

IN DEFENCE OF REPUBLICANISM: A REPLY TO GEORGE WILLIAMS

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INTRODUCTION

George Williams poses a very topical question:¹ is a republican tradition for Australia either possible or desirable? Simply by recognising republicanism as a tradition deeply rooted in the history of Western political thought, Williams helps to take us beyond the current officially sponsored nativist campaign to rid us of our "foreign" Queen. Republicanism is a complex phenomenon that first became manifest in the world of classical antiquity. The strength of Williams's article lies in the impulse to break free from the banal parochialism of the republic promoted by the Australian Republican Movement and a compliant media eager to service the perceived legitimisation needs of the national government.

In the American constitutional tradition Williams finds a rich store of ideas about the role of an active citizenry in the creation and preservation of a free republican society. The idea of the republic in America did not begin or end with the removal of a "foreign" monarch. Republicanism inspired the transformation of American society *after* the overthrow of the British monarchy.² It was that social revolution which transformed "a petty rebellion within the Empire into a symbol of liberation for all mankind"³. Even so, for over two centuries now, most British subjects in the far-flung settler dominions have remained loyal to the Crown and resistant to the lure of Yankee republicanism. In fact Williams also concludes that civic republicanism in anything like that American sense is probably neither possible nor particularly desirable in Australia. Unfortunately his entire argument betrays an incomplete understanding of both republicanism and what he calls "the Australian constitutional tradition".⁴

The weakness of Williams's piece lies not just in his preference for "our own" Australian "model of the Westminster tradition",⁵ but also in the manner in which he portrays republican alternatives to the established constitutional order. Constitutional scholars should welcome Williams's effort to broaden the terms of the republicanism

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1 George Williams, "A Republican Tradition for Australia?" (1995) 23 *F L Rev* 133.

2 Gordon S Wood, *The Radicalism of the American Revolution* (1993).

3 Pauline Maier, *From Resistance to Revolution; Colonial Radicals and the Development of Resistance to Britain, 1765-1776* (1972) at 272.

4 G Williams, above n 1 at 143.

5 *Ibid* at 148.

debate within Australia. The problem is that he also does republicanism a scholarly disservice by misunderstanding its complex nature and vital significance in the civil and political constitution of a modern federal polity. For fear of leaving Williams's account unchallenged, I now offer a formal reply in defence of republicanism.

BRITISH REPUBLICANISM

Early on, Williams declares that "republicanism offers little to the process of interpreting the Australian Constitution".⁶ In forming this judgment he succumbs to the powerful undertow of nationalist ideology that still limits the scope of his understanding. To assert that "republicanism does not yet form part of the Australian constitutional tradition" is to deny or forget the British and more broadly Western character, not just of Australian law, history and culture, but also of the republican tradition. It is not just because "the High Court is turning ever more to the experience and ideas of other nations in interpreting the Australian Constitution" that American republicanism has become relevant to Australia.⁷ After all, the High Court has consulted American authorities from the beginning. At a much deeper level, American republicanism remains significant to Australians because we speak or at least still understand a common ancestral constitutional language.⁸ It is important to remember that the American republic was created by a British people. Like Australia, Canada and New Zealand, the American colonies were overseas dominions of the British Crown. The formative political and legal culture of the American republic was the product of a shared Anglo-American or British civilisation. Indeed it was the unique ability of one English republican, Tom Paine, to articulate the common sense of their situation that inspired American colonists to reconstitute themselves as citizens within an independent confederation of free republics.⁹

Similarly, constitutional authority in Australia has its genesis and remains embedded within the field of British history. As defined by Pocock, British history is not just a sloppy synonym for English history. The distinctive field of British history lies in the interaction between the English and other peoples who became subjects (however reluctantly) of a common Crown. The basic premise of British history is that:

[T]he various peoples and nations, ethnic cultures, social structures, and locally defined communities, which have from time to time existed in the area known as "Great Britain and Ireland", have not only acted so as to create the conditions of their several existences, but have also interacted so as to modify the conditions of one another's existence and that there are processes here whose history can and should be studied.¹⁰

British history acquired an Atlantic dimension with the settlement of British North America and the West Indian empire. Later it took on an Oceanic character with the British occupation of Australia and New Zealand. We share a common genesis in the realm of British history with the American republic. We have also borrowed a good

⁶ Ibid at 134.

⁷ Ibid at 143 and 134.

⁸ On republicanism as a political language, see J G A Pocock, *Politics, Language and Time: Essays on Political Thought and History* (1989).

⁹ Thomas Paine, *Common Sense and the Crisis* (1960); Eric Foner, *Tom Paine and Revolutionary America* (1976).

¹⁰ J G A Pocock "The Limits and Divisions of British History: In Search of the Unknown Subject" (1982) 87 *American Historical Review* 311 at 317.

many constitutional theories, practices and institutions from the United States (after some had first been transplanted to our sister dominion in British North America). Republicanism has long been a significant theme and problem in British constitutional history. It should not be treated as just another foreign doctrine now available to us in the ideological bazaars of the global marketplace.

