

The Senate in the balance

In her engaging book, *Platypus*, Ann Moyal chronicles the debates among Nineteenth Century scientists and naturalists that followed their first acquaintance with what one of them called ‘This paradoxical quadruped’ (Moyal 2001: 7). At first some thought that it was a hoax, an artificial construction—a carefully stitched together amalgam of parts that were impossible to imagine as elements of a single natural organism. Once these suspicions were proven wrong and it became accepted that there really was such a thing as the platypus, attention then turned to efforts to determine the creature’s essential nature. For example: ‘How did this curious animal from the Antipodes produce its young? If it was not “viviparous”, producing its young like other mammals, was it in truth “ovoviviparous” like some lizards with eggs formed and hatched within the female’s body? Or was it, perhaps, “oviparous”, hatching its young from eggs laid outside its body, like a bird?’ (Moyal 2001: 14)

The answers to these questions were critical to resolving another quandary: how was the platypus to be fitted into the existing taxonomical schemes for organizing all living things into what came to be phyla, classes, orders, families, genera, and species? Taxonomy was proving to be a very useful device not just for organizing knowledge, but for identifying relationships and predicting traits that had not yet been observed. Moyal concludes that ‘each naturalist sought to shoehorn the little animal into their [sic] different prescriptive forms. Each sought to accommodate it within fixed and long established categories.’ But none succeeded. ‘No animal ... was to rub more strenuously up against the prevailing taxonomic categories than the paradoxical platypus.’ (Moyal 2001: 41)

So too the Commonwealth Parliament. Perhaps no other national assembly in a truly democratic nation rubs more strenuously up against the prevailing taxonomic categories that shape and underlie political and constitutional analysis. Yet ironically, even that assertion may be vehemently contested by some who profess no doubt about where

Australia's national constitutional regime fits into the range of democratic alternatives.

If we take 'democracy' to be one of several alternatives at the most fundamental level of categorizing political systems—the political equivalent of animal, vegetable, and mineral—the other alternatives may be oligarchy, dictatorship, and perhaps more. More relevant for our purposes than the alternatives to democracy are the phyla and classes to which different democracies can be assigned, based on fundamentally important criteria that distinguish among them. So at the phylum level, we might distinguish between direct democracy and representative democracy. And more important still, we might accept a division of representative democracies into two broad classes: to use the familiar shorthand, parliamentary and presidential (or presidential-congressional) systems. But observers of contemporary democratic governments would be quick to point out that, even putting aside the varieties of parliamentary and presidential systems, there are others that are unarguably democratic but neither quite one nor the other. Instead, they are described as mixed systems, hybrid systems, or semi-presidential systems, among other labels. What typically characterizes this third class of representative democracies is some significant degree of sharing of executive power between a president, who may or may not be directly elected, and a prime minister (or prime minister-plus-cabinet), who is appointed and removable by the president, the parliament, or both.

But when we come to Canberra, where do we fit the Commonwealth constitutional system into this schema? Is it even possible to fit the Australian regime comfortably into any one of these three classes? In this final chapter, first we shall explore this question, which is essentially descriptive and analytical. Then, I propose to venture an assessment of the Australian system and the Senate's place in it, and offer a personal perspective on whether the people of Australia should view their system with dismay, alarm, or satisfaction (indifference being an unacceptable alternative). We will conclude with some speculations about what is to come.

What kind of creature?

It is easier to say what the Australian system is not. Obviously it is not a presidential system, and I argue that it also is not a hybrid system in which executive power is shared in significant ways between president and prime minister (a simplification admittedly, but a useful one, of what characterizes these hybrid systems). Some may well disagree, contending that Australia's prime minister and cabinet share executive

power with another executive in the person of the Governor-General—or perhaps more accurately, that the former derive their executive power by delegation from the Governor-General.

In support of this contention, there are, first, the black letter of the Constitution and the formal powers it vests in the Governor-General, and from which derive his reserve powers; and second, Governor-General Kerr's undoubted exercise of power during the famous or infamous events of 1975 that I have reviewed at some length. But I find this point of view unpersuasive because, as a matter of political practice, not constitutional abstractions and speculations, it rests almost entirely on that dramatic and controversial dismissal of Prime Minister Whitlam and his government. I strongly suspect that the Governor-General's reserve or potential powers rarely would be thought worth discussing, except among legal scholars, if, in 1975, the incumbent had announced that the impending crisis was a dispute between Labor and the Coalition, between the government and the Senate, that needed to be resolved through the political process, and so was a matter in which it would be inappropriate for the Governor-General to intervene.

That leaves us with a third possibility—that the Commonwealth is a parliamentary system—a possibility that, to many past and present observers, is obviously, even self-evidently, correct. The Commonwealth Constitution, after all, is a direct second-generation descendant of the British constitution, home of the Westminster model, which is the mental image that most of us probably have in mind when we think of 'parliament.' The colonial constitutions of what became the six Australian states were modelled in many of their fundamentals on the British system of government and, in turn, provided the model that the creators of the Federation knew, admired, and adapted to the somewhat different requirements of a continental and federal state. And if this historical argument is not persuasive, look at the basic elements of the system at work. The government comprises members of the Parliament who are chosen by the Parliament and remain in office only as long as they retain the confidence of the Parliament. Those are precisely the core relationships, even the definition, of a parliamentary system.

Consider the following argument from *House of Representatives Practice* (2001: 461):

One of the features of the Westminster system of government is the existence of a clear line of representation from the people through the Parliament to the Executive Government. This in turn results in a clear line of responsibility in reverse order from the Executive to the Parliament to the people. Once this clear line of responsibility is interfered with (as with the intervention of the Senate which is not an equitably representative body

in the sense that the House is) the powerful concept of representative and responsible government is weakened.

Note that ‘the Parliament’ is distinguished here from the Senate, so it must be synonymous with the House of Representatives only. But that is a semantic quibble. What is more interesting is the undefended assumption that ‘the Westminster system’ (or the ‘Westminster syndrome’, Parker’s (1980b) more flexible and accommodating formulation) provides the appropriate basis for understanding how the Australian government should work. In fact, that assumption is true, but it is only half of the truth—and then only if we are prepared to ignore the absence of parliamentary sovereignty in Australia (discussed below) and the widespread conviction that the Parliament is more responsible to the Executive than vice versa.

It is fair to apply the label of Westminster model, system, or syndrome to the relations between the government and the *House of Representatives* but not to the relations between the government and the *Parliament*, which, by explicit constitutional definition, includes the third institution that shares Parliament House: the Senate. However well or poorly the somewhat idealized formulation just quoted actually describes the relations between the government and the House of Representatives, it fails to take account of the contemporary Senate which is elected by a form of proportional representation that has made it very unlikely—almost impossible, according to many—that any government ever will have a majority in the Senate under the present electoral system. In truth, the legislative powers of the Senate simply cannot be reconciled with the contention that Australia has a parliamentary form of government, pure and simple.

The Senate’s constitutional authority to reject any or all bills, coupled with an electoral system that stacks the deck against the government’s control of the Senate, is incompatible with a fundamental principle of parliamentarism: that the government can remain in office to enact and implement its legislative program because (and only as long as) it has the support of a majority in the government-creating and -destroying house of the Parliament. That condition is both necessary and sufficient. The government cannot enact and implement its program unless it has the support of that majority. And the support of that majority enables the government to enact and implement its program.

The argument why this principle does not apply in Canberra can take either a weak or a strong form. The weak form of the argument is that non-government majorities in the Senate can defeat government bills or force the government to accept changes in them as the price of passage. For some of the reasons we will consider later in this chapter, the Senate may be very restrained in exercising these powers (perhaps

because the non-government parties disagree among themselves), but that is a decision to be made on the non-government side of the Senate. It may be subject to the government's influence, but not to the government's control. As Reid and Forrest (1989: 479) put it, 'The Senate is plainly the Executive Government's hair shirt.'

The strong form of the argument is that, as the events of 1975 demonstrated, an intransigent Senate has the power to force a government to resign, even though it retains its majority in the House. I argued in Chapter 4 that the Fraser-controlled Senate should not have refused to vote supply for party political reasons, and that Kerr should not have dismissed Whitlam when he did. But assuming the Senate had remained intransigent (a dubious assumption, I argued), and even if Kerr had done nothing, Whitlam would have had no choice but to resign, sooner or later, after the money ran out, after government activities ground to a halt, and after Australians noticed the difference. I think it highly unlikely that anything like the events of 1975 will be repeated in the foreseeable future, but unless and until the Constitution is amended (or the statutory solution I proposed in the preceding chapter is enacted), a non-government Senate majority can force a dissolution of the House or a double dissolution if it is willing to pay the price for the damage it is almost certain to inflict on itself and the nation.

As a general proposition for the comparative study of politics, parliamentarism is not necessarily incompatible with bicameralism, because we understand the former to mean that the government must have a majority in the only house of Parliament that matters, the only one that has the constitutional writ to approve or disapprove the government's legislation. In London and Ottawa, that means only the House of Commons. But in Canberra, both houses matter, and that fact matters for the argument that Australia has a parliamentary government. It does not. Nor does it have a mixed or hybrid system of the kinds that have become increasingly familiar throughout Europe, including the new or proto-democracies of eastern Europe and the former Soviet Union. Australia is a different place in the form of its national government, just as it is a different place in the form of its fauna. Parliament as platypus.

It is not difficult to understand why this conclusion may be bothersome to many Australians—for example, to those who associate democracy with their understanding of the 'Westminster model' and the practices of the British Cabinet and Parliament, and to those who were taught as children that they lived in a parliamentary democracy defined by responsible cabinet government ('although, oh yes, we also have the Senate, don't we?'). The mixed nature of the Commonwealth

Constitution creates ambiguity and uncertainty; it is considerably easier and more convenient to suppose that Westminster is alive and well in Canberra than it is to understand and explain the more complex and confusing reality.

So a natural enough response is to look for ways to show that the Commonwealth is a parliamentary regime after all. One way is to argue that the Senate really does not have the legislative power that the Constitution appears to give it, and to search the debates of the constitutional Conventions for evidence that its authors could not possibly have meant what the Constitution clearly says. How could these children of Westminster, these products of colonial systems of responsible government, have intended anything but to recreate what they knew and what they had inherited? The question answers itself, so if we look at the Commonwealth Constitution through this historical prism, it is possible to see the Senate's legislative powers becoming more and more insubstantial.

Another way is to argue that the Senate's apparent legislative powers must be understood in the context of the unwritten conventions on which Westminster government rests. The Senate, according to this line of argument, may have the written constitutional power to defeat important government legislation, and even to reject an essential appropriation bill, but it would be unconstitutional for the Senate to do so because that would violate an absolutely fundamental convention of responsible government. The Constitution vests executive power in the hands of the Governor-General, but everyone knows that is not what its authors really intended. By the same token, the authors surely did not intend for the Senate actually to use to their fullest the legislative powers that the Constitution assigns it. David Mayer (1980: 51), for example, identifies 'two defensible, but contradictory, interpretations of the Australian Constitution—a literal, federalist interpretation, and a constitutionalist interpretation which gives primacy to responsible government.' When confronted with the choice between 'literalism' and 'constitutionalism', it is not difficult to guess which interpretation he believes to be the proper one.

