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978-0-521-88864-6 - The Constitution of a Federal Commonwealth: The Making and Meaning of the Australian Constitution

Nicholas Aroney

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THE CONSTITUTION OF A FEDERAL COMMONWEALTH

By analysing original sources and evaluating conceptual frameworks, Nicholas Aroney discusses the idea proclaimed in the preamble to the Constitution that Australia is a federal commonwealth. Taking careful account of the influence which the American, Canadian and Swiss Constitutions had upon the framers of the Australian Constitution, the author shows how the framers wrestled with the problem of integrating federal ideas with inherited British traditions and their own experiences of parliamentary government. In so doing, the book explains how the Constitution came into being in the context of the groundswell of federal ideas then sweeping the English-speaking world.

In advancing an original argument about the relationship between the formation of the Constitution, the representative institutions, configurations of power and amending formulas contained therein, fresh light is shed on the terms and structure of the Constitution and a range of problems associated with its interpretation and practical operation are addressed.

NICHOLAS ARONEY is a Reader in Law at the T. C. Beirne School of Law, University of Queensland, a member of the Australian Association of Constitutional Law and a fellow of the Centre for Public, International and Comparative Law at the University of Queensland.

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[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.

James Bryce (1889)

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PREFACE

My present interest in the federal dimensions of the Australian constitutional system was triggered some years ago when writing on the subject of constitutional implications. At the time I was examining a line of cases in which the High Court of Australia had held that the Constitution contained an implied freedom of political communication. One of the arguments apparently accepted by the Court was that since the Constitution was founded upon the sovereignty of the Australian people, it accordingly made provision for a system of representative democracy and that various political freedoms, such as freedom of speech, were necessary in order to preserve the integrity of the system. My central criticism of this and similar lines of argument was that the more radical of these implications were not warranted because the multiple steps in the reasoning, while individually plausible, had the cumulative effect of producing an outcome far removed from the text and structure of the Constitution.¹

When considering these arguments, however, it was necessary for me to bear in mind another line of High Court decisions in which constitutional implications had been derived from the federal nature of the Constitution. In these cases it had been held that the Commonwealth Parliament could not enact legislation which would prevent the states from continuing to exist and function as autonomous, self-governing bodies politic. A question I had to face was whether these ‘federal’ implications – in contrast to the ‘democratic’ ones I had criticised – were warranted. Moreover, in other important cases decided by the High Court it had appeared that federal and democratic implications were in conflict and it seemed necessary for the Court to determine which would prevail.

¹ Nicholas T. Aroney, *Freedom of Speech in the Constitution* (Sydney: Centre for Independent Studies, 1998).

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Issues such as these forced me to ask to what extent and in what respects democratic and federal principles were embodied in the Constitution. What is more important, the federal or the democratic aspects of the Constitution, and how do these principles relate to one another? A survey of the Constitution's text suggests that while democratic provisions are very evident, federal principles permeate almost every section. Furthermore, the preamble to the Constitution states that the Commonwealth of Australia is a 'federal commonwealth'. What does this mean? What *kind* of union was envisaged, and why?² This book is the result of an extended inquiry into questions such as these.

Throughout this period I have benefited substantially from the encouragement and guidance of many colleagues who have read and commented upon the manuscript, including especially Greg Craven, Jeff Goldsworthy, Donald Kommers, Gabriel Moens, Suri Ratnapala and George Winterton.

The book includes a substantial study of American, Canadian and Swiss federalism, and I have been able to benefit from academic interaction with many scholars in these three countries through the support of the T. C. Beirne School of Law at the University of Queensland, together with a number of overseas research institutions. The Pew Charitable Trusts enabled me in 1998 to participate in a highly stimulating seminar on political theory led by Nicholas Wolterstorff at Calvin College, and I wish to extend my hearty thanks both to him and to the organisers and participants of the seminar. Special thanks in this respect are extended to Bill Brewbaker and Mark Hall for reading and commenting on draft chapters of this book. I am also very grateful to John Witte, Director of the Law and Religion Program at Emory University Law School, who in 1999 provided me with an office, enlightening discussion and the opportunity to present my research to a discerning audience. In particular, I must acknowledge my debts to Johan van der Vyver, Charles Reid and the late Harold Berman, whose encouragement and example will be long remembered. William Buss also at this time very kindly gave me the opportunity to present my research to faculty at the University of Iowa College of Law. Similar hospitality was shown to me by the late Daniel Elazar of the Centre for the Study of Federalism at Temple University. Professor Elazar's passing is a great loss; the 'covenantal' approach to federalism applied in this book owes much to

² Jed Martin, 'Explaining the Sentimental Utopia: Historians and the Centenary of Australian Federation' (2003) 18(1) *Australian Studies* 211, 219.

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him. In this connection I need also to thank Ellis Katz, Donald Lutz and Robert Williams for their comments, advice and encouragement.

In 2000, the United States Supreme Court Historical Society of Washington DC enabled me to present a paper on the colonial origins of US federalism to a seminar led by Jack Rakove, Akhil Amar and Maeva Marcus. My thanks are extended to them and to all the participants for stimulating discussions. Between 2001 and 2003, I again made a number of visits to Switzerland, Germany, the Netherlands and the United Kingdom, and was given very helpful guidance by numerous scholars, among whom I must mention Alexandre Fasel, Thomas Fleiner, Max Frenkel, Anton Greber, Walter Kälin, Wolf Linder, Daniel Thürer, Roland Vaubel, Stephen Weatherill, Dieter Wyduckel and the late Alis Koekkoek. Alis in particular organised for me to present my research at the Schoordijk Institute at Tilburg University; his kindness and integrity will long be remembered. Among Canadians, I also owe particular debts to Peter Hogg, Thomas Hueglin, Victor MacKinnon, Wes Pue and Barry Wright. Others I must mention who have commented on aspects of the argument include Ruben Alvarado, Bob Destro, Daniel Dreisbach, James Hutson, Gordon Hylton, Barry Shain, Ryan Streeter, Graham Walker, Peter Wallace and Todd Zywicki.

I am especially grateful to Finola O'Sullivan at Cambridge University Press, who embraced the idea of this book with great enthusiasm, and to many members of the editorial staff for their attention to detail.

Particular thanks are also due to Colin Hughes and John Nethercote, both of whom read the entire typescript closely and provided me with pages of suggestions for improvement. To these and many others, I must express my gratitude. The book is much better than it would have been because of their helpful advice, although I am of course responsible for its remaining shortcomings.

Most importantly, however, I wish to thank my wife, Lisa, for her love, constancy and support. To her I owe more than I can say.

A note on terminology

The Commonwealth of Australia came into being when the six self-governing colonies of Australia were united into a federal commonwealth by force of the Commonwealth of Australia Constitution Act 1900 (UK). In this book, I use the term 'colony' to designate the six colonies prior to federation and use the term 'state' to designate them subsequent to federation.

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