The Republican Debate and the True Course of Constitutional Conservatism

Professor Greg Craven

Introduction

It is customary to begin any presentation with mandatory remarks of gratitude for having been invited to speak. However, on this occasion, these remarks are all the more sincere, in view of the fact that it is highly unlikely that I will say anything that those in this gathering will want to hear. As it is the hallmark of intellectual debate to invite the uncongenial and court the unpalatable, the Board of the Society undoubtedly is owed congratulations for so unprepossessing a choice of speaker.

I feel that these prefatory and pacific compliments are highly advisable, in view of the fact that what follows is an entirely unapologetic and uncompromising defence of the "referendum" or "Convention" model for an Australian republic. Indeed, I intend to compound this heresy by going on to argue that support for the referendum model undoubtedly is the position that should be adopted in the upcoming debate by any thoughtful constitutional conservative who genuinely wishes to preserve intact Australia's existing constitutional genius.

In this connection, I feel that it is incumbent upon me to make clear from the very beginning the general constitutional position from which I will be arguing. I flatter myself of few things, but among those rare crimes that I do not believe plausibly may be imputed against me are any based upon a charge that I am a constitutional radical, a constitutional adventurist, or one so infected with "Founding Fathers syndrome" that I desire to re-create the Constitution in my own god-like image. No-one who has read me or heard me in the past – and among those so afflicted will be a number of the members of this Society – reasonably could believe any such imputations.

On the contrary, I have always – for my sins – been type-cast as "constitutional conservative", although I believe the more pungent description applied to me at a number of Australian law schools is "rabid constitutional reactionary". This is an appellation that leaves me unmoved. If the belief that Australia has an outstanding Constitution, which is to be preserved alike from the vain meddling of the High Court and the depredations of assorted academic vandals qualifies one for such a description then, indeed, I am a rabid constitutional reactionary. Indeed, were it possible to be decorated for suicidally conservative constitutional impulses, then I undoubtedly already would have been awarded the Sir Garfield Barwick Cross (third class) by the common disapprobation of the Australian academic community.

Undoubtedly, the professor doth protest too much, but there is a purpose to this apologia. To this end, I freely acknowledge that on the present republican issue, as on any other, I may be mistaken in my analysis, which is the common lot of the constitutional commentator. However, what simply cannot be argued is that this analysis does not proceed from a reasoned constitutional perspective that is thoroughly and undeniably conservative in its genesis. What this illustrates is the simple truth that continued support for the Monarchy is not the only constitutionally conservative position that may be taken within the Australian republican debate. This is a fundamental point, and one that should lead all conservatives to

seriously consider their position on the November referendum: put simply, to be a constitutional conservative and a monarchist are not one and the same thing.

My approach in this paper will be, first, to essay some brief definition of "constitutional conservatism" in an Australian context. I will then attempt to isolate the main features of what might be termed the "rational" case against the Monarchy. It may be observed here that there are any number of "irrational" arguments against the Monarchy's continuance, but what will be concentrated upon here are those which are solidly based in reason.

Critically, the paper will go on to consider the consequences of the failure of the projected republican referendum later this year. It is this issue of the consequences that will ensue from such a failure that is absolutely critical to the formation of an appropriate attitude to that referendum. The conclusion of this paper on this point will be that the collapse of the November referendum will in all probability lead, in the short term to medium term future, to an Australian republic in which the Head of State is directly elected.

This conclusion will lead the paper on to a detailed examination of direct election, where it will be concluded that the alteration of the Australian Constitution to embody such a method of appointment for the Head of State ultimately would involve the utter destruction of Australia's existing constitutional order, and thus (it hardly need be said) would be entirely inconsistent both with any general notion of constitutional conservatism, as with the precepts underlying the most commonly put arguments for the retention of the Monarchy.

Following upon this rejection of direct election will be a brief defence of the referendum model, together with a rebuttal of some of the principal arguments made against that model.

Finally, the paper will conclude that the only means by which Australia's outstanding constitutional system may be preserved is via its translation intact from a monarchical to a republican constitutional setting, a translation which only may occur through the success of November's referendum.

Constitutional conservatism

The first question here is as to precisely how the term "constitutional conservatism" may be defined in an Australian context. At the very least, a constitutional conservative will display two characteristics. Firstly, he or she will admire Australia's constitutional system as one of the finest in the world; and secondly, will be prepared to argue and work for its retention. It should be noted that what is, at first blush, a relatively low threshold for inclusion in so august a company in practice excludes a great many of Australia's most prominent – or at least most obvious – constitutional authorities. These authorities typically display a profound distaste for Australia's constitutional system, with its unfashionable emphasis on federalism, States' rights, and parliamentary sovereignty, and tend to favour the fundamental re-moulding of that system along the lines of a rights-based, centralising judicial supremacy. Such a description aptly comprehends a large majority of Australia's constitutional academics, as well as a number of former and present Justices of the High Court, and a wide variety of lesser, associated legal luminaries.

Critically, however, adherence to a position of constitutional conservatism in an Australian context (and doubtless in any other context) does not involve the proposition that one is opposed to any constitutional change whatsoever. No constitution, with the possible exception of that of the ancient Medes and Persians, can remain static indefinitely, in the sense that it "altereth not". A constitutional structure which cannot contemplate significant alteration in response to changing circumstance eventually must come to the point of unavoidable collapse when the weight of altered conditions proves too great for the rigid

constitutional superstructure to bear.

Endless examples of such a phenomenon may be given, ranging from the ensured destruction of the *ancien régime* through its own intransigence in the years leading up to the French Revolution, to that of the collapse of the Soviet party dictatorship in the late 1980s. Consequently, the difference between the constitutional conservative and the constitutional innovator is not that the conservative will countenance no change. On the contrary, even the most reticent constitutional conservative will recognise the need for constitutional change from time to time. Rather, the essential difference between the conservative and the innovator in an Australian constitutional context is that the constitutional conservative is determined to preserve, not the incidents and detail of the constitutional order, but its fundamental essence; while the innovator favours transforming change to its basic fabric.

Understood in this manner, change in fact plays an important role for the constitutional conservative. He or she will be prepared to contemplate change, even significant and far reaching change, provided that such change is necessary to defend the constitutional order in essence. In other words, a constitutional conservative will be prepared to dispense with less important and fundamental elements of the Constitution in order to preserve its fundamental public truths.

There is nothing novel in these propositions. For example, anyone familiar with the work of Edmund Burke cannot but be struck by his strong awareness that constitutional conservatives must be prepared to contemplate changes of form in order to be able more effectively to transmit basic constitutional values into the future.

Few better instances of this could be put forward than the British monarchy itself. That institution has evolved from a feudal monarchy (Henry II); to an absolutist Renaissance principality (Henry VIII); to a politically participative nineteenth Century monarchy (Victoria); to a strictly constitutional monarchy in our own times(Elizabeth II): but the principle of monarchy always has been maintained, throughout these seemingly dramatic changes in the manner in which that principle has been expressed.

In much the same way, the British Parliament has evolved from a feudal council (fourteenth Century); to a gathering of property (eighteenth Century); to an institution of popular democracy (nineteenth and twentieth Centuries): always maintaining its character as a representative parliamentary assembly. The genius of the British Constitution thus has lain not in a refusal to change, but rather in an ability to make continually relevant basic governmental values through a willingness to alter the constitutional prism through which they are reflected.