Forgetting the common British roots of both the American and the Australian constitutional orders, Williams manages to transform republicanism into a vaguely sinister creed almost as out of place in Australia as the foreign Queen who so offends the nativist sensibilities of our political and ideological elites. American republicanism is portrayed by Williams as being somehow alien to "the Australian constitutional tradition". But, in a curious paradox, the defining feature of that Australian constitutional order turns out to be the Westminster tradition we share in common with the other British dominions. If the limits of possible and desirable constitutional reforms are defined by the Westminster tradition, it is hard to see why the abolition of one British element of the Constitution while retaining other more fundamental elements of the undeniably "British" Westminster tradition will somehow establish and consolidate a distinctive "Australian" constitutional identity. Like most nationalists, Williams is slow to acknowledge that Australia is constitutionally distinctive because of the historic British allegiances that have created, not just a vertical relationship with the United Kingdom, but also the horizontal ties endowing the old settler dominions with a common constitutional tradition. The British monarchy, like the Westminster system of which it is a part, stands for an Australianism that transcends Australia just as, in Canada, the Crown stands "for a Canadianism which, while utterly loyal to Canada, looks beyond Canada".¹¹ It is because they all draw on the borrowed legitimacy of a common Crown that the old British dominions of Australia, Canada and New Zealand have a uniquely supra-national constitutional identity. In another paradox our common British allegiance to the Crown gives us a direct and immediate interest in the historical and constitutional legacy of Anglo-American republicanism. The American revolution and the rush of constitution-making that it set in motion amounted to a major episode in British constitutional history. Two centuries later, a revived English-speaking republicanism could become an essential ingredient in the constitutional reformation of the remaining British dominions. The example of a modernised British republicanism might even help to inspire the reflexive reformation of a dilapidated American republic that has "guaranteed the survival of the forms of corruption it was created to resist".¹²

THE PHENOMENOLOGY OF REPUBLICANISM

Not only does Williams forget the British roots of the Australian constitutional tradition, he also misunderstands the phenomenology of republicanism. By characterising it as a "doctrine" or as an "extra-constitutional notion",¹³ Williams treats republicanism as an essentially ideological phenomenon, a tradition that is "more philosophical than constitutional", to use the putatively disinterested and authoritative

¹¹ Eugene Forsey, *Freedom and Order: Collected Essays* (1974) at 49.

¹² J G A Pocock "1776: The Revolution Against Parliament" in J G A Pocock (ed), *Three British Revolutions: 1641, 1688, 1776* (1980) 265 at 286.

¹³ G Williams, above n 1 at 134-135.

language of the Republic Advisory Committee.¹⁴ But republicanism can also be understood and institutionalised as a schema of civic action.¹⁵ As such, republicanism would establish a constitutional linkage between the principles of civic freedom and the institutions available for their formal reception and practical fulfilment.

Williams boldly declares that "civic republicanism is incapable of simply being applied to produce answers to contemporary legal problems". But he makes no serious effort to consider how republican principles of institutional design might be invoked to reform the Australian constitutional order. Indeed, when he writes that until recently, "republicanism ... has not been seriously examined in the context of Australian constitutionalism", he gives reason to suspect that he has not been willing to look very long or very hard to turn up "serious" examinations of republicanism in an Australian context.¹⁶ At most, Williams finds that his Canberra colleagues Braithwaite and Pettit have made a noteworthy contribution to a republican criminal justice policy.¹⁷ Pettit is also credited with the formulation of a model of republicanism compatible with our native constitutional traditions. According to Pettit, republicanism is characterised by three themes: an antimonarchical theme, the rule of law and the rule of virtue among politically active citizens and conscientious public officials proof against corruption.¹⁸ Neither Williams, who seems much taken by this schema, nor Pettit, sees the republican hostility to monarchy as a critical issue. It seems obvious to Williams that monarchy can be abolished simply by "the removal of the monarch of the United Kingdom as Australia's Head of State". Opposition to the monarchical principle need not, in his view, "disturb the existing political structure".¹⁹ But monarchy is a complex multi-faceted phenomenon, appearing in many guises. Fixated on the monarchy as such, on its literal embodiment in the Queen, Williams ignores the question of what the Crown stands for.²⁰ Monarchy is "a political structure of large dimensions" and we have lived within it for a very long time. In the late eighteenth century men learned that they could not "simply walk out from under their kings as if they were taking a stroll".²¹ By the late twentieth century we should have come to understand that monarchy is not synonymous with the institution of hereditary kingship. Even if Australia tips out the blue-blooded English royal now occupying the throne in favour of a President possessed of a more acceptable Australian ancestry or domicile, the larger problems posed by the monarchical principle will still await republican solutions. Republicans should consider more carefully what monarchy means within the total constitutional order of the contemporary corporate welfare state.

