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**Essays on Republicanism:
small r republicanism**

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FOREWORD

This issue of *Papers on Parliament* brings together several brief essays published elsewhere and one not previously published, on the subject of republicanism in Australia.

In the public debate on the question of whether Australia should become a republic, that is, remove from its Constitution the provisions whereby the sovereign of the United Kingdom is the titular head of state of Australia, several issues have been largely ignored: the meaning of the term republicanism itself; the elements of republicanism as a theory and as a practice; the intellectual and historical foundations of republicanism as a phenomenon of European culture; the enormous extent to which republican theory and practice has influenced government in Australia and the framing and operation of the Australian Constitution; the extent to which the theory and practice of government in Australia actually reflect republican and monarchical elements; the question of whether those advocating a change to a republican head of state in Australia actually adhere to republican theory or follow republican practice.

These essays draw attention to such issues without any pretence of analysing them in great depth, and it is hoped that republication will help to bring out the issues in the continuing debate.

The articles aim to draw some attention away from what is misleadingly called “The Australian Republic” (as if it were some monolithic entity to which total loyalty must be given) towards small r republicanism, the principles and practices of republicanism as an historical phenomenon.

ACKNOWLEDGMENTS

Acknowledgments are due to the editors of the journals and the monograph in which all but one of these articles appeared, for their very kind permission to reprint the articles. The publication in which each article appeared is shown on the first page of the article. The journals, *Legislative Studies*, *The House Magazine* and *Policy*, have made valuable contributions to furthering informed debate, as has the Centre for Independent Studies, the publisher of the monograph from which one of the articles is taken.

Harry Evans

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A Note on the Meaning of 'Republic'[†]

The revival of debate about Australia becoming a republic provides a further opportunity to examine the meaning of that word. In that debate, and in general current usage, the term is taken to mean simply the absence of an hereditary monarchy. With that meaning it is not a particularly useful term of classification, and indicates nothing important about the form of government in any particular state to which it is applied. This is demonstrated by the categorisation of the United States of America and Iraq as republics, and the United Kingdom and Saudi Arabia as monarchies, although one member of each class has much more in common with a member of the other class, on all significant criteria of classification, than the other member of the same class.

Although a word of many connotations, the term “republic” had a much more useful meaning for classification purposes until relatively recent times.

In his book *Monarchy to Republic*, Professor George Winterton has a somewhat attenuated discussion on the shift in the meaning of the word¹. He observes that it had an association with the concept of a mixed or balanced regime which could include monarchical elements, and that this meaning was gradually abandoned as a result of the work of the American founders, resulting in the modern dictionary meaning which denotes much the same as “democracy”, and refers to a regime constituted wholly on a popular basis by election of key officials. This discussion, however, misses out on, or at least glosses over, one of the valuable old connotations of the word, and also oversimplifies the contribution of the American founders. In relation to the meaning of the term, Professor Winterton misinterpreted a statement by the author that the current usage is a “debased contemporary sense”, taking this to refer to the dictionary meaning, when what was referred to by that phrase was the sense of simply the absence of an hereditary monarchy². Some further exploration of the meaning which the word once had and now has been made to bear may therefore be interesting.

[†] *Legislative Studies*, Summer 1992

The word “republic”, as every young scholar used to know before progressive education, comes from the ablative of the Latin *respublica*, which is composed of *res*, matter or thing, and *publicus*, appertaining to the people or the community as a whole. The word is therefore almost the exact equivalent of the old English word “commonweal” or “commonwealth”, which came to have the same developed meaning, and it originally signified nothing more than public affairs or the concerns of the community. By the time of the later Roman Republic the term had a more developed meaning, and a dual meaning. It was used to denote any state or constitution, but it also denoted a particular kind of state, one in which power was exercised in accordance with a constitution and was divided between duly constituted offices of state. (It is interesting to note that the classical Greek word “polity” and the English “commonwealth” came to have a similar duality of meaning.) The Romans were conscious that the establishment of the Republic in 507 BC was not simply a change of rulers but the constitution of a regime on different principles, a regime which sought to realise those principles by means of particular institutional devices, and particularly by the division of power. This is illustrated by the following passage by Livy, in which he discusses the foundation of the Republic:

“My task from now on will be to trace the history in peace and war of a free nation, governed by annually elected officers of state and subject not to the caprice of individual men, but to the overriding authority of law ... the first step towards political liberty in Rome consisted in the fact that the consuls were annually elected magistrates — in the limitation, that is, not of their powers but of their period of office. The earliest consuls exercised the full powers of the kings. ... Brutus [the legendary founder of the Republic] ... turned his attention to strengthening the influence of the Senate ... [and subsequent developments accentuated the division and limitation of power].”³

The term had come to denote a state with a system of constitutional government in which government according to law, and the customary rights and duties of the citizens, were safeguarded by the due apportionment of powers between the organs of state.

This interpretation of the concept of a republic was expounded in some detail in Cicero’s work *De Republica* (On the Republic, sometimes translated as On the Commonwealth to avoid the contemporary restricted meaning of the term under discussion).⁴ Defining a republic as the property of the whole people and as a partnership in justice, Cicero finds that none of the three classical forms of government, monarchy, aristocracy and democracy, especially in their degenerate forms of tyranny, oligarchy and mob-rule, can properly be described as republics, because each of those forms allows one element (in a democracy, a faction) to rule others. He confines the proper use of the term to the balanced form of government such as was epitomised by the middle Republic, with its division of power between the consuls, the Senate and the popular assemblies assisted by the tribunes, and its adherence to a body of established, if complex, constitutional law. Cicero’s ideal republic is similar to the Republic of about 200 BC, and is described in another work, *De Legibus*, On the Laws.

This discussion of the nature of a republic is mixed up, to use a mild pun, with the Greek concept (derived mainly via Polybius) of the mixed regime, combining monarchy, aristocracy and democracy. The attempt to characterise the Republic as a mixed regime is not very convincing, because the two consuls were elected for one year only and were not eligible for consecutive terms, and therefore cannot readily be identified as a monarchical element, and the Senate consisted partly of current and former elected office-holders, and therefore did not quite correspond to an aristocratic element. Cicero's analysis would have been clearer had he dropped the Greek idea of the mixed regime and not attempted to superimpose it on his ideal state.

De Republica was lost until it was rediscovered in 1820, so it was not available to influence the constitutional discussions of the 17th and 18th centuries, but Cicero's views were known from his other works, particularly *De Legibus*. The ideal of the mixed regime was the guiding light of the middle ages and survived into modern times. It was thought to be epitomised by the British constitution as it emerged from the revolutions of the 17th century, and it entered into the debates of the American founders. The notion that a republic is essentially, or by definition, a constitutional system of government founded on division of power, also survived into modern times, and may be glimpsed in the constitutional deliberations particularly of the 18th century.