Such thoughts lead us inevitably to the position of the Monarchy within the Australian constitutional order. Here, it has to be acknowledged – whether regretfully or not – that the *institution* of the Monarchy simply does not go to the heart and soul of the Australian Constitution, but rather to its outer garments. Perhaps the easiest manner in which to demonstrate this potentially unpalatable truth is to compare the Monarchy to just a few of the features of the Constitution that do indeed comprise Australia's constitutional essence.

Thus, by way of example, consider the institutions of parliamentary government; the rule of law; and federalism. Each of these is vastly more basic to the continuance of the Australian Constitution than the Monarchy, and each will survive its abolition unmarred. To adopt this position is not to insult the Monarchy, but merely to acknowledge that, at heart, it historically has comprised an immensely useful exercise in constitutional symbolism, but nothing more. In a sense, it has occupied a position rather analogous to that of the jumper of

a football club: a genuine emotional attachment undeniably is involved, but be the club itself fundamentally sound, replacement of that symbol will not lead to diabolic catastrophe.

The general conclusion in the present context must be, therefore, that on a proper understanding of Australian constitutional conservatism, the Monarchy may be dispensed with if this proves necessary in the interest of preserving the wider constitutional order as such. In other words, a simple truth of constitutional conservativism in its Australian manifestation is that the Monarchy is not an end in itself. Rather, it merely is one means towards the fundamental end of preserving our unique constitutional order. This is an absolutely vital point, and one not understood by a significant number of monarchists. Put simply, the Constitution is more important than the Monarchy which it contains, and correspondingly, conserving that Constitution is more important than conserving the Monarchy to a true constitutional conservative. What this means in the context of the present referendum is that a constitutional conservative must see his or her primary duty as lying not to the Monarchy or the Monarch, but to the Constitution.

Perhaps the most poignant underlining of this truth that the Monarchy ultimately is a player, but not the star in the drama of the Australian Constitution, is to note just how simply it is eliminated from the Constitution in textual terms by the present referendum Bill. Upon reading that Bill for the first time, I was astounded – and even a little saddened – to see with what ready facility of drafting the Monarchy could be consigned to the realms of constitutional history, and could not help but compare this scenario to that which would apply were one to be engaged, for example, in the abolition of federalism, where it literally would be a case of ripping the Constitution in two, and then throwing both parts away. The reality is that the Australian Constitution will comfortably survive the demise of the Monarchy, as one would expect of one of the truly great constitutions of the world.

The rational case against monarchy

The question considered here is the threshold one of why one would wish to remove the Monarchy from the Australian Constitution. It cannot be denied that some silly arguments have been advanced in favour of the abolition of the Monarchy, just as a great many silly arguments have been put forward to justify its retention. My personal favourite among republican *non-sequiturs* is that which runs along the lines that the abolition of the Monarchy will produce some cornucopia of international trade as Asian nations rush to upgrade their commercial relations with a republican Australia. This is not a matter worthy of serious debate. Of course, there are arguments in favour of the retention of the Monarchy which are positively comic in their lack of logic – for example, that without the personal restraining influence of Her Majesty the Queen, Australia immediately will descend into the black depths of savage dictatorship. To this, I always reply that if Her Majesty, doughty as she may be, is all that stands between us and totalitarianism, then we may as well bring out the brown shirts now.

The real argument against the retention of the Monarchy is relatively straight-forward, and indeed elegant, whether or not one ultimately is persuaded by it. Certainly, just as the case for monarchy cannot simply be laughed off as mere crankery by republicans, neither can reasonable monarchists dismiss the core case of Australian republicans as fanciful.

The starting point of what might be termed “sophisticated republicanism” is the acknowledgment that the Monarchy has held a unique place within Australia’s constitutional structure. Thus, our Constitution – mercifully – is a highly practical one, composed overwhelmingly of politico-legal nuts and bolts: its provisions deal with

structures, not aspirations, and operate upon real constitutional objects, such as Parliaments, States, federal relations, judicial powers, and so forth. Strikingly, the Monarchy is the only element of the Constitution which is fundamentally symbolic. It exists, not as some logically unavoidable practical component of Australian constitutionalism – the one thing that the present republican debate amply illustrates is that the range of potential constitutional options in relation to a nation's Head of State are almost infinite – but as a powerfully symbolic presence floating above (or perhaps across) the entire document. Like it or loathe it, the Monarchy is our only constitutional institution which is essentially symbolic in character, and none the less important for that. The real question is what we are entitled to demand of constitutional symbols, and whether the Monarchy can meet those just claims.

It seems to me that the very minimum thing which we may demand of symbols, constitutional or otherwise, is that they be true. In other words, in the case of constitutional symbols, these must embody or reflect basic truths about the constitutional, cultural and political system to which they relate. Consequently, the question which plausibly may be asked of any constitutional symbol is, what constitutional truths it purports to convey, and whether those constitutional truths are indeed valid in respect of the polity to which they relate. What, then, are the basic "constitutional messages" conveyed by the Monarchy?

The answer is that if the ubiquitous hypothetical man from Mars were to observe the "Australian" Monarchy, he undoubtedly would discern immediately within it two fundamental features. The first is that it is in origin, personnel, culture and location profoundly British. The second, is that it is hereditary in character, in the sense that the Monarch is chosen as a matter of birth, rather than by any process of selection, popular or otherwise. Thus, no amount of polite constitutional fiction can disguise the fact that the Queen of Australia is indeed not an Australian, does not reside in Australia, and does not reign through any positive endorsement by the Australian people. The critical question therefore must be whether the basic truths of Australia are indeed reflected by these basic truths of the Monarchy, and whether these truths plausibly may co-exist within the Australian Constitution, which itself embodies our nation's fundamental "constitutional truth"?

The answer to both these questions hardly can fail to be "No", whether that syllable is uttered in a resounding shout, or with a regretful shake of the head. It is true, we once were British. It also is true, that we once were profoundly comfortable with the notion of our hereditary monarchy. But the fundamental reason for the rejection of the Monarchy in the Australia of the twenty first Century is that we overwhelmingly are not comfortable any longer with these two non-truths. Australians do not now consider themselves "British", much as they may feel gratitude for the British constitutional heritage that we enjoy; and do not, by and large, feel any closer relationship to the United Kingdom than they do, say, to the United States of America.

Likewise, the degree of constitutional pre-determination embodied in being an "Australian Briton" having evaporated, we no longer view the principle of hereditary position embodied in the Monarchy with anything other than real discomfort. These conclusions safely may be reached of the vast majority of Australians of Anglo-Celtic descent and no particular political ideology, without even seeking to rely upon changes to the ethnic composition of our population, or resorting to claims that the Monarchy encapsulates the values of a British class system antithetic to Australian sensibility. The brutal conclusion must be that, for

Australia, the symbolism of the Monarchy no longer is true, yet that symbols must be true to have any right to survive.

In reality, however, the position is rather worse than this. It is not merely the case that the British Monarchy no longer is true for Australia; worse, we know that it is not true. The consequence is that Australians no longer believe in the Monarchy. We may tolerate it; we may refrain from actively attacking it; we may even feel a certain amused resignation towards it. But the continued existence of a constitutional organism cannot be justified by the claim that we do not sufficiently detest it that we are prepared to take to the streets. On the contrary, the subsistence of a constitutional symbol, particularly a symbol as important as the Monarchy, only may be justified by a strong, positive, popular belief in its relevance.

Moreover, the situation in this respect is deteriorating. As one who has invested a considerable amount of time and effort over the years in attempting to bolster the claims of a failing Monarchy, I have been made painfully aware that it is almost impossible to conduct a serious conversation on the subject with the overwhelming majority of younger Australians: they scarcely are aware of the Monarchy's existence, except as a casual irritant.

