

REVIEW ARTICLE*

The Spirit of the Laws: Republicanism and the Unfinished Project of Modernity, A W Fraser, University of Toronto Press, 1990, pp i-xiv + 1-455, Cloth recommended retail price: 75.00 (ISBN 080-20-5836-1).

The imposing title of Andrew Fraser's book heralds a work that is introduced as an examination of Canadian and Australian constitutionalism. The generality of the book's argument, however, is such that it could in large measure refer to the legal structure of virtually every past and present nation-state. As such it is "grand theory" of an exemplary kind. By the end of the first couple of chapters, it was difficult not to be reminded of another similarly-pitched theory, that of the sociologist Talcott Parsons in his *The Social System*, and, in turn, of C Wright Mills' review of it. Of that work Mills concluded, "[t]he fact is that it is not readily understandable; the suspicion is that it may not be altogether intelligible".¹ The reviewer went on to point out that however abstract, opaque or complex an argument may be, its essential message can still be reduced to a small number of short paragraphs. Accordingly, he proceeded to translate the 555 pages of *The Social System* into four. Given that, as I shall argue in more detail later, Fraser's book to my mind is of a similar order of density and opacity, I propose first to offer a summary translation of its main theses as a preliminary introduction to a more detailed analysis. It goes like this.

Despite appearances to the contrary, the essence of Westminster constitutionalism is monarchical rule from above. Generally speaking monarchs are undesirable insofar as their existence and practices prevent citizens from becoming virtuous. Citizens can only be virtuous where there is both genuine rule from below and a range of institutions open to public participation. However, not only kings and queens, but also entire populations purporting to exercise their democratic will, can be essentially monarchical. This might seem a

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1 C Wright Mills, *The Sociological Imagination* (Harmondsworth, 1977) at p 34.

little odd but it is, in fact, even the case with all contemporary *republican* states. Why? Because their single collective objective is the maximisation of wealth. To achieve this necessarily entails increasingly centralised power and the corresponding erosion of political space. It follows that the United States, for example, is in essence as monarchal we are. The path to civic virtue is as blocked there as it is anywhere else in the modern world. To make matters worse, private organisations, such as corporations, have been similarly affected by an obsessive materialism. This is all rather unfortunate.

By contrast, classical Athens and the early American republics were fine places to be. The reason for this was because their citizens (though only a small proportion of their total populations) were not too bothered about maximising wealth. Or indeed redistributing it. They were more interested in virtue. This is the mark of the good and just life. If we in Australia would only follow their example we too could be virtuous and live the good and just lives that are most certainly beyond our attainment in the real here and now.

Therefore, I have not a dream - because they are merely utopian - but a plan. It consists in two simple legal reforms. First, we must ensure that our Constitution is changed to allow the states to become more autonomous. They would thereby obstruct centralising tendencies in the name of a national economy. Second, we must constitutionalise our corporations, that is, make them political institutions by giving every shareholder a vote regardless of the amount of shares held. We should also make it impossible, without unanimous consent, for corporations to sell up and go into businesses not originally envisaged by their memoranda of association. This could make them think rather more about their public purposes than the pursuit of filthy lucre. Australia and Canada would then be breeding grounds for virtue.

I have very little idea how all this would work in practice, or indeed what virtuous behaviour specifically is, but what better evidence could we get than the above-mentioned historical examples. A further reason for heading in this direction is because every attempt to date to deal with the dire psychological, sociological, ethical and cultural consequences of the materialistic, market-driven character of our modern world have only made things worse. So let's get on with it. (End of translation.)

As this outline might suggest, though the term "republicanism" appears in the title, this book is not about republicanism as currently understood in contemporary Australian or North American constitutional discourse. In the author's words, "[a]s things have turned out, the constitution of the American republic does not seem to have marked an altogether revolutionary and unique departure from the hierocratic spirit of Westminster constitutionalism";² and "American constitutional jurisprudence no less than that of the British dominions must speak in the monarchal language of *jus et dominium*".³ It is

2 Fraser, at p 342.

3 *Id.*

tempting to conclude that with this striking elision Fraser seems to have achieved something that Ronald and Nancy Reagan only vainly aspired to.

A mark of our collective fall from grace is the fact that "[t]he republican language of civic virtue has long been lost to the foremost practitioners of liberal legalism".⁴ Republicanism is defined by Fraser in accordance with its classical meaning: as a principle of mixed and balanced government where sovereignty is located not in a unitary monarch, nation-state or people-at-large but rather, is fragmented and located in a range of "little republics" which, though they may be united" in the federative act of covenanting together",⁵ would nonetheless retain a significant legislative or "jurisgenerative" autonomy: "The federal republic... presupposes a civic distribution of authority arising out of the prudential wisdom of an active and virtuous citizenry committed to the public goods generated within a multiplicity of common worlds of speech and action".⁶ This form of polity is alleged to be totally at odds with the "corporate welfare state" which, by implication at least from the text, seems to be the essential character of all contemporary capitalist, formally democratic nation-states.