¹⁴ Republic Advisory Committee, *An Australian Republic: The Options - The Report* (The Report of the Republic Advisory Committee, 1993) Vol 1 at 41. Cited in G Williams, above n 1 at 140.

¹⁵ Andrew Fraser, *The Spirit of the Laws: Republicanism and the Unfinished Project of Modernity* (1990) at 97 and 111-116.

¹⁶ G Williams, above n 1 at 140.

¹⁷ J Braithwaite and P Pettit, *Not Just Deserts: A Republican Theory of Criminal Justice* (1990).

¹⁸ P Pettit, "Republican Themes" (1992) 6(2) *Legislative Studies* 29.

¹⁹ G Williams, above n 1 at 141.

²⁰ Cf Tom Nairn, *The Enchanted Glass: Britain and Its Monarchy* (1988).

²¹ Michael Walzer, *Regicide and Revolution: Speeches at the Trial of Louis XVI* (1974) at 88.

THE MANIFOLD MEANINGS OF MONARCHY

In the ancient world, monarchy first seemed a simple matter of one-man rule. In its most literal sense the word monarchy means the rule of one. But the one who rules may be one person, one assembly, one party or even one God. Examples of monarchical rule range "from outright tyranny of one against all to benevolent despotism and to those forms of democracy in which the many form a collective body so that the people 'are many in one' and constitute themselves as a 'monarch'".²² It may seem absurd to speak of a democratic assembly as a monarch but even prominent English jurists recognise their parliamentary regime as a dignified facade masking the efficient reality of an "elective dictatorship".²³ The French Revolution provides an even more compelling illustration of the monarchical logic of popular sovereignty. Because the collapse of the *ancien régime* was so sudden there was no available alternative to the political culture of monarchy. The result was a constitutional "vacuum ... in which the revolutionaries created for themselves a substitute image that was only a copy of the absolute power of kings, merely inverted in the people's favour". According to François Furet, the French Revolution depended heavily upon the conceptual legacy of undivided power bequeathed to the nation by the old monarchy.²⁴

After all, it was the fusion of a monarchical image of absolute power with the new democratic legitimacy that allowed Bonaparte to crown himself "king of the Revolution".²⁵ In line with the democratic ideology of popular sovereignty, the many conflicting particular wills in French society were absorbed into the republic, one and indivisible. The absolutist model of concentrated power was encapsulated in the identification of law with the general will of the nation.²⁶ This "implied not only the restriction of all citizens to an equal submission to the law common to all Frenchmen, but the annihilation of any sense of common interest intermediate between the individual and the nation".²⁷ To the extent that provinces, estates, orders, communities and corporations inspired particularistic loyalties, the absolutist logic of popular sovereignty mandated their immediate abolition. Their continued existence was seen as an open invitation to "federalist" subversion.

This is not to suggest that every form of democracy is merely a populist inversion of the monarchical principle of sovereignty from above. What all monarchies have in common is "the banishment of citizens from the public realm and the insistence that they mind their private business while only the ruler should attend to public affairs".²⁸ Within the New England town meeting or the Athenian *polis*, men neither ruled nor were ruled. Rather every citizen participated in authority while retaining his own private domain to which he could retreat away from the glare of publicity. At the same time, it must be acknowledged that those assemblies did rule over others such as women, children, slaves and aliens. The absolute monarchs of early modern Europe claimed to be the only truly public persons. All other men and women were "private,

²² Hannah Arendt, *The Human Condition* (1958) at 221.

²³ Lord Hailsham, The Dimpleby Lecture 1977, expanded in *The Dilemma of Democracy* (1978).

²⁴ François Furet, *Interpreting the French Revolution* (1980) at 34-39.

²⁵ *Ibid* at 78.

²⁶ Article VI, *Declaration of the Rights of Man and Citizen*, August 26, 1789.

²⁷ William H Sewell, *Work and Revolution in France: The Language of Labor from the Old Regime to 1848* (1980) at 89.

²⁸ H Arendt, above n 22 at 221.

limited in their function, dependent, members of the body politic only because of the unifying role of the king".²⁹ Those who were not citizens of the *polis* were similarly denied the status of public persons and were consigned instead to the private realm of the household. There they were ruled as by a king.³⁰

Perhaps the ancients were right after all. Perhaps every operating constitution can still be understood in terms of the balance it strikes between the one, the few and the many. If so, even republican polities may incorporate some monarchical elements in their governments. Monarchy sometimes manifests itself in the strangest and most unexpected manner. The monarchical principle can become detached from the person of a king and lodged instead in a system. Through the ubiquitous and inescapable power of the global system of needs, just such a novel, disembodied form of monarchical rule now holds sway over both the state and the subpolitical realm of civil society.

