Australian Federalism and the Debate Over a Bill of Rights

Brian Galligan
Australian National University

Rainer Knopff
University of Calgary

and

John Uhr
Australian National University

Successive Australian Labor governments have tried to nationalize standards for the protection of rights either by means of a statutory bill binding on the states under the Commonwealth's much expanded external affairs power, or by further entrenching specific rights in the Constitution. All these attempts have failed for a variety of political and constitutional reasons including, importantly, the strength of Australia's established system of federalism and parliamentary responsible government. The article examines the constitutional issues underlying the debate over a bill of rights for Australia, arguing that Labor's attempts to implement a bill of rights have been inspired by a preference for more centralized government whereas the defeat of such initiatives indicates the established strength of Australian federalism.

During the 1960s, the Australian Labor Party committed itself to a bill of rights, and during periods in national office in the 1970s and 1980s, Labor governments have attempted to bring in various statutory bills of rights that purported to bind the states by means of the external affairs power or to entrench additional rights in the Constitution. This article gives an account, in terms of Australian constitutional principles and politics, of what was entailed in those initiatives and suggests why they failed. Our intention is to articulate the arguments of principle which underlie those of partisan politics. We argue that the various proposals entailed nationalizing rights according to a more centralized constitutional model that was at odds with the existing model of federalism and responsible government. We reformulate the conventional thesis about Australia's supposed "hybrid" constitutional model in terms of a more positive model of Australian federal democracy.

The various initiatives for nationalizing rights were defeated by means of the federal parts of the Australian Constitution: the Senate and the referendum process, after stiff opposition from the Liberal and National parties and various states. It is perhaps ironic that institutions modeled on the
American federal design should be used to defeat bills of rights when an important purpose of American federalism was precisely to protect rights. However, a national bill of rights is, in important respects, a centralizing instrument and has been perceived as such by opponents in Australia. The defeat of all of Labor's attempts at bringing in a national bill of rights indicates the vitality of Australian federal democracy, and the incorrectness of popular claims of the "ever-increasing centralization" of Australian federalism.¹

FEDERALISM AND RIGHTS

Federalism divides powers between the national and state governments. The method of such division in the Australian Constitution, following the United States model, is to enumerate Commonwealth powers and guarantee the residual to the states. The Australian founders did not follow the American example and entrench a bill of rights in the Constitution, nor did they give the Commonwealth a power to make laws with respect to human rights.² Rather, they relied on accustomed British safeguards of responsible parliamentary government and the common law. Of course, those traditional means were consciously restructured within the federal parliamentary system and reorganized in curious ways. For instance, the common law and its statutory modifications and codifications (as with criminal law in some states) were left to the states, but in a significant departure from the American model, the High Court was made the final court of appeal for state as well as Commonwealth law.³

Advocates of a national bill of rights claim that the existing system is unsuitable for adequately protecting rights and honoring Australia's international obligation to do so. Responsible government has become more of a threat than a safeguard to individual rights, it is claimed with some justification, because modern governments that have grown enormously in size become intrusive and unaccountable, being increasingly dominated by the party executive. In addition, the other venerable bastion, the common law, has been overwhelmed by statutory law. The proffered solution of a national


Debate Over Bill of Rights

bill of rights, either entrenched in the Constitution or binding on the states under the Commonwealth’s external affairs power, has serious implications for federalism that are usually not given due weight. Our intention is to bring to the fore the principles involved in the recent debates that were only partly recognized by the opponents of a bill of rights, and rarely given due credit by proponents or academic commentators.

Australian attempts to reform federalism through incorporating a national bill of rights echo previous debates in comparable federal countries. The classical formulations first arose in the United States during the debates over the ratification and amendment of the federal Constitution to incorporate a bill of rights. The framers of the Australian Constitution had that example of reformed federalism before them during the federation conventions of the 1890s, but declined to follow it. Australia’s more recent reformers have also had the example of the federation of Canada with its recent Charter of Rights and Freedoms as a powerful model of reformed federalism.