All such societies are repugnant for Fraser (indeed modernity itself) insofar as they operate on principles antithetical to the classical model of the republican polity. The latter is, to echo the words of Aristotle, "an association of persons formed with a view to some good purpose". By contrast, "[t]he corporate welfare state acts to produce the normalized experience of an abundant life, not to secure the moral and institutional conditions of the good and just life".⁷ It follows that politics in the classical sense, and with it legitimate constitutional order, are unattainable in such states because the remorseless pursuit of economic growth, ever-increasing productivity and abundance consistently undermine and corrode all institutions, traditions and cultural forms which are capable of securing the "moral and institutional conditions of the good life". Republicanism is the suggested answer here because:

Only a republican jurisprudence committed to the constitution of a multiplicity of public spaces of appearance within the legal framework of civil society seems likely to restore to private individuals the capacity to appear in public as virtuous and independent citizens prepared to assume responsibility for the social consequences of their own concerted actions.⁸

The key dichotomy in this formula is "the normalized experience of the abundant life" (the inhuman condition of contemporary corporate welfare states) and "the moral and institutional conditions of the good and just life". Only if this can be sustained can the analysis as a whole stand up. Yet one looks in vain for any extended discussion of this fundamental distinction. True, Fraser points

4 *Id.*

5 *Ibid* at p 40-41.

6 *Id.*

7 *Ibid* at p 13.

8 *Ibid* at 337.

out how the legitimacy of modern societies is inextricably bound up in their *telic* purposes: in other words, what they produce and deliver. As a rule, so the argument uncontroversially goes, citizens are not bothered too much about what they emerged from, or their *genesis*. Fraser's conclusion suggests that all these *telic* purposes can be conveniently pigeon-holed under "abundance". However, a more detailed examination of the legitimation-strategies employed by modern states, not to mention their varied functions, might suggest that these *telic* purposes can only by means of a crude reduction be characterised as uniformly unconcerned with the good and just life. For example, the environmentalist movement has clearly shown that there is now not merely significant resistance to the belief in growth-at-all-costs but that in many areas this has been translated into meaningful, if still limited, public policy. It is far from clear from Fraser's argument why this should not have anything to do with the good and just life. Moreover, citizens' rights to health services, education and welfare are inextricably implicated in visions of the good life.

Of course, from the Archimedean vantage point of total critique these political values can be dismissed as irrelevant to the "essential" or "true" functions of the modern nation-state. Aside from the over-simplified or reductionist nature of this view, this sacrifices a sensitivity to detailed differences between different states and the capacity to chart subtle changes in historical trends for the comfort of being able to dismiss every political initiative - even if originating in a largely undefined concept of "civil society" - as merely proof of the basic corruption of the system. This is but another variant of the revolution/reformism/conservatism trichotomy typical of certain forms of "radicalism" of the sixties. The gist of such rhetoric was that if change was not truly revolutionary, then by definition its function was merely to prop up the status quo. Reformism was in many ways a more insidious practice than outright conservatism insofar as it duped the majority into believing that something progressive was happening thereby inducing political quiescence. Fraser's argument is very much in this mould. No matter what is done, politically, in the context of modern nation-states is yet more evidence of the "normalized experience of abundance". However, this approach is itself particularly and peculiarly suited to political quiescence insofar as political programs informed by such overarching critiques are commonly cast in impossibilist or utopian moulds. This point will be pursued later.

For the purpose of the present argument, however, there is little doubt that while the pursuit of economic growth continues to be a primary objective of modern states, in this respect it is not so dissimilar to the Athenian *poleis*. What Fraser's argument completely ignores (and likewise the political philosophy of Hannah Arendt which he relies on heavily in this context) is the extent to which domestic and foreign policy and more generally the practice of legislation of those states - the public sphere in action - was very heavily geared toward imperialist and thereby, ineluctably, economic expansion. Indeed, not for nothing did Aristotle refer to much of their law as "only a promiscuous heap of

legislation".⁹ Accordingly, it is a peculiar distortion of the reality of the polis to suggest that it represented a neat dichotomy between politics (the public sphere) and economics (the private). In fact at one point in *The Politics* Aristotle emphasises how the acquisition of financial resources is an essential feature of political life, even concluding that political careers are justifiably devoted to finance.¹⁰ There is no sense of these complexities in Fraser's black and white narrative, even where he is relying on Aristotle's work. My argument here is not that the polis was equally characterised by "the normalized experience of abundance", for it is undeniably the case that the modern state is significantly more immersed in the processes of production, consumption and exchange than pre-industrial states ever were. Rather, I want to emphasise that all legitimate political activity must to some extent develop and implement economic policies directed at producing surpluses unless committed to either a radical program of no-growth self-sufficiency or a completely free market. It is more than significant that Fraser effectively glosses over these uncomfortable realities. Moreover, to the extent that policies may be directed to increasing wealth does not mean that they can be simply reduced to amoral, virtueless activity.