Further compromising the status of the Monarchy is the fact that the last ten years of republican argument, regrettably or not, has done its work – the Monarchy has been seriously and permanently destabilised. Moreover, the effects of this active destabilisation have been exacerbated by the personal miseries of the members of the House of Windsor, which have had the disastrous effect of demystifying, as well as demoralising the monarchy.

Observing the course of dynasties throughout history, it often has occurred to me that monarchies can survive being perceived as murderous or treacherous, but they cannot, it seems, survive being humorous. One major practical difficulty in the entire republican debate from a monarchist point of view is that, to a large proportion of the Australian population, the House of Windsor has become a very funny monarchy indeed. The interaction of this factor with the anti-monarchical campaigns of such bodies as the Australian Republican Movement has had a devastating effect upon popular support for the Monarchy in Australia.

The consequent reality is that the Monarchy is not so much being killed, as that it is dying under its own steam. Indeed, it often seems the case that the Monarchy already is dead, and that what we really are arguing about is the nature of the funeral service. This is a conclusion which gives me no great personal satisfaction, but it is the essence of conservatism, constitutional or otherwise, that it faces and deals constructively with reality, rather than protests shrilly against an unchancy fate.

Such a classically conservative reaction is rendered all the more imperative by the fact that the recent republican debate has not merely destabilised the Monarchy. One further tendency of that debate has been to seriously undermine the status of the Constitution as a whole. This has occurred, inevitably, because the Constitution contains the Monarchy, and attacks on the Monarchy therefore have a natural tendency to develop into attacks on the Constitution as such. Thus, far too many people are inclined to believe that a Constitution which contains a "horse and buggy" Monarchy must itself be a "horse and buggy" Constitution. The effect of this phenomenon has been that the Constitution is beginning to suffer from what might be termed a "constitutionally transmitted disease", acquired through its congress with the Monarchy.

This is a fundamental reason why I am prepared to support the abolition of the Monarchy. It often is said of the Monarchy – so often that I, among many others, am sick to death of it –

that “if it ain’t broke, why fix it?”. The answer is that the Monarchy is indeed broke, firstly because it is not true, and secondly because it threatens to compromise the legitimacy of the entire Constitution.

In this connection, I somewhat wistfully recall that I used to state my position upon monarchy and republic along the following lines. First, that I accepted, in principle, that a good republic was better than a good monarchy. Second, and obviously, that a good monarchy was better than a bad republic. I would go on, thirdly, to assert that what we had was a good monarchy, and finally, to argue that I therefore would not agree to a republic until someone could show me one that was equally good. I now say with genuine regret that I no longer believe that what we have is a good Monarchy. This is not because the Monarchy failed to be, throughout most of its history, a benevolent constitutional influence within Australia. Rather, it simply is because I do not believe that a dead Monarchy ever can qualify as a good Monarchy, and today – as opposed to when our Constitution was written – the Monarchy is as dead in the hearts and minds of the people of Australia as Queen Victoria. This sorry conclusion leads me on to consider the question of the likely chain of events were the present republican referendum to fail.

Consequences of a failed Referendum

It is an obvious truth that one cannot intelligently determine which way one will vote in the November 6 referendum without considering the likely results of failure of that referendum in the wider context of Australian constitutional politics. This quite obviously is the case, as one will not be able to determine the advisability of a “Yes” vote at the referendum unless one can contrast the consequences of such an affirmative response with the practical consequences of the referendum’s rejection. Strangely, this approach sometimes is said to be inadmissible, on the grounds that any attempt to extrapolate a result from a failed referendum, other than the immediate continuation of the Monarchy, would involve little more than constitutional crystal ball gazing and vague speculation. In fact, such censures are nonsense, and self-deceptive and irresponsible nonsense at that.

In reality, all assessments as to how one should vote in the November referendum rely absolutely upon one’s understanding of what will occur if the referendum fails. Thus, for example, even a conventional monarchist will be inclined to vote “No” on the precise basis that he or she subscribes to a view of the future which posits that, if the referendum be lost, the Monarchy will continue into the indefinite future. This, however, is a fatal misassumption. The basic truth of the November referendum is that if the Convention model for a republic fails, the Monarchy will in no sense emerge as a “winner” in the ensuing constitutional fracas. It is this perception on my part that the Monarchy cannot win the upcoming referendum, even in the event of an overwhelming negative vote, that fundamentally colours my entire attitude to that referendum, and which needs to be elaborated here.

The starting point in this discussion must be to recall my previously expressed view that the Monarchy is in irreversible political, social and constitutional decline. The practical question in such circumstances must be, if this referendum fails, will Australian republicanism simply go away? Will the Australian people magically repent of their republican dalliance, and revert to their former allegiance, or at least the former allegiance of their parents? Clearly, such a scenario never will come to pass. On the contrary, republican sentiment will be just as strong as ever, precisely because the underlying impetus for that sentiment will remain just as intense as ever, and indeed, inevitably will intensify.

The only difference that will be made to the existing constitutional equation by a failed referendum will be the increased frustration that will be felt by the large majority of Australians in favour of some form of republic.

This brutal reality is starkly underlined by the fact that, if the Convention model is defeated at the referendum on November 6, it will be because people have been convinced, by the "No" campaign or otherwise, that they should reject that model, not out of any preference for the Monarchy, but on the basis that any Australian republic should be one which includes a directly elected Head of State. This undoubtedly will be the message that will lie at the heart of arguments of opponents to the Convention model during the referendum campaign, whether it is expressed overtly by direct electionists, or covertly by disguised monarchists through such disingenuous phrases as, "It's not a republic we're opposed to, just the model". This hardly is surprising, as virtually every opinion poll indicates that this is precisely the point upon which the Convention model is most vulnerable, rather than to any ringing appeal to save an ailing monarchy.

In short, if the referendum fails, it will fail not because people have voted for the Monarchy, but because they have voted in favour of a more radical form of republic. In these circumstances, how can it possibly be imagined that the Monarchy will emerge rejuvenated from a failed referendum, or that republicans will re-commit to the Monarchy? On the contrary, what will emerge from a bitterly fought referendum campaign will be a Monarchy even more savagely traduced and damaged than presently is the case. The Monarchy will not swagger, but rather will limp out of the referendum, not a victor, but a mortally wounded and fundamentally compromised short-term survivor. The painful question must be, therefore, as to what really is the likely chain of events after a failed referendum.

The broad answer already has been given: the Monarchy will emerge from a failed referendum at least as weak, but probably far weaker than presently is the case. Correspondingly, general republican feeling in Australia will be at least as strong, and very likely – fuelled by a profound sense of frustration – will be even stronger. The one fundamental change that will indeed occur will concern the internal politics of the republican movement.

The constitutionally conservative republicans who have supported the Convention model – the Turnbulls, Robbs, Holmes a Courts, Vizards, Wrans and – alas – Cravens, will emerge fatally wounded. Their conservative model will have been rejected at referendum, and undoubtedly the popular and media hindsight will be that this rejection was richly justified, on the basis that these excessively cautious republicans arrogantly insisted upon offering the people the wrong model: that is, that their sin lay not in being republicans, but in failing to support direct election. Correspondingly, and critically, the hand of direct electionists will be enormously strengthened. If the November poll fails, they inevitably must emerge as the true winners of a referendum which ultimately will have been conducted upon the lines not of, "Vote for the Queen", but rather, "Don't vote for *this* republic".