It has been pointed out that the American founders used the word "republic" in an inconsistent and somewhat confusing way⁵. They certainly applied it to any regimes in which the offices of state were constituted other than on an hereditary basis, for example, in Jefferson's damning characterisation of the oppressive oligarchy, disguised as an elective monarchy, of Venice⁶. It is true that the effect of their work was to recast the meaning of the word so that it became virtually interchangeable with "democracy". Their great achievement, however, was to build into a system of government constituted entirely on a popular basis the safeguards against the misuse of power adopted from older republican constitutions. They saw this synthesis as the great problem of their work:

"When a majority is included in a faction, the form of popular government, on the other hand, enables it to sacrifice to its ruling passion or interest both the public good and the rights of other citizens. To secure the public good and private rights against the danger of such a faction, and at the same time to preserve the spirit and the form of popular government, is then the great object to which our inquiries are directed."⁷

It is also quite true, as Martin Diamond has observed, that they constructed a state on quite different principles from those of previous regimes because the separation of powers on which their constitution was based is radically different from the older and more primitive divisions of power that were a feature of ancient and medieval republics⁸. They were conscious of achieving a new and improved structure for attaining the goals of republican government:

“We have found that, in order to arrive, in this first of human sciences, at a point of perfection hitherto unattained, it is not necessary to intermix the different species of government. We have discovered, that one of them — the best and purest — that, in which the supreme power remains with the people at large, is capable of being formed, arranged, proportioned, and organised in such a manner, as to exclude the inconveniences, and to secure the advantages of all the three.”⁹

It is precisely because of this achievement, however, that the American founders should be seen as continuing the classical notion of a republic as expounded by Cicero. The goals were the same, though the means were modern. The true republic is a constitutional order in which government is conducted according to rules and there is an apportionment and balance of powers to guard against their misuse, even by the people. Federalism as they framed it was also an improvement on the classical model because it could be directed to the same end:

“In a single republic all the power surrendered by the people is submitted to the administration of a single government; and the usurpations are guarded against by a division of the government into distinct and separate departments. In the compound republic of America, the power surrendered by the people is first divided between two distinct governments, and then the portion allotted to each subdivided among distinct and separate departments. Hence a double security arises to the rights of the people. The different governments will control each other, at the same time that each will be controlled by itself.”¹⁰

The American founders, in effect, gave a whole new life to the classical concept of a republic; as James Madison said, they constructed a “republican remedy” for the diseases of past republics¹¹.

It would therefore be in accordance with both older usage and the great example of modern times to apply the name “republic” to balanced constitutions characterised by the supremacy of law and the division and separation of powers, and to avoid the “debased contemporary sense” of simply the absence of hereditary monarchy.

Something of an attempt to revive what might be regarded as the proper use of the word was made by Professor Bernard Crick in his new classification of governments into three classes: autocracies, republics and totalitarian states. His selection of names rested partly on historical language usage and partly on usefulness for classification purposes:

“And if the Americans, to speak broadly, have debased the word ‘democracy’ into almost total uselessness as a scientific term, the French tradition of ‘republic’, to speak with equal pedantry, has made us forget the Roman, the British Whig and the Dutch traditions in which ‘republican virtues’ and ‘republican institutions’ certainly did not imply ‘no king’, still less a dead one.”¹²

On this fruitful system of classification, and also on the older and more meaningful usage, Australia, Britain and the United States are all republics, while Iraq and Saudi Arabia are autocracies, the former perhaps three parts of the way to a totalitarian state. It takes more than a sound analysis by a Professor, however, to divert the degeneration of modern language.

The reference to “republican virtue” reminds us that it was a classical tradition, which also lasted well into modern times, especially evident in Montesquieu, that a republic required a particular kind of virtue, encompassing an intense patriotism and devotion to the service of the state, resolution, fortitude and a high standard of personal morality based on contempt for personal gain and on a strong sense of honour. Recently there broke out a somewhat esoteric dispute among American academics as to whether the American founders were “classical republicans” in that tradition, or modern liberals who accepted that citizens of the new republic would basically pursue their own interests. It was concluded that they were in a transitional period between cultures¹³. Whatever one thinks of this thesis, this matter of republican virtue also serves as a reminder of the more substantial content of the concept of a republic.

There is wisdom in all of this for Australians as they contemplate whether to embrace republicanism in the “debased contemporary sense” by abolishing the monarchy. Those who wish to take this step generally speaking are also those who wish to dismantle some of the structure of safeguards built into the Australian constitution, for example, federalism and the Senate. Most are very anxious to convey that it is only a change of the method of appointment of the head of state which is in issue, and in order to keep to this path, and to avoid reviving awkward possibilities of a greater separation of powers, they are willing to forsake their democratic principles by having a president appointed by some method other than direct election¹⁴. Perhaps the pole star which could best be kept in sight at this time is the principle that Australia should remain a republic, as it is, in the original and more meaningful sense of the word. A little republican virtue, conspicuously lacking in Australia, would also not go astray.

NOTES

- 1 OUP., 1986, pp 2-4.
- 2 *ibid.*, p 2 and note 6.
- 3 *The Early History of Rome*, trans. A. de Selincourt, Penguin, 1986, pp 105-6.
- 4 trans. C.W. Keyes, Loeb, 1977, pp 218-223.
- 5 Peterson, Paul, 'The meaning of republicanism in *The Federalist*', *Publius*, Spring 1979, pp 44ff.
- 6 *The Federalist* No. 48, Everyman ed., 1978, p 254.
- 7 *The Federalist* No. 10, p 44. Madison's diagnosis of rule by faction as the disease of democracy thus has obvious classical antecedents.
- 8 'The separation of powers and the mixed regime', *Publius*, Summer 1978, pp 33-43.
- 9 James Wilson, 'Lectures on Law', quoted in Peterson, *op. cit.*, p 68.
- 10 *The Federalist* No. 51, pp 265-6.
- 11 *The Federalist* No. 10, p 48.
- 12 'The elementary types of government', *Government and Opposition*, Winter 1968, pp 7-8.
- 13 Lienesch, Michael, *New Order of the Ages*, Princeton, 1988, pp 3-9. See also Pangle, Thomas, *The Spirit of Modern Republicanism*, Chicago, 1988, pp 28-39.
- 14 Professor Winterton comes to this conclusion: *op. cit.*, pp 108-114.

Republicanism, Continued[†]

A brief rejoinder to Graham Maddox

Unfortunately Professor Graham Maddox ('The Origins of Republicanism', *Legislative Studies*, Spring 1992) has misunderstood the point I was trying to make about the relationship between Roman and modern republicanism. My statement that Australia is a republic "in the original and more meaningful sense of the word" did not refer to the doctrine of the mixed constitution; on the contrary, I suggested that Cicero's attempt to superimpose this Greek notion on his ideal of the balanced constitution was unconvincing and artificial. He identified as the essence of republican government a structure of constitutional constraints against the misuse of power by any element in the state, which is encapsulated in the expression "checks and balances", and it was to that essence that I referred.

It is surprising that a professor of politics in 1992 should repeat the old chestnut that the American founders aimed to entrench a property-owning oligarchy behind their constitution. This thesis, which was current about 50 years ago, has been demolished by more recent American scholars, such as Martin Diamond, Vincent Ostrom, Walter Berns and George Carey. It is refuted, for example, by the rejection by the 1787 Convention of a proposal for a constitutionally-entrenched property qualification on the franchise.

Where the American founders took up the classical tradition of republicanism was in their realisation that popular governments without constitutional safeguards did not last very long. They

[†] *Legislative Studies*, Autumn 1993

also realised that a democratic state would not flourish without an infusion of civic virtue also drawn from the old republican tradition. These points were taken up later by nineteenth century liberals such as Matthew Arnold, Lord Acton and Sir Henry Maine.

Then there is Professor Maddox's amazing statement that "checks and balances have never been applied save to protect a settled order with its existing privilege and current disposition of wealth and property. Checks and balances are inherently anti-democratic in that they veto reform programs designed to raise the lot of the poor." Conservative critics and liberal supporters of the US Supreme Court would beg to differ, as would radical supporters of bills of rights.

The classical republican traditions of constitutional safeguards and civic virtue are still central to any critique of the modern liberal democracy, and it is in the interests of the latter's survival that that critique continue to be advanced.

Republicanism and the Australian Constitution[†]

(This article is taken from a recent symposium paper and an address to the Harvard Club of Australia.)

The concept of republicanism, rightly understood, is essential to an appreciation of the Australian constitution, because of the way in which the framers of the constitution drew upon republican as well as monarchical models for the keystones of their edifice. This is not readily apparent because they assumed the validity of earlier republican doctrines without repeating the analyses of their predecessors.

Due to a relatively recent degeneration of meaning, similar to that which has overtaken the term "democracy", the name "republic" is applied to any state without an hereditary head of state. That this usage is worthless for the purposes of classification and meaning is demonstrated by the statement that Britain and Saudi Arabia are monarchies while the United States and Iraq are republics. Originally, however, the terms had useful meanings. In particular, the term "republic" had a much more meaningful content, which was closely associated with the most conspicuous and long-lived ancient example, the Roman Republic, and with the first modern republic, the United States, and which was expounded by the famous thinkers and analysts of those regimes.