After all, the promise and partially-achieved goal of "abundance" or economic growth, provides, among other things, funding for the "good purposes", noted above, of health and education. So, for instance, educationists committed to the good purpose of their chosen careers do therefore have a legitimate moral interest in national economic efficiency. Obviously, this moral value must be weighed with others in any sophisticated moral judgement. Likewise, however patchy and inadequate our welfare safety net is, it *does* rest on the fundamentally moral foundation that all members of the community are entitled to a basic minimum of income. And welfare rights groups are surely right in lobbying, as they have done in the recent past, for changes in government economic and fiscal policy better to achieve this good purpose. It is, of course, a sociological truism that advanced industrialised societies are characterised by bureaucratic structures stubbornly resistant to political change. But to recognise that fact is a very long way from the simplistic reduction that the pursuit of the good and just life is a thing of the past. Furthermore, civil society - the empirical features of which remain suspiciously underexamined in this work - still functions, and with a measure of autonomy, to set political agendas and provide forums for political debate and activity. Fraser rightly points to the fact that one indicator of the limited extent of political space in advanced industrial societies is the termly vote in the national elections. But this seriously understates the significance of "civil society" in Australia, for instance, at the present time. From anti- and pro-gun lobbyists, to campaigners against wrongful convictions, to citizens sitting as jurors, to tenants' associations, employers' groups and trade unionists, liberalism does allow

9 Aristotle *Politics*, 1324b (Ernest Barker trans, Oxford, 1946) at p 285.

10 *Ibid*, 1259a at p 31.

freedom of *political* association as well as economic association, not to mention the freedom not to associate at all. Moreover, these freedoms are to greater and lesser extents availed of. For Fraser, it is the freedom not to associate at all that inexorably prevails in liberal societies. Here, surely, some important distinctions need be drawn between, say, Pinochet's Chile and social-democratic Sweden. As Laclau and Mouffe suggest,¹¹ this particular strength of liberalism is something which socialists should build on rather than reject out of hand in demands for a more equitable division of wealth and the democratisation of our more powerful institutions.

A rather different perspective was recently advanced by Colin Mercer when he addressed the question of the function of radical critiques in the present political and intellectual climate. Referring to the work of many bureaucrats, community workers and policy advisers he concluded:

These people are responding, in their chosen career paths, to both a reality and to changed circumstances which some of their teachers from another age have realised: that government - or "governmentality as some have called it - is not confined to the legislature or the central apparatuses of the State. One key lesson that was learnt from the 1960s and 70s from feminists, from the work of writers such as Gramsci and Foucault and many others, is that government happens in lots of places and that is not necessarily experienced as forms of oppression or intrusion. It has its positive and productive dimensions too and this is one of the reasons for a change in political culture among a whole generation of people initially trained in the orders of critique but now operationalising those capacities effectively in the machinery of government and quasi-governmental organisations.¹²

This suggests that changes in the form of government may open up political forums - or "public spaces of appearance open to a free citizenry" as Fraser would have it - as well as closing them off. To take but one example, since the passing of the *Residential Tenancies Act* 1987 (NSW) a consultative committee has been set up to examine among other things the functioning of the Act. This is undeniably a political forum which allows interested groups and their representatives to propose changes to the Act's regulations where injustice is felt to have occurred, to raise for deliberation tribunal procedures, landlords' agents practices and so on. There is now *more* political space than existed formerly when the common law governed landlord/tenant relations. Furthermore, the existence of this forum neither obstructs or deflects political action on other fronts, nor neatly dovetails into a pattern of "total administration" or "the normalised experience of abundance", still less "the absolute political imperative of development emerging from a corporatist system of interest intermediation".¹³ This form of legislation is an increasingly common feature of the modern state. However, Fraser manages to gloss over

11 C Mouffe and E Laclau *Hegemony and Socialist Strategy, Towards a Radical Democratic Politics* (London, 1985).

12 Colin Mercer "Cause Without Effect" *Australian Left Review*, March 1991 at p 13.

13 Note 2 *supra* at p 30.

such very real changes in the political structures of contemporary corporate-welfare states by pitching the critique at such an abstract level that makes it *either theoretically* impossible to descend to such specific empirical detail, or has passed judgement in advance on its nature.

Chief among the tools Fraser employs to do this are the broad framework of Frankfurt School social theory and the philosophy of Hannah Arendt. For the former, following Weber, the dominant feature of modern industrialised societies is an essentially bureaucratic mind-set. Accordingly, political activity comes to be marked by an obsessively technocratic rationality. Martin Jay points out, however, in his masterful survey of the Frankfurt School, that their theory - Hannah Arendt's could be included here - developed for most members of the group in Nazi Germany, remained wedded to the notion that liberalism is merely one step away from, indeed the breeding-ground for, totalitarianism. Its leading theorists' ensuing failure to attempt to identify the differences between various advanced societies led its proponents at times to assimilate Nazi coercion, for example, and the American culture industry. As Jay concludes, this not only undermined the possibility of their winning more than a small audience, but it did so because it was an over-simplified picture of the reality of advanced capitalist societies. A further weakness is a "tendency to cast its theoretical critiques in the most extreme terms".¹⁴ One does not have to read very far into Fraser's book to see a similar pattern. Thus, already by page 13 it is "depressingly obvious" that it is difficult to account for the legitimacy of the modern nation-state, by page 16 we are told of "the bleak and impossible choice between a nationalist jurisprudence prepared to subordinate the institutional preconditions of the good life to the glittering promise of material abundance" and "a conservative monarchist tradition that offers little more than a transcendent illusion of legitimate constitutional authority". Also on the same page, it is asserted that British dominions need rescuing "from the antinomic confusion now revealing itself in the prolonged intellectual crisis of Anglo-American liberal legalism".