What will occur then? The answer is that Australia will be faced with an undiminished republican movement that has been handed, partly by the votes of constitutionally conservative monarchists, squarely to the direct electionists. The republican movement, now thus radicalised, will square off with a fatally wounded monarchy. The virtually inevitable result will be direct election, not immediately, but perhaps in five, ten or twenty years. However long this catastrophe may take, it will happen eventually, simply because it is not possible to foresee any other plausible outcome.

Of course, as was mentioned above, some monarchists are inclined to ignore such an eventuality on the convenient basis that it is too remote to contemplate, or perhaps more realistically, that it may well occur after their practical involvement in constitutional affairs has been terminated by reason of physical infirmity or actual demise. Yet conservativism surely is about the laying of secure foundations for the future and the far-away, and this particularly is true of constitutional conservatives, whose boast it is to see past the transitory imperative of the moment, towards the necessity to provide lasting and effective constitutional order into the future.

All of this leads to the crucial conclusion concerning the appropriate stance to be taken by a thoughtful constitutional conservative at the up-coming referendum. Any such stance has to be based on the one brutal reality of that referendum: there is no vote which even conceivably can secure the continuance of the Monarchy. Rather, the choice is starkly republican. One can either vote "Yes", in favour of the conservative republican model being put to referendum; or one can, by voting "No" to that model, vote in favour of a republic which embodies the constitutionally radical option of direct election at some indeterminate remove. Of course, a delicious irony in this situation is that many constitutional conservatives undoubtedly will be misled into voting "No" to the referendum model under the belief that they are preserving Australia's existing constitutional system, when in actual fact, they will be signing its death warrant.

Naturally, I repeatedly have asked myself whether there is any alternative scenario which could develop out of the failure of the November referendum. The only possibility which I can foresee – and it is a slender one – I would regard as being almost as horrifying as that which I already have sketched. Under such a scenario, the failure of November's republican referendum would see Australia move into a situation of indefinite and de-stabilising constitutional stalemate. Within that stalemate, a substantial majority of the electorate would be broadly "republican", but would be split between supporters of some conservative model along the lines of that produced by the Convention, and the supporters of the various versions of direct election. There also would exist a significant minority of monarchists.

What then would occur would be that the monarchist component of the polity would combine with whichever republican model was unfavoured with referendum status at the relevant time to defeat any proposal which might be put to the electorate. The result would be that Australia would become the unhappy captive of a constitutional system which had at its heart, not a constitutional consensus, but rather a basic disagreement. In a sense, we would on this point vaguely resemble the Canadians, who cannot decide whether they are a cohesive English speaking polity, or a bi-lingual and diverse federation, and instead oscillate dangerously between these two poles. However one chose to view the matter, nothing could be more disastrous for the constitutional stability or national unity of this country than for it to become an untreatable constitutional schizophrenic.

Of course, one question that quite legitimately might be raised concerning this analysis would be why the adoption of the referendum model would prevent Australia from subsequently moving on to the adoption of direct election, the fundamental deficiencies of which will be considered in the next section of this paper. The answer to this question is simple. The effect of a victorious referendum in November would be to cement in place nothing more than a republican version of our existing constitutional system. Any close student of Australia's history, and particularly its constitutional history, readily will accept that once so decisive an action had been taken, the present republican issue would have

been to all intents and purposes resolved. As at Federation, the Australian people solemnly would have made up their collective mind on an issue of basal importance, and once that had occurred, any attempt to alter fundamentally a resolution that had so decisively and democratically been reached would be doomed to ignominious failure.

In short, the success of the referendum model would mean that the issue of republicanism will not return, at least in our lifetimes. In this sense, and perhaps ironically, adoption of the model would represent the ultimate victory of our present constitutional system, rather than the defeat bewailed by so many monarchists. The victory of that model would see the successful translation of our constitutional system from a monarchical to a republican setting, but with its essence utterly unchanged. To put the matter rather more romantically, we would have ditched the Monarchy to save a republicanised Crown.

The Republican Debate and the True Course of Constitutional Conservatism (Continued)

Professor Greg Craven

The disaster of direct election

Clearly, the whole of this analysis concerning the ultimate effect of a failed referendum on November 6 directly or indirectly assumes that the re-constitution of Australia as a republic with a directly elected Head of State would comprise some form of constitutional catastrophe. Otherwise, there could be no occasion for this high anxiety concerning the coming about of precisely such an eventuality. Naturally, those Australians who genuinely favour direct election of a Head of State – what might not inaccurately be termed the "radical" wing of the republican movement – fiercely dispute such a conclusion. Rather more surprisingly, however, some monarchists also seem to be remarkably tolerant of the possibility of direct election, and even to articulate it as their preferred second option – above the Convention model – assuming the retention of the Monarchy to have been proved impossible. It is one of the chief objects of this paper to suggest that such a position on the part of monarchists represents nothing more nor less than stark constitutional nonsense. No proper understanding of our existing constitutional arrangements conceivably can lead to the conclusion that the institution of a republic embodying direct election of a Head of State represents an outcome even remotely consistent with their continuance.

Perhaps the fundamental feature of our existing constitutional arrangements as they touch upon such concepts as the "Head of State", the "Sovereign", the " head of government" or any other corresponding notions is the strict division it effects between "legitimacy" on the one hand, and "power" on the other. That is, under our Constitution, there is achieved a fundamental divorce between the organs of practical power and the repositories of fundamental legitimacy. Ultimate legitimacy, in the sense of constitutional dignity and prestige, reposes in the Crown; while ultimate power or political capacity resides with the parliamentary executive, and in particular, the Prime Minister.

The result of this division is critical to our constitutional system. Through its operation, it simply is not possible for the beneficiaries of political power to enlist in aid of any of their programmes total legitimacy. Consequently, no exercise of political power, and no political authority, however pervasive, also may present itself as enjoying untrammelled legitimacy and constitutional prestige. This is a vast virtue in a constitutional system, and one highly productive of the continuance of such endangered constitutional species as democratic government and the rule of law.

The position thus achieved usefully may be contrasted with situations in which ultimate power and ultimate legitimacy have been combined in one person or one institution, as in the case of the Emperor Napoleon under the First French Empire, and Adolf Hitler within Germany's Third Reich. Crucially in the present context, it is precisely this same division between legitimacy and power that is observed and enshrined in the model being put to the referendum in November. Thus, practical power will continue to reside with the parliamentary executive, as personified by the Prime Minister, while national legitimacy, as expressed in the notion of a Head of State, will be located with the President, as succeeding jointly to the position and prerogatives of both Her Majesty and the Governor-General.

It is the fatal effect of direct election that it immediately and inevitably combines these two never-to-be mixed streams of power and legitimacy. The very fact of popular election inevitably will produce a Head of State who not only represents the apex of constitutional

legitimacy, but who also has real claims to the influence and exercise of power. This is not a matter of speculation or guesswork. Any President who, by virtue of his or her election, commands the direct support of the majority of the Australian people, must unavoidably have a genuine practical and moral claim to political authority, as well as to political legitimacy. Given this, such a President will be impelled by the simple logic of his or her office towards the substantive exercise of power.