The essence of monarchy is that sovereignty is vested in the monarch, and all institutions of government and powers flow

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from the sovereign. Thus in England the Parliament was originally an advisory body summoned to consult with the monarch, and the courts exercised delegated royal powers, as "lions beneath the throne". Although these institutions came to have an independent life, they are still seen as deriving their authority from the crown, and an indirectly-elected officer, the prime minister, wields the extensive royal prerogatives. (Incidentally, this character of the Parliament as an advisory body to the crown explains the ceremony of the opening of Parliament, which has also been under discussion recently.)

The essence of republican government is that sovereignty is vested in the whole community and its powers are exercised on its behalf by different officials acting as its agents. To prevent a republic from becoming monarchical, and the governors becoming masters instead of servants, power is divided between a number of different bodies and office-holders, and constitutional safeguards are provided against any of them misusing their power or seeking to assume sovereignty. Division and limitation of power are therefore essential to republican government, a point on which republicans from Cicero to the American founders and their current exponents have insisted. Thus the following passage by one of the American framers is regarded as encapsulating the American revival of republicanism:

In a single republic all the power surrendered by the people is submitted to the administration of a single government; and the usurpations are guarded against by a division of the government into distinct and separate departments. In the compound republic of America, the power surrendered by the people is first divided between two distinct governments, and then the portion allotted to each subdivided among distinct and separate departments. Hence a double security arises to the rights of the people. The different governments will control each other, at the same time that each will be controlled by itself.

No republic, ancient, medieval or modern, has survived long without some division of power. The death of republics is caused by concentration of power leading to caesarism or bonapartism, the emergence of a new and popular monarch in the shape of a dictator. It is no accident that the only two long-lived modern republics are federations.

The authors of the Australian constitution combined the monarchical elements of the British system and the republican elements of modern federations, and created a constitution which is a blend of monarchical and republican ingredients. In effect, they erected a compound republic under the crown, and apparently saw nothing incongruous in such a hybrid creation. The principal monarchical, or power-concentrating, elements are:

- executive power of a monarchical kind vested formally in the crown and actually in ministers technically appointed by the crown
- the power of the crown (i.e. the ministry) to prorogue the Parliament and dissolve the House of Representatives
- ministers drawn from the Parliament to absolve the crown of political responsibility
- the judiciary appointed solely by the crown.

The principal republican, or power-limiting, elements are:

- sovereignty vested in the whole people, who have the sole power to amend the written constitution
- the separation of the legislative, executive and judicial powers by the terms of the written constitution
- the division of the legislature into two directly-elected Houses with virtually equal powers
- the division of power between federal and state governments
- the judiciary as the interpreter of the constitution, which is the supreme law.

One could say that the constitution is 70 percent republican and 30 percent monarchical. The monarchical element is not so much the crown as such but the concentration of royal powers in the hands of the ministry which, under the modern development of responsible government, dominates the lower house of the Parliament by party discipline and assumes legislative as well as executive powers.

While the United Kingdom, however, is a profoundly monarchical country, in the sense that its people are accustomed to power being concentrated in one place, Whitehall, Australia has a republican culture to the extent that we are accustomed to the dispersal and limitation of power under the written constitution.

The injection of what is now called republicanism into discussion on the constitution has caused a curious inversion of principles. What is now called republicanism, while aiming to dispense with the formal position of the crown, tends to adhere to the power-concentrating monarchical elements of the constitution and oppose the power-limiting republican ingredients, while the defence of the monarchy tends to rally to the republican parts of the constitution.

Although the republican movement as such aims to replace the monarch with some kind of indirectly-elected president and leave the rest of the constitution alone, this appears to be because of the tactical problem of selling too many changes at once, not because of a fondness for the other dominant ingredients of the constitution. On the contrary, there are declarations in favour of other changes to the constitution, such as abolishing the states and curbing the Senate, which would amount to dismantling its republican elements.

The favoured system of government on this view would appear to consist of a ceremonial head of state, a central parliament with overriding legislative powers, a prime minister and cabinet controlling a single directly-elected chamber, with either no second chamber or one with very limited powers, and a constitution much easier to change. Ironically, such a system would most resemble that of the United Kingdom, and would emphasise the monarchical elements inherited from the British constitution, particularly the concentration of power in a central executive.

Australian monarchism, on the other hand, concentrates on defending the existing constitution and its essentially republican division of power between the state and federal governments and the two chambers of the Parliament.

There are some exceptions to this pattern on both sides, but generally speaking the firmest monarchists are in the

republican camp and the most convinced republicans are to be found amongst the monarchists. The republicans seem to regard the federal system and the Senate as in some way part of the monarchy, while the monarchists view the written constitution and the separation of powers as attachments of the crown.

Unless the question is focused very narrowly upon an hereditary or an elected head of state, the matter could be very confusing. The electorate could be asked to accept essentially monarchical changes in the name of a republic, or to keep the crown as a condition of maintaining an essentially republican constitution.

The consequent confusion could be avoided either by limiting the question to the narrow compass, as suggested, or by adopting more descriptive names for the larger contest. As has been indicated, clarification of terminology is important for clarifying issues. The republicans could call themselves the democratic centralists, and the monarchists could be styled the constitutional republicans. In that way any wider debate might become intelligible.

Introduction: The Agenda of the True Republicans[†]

Australians are constantly being told that the years leading up to the centenary of federation provide an opportunity for a review of the constitution and a consideration of whether changes should be made to the constitutional order of the country. Unfortunately, many of those urging this seemingly worthwhile course appear to be determined to force that review and consideration into a particular path and to limit the avenues which might otherwise be open. The proposed decade of review has so far been monopolised by those who have sought to confine constitutional consideration to the so-called republic debate, the question of whether some other office-holder should replace the Queen as the head of state. This debate has been notable for its lack of depth. There are the monarchists, who hold that the constitution is not in need of any major change, and the self-styled republicans who are, on their own analysis, divided into the "minimalists" who wish to make that allegedly simple change and the radicals who want that change to be accompanied by a major "reform" of the constitution.

This stage-managed debate has diverted attention from a more balanced assessment of the constitution and the changes which may be desirable. The choice is presented as one of keeping the status quo, including the Queen, making the "minimalist" change and thereby keeping the status quo without the Queen but with all the other features of the current system of government, whether defective or not, or disposing of the Queen and at the same time disposing of elements of the constitution

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From *Restoring the True Republic*, G. Walker, S. Ratnapala, W. Kasper, Centre for Independent Studies, 1993

which have nothing to do with the monarchy but which may be regarded as ameliorations of the faults of the current system. The monarchist position of no change and the minimalist position both involve keeping a system which is marked by an unhealthy concentration of power in the central executive government, while the supposedly radical republican position involves dismantling those aspects of the constitution which provide safeguards against that concentration of power. It is a choice of going slowly or quickly in the same direction.

It is appropriate that the public now be informed that another direction is possible, and that a truly republican agenda be advanced. Hence this collection of papers.

A republic, as the dictionary tells us, is a state in which sovereignty or supreme power is vested in the whole people rather than in a monarch. The distinction drawn by the American founders between a democracy, in which the people assemble and administer the government in person, and a republic, in which they entrust political powers to their chosen agents, is a necessary refinement of the definition. The essence of republican government is that elected officials act as the agents or trustees of the whole people. In order to keep sovereignty with the people and to prevent the misappropriation of sovereignty by officials, power is not entrusted to any single officer or body, and the power entrusted to each officer or body is limited in accordance with constitutional rules. This division and limitation of power in accordance with constitutional rules is essential to the theory and practice of republicanism. It has been expounded as such by republican thinkers from Aristotle to the present, and has been the hallmark of all long-lived republics, ancient and modern. The only two modern republics which have lasted for more than 100 years, the United States and Switzerland, are federations, and federalism exemplifies in its most congenial form the limitation and division of power. The existence of different governments operating within their own spheres at different levels in a federation has been the most effective safeguard against the capture of government by tyrants and factions, as the American founders thought. Suri Ratnapala, one of the contributors to this collection, reformulates this thesis that federalism is essential to republican government.