Over the past two centuries the associational life of modern civil society has been progressively subjected to the absolute imperatives of capitalist development. That is the modern form of monarchical rule that should be of greatest concern to Australian republicans. In the modern bourgeois liberal republic the citizen has no significant role to play in the corporate and institutional governance of civil society.³¹ Civil society is the realm of the bourgeois, while the citizen is confined to a more or less passive role in the electoral rituals essential to the democratic legitimacy of the nation-state. Under these conditions the monarchical principle may manifest itself as an organic ideal of the social, justifying the therapeutic and normalising penetration of public power into the private and intimate realm of civil society.³² Within this distinctively modern monarchical regime, the cult of the divine economy becomes the official religion of a global empire.

Capitalist modernity is the product of a kind of person, a kind of economy and a kind of religion. A God of Will was worshipped by the driven individual of the Protestant ethic whose enterprising ways helped the modern capitalist economy to take off. If the inner-directed Protestant supplied power on the runway, once in flight the economy relied on technique, not on character, to keep itself aloft. As Donald Meyer puts it in his study of the American gospel of positive thinking, "[I]f at the centre of nineteenth century social imagination there had stood a man, in the twentieth he was replaced by the vision of a system".³³

That vision draws upon a novel blend of psychology, economics and theology. Even in the rarefied realm of constitutional discourse, the economy is regarded in a traditional religious fashion. Judges, no less than professional politicians and corporate managers, treat the economy as an object of worship. In all sections of society and culture, economic development has become "an occasion for dependency rather than

²⁹ M Walzer, above n 21 at 23.

³⁰ Aristotle, *The Politics*, tr T A Sinclair (1957) at 92.

³¹ According to John Dunn, the "organizational reality of any modern state is radically incompatible with its being a system of popular rule": see *The Economic Limits to Modern Politics* (1990) at 30. Cf Andrew Fraser, "Postmodern Populism and the Australian State" (1992) *Thesis Eleven* 31 at 143-53.

³² A good Australian example of the doctrinal strategy can be found in M J Detmold, *The Australian Commonwealth: A Fundamental Analysis of Its Constitution* (1985).

³³ Donald Meyer, *The Positive Thinkers: A Study of the American Quest for Health, Wealth and Personal Power from Mary Baker Eddy to Norman Vincent Peale* (1966) at 177.

belonging".³⁴ Our abject dependence on the mysterious movements of the global economy parallels the relationship of Protestant believers to their God. In a downward spiral we are returning to the situation of the early Protestants as an abyss opens up between us and an economy invested with all the attributes of divinity. Its inner workings surpass ordinary human understanding. Among our elites and opinion leaders, insight, knowledge and intelligence can do no more than suggest how we might best propitiate the spirits animating a society of perpetual growth. It is not the courage or the strength of our leaders, nor our respect for tradition that sanctifies the system. It is faith alone. Awesome and inscrutable, spectacular and self-impelling, the system invites adoration.³⁵

Ever since the early Protestants sought signs of divine grace in worldly success, being has progressively been reduced to having. If the economy has acquired an aura of divinity, the modern business corporation has become its cathedral and positive thinking its managerialist creed. Gierke tells us that the sorts of corporations prominent in the life of medieval civil society could realistically be understood as fellowships, not just as legal devices to pool assets under firm central direction.³⁶ In more recent times the property element in the legal conception of the corporation has all but eliminated the associational element. Once the economy subordinated every other dimension of corporate life to its own absolute imperatives, the fellowship principle was subjected to the lordship of capital. Gierke recognised "the joint-stock company" as a beneficial and necessary "link in the chain of economic organisms", but feared that "if it alone ruled it would lead to the despotism of capital".³⁷

With the rise of corporate capitalism, ruling elites have divested themselves of personal and collective responsibility for their stewardship over economy and society.³⁸ The economy has become their master. But the economy is a forgiving master to those who serve it well. Many forms of professional and corporate liability can be insured against when responsibility cannot be otherwise displaced onto the unpredictable tremors and convulsions inherent in the system. Arendt characterised this corporatist regime as "a kind of no-man rule". She added: "But this nobody, the assumed one interest of society as a whole in economics, does not cease to rule for having lost its personality". It, too, is a version of monarchical rule. She warns that "the rule by nobody is not necessarily no-rule; it may indeed, under certain circumstances, even turn out to be one of its cruelest and most tyrannical versions".³⁹ Republicanism has been drained of meaning or interest in societies where there are few public spaces in which to *be* a republican or to *act* as a citizen.⁴⁰ Like most of those minimalists who seek only to end the reign of the House of Windsor in Australia, Williams is not noticeably antagonistic to a suitably disguised model of monarchical rule, such as parliamentary absolutism or the corporatist cult of the divine economy. Certainly he gives short shrift to even the most moderate reforms. More radical republican proposals scarcely rate a mention.

³⁴ Ibid.

³⁵ Ibid at 178. See also Guy Debord, *The Society of the Spectacle* (1970).