Thus, for example, what of the position of a President elected by a massive majority of the Australian population who was faced with a Bill which he or she genuinely believed to be morally repugnant? Imagine a President whose political persuasion was to the left of centre, faced with a Bill passed by a conservative Parliament that drastically narrowed the concept of Native Title in a manner utterly inconsistent with his or her own perception of the national interest. How could anyone realistically imagine such a potentate acting otherwise than in accordance with his or her inevitable self-vision as the democratic embodiment of the national will, and acting to veto such a Bill? The confidently myopic assertions of direct electionists that such a scenario is an exercise in constitutional fantasy merely serve to underline the depth of their misunderstanding of the logical imperatives that must attend a Head of State whose very election irrefutably demonstrates their national support.

Of course, some Australians would respond to this prospect of a Presidential behemoth with undisguised glee – at last, a champion of the people to outface the despised politicians. Two points must be made in response to this high constitutional naiveté. First, consistently with what has been said above, it quite simply is not a response which plausibly may emanate from the mouth of a constitutional conservative – monarchist or republican – who purports to value a basic separation between constitutional legitimacy and practical political power.

Secondly, and much more generally, such a position ignores the thundering reality that the existence of a directly elected Head of State automatically would engender massive constitutional instability by juxtaposing two independent executive authorities – the President on the one hand, and on the other, the Prime Minister as head of the parliamentary executive – each fully seised of a plausible claim to political primacy. Given the inevitable character of an elected presidency, as explored above, no other result would be conceivable than one that embodies a more or less continuous struggle for executive primacy. In short, Australia would be opting for a constitutional settlement where the 1975 crisis became the programmed outcome, rather than the occasional glitch.

Naturally, this outcome is rendered all the more certain by the inevitable interaction between the election of a Head of State and our country's established system of party politics. Political parties inevitably would be highly desirous of fielding their own candidate in a Presidential election and securing that candidate's election. This would be for the simple reason that they would thereby secure a guaranteed friend in Yarralumla, and what is more, a friend who could be relied upon to exercise his or her vast theoretical powers in a positive manner when the "right" party was in government, and in a "responsible" manner whenever barbarian forces occupied the Treasury benches.

Worse still, the reality is that the major political parties would be the only organisations in Australia who would have the necessary financial, media, administrative, and organisational skills necessary to conduct a successful Presidential campaign. The inevitable result must be that direct election not only would produce a President programmed toward the exercise of his powers in defiance of uncongenial ministerial advice, but also would ensure that the office of President became a political prize, and one that therefore unavoidably would be

occupied by a politician or a political instrument.

Inevitably, therefore, the very existence of a directly elected Head of State, enjoying both constitutional legitimacy and an irrefutable claim to influence affairs, must be highly productive of debilitating constitutional instability. Significantly, this conclusion is not affected by any argument to the effect that such a President effectively might be confined within strict constitutional limits through the comprehensive codification of his or her powers – and, crucially, the codification of the conventions traditionally associated with the exercise of those powers – and the removal of all but the most ceremonial of functions.

In the first place, the codification of conventions (and in particular of the conventions of responsible government) would involve the virtual re-writing of the Constitution, and would raise enormous questions as to the unpredictable effects of such an exercise in constitutional transformation. Secondly, even were one to contemplate in principle so massive an exercise in codification, it practically would be impossible for Australians to agree upon the direction such a codification would take. Thus, for example, towards what end are we to codify the powers of the Head of State in connection with the dismissal of a government unable to guarantee supply due to the actions of an intransigent Senate? On such an issue, politicians, constitutional lawyers and Australians generally divide instantly into two irreconcilable camps. Finally, even in the inconceivable event that all constitutional powers successfully could be codified, the interference of an elected Head of State in political affairs still could not be precluded. For example, what would be the impact of the intervention of an elected President, theoretically powerless, who nevertheless appeared on nationally broadcast television and radio to formally denounce the actions of "his" government as immoral and repugnant? The answer must be that such an intervention would precipitate an immediate constitutional crisis, but we surely do not propose to codify the President's power of speech, nor could we successfully so do, even were that outcome to be desired.

Of course, some point to other constitutional systems, most notably that of the Republic of Ireland, which allegedly have successfully combined strong representative government with a directly elected Head of State. However, to each of these foreign republics which have been posited as offering potential models for Australia, one or both of two disqualifications invariably apply. Either it is the case that they are non-parliamentary systems with executive Presidents, such as the United States of America; or they comprise systems that rely for their efficacy upon cultural, social, historical and political traditions fundamentally different from those which apply in Australia, as is the case with Ireland.

The conclusion therefore must be that direct election, through its merging of the streams of legitimacy and power, represents an utter repudiation of the principles underlying our existing constitutional system, principles which would be translated into a republican form under the referendum model. It follows, therefore, that direct election is an option which no true constitutional conservative conceivably could support, either as their model of choice, or as some form of second preference in the event of the failure of the Monarchy. It thus is singular, to say the least, to hear some monarchists and purported constitutional conservatives solemnly put forward direct election as the most preferable form of republic. It is a little like a fastidious breeder of St Bernards saying that if he cannot have his usual noble beast, then his second preference is for a mongrelised dingo. One can only hope that this tendency represents a certain perverted *realpolitik* in the lead-up to the referendum campaign , rather than an utterly irresponsible attitude of *après moi le déluge*, according to

which if one's beloved monarchy is to go down, then it may as well take the entire Constitution with it.

A modest defence of the Convention model

This is not the occasion to rebut in detail every argument that has been raised against the Convention model for a republic. There are too many such arguments, some having a certain initial plausibility, and requiring careful treatment and explanation, others too silly to dignify by disputation. All that will be attempted here will be to deal with some of the more significant objections, and these more by way of example than exhaustion. The general point to be made by way of introduction, is that as with any argument for or against a given constitutional position, arguments directed against the referendum model must as a matter of intellectual integrity be assessed critically and not credulously, regardless of the depth of one's attachment to the Monarchy.

Thus, suggestions that the largely republican Commonwealth of Nations would rush to expel a republican Australia, or that the referendum model is likely to produce a Hitlerite dictatorship are plain silly, and should be rejected as such. After all, if one heard a republican putting forward arguments of comparable inanity, such as the proposition that monarchies inevitably lead to tyranny, put forward by reference to the reigns of the Queen's Tudor ancestors and the careers of Caligula and Nero; or that the Queen, as supreme commander of the armed forces of the United Kingdom, might one day order an assault on Sydney, one would react with contempt, and rightly so. Thus, foolish monarchist arguments should be treated as foolery in the same way as inane republican arguments are to be rejected as inanity.

As already has been noted in this paper, the fundamental objection to an Australian republic is perhaps summarised in the much used catchcry, "If it ain't broke, don't fix it". Likewise, the simple riposte to this glib assertion of ruddy constitutional good health already has been made. The Monarchy is indeed "broke": it is "broke" because it is symbolically untenable; it increasingly is divisive; and it is becoming a focus for wider constitutional dissent. Above all, the monarchy certainly is "broke" if an attempt to retain it will result only in the victory of direct election, which will see the utter destruction of our Constitution and all who sail in it. All in all, monarchists will have to do a good deal more to demonstrate the continuing utility of the monarchy than to make the sweeping and implausible assertion that, in spite of the debate that is raging about it, the Monarchy represents unequivocal constitutional perfection in all its aspects.

One interesting attempt by monarchists to move beyond the realms of crude panegyric has been their argument that the Governor-General, and not the Queen, is Australia's Head of State. This argument is centrally directed towards neutralising the chief perceived deficiency of the monarchy, that the Queen – as Australia's generally supposed Head of State – is not an Australian citizen. I must confess to a certain wistful fondness for this line of argument, for the uncomplicated reason that I myself, at a time when I was searching futilely for props with which to bolster the Monarchy, desperately sought to persuade myself and others that the Governor-General was indeed Australia's Head of State. Yet the argument ultimately suffocates in its own atmosphere of utter unreality.