The Australian constitution exhibits many characteristics of republican government. The federal system divides the powers of

government between the central government and the states in accordance with constitutional prescription, and provides a basis for the division of the legislature at the centre, so that changes to the law can be made only by two separately-constituted majorities, representing the states by population and the states as equal units. The separation of legislative, executive and judicial powers is also constitutionally prescribed. The constitution can be changed only by the sovereign people in a referendum, with a special majority to ensure that support for a change is geographically distributed. These are the devices by which successful republics have sought to avoid a concentration of power which would turn them into de facto monarchies or closed oligarchies. Australia's constitution provided the equipment for sound republican government.

Developments since 1901, however, have seriously undermined this constitutional structure and have given rise to a centralisation and concentration of power which is pathological to a republican government. The most significant of these developments has been in relation to what is generally called responsible government. The Australian founders adopted the British system whereby the executive government is carried on by ministers who depend for their tenure of office on the confidence of the Parliament, and may be removed from office by the Parliament if they lose that confidence. In the first 10 years of federation, government worked in this way, with changes of ministry brought about by parliamentary action. Since the arrival of highly disciplined and hierarchical parties, however, a situation has developed of the ministry of the day, led by the prime minister, completely controlling the House of Representatives, and controlling the whole Parliament when there is a similar party majority in both Houses. This has been accompanied by a massive delegation of legislative power to the ministry, so that, in effect, the executive has assumed the legislative power and habitually seeks to legislate by decree.

This development is often viewed in terms of the rise of the welfare state, and Suri Ratnapala's analysis shows how assumption by governments of responsibility for the economic well-being of individuals has undermined the separation of legislative and executive powers by encouraging governments to make laws for particular cases rather than laws for general application. Professor Wolfgang Kasper points out that this

development began with the "Australian Settlement" of the early federal period.

As the papers in this collection also show, however, the third branch of government, the judiciary, has played a large role in this situation. The High Court, in many of its interpretations and applications of the constitution, has reinforced this concentration of power in the hands of the central ministry. The virtual rewriting of the federal distribution of power in the Tasmanian dams case, the failure to place any limitation on the delegation of legislative power, the confusion about "basic rights", rights conferred by statute and "innominate powers", the failure to distinguish between subject and function of powers, and the recognition of the power of administrative bodies to make final decisions concerning individual rights, have all helped to put us into the camp of ministerial absolutism. We have drifted into a system of government whereby we choose a party to govern for three years and entrust the leaders of that party with virtually unlimited powers. As Suri Ratnapala points out, we have put all our constitutional eggs in the one basket, and have come to rely solely on regular elections as the only safeguard against the otherwise absolute powers of government. This is utterly contrary to the theory and practice of republican government.

The proposals now put forward by the self-proclaimed radical republicans would remove the remaining republican safeguards from the constitution, which still provide some amelioration of the despotism of ministers. The federal system still places some constraints on state and central governments; the Senate, which is frequently not under the party control of the government of the day, provides a limit to legislation by decree; and the provision for changing the constitution by referendum with a special majority ensures at least that the politicians in power cannot rewrite the fundamental rules at will. The "reform" platform of the radicals includes abolition of the states, abolition or significant curbing of the Senate and an easier method of changing the constitution. Such proposals would turn the country into a highly centralised state in which the entire government apparatus is dominated by the ministry of the day. Apart from amounting to a fundamental remaking of the country, this agenda, as Professors Kasper and Walker point out, would take Australia in the opposite direction from the rest of the world. Federalism is now flourishing as never before, and is being applied to the

problems of countries recently freed from totalitarian rule. We seem not to have learned the lesson of recent history, that central government power is not the key to economic success.

There is a need to oppose to the authoritarian agenda for change a genuinely republican agenda which would seek to strengthen and add to the safeguards in the constitution, and to provide an alternative to the drift into unmitigated centralism and executive absolutism.

If there is to be an elected head of state, the true republicans could propose that that office be provided with sufficient independence, perhaps by popular election, to provide a balance to an otherwise autocratic prime minister. The extremely wide powers of the executive could be reformed. In the absence of the monarchy, there is no justification for the executive government possessing such monarchical prerogatives as the powers to prorogue Parliament, to dissolve the House of Representatives at any time, and to make treaties and appoint judges without legislative sanction.

Reforms may be proposed to reinvigorate federalism. The first step in this process, as Professor Walker states, is to expound the real case for federalism, as distinct from the empty cliches of "states rights" which are used by centralists to discredit the federal system. Professor Wolfgang Kasper provides an excellent basis for this task with his exposition of competitive federalism. He points out that one of the great potential advantages of a true federal system is that state governments may be encouraged to compete in the search for the best policies and legislation and for the allegiance and support of citizens. This competition may help to make Australia competitive in the world.

A program of parliamentary reform may serve to address the domination of the legislature by the ministry. It is significant that improved procedures for parliamentary scrutiny and control of the executive, such as the Senate's Scrutiny of Bills Committee, have almost exclusively occurred in upper houses not under ministerial control. The further development of such procedures is essential to a restoration of parliament as a representative institution.

More significant constitutional changes, such as Professor Walker's suggested citizen-initiated referendums and recall of

members of Parliament, may provide further safeguards against government abuses. That they are resisted by persons claiming the title of democrats says a great deal about what Professor Walker appropriately characterises as the elitist nature of our current politics.

Such a republican agenda would indicate to the electorate that the options are not as restricted as the managers of the current constitutional "debate" would have us believe, and that there may be a real choice of systems of government. The history of referendum proposals in Australia leads the orthodox radicals to conclude that the populace are conservative; to the true republican they indicate a suspicion on the part of the electors of proposals to increase central government power. They also indicate that a genuinely republican agenda could arouse the interest and support of the citizenry.

The essays in this collection are a significant contribution to establishing such an agenda and to providing the electors with such a choice.

Keeping the Australian Republic[†]

The most notable aspect of the current republican movement in Australia is its lack of a broad historical and theoretical base. There is a great deal of old-fashioned plebeian nationalism and anglophobia, which has been around since last century, but which has been given greater credence by British withdrawal from great power status and entry into the European Community, and the troubles of the royal family, with economic recession perhaps also giving a boost. There has been little or no attempt, however, to give the local republican movement roots in history or political theory, other than that which can be found here (Australian history according to Manning Clark and political theory according to Donald Horne). On the contrary, there is a certain contempt for any history and political science not of antipodean pedigree, and appeals to anything beyond that boundary are made mainly by the monarchists.

This instinctive hostility to historical and theoretical analysis is appropriate. The least attempt at such analysis reveals republicanism as a phenomenon and a concept inseparable from Western European civilisation, and our Australian nationalists are not anxious to remind us that we are a small and recent part of that civilisation. Further study exposes a content of republicanism which largely undermines the shallow

[†] *Policy*, October 1993

notions currently being propounded here, and indicates that Australian republicanism actually seeks to cut out of the country's cultural heritage a large portion of the historical capital necessary to make genuine republicanism flourish on this continent.

The history and theory of republicanism, which does not begin with Henry Lawson, is highly instructive to us as we contemplate our future direction.