Unfortunately for these arguments, scholars have documented that leaders of the constitutional Conventions knew precisely what they were doing. They knew perfectly well that they were creating a federal system with the voluntary consent of the six colonies, and that this required institutional arrangements that had no counterpart in London (or in the colonial governments themselves, for that matter). As we have seen, some of them acknowledged in debate that the arrangements they were creating were inconsistent with responsible government. Recall Samuel Griffith's statement that 'the experiment we propose to

try has never yet been tried,' and Baker's recognition that 'The essence of federation is the existence of two houses, if not of actually co-equal power, at all events of approximately co-equal power. The essence of responsible government is the existence of one chamber of predominant power.' The solution for them was not to pretend that they were doing something other than what they did. No, their solution was to rely on the prudence, self-restraint, and common sense of those who would operate the system they were creating, so that the contradiction inherent in their creation would remain of theoretical interest—which it has, with few exceptions, ever since.

Still another way to discover a parliamentary regime in Canberra is to revise how we define such a regime. For instance, Ward offers an alternative path to the conclusion that 'Australia is a relatively orthodox parliamentary state' which involves defining away the main objection to this conclusion. One of his criteria for identifying such a state is that, if the parliament is bicameral, 'one chamber has primacy.' Contrary to Barwick and Kerr, he posits that 'The parliamentary model rejects the proposition that a government can be responsible to two chambers, because they might be controlled by different majorities.' So, the question becomes, what constitutes 'primacy'? Ward responds by proposing four criteria:

First, the government is formed by the party or coalition which has a majority in the lower house. Second, the Prime Minister is a member of the lower house. Third, a majority of ministers sit in the lower house. And fourth, the lower house, or effectively the government that controls the lower house, possesses legislative initiative. Financial bills originate there, and most other legislation begins there too. Furthermore, legislation that originates in the upper house is most often government legislation, introduced there because of time constraints in the other house. In most parliamentary states, the upper house may only delay, not deny, legislation, but even where an upper house has the power to deny all, or certain, bills, as in the German and Indian federations, there is a presumption that the government will determine the bulk of the legislative program. This is certainly true of Australia ... (Ward 2000a: 65)

What is most interesting about this analysis is the criterion that is missing: the capacity to control legislative outcomes. According to Ward's analysis, if the constitutional and electoral systems combine to compel the government to engage in legislative compromise or face the rejection of its legislation, that awkward fact does not detract from characterizing the regime as 'a relatively orthodox parliamentary state.' I would have thought that in such a state, the governing majority can expect to secure enactment of its legislative program, or at least the priority items of its program, so long as it retains majority support in

the lower house to which it is formally responsible. Not so, Ward tells us. The electoral mandate that we encountered in the last chapter and that gives a responsible parliamentary government both the right and responsibility to implement its program without significant hindrance or delay, here is reduced to a 'presumption that the government will determine the bulk of the legislative program.' Would John Howard or Paul Keating or, better yet, Margaret Thatcher, be content with such a minimalist conception of parliamentary orthodoxy? I think not.

The problem or the solution?

I now propose to conclude what began as a kind of diary of ideas and understandings with my own reaction to what I have learned about the Commonwealth Parliament and the regime of which it is a part.²²⁷

It is interesting and informative to explore what the authors of the Constitution intended in the 1890s or what the proponents of the 1948 electoral law expected to follow in its wake. Ultimately, though, those questions are primarily of historical interest. For one thing, what's done is done. For another, debates over such questions frequently are as inconclusive as debates over the 'original intent' of the authors of the US Constitution. Quotations often can be adduced to sustain conflicting positions, and may be offered to support conclusions that comport with the analyst's preconceived notions or the advocate's prior preferences. Also, when many people come together to make a decision, almost invariably they will have different reasons for making their decision, even if they agree on what it should be. Sometimes a single individual even has mixed motives for his or her own decision, especially when it is possible to point to reasons of principle for a decision that just happens to advance self-interest as well.

So there comes a point at which the question to be asked is not why a decision was made or why an action was taken long ago, but whether that decision or action has proven to be a good thing or something less. When that question is posed about the current design of the Commonwealth political system, my answer, and my interpretations and evaluations of Australian government and politics, unavoidably are filtered through the prism of my experiences in Washington, especially as those experiences have shaped my understandings of how political institutions work and what motivates politicians. In fact, it will become

227 The discussion that follows draws heavily and freely on my paper, 'A Delicate Balance: the Accidental Genius of Australian Politics,' presented at Parliament House, Canberra, on 28 February 2003, as part of the Australian Senate Occasional Lecture Series. http://www.aph.gov.au/Senate/pubs/occa_lect/transcripts/280203.pdf.

clear almost immediately that my perspective on governance in Canberra is very much a reflection of my American heritage.

Emy (1995: 25) has written that the Senate is an aspect of the Australian constitutional system that is 'essentially contested', which Mulgan (1996: 191) takes to mean that it is 'subject to opposing interpretations and evaluations based on conflicting and irreconcilable political values.' Let me begin by foreshadowing my own general interpretation and evaluation. In much of what has been written about the Australian political system, the Senate is depicted, either explicitly or implicitly, as a problem. Sometimes the Senate is portrayed as a conceptual problem—as an institution that does not quite fit into Australia's intended constitutional design. Often it is presented as posing a continuing practical problem for the government of the day, when the Senate interferes with the government's ability to fulfill its self-proclaimed electoral mandate by enacting its legislative program. My perspective is a contrary one. For me, the Senate is not the problem, it is the solution—or, perhaps I should say that the Senate is the potential solution for a problem that has not yet had the most dire consequences to which it could give rise. Now let me try to explain what I mean and reveal the political values on which my position rests.

For more than 30 years, as I explained in the Preface, I earned my living by worrying about the United States Congress, which was, most assuredly, a full-time job. And for more than 20 years, my office in Washington was in the James Madison building. Madison, as some readers will know, often has been proclaimed as the 'father' of the United States Constitution. He also was one of the authors of *The Federalist Papers* which, to my mind, remain the most compelling example of practical political theory since Machiavelli, and unquestionably an effective piece of political advocacy, which was their essential purpose.

In the fifty-first of those essays, Madison offered a rationale for the US Constitution and, in the process, revealed a posture toward power and the powerful that continues to resonate in American political thought. It is an attitude that many Americans continue to share, even if they would not phrase it so felicitously. Here is how Madison begins his defence of the separation of powers as we know it in America:

But what is government itself but the greatest of all reflections on human nature? If men were angels, no government would be necessary. If angels were to govern men, neither external nor internal controls on government would be necessary. In framing a government which is to be administered by men over men, the great difficulty lies in this: you must first enable the government to control the governed; and in the next place oblige it to control itself. A dependence on the people is, no doubt, the primary control

on the government; but experience has taught mankind the necessity of auxiliary precautions.

Those 'auxiliary precautions' take the form of a set of checks and balances imbedded in a system of separation of powers. I fear that phrase, the separation of powers, is being claimed and then distorted by defenders of such different constitutional systems that it is in danger of losing any real meaning. So let me make clear that I use it in the sense that was explicated in a classic of American political science, *Presidential Power* by Richard Neustadt, which was published at just about the time John Kennedy was elected President. Neustadt's book probably is best known today for two insights. One is his understanding of presidential power, which was roughly this: that the power of the President is the power to persuade others that what he wants them to do is what they should want to do in their own interests—in other words, that the most persuasive way for anyone, not just the President, to elicit the support of others is to shape their own sense of their own self-interest. Notice that this conception is entirely compatible with Madison's doubts about the essentially altruistic nature of humanity.

More to the point is Neustadt's other insight, which is that the American political system is *not* one in which each of the different powers of government is neatly and clearly assigned to one of the different institutions of government: the legislative power to the Congress, the executive power to the President, and the adjudicative power to the courts. Instead, as Neustadt explained, the American regime is characterized by a separation of institutions that share the powers of government. The core of the legislative power is assigned to the Congress, but it is shared with the President, primarily through his enormously potent veto power. The core of the executive power is assigned to the President, but it is shared with the Congress that must approve the organization, procedures, and most senior personnel of the executive departments, just as the executive power also is shared with the courts that have the authority to invalidate executive actions inconsistent with the law or the supreme law of the land, the Constitution. And the adjudicative power is centred in the courts, but it also is shared with the President who chooses all federal judges, and with the Congress which must approve those choices and which, through legislation that is subject to the President's veto, controls the organization, resources, and budgets of the courts, even the Supreme Court. It is in this complex sharing of powers that are to be found the

checks and balances that provide many of the ‘auxiliary precautions’ to which Madison referred.²²⁸

Madison then extends his argument in a way that, from today’s perspective, is striking for both its lack of prescience and its lack of application to the Commonwealth Parliament. First he explains that the protection of individual rights ultimately lies in the competition for influence that the Constitution creates among institutions that share the legislative, executive, or judicial powers of government. Those who serve in any one of these institutions have an incentive to preserve its institutional power not for reasons of abstract principle, but in order to protect their own influence—so that ‘the private interest of every individual may be a sentinel over the public rights.’ Harness individual self-interest to preserve the balance among institutions. So far so good. Then he continues:

But it is not possible to give to each department an equal power of self-defence. In republican government, the legislative authority necessarily predominates. The remedy for this inconveniency [legislative dominance, that is] is to divide the legislature into different branches; and to render them, by different modes of election and different principles of action, as little connected with each other as the nature of their common functions and their common dependence on the society will admit.

228 The concept of checks and balances is distinguishable from beliefs about the appropriate range and scale of governmental activity. Some authors of the Constitution certainly preferred the most limited government, and especially the most limited central government, that was practical. However, I believe that Sawyer (1977: 139) was partly mistaken in asserting that “‘checks and balances” is an eighteenth-century American notion based on a suspicion of all government, and a desire to ensure that governments performed the minimum of functions.’ (emphasis added) The challenge to modern democratic life, as Sawyer recognized, is the product of the widespread belief that Twenty-first Century governments need to be much more powerful, and have a far broader reach, than Eighteenth Century governments. This does not mean, however, that checks and balances have become outmoded. To the contrary, they are more essential than ever before. Sawyer (1977: 140) argued that a modern democratic government ‘committed to economic management and a multitude of welfare services ... is not possible if the initiatives of a government based on a House of Representatives majority are to be constantly “checked” by a hostile majority in the Senate, as the American Founders expected their two Houses of Congress and President, elected separately and at different intervals, to “check” each other *so that laws would be few and administrative activity negligible.*’ (emphasis added) It is true that checks and balances sometimes can slow the wheels of government and certainly can require governments to make compromises that are distasteful to them, and it also is true that the reach of the Australian central government may be greater than that of the American. Still, I doubt that any observer of American society would contend that the checks and balances built into the US Constitution prevented an extraordinary expansion of federal powers and activities during the Twentieth Century.