Related to this tendency is something of an imbalance in the argument of the book. We are treated to an exhaustive analysis of the emergence and development of "little republics" in ante-bellum United States: indeed, this occupies a full one third of the book. This exercise is directed toward demonstrating the way in which a genuine republicanism took hold there starting in embryonic form with the Mayflower pilgrims who entered into a compact to constitute themselves a political community, culminating in the formation of the states in the early federation. Also numbered in these "little republics" were corporations which were structured more in the nature of political rather than economic entities insofar as each shareholder had one vote, regardless of the number of shares actually held. Unlike the modern

14 M Jay *The Dialectical Imagination: A History of the Frankfurt School and the Institute of Social Research 1923-50* (London, 1973) at p 297.

corporation, therefore, their structure entailed an uncoupling of economic and political power. These republics were obliterated as the nation under the banner of popular sovereignty rushed headlong toward unlimited economic growth. More specifically, the imperatives of capitalist modernisation led to these institutions being seen as obstacles to the free flow of capital. This argument suggests three separate questions. First, is this historical perspective tenable? Second, is it necessarily an argument in favour of one conclusion which Fraser reaches later in the text, namely that a reinvigorated federalism has become a pressing, nay inescapable, political priority? Third, would his proposed re-establishment of the corporation as a body politic be a constitutional strategy capable of remedying the multitudinous evils of the Australian corporate welfare state? These issues need to be taken separately. First, what of this history?

Fraser's historiography is a dialectical one, in the manner of liberal and Marxist metanarratives, whereby historical development is seen in terms of a struggle between the good of republicanism and the evil of economic modernisation. Like most such dualisms, however, they reduce too many complexities to an over-simplified unilinear, or teleological, progression. So, the pre-capitalist virtuous English and American republicans are seen to have stood in stark opposition to the rampant forces which sought to undermine the stable order of their good and just bodies politic. This necessitates an at times strikingly rose-tinted and ultimately misleading account of various aspects of relevant legal history. The discussion of the particular legal changes in labour law in the course of the nineteenth century is a clear example of this. In his analysis of the common employment cases in both the United States and England (the doctrine that rendered liable an employee for acts of negligence occasioning injury to a fellow worker) Fraser counterposes his interpretation to the "complete misunderstanding"¹⁵ of theorists such as Levy, Friedman and Ladinsky. Chief Justice Shaw of Massachusetts and his English counterpart Lord Abinger both found that while employers and employees owed duties to each other by virtue of their contracts of employment, those contracts did not go so far as to embrace the notion that the doctrine of vicarious liability required employers to be held automatically liable for the negligent acts of employees toward each other. Fraser concludes that these judgements amounted to a refusal "to encourage the corruption and decay of their [the workers'] sense of individual responsibility and mutual concern",¹⁶ and, furthermore, a denial "that workers were entitled to view themselves as isolated monads devoid of responsibility".¹⁷ Obviously, for Fraser, the eventual rejection of this doctrine in favour of the imposition of a more rigorous set of duties on employers is but

15 Fraser, *supra* at p 173.

16 *Ibid* at p 171.

17 *Ibid* at p 172.

one more step down that lugubrious path to the perdition of the corporate welfare state.

However, this reading involves a number of its own "misunderstandings". First, even if we accept at face value that the judges were honestly attempting to preserve the moral responsibility of employees toward each other (and this in itself involves a considerable leap of faith), Fraser's analysis occludes the fact that the judges who reached these decisions were not simply choosing between "monadism" (that is, "anomic" modernity) and collectivism. Rather, their choice was between which of two notional "monads" should be held morally and legally responsible in these particular circumstances. To conclude that their choice merely exacerbated the already miserable conditions of nineteenth century factory workers is obviously based on a very different sociological understanding of the structural dynamics of the contract of employment and the workplace because it rejects the idea, implicit in Fraser's interpretation, that the *express* motives of the judicial actors exhaust the explanatory evidence on offer here. Put bluntly, what the judges said they were doing, and indeed may have believed they were doing, is not the end of the matter, legally or sociologically. The grim reality of the nineteenth century workplace entailed non-negotiable contracts, appalling conditions which at times forced workers to play a form of Russian roulette with each other's health and safety. This arose both in the context of operating unsafe machinery and being pressured by inadequate wages to cut whatever corners existed to get work completed even faster to ensure greater profits for employers. This regime, in turn, was coerced by contracts of employment which made it possible for employers to dismiss employees on the spot with negligible compensation if they refused to undertake such risks, and a wider battery of common law remedies, civil and criminal, for workers who combined to resist the system. The real point here is that "prudential judgement" - Fraser's term for enlightened judicial reasoning - is never merely about reaching a result in terms of making abstract monad 'x' responsible to abstract monad 'y'. On the contrary, it is a question of ensuring that those specific social subjects who can reasonably prevent injury, having created the conditions which cause it to happen, and having at their disposal the resources to prevent such injuries happening in future, are the very persons who should morally be forced to shoulder the responsibility. It is therefore a matter of (prudentially?) identifying who basically benefits and who loses as consequence of these particular "accidents". There is a certain irony about Fraser's interpretation here, because he is guilty of the very formalism that he continuously accuses liberal legalism of, namely, that legal truth can be captured by means of examining only the *content* of relevant rules. The context of the operation of the rules is vital to comprehending their reality no less in this context than anywhere else. It should also be pointed out that there would commonly be a form of legal responsibility on the employee in any case: they would often be dismissed for such conduct. To this extent, the authors Fraser accuses of misunderstanding are surely right in their assessment that a profound

