CAMBRIDGE

Cambridge University Press
052159751X - Citizens without Rights: Aborigines and Australian Citizenship
John Chesterman and Brian Galligan
Excerpt
More information

Introduction

A citizen, according to Aristotle's famous definition which has shaped western political thinking, is one who shares both in ruling and in being ruled. Citizens as rulers exercise collectively the political prerogatives of authoritative power over the polity, while the self-same body of individuals are the subjects of such rule. This ideal was severely limited in practice for Aristotle and other ancient thinkers, because they thought that most people lacked either the qualities necessary for participating in political life or the privileged circumstances of a leisured life that would enable cultivation of such qualities and make political participation feasible.

The democratisation of politics in modern times has entailed a fundamental reaffirmation of the ancient ideal of citizenship. Democracy entails free and equal individuals forming themselves into a political community in which they, the people, have final authority to rule and in which they constitute government accordingly. As Rousseau expressed it succinctly, the individual is equally a member of the sovereign body that makes fundamental law and a member of the subject body that obeys it. This virtuous circle of citizenship links both sides of the political equation, restraining and civilising political authority on the one hand and on the other ennobling civil obedience because the citizen is obeying the will of a larger collective of which she or he is an active member.

The adoption of the principle of representation in modern times made democracy feasible for large political societies, even if it lowered the ideal of citizenship, for in representative democracies citizens do not participate directly in ruling but only indirectly through voting for those who exercise governmental power. Nevertheless, participation in the process of governing in this indirect way is

© Cambridge University Press www.cambridge.org

CAMBRIDGE

Cambridge University Press
052159751X - Citizens without Rights: Aborigines and Australian Citizenship
John Chesterman and Brian Galligan
Excerpt
More information

fundamentally significant for any individual or group of people, and the denial of the right to participate entails a basic restriction. In a *constitutional* representative democracy like that of Australia, citizens also share the primary role of sanctioning the very system of government, including its key structures and offices, through which they are governed. At the political level, exclusion from citizenship means being cut off from membership of the sovereign body of people and from the ongoing process of collective self-rule. While those who are excluded may be treated well or badly, depending on the benevolence of the regime, they are denied realisation of the fundamental human fulfilment of sharing in the political rule of a self-governing community of people. In other words, citizenship itself is the important thing, not how well non-citizens might be treated. And, in any case, the best guarantee of proper treatment for individuals and groups is full entitlement to, and sharing in, citizenship rights and privileges.

Australia provides a rich political continent for studying citizenship in a modern constitutional democracy. Despite its unpromising beginning in this regard in the late eighteenth century as a series of isolated European penal colonies established by an imperial power through occupation and conquest of the original Aboriginal peoples, Australia, along with New Zealand, soon became something of a laboratory for democratic politics. Transportation of convicts was terminated, colonial self-government easily achieved, democratic innovations such as the secret ballot pioneered and, beginning with South Australia in 1894, female franchise implemented. In the closing decade of the nineteenth century, the Australian Commonwealth Constitution was drafted by elected delegates and endorsed by the people in referendum before being formally passed by the imperial parliament at Westminster. While links with Britain and the formal vestiges of monarchy were retained by deliberate choice, Australia had become one of the most progressive and innovative democracies in the world.

However, the most ignoble side of Australian politics was the treatment of Aboriginal peoples. Under the introduced law, they, by virtue of being born here, were British subjects. Similarly, from 1948, when Commonwealth legislation created the legal entity of 'Australian citizen', Aborigines, along with other Australians, automatically became citizens. However, even though subject to being ruled by the early British and colonial regimes and, after federation, by Commonwealth and State governments, Aboriginal peoples were denied a share in ruling. They had no say about being subjected to such rule, which was imposed by force, and no share in the rights and entitlements that

© Cambridge University Press www.cambridge.org

CAMBRIDGE

Cambridge University Press
052159751X - Citizens without Rights: Aborigines and Australian Citizenship
John Chesterman and Brian Galligan
Excerpt
More information

ordinary citizens enjoyed. This book tells the institutional story of how Aboriginal peoples were subjected to being ruled but were denied a share in citizenship rights and entitlements; how they were treated as citizens without rights in their own land.