Here, then, is a theoretical rationale for the Senate of the United States and, if you choose, for the Commonwealth Senate as well: to protect against the uncontrolled exercise of power by a naturally predominant legislature.²²⁹ And here also is a world-class example of one of a skilled politician's most valuable traits: the ability to transform a necessity into a virtue, to discover a principled reason for doing what self-interest and necessity dictate. We will never know if Madison would have found such compelling virtues in bicameralism if he were not selling to the state ratification conventions the 'Grand Compromise' that made agreement on the US Constitution possible.

This Madisonian fear of power and suspicion of the powerful—the idea that Lord Acton may have been on to something when he posited that power tends to corrupt, though not necessarily in terms of dollars and cents—seems eminently sensible to me. It justifies a system of government that can entail costs of government delays, sometimes inaction, and even occasionally deadlock. These costs sometimes may be high but, considering the alternative, they are well worth paying. The same emphasis on the risks created by government power also highlights the dangers of what, during our current era of post-Soviet democratization, sometimes has been called plebiscitary democracy as distinguished from liberal democracy. In the former, a president is chosen in what satisfy, more or less, the standards of free and fair elections, but then encounters few effective restrictions on his actions in office until the next election. The limits on his exercise of power are electoral only. In the latter, free and fair elections are accompanied by various checks and balances, through a system of separation of powers or by other means, that constrain the president or the parliament in their exercise of power between elections.

This is why talk of presidential emergency powers that are justified as being inherent in the Constitution, and not grounded in statutory grants of power, tends to make many Americans nervous. And it is why I doubt that Americans ever would be very comfortable with the concept of 'reserve powers.' Furthermore, 'conventions' are not a staple of American political discourse, unless we are referring to the quadrennial presidential nominating extravaganzas. The American political system, as well as its legal system, places great weight on there

229 In addition to the other rationales for bicameralism that it offers, *Odgers' Australian Senate Practice* (2001: 4) holds that 'Bicameralism is also an assurance that the law-making power is not exercised in an arbitrary manner. Such an assurance is of considerable practical significance in parliaments where the house upon which the ministry relies for its survival is liable to domination by *rigidly regimented party majorities.*' (emphasis added)

being knowable rules of law to govern and thereby constrain the authority of power-holders, even democratically-elected power-holders. So speak not to me of reserve powers unless you can tell me what they are. And speak not to me of unwritten conventions that stand on equal footing with the words of the Constitution. In the United States, a constitution that fails even to acknowledge some of the core institutions and relationships of government would be a source of dismay and concern, not a source of pride.

In one essay about the ‘troubles’ of 1975, two distinguished Australian academics denigrated their written Constitution as a mere ‘selection of legal rules’. They contended that there was no ‘qualitative distinction between written and unwritten constitutions’, and argued that to give precedence to the Constitution when it conflicted with unwritten convention would be ‘to deny a democratic foundation to Australian politics.’ (Archer and Maddox 1985: 56–59)²³⁰ It is difficult to conceive such a statement being made in the United States by analysts of comparable repute. To endorse giving the greatest weight to a convention, defined as ‘a rule of behaviour accepted by those involved in public life’ and a ‘tradition of past conduct which experience has shown to work,’ as the authors were prepared to do, strikes me as being breathtaking in its complacency.²³¹

The notion that ‘we really can’t define our conventions of parliamentary governance well enough to commit them to paper, but never mind, we all can recognize a convention when we see one, and we all know what they are’ presumes and depends on a degree of political consensus that is enviable beyond words. There may have been just such a consensus in the Australia of 1900, and maybe it remains today. In multicultural Australia of the Twenty-first Century, however, it may require an extraordinary effort, and quite possibly a futile effort, to maintain that consensus—a universally shared understanding of what the essential customs and practices of political life are and a universally shared agreement to accept as them as binding.

Millions of people, especially in post-Communist nations, are struggling to create for their own benefit and protection what they often

230 In similar fashion, a New Zealand government publication even listed, as the first of the major elements of the Westminster model, that ‘important parts of the constitution remain unwritten.’ New Zealand Electoral Commission (1996), *Voting Under MMP*. GP Publications.

231 I am hardly reassured by de Smith’s observations (quoted by Hughes 1980: 41) that ‘Some conventions are clear-cut; some are flexible; some are so elusive that one is left wondering whether the “convention” is an ethereal will-o’-the-wisp. It is often particularly hard to say whether a political practice has crystallized into a constitutional convention and, if so, what is its scope.’

call 'rule-of-law societies'. So it is both ironic and paradoxical that Australia has flourished for more than a century, with only one truly painful hiccup in 1975, under a political regime governed by rules that have not been codified and, for that reason, perhaps cannot be enforced. If Australia ever decides to become a republic (as I expect it will, sooner or later), that will require that the Constitution be amended. Opening a constitution to amendment is the political equivalent of opening Pandora's Box, so there is a wise and natural reluctance to make amendments that are not absolutely necessary. The litany of constitutional amendments defeated in Australian referenda demonstrates what seems to be an instinctive constitutional conservatism on the part of the Australian people, or a profound cynicism about the motives of Australian politicians (as well as the difficulty of the requirements that sec. 128 imposes for amending the Constitution).

On the other hand, I am unpersuaded by the argument that the conventions (and reserve powers, for that matter) that are thought to be so central to responsible government are simply too complex, subtle, and full of nuance to be codified. Ward (2000b) reports that other parliamentary democracies have succeeded in doing so quite well, especially if the task is limited to incorporating into the Constitution those now-unwritten rules that are truly essential.²³² I think it would be more in keeping with what I have come to know and admire about

²³² Ward (2000b: 121) argues that some of the Australian attempts to codify conventions foundered because too many practices of government were included on the lists of conventions that required codification. He reports, for example, that one such effort included among the conventions to be codified the practices that 'the Governor-General [is] to appoint a Prime Minister he judges to have the support of a majority in the lower house,' and that he is 'to consult the outgoing Prime Minister about a successor.' Surely such common-sense practices do not require or deserve constitutional standing. All that matters ultimately is whether a new prime minister and government enjoy the confidence of a majority in the House of Representatives. The process of forming that new government is expedited and simplified, of course, if the Governor-General has the good sense to consult with those who best understand the mind of the House and if he then selects the obvious candidate, but it hardly is necessary to transform such obvious practices into constitutional requirements. If the Governor-General should fail, for whatever reason, to appoint the House's choice for a new prime minister, a majority in the House would have little difficulty in securing the House's consideration and adoption of a resolution expressing its will to the Governor-General. That is just what the House did in the first hours after Whitlam's dismissal in 1975 when the House voted, too late as it turned out, to express its lack of confidence in the caretaker Fraser Government and called upon the Governor-General to ask Whitlam to form a new government.

Australians if the Commonwealth Constitution were amended so that, in more respects, it means what it says and says what it means.

Perhaps there is an underlying difference in the American and Australian political cultures as well as in the two societies' respective approaches to constitutional law. Perhaps Australians have a more positive view of government and a more optimistic view of human nature, despite their cynicism about politicians generally and their disrespectful attitude toward individual political leaders. If so, there may be less concern in Canberra than in Washington over the question of 'who guards the guardians.' Ian McAllister (1997: 9) of the Australian National University wrote several years ago that, in Australia, 'the state exists primarily in order to resolve problems and disputes, not to preserve individual liberty,' and he quoted W.K. Hancock in 1930 to the effect that 'Australians have come to look upon the state as a vast public utility, whose duty it is to provide the greatest happiness for the greatest number.' This view is consistent with the first point that Lord Bryce (1905: 298–299) thought to make almost a century ago when considering the new Commonwealth Constitution and comparing it with its American counterpart:

When that instrument [the US Constitution] was enacted, the keenest suspicion and jealousy was felt of the action of the Government to be established under it. It was feared that Congress might become an illiberal oligarchy and the President a new George the Third. Accordingly great pains were taken to debar Congress from doing anything which could infringe the primordial human rights of the citizen. ... The English, however, have completely forgotten these old suspicions, which, when they did exist, attached to the Crown and not to the Legislature. So when Englishmen in Canada or Australia enact new Constitutions, they take no heed of such matters, and make their legislature as like the omnipotent Parliament of Britain as they can Parliament was for so long a time the protector of Englishmen against an arbitrary Executive that they did not form the habit of taking precautions against the abuse of the powers of the Legislature; and their struggles for a fuller freedom took the form of making Parliament a more truly popular and representative body, not that of restricting its authority.

This benign attitude persisted. La Nauze (1972: 227) recounted that Sir Owen Dixon, one of Australia's pre-eminent jurists and Chief Justice of the High Court during 1952–1964, once was asked to explain to an American audience why Australia's Constitution lacked the protections of individual rights offered by the Bill of Rights and the Fourteenth Amendment. Dixon responded:

Why, asked the Australian democrats [and authors of the Constitution], should doubt be thrown on the wisdom and safety of entrusting to the

chosen representatives of the people sitting either in the Federal Parliament or in the State Parliaments all legislative power, substantially without fetter or restrictions?

The same attitude was reflected years later in former Prime Minister Robert Menzies' statement, made after leaving office, that 'the rights of individuals in Australia are as adequately protected as they are in any other country in the world' because of 'our inheritance of British institutions and the principles of Common Law.' Menzies was quoted to this effect by Brian Galligan; we have relied on Galligan's scholarship in earlier chapters, so it is worth taking account of his rejoinder:

Menzies' defence of the Australian system was seriously flawed in a number of respects. The independence of parliament, particularly the House of Representatives, had been undermined by disciplined political parties so that the prime minister and his senior ministers controlled the house and not vice versa. Whether a minister resigned depended on retaining the prime minister's and not parliament's confidence, provided the prime minister retained control of his ruling party. The growth of 'big government' served by large bureaucracies meant that government had become more pervasive with many policy decisions being taken in the executive branch outside parliamentary scrutiny. In other words, parliament was no longer a sufficient check on prime ministerial and ministerial conduct nor an adequate means of protecting rights, despite Menzies' claims. (Galligan 1997: 27)

The formation of the Commonwealth may have been guided by a sunnier attitude toward government and governors than is to be found in the writings of Madison or other theorists of American government (or in the views of Lord Acton, for that matter). In fact, if we are to take Menzies' boast as indicative, that sunnier attitude persisted for decades. I wonder, however, if that attitude is equally widespread today. I also wonder whether Americans have ever been quite so suspicious of government and Australians quite so trusting as Madison and Menzies would lead us to expect. I would guess that the average American, if she exists, has more sympathy with the view of government as problem-solver and utility-enhancer than a reading of Madison might have us predict, just as I suspect that many Australians are more sceptical and suspicious of how governmental powers are exercised, and for whose benefit, than the 'public utility' imagery would imply.

What does all of this imply about the Commonwealth Constitution and the Australian polity? The implications I am about to draw should not be too difficult to predict. But since I already have referred in passing to Lord Acton, let me allow my argument to be introduced by Lord Hailsham, who was Lord Chancellor of the United Kingdom when

he became famous, or infamous, for describing the British political system as an 'elective dictatorship'. As Harry Evans (1982), among others, has pointed out, what he actually had in mind is not what often has been attributed to him. It is the doctrine of parliamentary sovereignty that gives rise to elective dictatorship.