When European settlement in Australia was beginning just 200 years ago, the founders of the first modern republic were contemplating in Philadelphia whether republican government was possible as a long-term proposition. This was a very serious question for them. Could the people of the newly-independent thirteen states govern themselves? The greatest political analyst since Aristotle, the "celebrated Montesquieu", cast doubt on the viability of republics. A republic, he observed, is a state in which sovereign power is held and exercised according to law by all the citizens or a substantial number of them, rather than by a ruler, who may rule according to law or despotically. The continuance of republican government therefore depends upon the ability of the citizens to exercise the powers of government themselves or to control and supervise those to whom they entrust those powers. This can be done only in small states; when a state expands beyond a certain size, it becomes impossible for the citizenry to participate or to control, and power falls to the centre and to the strongest man at the centre. Republics can therefore only be small, but that puts them in perpetual danger of conquest by powerful neighbouring empires. Quite apart from the question of size, the citizenry of a republic are apt to lose the high degree of virtue which their active citizenship requires, and to depute their powers to professional rulers. Republics are therefore usually short-lived.¹

This theory was amply supported by history. The Greek city states, after short and turbulent lives, had been absorbed by monarchical empires. The Roman Republic, having long survived by the exceptional virtue of its aristocracy and people, collapsed into despotism when the city expanded into an empire. The centralised kingdoms of Europe had subsumed the self-governing towns of late medieval times. Those that kept some independence became closed oligarchies. The English Commonwealth had not outlived its military Lord Protector who

had actually overthrown it. The prognosis for the former colonies of America was therefore not conducive to optimism.

The thoughtful assemblymen of Philadelphia, however, were provided with a ray of hope by the "celebrated Montesquieu". There was a way in which republics might be permanent: by leaguings together into confederations, they could preserve the republican form of government in the component units while gaining the advantages of greater size. A confederation could also guard against the propensity of republics to revolution and the seizure of power by tyrants: if these occurred in one state, the others could come to its rescue. It would be more difficult for a demagogue or a faction to corrupt every government at once.² Ancient confederations and that of Switzerland provided evidence for these deductions.

The American founders further developed, in theory and in practice, this significant discovery, in framing and expounding their new constitution. The existence of the thirteen independent states unwilling to give up their separate sovereignties was seen, not as a drawback to a union, but as a positive advantage, because it provided the opportunity to gain the advantages of federation. The framers' exposition turned the supposedly iron law of the size of republics upside down: the extension of the republic over a large territory and many states would guarantee republican government by conferring greater stability and security against capture by factions or tyrants.³

To the conventional confederation, which was simply an alliance of states, they made two ingenious modifications. There would be a central legislature to legislate with direct effect upon the people within the spheres specifically delegated to it by the written constitution, and a central executive to execute its laws, while the states would continue to legislate and execute their laws for their people within their spheres. This was a great advance on a central council relying on the state governments to administer its decisions. Secondly, the states would be granted representation in proportion to population in one chamber of the central legislature and equal representation in the other chamber. Though emerging as the product of compromise, this device avoided the concentration of the law-making power in one house and reduced the consequent danger of rule by a faction, and provided a basis for an upper house without constituting some kind of aristocracy. These inventions

of modern federalism have been so widely copied and become so common that we have forgotten what great inventions they were.

With these innovations of their own the founders provided the separation of the executive, legislative and judicial powers between different offices, which Montesquieu had declared essential to liberty. It has become customary to mock them for adopting what is said to be Montesquieu's misunderstanding of the British constitution, and to deride his failure to detect the emergence of responsible government, whereby the executive power is entrusted to a ministry formed out of, and depending on the confidence of, the lower house of parliament. This conventional wisdom is entirely misplaced. The development of responsible government, after it flourished for no more than 50 years, into a system of executive tyranny whereby the ministry, through party discipline, completely controls the lower house, has vindicated the French sage and the American practitioners.

They considered that they had found the secret of making a sizeable republic last, and republican government feasible for the first time since the ancients:

In the extent and proper structure of the Union, therefore, we behold a republican remedy for the diseases most incident to republican government. And according to the degree of pleasure and pride we feel in being republicans, ought to be our zeal in cherishing the spirit and supporting the character of Federalists.⁴

In other words, federalism is essential to viable republicanism over large countries.

When the Australian founding fathers met in the 1890s to form a union for Australia, they had no reason to doubt the truth of that precept. A further hundred years' history had supported it. The United States was still the only stable large republic. The only other stable republic of any size, Switzerland, was a medieval confederation which had been refashioned after the American model in the middle of the century. The chronic instability of France and its numerous revolutions and dynastic changes provided a warning of the futility of highly centralised republics: with only one capital and one government to capture, a succession of Robespierres and Bonapartes was greatly facilitated.

It is not generally appreciated that our founders were republicans, in the sense that they desired that their union rest upon popular sovereignty and elected institutions. The federalist republican system provided them with a ready-made model for a such a government over an extensive country. There was never any doubt that they would adopt the method of delegating specific powers to a central legislature, and of providing the states with equal and proportional representation in the two chambers.⁵ There was some resistance, however, to the grafting of responsible government onto the federal structure; a minority of convention delegates urged that it not be adopted for the federal government on grounds of its new and untried character and its inconsistency with the federal system.⁶ The deterioration of responsible government since their time has vindicated them as well as Montesquieu and the Americans.

This is not to say that Australia's founders only copied foreign designs. Much of their work was their own. They were more republican than the Americans in submitting the constitution to referendums for approval and in providing the same method for amendment, rather than relying on representative conventions for those purposes. The special majority (in a majority of states as well as of the whole number of voters) is an ingenious means of ensuring that a majority is both representative of the country and geographically distributed.⁷ The direct election of senators anticipated the 17th amendment of the U.S. Constitution (1913). The provision for resolving deadlocks between the two houses of the Parliament by simultaneous dissolutions was unique. The integrated judicial structure was a distinct improvement. As well as being drawn up in Australia by Australians, the constitution contains much that is indigenous.

Events since 1901 have not refuted the decision of the founders to follow the federalist road. Republics have tended to prosper in accordance with their adoption of federalist principles; highly centralised republics have not proved enduring. That Australia has prospered may fairly be attributed in large part to federalism. The existence of state governments and the equal representation of the states in the Senate may well have prevented the extreme alienation of the outlying regions such as has occurred in Canada. Those institutions have certainly placed restraints, as has the written constitution, upon the power of the majority party at the centre. It is a useful

exercise to contemplate what Australia would have been like with no states, no written constitution amendable only by a special majority, a geographically distributed majority, of the electors, and no Senate. The country would then have been entirely controlled for long periods by the dominant faction in the party which gained forty-odd percent of the votes in Sydney and Melbourne in House of Representatives elections. It is not an inspiring prospect. It is to be doubted whether the country would have held together in such circumstances. As it is two states, Queensland and Western Australia, have provided cautions against entrusting absolute power to the majority party caucus and ministry. Federalism at least prevented those experiments in unlimited government being conducted over the whole country. (If our republicans want a sound republican agenda they could turn their attention to the excessive centralisation and lack of constitutional safeguards of the state governments.)

The current republican agitation in Australia appears to operate in blissful ignorance of, or deliberate blindness to, any such considerations. It believes, or pretends to believe, that federalism, the division of power between the central and state governments, the geographically distributed majority for changing the constitution, the constitutional restraints on the central government and the Senate are all, like the monarchy, archaic limitations on native democracy, imposed upon us by the wicked British colonialists. Our whole system of government is a consistently bad work, "an outmoded Constitution, outmoded Governor-General and cohorts of supporting knights" .⁸ Thus for our "shopping list" to achieve "better government", the states, the special majority for changing the constitution and a Senate with legislative powers have to go. The basis of this conclusion really lets the cat out of the bag:

Do we believe that our system is meaningfully representative when governments have been forced to compromise with the wishes of two or three members of an Upper House, representing the views of a relative handful of Australians? Surely representative government means that ultimately the Senate must yield to the wishes of the *executive* of the popularly elected *government*? (emphases added)⁹

This is a recipe for that absolutism of the controlling faction of the party with a simple majority of votes, from which we

have hitherto been partly shielded. The true republicans from whom we derived so much would say that these words propose the kind of "representation" and "democracy" which have brought so many republics down, and which constitution-makers should seek to avoid.

Hence the avoidance in the movement of any constitutional history which might throw light on the republican federalist basis and the indigenous ingredients of the constitutional structure.

