Garran, above n 6, 992, citing Burgess, above n 39.

\(^{127}\) Quick and Garran, above n 6, 335, 341–2.

\(^{128}\) Ibid 380, citing Burgess, above n 39. Thus the two 'tensions' in their thought noted earlier may well have been resolved in their commitment to Imperial sovereignty. At ibid 380, having said that the Constitution derives from the ultimate sovereignty of the Imperial Parliament, they remarked that the Constitution partitions 'the totality of quasi-sovereign powers delegated to the Commonwealth, as well as providing for a future development and expansion of those powers.' The approach is clearly shown in a diagram at ibid 928.

\(^{129}\) Ibid 340–42.

\(^{130}\) La Nauze, above n 9, 102, 120, described Higgins as 'an obstinate individualist radical', yet 'learned and courteous' and 'heard with attention while he argued a hopeless case'.

\(^{131}\) Crisp, above n 26, 173, who also discussed other radical nationalists, such as George Dibbs, A B Piddington, Tom Price and George Reid.

\(^{132}\) Henry Bournes Higgins, Essays and Addresses on the Australian Commonwealth Bill (1900) 9-10, 13, 44, 60, 72-3, 109, 111, 123, citing H J Ford, The Rise and Growth of American Politics: A Sketch of Constitutional Development (1898); see also, Walter Bagehot, The English Constitution
Constitution was too difficult to amend, and the Australian Commonwealth Bill suffered from the same defects. Rather, the 'essential' feature of federation is the division of powers.

The similarities with the views of Dicey and especially Burgess are quite evident, but Higgins may have been a little hesitant to rely explicitly on these authors on account of their relatively liberal-conservative views. By contrast, Isaacs was very ready to rely on Dicey and Burgess when their views acceded with his own. Following Burgess and Dicey, he held that the essential principle of federalism is the division of powers, not equality of representation. On the question of constitutional amendment, he also followed Burgess, arguing for a relatively easy, national-majoritarian means of constitutional alteration in order to avoid an eventual 'stagnation'.

In this connection, it is interesting to note that in the Engineers Case, one of Justice Isaacs's central premises was that the Constitution was 'the political compact of the whole of the people of Australia, enacted into binding law by the Imperial Parliament'—specifically rejecting the more compactual approaches adopted by Griffith CJ and Barton and O'Connor JJ in previous decisions. In Australian Democracy and Our Constitutional System (1939), Isaacs repeated his national-majoritarian interpretation of the Australian Constitution and called for an expansion of Commonwealth legislative powers.

In the 1890s, however, the question was whether Higgins's and Isaacs's nationalist views would prevail against the replies of those like Inglis Clark, who insisted that 'each State is a separately organised community which has a distinct collective and corporate life and distinct interests', requiring separate representation of the people thereof in the federal Parliament and a distinct say in the amendment procedure. Madison's analysis of the American Constitution suggested that at the foundation of the federation was a 'federal' process whereby, as the Preamble to the Australian Constitution would declare, the peoples of several independent colonies separately agreed to unite in a federal commonwealth. This origin of the federation was, contrary to Burgess's abstract, nationalistic conception, premised on the capacity of the

(1872); Dicey, above n 21 (4th ed, 1893), 135; Freeman, above n 1, 2; Burgess, above n 39, vol I, 151-3; John Locke, Two Treatises of Government (1690, republished 1992), §96.


Higgins, above n 132, 100, 128.

Although see ibid 73.


Amalgamated Society of Engineers v Adelaide Steamship Co Ltd (1920) 28 CLR 129.

Amalgamated Society of Engineers v Adelaide Steamship Co Ltd (1920) 28 CLR 129, 142. Cf D’Emden v Pedder (1904) 1 CLR 91.

Isaacs, above n 136; see Crisp, above n 26, ch 4.

representatives of those colonies to negotiate and agree on the terms of a federal union. A majority of those representatives understandably used that capacity to create a federation that was, like Madison's own, a composition of both federal and national elements.

III CONCLUSIONS

This article has been centrally concerned with the third of three related questions: What were the sources upon which the Australian framers relied for their ideas about federalism? What accounts of federalism did these sources convey to the Australians? And how did the Australians appropriate and interpret these accounts?

The nationalistic writings of Burgess insisted on the consolidated nature of the sovereign nation-state and defined the 'federal state' as a unitary state with a 'dual system of government under a common sovereignty'. It was a view that dovetailed with Dicey's legalistic focus on the 'division of powers' between two 'spheres' of government, presided over by a supreme judiciary. Australians who held to similarly nationalistic points of view, such as Isaacs and Higgins, and to a lesser extent, Quick and Garran, were understandably drawn to such theories of federalism, and adopted many of Burgess's and Dicey's arguments and analyses.