The point is not that all other nations have what is called a written constitution in the literal sense. After all, much of our own is in writing and much more could be reduced to writing if we wished without making any appreciable change. No, the point is that the powers of our own Parliament are absolute and unlimited. In this we are almost alone. All other free nations impose limitations on their representative assemblies. We impose none on ours. (Hailsham 1976: 4)

Traditionally in Britain, all governmental authority ultimately resides in Parliament and, within Parliament, in the House of Commons. In some cases, Parliament itself acts to exercise its sovereign power. In other cases, others act on its behalf and are accountable to it. In all cases, the authority of government belongs to Parliament as the directly elected representative of the people. Parliament determines its own constitutional powers; there is no court that can intervene and restrain Parliament in order to enforce the sovereignty of a constitution from which parliamentary powers derive and by which they are limited. Similarly, Parliament is accountable to no authority other than the voters (and today, perhaps, the largely unaccountable institutions of the European Union).

Referring to this doctrine of parliamentary sovereignty, which he understands to be a defining characteristic of the 'Westminster model' of democratic governance, Lord Hailsham concluded that:

There is nothing quite like it, even among nations to whom we have given independence. They believe of course that they have inherited the so-called Westminster model. In fact, the Westminster model is something which we have seldom or never exported, and, if we had tried to do so, I doubt whether any nation would have been prepared to accept it. (Hailsham 1976: 3-4)

On this basis alone, we could dismiss contentions that the Commonwealth political system comports with this model. First, Australia, like most other democracies but unlike Britain, has a written Constitution to which the Commonwealth Parliament, like all other institutions of government, is subordinate. Parliament may not do things and may not make decisions that contradict the Constitution. Second, the High Court, which is independent of the Parliament, has the constitutional power to overrule it by declaring its acts unconstitutional and, therefore, null and void. Third, the Constitution grants specific

powers to Parliament and the authority to legislate on an enumerated list of subjects (as interpreted by the High Court); all other matters are beyond Parliament's legitimate reach and belong to the states, or are beyond the reach of government at any level. And fourth, there is the Senate and its powers, which we already have discussed and to which we will return shortly.

What is important for our purposes here is what had come to worry Lord Hailsham because, after all, parliamentary sovereignty was not exactly a recent innovation. He later wrote that:

human nature being what it is, every human being and every human institution will tend to abuse its legitimate powers unless these are controlled by checks and balances, in which the holders of office are not merely encouraged but compelled to take account of interests and views which differ from their own. ... It is the absence of balance and effective checks which has destroyed established regimes by bloody revolution, which has overthrown democracies which have proved ineffective or aggressive. It was this which corrupted political societies hitherto distinguished for their success. (Hailsham 1982: 293)

And this from the Lord Chancellor of the United Kingdom, who reigned but did not rule over the British Senate!

What is the connection between Lord Hailsham's view of human nature and his assessment of the British political system?

[T]he sovereignty of Parliament has increasingly become, in practice, the sovereignty of the Commons, and the sovereignty of the Commons has increasingly become the sovereignty of the government, which, in addition to its influence in Parliament, controls the party whips, the party machine and the civil service. This means that what has always been an elective dictatorship in theory, but one in which the component parts operated in practice to control one another, has become a machine in which one of those parts has come to exercise a predominant influence over the rest. (Hailsham 1976: 8)

He elaborates:

Until fairly recently influence was fairly evenly balanced between Government and Opposition, and between front and back benches. Today the centre of gravity has moved decisively towards the Government side of the House, and on that side to the members of the Government itself. The opposition is gradually being reduced to insignificance, and the Government majority, where power resides, is itself becoming a tool in the hands of the Cabinet. (Hailsham 1976: 7)

Unconstrained parliamentary sovereignty had been acceptable because Parliament's exercise of its unchecked power was constrained by checks imposed by the operations of Parliament itself and by the

relations between Parliament and its government. But now, he argues, those non-constitutional checks have succumbed to the combined increase in the powers of government and the strength of party.

In other words, the combined growth of government and party has produced an *elective* dictatorship (his phrase) that can be exercised by an *elected* dictatorship (my phrase). The potential for elective dictatorship has existed for as long as parliamentary sovereignty; it has been transformed into a more real threat to democratic governance by the emergence of strong political parties that, once in government, are not subject to effective checks and balances. The Opposition in Parliament may oppose government legislation, but its ability to do so is effectively at the sufferance of the government majority which can suspend or amend the Parliament's rules of procedure at will. For these reasons, he concluded that 'the absence of any legal limitation on the powers of Parliament has become unacceptable.' And of course, Lord Hailsham was referring to Great Britain, where party discipline is not nearly as strict as it is in Australia.

In light of what I already have said, it should not be surprising that I have come to view the Australian political system with both admiration and apprehension. My admiration is for a political system that has several important advantages over the American system.²³³ In a democratic polity, no government should be able to dominate the political debate and control the legislative agenda to the exclusion of other issues and alternatives. Still, a parliamentary system, as manifested in Canberra in the relationship between the government and the House of Representatives, provides a clarity of voice and direction that American Presidents rarely are able to achieve. In Washington, there always are a myriad of forces and interests, in government and outside of it, advocating this and demanding that, with the result that the policy-making process often seems to lack any sense of direction or priorities. So many issues are being studied and so many bills are being debated, all at the same time, in the committees of the House and Senate, in the executive branch's 'corridors of power', and in the pages of the few newspapers that pay much attention to such things, that it

233 My admiration also extends to the many fine men and women whom I have come to know and who have dedicated their professional lives to the service of the Senate and the House of Representatives, sometimes under rather trying conditions, such as the evening sessions which must strain the family lives of those who actually make Canberra their home, not a place they visit for a few weeks of some months. I especially want to make it clear that I would not want my qualms about the House of Representatives to reflect in any way on the skills and dedication of the people who serve it.

becomes difficult for even the most interested and conscientious citizen to know what to worry about first.

In Canberra, the daily contests in the chambers of the House of Representatives and the Senate constantly define and redefine the partisan and policy alternatives that will be available to the voters at the next election. In the American system, by contrast, there often is a serious disconnect between elections and governance. Individual Representatives and Senators are running for re-election all the time. In doing so, they are promoting their own personas and, to a lesser extent, their individual records in office. Their campaign activities are not overtures for the next presidential campaign. Although those campaigns also never seem to end, it is hard to think of them as natural extensions of governance. The party out of power has to select its leader every four years, and the anointed one often has to introduce himself to the American people. One of the worst positions from which to run for the White House is that of party leader in the House or Senate. The names of congressional party leaders and committee chairmen who sought, or who would have liked to seek, their party's presidential nomination and failed, just since World War II, would constitute an impressive cast of characters. However, the skills required of an effective House or Senate leader and the demands of their positions almost disqualify congressional leaders from becoming successful presidential candidates. There is a connection between elections and governance in parliamentary regimes in Canberra that is admirable—and absent in America.

Responsibility and accountability

What concerns me about the House of Representatives in the Commonwealth political system—and, to a lesser extent, about other parliamentary regimes in which party discipline is not as strong—is that it may yield responsible government without accountable government. In Canberra, the House of Representatives continues to make governments and, in principle, retains the power to dismiss them. But I believe that the concept of responsible government should entail more than that.²³⁴ A responsible government has been described as being the executive committee of the Parliament. The Parliament chooses some of its members in whom it has confidence to act as its agent—to administer the government on its behalf and only for so long as that

234 I acknowledge, but from a safe distance, the disagreements about the meaning of 'responsible government'. On this, see the essays by Archer, Parker, and Thompson in Weller and Jaensch (1980).

confidence remains unbroken. For this relationship to work, the Parliament must be able and willing to make informed, independent, and, when necessary, critical judgments about what the government is doing and how well the government is doing it.

It is an appealing theory, but only so long as we do not allow some awkward practical considerations to intrude. As both Madison and Lord Hailsham would remind us, it is only human for those elected to this (or any other) Parliament to have their own self-interest in mind. So if I were a Member of the House of Representatives, or the Senate for that matter, I first would understand that my continued service in the Parliament depends on the support of my party. In fact, this is probably more true of the Senate, with its list system of elections, than it is of the House. Second, I also would understand that my prospects for advancement in the Parliament are limited indeed—that there are few if any positions in the House of true power and influence that do not carry with them the title of minister. In Congress, the position of committee chairman is one to which all members aspire and a position with which most are perfectly content as constituting the pinnacle of a successful and fulfilling political career. If I truly seek political advancement in the Australian Parliament, on the other hand, I must look for a ministerial appointment, and those appointments are dependent on the good will of my party leaders. And third, I would understand that I am less likely to achieve my first goal—political survival—and I cannot achieve my second goal—political advancement to ministerial office—unless my party remains in government or becomes the government. In short, it is very much in my interests to be a loyal and obedient member of my party.

The government is responsible to the House, but it is not accountable to the House in the sense of having to face parliamentary scrutiny of its decisions and actions that is sufficiently intense and regular to protect against unwise or inappropriate uses of its power or even abuses of power. Although the House's standing orders provide regular opportunities for Opposition members to make speeches and ask questions, the majority party or coalition ultimately controls the proceedings of the House, and that majority has a powerful incentive to avoid holding the government to account in ways that are likely to undermine popular support for their party at the next election.

Under these circumstances, what does it mean to say that the Parliament effectively holds the government accountable for its decisions and actions? What are the incentives for the Parliament to hold the government accountable after installing it in office? Where are those subordinate distributions of power to which Madison referred, 'where the constant aim is to divide and arrange the several offices in

such a manner as that each may be a check on the other'? And where are those checks and balances of which Lord Hailsham wrote, 'in which the holders of office are not merely encouraged but compelled to take account of interests and views which differ from their own'?

When I look only at the House of Representatives, I have difficulty answering these questions to my satisfaction. It is not that I charge any individual prime minister with undemocratic ambitions, but I do charge that the government and the House in Canberra fail to offer a satisfactory answer to that core question of democratic governance to which I referred earlier: who guards the guardians? It is difficult to predict what effects the acquisition of power will have on men and women. What if an apparently benign and honorable person is selected as party leader, becomes prime minister, and the people of Australia wake up one day to encounter their own version of Joseph McCarthy or Richard Nixon? Is that likely? No. Is that possible? Of course. The Washington system, for all its faults, and it has many, is designed, however imperfectly, to protect against the consequences of such a worst-case development. The Westminster system, for all its virtues, and it has many, is not.

Furthermore, again recall Lord Hailsham's concern that 'the holders of office are not merely encouraged but compelled to take account of interests and views which differ from their own.' In the House, those other interests and views are expressed, to be sure, and often very loudly. But being heard is not the same as being listened to, as being taken into account. There is nothing in the mechanisms of parliamentary government that requires the government to moderate or modify its legislative program to accommodate in any way those who have objections to it and those who believe they will be injured by it. In fact, in claiming their electoral mandates, the winners of parliamentary elections even make a great virtue of their determination to enact their legislative program without change, implying that doing otherwise would constitute a breach of faith with their supporters. This is representative democracy at its best, we have heard them argue. A party presents a clear program to the voters and pledges to enact it; a majority of the voters endorses that program with their votes; and the party then redeems its pledge by promptly moving its program through the Parliament. Last year's campaign manifesto becomes this year's new package of laws. The legislative process is a smooth and efficient assembly line.

