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Brian Galligan

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# A FEDERAL REPUBLIC

## Australia's Constitutional System of Government

BRIAN GALLIGAN

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University of Melbourne*



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## *Preface*

This book reflects my research and thinking on the Australian Constitution and federalism since 1984. Since then I have had the privilege of working in the Research School of Social Sciences at the Australian National University, initially in the Political Science Department, where I was responsible for the Federalism Project, and more recently in the Federalism Research Centre. Don Aitkin, then head of the department, had flagged federalism as a core issue of Australian politics that had been relatively neglected by Australian political scientists, and in the early 1980s he instituted the Federalism Project to stimulate research. John Warhurst initially ran the project, which entailed facilitating a research network of interested scholars from State universities, producing a newsletter and running an annual federalism conference in Canberra. I went to Canberra and the Federalism Project from Tasmania in 1984, after John left for the Australian Studies Centre in London, and have been at the ANU for a decade with a large part of my time devoted to federal issues.

My constitutional interest goes back two decades to graduate school at the University of Toronto, and in particular to a stroke of good fortune in 1974 at being chosen as a teaching assistant for the joint course taught by Walter Berns and Peter Russell on the Canadian and American constitutions. Both professors attended all classes, and there was a good deal of lively interchange between them and the keen students, many of whom were jostling to get into law school. My enthusiasm for constitutional study having been sparked, I took graduate courses with both of these eminent constitutional scholars and chose to do my PhD thesis on the Australian Constitution with Peter Russell as supervisor and Walter Berns as an adviser. In wrapping up this book and writing the preface, I was delighted to have Peter Russell as a visiting fellow in the Federalism

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Research Centre and to use his recent book, *Constitutional Odyssey: Can Canadians Become a Sovereign People?* (Toronto: University of Toronto Press, 2nd ed., 1993), to sharpen my central argument that the Australian people, in contrast to the Canadians, did constitute themselves as a sovereign people in adopting the Australian Constitution in 1901.

This book champions federalism and the Constitution against an Australian tradition of opposition and neglect. It supports the counter tradition, now becoming dominant, of taking federalism seriously of which S. Rufus Davis has been a leading advocate over a professional lifetime, continuing with his *Theory and Reality: Federal Issues in Australia, England and Europe* (St Lucia: University of Queensland Press, 1995). The book challenges the orthodoxy that assumes and defends parliamentary and party responsible government as the dominant and preferred parts of the Australian political system. It establishes that the Australian people are sovereign and have constituted themselves in a federal polity under a constitution that controls all the other institutions of government, including parliaments and executives with their monarchic forms and responsible government practices. For this reason Australia is properly a federal republic rather than a parliamentary democracy: the people rule through a constitution that is the basic law of the regime and incorporates the checks and balances of such a constitutional system with a federal division of governments and powers.

The book is concerned with political ideas and issues of institutional design rather than practical politics and policy processes. It focuses mainly on the constitutional aspects of federalism, on key parts of the constitutional system such as the Senate and referendums, on issues of institutional design such as combining responsible government with a federal Senate or protecting rights through the division of powers and checks and balances, and on areas of tensions such as between the Labor Party and the Constitution. The coverage is selective — for example, there is a chapter on the Labor Party but not one on the Liberal or National parties. The reason for concentrating on the Labor Party is that Labor has been the main political opponent of federalism and the Constitution since federation whereas the conservative parties have been supportive of the status quo. Where subconstitutional topics such as intergovernmental relations and fiscal arrangements are considered, as in chapters 8 and 9, there is a strong emphasis on the constitutional provisions that broadly shape such areas.

I always had in mind to write a book on federalism while I was at ANU, but my role as coordinator of, and participant in, joint federalism projects and conferences favoured shorter pieces on particular topics. Hence this book is something of a synthesis and has been long in the



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making. Various chapters draw heavily on collaborative work with colleagues and on earlier papers and articles of my own.

I have developed my own ideas and absorbed those of my co-authors in writing a number of joint papers, which I have used in this book. Chapter 3 draws in part on a joint article with John Uhr, a friend and colleague at ANU, 'Australian federal democracy and the Senate', *Public Law Review* 1(4), 1990: 309–28. Chapter 4 draws extensively on a joint article with David Mardiste, then a research assistant at the centre, 'Labor's reconciliation with federalism', *Australian Journal of Political Science* 27(1), 1992: 71–86. Chapter 9 draws partly on a joint article with Cliff Walsh, 'Australian federalism: Developments and prospects', *Publius: The Journal of Federalism* 20(4), 1990: 1–17. My thinking on the compatibility of federalism and increasing globalisation in chapter 10 was developed in writing several joint papers on federalism and the environment with Georgina Lynch who worked at the centre on a number of occasions during her law studies. I would like to thank all my co-authors and colleagues who have assisted and stimulated my study of federalism and the Constitution.