As we approach the centenary of federation, which is doubly significant as the centenary of the nation and the centenary of the Constitution, there has been much discussion about the establishment of a republic with an Australian head of state and about formally terminating the monarchic link. This issue has generated a surprising amount of heat and stimulated a good deal of historical investigation and argument about why Australia remained a formal monarchy at federation and what continuation of that status entails. Less prominent, but in our view much more significant than the issue of formal monarchic head of state, is that of Australian citizenship and the treatment of Aboriginal peoples as citizens without rights for most of our colonial and national history.

True, the reconciliation process has been in place for some time and has been given impetus by the 1992 landmark High Court decision in *Mabo v. Queensland*, which recognised native title, and the subsequent passage of the *Native Title Act*. And there is currently a burst of public and scholarly interest in civic education and in the concept of Australian citizenship. There has been a major gap, however, in understanding the institutional definition and development of Australian citizenship. How could Aborigines have been systematically excluded from the key rights and privileges of citizenship while having its formal shell? What is it about Australian citizenship that allowed Aborigines to be citizens without rights and, prior to the 1948 *Nationality and Citizenship Act*, subjects without the normal citizenship rights that other Australian subjects enjoyed?

Understanding the shameful status of Aboriginal people as citizens without rights for much of our political history is not simply a prerequisite for proper reconciliation as we approach the constitutional centenary. It is also necessary for understanding Australian citizenship *per se*. In order to be citizens without rights, as Aboriginal people were, citizenship had to be an empty category, and it was. The Australian founders eschewed putting any core positive notion of citizenship in the Constitution precisely to allow the States to perpetuate their discriminatory regimes and to enable the new Commonwealth parliament to implement a national regime of discrimination. As subsequent chapters show, the States not only continued but tightened up their discriminatory practices while the Commonwealth similarly availed itself of the opportunity by excluding Aborigines from voting and from receiving basic welfare benefits and entitlements.

© Cambridge University Press www.cambridge.org

CAMBRIDGE

Cambridge University Press
052159751X - Citizens without Rights: Aborigines and Australian Citizenship
John Chesterman and Brian Galligan
Excerpt
More information

Citizenship has traditionally been an exclusory category because citizens have basic rights and privileges that non-citizens do not share. The divide between citizens and non-citizens has often depended not so much on geography as on the fact of belonging to a particular race, religion or class, or some combination of these. With the expansion of regimes and the movement of peoples, original inhabitants have at times increased their power and wealth by precluding newcomers from citizenship. The early modern Italian republics like Venice operated in this way, as do some of the modern Arab nations. In such regimes the key divide is between citizens and non-citizens, those who enjoy full political rights and those who do not. In egalitarian Australia, however, subjecthood or citizenship was easily acquired – one simply had to be born here – but at the same time one's formal status as a citizen meant very little. The crucial divide was between those citizens who had rights and privileges and those who were denied them. Particular rights and privileges, from the crucial political right of voting to the social right of mothers to receive the maternity allowance, were controlled by separate legislation and administered by regimes that were characterised by their standard disqualification of 'aboriginal natives' of Australia and 'aboriginal natives' of other Asian and Pacific Island countries.

So, however rich Australia's democratic tradition and political culture may have been, Australian citizenship was empty and barren at its core and blatantly discriminatory in its parts. While such a flawed heritage obviously provides no positive standard for modern citizenship practice, its recognition is essential for mature reflection on Australia's past development as a nation and on its future. Moreover, the institutional definition and development of Australian citizenship that excluded Aboriginal people for so long is a central part of Australian political history and practice which needs to be known and appreciated. This is not a 'black armband' view of history; rather it is the reality of how Australian citizenship was structured and how Aboriginal peoples were systematically excluded. We need to understand and appreciate these realities if we are to have a mature appreciation of our nation, which has been at least partly defined by such practices.

Australians, or at least the majority of Australians who have enjoyed its benefits, have been inclined to take citizenship for granted. Our study of Aborigines and Australian citizenship shows just how precious it is, and how its denial can be a fundamental deprivation for those who are excluded. The Australian case illustrates only too well the significance of each of T.H. Marshall's three elements of modern democratic citizenship – civil, political and social – and how they are interrelated.