moral insensitivity marked the tone of these decisions for the very reason that meaningful moral judgement must weigh general principles in complex practical contexts. Such judgement would recognise that employees in these situations were merely secondary links in a causal chain initiated by profit-seeking employers. Furthermore, any serious attempt to implement the undeniably good purpose of preventing industrial accidents would even more compellingly impose liability on employers. Moreover, given that Fraser makes liberal use of Foucault's work elsewhere in the text, it is rather surprising that he does not employ his concepts to examine the extent to which "republican" bodies politic are marked by their own specific grids of power relations.

To counter these objections Fraser seeks to justify the moral reasoning of the judges on another ground, namely, that the imposition of these additional legal burdens on employees would induce them to collective action to improve working conditions. That would, in turn, have been a judicially-nurtured "natural outgrowth of the civic ethos... within the associational life of American civil society".¹⁸ Accordingly, those judges were implementing a republican strategy to preserve a political space in the face of modernising capitalist tendencies to obliterate it. Depressingly, this is not unlike various crude Marxisms that have implied that the more oppressive the living conditions of the working class are made the better are the conditions for revolution. One only needs to ask oneself whether employees through their unions have historically needed the added incentive of liability for their co-employees' negligence to move them to articulate a "civic ethos" of demanding increased vigilance on the part of employers to provide safer workplaces to sense the absurdity of this argument. This point suggests a rather different conclusion to Fraser's: that the judges who reasoned in this way were indeed adding to the disadvantages already suffered by workers, however much they may have believed that they were strengthening the moral bonds between them. A theory that characterises companies with such limited responsibilities as the seedbed of virtuous conduct really does beg the question: is this a concept of virtue that that we want, still less need? It might be added that the continuing struggle by trade unions to improve working conditions is part of a politics to achieve a "civic ethos" in the here and now of the corporate welfare state. Contrary to Fraser's history it did not end with the demise of that pristine republicanism to be replaced by an amoral complicity with the more powerful elements of the totally administered society: it is part of the present life of the labour movement. More to the point, it is hard to avoid the conclusion that the "moralism" of Fraser's historiography really does feed into in present-day conservative rhetoric, such as the reasoning behind the current New South Wales government's Industrial Relations Bill. After all, as John Fahey, the Minister for Industrial Relations, has emphasised, this legislation will allow employers and employees to sort out their own priorities of rewards and

18 *Id.*

responsibilities without the intervention of unions and the state. What is so different from this attempt to introduce a "civic ethos" into the workplace and that of Fraser's good judges of the nineteenth century?

Second, the proposed revival of federalism involves its own, separate rose-tinted analysis. Like any other political institution federalism is not a pure (Platonic) form, but represents a coalescence of power relations, political struggles and vested interests at a particular time and place. It follows that however pure, noble and civilly virtuous those early American little republics were - and one should remember that this concept of virtue was quite consistent with particular brands of sexism, racism, religious bigotry, elitism and economic exploitation - one surely needs to examine the very particular matrices of power relations and sectional interests that animated the particular compact which resulted in Australian federalism in order to judge the extent to which it represents the most effective option for the "creation of public spaces of appearance wherein citizens might cultivate and display the civic virtues".¹⁹ Moreover, a similar measure of scrutiny needs to be directed to their present composition and functions. Yet we get nothing that even approximates a study of the debates and alliances which gave rise to the present federative structure, or an examination of the role that the states presently play in our federation. One gets the feeling that Fraser has avoided this exercise precisely so as to dodge raising this irksome political question. While it may be methodologically convenient to transpose the supposed political advantages and virtuousness of early American constitutional and company law to the contemporary Australian context, this hardly makes it either historiographically or politically defensible in a thesis directed to proposing future reforms of Australian and Canadian constitutionalism.

Given this lacuna, it comes as no surprise that Fraser reserves some of his most trenchant criticism for the Critical Legal Studies movement, especially one of its leading proponents, Roberto Unger. For Unger, as for other like-minded theorists, the identification and critique of illegitimate hierarchies has almost become an article of faith. As Unger emphasises, all civic and institutional arrangements should be subject to fundamental revision so as to prevent the possibility of the entrenchment of power elites. It follows that federalism, like any other human institution, should be "cracked open to politics".²⁰ Obviously, any theory such as Unger's necessitates concrete analysis of both the *geneseis* and *telic* of every body politic to determine the question of their legitimacy. Fraser's reluctance to undertake this exercise in the context of the two specific objects of focus of this book, Australian and Canadian federalism, suggests that the very historical existence of a federal structure, even if enacted by an alien Imperial Parliament is enough to constitute a "narrative history of civil associations of persons, formed in solemn covenant with a view to some good

19 *Ibid* at p 233.