So long as the Governor-General is appointed by the Queen, albeit upon immutable Prime Ministerial recommendation, and so long as the Queen undeniably represents the clearly recognisable apex of Australian constitutional prestige and legitimacy, it is quite implausible to argue that her constitutional creature, the Governor-General, is our nation's

Head of State. What is more, no average Australian could be expected to swallow any mystical formula to the contrary. As Andrew Robb memorably has remarked, the Governor-General undoubtedly qualifies as the vice-roy and the vice-captain, but skulking dimly in the deep shadow of his Royal progenitor, never, ever as the thing itself.

The attempted justification of the constitutional monarchy as functionally perfect often is bolstered by a vague and generic argument that every conceivable form of Australian republic would be so inherently uncertain in detail, operation and utility that their establishment could not even be contemplated as a matter of simple public prudence. This is not constitutional conservatism, but constitutional paranoia.

Our forefathers successfully transformed our country from six disparate colonies into one great federation, importing along the way, elements of the Constitutions of the German Empire, the United States of America, Canada and the Swiss Confederation. While not every result of Federation was predicted, its overall success hardly is open to doubt, nor can the factual achievement of the general vision of the Founders be disputed. The conversion of Australia into a republic is an enterprise so vastly more modest in conceptual scale than the conversion of the Australian Colonies into a cohesive federation, that the comparison of the two processes is positively embarrassing. To suggest, therefore, that the very notion of the republicanisation of the Australian Constitution is inherently impossible and beyond our collective constitutional wit is quite implausible.

Perhaps the next most common argument in favour of the retention of the Monarchy, again already touched upon in passing, is that without the Monarchy our constitutional order inevitably must move towards tyranny and decay. The central idea here is that the Monarchy is the keystone of our constitutional order, and that without it, that order necessarily will collapse.

It is hard to imagine a grosser insult to the Australian Constitution, nor one that sits more uneasily in the mouths of those who would claim themselves as that Constitution's greatest admirers, than the charge that our entire, magnificent constitutional system would be rendered helpless and bereft if deprived of the less than Herculean protection of the Monarchy. The defence of Australian constitutional democracy, as encapsulated in and presided over by its Constitution, cannot by the wildest stretch of the imagination be said to depend entirely or principally upon the subsistence of the Monarchy. On the contrary, it has to be accepted that such other vestigially important institutions as the rule of law, parliamentary and responsible government, federalism, the independence of the judiciary, separation of powers, the common law and freedom of the press all operate inexorably in defence of that order. It is the merest pretence that these institutions suddenly will fail or be fatally compromised simply because the Monarchy is replaced by a republic that reflects the Monarchy's own essential constitutional truths.

It is true, of course, that the Monarchy is closely intertwined with some of these institutions, notably parliamentary and responsible government; but its removal need have no real or practical implications, so long as the Monarchy is replaced by constitutional institutions which directly reflect its own operations. Thus, for example, responsible government will continue to subsist, regardless of whether a government is commissioned by a President appointed pursuant to the mechanisms provided for under the referendum model, or by a Governor-General appointed by the Prime Minister via the formal device of Royal designation. Similarly, the Australian judiciary will continue to be independent, whether its judges are commissioned by a Governor-General and royal State Governors, or by a

President and republican State Governors.

Critically, both within the current republican controversy and within any wider debate over Australia's constitutional future, it needs to be understood by monarchists and republicans alike that politicians and other potentates do not obey the law purely because they are terrified of, impressed by, or respect Her Majesty. Such a view is ludicrously naive. Significant individuals and institutions abide by the precepts of our constitutional system because they themselves are part of a complex constitutional psychology that is itself a product of a rich and diverse century of self-government, to which process the Monarch has been practically irrelevant, existing rather as a matter of peripheral constitutional romance.

Of course, the office of Governor-General has been highly relevant in practical terms within the Australian constitutional equation, but not as any true representative of constitutional monarchy. Rather, the significance of the Governor-General has lain in his functioning as a surrogate – though regrettably not a plausible substitute – Head of State. Depressingly for the monarchist position, it is precisely these real and substantial functions of the Governor-General that will pass intact and unaltered to a President. Only the tattered fiction of a potent Monarch will pass away.

A further, and highly prevalent argument against the referendum model has been that it will transfer power to politicians, and in particular, to the Prime Minister. This argument, which quite cynically seeks to enlist the widespread prejudice of Australians against their parliamentarians, has a number of aspects.

The first concerns the proposed mechanism for the appointment of the President. Some critics of the model claim to consider it outrageous that the Prime Minister will possess an effective veto over the choice of a President, by virtue of the fact that he or she will be the only person with the power formally to put forward a candidate for appointment by a joint sitting of Parliament. This criticism frankly is incredible, so long as it emanates from the mouths of those who support the present constitutional monarchy. Under that Monarchy, the Governor-General – the monarchists' pseudo-Head of State – undeniably is appointed as a matter of hard fact by the Prime Minister. The Prime Minister makes a "recommendation" to the Monarch, who constitutionally is bound to accept that "recommendation", even if he or she personally disagrees with it, as seems to have been the case in 1930 with the recommendation to King George V that Sir Isaac Isaacs be appointed.

The most that is conceivable, and this remotely, is that the Queen might raise some polite objection to a particular appointment, which a Prime Minister would be utterly free to ignore, doubtless with equal politeness. Understood against this real, as opposed to imaginary constitutional background, the sole effect of the referendum model is actually to restrict, rather than to enlarge or fortify Prime Ministerial choice. Thus, whereas a Prime Minister practically is unrestricted in any formal constitutional sense in the appointment of a Governor-General, a Prime Minister seeking the appointment of a President under the Convention model will be required to obtain the cross-party support necessary to achieve the success of his nomination through the prescribed mechanism of attaining a two-thirds majority of a joint sitting of the Commonwealth Parliament.

A corresponding objection relates to the power of the Prime Minister under the referendum model to dismiss a President. It should be noted at the outset that this power of dismissal is mutual: far from being some supine constitutional victim, the President is as able to dismiss the Prime Minister as the Prime Minister is able to dismiss the President. Again, however, the most fruitful course of inquiry is to compare the position that would apply under the

referendum model with that which presently applies – as a matter of reality, rather than decorous fantasy – under the constitutional monarchy.

Within our existing constitutional arrangements, the Governor-General is in all practical respects readily dismissible by the Prime Minister through the simple mechanism of the Prime Minister issuing the appropriate advice to the Queen. In functional terms, this is precisely the same position that will apply under the referendum model: that is, the tenure of the monarchists' own purported Head of State, like that of the future President, ultimately is dependent upon the Prime Ministerial will. The only conceivable difference as between the Monarchy and the referendum model for a republic on this point is that, under the existing Vice-Regal arrangements, there might be some short delay before the Queen inevitably acted upon Prime Ministerial advice. This might be thought, in an undeniably small way, to impose some restriction upon the implementation of a Prime Minister's designs, although the plain truth is that, were a Prime Minister to insist upon virtually instantaneous dismissal, the Queen would be in no better position to resist this, than any other constitutionally binding advice.