³⁶ Otto von Gierke, *Community in Historical Perspective* (1990). Cf James Willard Hurst, *The Legitimacy of the Business Corporation in the Law of the United States, 1780-1970* (1970).

³⁷ O von Gierke, above n 36 at 203-204.

³⁸ Christopher Lasch, *The Revolt of the Elites and the Betrayal of Democracy* (1995).

³⁹ H Arendt, above n 22 at 40.

⁴⁰ Cf Hannah Arendt, *On Revolution* (1977) at 253.

Williams does make a few passing references to republican models of constitutional reform that go beyond the recurrent nativist campaigns against British royalty. Strong republicans in Australia hope to expand participation by citizens in the exercise of constitutional and civic authority, in both the internal political order of the state and in the institutional life of civil society. Though he mentions a few, Williams shows no sustained interest in reform proposals to combat the forms of despotic rule and oligarchic privilege characteristic of the modern corporate welfare state. He makes no effort to identify the constitutional problems for which citizen-initiated referenda might provide a solution. Nor does he seem to care much why anyone should want business corporations and professional associations to be treated as constituent elements of a modern federal republic.⁴¹

The question of how citizens might act to create and sustain a republican constitution is of much less interest to Williams than the issue of how judges might interpret it. This becomes evident when his search for alternatives to the sort of minimalist republicanism now on offer in Australia begins and ends with the work of Cass Sunstein. Like Sunstein, Williams treats republicanism as a doctrinal phenomenon of mainly heuristic significance in the process of constitutional adjudication and textual interpretation.

FEDERALISM IN A MODERN REPUBLICAN POLITY

Because he fails to treat the problem of monarchy seriously, Williams misses the contribution that a republican jurisprudence could make not just to the doctrinal analysis of Westminster constitutionalism, but also to its practical reformation. Historically, republicanism became an important factor in constitutional history whenever citizens were moved to act in opposition to the despotic tendencies inherent in every form of monarchical rule. Pettit and Williams err when they distinguish the role of a virtuous citizenry from the anti-monarchical motif in republican thought. Monarchy feeds on the corruption of the civic virtues. Montesquieu observed long ago that "in a monarchy it is very difficult for the people to be virtuous".⁴² This remains as true under the monarchical sway of the divine economy as it has been under the electoral reign of good King Demos.

In every monarchical regime, the republican is bound to be a spiritual outsider. Watching the self-interested competition for whatever honours the reigning monarch deigns to bestow, the republican will sink into melancholy memories of times past when the civic virtues reigned supreme.⁴³ Williams concludes that republicanism has not got much of a future in Australia for the least credible of reasons when he holds Sunstein up as a model republican. Sunstein is no moody malcontent. He is a highly regarded American constitutional scholar who could deservedly pride himself on being very much "in the loop". Sunstein has no affinity for republicanism understood as an oppositional ideology. In the American context Sunstein is a minimalist republican. For Sunstein and others associated with the republican revival in American

⁴¹ G Williams, above n 1 at 142.

⁴² Montesquieu, *The Spirit of the Laws* (1989) at 25.

⁴³ Cf David Gross, "Left Melancholy" *Telos* 65 (Fall 1985) 112.

legal scholarship, republicanism is conceived as a sort of ideological residue in the constitutional crucible of liberal modernity.⁴⁴

In so far as Williams demonstrates that Sunstein has little to offer by way of alternatives to the minimalist republicanism favoured by constitutional insiders in Australia, he has done us all a positive service. Unfortunately he makes a rather large jump from that correct observation to the suggestion that republicanism as such offers no possible or desirable alternative to and forms no part of the Australian constitutional tradition. In fact there are republican values, institutions and practices already immanent within the Westminster tradition we share with the other British dominions. Anglo-American republicanism did not disappear from British constitutional history with the declaration of American independence from the Empire. The undeniable success of the American model of the bourgeois liberal republic had a radiant impact on the coeval constitutional development of the self-governing dominions.

Federalism is an obvious example of American and republican influence on the development of the Westminster tradition in the settler dominions of the second British Empire. But the civic significance of the federal principle has been distorted, repressed and denied by those who preach the political theology of sovereignty.⁴⁵ The federal principle is certainly a side issue for the elites and interests now promoting the minimalist republic. For them constitutional reform is part of a scheme to market Australia's new corporate image in the capitals and boardrooms of Asia. If anything, federalism is just another archaic constitutional obstacle to economic growth and development. Federalism is commonly understood as a process of intergovernmental relations that often generates jurisdictional disputes requiring regular judicial resolution. Understood in those prosaic terms it is hard to see what federalism could have to do with republicanism. In both Australia and Canada, constitutional doctrine and political expediency have obscured the republican significance of the federal principle. To recover the civic and oppositional meaning of the federal idea will require a substantial break with the deeply entrenched absolutist traditions of Westminster constitutionalism.