© Cambridge University Press www.cambridge.org

CAMBRIDGE

Cambridge University Press
052159751X - Citizens without Rights: Aborigines and Australian Citizenship
John Chesterman and Brian Galligan
Excerpt
More information

According to Marshall's influential account, which has shaped modern thinking on citizenship, there are three main components of citizenship, or three kinds of human rights, which have developed cumulatively during the last three centuries: the civil element, which developed largely in the eighteenth century, consisted of the rights necessary for individual freedom, such as the right to freedom of speech and the right to own property; the political element, which largely arose during the nineteenth century, entailed the right to take part in political processes, most importantly as a voter; and the social element, which has received its greatest definition during the twentieth century, was the third and least easily defined category, to which Marshall most closely connected the educational system and social services. This social element covered a range of rights, from one's right to a modicum of economic security to the 'right to share to the full in the social heritage and to live the life of a civilised being according to the standards prevailing in the society'.[1]

Our account of Aborigines and Australian citizenship, which is a political and institutional one focusing on the constitutional system, legislation, regulations and public administration, explores how Aborigines have been specifically excluded from certain rights in all three of Marshall's categories. We do so not on the assumption that this is the only way to write about the topic of Aborigines and citizenship. A number of writers in Australia have recently been considering the ways in which developments in the recognition of Aboriginal rights may inform new understandings of citizenship.[2] Their work adds to a growing body of literature that is broadening the study of citizenship by concentrating on its less formal aspects.[3] While these less formal social and cultural aspects of citizenship and community structures, practices and values are crucially important and an integral part of the total picture, we leave their articulation to other writers.

Nor do we pretend to speak for Aboriginal people or to give their account of what it was like to be treated as citizens without rights in their own land. It would be inappropriate for us to do so and it is not a task that we have set ourselves. At the same time, it is essential for any student of Australian history to engage with indigenous perspectives on this issue, and this is becoming an easier task, with the growing body of excellent literature that is being written by Aboriginal authors.

This literature, as with Aboriginal perspectives, is diverse. It ranges from the memoirs of political agitators, such as Faith Bandler, Roberta Sykes, Kevin Gilbert and Charles Perkins,[4] to more reflective pieces on what it has meant to grow up Aboriginal in Australia. Books in the latter category often detail moving personal testimonies about the

© Cambridge University Press www.cambridge.org

CAMBRIDGE

Cambridge University Press
052159751X - Citizens without Rights: Aborigines and Australian Citizenship
John Chesterman and Brian Galligan
Excerpt
More information

devaluation of Aboriginal identity that the regimes discussed in this book were so centrally implicated in bringing about. Most famous among these would be Sally Morgan's *My Place*, but others include Margaret Tucker's *If Everyone Cared*, Ruby Langford Ginibi's *Don't Take Your Love to Town* and *Real Deadly*, and most recently Wayne King's *Black Hours*.[5] In addition, Aboriginal academics are now coming through university departments (although still in insufficient numbers) and are contributing to academic debates both in their teaching and writing.[6]

Our focus is on government institutions and practices, combining insights from an interdisciplinary approach that draws from political science, history, law and public policy. We aim to give an account of the public articulation of citizenship and the treatment of Aborigines through constitutional provision, legislative definition, administrative practice and judicial determination.

Citizenship in Australia is complicated because of the multiplicity of governments involved. Prior to federation, the various colonies had established their own regimes to govern Aboriginal people which, although there was a good deal of similarity and copying, differed in important respects, as chapters 1 and 2 on Victoria and Queensland show. For example, Victoria drew a sharp distinction between 'aboriginal natives' and those it accorded the offensive, but administratively much-used label of 'half-castes'. The Victorian government provided meagre sustenance for those in the former category on special stations and forced the latter to merge into white society. Queensland, in contrast, defined 'aboriginal natives' more broadly. If Queensland's treatment was less divisive among Aborigines, it was politically more oppressive because Queensland legislated to preclude Aborigines from voting while Victoria did not. The Commonwealth Constitution was designed to allow this mosaic of discriminatory but somewhat divergent colonial practices to remain in place, as chapter 3 shows.

Federation added a new sphere of national government with large but by no means exclusive citizenship powers. Although the national government lacked a specific power to pass laws with respect to Aboriginal people, the Commonwealth might have enhanced the status of Aborigines by including them in all the rights and entitlements that it controlled, such as the Commonwealth franchise, sickness and disability pensions and maternity benefits. Moreover, it could have used its ample taxing and spending powers to provide for Aboriginal people directly or to leverage better treatment for them from the States. Or when it took over the administration of the Northern Territory from

© Cambridge University Press www.cambridge.org

CAMBRIDGE

Cambridge University Press
052159751X - Citizens without Rights: Aborigines and Australian Citizenship
John Chesterman and Brian Galligan
Excerpt
More information

South Australia in 1911, the Commonwealth could have put in place a model regime for the States to emulate. It did none of these.