These two examples illustrate how different institutional variations of a federal polity, one congressional and the other parliamentary, have incorporated a national bill of rights. Behind both developments is the common assumption that citizenship in a federal polity either requires or is enhanced by a national bill of rights. The American debate emphasized the protective qualities of a bill of rights in helping to secure the rights of the individual citizen against the abusable powers of national government. The Canadian debate turned on the more positive qualities of a bill or charter of rights in promoting citizens’ rights of access to the powers and especially to the benefits available through the national government and provincial authorities. The common feature, which could well have encouraged Australian reformers, is the attempt to use a bill to guarantee equal national citizenship, in the very real sense of equal rights of access to a range of common citizenship rights as well as benefits and services nationwide. Thus, reformers can argue that citizens in a common polity or national community should not be subject to different levels or degrees of access either to the political process or to sharing in crucial public goods, such as education or health care.

Australians are familiar with, and indeed by comparative standards have taken to extreme lengths, the process of fiscal equalization within a federal system. Fiscal equalization is an obvious means of nationalizing standards of public service delivery through equalizing the capacity of states to provide services at a common level regardless of their taxation capacity or expenditure differentials due to population size, economic condition, or natural geography. Moreover, there has been a substantial proliferation in national policies for education, health, and social welfare during the postwar decades by means of Commonwealth “conditional” or “specific purpose” grants. Such national policies have supplemented, and, in some instances, such as tertiary education, supplanted state policies in these areas.4 Such na-

4See Russell Mathews, “Fiscal Federalism in Australia: Past and Future Tense,” Reprint Series No. 74 (Canberra: Centre for Research on Federal Financial Relations, Australian Na-
ionalization of fiscal and policy areas has not been extended to rights.

A national bill of rights that binds the states is a legal or constitutional device for providing common standards of political and legal standing and access for individual citizens regardless of state boundaries. While such an instrument is designed to enhance the position of the citizen and constrain intrusion or unfair treatment by both orders of government, it is nevertheless a national instrument that standardizes important aspects of politics and law that might otherwise vary among states. Obvious Australian examples of the latter are criminal law and state electoral arrangements. In recent decades, Australian Labor governments have attempted to impose national standards for citizenship and individual rights by two different methods: either a statutory bill of rights relying on the Commonwealth's constitutional power over external affairs together with international treaty obligations to place certain rights issues "beyond federalism," or incorporating international standards into the national constitution as a charter of citizenship rights to be protected by the courts.

All these attempts to implement an Australian bill of rights have failed, partly because of the strength of reasons that were articulated by opponents of such bills in the historic debates of the reformed federations referred to earlier. The Canadian experience is perhaps too recent to interpret properly, although the nationalist thrust of the Charter was a major purpose of its initiator, Prime Minister Pierre Trudeau. 5 Herbert Storing, however, has rehabilitated the arguments of the earlier American Federalists. 6 The heart of their argument against a bill of rights is that a federal constitution is itself a bill of rights, with a division of representation and powers among inter-related spheres and institutions such as to guarantee due process in government. The very federal design of the governance process—notably the selective division of powers and responsibilities between national and state governments, and the balance of popular and state representation in a bicameral legislature—promotes rights-oriented citizenship.


LABOR'S ATTEMPTS AT NATIONALIZING RIGHTS

Successive federal Labor governments have tried a range of measures for nationalizing rights, the most ambitious being a bill of rights that purported to bind the states under the external affairs power. While formally committed to a constitutionally entrenched bill, Labor’s initiatives have been with three successive statutory bills, and in 1988 a modest extension of entrenched rights to bind the states. These attempts have all failed. Although, in each instance, there has been a range of reasons for the failure, including political incompetence and strong opposition on nonfederal grounds, federal issues have been important elements of the controversy and federal processes have been constraining factors.

Murphy’s Bill of Rights

Labor’s first bill of rights, that followed fairly closely the wording of the International Covenant on Civil and Political Rights, was introduced into Parliament by Attorney General Lionel Murphy in November 1973. Although the reach of the Commonwealth’s power over external affairs was somewhat uncertain at the time, it was considered that close adherence to the wording of an international instrument would be a necessary qualification for validation of the bill by the judicial branch of government in a challenge that would invariably be brought by opposing states. Murphy preferred an entrenched bill of rights, but in settling for a statutory one, he was determined to make it binding on the states:

Ideally, in my view, a Bill of Rights should be written into the Australian Constitution. . . . But in the absence of a constitutionally entrenched Bill of Rights, it is proposed that those rights should be set out in legislation of this Parliament, so far as it is within the powers of the Parliament to do so. The legislation will be binding on Australian, state and local officials and on state parliaments. Only this Parliament will be able to abrogate the rights thus established, and I would hope this Parliament would not lightly subtract from rights guaranteed by this legislation.7

The constitutionality of this ambitious Commonwealth bill was never tested, however, because it was abandoned by the government in the face of intense opposition. Partisan lines had already emerged in debate over a bill of rights in the Constitutional Convention. There, rugged state premiers, such as Sir Charles Court of Western Australia, bluntly opposed any such Labor initiative as “political opportunism” masquerading as “starry eyed idealism.”8 Other state spokesmen branded Murphy’s real purpose as being “to assert a Commonwealth domination over the states.”9 With intense

9E. A. Willis, with whom Dr. Forbes concurred, “In Regard to the Issue of a ‘Constitutional
criticism from vocal interest groups, Murphy's bill of rights had little chance of weathering the political and institutional checks of the system. A majority of unfriendly state governments orchestrated opposition by concerned groups, while a hostile Senate, popularly elected and therefore confident of its democratic legitimacy, effectively blocked any chance of the bill being passed by Parliament. Hence, it was abandoned in the lead-up to the 1974 double dissolution and election.

**Anti-Discrimination and Koowarta**

The Whitlam government was more successful in passing specific anti-discrimination legislation that bound the states. A Racial Discrimination Bill that relied on the International Convention on the Elimination of All Forms of Racial Discrimination was introduced at the same time as the unsuccessful Human Rights Bill and passed in 1975 after lengthy debate and some amendment. The act set up the office of Commissioner for Community Relations to promote its purpose of eliminating racial discrimination in such areas as employment, housing, and access to services and facilities. The appointment of Al Grassby, a colorful ex-Labor minister, ensured that the office had a high public profile. Grassby continued as a controversial commissioner under the Fraser Liberal Coalition government, which came to office in late 1975. Subsequently the Liberals set up the more extensive Human Rights Commission in 1981 that subsumed the office and functions of the Commissioner for Community Relations.

A particular target of the Whitlam government's Racial Discrimination Act was Queensland's discriminatory laws concerning Aborigines and Torres Strait Islanders. Not surprisingly, then, the constitutional challenge that was eventually mounted came from Queensland in the *Koowarta* case (1982). In this case, the High Court upheld the Commonwealth's legislation as a valid exercise of its Section 51(xxix) "external affairs" power on the ground that the act closely followed the international convention ratified by Australia. The judges were deeply divided, however, and the 4–3 majority could not agree on a common rule of interpretation. Three judges held that Section 51(xxix) was satisfied by any matter that became the subject of an international treaty, whereas the fourth majority judge, Stephen, held that some inherent attribute of "international concern" was required for Commonwealth legislation to so qualify.

**Tasmanian Dam Case**

The following year, in a landmark decision in the Tasmanian *Dam* case (1983), the Court affirmed the sweeping interpretation of the external af-
fairs power favored by the other three majority judges in Koowarta. Two of the judges from the earlier case, including Stephen, had been replaced on the Court, but a new majority of four rejected the Stephen qualification that restricted the sorts of things that could be brought under external affairs. Being the subject of a bona fide treaty was certainly enough, and perhaps that might not even be necessary, provided the matter were one of genuine international concern for the national government. This particular case upheld bold legislation of the newly elected Hawke Labor government preventing the Tasmanian Electricity Commission from building a hydroelectric dam on the Gordon-below-Franklin River in wilderness country that had been listed on the World Heritage List, maintained under the World Heritage Convention.12

The scope for Commonwealth invasion of traditional state jurisdictional areas sanctioned by the Dam decision was enormous, as both majority and dissenting judges affirmed. Mason, the senior majority judge who has subsequently been appointed chief justice, approvingly listed numerous examples of international agreements covering an extensive range of humanitarian, cultural, and idealistic objectives. "Indeed," he said, "the lesson to be learned... is that there are virtually no limits to the topics which may hereafter become the subject of international co-operation and international treaties or conventions."13 That was precisely the bitter complaint of the minority, for as Chief Justice Gibbs emphasized: "The division of powers between the Commonwealth and the states which the Constitution effects could be rendered quite meaningless if the Federal Government could, by entering into treaties with foreign governments on matters of domestic concern, enlarge the legislative powers of Parliament so that they embraced literally all fields of activity."14 The consequence in this, as in other major constitutional cases, of using a literalist and expansive method to interpret Commonwealth powers inevitably leads to their expansion at the expense of the states' residual powers. As Brennan summed up the centralizing impact of the Court's method of interpreting Commonwealth powers in a plenary way irrespective of the effect on the states: "the position of the Commonwealth... has waxed; and that of the states has waned."15