Well, perhaps. But perhaps we should be less impressed with how quickly a bill can be made into a law and more impressed with whether that law addresses an acknowledged national problem in a way that is likely to achieve widespread social acceptance. A parliamentary regime

that is dominated by what effectively are two disciplined political parties provides inadequate protections against a democratically elected government abusing its powers. But a greater source of daily concern is that it also offers inadequate incentives for policy compromises. The true challenge of the legislative process is not to distinguish right from wrong, but to acknowledge that there are legitimate differences of interests in a diverse society such as America's or Australia's, and then to decide how best those interests can be taken into account, even if they cannot be fully reconciled.²³⁵ In the political world that I wish to inhabit, compromise is not only a necessity, it is very much a good thing. Protect me from those who claim to know the Truth, however well-intentioned they may be.

And so we come to the Senate of Australia.

When I first read the Commonwealth Constitution, I thought that my copy was incomplete because it failed to do what I expect a constitution to do—to define the essential relationships among the core institutions of government. After reading the Constitution, I decided that it was a conceptually incoherent document, and I found myself nodding in agreement with that oft-quoted (see Chapter 5) prediction of Winthrop Hackett in 1891 that 'either responsible government will kill federation, or federation ... will kill responsible government.' I understood the reasons why the Constitution was designed as it is, but I thought the authors' institutional concoction was a recipe for disaster. Then I began

235 This argument is compatible with Harry Evans' advocacy of 'distributed majorities'. 'If institutions require, for the making of major political decisions, the support of majorities distributed across different groups in society and different regions, factious government and the growth of alienated and disaffected minorities are discouraged, and government is made more acceptable and stable.' At first, the equal representation of states in the Senate created the need for majorities that were distributed geographically. Later, the adoption of PR came to require 'an ideologically distributed majority for the passage of legislation through the Senate, a majority distributed over the political parties which receive a significant share of votes.' (Evans 1994: 28–29) Actually, what creates the kind of distributed majority to which Evans refers is the fact that *different* majorities control the two houses. So legislative decisions must take account of the preferences of more parties than those constituting the majority in the House. The basis of Senate representation or the mode of Senate elections is less important than that the two houses are constituted sufficiently differently so as to produce, as a matter of course, different majorities in each. Consider Brennan's (1999: 1) thesis that, 'If one believes ... that good government is, like the amateur golfer's swing, a mass of compensating errors, then a good case might be made for the use of PR in the Senate without requiring one to decide on whether PR is, in a global sense, a better electoral system than the single-member electoral district system that characterises the House of Representatives. One might take the view that there is something to be said for both multiple-member (PR) and single-member districts, and conjecture that the Australian bicameral system serves to exploit the advantages of each.'

to read about the events of 1975, and I found myself again nodding my head, but this time smugly, at the naive if benign arrogance of those in the 1890s who recognized the contradiction they were building into the Constitution, but who were confident that its dangers could be avoided by relying on the 'prudential restraint' of Australia's politicians, or 'their rugged sense of British constitutionalism and parliamentary politics,' as Brian Galligan has put it.

It took some time for me to decide in my own mind how to allocate the responsibility for the events of 1975. It took even longer for me to appreciate the importance of the fact that events such as those had not happened before nor have they happened since—and, in fact, that one effect of the 1975 crisis undoubtedly has been to make any political combination in the Senate much less likely to force such a confrontation again, at least in my lifetime.²³⁶ The authors of the Constitution were fundamentally justified in their hopes or expectations that the good sense of Australia's politicians would suffice to prevent the Constitution's conceptual fault lines from causing repeated political earthquakes.

Generally, I have come to appreciate that the Australian system of government *works*. Even though it cannot easily be labelled, even though it is difficult to explain, even though most Australians may not understand it very well, and even though it is a recurring source of heartburn for prime ministers and their Cabinets, it has served the people of Australia reasonably well. In light of the track records of governments around the world, that is enough to ask.

In 1990, Campbell Sharman, a distinguished Australian student of parliamentary affairs, lamented the lack of a theory to explain and justify his system of government—to resolve 'the tension between those institutions deriving from the liberal tradition manifest in the United States constitutional structure [which would include the Senate, of course], and those from the collectivist tradition of the contemporary British parliamentary system [especially responsible party government].' (Sharman 1990a: 1) That is fair, though any such theory would be something imposed after the fact rather than one discovered in the thinking of the Constitution's authors, often described as a collection of men distinguished by their practical experience.

236 This was not necessarily assumed at the time. Epstein (1976: 27), for example, wrote that, 'in the immediate aftermath of the 1975 election, there is good reason to accept the widespread assumption that the Senate has established its power to force a general election. ... [I]n political practice, the 1975 election result provides sufficient indication of popular acquiescence to serve as a precedent for subsequent blockage of supply by the Senate.'

Principles are sometimes used to determine compromises. But this is rare. The whole point of a compromise is that two or more parties have principled reasons for their stances and modify them for no other reason than the desirability of an agreed conclusion. The (conflicting) principles are what provide the *need* for compromise rather than the compromise itself. (Sampford 1989: 359; emphasis in original)

By this reasoning, the absence of a unifying theory of Australian government should be no surprise. What is more interesting is the inference, as Sharman (1990a: 2) encapsulates it, that ‘Australian government is thus portrayed as an imperfect structure, a mongrel, defective and without coherent justification.’ I have just acknowledged that I am among those who think the Commonwealth Constitution, in its marriage of federalism and responsibility, is conceptually incoherent. But even if the document might make Montesquieu wince, that does not necessarily mean that, for the practical purposes of democratic governance, it is imperfect or defective—‘a mongrel’. Indeed, the refutation is inherent in the very terms of the claim. I put the matter to a professional veterinarian who later became a political scientist, and who confirmed my impression that ‘mongrels’ often are more vigorous and healthier than their pure-bred cousins. In fact, veterinarians recognize the concept of ‘hybrid vigor’, especially in first-generation hybrids. I rest my case for Australia.

That often denigrated system may be serving Australia better now, since the emergence of seemingly permanent non-government Senate majorities, than ever before, and certainly better than before the advent of proportional representation. Since Federation, we have seen democracies rise and fall in many parts of the world, and never take root at all in others. Now we are witnessing many nations confront the discovery that democracy depends on both the words of their constitutions and the values of their leaders. Under these circumstances, the people of Australia should not under-value what they and their chosen leaders have built, even if their construction sometimes looks less like the Old Parliament House with its modest stateliness and more like the new Federation Square in Melbourne with its unusual and confusing design.²³⁷

237 I have been told that many Australians admire the US Constitution more than they appreciate their own, and that they may be better able to identify the drafters who met in Philadelphia than those who divided their time among Adelaide, Melbourne, and Sydney. It is undoubtedly true that, for many Americans, their constitution has been elevated to the status of a sacred though secular text, but one that very few have read since their early school days. In the midst of the 1975 crisis, Gareth Evans wrote in *The Australian* (29 October 1975: 11) that ‘The Australian Constitution is not a blood-stirring document. Unlike its United States counterpart,

In earlier chapters, we encountered the Senate being described as a House of the States or a House of Review. Having found the first label inaccurate and the second label unhelpful, let me offer labels of my own. The House of Representatives remains the site of responsible government—the House of Responsibility—and the Senate is becoming more and more the site of accountable government—and so, the House of Accountability. In this respect, I agree with Mulgan (1996: 201) when he says that ‘A division of labour is emerging with the two major parliamentary functions, the provision of government and the holding of government to account, being increasingly divided between the two houses.’

In my usage here, ‘responsibility’ and ‘accountability’ are by no means synonymous.²³⁸ When I refer to the House as the House of Responsibility, I am using ‘responsibility’ in a narrowly technical sense, but one appropriate to the real dynamics of Australian government. When I refer to the Senate as the House of Accountability, I am using ‘accountability’ in an unconventionally broad sense (compare, for example, Aldons 2001), and I am thinking as much about what the Senate could become as about what it now is.

By ‘responsibility’, I mean that the government is responsible to the House in and only in the dual sense that the House creates the government and retains the ultimate power to destroy it. It is true that, in Australia, there is no suspense about what government the House will create. Yet the act of creation remains both an essential one and an essentially defining one that distinguishes a parliament from a congress that confronts an independently elected president. It also is true that there is little likelihood of the House engaging in an act of destruction (by voting no confidence in the government it created), but that does

it has never been much recited in schoolrooms or bar-rooms.’ I suppose he was mistaking the Constitution for the Declaration of Independence (the preamble of which I did have to recite as a schoolboy), but even in that case, I would be truly amazed—and equally disappointed—to learn that such bar-rooms actually exist.

238 I think it is useful to maintain a distinction between the two. Otherwise, meanings and arguments can lose their clarity. In *Odgers’ Australian Senate Practice* (2001: 10), it is argued, for example, that ‘The representative character of the Senate has enabled it to uphold the *responsibility* of governments to Parliament. ... [Because of the unusually strong party discipline in Australia,] the need for alternative parliamentary avenues for holding a government *to account* is pronounced, and this need in Australia is supplied by its elected Senate. ... The Senate when functioning as a repository of and forum for *responsibility* is thus more than a mere venue for a clash between government and Opposition working on the basis of pre-determined numbers. Governments have therefore been held *to account* in the Senate more effectively than in a house where they are always supported by a party majority.’ (emphasis added)

not make this second sense of ‘responsibility’ unimportant. Again, it defines the formal relationships between institutions of governance and it remains available as the ultimate weapon of control that governments can never entirely ignore. In this sense, it is much like the impeachment power in the United States. The fact that only twice has the US House of Representatives actually impeached a President (and would have done so in a third case if Richard Nixon had not resigned) cannot be taken to mean that the power is of little consequence. Anyone who thinks this is the case might ask Bill Clinton for his opinion.

This is what I mean by responsibility. What I do not mean by the term is that the House monitors, oversees, constrains, and controls on a daily basis what the government does and how the government does it. Instead, that is part of what I mean by ‘accountability’ and what I have in mind when I label the Senate as the House of Accountability. This post facto sense of accountability is a familiar one. Especially in the Australian context, however, it is appropriate to adopt a more expansive definition that includes holding the government accountable for what it proposes to do as well as for what it already has done. Accountability that is limited to looking backward carries the risk of coming too late. Holding the government to account also should mean reviewing and evaluating its proposed primary legislation as well as its proposed secondary legislation (functions performed in part by the Senate Committee for the Scrutiny of Bills and the Committee on Regulations and Ordinances, respectively). This sense of accountability, therefore, includes the process of evaluating government bills (always), amending them (sometimes), and refusing to pass them (infrequently).²³⁹

For me, then, the genius of the Australian political system lies in the way in which it can combine the virtues of parliamentary government with the means to control its vices—how its constitutional and electoral systems can combine to make the government responsible to the House but accountable to the Senate.