From a republican perspective, federalism has to do not just with the rights, powers and duties of governments, but also with the rights and responsibilities of the citizen. The point of the federal idea in a republican polity is to constitute a multiplicity of public spaces wherein citizens can exercise their powers of reasoned speech and deliberative decision-making in matters of common concern. Neither in the internal political order of the state or Commonwealth governments, nor in the governance of the corporate sector are there many such spaces. The jury is one of the few obvious examples. And yet it is clear that private corporations have acquired a large share of

⁴⁴ Andrew Fraser, "The Partial Republic: A Review of *The Partial Constitution*" (1995) 2 *Review of Constitutional Studies* 396. On republicanism as an expression of oppositional politics, see Caroline Robbins, *The Eighteenth-Century Commonwealthmen* (1959); Bernard Bailyn, *The Ideology of the American Revolution* (1967); J G A Pocock, *The Machiavellian Moment: Florentine Political Thought and the Atlantic Republic Tradition* (1975); David Burchell, "The Virtuous Citizen and the Commercial Spirit: The Unhappy Prehistory of Citizenship and Modernity" in G Hage and L Johnson (eds), *Communal/Plural: Republicanism Citizenship, Community* (1995) 17.

⁴⁵ Cf A Fraser, above n 15 at 97 and 111-116. See also, Carl Schmitt, *Political Theory: Four Chapters on the Concept of Sovereignty* (1985).

the governmental power to make and enforce public policy decisions.⁴⁶ If corporations actually have become private governments, the operating constitution of Australia now incorporates a federal distribution of authority not recognised in the formal text of either the Commonwealth or the State Constitution Acts. Those private governments should be reconstituted as "little republics" in which the public-spirited *citizen* encounters the self-interested *bourgeois* on a plane of equality.

Whether we like it or not, economic federalism is already a fact of life. It takes the form of a corporatist regime in which significant governmental powers and prerogatives are vested in private organisations. For decades it has been clear that in "an industrial society the most important units of local government are the supercorporations". According to Arthur Selwyn Miller, "the decay in American local governments, especially of town, city and county, is primarily the result of a shift of focus to the giant firms". But, in both Australia and the United States, "Orthodox constitutional theory and doctrine recognise the existence of two entities: government and the individual person. Nothing intermediate is envisaged".⁴⁷ It will be the task of a republican constitutional jurisprudence to craft a civic distribution of authority within the corporate institutions of modern civil society. That republican reformation will be complete when orthodox constitutional theory treats even the business corporation as a civil body politic, thereby acknowledging its vital role in the functional federalism of the corporate welfare state.

Within the Westminster tradition the civic significance of the federal principle has been undermined by the doctrinal primacy given to the political theology of sovereignty. The substantive political and constitutional possibilities inherent in the federal idea cannot be translated into the legal language of sovereignty without doing logical violence to one principle or the other. This became obvious in the early years of the High Court when the civic roots of the federal idea were obscured by arcane metaphysical disputes as to whether there existed only one or several Crowns in Australia. Not only was the republican significance of federalism buried in the constitutional jurisprudence of the High Court, the constitutional balance was tipped in favour of the doctrinal and political strategies subservient to the absolutist imperatives of economic growth and development.⁴⁸

Williams is oblivious to the complexity of the problems posed by the deeply entrenched constitutional influence of the monarchical principle. He is similarly deaf to suggestions that a modernised model of civic federalism might offer an alternative to both the absolutist logic of sovereignty and the anomic rule of nobody. Williams cannot fairly dismiss the relevance of republicanism to the legal and constitutional reformation of the British dominions without seriously examining the possibility that a federal distribution of civic authority might be substituted for the increasingly irresponsible lordship of capital.

⁴⁶ Mark Nadel, "The Hidden Dimensions of Public Policy: Private Governments and the Policy-making Process" (1975) 37 *Journal of Politics* 2.

⁴⁷ Arthur Selwyn Miller, *The Modern Corporate State: Private Governments and the American Constitution* (1976) at 200-209.

⁴⁸ *Ibid* at 243-251.

LAW AND POLITICS

Williams's failure to consider federalism as a republican alternative to monarchy in all its manifold forms is a pity. Had he done so he might have avoided a serious misrepresentation of the relationship between law and politics in the republican tradition. Federalism in the republican tradition is not just about intergovernmental relations. For republicans, law is a means of maintaining boundaries between autonomous bodies politic. This is for the sake of citizens, not for the convenience of governments. In the constitution of a modern federal polity good fences should make both good neighbours and good citizens. Only if the law maintains the integrity of the public spaces constituted within those bodies politic can the virtuous citizenry of a federal republic help it survive the corrupting effects of time.

