4. Conclusion: republican measures for a republican future

For forms of government let fools contest
Whate’er is best administer’d is best

— Alexander Pope

Elegant in its cynicism as this couplet is, it ultimately fails, because the quality of administration usually depends in significant part on the nature of the form of government—the regime—under which it functions.

Because of the ubiquity of imputation, the republican mode of governing is always difficult. The republican might succeed in making explicit some long-tacit norm, only to find it slipping back into another assumptive world. Take, for example, the phenomenon of regulation, which is always a concern of governments, but a concern that has moved to centre stage in the contemporary world according to one recent perceptive account (Braithwaite 2008). After some time considering the phenomenon of modern regulation to be best approached under the rubric ‘the regulatory state’, Braithwaite now deems it more appropriate to allow the State to recede into the background of regulatory capitalism. Why? Because governments are now politically pressured to regulate the activities of their own agencies (Braithwaite 2008:21), and many activities are being regulated by global bodies with remits wider than any nation-state. So, Braithwaite argues, it is no longer appropriate to have a core governance definition focused on the nation-state.

In this, of course, Braithwaite differs sharply from Keane, with his core concept of monitory democracy. To place capitalism at the centre of the definitional field is, however, to marginalise fiducial political action—the performance of governance that provides a genuine basis for strong and continuing public trust. Braithwaite is after all not averse to endorsing institutional untidiness, for this can provide opportunities for ‘interstitial freedom’: the phenomenon that can be observed when the citizenry uncovers openings for free action in the interstices of governing institutions—openings that were not intended by the designers of those institutions. While no liberal republican can be hostile to interstitial freedom—for we all deserve all the breaks that come our way in the modern world—s/he cannot be content with the solely accidental and the

1 At one point, he expresses a preference for ‘many semi-autonomous powers recursively checking one another, rather than a few autonomous branches of governance’ (Braithwaite 1997:312).
contingent as bases for fiducial governance. Such governance does require our very best efforts in institutional design. Freedom that is based on such design work is more secure than the interstitial form.

In this concluding section of the monograph, then, I am unashamedly political in my arguments. I shall take it as a given that a jurisdiction has proceeded well down my order of institutional reform set out in the preceding section. In this way, I hope to show most clearly the ways in which a fully republican regime could effectively tackle the tasks of fiducial governance. I shall therefore be working my way through the problems identified in Section 2, but doing so in reverse order, so that I shall be able to conclude with a discussion of the ways in which a republican version of the regime of constrained parliamentarianism could strengthen our democracy.²

Armed with the set of new and rejuvenated institutional mechanisms introduced in the preceding section, we can now return to the components of the expanded framework of constrained parliamentarianism. This time, however, we can be much briefer, for as they are presently constituted, the several components share the relatively small number of problems that would be ameliorated by the introduction of these new mechanisms.

**a) Viable role for a contemporary head of state**

To place the roles of a contemporary head of state in the context of constrained parliamentarianism is to identify clearly the unsuitability of the monarchical style of governing. If a regime is to be able to respond fully to the demands of polyarchic rule, it needs to demonstrate the capacity to handle ‘multi-valued choices’ (Stewart 1974). Because of its distinctively different politics, a council of state would be able to develop this capacity in ways well beyond the reach of partisan contestation.

In further developing this capacity for fiducial politics, each council of state would be building on the work that has been accomplished over the years as our parliaments have struggled to establish viable committee systems, for these often display a consensual politics close to the fiducial. Indeed, over time the activities of a council of state could have the effect of strengthening still more the committee systems of its parliament, because of the ways in which it will be softening the nature of partisan contestation and indeed changing the very nature of our parties. As this transformation of our parties continued, the council

---

² In a companion monograph that I am preparing with Harshan Kumarasingham, we shall be arguing that the constitutional reforms that are most feasible in the foreseeable future in New Zealand could fall well short of republicanism.
of state could be expected to withdraw in the face of stronger parliamentary committee work. It is in the very nature of fiducial governance that the head-of-state roles are not primarily those of doing, but rather of assuring him/herself that appropriate action is being taken somewhere in the system of governance. As the Hasluck approach considered above indicates, the holder of a head-of-state office has only to intervene directly when s/he discerns faults in the performance of others.

It could be expected that each council of state would take its lead from its head-of-state leaders and would be equally circumspect in respecting the integrity of the other branches of governance whose representatives would of course be participating in its deliberations.

**b) Serial referenda**

If the proposed councils of state were to commit themselves to the principles of serial referenda on matters of high fiducial policy, the whole culture of constitutional reform in Australia could be transformed. If referendum proposals were to be generated by fiducially minded partisan leaders meeting in collegial deliberations, the citizenry could be expected to view them more favourably than it has in the past, when reform proposals were generated for the most part by remote commissions of lawyers. And if the serial nature of these referendum exercises were to be institutionalised along the lines recommended by Ackerman, their very familiarity could enhance their prospects of success.