Evans' Bill of Rights

The Dam decision was greeted enthusiastically by Labor Attorney-General Gareth Evans, as confirming the Commonwealth's constitutional ability to proceed with his statutory bill of rights to bind the states. The Evans bill was a somewhat weaker and looser version of the earlier Murphy legisla-

12 The area was nominated by the previous Fraser Liberal Coalition government in 1981 at the request of the then Lowe Labor government in Tasmania, and listed by the World Heritage Committee in 1982.
14Ibid., p. 475.
15Ibid., p. 528.
 tion. Nevertheless, it was touted as the "centerpiece" of a new human rights package that included strengthening and expanding the Human Rights Commission and tightening up the Racial Discrimination Act. Although intended to be "a shield rather than a sword," the Evans bill was based on the International Covenant on Civil and Political Rights and was to be enacted in reliance on the external affairs power. Evans blundered in circulating copies of the draft bill to selected individuals while withholding it from public scrutiny until after the 1984 election because of the likely controversy it would generate. Opponents, such as the wily Queensland premier, had a field day repudiating this shadowy instrument. Premier Bjelke-Petersen objected to the investigatory mandate proposed for the Human Rights Commission in state affairs, and to having Commonwealth appointed judges determining state matters. It was "an audacious attempt to restructure Australian political and social life to meet the demands of a power-hungry Commonwealth Government bent on the destruction of the states and the establishment of a socialist republic," he claimed with typical exaggeration. Evans' botched attempt at a bill of rights was abandoned by the reelected Hawke government, and Evans was moved to a different portfolio.

Bowen's Bill of Rights

Labor's third attempt at a statutory bill of rights was just as inept and unsuccessful, even though the instrument had been further watered down and was not to apply to the states. The Australian Democrats, a small party favoring a bill of rights and controlling the balance of power in the Senate, criticized the Bowen bill because it was ineffectual. This did not deter opposition parties and groups from again launching a spirited crusade of vilification. The bill died in the Senate where the opposition parties mounted a concerted filibuster.

The Constitutional Commission

Meanwhile, Attorney-General Bowen had turned the more substantial question of an entrenched bill of rights over to a hand-picked Constitutional Commission that was appointed to carry out a thorough review of the Constitution with a view to "reforming" and modernizing it on the occasion of the 1988 bicentenary. The Constitutional Commission, made up of Commonwealth appointees, superseded the Constitutional Convention in which the states and local government were represented. The convention had been a useful forum for periodic discussion of constitutional issues and had met in five plenary sessions between 1973 and 1985. Although a cumbersome body that was increasingly paralyzed by partisan and Commonwealth-state

16Gareth Evans, "Commissions, Contempts and Civil Liberties," Address to conference organized by Centre for Continuing Education (Canberra: Australian National University, 1984). Also Draft Australian Bill of Rights 1984, subsequently released by Attorney-General Bowen.

17Canberra Times, 24 October 1984.
rivalries, the convention was credited with preparing the groundwork for the 1977 referendums in which three out of four proposals were carried.

Unlike the Constitutional Convention that was initiated by the states and broadly supported by the opposition parties, the Constitutional Commission had no state support and was repudiated by the opposition. The opposition coalition parties threatened to wind it up if elected to office; when that failed to eventuate, they waged an effective campaign of denigration. Nor were many on the Labor side very enthusiastic with state Labor premiers, such as John Cain from Victoria, favoring the previous Constitutional Convention in which state political leaders had a direct voice. Moreover, Cain and other state premiers had a different reform agenda that centered on redressing the extreme fiscal imbalance in Australian federalism. In any case, the federal government had not demonstrated any pressing need for a new round of constitutional review and revision, nor was there much public interest in the work of the commission.