However, Dicey and Burgess were not the only sources of ideas about federalism, and their effect on Isaacs, Higgins, Quick and Garran is not representative of their influence on the framers as a whole. Other Australians, such as Just, Inglis Clark and Baker, drew more substantially on writers like Madison, Bryce and Freeman—writers who described the historical origins, theoretical development and institutional details of the American federation in a way that demonstrated the 'partly national, partly federal' nature of the system.

In particular, Madison's Federalist No 39, although rhetorically-motivated, was very strictly empirical and precise. Madison carefully analysed the formation of the Constitution, its representative institutions, the operation of federal power, the allocation of powers and the amendment of the Constitution. And in identifying both 'federal' and 'national' features embedded in each aspect, he drew attention to important analytical relationships between them. For just as the federal legislature was partly federal and partly national, so the amendment procedure contained both federal and national elements. It was but a small step for Madison's readers to conclude that there might be some kind of 'necessary' relationship involved: that an 'ideal' federation 'ought' somehow to embody both federal and national aspects in the way that Madison had described.

Thus for Thomas Just, the circumstances in which the American Constitution was framed were those that should also characterise the formation of the Australian Constitution. The implication was that federation should be 'federal' as to its foundation (a unanimous agreement of the constituent states)[142] and 'partly federal, partly national' as to its representative institutions and amending formula. Accordingly, leading figures in the Australian federal conventions, such as Edmund Barton, Bernhard Wise and Alexander Cockburn, explicitly adopted this reasoning when

[142] The agreement of the States might be expressed through elected conventions in each State (as in the United States) or through referenda held in each State (as happened in Australia).
discussing the composition of the Senate. Likewise, when debating the composition of the federal legislature, the framers regularly reasoned in terms of the formative basis of the proposed federation, and when debating the amendment formula, similarly reasoned in terms of both the formative basis of, and the representative institutions to be adopted under, the Constitution. The result, as Harrison Moore pointed out, was a federal commonwealth that was:

founded on the assumed continuance of [the existing political] communities in the distribution of powers between the Commonwealth and the States, in the organisation of the Commonwealth Government, and in the machinery for the alteration of the Constitution.

Madison had showed that the American Constitution had both federal and national elements. The Australian Constitution—subject to the overarching role of the Imperial Parliament and the institution of responsible government—was to follow a very similar course. This was partly because the practical, institutional conditions under which the Australian Constitution came into being were analogous to the process by which the American Constitution had been formed. It was also because theoretical reflection on the American system suggested that such processes and outcomes were essential to the idea of a 'true federation'.

Madison's was not the only approach to federalism that influenced the Australian framers. However, the various theoretical approaches had to be accommodated to the institutional processes by which the Australian Constitution was, in fact, formed. All of this suggests that Madison's analysis, adapted to the context of responsible government and Imperial subordination in Australia, was not only a key influence on the Australian framers, it provides the most empirically accurate basis upon which to understand the nature of the 'federal commonwealth' embodied in the Australian Constitution.

143 Conference Debates, above n 13, 11 February 1890, 131-8 (John Cockburn) Convention Debates, above n 8, 10 September 1897, 325-6 (Bernhard Wise), 10 September 1847, 340 (Edmund Barton).

144 Space does not permit a full elaboration, but see, eg, Garran, above n 6, 184; Convention Debates, above n 1, 8 April 1891, 884-5 (Duncan Gillies), 8 April 1891, 893-4 John Cockburn), 8 April 1891, 894 (Sir Samuel Griffith); Convention Debates, above n 5, 25 March 1897, 105-110 (Bernhard Wise), 31 March 1897, 388 (Edmund Barton), 15 April 1897, 656 (John Quick); Convention Debates, above n 8, 9 September 1897, 259-60 (Henry Higgins), 13 September 1897, 411-12 (Matthew Clarke); Convention Debates, above n 137, 9 February 1898, 772 (Edmund Barton).

145 Moore, above n 9, 67-8. Quick and Garran, above n 6, 332, similarly observed that '[t]he Federal idea … pervades and largely dominates the structure of the newly-created community, its Parliamentary executive and judiciary departments.' See also Frederic Maitland, 'The Crown as Corporation' (1901) 17 Law Quarterly Review 131, 144.