20 R M Unger *Social Theory : Its Situation and Its Task* (New York, 1987) at pp 57 and 210.

purpose".²¹ It is hardly churlish to suggest that this solemn covenant was not even made by some who continue to be bound by it, for example, Aborigines. One does not have to cite Paul Keating to wonder why the states, rather than, say, local government should be the focus of proposals for deepening and extending democracy in Australia, or, indeed, why only a revamped federalism would avoid the unbridled pursuit of "abundance" that currently afflicts the nation-state.

Third, as for the question of the reform of corporations, it is hard to avoid the conclusion that Fraser is attempting to reinvent the wheel, in particular, a Durkheimian wheel. One of the founding fathers of modern sociology, Durkheim saw modern societies as characterised by *anomie* or alienation. This was generated in large measure by the disintegration of traditional communities in the face of a rampant industrialisation requiring a very high degree of division of labour. The solution, for Durkheim, was to make the corporation the locus for a new communitarianism, where its members would be given a participatory voice and would thereby regenerate the sense of stability, value and purpose characteristic of pre-industrialised society.²² This seems, in essence, to amount very much to the sociological analysis of contemporary capitalist societies that Fraser employs, in addition to being analogous to the legal reforms he is proposing to redress the problem. To be sure, Fraser's conclusions are derived from some different theoretical sources, but it is hard to see that Fraser adds much to what Durkheim proposed. Yet there is no discussion of Durkheim's work in this book. Furthermore, unlike Fraser, Durkheim realised that the dynamics of large-scale industrial societies required a significant number of political modifications to be made to achieve the integrative features of the guilds and early corporations, such as representation at the national level organised along functional or occupational lines. Accordingly, he proposed that, in addition, the corporation should become "the basis or one of the essential bases of our political organisation" and "the elementary division of the State, the fundamental political unit".²³ In this, as Stephen Lukes points out, his suggestions are in line with a tradition of sophisticated French theorising about the possible role of corporations as the basis of intermediate political institutions in advanced capitalist societies.²⁴ A recurring feature of these theories, as well as Durkheim's - though as a sociologist he claimed that it was a little beyond his field - has been an examination of the way in which those institutions would interact with other political bodies. By contrast, Fraser's proposals seem sketchy indeed.

In this context it is instructive to consider the economics of reform, for instance. To those who might characterise the proposed reform of the

21 Note 2 *supra* at p 280.

22 E Durkheim *The Division of Labour* (1933 trans 2nd ed, Paris) at pp 23-25.

23 *Ibid* at p 27.

24 S Lukes *Emile Durkheim: His Life and Work* (Harmondsworth, 1973) at p 541.

corporation as an impossibly utopian proposal - and Fraser is at pains to point out that republicanism does not need to lapse into this²⁵ - he argues that, for example, large institutional investors are unlikely to take their capital elsewhere because they usually are not concerned with management anyway. What they *are* concerned with Fraser does not go on to explore, possibly because this exercise would expose the extraordinary naivety of this proposed panacea for our degenerate condition. Given his earlier rejection of the legislative framework of the corporate welfare state, there seems to be no room for some sort of "jurisgenerative" regulatory regime to govern these bodies politic. So how would institutional investors behave in this corporate nirvana? Well, they probably *would*, as Fraser citing David Ratner suggests, leave management to the managers and those other shareholders who were so minded to play an active role in the process. But equally they most certainly *would* exit and place their funds elsewhere if the management decisions reduced the profitability of the relevant corporation. And what factors might also crucially bear on the profitability of this "corporation as body politic"? The *market*. The essential, determinative mechanism for these new institutions' continued functioning is that very thing that Fraser spends a large part of the book lambasting. For with the state as "agent of society" out of the way in the new republic, the good purpose, shall we say, of producing asbestos sheeting (and it should be noted that associations of individuals choose their own good purposes - for the state to decree what bodies politic should or should not do would surely be an unacceptable "despotic extension of power") cannot but depend on the marketability of such a product. This in turn hinges on, among other things, the efficiency of its production, marketing strategies and the ultimate sale price. Now, these external factors will need to be registered in the "political" governance of the corporation, even if that mode of governance is truly republican, that is, one vote regardless of shares held. If profitability goes down, investors will flee and bang goes the "good purpose". It is hardly necessary to belabour the point that you simply cannot begin to achieve your good purpose if the market does not want your product. In other words, as was argued above, economic viability, abundance and good purposes, in practice, are inextricably intertwined.

Equally, profitability will depend on wages and the amount the body politic is to spend on the health and safety of the workforce. (These costs, of course, would be a little less than they presently are in the "despotic" corporate welfare state because individual employees rather than the corporation would be liable for injuries caused to their colleagues!). Companies which are more effective at cutting costs in this way will attract more institutional investment, will become more profitable and will be the better able to overrun competing "good purposes". Likewise, where the workers most subject to the risks associated with the production process are a minority of voices (and this could arise even