At the same time our bunyip republicans adhere very closely to the one genuinely British element in the constitution, cabinet government, which tends to despotism by the rulers of the majority party. Thus Thomas Keneally, conceding that he writes "flat out", is able to assure us that "the parliamentary democracy which was our version of the Westminster system [sic] would remain in place", while in the same breath (because he writes flat out) declaring that "the whole process would be immensely more democratic than in the present system, where our Head of State is handed to us willy nilly by Westminster".¹⁰ That "our version of ... Westminster" is far more rigid, because of party discipline, than the original is not a matter with which to trouble him.

Discarding the monarchy thus becomes a cover for dismantling the very thing on which a successful republic would depend, the federal system, and removing the republican restraints on that ministerial power which, ironically, is derived from the crown and the royal prerogative.¹¹

It may be unfair so to characterise the whole tribe, but if there are any genuine federalist republicans in the movement, their voices have been muted. As with all revolutions, the extremists and authoritarians are likely to take over from the liberals unless the latter are resolute. A defence of the constitution involves saving Australia's truly republican federal institutions from the centralism which would actually be a repudiation of the republican ideal.

NOTES

- 1 *The Spirit of the Laws*, Book VIII, Chapters xvi to xx.
- 2 *ibid.*, Book IX, Chapter i, quoted in *The Federalist*, No. 9, para 7.
- 3 *The Federalist*, No. 10.
- 4 *ibid.*, last para.
- 5 This plan of federation was put to the 1891 Sydney convention by Sir Henry Parkes and never departed from: *National Australasian Convention Debates*, Sydney, 1891, p. 23.
- 6 See speech by Sir Richard Baker, later first President of the Senate, attacking responsible government as a "British sham" : *Australasian Federal Convention Debates*, Sydney, 1897, pp 782-9.
- 7 Federalism prevents governments from attempting to follow the false and destructive notion that there are simple majorities and minorities: Daniel Elazar, *Exploring Federalism*, 1987, pp 2, 19.
- 8 Patrick White, quoted in Thomas Keneally, *Our Republic*, 1993, p. 178.
- 9 Dr Elaine Thompson, "Giving Ourselves Better Government" , in Donald Horne, *The Coming Republic*, 1992, pp 148-60.
- 10 *Op.cit.*, pp 220-1.
- 11 For federalism as the essence of republicanism, and the monarchical origins of conventional "democracy" , see Andrew Fraser, *The Spirit of the Laws [sic]: Republicanism and the Unfinished Project of Modernity*, 1990, esp. at p. 17.2.

Essentials of Republican Legislatures: Distributed Majorities and Legislative Control[†]

Republican government and its ailments

The construction of the legislature in a republic should be designed to safeguard republican government, that is, government carried on by the temporary chosen agents and trustees of the whole people in accordance with constitutional rules and limitations, as distinct from government by the arbitrary will of a tyrant or a factious oligarchy. The republican legislature must be proof, as far as possible, against those perversions of republics.

There are two superstitious practices which have been the ruin of many republics. One destroyed the democracy of ancient Athens, and the other brought down the Roman Republic, and they have continued to work destruction ever since.

As they form part of the dogmas of most proponents of the current republican movement in Australia, it is well that they should be analysed.

As they also relate to the construction of the legislature, they are a suitable subject for this conference.

It is a great irony that those superstitious practices have been contracted by Australia and many other countries largely

[†] Australasian Study of Parliament Group, 15th Annual Conference, 1-2 October 1993, Parliament House, Melbourne.
Legislative Studies, Autumn 1994

as a result of British influence. The abolition of the monarchy may result in, and indeed is advocated by some with the deliberate intention to bring about, a more acute infection of these two British diseases.

Simple majoritarianism

The first superstitious practice is simple majoritarianism. This involves the formation of governments on the basis of a simple majority of votes of all electors, and the making of all decisions, administrative and legislative, by those who obtained that simple majority in the last election. In practice it means that the political party which gains a simple majority, which is usually less than 50 percent of the total, of the votes, rules the country. This practice is exemplified by the British system, whereby such a party controls the legislature and forms the government. In the Australian context it means, or would mean but for certain factors which will be mentioned anon, that the leaders of the faction which controls the party which gained forty-odd percent of the votes at the last election rule the country.

The superstition which goes with the practice is that this is the only legitimate form of rule, and anything contrary to it is undemocratic. In fact it tends to destabilise democracies.

Simple majoritarianism is destructive because it produces overbearing majorities and alienated and disaffected minorities, which can in severe cases destroy the state. Simple majority government is more easily captured by a self-perpetuating faction to bring about this situation. Examples of these phenomena abound: the lapse of newly-independent states into tribal warfare; the extreme alienation of the western provinces from the Canadian central government, which is run by deals between Toronto and Montreal; Northern Ireland under Stormont; Queensland before Fitzgerald; the antagonism to Whitehall of the Scots, the Welsh and, more recently, the inhabitants of the Midlands, leading to the movement for constitutional reform in Britain.

Distributed majorities

The cure for the evils of simple majoritarianism are institutional arrangements, particularly in the construction of

the legislature, to encourage the formation of distributed majorities. If institutions require, for the making of major political decisions, the support of majorities distributed across different groups in society and different regions, factious government and the growth of alienated and disaffected minorities are discouraged, and government is made more acceptable and stable.

One institutional arrangement to encourage distributed majorities is federalism, whereby different governments exercise responsibilities at their respective levels with the support of regionally-constituted majorities. Federalism has long provided a means of governing in an acceptable manner societies which are ethnically or otherwise divided, or which spread over an extensive territory. It is now being employed as a solution to the problems of such societies recently freed from one-party centralised governments.¹

Closely associated with federalism is the design of the legislature to require distributed majorities for legislative decisions. The ingenious invention of the American founders, of one chamber representing the units of the federation according to population and the second chamber representing those units equally, has been widely adopted, including by Australia. It requires that proposed laws be endorsed by two majorities, one constituted by population and one constituted by regions. This ensures that the double majority for legislative decisions is reasonably geographically distributed, an important factor in a country with an extensive territory and an uneven distribution of population.

The key to the success of federalism in holding big and diverse countries together is its tendency to prevent the growth of simple majority rule and the consequent evils of factional government and alienated minorities.

This is in addition to the advantages of federalism of limiting the power of the central government and providing the citizen with another avenue for redress of abuses.

Australia's founders equipped the country with these institutional arrangements to encourage distributed legislative majorities. Apart from the Senate, the clearest example of provision for a distributed majority is the requirement for the

special majority in referendums for changing the Constitution. When the growth of nationally-based and highly cohesive political parties undermined the effectiveness of the Senate as a device to encourage geographically distributed majorities, proportional representation for Senate elections was adopted. This has had the effect of requiring what might be called an ideologically distributed majority for the passage of legislation through the Senate, a majority distributed over the political parties which receive a significant share of votes. In effect, the design of the Australian legislature requires a triple majority for legislative decisions: a simple majority by population, a geographically distributed majority and a majority across the political parties represented proportionally.

When the federal system, the Senate and the special majority in referendums are understood as institutional arrangements to encourage the formation of distributed majorities and to prevent simple majority government and its consequent evils, their value is more readily appreciated. The nonsensical slogans of "states' rights" and the Senate as a "states house" are then dispensed with in favour of the real substance of federalism and bicameralism.

Simple majoritarianism in Australia

Unfortunately, the superstition of simple majoritarianism is an article of faith to Australian radicals, and therefore it permeates the republican movement. It has become clear that the abolition of the monarchy is a convenient cover for the dismantling of the restraints on simple majority rule, particularly the federal system and the Senate (the recent proposals to change the electoral law for the Senate so as to eliminate minor parties is only the latest manifestation of such an intent).