It is the Westminster tradition and not civic republicanism that fuses the power to make law with the political will of a sovereign parliament. A republican constitutional jurisprudence in the old British dominions would have to extend the federal principle beyond the internal political order of the state into the institutional life of modern civil society. Such a federal distribution of civic authority would be accomplished by creating a multiplicity of public realms within the corporate enterprises and professional groups in civil society.⁴⁹ In effect new forms of the civil body politic well known to early modern British law would come into being. They would play a legitimate role in making and executing public policy decisions. Just as the state would no longer possess a monopoly over political life, so too it would no longer assert an exclusive power to make law.

Because one contemporary American constitutional scholar has claimed that "law is best understood as a form of politics", Williams leaps to the conclusion that the "distinction between politics and law cannot be sustained" in a republican constitutional tradition.⁵⁰ Similarly in his analysis of *Australian Capital Television Pty Ltd v Commonwealth (Political Advertising)*,⁵¹ Williams identifies republicanism with the "notion that governments should intervene to enhance the political process", presumably through the exercise of their sovereign legislative will. At the same time he claims that the High Court set itself in opposition to the government's republican principles when it invalidated the legislative ban on political advertising in the name of individual liberty.⁵² It would be more accurate to see both the government's legislation and the High Court's decision striking that legislation down as legal corollaries of the self-contradictory model of enlightened despotism sanctified long ago in the *Amalgamated Society of Engineers v Adelaide Steamship Co Ltd (Engineers)*.⁵³ In that decision the despotic enhancement of Commonwealth power was justified by reference to the conventional norms of responsible government controlling its exercise. A responsible government is by definition an enlightened one and hence fit to determine the limits of its own jurisdiction. It was up to the electorate and not the courts to guard

⁴⁹ Cf Andrew Fraser, "Strong Republicanism and a Citizens' Constitution" in W Hudson and D Carter (eds), *The Republicanism Debate* (1993) 36; Andrew Fraser, "Beyond the Charter Debate: Republicanism, Rights and Civic Virtue in the Civil Constitution of Canadian Society" (1993) 1 *Review of Constitutional Studies* 27.

⁵⁰ G Williams, above n 1 at 142.

⁵¹ (1992) 177 CLR 106.

⁵² G Williams, above n 1 at 146-72.

⁵³ (1920) 28 CLR 129.

against the despotic misuse of Commonwealth powers.⁵⁴ By the same token, the electorate must remain free to inform itself as to the deeds and misdeeds of its parliamentary rulers. In other words, the *Political Advertising* case is not "inconsistent" with a literalist interpretation of the *Engineers* case. Instead it is simply the other side of the coin.⁵⁵

On republican grounds, according to Williams, the Commonwealth was entitled to safeguard the integrity of its own political process by banning televised political advertising during federal elections. But Williams fails to recognise that the despotic extension of that ban to State and local elections offends the federal principle. In a federal polity, the autonomy of State and local government implies a constitutional capacity to preserve the political integrity of their own electoral processes. Only two members of the High Court concerned themselves with that federalism issue. The majority of the Court offered no challenge to the centralist schema of enlightened despotism. Instead they affirmed only that despotism "must be enlightened or not be at all".⁵⁶

Responsible government and representative democracy are the institutional mechanisms through which the state grounds its sovereign claims to enlightenment and constitutional legitimacy. Governments, the High Court is simply saying, must be seen to be responsible to the people as represented in Parliament or not be entitled to govern at all. The Commonwealth ban on political advertising was successfully portrayed as a threat to the formal integrity of the electoral rituals underpinning the legitimacy of the parliamentary state. As a practical matter, this has less to do with "enhancing the liberty of the individual"⁵⁷ than with recognising the powers and privileges of the communications industry as constituent elements in the contemporary Australian practice of responsible government.

The blurring of boundaries between politics and law within the total constitutional order of the Australian corporate welfare state has become an uncomfortable reality. No one can be sure any longer where real authority lies. When Her Majesty's High Court judges take to saluting the sovereign people, sounding for all the world like Yankee republicans, constitutional doctrine is bound to become something of a logical muddle. But that has always been the essence of the *Engineers* case. It was the particular confusion of law and politics authorised by that judgement that has long since hollowed out the federal principle. Williams seems one-eyed, therefore, when he accuses republicans of threatening to politicise the law. He is also wrong. Far from seeking to undermine the integrity of either the body politic or the legal process, civic republicans aim to reconstitute stable and legally recognised borders between the public, the private and the social realms.

Williams charges that republicanism represents a clear and present danger to "the integrity of the process of constitutional interpretation". Republicanism, it seems, is not only a doctrine alien to "the Australian constitutional tradition", it threatens to subvert established forms of constitutional order by "breaking down the boundary between

⁵⁴ Ibid at 151-152.

⁵⁵ Andrew Fraser, "False Hopes: Implied Rights and Popular Sovereignty in the Australian Constitution" (1994) 16 *Sydney L Rev* 213; cf George Williams, "Engineers is Dead, Long Live the Engineers!" (1995) 17 *Sydney L Rev* 62.