25 Note 2 *supra* at p 312.

where they all own shares, and increasingly so in our post-Fordist economy) the possibility for their exploitation is ever-present. Having already deprived himself of the theoretical tools for identifying microprocesses of power relations, Fraser is as unable to identify this problem in the future republican workplace as he was in the nineteenth factory. All this is to say that market processes are integral to the achievement of most corporate good purposes, and there is nothing in this model of republicanism to suggest that would not continue to be the case. By ignoring this disturbing reality, Fraser is the better able to present his proposal as a viable alternative to the depressingly anomic tendencies of existing markets and the regulatory mechanisms put in place to limit their socially harmful consequences. Of course it is possible that the author has in mind some alternative non-command economic form. If so, he is not telling, and if he is not telling, there is little reason why this particular proposal should be given very serious consideration. Indeed, apparently unable or unwilling to banish the determinative role of the market in a republican polity, and given a minimal state in Fraser's model, the potentiality of the market to corrode the stable structures of civil society would be even greater than it is now. To this extent, the substance of his republican polity is likely to be every bit as conservative as the free market "constitutional state" recently advocated separately by Suri Ratnapala and Geoffrey de Q Walker.²⁶ Moreover, given an (understated) antipathy to economic growth, or abundance, it is hard to avoid the conclusion that what is on offer here is in essence a "banana republicanism".

Furthermore, given Fraser's predilection for figures of speech - autonomous nationhood under the Crown is, for example, "oxymoronic"; the image of the Crown is "metonymic" - it may be appropriate to examine how his language itself reveals the weakness and vacuousness of his proposals. In the first two sections of the book the verbs are in a distinctly indicative mood - little republics *were* repositories of civic virtue; capitalist states *are* beset by constitutional doctrinal incoherence and a "despotic" extension of power [emphasis added]. By the third section of the book where the discussion focuses on the positive benefits which only republicanism can deliver there is a revealing shift to the subjunctive and optative moods. So, "[t]he federal principle *might serve* to mediate the legal relationships between state and civil society...";²⁷ republican jurisprudence "*seems likely* to restore to private individuals the capacity to appear in public as virtuous and independent citizens prepared to assume responsibility for their own concerted actions";²⁸ "only a critical hermeneutics *could forge* effective links between political and social

26 G de Q Walker *The Rule of Law* (Melbourne, 1988); S Ratnapala *Welfare State or Constitutional State?* (1990).

27 Note 2 *supra* at p 371.

28 *Ibid* at p 337.

praxis and some more or less stable doctrine of the just and good life";²⁹ [o]nly the autonomous power of modern social movements deeply loyal to a durable schema of free civic action *offers much hope of resisting*, much less overcoming, a legal despotism whose formal constitutional warrant bears the synechdochic imprimatur of the Crown"³⁰ [emphasis added]. This shift from unwavering certainty to faltering hesitancy says much about how a political and legal theory the practice of which was grounded in pre-industrial societies really has very little to offer progressivist visions of contemporary capitalist societies. This comes as more than a little disappointing after 311 pages of unrelenting critique. More to the point, the substantive proposals that Fraser does come up with seem to be the feeblest offerings for the remedy of our present malaise. If the oxymoron will be excused, the last two chapters of the book, expressly directed to fleshing out the form of republican modernity, read like nothing much more than a drawn-out *aposiopesis*.

A further question mark that arises for Fraser's republican constitution and its associated bodies politic relates to the concept of "virtue". What marks the latter out as the collective antithesis to the evils of the corporate welfare state is that they are the repositories of virtue. The author reminds us that we have lost the language of virtue, and this is certainly true. Though repeatedly informing us of the loss, however, there is not much assistance given to help us find it. We are told that "property is the precondition of virtue",³¹ a reference to the Aristotelian notion that only those who were freed from the necessity of labour could become virtuous. Aristotle, however, did not leave it there, and spill much ink telling us what he meant by the term. Indeed, his *Nicomachean Ethics* represents a profound study of this fundamental question.³² Something of this order needs to be incorporated into this theory of republicanism, for without this any attempt to discover what is meant by the "good and just life", "prudential judgement" or "the civic ethos generated by participation in the institutional life of the body politic"³³ is doomed to failure. There are two direct consequences of this omission. First, it makes this brand of republicanism an even more questionable *moral* proposition; second, it becomes so much more difficult to criticise it because there is virtually nothing there *to* criticise. Of course there are implications in the text about virtue, that it is the "active expression of the civic personality of the individual", and a "constitutional right to participate in authority".³⁴ But these vacuities would include anything that might be done while participating in the life of various bodies politic. In other

29 *Ibid* at p 351.

30 *Ibid* at p 369.

31 *Ibid* at p 136.

32 Aristotle *Nicomachean Ethics* (M Ostwald trans, Library of Liberal Arts) esp. Books III and IV.

33 Note 2 *supra* at p 136.

34 *Ibid* at p 137.

words, virtuous conduct appears to be little more than what happens be done in the public sphere. More to the point philosophically speaking, there is something rather amiss with a critique of the supposed inability of liberalism to express a vision of the good and just life which instead merely proposes the multiplication of political forums without addressing the limits of what they should do and the terms according to which they should operate. By contrast, constitutional theories which have embraced notions of human rights have grappled with these difficult issues.