**c) Integrity of major institutions**

The reform program here proposed provides answers to the two questions that have most perplexed the advocates of greater integrity in our institutions of governance. The first of these is the discovery of political champions. For the reasons already stated, these are unlikely to emerge from our current, unreformed democratic regime. A directly elected president would, however, be well placed to perform the champion’s role. The second question is the identification of those who would be well placed to undertake the work of comprehensive regime design. As we have seen, the governance review councils/committees proposed by the integrity advocates would have too narrow a brief to be able to undertake reviews of governance arrangements *tout court*. For this work of comprehensive review to be undertaken, the much more broadly constituted councils of state that I recommend would be admirably suited.
With these arrangements firmly in place, the reformed regime would be well equipped to deal creatively with the problem that is always the most vexing for any democratic regime: how to devise extra-constitutional practices that can overcome the policy rigidities caused by the intersection of the formalisms of constitutional phrasing, on the one hand, and the inflexibilities of partisan contestation, on the other.

When the head of government and the leader of the opposition are required to negotiate the scope of partisan contestation in a collegial setting oriented towards fiduciality, it becomes possible for that same collegial body to work on the overall design of the regime’s constitutional arrangements.

d) Securing human rights

While the dialogue model of securing human rights through a charter is an attractive one, in none of the regimes that has adopted this model has collegial dialogue been attained. And the reason for this lacuna is clear enough. Only in the setting provided by a properly constituted council of state could the dialogues essential to the charter model of securing human rights be conducted.

The awkwardness inevitably associated with the functions of the attorney-general—attempting to perform non-partisan functions in a context of continuing partisan contestation—would be removed. Indeed, in some jurisdictions, it could be deemed appropriate to seat this officer (and possibly his/her shadow as well) on the council of state—a context for the discharge of his/her long-established quasi-judicial functions that would avoid the difficulties caused by partisan rigidities.

As the listing of current deficiencies discussed above clearly indicates, the design of a regime that reconciled the need for human rights to be entrenched in ways that respected the ultimate role of the Parliament in determining the scope of those rights is one that typically falls short because of the rigidities of partisan contestation. The reformed regime here recommended would provide a way through such difficulties, for it would be the fiducial politics of the council of state, rather than the partisan politics of the Executive, that would determine the design of the human rights regime. Party leaders would continue to play the leading roles in this work, but they would do so in a collegial setting that would impose new, but more flexible, disciplines on them. In such a setting, strong differences of opinion would continue to express themselves, with conservatives opposed to progressives on the definition of the proper scope of the rights to be protected (social and economic as well as political and civil?), but issues such as these would be settled in each jurisdiction away from the rigidities of partisanship.
Along this dimension of constrained parliamentarianism, a distinctively new style of problem tackling—what we could term dialoguing—would emerge as each council of state wrestled with the design of a fiducial regime that genuinely respected human rights.

e) Independent judiciary

Under this heading we encounter an apparent paradox. Surely, it could be objected, the involvement of the judiciary in the politics of a council of state would compromise the independence of the judiciary? The answer to this important question is most conveniently phrased as follows: if the representatives of the judiciary were able to participate in deliberations about the boundaries around partisan contestation that should be observed, this would make it not more but less likely that the judiciary might in the future find itself in the middle of partisan disputes. And the office of head of state would be much better suited to act as the guardian of judicial independence than the attorney-general, whose partisan commitments might continue seriously to weaken his/her capacity to act in this way.

We could expect considerable variation between jurisdictions in the ways in which the leaders of the judicial branch decided to handle their representation in the council of state. Some, like their Irish colleagues, would be relaxed about direct participation; others might prefer to be represented by surrogates, such as retired judges, who could regularly consult with current officeholders.

This discussion has introduced a further important dimension to the work of the proposed councils of state: the boundaries of the dialoguing activity would have to be negotiated—and continually renegotiated—in ways that respected the integrity of the established roles of those coming from other branches and from civil society. As I note in the Appendix, a recent Senate Committee report (Parliament of Australia 2009b) could provide firm grounds for the establishment of a new body (which I have tentatively called a judicial selection and protection committee of a council of state). Such a body would be well placed to address the issues as the political dimensions of inter-branch dialogue.

---

3 And in New South Wales? In that jurisdiction, the activist Chief Justice has been strongly advocating a stronger judicial role in the securing of institutional integrity (Spigelman 2004, 2005).

4 According to the foremost authority on Australian constitutional law, such representation would ultimately require constitutional change to be in order (Zines 2008: 262 — on judges appointed as *personae designatae*). In the meantime, until the climate for constitutional reform improved, the views of the judiciary might best be presented by retired judges serving on councils of state, although serving judges with strong personal interests in broad issues of governance could well participate.
f) Professional public service

A similar point can be made under this heading. While the head of the public service in each jurisdiction is well suited to protect the integrity of the public service, s/he needs high-level collegial support in discharging this heavy responsibility. While much of this collegial support would be provided by the proposed merit and equity committee of the council of state, the council itself—and its presidential leader—would be able to provide the democratic legitimacy needed to underpin the deliberations of the committee.

g) Strong upper house

Of all the institutions that will be affected by the proposed reform program, this is the one whose future shape will be most unpredictable, because the most powerful influences on it will be indirect. The involvement of the parties in the head-of-state election campaigns will transform them and in the process shift the balance between the styles of politics characteristic of the two chambers—and will shift the balance very much in the direction of the upper house style.