This is the opportune moment to introduce the remedy that Lord Hailsham offered in reaction to his critique of the House of Commons. Being a responsible statesman, he was not satisfied with criticizing the status quo; he thought it his responsibility to offer at least a general sketch of the changes he hoped to see take place in the British political system. After opting for a written constitution, he proceeded to identify some of the essential elements that document should contain:

239 To students of the US Congress, this is an unconventional notion of accountability. The study of Congress often—too often, actually—tries to separate the legislative work of Congress from its oversight activities.

I would myself visualise a Parliament divided into two Chambers, each elected. The one, the Commons, would, as now, determine the political colour of the executive Government and retain control of finance. Preferably, in my view, it would be elected as now by single member constituencies. The other, you might call it a senate, but I would prefer the old name, would, like the Senate of the United States, be elected to represent whole regions, and unlike that Senate, would be chosen by some system of proportional representation.

The powers of Parliament, so formed, would be limited both by law, and a system of checks and balances. Regions would have devolved assemblies, and the respective spheres of influence of these and of Parliament would be defined by law and policed by the ordinary Courts. (Hailsham 1976: 14–15)

Welcome to Canberra, Lord Chancellor.²⁴⁰ Having found that the Westminster model, in contemporary British practice, has ‘moved towards a totalitarianism which can only be altered by a systematic and radical overhaul of our constitution,’ he concluded that the elements of the remedy lie in precisely those elements which now distinguish the Australian from the British constitution, and especially in the potential of the Senate. Instead of viewing the Australian Senate as a constitutional appendage of doubtful value and questionable legitimacy that is fundamentally incompatible with the purity of Commonwealth parliamentarism, Lord Hailsham would encourage us to view the Senate as a protection against the weaknesses and dangers of parliamentary government in an age of executive dominance and party discipline.

As I have said, the Commonwealth Parliament’s combination of capacities for responsibility and accountability, centred in the House and Senate respectively, seems theoretically contradictory, and it may be so. Having just introduced my own labels, let me also say, at the risk of seeming to contradict myself, that the Australian polity, taken in its entirety, does not readily lend itself to labels and capsule characterizations—‘a parliamentary system’, ‘the Westminster model’, ‘the Washminster mutation’, and so on. I prefer my emblem: the platypus. It may be implausible, but it works. The fact that no more conventional label fits very well must make it more difficult to explain to new or young Australians how their government works and for the House and Senate to explain themselves to the public. So be it. One sign of maturity is the acceptance of ambiguity. I have sometimes heard it said that Australia, as such a young nation, still lacks a sense of its own identity. I have seen no evidence of that. But in any case, perhaps

240 I do not mean to suggest that he was not aware that his prescription closely tracked the Commonwealth Constitution. He was. It also should be noted that his constitution also would incorporate an entrenched Bill of Rights.

one sign of Australia's growing maturity as a self-confident nation will be its growing acceptance of the ambiguity that is inherent in its constitutional system.

A delicate balance

This is the genius of the Australian political system, but it is an accidental genius. I do not believe that it really was intended to work this way. I especially doubt that the distinction I have drawn between responsibility and accountability would have resonated well at the constitutional Conventions. Instead, I suspect that most of the Constitution's authors would have argued that it is precisely by holding governments responsible that the Parliament holds them accountable. I also accept the judgments of scholars that the Chifley Government in 1948 did not intend to make it almost impossible for future governments to have 'the numbers' in the Senate. Finally and most important, I am sure that many inhabitants of each of the three parts into which Parliament House is divided—the Senate, the House of Representatives and the Government—would not fully accept my appraisal and characterization.

If, as I have just argued, what makes the Australian political system special is its capacity to balance principles of responsible government (as manifested primarily in the House of Representatives) with the principles of controlled government embodied in checks and balances (and manifested primarily in the Senate), then it is a delicate balance. By this I mean four things, two of which by now will be familiar. First, I mean that the Australian political system is an unusual and probably unique combination of elements that do not fit together comfortably. So the balance among them is not necessarily a sturdy one. Second, I mean that those elements can combine to create a functioning political system that avoids some of the deficiencies of more 'pure' versions of both parliamentary and presidential regimes by balancing some characteristics of each against the other.

Third, I also mean that the balance requires constant maintenance and, when necessary, adjustment. In practice, this requires that the stronger the bonds that tie the House to the government, the more important it becomes for the Senate to increase its own capacity and willingness to demand accountability from the government. The Senate has yet to develop fully the capacities and, more important, the sense of itself that it will need if it is to provide the accountability that once was expected to accompany the relationship of formal responsibility between the lower house and the government. The Senate rightly prides itself on a more deliberative legislative process (and a more energetic

committee system, an important subject that I have not addressed)²⁴¹ than is to be found in the House of Representatives or, for that matter, in perhaps any other ‘upper house’ that is part of what otherwise is a parliamentary regime. But my argument suggests that the Senate should begin asking not whether its glass is half-full, but whether it remains half-empty, and whether it has further to go before it is willing and able to enforce the degree of accountability that my conception of democratic governance requires.

The future direction of the Senate and the prospects for it evolving into an even more effective House of Accountability rest primarily in the hands of the Opposition, whether it be the ALP or the Coalition.

The government party can make a rational calculation that a weak Senate, or a Senate no stronger than it is today, is in the government’s interests. A Senate that interferes with passage of the government’s legislative program and a Senate that second-guesses the government’s administration of existing policies and programs is a distraction and a hindrance. Only a government that knows that it is almost certain to lose the next House election, as the Chifley Government evidently did in 1948, would have a self-interested reason for supporting a strengthened Senate. Otherwise, even if the government party accepts the argument that the Commonwealth needs a better system of checks and balances and that the Senate is the key to meeting that need, I am happy to predict that the government (whether Coalition or Labor) usually will find a compelling reason that this simply is not the best time for reform. A more suitable time surely will come, even if it just so happens that time does not arrive until the governing party has been exiled to the Opposition side of the House and the Senate.

For minor parties, on the other hand, their incentives are to preserve the Senate or strengthen it. With no foreseeable hope of becoming part of government, the institutional base of minor parties will remain the Senate; it is there that they will exercise whatever influence they can. The influence they can exert, therefore, depends on the powers of the Senate—not only its formal constitutional powers, but its capacity and willingness to exercise those powers. So we should expect that, more often than not, the minor parties will react sympathetically to proposed enhancements in the Senate’s authority, practices, and resources that

241 The scrutiny activities of Senate committees have become well enough entrenched to have entered popular culture. A recent novel centering around Aussie Rules football opens with the hero/narrator speculating on espionage in sports and imagining himself ‘giving evidence before a senate committee, how approaches were made, cash dangled under my nose ...’ (Wearne 1997: 1) This may not qualify as scientific proof, but it is a telling example of what have been called ‘unobtrusive measures’ of social phenomena.

the government is just as likely to oppose. Furthermore, the minor parties should be especially sensitive to proposed changes in the rules for electing Senators. It was the switch to proportional representation that made it possible for minor parties to secure representation in the Senate, and it is no secret that the best way to deprive them of their seats and their 'balance of power' is through carefully designed and calibrated changes in the electoral laws as they affect the Senate.

The Opposition is the key. Whether the ALP or the Coalition is the Opposition of the day, it can view the Senate in several different ways. It can view the Senate as its bastion of power; the place where it has opportunities to create alliances against the government and defeat it—opportunities that are not available in the House. From this perspective, the Opposition also should be an advocate of strengthening the Senate; by joining forces with the minor parties, it could institute changes that serve their separate but coinciding interests. Alternatively, the Opposition can view the Senate from the vantage point of the future government. From this perspective, the Opposition would evaluate any proposal to change the Senate by asking not only if that change would work to the Opposition's advantage today, but whether that same change would make its life even more difficult—unacceptably difficult—when it returns to power, presumably in the very near future.

There is another alternative. The government and the Opposition could decide to join forces, as early as tomorrow, to amend the electoral law to rid both of them of minor party and Independent Senators and the leverage they now can have. The major parties could agree to scrap proportional representation altogether or, as I already mentioned, to divide each state into divisions—perhaps three divisions with two Senators to be elected from each of them at each half-Senate election. That 'reform' should just about ensure a two-party Senate. Another approach would be to retain the current electoral system but add to it a requirement that a minor party would have to win some significant percentage of first preference votes before it would be eligible to hold any Senate seats. In other words, a minor party could not win a seat through the distribution of second and subsequent preferences unless it could demonstrate that it was the first choice of a sufficient share of the electorate. By such means the Coalition and the ALP could implement an agreement that the pivotal place of minor party and Independent Senators simply makes legislative life in the Senate too complicated and unpredictable, and that they would rather take the risk of a winner-takes-all system that would allow one to govern and the other to oppose, without the negotiating and compromising and temporizing that non-government majorities in the Senate impose on them both. Were

that to happen, I suspect that it would be a decision that would prove difficult to reverse.²⁴²

In this respect, the balance is delicate indeed, and there is no guarantee that any change affecting the Senate is going to be change for the better. For the Opposition to join with the minor parties in promoting a stronger Senate today would create problems for it in the future, when it becomes the government. But for the Opposition to join with the government in weakening the Senate would be detrimental to the Opposition's short-term interests and, by making it easier for the government to enact its program and protect itself against searching scrutiny, might even make it more difficult for the Opposition to discredit the government and replace it in power. In the longer term, a government-controlled Senate would have the same political incentives to treat the government gently—too gently—that the House majority has. It is likely that sooner or later, and probably sooner, the Senate would be no different from the House if the government held a majority of seats there as well. An Opposition-controlled Senate, on the other hand, might undertake energetically to hold the government accountable, but it would be motivated by the natural desire to help promote the Opposition to majority status in the House. The risk, therefore, is that the Senate would become another instrument in the electoral contest, not an instrument of effective governance.

A likely result of all these calculations and considerations is a perpetuation of the status quo, with only incremental and unintended changes taking place to strengthen or weaken the Senate at the margins. Incremental changes or changes with unintended consequences may be what the future holds for the Senate, and this is not necessarily a bad thing. The consequences of major or rapid changes in institutions are very difficult to predict, which is the source of the truism that today's reform becomes tomorrow's problem. For a complicated institution of democratic governance, gradual change may be best. What may be more important than the pace of change is a clear sense of the direction that change should take.

242 Bennett (1996: 82) has pointed out that, in recent decades, PR has been introduced for upper house elections in New South Wales, South Australia, and Western Australia (and proposed in Victoria). 'It is now close to an Australian norm,' he argues, 'that preferential voting is used for lower houses and PR for upper houses, and a government that attempted to alter this pattern might find many voters antagonized by what would be portrayed as a government attempting to distort the electoral system for its own ends.' As the proposal for multi-member Senate districts or regions indicates, however, there are ways to reshape electoral outcomes while arguing that PR is not being abandoned, and that only the form of PR is being changed.