In answer to this criticism, it might be argued that virtue is characterised in this work as something fundamentally at odds with the essentially corrupt and corrosive features of the market, but this negative definition on its face could theoretically embrace any range of practices and behaviours. Accordingly, Fraser appears guilty of the very "irrationalism", or moral nihilism, he accuses the critical legal studies movement of. Having shirked the important ethical question of what constitutes goodness, justice and virtue from the very beginning of his thesis, it is hardly surprising that he ends up in a particularly dark blind alley. At the very least, one would have expected, given his emphasis on the historical importance of property as a precondition for virtue for some discussion of redistribution of property. But his repudiation of the despotism of the corporate welfare state theoretically prevents examination of this question. In Aristotle's work, by contrast, there is clear focus on the contradictions between the concept of virtue as a human attainment and the fact that it was, in the practice of Athenian *poleis*, only available to a small proportion of citizens. There is, consequently, detailed analysis of issue of distributive justice. Likewise, constitutional theorists seriously concerned with such problems have been driven to consider questions of the minimal legal conditions of equality.³⁵ No such complexity appears in this text. The setting up of one shareholder/one vote corporations, and revival of the federal principle is assumed to be enough to achieve the conditions for the "good and just life". To this extent, there is a striking similarity between this work and the deeply conservative tenor of Walker's and Ratnapala's. Like them, having kicked away the crutch of the *de-moral*-ising welfare state, and also having theoretically precluded any redistribution of wealth, all citizens, rich and poor alike, would be free to constitute their very own bodies politic and would be thereby transformed into truly virtuous agents. It should be added here that the perception of republicanism as the purified political ideology as seen by Fraser seriously over-simplifies what those earlier theorists themselves proposed. As Gregory Alexander suggests, classical republicanism was much more contradictory in its view of the role of state, corporations and the division of wealth than contemporary theorists suggest, and consequently it has much more

35 For a recent example, see S A Munzer *A Theory of Property* (New York, 1990).

in common with present solutions on offer.³⁶ It follows from this insight that it is hardly the unique panacea as advertised in this book.

The practical difficulties with implementing Fraser's proposed reforms should not divert our attention from the important constitutional objectives that lie buried beneath the mounds of Fraser's rhetoric of total critique. They include the need to democratise our still many powerful and largely unaccountable institutions. To do this requires constant political, moral and political examination and evaluation of their present operation and structure, their hierarchies, their actual functions and their (telic) results. This will involve, in turn, appraisal of the available range of resources and forces, both of civil society (trade unions, ethnic groups, environmentalists, professional associations, the press and so on) as well as the state (bureaucrats, politicians, law reform agencies, for example). This project will, of course, require formulation of policies regarding such mundane matters as the constitutional recognition of local government, the limits of state activity and the related role of human rights, and new forms of state/federal relations. As Ian Ramsay has pointed out recently, this latter question is one of considerable complexity involving among other things (moral) matters such as the problem of states enacting such an unregulated corporate law, as Delaware does in the United States, that vast numbers of firms incorporate there and in so doing undermine regulatory attempts by other states; the potential for considerable duplication of regulatory regimes; the possibilities for inefficiencies to result; the question of the extent to which maximisation of wealth is a value to be balanced with others, and so on.³⁷ Such complexities cannot be resolved by vague generalisations that the good and just life can only be attained when a vaguely-defined federal principle is truly revived and corporations are constitutionalised. More specifically, there must be something amiss with an overarching theory of federalism and the maximisation of political space which has failed even to comment on the referenda in the 1987 Australian federal election which proposed, among other things, that local government - surely a candidate *par excellence* for body politic status - be given constitutional protection. Here we have a grand theory, which in the words of C Wright Mills, is one of those:

so rigidly confined to such high levels of abstraction that the 'typologies' they make up - and the work they do to make them up - seem more often an arid game of Concepts than an effort to define systematically - which is to say, in a clear and orderly way - the problems at hand, and to guide our efforts to solve them.³⁸

The mark of a genuinely valuable theory is the provision of tools which will allow us to "shuttle between different levels of abstraction", as Mills put it, and

36 G S Alexander "Time and Property in the American Republican Legal Culture" (1991) 66 *NY Univ L Rev* 273.

37 I Ramsay "Company Law and the Economics of Federalism" (1990) 19 *Federal Law Review* 169.

38 Note 1 *supra* at p 43.

also the development of meaningful and attainable strategies to deal with our specific and complex present problems. So, with regard to this theory, Fraser may not see it as particularly utopian to propose, in terms of the grand narrative of republicanist nostalgia, that both Kerry Packer and the cleaner of Jana Wendt's office at Channel 9 should have one vote each in the governance of their shared corporation. Grand narratives, marked by over-arching visions of emancipation, are a feature of modernity's legitimating symbols and generally, as Jean-Francois Lyotard has suggested, have as often as not obstructed our understanding of social processes by reliance on teleological histories and totalising concepts.³⁹ Relatedly, these theoretical weaknesses translate into increasingly unconvincing proposals and strategies for reform. This version of republicanism is squarely in that mould. For myself, those present-day Australian republicans Fraser contemptuously dismisses as engaged in the "banalisation of the Constitution" are, to be sure, performing a far less utopian, but for all that a more useful and progressive political function in forcing onto the popular agenda the idea that all elements of *our* Constitution must be *of* us to be legitimate. A little story, or *petit recit*, this may be, but it politically connects with, deepens and sustains the democratic ideal which is still part of the unfinished project of *postmodernity*.

39 J F Lyotard *The Post-Modern Condition: A Report on Knowledge* (Manchester 1986).