Other parts of the book draw on my own published papers: chapter 1 on 'Regularising the Australian republic', *Australian Journal of Political Science*, Special Issue, 28, 1992: 56–66; chapter 5 on 'The 1988 referendums and Australia's record on constitutional change', *Parliamentary Affairs* 43, 1990: 497–506; chapter 6 on 'Parliamentary responsible government and the protection of rights', *Public Law Review* 4(2), 1993: 100–12; chapter 8 on 'Australian federalism: The challenge of governing in the 1990s', in *Governing in the 1990s: An Agenda for the Decade*, ed. I. Marsh, Melbourne: Longman Cheshire, 1993: 288–312; and chapter 9 on 'Federalism and policymaking', in *Policymaking in Volatile Times*, eds A. Hede and S. Prasser, Sydney: Hale & Iremonger, 1993: 175–92.

As well, I have used unpublished papers presented at seminars and conferences. Chapter 8 draws on papers on 'Concurrent versus coordinate federalism' presented at the centre's Research Advisory Committee seminar and 'The character of Australian federalism: Concurrent not coordinate' presented at the Australasian Political Studies Conference, both in 1991; while chapter 9 uses a paper, 'Ideas about Australian federalism: Misconceptions and consequences' presented at the centre's New Federalism workshop in 1992. Chapters 2, 3, 4 and 7 develop themes from earlier work concerning federalism and its Australian critics, Labor's opposition to federalism and the role of the High Court. These remain core issues for any study of the Australian Constitution and federalism.

The draft manuscript has been read in whole or in part by a number of friends and colleagues who have made helpful suggestions and

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helped me to refine and correct a number of significant points. I would like to thank in particular John Nethercote for his superb editorial assistance, Peter Russell and Rufus Davis who read the entire manuscript, and Paul Finn, Philip Pettit and John Warhurst who read parts. Finally I would like to acknowledge the continuing assistance of Stephanie Hancock, Robyn Savory and Linda Gosnell for their patient secretarial assistance in preparing various drafts of papers and the manuscript. Their congenial fellowship and competence made the centre a delightful place in which to work and write.

I would like to acknowledge the stimulation of colleagues at the Federalism Research Centre: Cliff Walsh who was director until 1993 and Christine Fletcher who was a research fellow. In addition, the centre established an extensive network of scholars from other Australian and overseas universities who were regular visitors to the centre or participants in its activities. My own work and that of the centre benefited enormously from being located in the ANU's Research School of Social Sciences and from participating in the school's centenary project, *Reshaping Australian Institutions* (2001). Geoffrey Brennan, director of the Research School, and John Braithwaite, coordinator of the Reshaping project, have given a major fillip to the study of Australian institutions through this centenary initiative.

This book straddles two strands of the *Reshaping Australian Institutions* (2001) project: the constitutional system and intergovernmental relations streams, of which I have been coordinator. The book's purpose is to establish the basic character of Australia's Constitution so that discussion of its possible reshaping is properly grounded. Too often in the past, and continuing in the current republican debate, those proposing change or defending the status quo have been surprisingly ignorant of the constitutional system that is in place.

Summing up Australia's constitutional system of government as 'a federal republic' is not meant to take one side and provoke the other in the current debate on republicanism versus monarchy. That debate neglects the substantial fact that Australia is already a federal republic. The book explains the deeper constitutional reality that needs to be appreciated before proposals for its reshaping are put forward. There are changes to the Australian constitutional system that might well be made and which I would support; some of these, including formally republicanising the office of head of state, are canvassed in the last chapter of the book. The main problems facing Australia today are not of a constitutional nature requiring constitutional change, however, but concern national policy for a more competitive and open economy while ensuring social justice for all Australians. The institutional reshaping necessary is chiefly at the subconstitutional level: streamlining

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intergovernmental relations, restructuring governmental enterprises, providing domestic compensation for those adversely affected by the impact of international market forces and technological change, and enabling all Australians to achieve the republican ideal of tranquillity of mind secure both materially and spiritually in the enjoyment of their liberty and rights as citizens. The centenary in 2001 provides a national opportunity for appreciating and celebrating the constitutional system of government that we have inherited and ensuring that its principles are appreciated and cherished throughout Australian academic and public life.

Finally, I would like to put on record my own personal position. Growing up as a fourth-generation Australian in rural Queensland, I never considered the Queen and royal family as anything but British and foreign. Having retired British military gentlemen as State governors, which was still the practice then, reinforced the impression of the vice-regal office as an anomalous institution. Being a Catholic, I thought it improper that Australia's head of state should also have to be the head of the Anglican Church. This seemed wrong in principle and caused the monarchy, instead of being a symbol of national unity, to reinforce petty sectarianism and the pretences of a provincial Protestant ascendancy. Moreover, being a democrat, I was opposed to any Australian office of state being hereditary.

Ironically, it was the youthful Queen's visit in 1954 that confirmed for me the alien character of the monarchy. With hundreds of other children from one-teacher bush schools across the Darling Downs I was brought to Oakey, a nondescript country town that boasted an airport, and required to spend a hot and boring day lining the road from the airport. The Queen's flight was late. The Queen had been airsick, we were told, and the cavalcade sped by in a blur. Unlike Prime Minister Menzies, whose fawning obsequiousness at a state function during a subsequent visit seemed to embarrass even the Queen herself, I did not see her passing by so have not loved her till I die. Forty years on I find the monarchy irrelevant and support Australia's quietly regularising its republican constitution by formally republicanising its head of state.

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*For Grove ...*

*Grove J. in appreciation  
and  
Grove G. in anticipation*