The 1988 Referendums

In order to get some proposals before the people during 1988, Bowen had the commission make an interim report covering items that the Government might put to referendum. In so doing, he compromised further the independent standing of the commission, which was seen as furthering the Government's constitutional strategy. This was exacerbated during the referendum campaign when the chairman of the commission and other commissioners endorsed the Government's proposals, even though the one seeking a four-year term for Parliament substantially altered the commission's recommendation. The four proposals put to referendum in September 1988 were for four-year maximum terms for members of both houses of Parliament; a proposal for "fair and democratic" parliamentary elections throughout Australia; recognition of local government; and the extension to the states of three constitutional guarantees of rights that already bound the Commonwealth. These were the right to trial by jury, to freedom of religion, and to fair terms for persons whose property is acquired by any government. The first two proposals concerning four-year parliamentary terms and "fair and democratic" elections extended the powers of the federal government over the Senate and the states. On the first matter, the commission had recommended a four-year maximum term for the House of Representatives with a bar on elections before three years, and an eight-year term for the Senate

---

19For critical discussion of this, see Chapters 6 and 10 by Bhajan Grewal and Cliff Walsh in *Australian Federalism*, ed. Brian Galligan (Melbourne: Longman Cheshire, 1989).
that would have retained the ratio of the existing three and six year cycles. The Government’s proposal that dropped the three-year minimum term and made the Senate’s term coterminous with that of the House would have enhanced significantly the prime minister’s discretion to call elections for both houses whenever it suited him. While some advocates argued that the Senate’s authority would be enhanced by a shorter term that would make it more representative, the opposition branded it as “effective castration of the Senate behind the camouflage of the four-year term for the House of Representatives.”21 The second proposal, although beguilingly attractive, referred to a complicated bill that sought to impose “one vote, one value” on the states as well as the Commonwealth. The third and fourth proposals, for recognizing local government and extending three existing constitutional rights to cover the states as well as the Commonwealth, were considered by many as palliatives to attract support for the overall package.

The rights proposal, however, proved the most contentious and received the lowest support, only 31 percent, of any referendum proposal ever put to the Australian people. Opponents who had been stirred up by the previous Labor attempts to bring in a statutory bill of rights saw the fourth proposal as the thin edge of the wedge. The Constitutional Commission had given notice in its interim report that it would be recommending that a whole new chapter incorporating a substantial bill of rights be added to the Constitution. The text for this was appended to the interim report as Bill No. 13, titled “A Bill to alter the Constitution so as to guarantee certain rights and freedoms.”22 However, the justification for such a fundamental change to the Constitution had to wait for the final report that was not issued until after the referendum. Strategically this was a mistake, and for the opponents of a bill of rights it was further evidence that the commission had essentially a Labor view of constitutional revision. All four referendum proposals were overwhelmingly rejected, with the “No” vote running 2-1 against the “Yes” on virtually all questions in all states. After such a resounding rejection of its proposals, the Hawke government acknowledged that constitutional change was a dead issue. Subsequently, when the Constitutional Commission’s final report was published with an elaborate argument in favor of a whole new chapter guaranteeing rights and freedoms in the Constitution,23 it was universally ignored.

TWO MODELS OF THE AUSTRALIAN CONSTITUTIONAL SYSTEM

Underlying the attempts by federal Labor governments to impose national standards for the protection of rights is a constitutional view or preferred

model that is at odds with the established Australian constitutional system in important respects. In this section we articulate the established Australian model, which is a compound of federalism and parliamentary responsible government, and contrast this with the alternative rights model proffered by reformers who favor a bill of rights.

The Australian Model

The form of democracy provided by the Australian Constitution combines features of federalism with traditional parliamentary responsible government. This blend of institutions was the subject of great debate within the constitutional conventions of the 1890s that drafted the Constitution. The founders opted for both federalism and responsible government even though they recognized that certain features of the combination might become unworkable if pushed to unreasonable limits and despite dire warnings from some that federalism would kill responsible government or, more likely, responsible government would kill federalism. The debate was joined over the powers of the Senate, in particular its powers over money bills, which were seen as crucial for responsible government. Federalism required a strong Senate with power over all legislation including money bills, whereas responsible government presupposed the fiscal supremacy of the lower house of Parliament in which the political executive was located and to which it was primarily responsible. The founders provided no “mechanical” solution for the resolution of institutional conflict that might develop in this area, but left its practical working out to a robust sense of British constitutionalism that traditionally did not require complete specification of constitutional rules.