Simple majoritarianism put into practice would be more disastrous in Australia than in most countries, because political parties here are more narrowly based, hierarchical and rigidly disciplined, and there is a culture of government being seen as the art of riding roughshod over all opposition and criticism. In Britain simple majority rule is restrained by more independent backbenchers and a range of conventional controls, but even so the country flounders and reformers

become more shrill in their condemnation of the system. Australia with a British, simple majority legislature would have Britain's problems magnified.

Australia being a large country, it would also soon develop Canada's problems of irreparable alienation of the less populous provinces. It is significant that there is a strong movement in those provinces for equal representation in an elected Senate. There is also a movement for them to secede from Canada and join the United States, the rationale being that they would thereby gain two senators each, and more influence in Washington than they ever have in Ottawa.

The preservation of republican government in Australia therefore requires that the current design of the legislature, which is conducive to distributed legislative majorities, be retained if not enhanced.

Executive government equals government

The second superstitious practice which is destructive of republics is the equation of executive government with government as such. This arises from a belief that there is, and must be, in every state some person or group of persons called the government, that that entity governs, which is seen as a combination of administering and legislating, and that the executive government is that entity.

This belief is obviously encouraged by the British cabinet system, in which the ministry can readily be identified as the government. The formation of a ministry by the political party which wins a majority of parliamentary seats in an election means that such a government has a claim to be the democratically elected government, with a consequent strong claim to a monopoly of legitimacy.

According to this belief it is not only erroneous but a contradiction in terms to contemplate some other entity either controlling the activities known as governing or having some say in the performance of those activities. This amounts to suggesting that the government should be prevented from governing, and that someone else should govern, and as the government is democratically elected the very idea is a violation of democracy.

This kind of thought process, in which statements about governments governing are simply tautologies and therefore cannot be questioned, explains the violent reaction of certain people, particularly old-fashioned social democrats, to any suggestion that executive governments should be subject to control and veto by any independently-constituted body, such as a second chamber of a legislature.

Carried to its logical conclusion, the doctrine of executive government equals government results in caesarism or bonapartism, the embodiment of the popular will in an individual who is able to give expression and effect to that will. Some would say that prime ministerial government, particularly as practised in Australia, is not so far removed from that logical conclusion. One of the constant themes of the current republican movement is that any new elected head of state must not be allowed to limit the powers of the prime minister. The true republican asks: " why not?" .

Legislative control

Opposed to the doctrine of executive government equals government is the quintessentially republican idea of legislative control. According to this concept a representative and deliberative assembly controls the executive government, using the word control with its primary meanings, as given by the OED, of " to check or verify, and hence to regulate" , " to call to account" , " to exercise restraint or direction upon the free action of" . The basis of this view of government is that power without control is always abused. Regular elections are a necessary but not a sufficient control.² Therefore the representative assembly, on behalf of the sovereign people, exercises control in that sense over the offices to which the executive power is entrusted. On this view, government consists not only of the power which commands, but the institutions of countervailing power which limit and regularise it.

Contrary to some assertions, the principle of legislative control does not involve a clear distinction between legislative and executive powers, or an insistence on the complete separation of the bodies which exercise those powers. Of course, if the assembly possesses the legislative power, in the sense that primary laws cannot be made without its consent, this greatly facilitates and enhances legislative

control. The principle of legislative control, however, is perfectly consistent with the initiation of proposed laws by the executive, the delegation of secondary law-making powers to the executive, subject to control by the legislature, and the coordination of administration and legislation. The doctrine of the separation of powers in its purest form can lead to a notion that the legislature should exclusively legislate and the executive should exclusively administer, and neither should infringe upon the function of the other. This notion is exemplified in the decision of the US Supreme Court to the effect that the Congress cannot impose a legislative veto on executive decisions.³ The principle of legislative control, on the contrary, involves the legislature in administration to the extent that it scrutinises, and has some formal power to influence, the administrative activities of the executive.

If the legislature is so constituted as to reflect a properly distributed majority, this legitimises legislative control, because the legislature more accurately reflects the community, and also facilitates legislative control, because a properly distributed majority is likely to exercise that control in a constructive manner.

If the executive government controls the legislature, legislative control is absent, which generally means that there is little control over the executive, which tends to become absolute in power and absolutist in behaviour. This is the great problem of the British cabinet system: through control of the majority party, the ministry, which consists of the leadership of that party, can prevent any proper scrutiny or control of its activities by the legislature. That scrutiny and control is exercised only by second chambers to the extent that they are independent of the ministry. Thus even the non-representative House of Lords is regarded as valuable for the degree of legislative control it brings, and only upper houses in Australia have normally exercised scrutiny and control, thereby earning the enmity of "democrats" .

Executive prerogatives in Australia

As has been noted, the doctrine of executive government equals government is very strongly entrenched in Australia's political culture, particularly amongst orthodox radicals. It is

reinforced by the practice of the British system of cabinet government, which in turn is greatly reinforced by the intense cohesiveness of political parties.

To add to this, the Australian Constitution also reinforces executive government primacy, because it confers on the ministry certain prerogatives which derive from the monarchy, and which are unrepblican, not only in that sense, but in the sense that they limit legislative control.

Under the Constitution, the ministry in Australia possesses the following powers not subject to legislative approval:

- to make treaties (a power of great importance since the High Court held, in effect, in the *Tasmanian Dams* case, that a treaty can extend the legislative powers of the central government)
- to declare war and to engage in warlike military operations
- to prorogue the Parliament at any time
- to dissolve the House of Representatives at any time
- to veto legislative proposals (because the ministry controls the House of Representatives, this power is not exercised to veto legislation passed by both Houses, and arguably there is a (British) convention that it could not be so exercised; but the ministry has in effect a veto over any proposed laws passed by the Senate)
- to initiate all financial legislation and to determine whether such legislation passes the House of Representatives (in effect, an executive monopoly over such legislation)
- to make all executive appointments (including heads of departments, the chiefs of the armed forces, ambassadors, the Auditor-General, members of statutory authorities and quasi-judicial bodies)
- to appoint all federal judges (a very significant power, considering the role of the High Court in interpreting the

Constitution; a government long in office could stack the Court with its supporters).

A strong case can be made out that, in a government truly republican, the executive government should not possess an unlimited power of prorogation or dissolution, an unqualified veto over legislation or an unqualified monopoly over financial legislation, and that each of the other powers listed should be subject to legislative approval.

A survey of the constitutions of contemporary democratic republics which have been reasonably stable indicates that in most of those countries most of these powers are not entrusted exclusively to the executive government.⁴ It could be said to be a feature of republican constitutions that these powers are subject to legislative supervision.

It is ironic that the proponents of the current republican movement in Australia, generally speaking, not only eagerly embrace the British simple majoritarian and executive-dominated system of government, but also support these executive prerogatives, which are derived directly from the monarchy, which have little basis in the absence of the monarchy, and which are not characteristic of republics. Such support is indicated by the conspicuous absence of any proposals to change these powers.

A highly developed system of legislative control is a mark of republican government. A movement to make the system of government in Australia completely republican should also be a movement to strengthen legislative control.

Republican models and the republican movement

The discussion of republican models for Australia has been in fact a discussion of methods of appointing a new head of state, and, as has already been noted, the dominant theme is the need to devise such a method without interfering with, or limiting, prime ministerial power and the system of executive-dominated government. One would think that such a discussion in the presence of a genuinely republican ideology would welcome some method of selecting a head of state which would have the beneficial by-product of limiting prime ministerial power. One

would also think that such a discussion would include suggestions for improving the representative capacity of the legislature and the provisions for legislative control of the executive. On the contrary, the favoured proposals tend to be accompanied by schemes of "reform" for dismantling the institutions which encourage distributed majorities and which control executive power.

The reason for this is simply that the republican movement is not based on a genuinely republican ideology, but simply on a hostility to the monarchy as such, combined with a conventional radical faith in simple majority rule and executive-dominated government.

What is required is a true republican movement, which would, amongst other things, concentrate on strengthening the position of the legislature as the principal safeguard of government truly republican.