In Australia, the Senate has distinguished itself in the past four decades through its development of the most impressive committee system of any of our parliaments. It has been able to do this because it has for most of that time not been under the control of the governing party. Its further development over the next four decades could be heavily shaped by the emergence of a regime of fiducial governance, for such an emergence would open up new areas of investigation and policy development free of the stranglehold of partisan contestation.

h) Federal structure

There is one important assumption that Galligan shared with every other writer of the 1990s that should at this point be again questioned. This is the ‘merger assumption’, which uncritically posits that the current bicephalous arrangement (monarch plus governor) should be replaced with a single office. What, however, if we come to agree that a) the gubernatorial role that was developed by Hasluck and subsequently celebrated by former governor McGarvie is valuable and should be retained and indeed strengthened; and b) the wider community role currently being attempted by the monarchical head of state should be developed in ways that would make it most appropriate for a directly elected leader to perform it?
Such a leader would be well placed to introduce processes of serial referenda, along the lines recommended by Ackerman. The justification of our federal system would be much stronger if the experience of referenda on constitutional reform were to take a turn in a more positive direction. At present, as we have seen, champions of an Australian federal republic such as Galligan have had to place too much trust in positive referenda results of long ago.

While the reforms proposed will have a rejuvenating influence on the Australian federal system, the roles that the president might play in state/territory jurisdictions will vary. In the president’s home state, it would be most likely that the Commonwealth pattern of gubernatorial constitutional counselling and presidential vouching would be replicated. In other jurisdictions, however, different arrangements might be needed. In some, the president might be able to nominate an agent—such as the chairperson of an important parliamentary committee or the presiding officer of an upper house—to perform the vouching function. In others, especially where the constitutional counselling function was securely established in a cabinet secretariat, the gubernatorial incumbent might be entrusted with the vouching function.

It is at this juncture that the councils of state would encounter the institution with which the most important jurisdictional issues would have to be negotiated: the executive branch-oriented Council of Australian Governments. Just as the head of government and the leader of the opposition would be expected in each council of state to negotiate (and continually renegotiate) the boundaries of partisan contestation in that jurisdiction, so representatives of the councils of state and of Australian governments would have to engage in parallel negotiations and renegotiations, quite possibly through each council’s sectoral peak bodies chamber.

A genuine differentiation of the realms of partisan and fiducial politics, of the kind that could be delivered through councils of state, would permit the systematic development of coherent intergovernmental programs. It could even result in the better integration of the ‘dual constitutional culture’ (Galligan 1995:50), for it would facilitate the determination of those programs that could be freed of the heavier constraints of partisan contestation. Much heavy intergovernmental negotiation would remain, but it would be coordinated by the several new monitory branches through their respective councils of state.

### i) Parliamentary democracy

The insertion of a democratically elected president into a regime of constrained parliamentarianism would for the first time allow intelligible coordination to be achieved among the several constraints operating on the Executive. In this way,
the accountability of a parliamentary-based executive would be strengthened, and with it the trustworthiness of all the major institutions of governance. Democracy (in its widely accepted Schumpeterian sense) is essential to any form of effective governance in the contemporary world, but it could be rejuvenated in a regime of fiducial governance. The recognition of another form of democratic politics—to sit alongside but ultimately to defer to the familiar partisan form—could rejuvenate our parties. If the parties came to be seen as central participants in fiducial politics, they would become much more attractive to those whose interests were not those that readily lent themselves to partisan regimentation and contestation. (While this transformation of our parties would have the most immediate consequences for our upper houses and their committees, which I have noted above, in the longer term they would also begin to exercise beneficial influences on lower houses and their committee systems as well.)

With the establishment of councils of state in each of our jurisdictions, then, new balances will be struck in the ways in which representative democracy relates to fiducial governance. The deliberations of each of these councils will provide leadership for each monitory branch. Through these deliberations, the dialogues essential to the integrity of our major institutions and to the protection of basic human rights will be effectively conducted. Because these dialogues will establish firm boundaries around the fields of partisan disputation, judges and senior public servants will be able to participate in these dialogues without placing their independence in jeopardy. The institutions most beset by partisan contestation—sub-national governments and upper houses—will find more effective ways of coordinating their fiducial activities, while retaining the capacity of serving as arenas for vigorous partisan debate, all the more vigorous because it will be more clearly focused.

---

5 Schumpeter (1954:269) defined democracy as follows: 'An institutional arrangement for arriving at political decisions in which individuals acquire the power to decide by means of a competitive struggle for the people's vote'