A form of responsible party government emerged very early in the life of the Commonwealth, as is documented in Reid and Forrest’s recent history of the Commonwealth Parliament. The Senate demonstrated that it was determined to behave much more as a party house than a states house, yet it also accepted the primacy of the lower house as the house of government. However, the potential of the system to protect fragmented or loose parties encouraged early, if only occasional, expressions of a local variant of checks and balances quite removed from party government as practiced at Westminster. The hybrid model left room for considerable latitude in determining who was responsible for governing what. As Reid and Forrest note, the working out of Australian parliamentary government has involved an indeterminate clash between executive notions of mandate and parliamentary notions of public accountability, frequently located in the Senate and often justified in the name of federal constitutionalism.

There has been a tendency among Australian political commentators to exaggerate the extent to which traditions of responsible government have dominated the working of the Australian Parliament and to ignore the com-

plicating role of the Senate. This derives from a more fundamental assumption that Australia is, or ought to be, a majoritarian democracy with basically a unitary system of government. The reality, however, is that Australia is a federal democracy with the people organized into both national and state political communities. The federal principle is evident throughout the constitutional system: in the way the national Parliament is organized into Senate and House of Representatives; in the referendum procedure, which requires “double majorities” of the electors overall as well as majorities of electors in a majority of the states; in the basic division of powers between the Commonwealth and state governments; and in the saving of state constitutions and powers in a separate chapter of the Constitution.

Because the preferred unitary alternative is so prevalent and erroneous, it is worth spelling out the extent to which the Australian constitutional system combines a range of federal institutions with parliamentary responsible government. The main components are:

1. a written constitution that specifies the institutions and powers of government, including
   a. the branches of the Commonwealth government—legislative, executive, and judiciary,
   b. the precise structure and powers of the Senate,
   c. the federal division of powers between the Commonwealth and the states,
   d. the continuation of the states with the powers they had as colonies that were not otherwise given to the Commonwealth,
   e. a High Court exercising judicial review, although this is implied rather than spelled out in the constitutional text, and
   f. a referendum procedure that requires a majority of electors voting in a majority of the states and a majority of electors overall, and

2. a parliamentary system of responsible party government, which is manifest in government based in the House of Representatives, but whose rules of operation and tenure are based on constitutional convention.

The first strand is clearly more complicated than either federalism or the separation of powers because it includes both and, in addition, the complementary institutional features of a written constitution and judicial review.

25The Westminster aspects of Australia’s hybrid system have tended to dominate political thinking and commentary. As Andrew Parkin has pointed out, the “conventional wisdom of Australian political culture and of Australian political science” that has been featured as the paradigm of the textbooks is “party responsible government”: “Pluralism and Australian Political Science,” Politics 15 (May 1980): 51. Elaine Thompson emphasizes the separation of powers within the Commonwealth government but surprisingly overlooks the more important federal division of powers: “The ‘Washminster’ Mutation,” Politics 15 (November 1980): 34, 38.
Debate Over Bill of Rights

In short, it ensures a highly fragmented and decentralized system of government with many of the institutional features that the American Federalists argued was an institutional means of protecting individual rights and freedoms. The range of federal institutions is grounded in principles of federal democracy that are more pervasive than the majoritarian tendencies often associated with parliamentary responsible government. In fact, it is the latter that are grafted onto the former. Parliamentary responsible government provides the form of executive government found in both the national and state systems, thus producing the "executive federalism" that characterizes Australian intergovernmental relations and public policy.

The Alternative Bill-of-Rights Model

This too is an amalgam of two rather distinct parts, but works in a different way from the existing model sketched above. In this model, the institutional checks are reduced, particularly with respect to the Senate. This does not affect state interests unduly because the Senate is not really a states house, and the state representation in party caucuses that is weighted in favor of smaller states is unaffected. This is balanced by beefing up entrenched rights and the role of the Court in enforcing them. However, the impact on the states is considerable because of the national standardization of social/rights policy.