The fourth respect in which the Australian political system embodies a delicate balance lies in the fact that making the system work to its potential requires a degree of self-restraint as well as a tolerance for institutional complications and political inconveniences. These are things that do not come naturally to impatient politicians whose instinctive interests are in maximizing their power and in subordinating concerns with government institutions and procedures to their desire to get things done—now. This last meaning of balance merits some elaboration.

Nowhere is self-restraint more necessary than in the Senate itself. Harry Evans, Clerk of the Senate and editor of the tenth edition of *Odgers' Australian Senate Practice* (2001) is not shy about claiming for the Senate its rightful place in the sun. At first he makes a relatively modest argument based on the virtues of bicameralism:

In every walk of life—be it medicine, science, or day-to-day family problems—the second opinion is sought and valued. So is it in government, where a second House acts so as to ensure proper consideration of all legislation, imposes a period for reflection and provides an opportunity for anyone to voice an opinion, support or protest regarding proposed legislation, after which the second House may make or suggest amendments to proposed laws. (*Odgers' Australian Senate Practice* 2001: 11)

Later, though, he asserts the legislative primacy of the Senate, if only by default:

Section 1 of the Constitution vests the legislative power of the Commonwealth, that is, the power to make laws subject to the limitations provided by the Constitution, in the Parliament, which consists of the Queen represented by the Governor-General, the Senate and the House of Representatives. The agreement of each of the three components of the Parliament to a proposed law is required to make a law of the Commonwealth. In practice, with the ministry, the executive government, initiating most legislation in the House of Representatives, controlling that House through a party majority, and advising the Governor-General, the task of exercising the legislative power falls upon the Senate. (*Odgers' Australian Senate Practice* 2001: 251)

Almost by necessary implication, the Senate is all that stands between the Australian people and an electoral parliamentary dictatorship. Even if that is so, it does not imply that the Senate should exercise its constitutional powers fully and at will. When push comes to shove, the Senate is well-advised to show deference to the House. In this context, we should revisit for a moment the trio of considerations (introduced in the last chapter during the discussion of mandates) which

it is proposed that the Senate take into account as it decides how to use its powers ‘circumspectly and wisely’:

A recognition of the fact that the House of Representatives represents in its entirety, however imperfectly, the most recent choice of the people whereas, because of the system of rotation of senators and except in the case of simultaneous dissolution of the two Houses, one-half of the Senate reflects an earlier poll.

The principle that in a bicameral parliament one house shall be a check upon the power of the other.

Whether the matter in dispute is a question of principle for which the government may claim electoral approval; if so, the Senate may yield. The Senate is unlikely to resist legislation in respect of which a government can truly claim explicit electoral endorsement, *but the test is always likely to be the public interest.* (*Odgers’ Australian Senate Practice* 2001: 13; emphasis added)

It is interesting to compare these statements from 2001 with what the then Clerk of the Senate, J.R. Odgers, wrote in 1966:

The House of Representatives is, and must always be, the policy making chamber. The worst thing that could happen to the Senate is for it to attempt to compete with the House of Representatives as a policy maker. If it did, it would, in the process of time, risk emasculation, as the House of Lords was eclipsed. ...

If it disagrees with policy, the Senate has the right, indeed the duty, to project its viewpoint by the process of amendment or suggestion, but it is submitted that the Senate should not—except where state interests are seriously threatened—insist upon amendments disagreed to by the policy making Chamber. The will of the House of Representatives should prevail and, if that House errs, it can safely be left to the sanction of the people at election time. (quoted in Solomon 2000: 11)

In 1966, the standard for the Senate acting to thwart the government was a serious threat to ‘state interests’. In 2001, it was the arguably weaker standard of what is likely to be in the public interest, presumably as determined by the Senate. Although we should not subject these phrases to too fine an examination, it is not difficult to discern in them a less deferential tone in 2001 than in the mid-1960s.

For a moment, let us ignore the advice to the Senate in both quotations, think only of the Senate’s formal constitutional authority, and imagine what might happen if the Senate were willing and able to exercise that authority to its fullest.²⁴³ The Senate could reject, or amend

243 I put aside as unknowable how the High Court might rule on the boundaries of Senate power, and if, when, and why it might invoke conventions as the basis for limiting that power.

beyond recognition, any and all government legislation that did not accord with the policy preferences of stable or shifting majority coalitions of non-government Senators. The Senate also could initiate its own legislation and, if there was a sufficiently stable non-government majority on that side of Parliament House, it could develop and seek enactment of its own legislative agenda in competition with that of the government. The government's ability to implement whatever electoral mandate it tried to claim would be at the mercy of the majority will of the Senate. And in effect, the Senate could, at any time and on any issue, force the government to choose among compromise, capitulation, or a double dissolution. In response, a sensible government would ensure, as soon as possible, that at least one bill had satisfied the requirements of sec. 57, and so could be invoked to trigger a double dissolution whenever the government decided the time was right. In turn, an intransigent Senate could try to force the government's hand by refusing supply and compelling the government to resign, in order to provoke simultaneous elections at a time more to the liking of the non-government parties in the Senate.

Fortunately, this is a nightmare scenario that so far has remained just that: a bad dream. But why? Why were the events of 1974–1975 so much more the exception than the rule? Although governments often complain about the Senate, it becomes clear that its non-government majorities have exercised great self-restraint when we compare what they do and have done with what they could do if they threw caution and good judgment to the winds. More than half a century ago, Denning (1946: 64–65) suggested four reasons for the Senate's self-restraint: (1) the responsible attitude of Senators 'towards the proper working of the machinery of government'—in other words, respect for what both parties take to be the principles underlying the Constitution; (2) the recognition that 'capricious use' of their power would seriously damage the public standing of the Senate; (3) the non-controversial character of much legislation; and (4) the recognition, or hope, that the party in government today soon will be in Opposition, so that neither party has a long-term interest in encouraging bicameral practices that increase the likelihood of stalemate.

These arguments, which are interconnected in many ways, remain plausible today. Although Odgers did not explain exactly what he meant when he wrote in 1966 that a too-assertive Senate would 'risk emasculation,' he presumably was suggesting a recognition by the Senate that, to some Australians, its position in the constitutional order was and remains questionable or ambiguous. Reid and Forrest (1989: 479) recite various ways in which the Senate has arranged its procedures to suit the interests of the government, even when the

government lacks a Senate majority. This leads them to conclude that 'Senate majorities have taken an enlightened attitude towards protecting the Government's interests in the Senate, and *in doing so they have protected the Senate in the eyes of the public.*' (emphasis added) I believe, as they evidently did, that there remains an ambivalence or uncertainty among many Commonwealth politicians as well as the Australian public as to what is appropriate for the Senate to do and under what circumstances, notwithstanding its formal constitutional powers. If so, the Senate has to be somewhat concerned that if it becomes too assertive too often, it may find itself without the public support it needs to sustain that role. The too vigorous exercise of its powers could produce a backlash that would inspire greater support for attempts to reduce its powers.

Goot (1999b: 338–341) reports surveys showing that the Australian public does not necessarily prefer unified government (i.e., the government party or coalition also controlling the Senate), that there is no consensus that the Senate should refrain from blocking bills or that its constitutional powers should be curbed, and that 10–15 per cent of voters have split their tickets in recent House and Senate elections. These findings lead him to conclude that 'all the evidence points to a better educated, more politically aware electorate, welcoming the check on executive power and wanting the Senate to stay.' That must be reassuring for the Senate's advocates and defenders. However, practicing politicians will ask how stable public support for the Senate would be if and when the government accuses it, as it was accused in 1975, of being used by the Opposition in an attempt to bring the government to its knees in contravention of all that is most familiar about how Australia's political system works.

Denning's fourth argument is mirrored in Melissa Langerman's much more recent observation (in Bongiorno et al. 1999: 167) that 'Perhaps the only certainty for political parties, particularly in recent years, has been that whatever procedures they introduce as a stumbling block for the government while they are in opposition, almost certainly become a stumbling block for themselves in government.' As I already have argued, major 'reforms' in the Senate are most unlikely without the active support of the Opposition. However, the Opposition, of whatever party, always wants to convince itself that it is the Government-in-Waiting that will regain power within the next three years at most. With that happy prospect in mind, today's Opposition will think more than twice about pressing for changes in the Senate that may work to its immediate advantage but that soon will come back to haunt it.

When Denning wrote, there had been only one double dissolution and that had occurred more than forty years earlier. So it is not surprising that he failed to add to his list of arguments favouring senatorial self-restraint the fact that non-government Senators always must remember that if they refuse to pass a government bill, they may be creating the basis for a double dissolution and an election at which they all must face the voters. As Reid and Forrest (1989: 74) put it, 'In many cases the Senate's opposition to the government of the day has been limited not by the Constitution but by its willingness to face the possible electoral repercussions of its actions.' Furthermore, the non-government parties must ask themselves whether they are likely to be penalized at the polls precisely because their assertions of Senate power are thought to violate an essential principle of the constitutional system.

In practice, therefore, the question for a non-government majority in the Senate is whether or when the public will think it is legitimate for that majority to use its voting strength to block enactment of legislation unless the government makes satisfactory policy concessions, or whether the public will decide that doing so is incompatible with the governing principles of Australian democracy as it understands them. Under what circumstances is it appropriate for the Senate to exercise its right to amend or veto legislation? When should its non-government majority rest content with questioning, reviewing, and even investigating and exposing government policies and actions in a far more independent manner than can be expected in a House that the government controls through strict party discipline? In turn, the question for the government and its House majority is whether or when it should be flexible enough to accommodate the Senate's amendments to its legislation instead of allowing that legislation to die in the face of Senate opposition (and become a double dissolution trigger).

More often than not, the result is a reasonably effective working relationship between the House with its government majority and the Senate with its non-government majority. Sharman (1998: 8–9) concluded that 'governments can usually get most of what they want through both houses of parliament, given strong justification and the time necessary for proper scrutiny. It is only when governments are impatient or see partisan advantage in passing legislation without amendment that they become openly hostile to the actions of the Senate in forcing compromise.' Even more recently, Ward (2000a: 69) came to much the same conclusion: 'the evidence is strong that governments still hold the legislative initiative and get most of what they want, and certainly most of what they absolutely need, out of the upper house.' The problem for Australia is that this may not be the impression that an Australian citizen would get from reading media reports and listening to

government leaders in the House and non-government Senators chastise each other.

Some concluding thoughts

Some readers may try to discern in this chapter a hidden diagnosis and agenda. The diagnosis? That the underlying problem with the Australian political system is that it differs from the American system. The agenda? To move the Australian system further down the road from Westminster to Washminster to Washington. Not guilty, I argue. My goal is not to argue for a transformation of the Australian Senate into the United States Senate, nor to advocate that the Commonwealth move toward a US-style presidential-congressional system (as some Australians recently have proposed). On the contrary, my interest is in strengthening the capacity of the Parliament so that it is better able to fulfill its part of the bargain of parliamentary government. A core purpose of requiring the government to be responsible to the Parliament is to ensure that it is accountable to the Parliament. If the development of disciplined parties makes it unlikely that the House of Representatives will hold the government accountable, it would remain consistent with the underlying purpose of responsible government for the Senate to do so. In other words, to claim that the Senate acting as the House of Accountability contradicts the fundamentals of responsible government is to emphasize form over function.