⁵⁶ L Krieger, *An Essay on the Theory of Enlightened Despotism* (1975) at 39.

⁵⁷ G Williams, above n 1 at 146.

politics and law".⁵⁸ In fact, the whole point of constituting a multiplicity of civil bodies politic would be to generate new forms of civic *authority*. With the erosion of the traditional authorities once sheltered by the majesty of the British Crown, law has become an impersonal emanation of state and corporate power. The politicisation of law is not a development republicans welcome. No one familiar with a major republican thinker such as Hannah Arendt could doubt her commitment to the separation of law from politics. For Arendt:

[L]aws had always been understood as restrictions placed in the way of action. Laws were boundaries, fences, hedges, meant to guard men from one another and to limit the disruption caused by their anarchic ability to act.⁵⁹

REGAL REPUBLICANISM

In the end, Williams maintains a cool detachment from the republican tradition. Not surprisingly, that aloof posture reflects his commitment to the essentially monarchical premises of Westminster orthodoxy. When he sets out to imagine a constitutional transformation giving new constitutional meaning to citizenship and civic virtue he turns automatically to the tried and true techniques of parliamentary rule from above. The Australian republic, it seems, will come to pass through the procedures laid down in s 128 of the existing Constitution or not at all. The constituent power of the nation will remain seated in the Commonwealth Parliament. At most, sovereign authority will merely *derive* from the Australian people. Under this vague standard our unelected and unaccountable High Court already finds it a simple matter to portray itself as the virtual representative of the people at large.

Williams predicts that any worthwhile republican alternative to the minimalist program would run foul of the "conservatism of the Australian people and the difficulties of obtaining bipartisan support".⁶⁰ To back this claim, Williams offers up conventional wisdom as to the poor success rate achieved by the Commonwealth government in its repeated efforts to amend the Constitution through s 128 referenda. But if those referenda had nothing to do with a strong republican program of constitutional reform, it is hard to see what previous experience could tell us about the prospects of attracting popular support for a civic reformation of the contemporary corporate welfare state. Nor is it clear what constitutional significance we should attach to the supposed conservatism of the Australian people. A strong republican program of constitutional reformation could be seen as profoundly conservative in its desire to embed the dynamic forces of corporate capitalism in a coherent and binding sense of civic purpose. Williams closes with the suggestion that the emergence of a strong republican movement will only be achieved through the re-education of the Australian people under the benevolent and bipartisan auspices of the Civic Experts Group.⁶¹ That model of regal republicanism from above is characteristic of the political, economic and ideological elites gathered in the Australian Republican Movement. By contrast a civic republican movement would mount a constitutional challenge to the entrenched power of those same elites.

⁵⁸ Ibid at 143.

⁵⁹ Margaret Canovan, *Hannah Arendt: A Reinterpretation of Her Political Thought* (1994) at 87.

⁶⁰ G Williams, above n 1 at 146.

⁶¹ Civic Experts Group, *Whereas the People: Civic and Citizenship Education* (Report of the Civic Experts Group, 1994), cited in G Williams, above n 1 at 148.

CONCLUSION

The modern republican insurgency will not conform to past revolutionary models in which kings and nobility were displaced as the symbolic source of sovereign authority by the *demos*. The creation of a modern republican civil society will require a conservative reformation in which existing economic, political and ideological elites are neither overthrown nor liquidated. The private power of economic and cultural capital will be conserved and perhaps even enhanced on condition that it comes to be exercised in a politically responsible manner. This will involve carving out public spheres within the corporate and associational life of modern civil society where the *bourgeois* encounters the *citizen* on a constitutional plane of equality. The constitutionalisation of the corporation will endow the managerial and professional classes with a new measure of civic authority. By the same token, the naked economic power of the bourgeois will become more reflexive and sensitive to the constitutional norms of political discourse. Elite groups already wield enormous powers of social governance, control and innovation. Those private powers are legally remote from the responsible exercise of governmental power and public authority under the Commonwealth and State constitutions. Corporations and professional associations remain proprietary fiefdoms where the people's writ does not run. With the continuing drive to privatise ever more governmental responsibilities and sovereign prerogatives, the search for legitimate constitutional authority seems to have been transformed into a blind faith in the beneficent workings of the divine economy. It is the institutionalised irresponsibility and intellectual inertia of our elites rather than the conservatism of the Australian people that poses the greatest obstacle to the creation of a modern federal republic standing for anything more than the abolition of hereditary kingship.

Having set out bravely to explore the wide world beyond the insular boundaries of the minimalist agenda, Williams lapses back much too soon into the comfortable certitudes of constitutional nativism. Speaking as a fellow citizen in the republic of letters, it seems to me that Williams has failed to give a fair hearing to many of those he lumps together as "proponents of republicanism". Republicanism has much more to offer in the constitutional reformation of Australia than Williams concedes or realises. He should know better.