However, it also must be noted that under the referendum model, a Prime Minister who dismisses a President will be required to submit that action for ratification by a vote of the House of Representatives, something which presently need not be done even in the case of the most controversial sacking of a Governor-General. For all the constitutional rhetoric that customarily is deployed concerning the domination of Parliament by the Executive, a formal constitutional requirement that a Prime Minister solemnly account for his actions in relation to the Head of State before an open sitting of Parliament must impose a strong element of public and political accountability in respect of any Presidential dismissal. Thus, to suggest that the removal of the Head of State under the referendum model involves some chasmatic departure from present practice, together with an unprecedented hazard of dismissal through the exercise of unbridled political discretion, is an exercise in high constitutional dissimulation.

Two further points may be noted concerning the criticisms of the model's provisions in relation to dismissal of the President. The first relates to the already mentioned mutual dismissibility of President and Prime Minister, which has led to claims that the model embodies an unacceptable danger that the two principal functionaries of the Executive branch of government might play "constitutional chicken" with one another, racing to be the first to produce a notice of dismissal from their pocket. One obvious, and somewhat puzzled response to this argument, is that this alleged constitutional deficiency precisely replicates the present arrangements that subsist between Prime Minister and Governor-General, with the consequence that it hardly may be claimed as some peculiarly unattractive trait of the referendum model, particularly by supporters of the Monarchy. A further response is that this feature actually has proved to be highly desirable within the context of our current constitutional arrangements, in the sense that it provides for a balance of powers between the Governor-General and Prime Minister that operates to prevent precipate action on either side. The fact that there has been only one dismissal of a Prime Minister, and no dismissal of a Governor-General, would seem strongly to support this line of argument.

The second point that must be acknowledged in this connection is that it is somewhat bizarre to hear purported constitutional conservatives waxing lyrical on the horrors of the Head of State being subjected to an effective form of dismissal. As a matter of objective history, it was precisely the necessity for such a ready procedure of dismissal that was one

of the principal rallying cries of conservative constitutionalists at the 1998 Constitutional Convention. Perhaps most notably, the former Governor of Victoria, the Hon Richard McGarvie, clearly expressed the position of constitutional conservativism when he powerfully argued that a Head of State whose tenure was utterly beyond the reach of the parliamentary Executive, and who consequently was immune from all fear of dismissal regardless of any inappropriate political interventions which he or she might undertake, inevitably would become a rival for power with both Prime Minister and Parliament. Such rivalry would fatally compromise our existing system of parliamentary, responsible government. Far from being some ghastly blot on the constitutional parchment, therefore, the appropriately straightforward procedures for the dismissal of the President contained in the referendum model represent perhaps the greatest victory achieved so far by the forces of constitutional conservatism in the moulding of the form of an Australian republic.

Another, rather multi-faceted argument against the Convention model is that the nominations process which it contains would not, as a matter of practice, produce an appropriate Head of State. For example, it sometimes is urged that desirable candidates for the office of President will not present themselves, on the basis that the nominations process will "leak like a sieve", and that respectable Heads-of-State-in-waiting would not choose to have their names bandied about like those of common office-seekers.

In most respects, this argument displays a certain naivety. In the first place, there always and inevitably is speculation as to the appointment of any important constitutional officer. Thus, as any lawyer gleefully will tell you, vast and variably informed anticipation surrounds the appointment of every High Court judge, and undoubtedly will continue to surround such an appointment so long as lawyers are prone to gossip, which is to say, for ever.

Similarly, there virtually never has been an appointment in recent times to a Vice-Regal position at either Commonwealth or State level that has not been accompanied by media speculation as to the most likely and plausible candidates. A second, and rather more brutal point, is that if persons are not prepared to contemplate the high service of their country simply because their pride might be wounded were it to become known that they had been an unsuccessful candidate, then such individuals almost certainly do not possess a sufficient sense of civic obligation to render them suitable to serve as Head of State.

More generally, some critics of the referendum model have claimed that the model inevitably will produce a low quality President. The main line of argument which seems to have been advanced in support of such a view is to the effect that the requirement that a presidential nomination gain bi-partisan support, as follows necessarily from the stipulation of the Referendum Bill that a two-thirds majority of a parliamentary joint sitting be obtained for a President's appointment, will produce clandestine back-room deals between political parties, which in turn will lead to the appointment of unimpressive, politically compromised candidates.

However, a different and vastly more realistic way of viewing the same process is to regard its salient feature as being the entirely wholesome change that no longer will a Prime Minister be in the position of a winner who takes all through his unilateral appointment of a Governor-General, but rather must produce a presidential candidate broadly acceptable to a wide range of Australian opinion. It is difficult to the point of perverseness to see this as a retrograde step in relation to the appointment of a Head of State. On the contrary, a formal constitutional requirement that Australia's Head of State not be appointed simply as the

creature of the ruling political party of the day is a major point in the model's favour.

An argument that requires rather more consideration is that which maintains that implementation of the referendum model will involve the destruction of the centuries old constitutional conventions which are critical to the continuance of our system of responsible government. Once again, however, there is less to this argument than meets the eye. Fundamentally, the referendum model for a republic closely imitates and reflects our existing constitutional arrangements, and indeed, its entire rationale is based precisely upon this fact. Crucially, in its deep adherence to and encapsulation of established constitutional practice, albeit in a republican translation, the model precisely replicates the underlying constitutional psychology upon which the conventions of our Constitution are based. Particularly notable here is the manner in which the provisions of the Referendum Bill rehearse and enshrine the whole of the apparatus of Australian responsible government as it presently appears in the Constitution.

More specifically, and just as significantly, the Referendum Bill expressly preserves the operation of our existing constitutional conventions. Thus, clause 59 provides that the President will act upon the advice of the Federal Executive Council, the Prime Minister, and Ministers – that is, the clause specifically recites the relevant principles of responsible government – and goes on to provide that in relation to the reserve powers, the President will act in accordance with the conventions that previously bound the Governor-General. Far from representing some revolutionary massacre of the conventions of the Constitution, therefore, the relevant provisions of the Referendum Bill actually display an intensely conservative and meticulous determination to preserve them.

Yet another argument urged against the Convention model is that it will diminish the position of the States. Frankly, as one who has been condemned for many years as a veritable States' rights fetishist, it is difficult to see how. One thing that the model undoubtedly does do is to dispose comprehensively of the old chestnut that, as a part of Australia's conversion to a republican form of government, the States will be forced to abandon their own Monarchies. On the contrary, under the Referendum Bill, each State will be free to decide, in accordance with its own Constitution, whether or not it will retain its Monarchy, and no attempt is made under the Bill to impose republican structure onto any State Constitution. In this specific connection, regardless of one's views of the remainder of the Bill, credit should be given where credit is due: the Constitutional Convention acted firmly to protect States' rights.

Indeed, it usefully might be noted at this point that one incidental effect of the referendum model is to enhance the voice of the smaller States in the appointment of the Head of State, by requiring a two-thirds vote in a joint sitting of Parliament for the designation of the President, a forum in which the smaller States will be relatively strong through their equality of representation in the Senate. This is a markedly different position from that which applies at present, where the Governor-General is appointed by Prime Ministerial fiat. Moreover, it also is a vastly superior position from the point of view of the smaller States than that which would apply under any system of direct election, where the votes of the electors of Western Australia, South Australia and Tasmania would be completely swamped by those of electors residing in the vast population centres of the eastern seaboard.