Rather, as chapter 4 explains, one of the first and most significant acts of the new Commonwealth parliament was its passing of the *Commonwealth Franchise Act 1902*. This legislation is justly famous for enfranchising women but, and this is not so well known, it barred Aboriginal people from the vote. Instead of adopting the best State practice of the time, as it did in following South Australia and Western Australia to enfranchise women, the Commonwealth followed Queensland and Western Australia in adopting the worst practice by excluding Aborigines from the vote.

This exclusion was championed by senators from Western Australia and Queensland and was achieved through an amendment to the franchise bill which eventually won support in both houses of parliament. Such exclusion went further than the policy in the other four States, as was forcefully pointed out by the government spokesman, Richard O'Connor, whose rhetoric stands as an indictment of Australia's treatment of its Aboriginal people for the next sixty years:

> It would be a monstrous thing, an unheard of piece of savagery on our part, to treat the aboriginals, whose land we were occupying, in such a manner as to deprive them absolutely of any right to vote in their own country, simply on the ground of their colour, and because they were aboriginals . . . Although the aboriginals in New South Wales, Victoria, Tasmania, and South Australia, had the right to vote through all these years . . . now under the Commonwealth, with the liberal views we are supposed to entertain and to bring into the legislative field, we are asked to take away from the sons of those people for ever the right to vote.[7]

Yet, despite such rhetoric, the Commonwealth did precisely that and set the legislative paradigm for excluding 'aboriginal natives' from subsequent citizenship rights and entitlements.

The Constitution was not to blame for such exclusion of Aboriginal people, as chapter 3 explains. Out of deference for the ongoing democratic practice that would determine such matters, the Constitution was drafted so as not to encroach unduly on the established regimes of the States, and it provided no positive standard against discrimination. The Constitution barely mentioned Aboriginal people, and the two occasions on which it did were by way of exclusion – from the section 51(26) race power and the section 127 census count. Contrary to widespread misunderstanding, such exclusion did not require or entail exclusion from citizenship. That was done through normal legislation and administrative practices by successive parliaments, governments and bureaucrats and was undone by amending and changing those discriminatory laws and practices, a

© Cambridge University Press www.cambridge.org

CAMBRIDGE

Cambridge University Press
052159751X - Citizens without Rights: Aborigines and Australian Citizenship
John Chesterman and Brian Galligan
Excerpt
More information

process that largely occurred in the 1960s. Just as Aboriginal people were prevented from voting by the 1902 *Commonwealth Franchise Act*, they were granted the Commonwealth vote by 1962 amendments to the successor electoral Act.

After federation, as chapter 5 shows, the States tightened their discriminatory regimes and became increasingly more authoritarian in dealing with Aborigines. This was particularly the case in the 1930s, when it became clear that the Aboriginal race was not going to die out. The emphasis in Aboriginal policy shifted from protecting the last members of an ancient people to confining and regulating what white society considered to be an undesirable racial minority. Powers to remove Aboriginal people to reserves and keep them there under tight controls were increased. There was also more concern with merging or absorbing 'half-castes' into white society, as procedures for taking children from their mothers and communities were refined.

In response to such increased oppression, Aboriginal people became more effective in organising and demanding their rights in the 1920s and 1930s. But achieving the ordinary rights of citizenship was a slow and arduous process that was complicated by the patchwork of Commonwealth, State and Territory jurisdictions, as chapter 6 documents. Gaining formal 'Australian citizenship', along with other Australians in 1948, entailed no acquisition of basic citizenship rights for Aborigines. As Garfield Barwick pointed out in reiterating the legal structure of citizenship, there were 'nine different "citizenships" in Australia' and each had its own set of qualifications and disqualifications which were enshrined in discrete pieces of legislation. The States varied in the extent of their oppressive laws and harsh discretionary powers, with Western Australia, Queensland and the Northern Territory (under Commonwealth administration) having the largest Aboriginal populations and the most severe regimes. Moreover, the States often controlled, either formally or informally, the exercise of Commonwealth rights. For example, in 1949 the Commonwealth vote was extended to those Aborigines entitled to vote in the States, but of course this excluded Aborigines in Western Australia and Queensland. Many other Aborigines in those States – such as those officially labelled as 'half-castes' and, after 1949, those who were or had been members of the defence force – were entitled to the Commonwealth franchise in their own right, but were never enrolled. The 1961 House of Representatives Select Committee, whose report led to the Commonwealth's enfranchisement of all adult Aborigines in 1962, found that only 57 out of 659 Torres Strait Islanders who served in the Torres Strait Islands Regiment were enrolled in a local electoral division.