NOTES

1. Cf Daniel Elazar, *Exploring Federalism*, 1987: federalism "forces majorities to be compound rather than artificially simple" (p. 2); "majority rule is not rejected, but majorities are compounded either from distinct territories (territorial democracy) or concurrent groups (consociationalism), not counted through simple addition" (p. 19). As Elazar points out, this concept is the basis of James Madison's famous expositions in *The Federalist* nos 10 and 51.
2. Madison again: *The Federalist* no. 51.
3. *INS v Chadra*, 1983 462 US 919.
4. The countries covered by the survey are: Austria, Botswana, Finland, France, Germany, Iceland, India, Ireland, Israel, Italy, Switzerland, United States of America.

Australia's Real Republican Heritage[†]

The Australian constitution, as its supporters frequently tell us, has been highly successful in providing stability, freedom and good government for over 90 years. The most significant reason for this success is that it was built upon sound republican foundations. The current republican movement threatens those foundations.

These seemingly paradoxical statements can be explained by a little history.

When the Australian constitution was drawn up in the 1890s, monarchy was the dominant form of government throughout the world, as it had been for the whole of the Christian Era. Modern states had been formed by centralising monarchies which had assumed absolute powers. The European monarchies, with the notable exception of the Russian Empire, had become constitutional monarchies, but constitutions had been handed down by the monarchs, who were still the ultimate authority and the source of all power, which is the definition of monarchical government. Institutions of self-government, where they existed, were appendages of the crown. This was the case legally even in the United Kingdom, where parliamentary government had been won by civil war and revolution in the 17th century.

Republican government, that is, a system in which the whole people are the ultimate repository of sovereignty and the source of political power, was still in the 1890s very

[†] This article was solicited by a business journal, but not published because, the editor said, the subject was no longer topical.

problematical and a rarity. The history of republicanism was not encouraging. The ancient democracies, in which the citizenry assembled and personally made the political decisions, had been short-lived and marked by violent revolution and dictatorship. Ancient republics properly so called, in which the government was carried on by the elected agents of the people, had not had a happier career. The great classical model of republicanism, the Roman Republic, had collapsed when the extent of its empire became too great for its primitive institutions. The medieval and renaissance city states were oligarchical, unstable and unattractive. Of the modern republics, established since the Enlightenment of the 18th century, most had similarly fallen to revolution and dictatorship. The most conspicuous example was France; at the end of the 19th century the Third Republic, having recently succeeded by war and revolution the regime of Emperor Napoleon III, was constantly teetering on the brink of collapse.

There were only two modern republics which had survived, flourished and stayed free: the United States and Switzerland. The latter had remodelled its constitution largely on American lines in 1848. Both had experienced civil wars which were well within the memory of generations living in the 1890s. There was, therefore, only one viable republican model, and there were grounds for doubts about it.

Moreover, the British Empire then appeared to be the world's most successful polity, combining popular self-government, liberty and order in unmatched degrees. It was centred on a constitutional monarchy. Membership of the Empire, and protection by the British navy, were vital to Australia's survival. Over half of the delegates to the Australian constitutional conventions were born in parts of the Empire outside Australia.

Given all this, it is remarkable that the Australian founding fathers chose to follow the one viable republican model to the extent they did.

This was not because they were forming a federation, and that model provided the leading example of federation. Canada had shown that a federation could be based closely on the British system of parliamentary monarchy.

The Australian founders followed the republican model because they believed in it. It provided a framework for popular government over a wide territory in a country with a strongly democratic culture. This positive adherence to the republican model is typified by the least conspicuous but most influential of the founders, Andrew Inglis Clark of Tasmania, an ardent democrat and radical reformer who strongly promoted republican federal ideas as early as the 1870s. It was he and Sir Samuel Griffith of Queensland who steered the Australian constitution in that direction.

It appeared to many educated Australians, as to Clark, that the founders of the United States had solved the problem of republican government, of establishing a viable republic after so many others had perished. They had combined popular control of government with constitutional safeguards against abuse of power, and thereby avoided the fatal upheavals which had brought down earlier republican regimes. Earlier republics had depended on divisions of power between the people and aristocracies of wealth or office. The new republic relied for its safeguards on a balance of institutions all of which were popularly constituted. The division of power between the states and the central government, the separate representation of the people by numbers and by states in the bicameral legislature, and the separation of executive, legislative and judicial powers provided, as one of the founders put it, republican remedies against the diseases of republics. All successful republics have more or less followed this pattern, a fact we overlook because its innovations have become so common.

The Australian founders were impressed with the success of republican federalism, and adopted its key features. Their constitution was grounded on popular sovereignty: it was to be approved and amended by referendum. The division of power between the central government and the states followed the American precedent. The constitution was to be an overriding law interpreted and applied by the judiciary. The Parliament, unlike its United Kingdom equivalent, was not to be supreme in law making, but subject to the constitution. The ingenious invention of a lower house representing states by population and a second chamber representing states equally was also followed. Indigenous Australian ingredients were added, particularly the double dissolution provisions.

It is not surprising that the Australian founders kept the British monarchy at the apex of this essentially republican design. That was a condition of membership of the British Empire and protection by the Royal Navy. It was also regarded as conducive to responsible government, that is, the British system whereby the executive government is carried on by ministers who are members of parliament and who have the confidence of the lower house. The Australian founders adopted responsible government not because it was British, but because they believed it was best. They had operated it in the colonies. They thought that, although only 50 years old, responsible government had demonstrated a superiority to the republican separation of executive and legislature.

This belief was not universal. There were persistent critics of responsible government among the Australian founders. They considered it not only an inferior system but incompatible with the republican federation model which had otherwise been adopted. There were strong moves at the constitutional conventions, led by Sir Richard Baker, later the first President of the Senate, to abandon responsible government at the federal level and to have a separately constituted executive.

History has shown these pure federalists to have been right. The development of responsible government in all countries which have inherited it from the United Kingdom has resulted in a system whereby the ministry, relying on party discipline, completely controls the lower house of the parliament and is therefore not responsible in the way the theory of responsible government postulated. The control of lower houses by the ministry is more severe in Australia because party discipline is more severe. This system has reinforced the monarchical character of the British constitution: undivided power is now conferred on the ruling group of the majority party, and the prime minister is now a more powerful monarch than the Stuart kings. This concentration of power in the so-called Westminster system has been seen as a cause of the general decline and poor economic performance of the United Kingdom in this century.

Australia has incurred this degeneration of responsible government, but, while party discipline and therefore ministerial control has been worse here, it has been checked to an extent by the republican elements in the constitution: the subordination of Parliament to the written constitution as

interpreted by the High Court, federalism and bicameralism, the latter manifesting itself as a Senate not under government party control. It is these republican elements which have been successful, while the British element of responsible government has significantly failed, as it has elsewhere. We have been given a demonstration of what Australian government would be like without its republican safeguards: ministerial absolutism and abuse of power in Queensland illustrates the Australian version of the Westminster system deprived of those safeguards.

The problem with Australian republicanism now is that it sees a republic as simply the absence of the monarchy, and has no understanding of what republicanism really means, or of Australian constitutional history. Combined with hostility to the monarchy and the British connection there is a strong hostility to the republican elements of the constitution. Federalism is regarded as a brake on efficiency rather than a restraint on central government power. The Senate is regarded as a tedious interference with the mandates of governments to make law by decree. The process of changing the constitution by referendum with a special majority is regarded as a tiresome barrier to "reform". All should be swept away as relics of colonialism.

Constant propaganda along these lines may brainwash the public into thinking that these elements of the constitution must be jettisoned with the monarchy. There is a conspiracy to conceal the republican nature of these institutions and their value to a viable republican government. The danger of the republican movement is that it will result in centralised and unrestrained government and lead us down the Queensland, if not the South American, road.

What is needed in the current debate is a True Republican Party, to expound and defend the republican heritage of the constitution, and perhaps even to extend the republican elements and provide further safeguards against the centralisation and abuse of government power.