Ward has written that ‘the potential for conflict between a government responsible to the lower house and a powerful, federal upper house ... has been ... resolved in favour of the government. The threat to responsible government by an American-style Senate has not materialised.’ (Ward 2000b: 119) I disagree on all counts. First, I disagree that the ‘potential for conflict’ has been ‘resolved’—or at least I hope that the Senate will prove him wrong in the years to come. Second, I disagree with the implication that conflict between the Senate and the House (and government) is a ‘threat to responsible government.’ To the contrary, as I have argued, an assertive Senate is necessary to prevent ‘responsible government’ from remaining or becoming little more than an empty formalism.²⁴⁴ And third, I disagree with his implication that the alternatives are an ineffectual Senate and an ‘American-style Senate’. There is a middle ground, but finding and maintaining it may prove to be the greatest challenge of all.

Although I have come to admire the Australian regime, I doubt that I would recommend it to anyone else, precisely because of the delicate

244 This certainly is not an original argument; see Uhr (2002a), among others.

balance that it requires. Australians have made it work in Australia, however, and I now share the benign arrogance of the Constitution's authors in believing that Australians can make it work still better in the future. But that is most likely to happen if there is a clear understanding of what constitutes the problem and what constitutes the potential solution.

How likely is this analysis to be of anything more than historical interest ten or twenty years from now? Barring overwhelming victories by the same party in two successive Senate elections or any change in the election rules, non-government majorities in the Senate are likely to persist. The relatively balanced popular support for the two main contestants; the election of Senators, six or twelve at a time in each state, on a state-wide basis; the election rules that allow minor party and independent candidates to win Senate seats by meeting a fairly low quota requirement and doing so primarily on the basis of voters' second and third preferences—these and like factors combine to explain why some informed observers go further and contend that continuing non-government majorities in the Senate are a virtual certainty.

Of that I am not quite convinced. Landslides are known to happen and, given a good streak of luck and a strong economy, I can conceive of a landslide victor being rewarded two or three years later by another equivalent success. One obvious question, then, is whether a government (of either political persuasion) that finds itself with majorities in both chambers would take advantage of the opportunity to change the rules of the game to the detriment of the minor parties and Independents. The goal presumably would be to make it far more likely that, in the future, whichever party wins the House also will win control of the Senate.

There is no certain answer to this question because the governing party would confront conflicting incentives. On the one hand, there would be the obvious incentive to take 'control' of the Senate away from the inconvenient handful of Senators who, after all, represent such a small fraction of the national electorate.²⁴⁵ On the other hand, a government can gain control of the Senate only after two successive election victories. If it then changes the rules of the game, the new rules would take effect only at the next election. So the governing party would have to win a third successive election before it would be able to take advantage of its control of what now would be a two-party Senate. Under these circumstances, a government would have reason to fear

²⁴⁵ Jackson (1995: 46) cites a newspaper report of Prime Minister Keating saying in 1994 to Senator Kernot, Leader of the Australian Democrats, that 'We can get rid of you lot, that little tin pot show you run over there.'

that the 'reforms' it made actually would work to the advantage of the Opposition, which would stand an equal or better chance of winning that third election. It is quite possible, therefore, that even if and when a government does have majorities in both houses with which it could legislate a change in the system for electing Senators, it might decide not to do so out of fear that it might not be the immediate beneficiary of that change.

Alternatively, we can imagine the Coalition and the ALP forming a temporary coalition of convenience, agreeing that it is in their mutual interests to amend the electoral laws to squeeze minor parties and Independents out of the Senate. Then, with the battlefield cleared, they could contest with each other, and only with each other, for control of the Senate—winner take all. Yet there several reasons to doubt that this actually will happen. First, if it were such an appealing idea, why has it not already happened? Governments have faced non-government majorities in the Senate for most of the past five decades. During that time, either they have not sought to ally with the Opposition against the minor parties, or they have tried but been rebuffed. Perhaps the reason such a temporary alliance has not already been formed is the level of distrust between Labor and the Coalition. Each may fear that any 'reform' proposal that either makes somehow would work to the disproportionate benefit of the other, even if it is not clear how that could happen. Almost by definition, any proposal that was acceptable to both sides would have to guarantee that neither party would benefit at the expense of the other.

Change would entail political risks that one side or the other might decide are too great to run. Under the current system, both the government and the Opposition know that they usually are only a handful of votes away from victory in the Senate, and there are reasonable people with whom to negotiate for those votes. By contrast, the only reason to change the Senate's electoral system would be to make it much more likely that one of them, either Labor or the Coalition, would win control of the Senate at each election and the other would lose. However, the kind of 'reform' that both sides are most likely to accept is one that gives each of them an equal chance of winning in each state, a system that is likely to result in the Coalition and the ALP splitting the six or twelve votes that are on offer at each Senate election. And what could be worse than the realistic possibility of a two-party Senate in which the two parties are tied?

Finally, both the government and the Opposition must ask whether they prefer the inconveniences that the status quo creates for the government and the opportunities it creates for the Opposition when compared with the alternatives that significant electoral change almost

certainly would bring. Any reform that effectively precludes the election of minor party or Independent Senators would produce a Senate that is controlled either by the government or by the Opposition; there could be no third force to hold the balance of power. If the government controls the Senate, we could expect it to stagnate or degenerate. Just as governments have no incentive to strengthen the House, they would have no self-interested reason to support a Senate that reviews and even challenges and occasionally rejects its primary and secondary legislation, and that makes a serious effort to monitor its implementation of the laws. If the Opposition controls the Senate, we could expect it to become a forum for inter-party conflict that could make the House today resemble a tea party by comparison. Perhaps an apt comparison for the Parliament would become the Cold War or, even more frightening, a rugby union match in which blood flows freely but few tries are scored by either side.²⁴⁶ A government would not be able to enact *any* legislation without the support or at least the acquiescence of the Opposition. I would expect that after only a few years of enduring the frustration that would ensue, a government of either political complexion would try to reduce the Senate's powers by constitutional amendment or, if that proved impossible, as would be likely, to amend the election laws once again.²⁴⁷

It is not unreasonable, therefore, to assume that there will continue to be non-government majorities in the Senate. How that situation will affect the outcomes of Senate decision-making and the political dynamics in the Senate will depend very much on a complex of factors that include the policy distance that separates the government from the Opposition and where the 'balance of power' Senators stand, in policy terms, in relation to both of the 'major powers'.

Late Twentieth Century German experience offers a good example.²⁴⁸ For years, the Bundestag comprised the two major parties—the Social Democrats (SPD) and the Christian Democrats (CDU)—and a minor party, the Free Democrats (FDP). Ideologically, the three parties could fairly easily be positioned on a single left-right spectrum,

246 Note to American readers: it would take another book to explain this comparison adequately; suffice it to say that what I envision would not be a pretty sight.

247 Sec. 128 of the Constitution allows the Governor-General to submit a proposed constitutional amendment to a national referendum if the proposal is passed twice by either house, even if the other house rejects it on both occasions. In these matters the Governor-General would be expected to act on the advice of the government. Thus it is highly unlikely that a proposal passed by a hostile Senate and rejected by the House of Representatives would be put to a referendum.

248 Though I ask readers familiar with German politics to forgive the simplifications in what follows.

with the SPD to the left of centre, but not too far left, and with the CDU to the right of centre, but not too far right, and with the FDP in between. This situation made the FDP available as a plausible coalition partner with either of the major parties when neither won a majority in its own right, which was always the case.

Then, in the 1980s and 1990s, the situation changed. The status of the FDP as the third force in German national politics was challenged first by the emergence of the Greens and then, after German reunification, by the Party of Democratic Socialism (PDS). In their early years, at least, the Greens were not particularly interested in coalition politics and the compromises such politics entail, and neither the SPD or the CDU was interested in publicly choosing the PDS as its political bedfellow in the national parliament. This made life more difficult for both major parties, but especially for the CDU because it was further ideologically from either of the two new minor parties than it was from its primary opponent, the SPD. In terms of ideological compatibility, a grand coalition with the SPD made more sense for the CDU than a coalition with either the Greens or the Democratic Socialists.

Now return to Canberra, and recall that the first minor party to secure and retain Senate seats after the switch to PR beginning with the 1949 election was the Democratic Labor Party (DLP). The DLP usually voted with the Coalition; it even has been argued that the DLP's *raison d'être* was to keep the ALP away from power. For as long as the DLP remained in the Senate, therefore, the Labor Party often found itself opposed by a triad of the Liberals, the Country/National Party, and the DLP. The Senate's new, minor party was not often said to hold the balance of power. Then the DLP faded from the scene and the Australian Democrats emerged instead. At least at first, the Democrats fitted easily enough between Labor and the Coalition on a left-right continuum (though that changed as the new millennium began). And anyway, the Democrats claimed to be less interested in using their Senate leverage to promote their own social, economic, or international agenda than to 'keep the bastards honest'—a posture that emphasized the process of government as least as much as its policies.

Now, in mid-2003, the conventional wisdom is that the Democrats are in the process of imploding because of philosophical and strategic differences, and may not survive the next election. The more people assume this will happen, the more skeptical I become. But for the sake of argument, let us suppose that, after the election of 2004, the 'balance of power' in the Senate will be held by the Greens, not the Democrats. What difference will that make for the political dynamics in the Senate and for how much pain the Senate causes the government?

The answers are that (1) we do not know, and (2) it all depends. The first answer reminds us that things are obvious in politics only after the fact. The second answer is short-hand for saying that the Coalition could be expected to have more difficulty than Labor in coping with a larger Green presence in the Senate. It also is uncertain whether or not the Greens, for reasons of habit or conviction, might prefer remaining a force in opposition to whichever party is in government, so it might be reluctant to form government-Green winning coalitions. We have seen that the Greens in the late 1990s frequently voted with the Labor Opposition; what we cannot know is whether the Greens voted in this way because they chose to ally themselves with the *Labor* Party or with the *Opposition* party. In other words, that track record of the 1990s holds no guarantees about how often an enlarged Green contingent would be prepared to vote with a Labor Government (or a Coalition Opposition), much less another Coalition Government.

I offer no predictions about election outcomes or their consequences for what then happens in Parliament House. The purpose of these speculations is to emphasize two points. First, in politics as in finance, what has happened in the past is no guarantee of what will happen in the future. Politics is a human activity, an intensely human activity. Therefore, it is unpredictable. If it were otherwise, it would be boring. What we can say is that what will happen is going to depend to a significant though not necessarily determinative degree on what the rules of the game are and who the players are. But second, while the answers may change, the questions do not, or at least they do not change nearly as much. The same questions we have asked about the Senate in the 1990s, and the modes of analysis we have applied, will continue to remain relevant so long as the Commonwealth Parliament remains the platypus of the Australian political system.