The rights model balances a greater centralization of power with enhanced measures for protecting individual rights. Thus, it suits the post-1960s federal Labor party that is still centralist in its outlook but more keenly aware of the threat to individual rights posed by big government.

These dual traits were evident in the Hawke government’s 1988 referendums: one proposal was to extend entrenched rights by making them binding on the states, while another was to bring the Senate’s term in line with that of the House of Representatives. According to this latter proposal, the prime minister of the day would have effective discretion to call elections for both houses of Parliament whenever he or she chose. Moreover, the Senate voting system of proportional representation (PR), which virtually ensures that neither major party has control of the Senate, could be changed by a future government because it is not entrenched but only supported by Commonwealth legislation. Both this proposal and the one to extend the protection of entrenched rights had federal implications and would have weakened somewhat the power of the states.

Centralism tempered by a bill of rights has also been a common preference among more "progressive" constitutionalists. Geoffrey Sawer in particular has been a strong advocate of this position, but under the curious title of "organic federalism." Sawer used this term to describe an advanced stage of centralization in which the center is so dominant that the regional states lose "any substantial bargaining capacity" and become administrative units.26 Realistically, he admits that such a state might not properly be

called federalism at all but rather a "Bill of Rights state" and could emerge through the following metamorphosis:

[I]t is possible that the development towards organic federalism may better be described as a development towards a Bill of Rights state; geographically guaranteed autonomy may be replaced, gradually, by guarantees appropriate to a plural society in which the entrenched protection of an area of individual autonomy is the basis for denying omnipotence to a centrally organised Leviathan. The entrenching of decentralised administration may be regarded as an aid to protecting the Bill of Rights.27

Despite his preference for a "Bill of Rights state," Sawer also has had a realistic appreciation of the libertarian value of federalism, which he prefers to a unitary state without a bill of rights. That position is relatively uncommon among Australian critics whose polemics have dwelt on the frustrations that federalism imposes on a central government and its protection of more conservative state regimes. In a classic critique that epitomized the Left-progressive postwar view, Gordon Greenwood railed against "The Evil Effects of the Division of Powers"28 in restricting centralist reforms and economic management. To the critics of federalism, the other side of the division of powers was the protection of illiberal state regimes. Although none went quite as far as William Riker in branding federalism an "impediment" to minority freedom that actually encourages "local tyranny" and racism,29 they saw regional states as bastions of conservatism and reactionary policies.30

CONCLUSION

Successive federal Labor governments and their attorneys-general have tried for a decade and a half to nationalize standards for the protection of rights either by a statutory bill binding on the states or by further entrenching rights in the Constitution. The various statutory bills have been aborted by the Senate, however, and the modest entrenchment proposals overwhelmingly rejected by the people voting in referendums. These defeats indicate the continuing vigor of Australian federal democracy operating through the established constitutional system of the federal division of powers, entrenched states with jealous regard for protecting their primacy in major areas of rights jurisdiction, such as criminal law and state electoral law, bicameralism with an independent Senate checking a national government based in the House

27Ibid., p. 152.
30For a recent example of this view, Peter Wilenski, "Six States or Two Nations," A Fractured Federation, eds. Jennifer Aldred and John Wilkes (Sydney: Allen & Unwin, 1983), pp. 79-96.
of Representatives, and a constitutional amendment procedure requiring majorities of electors in a majority of states and a majority of electors overall.

True, there has been a good deal of spoiling partisanship from the opponents of Labor’s initiatives, and there also has been political ineptness in the way each measure has been handled. Nevertheless, the underlying constitutional culture and the institutional dynamics of Australia’s federal system of government need to be recognized. There are well known tensions between the traditions of parliamentary responsible government and a judicially enforced bill of rights that have no doubt been a significant factor in the triumph of the former in Australia. Even so, just as important, although less well recognized, have been federalism and the Senate.

The Australian Labor Party, which draws its inspiration from a tradition of reformist and majoritarian democracy, has traditionally resented both federalism and the Senate, preferring a centralization of power in the national government and its concentration in a dominant House of Representatives. Labor’s more recent attempts at nationalizing rights and reducing the independence of the Senate are in this tradition. This preferred Labor model of the centralization of power tempered by a bill of rights has not been successful in Australia, ironically because of federalism and the Senate, which provide institutional means for checking and constraining government power.