The next argument against the Convention model for a republic undoubtedly is the most pernicious from the point of view of constitutional conservatism. This is the argument that, if Australia is to be a republic, it were better that its Constitution should embody direct,

rather than the parliamentary election of the Head of State. This is an argument which has been dealt with in detail elsewhere in this paper, and only a brief recapitulation will be offered here. It is the unequivocal truth that direct election is not an option open to a sincere admirer of our existing system of responsible parliamentary democracy, for the simple reason that it is – as has been demonstrated – totally inconsistent with the precepts of that institution.

However, even approaching direct election quite independently of any attachment to constitutional conservatism, it must be recognized that it remains a recipe for complete catastrophe. First, quite regardless of whether one slavishly supports the existing precepts of Australian constitutionalism, direct election would introduce into our constitutional system a fatal element of instability, by creating two contending poles of elected power, the President and the Prime Minister. Each would have a plausible democratic claim to govern, and government each inevitably would attempt.

Secondly, and coincidentally with this creation of a bi-cephalous constitutional monster, direct election would ensure that the President always would be a politician, and thus always would be pre-programmed to attempt just such disastrous political intervention. As already has been shown, this result would flow inexorably from the facts, first, that political parties would desire the office of President for the sake of the power and prestige it conferred; and second, that such parties are the only organisations of sufficient financial, electoral and organisational sophistication to be capable of effectively conducting a presidential election campaign.

The general conclusion in relation to direct election, therefore, must be that it would involve both the ultimate repudiation of our existing Constitution, as well as a free ranging constitutional disaster on its own terms. The only way in which such a conclusion might be avoided in relation to direct election would be to abandon all attempt at meshing such a system with parliamentary government, and to entirely scrap our Constitution in favour of an American-style executive Presidency. However, while one intellectually could maintain the internal logic of such a system, how could any constitutional "conservative" propose the elimination of our existing Constitution, with all its glories, let alone its replacement by a system that not only has produced the enormous and varied constitutional problems experienced in the United States, but which also undoubtedly is inferior in every relevant respect to our existing regime of parliamentary government?

A final argument, and one that has a certain plaintive quality, is that the whole process has been too quick, and that we should take more time over becoming a republic, if indeed we are to become one at all. Frankly, I would have more sympathy for most of the proponents of this argument if it were not so obviously disingenuous. Almost invariably, the true object of those who raise this argument is not in fact to secure further time for deliberation, but rather comprises a not particularly subtle attempt to derail the entire process. Such an argument often is accompanied by the claim that its articulator is not opposed to all republican models, just to that under consideration. The fact that equally profound objections cheerfully will be found to exist in each and every republican proposal as they are put forward is left conveniently unsaid.

It is, perhaps, natural enough for opponents of the referendum model to point towards the process of Federation as comprising a more leisurely and a more comprehensive approach towards major constitutional reform. They argue that Federation took at least ten years to accomplish, counting from the Melbourne Federation Conference in 1890, to constitutional

consummation in 1901, whereas the present republican referendum will take place within two years of the holding of the 1998 Constitutional Convention. Out of this comparison rises the pitiful wail of, "Why the rush?". There are a number of possible responses to this line of reasoning. One is to the effect that the process of "republicanisation" has been a good deal longer than sometimes is suggested. We have been arguing more or less constantly about whether Australia should be a republic now for around eight years, and stupendous amounts of ink, if not blood, have been spilt in this battle. In this sense, the Convention represented merely a formal culmination of republican debate, rather than its commencement.

A second and more basic response is that the comparison between the creation of the Australian Federation and the institution of an Australian republic simply is not valid. It genuinely is not possible to pretend that the conversion of our very much existent polity into a fundamentally similar republic will be an operation of remotely similar complexity to the creation of the Australian Commonwealth from constitutional scratch.

By way only of illustrative example, the sponsors of Federation had to deal with the basic issue of Federation itself; the adoption of responsible government; the powers of the Commonwealth; the correlative powers of the States; the design of the Senate, and its powers vis-a-vis the House of Representatives; the facilitation of free trade; the federal financial settlement; how the Constitution was to be amended; the constitutional protection of the smaller States; allocation of the powers of taxation; relations between the Houses of Parliament; and so on and so forth, almost *ad infinitum*. Compared to this almost ghastly list of problems which had to be surmounted by our Founding Fathers, those presented by the conversion of Australia into a republic modelled along its own existing constitutional lines pale into insignificance.

Thirdly, and finally, one cannot help but be struck by a certain sense of pathos as those who purport to be the heirs of those great constitutional conservatives, Griffith, Barton and Deakin, frenetically oppose the very modest proposal being put forward to referendum on the basis that too much is being attempted in too little time. That pathos arises from the fact that one cannot but conclude that many of these entirely sincere commentators undoubtedly would have voiced precisely the same tremulous objections to the adoption of the Constitution which they now so ardently believe they are defending, had they only been alive a century ago.

Thus, precisely the same arguments that now are being put forward to suggest that the Convention model was hastily conceived and is being hastily executed were heard from the mouths of anti-federalists in the 1890s: it is all too fast; the outcomes are unpredictable; it will destroy a system that works perfectly well; why not take another twenty years? Indeed, there are very strong similarities between many constitutional monarchists today, and the anti-federalists of the 1890s. Thus, the anti-federalists could not see that the time had come to translate colonial government into a new framework of self-governing quasi-nationhood, not as a rejection of the Australian Colonies' constitutional pasts, but merely as their natural development. So the constitutional monarchists cannot see that the time unavoidably has come to transfer the timeless jewel of our magnificent constitutional order, utterly intact, into a genuinely conservative republican setting.

Perhaps there is one further similarity between the doomsayers of the 1890s and their brethren of the 1990s. Each seem to have had a visceral loathing for the concept of constitutional compromise. Just as the anti-federalists derided our Constitution as the hotch-

potch product of back room deals and compromises, so the critics of the Convention model sneer at it as the bastard child of expedience and deal. Yet no-one with the slightest experience of constitutional history could fail to understand that every successful Constitution, from the American to our own, has been just such a product of a convergence and co-operation of minds. When Deakin said that "the watch word of the Convention was compromise", he could have been speaking –and just as approvingly – of the Convention of 1998 as that of 1898.

Conclusion

However unfashionable it may be to say it, for Australia to become a republic along the lines embodied in the referendum model will be, in terms of basic constitutional change, no great thing. Rather, while it will represent a significant change in the surrounding symbolism of our Constitution, such a step will embody only the smallest of changes in its institutions and machinery. In this sense, adoption of the referendum model will involve neither more nor less than translating our existing constitutional order faithfully into a republican idiom. This is a task of preservation, not innovation, that should be approached neither in elation nor fear, but with a calm dignity engendered from a confidence that we merely are taking the next small, logical and consistent step along a path already marked out by Burke, Deakin, Griffith and a host of others.

Above all, we must remember at every point that the object of a true constitutional conservative is to preserve the essence of our constitutional order, not to hold so tight to every one of its incidents that it is suffocated. Unless the Convention model is approved at the November referendum, the Australian Constitution will face the greatest and most dangerous challenge in its history. It will be presented with the prospect of the almost inevitable victory, at some time in the future, of a referendum proposing the popular election of an Australian Head of State, a victory that will represent the destruction of our constitutional order. If that grim battle eventuates, then all constitutional conservatives, myself included, will be fighting on the same side. But we will lose, going down in a saccharine sea of cheap jingoism and facile populism. In November, constitutional conservatives are presented with a priceless opportunity to ensure that Australia's republican future is directly derived from her conservative Constitutional heritage, a heritage that has endowed us with the finest Constitution in the world. Under no circumstances can we prove ourselves unworthy of that opportunity.