© Cambridge University Press www.cambridge.org

CAMBRIDGE

Cambridge University Press
052159751X - Citizens without Rights: Aborigines and Australian Citizenship
John Chesterman and Brian Galligan
Excerpt
More information

As chapter 6 also shows, the 1967 referendum provided no legal watershed in the citizenship status of Aborigines. While its passage was broadly contemporaneous with the removal of various restrictive measures – a factor that has probably led to much of the myth that surrounds the 1967 referendum – the referendum did not grant Aborigines citizenship. All voting restrictions, for instance, had already been dismantled when the referendum was passed. The referendum merely altered the Constitution's two references to Aborigines, giving the Commonwealth the power to pass laws specifically for Aborigines and requiring Aborigines to be counted in census statistics. While of more limited legal significance than many commentaries upon it suggest, the 1967 referendum was still symbolically very significant both for Aborigines, who worked tirelessly for its success, and for Australians generally, who voted overwhelmingly for it. With the support of just over 90 per cent of voters this was far and away the most popular referendum ever carried. The full dismantling of restrictions to citizenship rights and entitlements for Aborigines, however, was a much more painstaking and drawn-out process.

In our final chapter we consider how the recent recognition of indigenous rights – particularly native title to land – represents a political step forward for Aborigines, beyond the citizenship rights belatedly obtained by them. This political step forward is still far from being a social step forward, but it has already been subject to criticisms that, as we show, have bordered on the hysterical. Whether this latest development in the rights of Aborigines will, like the legislation for the first federal franchise, see the Commonwealth government in its least noble light, remains to be seen.

Our book gives a detailed account of the institutional definition and development of Australian citizenship as it has applied to Aborigines from colonial times, through federation and up to the present time when indigenous rights to land have been recognised and claims to self-determination are being debated. Our study examines the patchwork of variegated State and Commonwealth regimes, and shows how Aborigines were citizens without rights for much of this time, and were subjected to discriminatory practices of quite extraordinary severity and detail. The sheer amount of legislative ingenuity and administrative effort that went into devising and maintaining these discriminatory regimes is truly astonishing, and the formalised injustice and inhumanity that they embodied is shameful. Researching and documenting these regimes has taken years of painstaking work, even though our study is by no means comprehensive.

© Cambridge University Press www.cambridge.org

CAMBRIDGE

Cambridge University Press
052159751X - Citizens without Rights: Aborigines and Australian Citizenship
John Chesterman and Brian Galligan
Excerpt
More information

Our purpose in so doing is first and foremost the scholarly one of giving an account of this important topic. While the story of Australia's treatment of its Aboriginal peoples as citizens without rights is deeply shameful, this is not a good reason for not knowing about it or acknowledging it. As Australians take stock of a century of nationhood in the closing decade of the twentieth century, we can be justly proud of many achievements as a democratic and decent nation. But we must also recognise the terrible injustice that has been done to Australia's indigenous people through conquest and discrimination. This is so fundamental a political truth about Australian citizenship and Australia's founding as a nation that its omission or concealment entails distortion or gross dishonesty. The challenge for the twenty-first century – our second century of nationhood – is to recognise the special status of indigenous people and their rights not only to land but also to self-determination within the Australian nation.

A central theme of the book is that the citizenship of all Australians is interconnected with that of Aborigines. Treating Aborigines as citizens without rights fundamentally compromised Australian citizenship in the past because, to allow such discrimination, citizenship had to be an empty concept, even a deeply hypocritical one. Working out a satisfactory system of self-determination for indigenous people provides Australians with a rich opportunity to redefine democratic citizenship so that active sharing in ruling, which is the nobler part of citizenship, is enhanced not only for Aboriginal people but for all Australians.

© Cambridge University Press www.cambridge.org