

The Australian Constitution and the 1911 Myth*

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Much of what passes for debate on constitutional matters in Australia is based on myths. Certain beliefs which are actually quite false are constantly repeated and accepted as true by the learned and unlearned alike. Most of them have been comprehensively refuted at one time or another, but this does not prevent their repetition or acceptance.

One such may be called the 1911 myth, which is along the following lines. The framers of the Australian Constitution followed the British pattern in deciding upon the powers of the two houses of the Parliament, and therefore gave the Senate the powers of the House of Lords as they were in 1900. If only the Constitution had been drawn up after 1911, the framers would have followed the British Parliament in stripping the second chamber of its powers, as was done with the House of Lords by the *Parliament Act 1911* after it rejected the Liberal government's budget of 1909. We should now make up for our time lag by following the British Parliament down that path, which is self-evidently conducive to good government.

This story is a favourite of Gough Whitlam, who repeats it on every plausible occasion. A recent disappointing recurrence of it appeared in a Parliamentary Library paper on section 57 of the Constitution (Research Paper no. 2/2000–01). The paper regards the tale as so well known that it does not bother with more than a casual line that 'A constitution framed after this might have been a less conservative document'.

* This article was published in *The House Magazine*, 6 September 2000 and H.D. Irving et al, *Trusting the People: An Elected President for an Australian Republic*. Cottesloe, WA, Design by Design Practitioners, 2001.

The use of the word ‘conservative’ incorporates at a stroke a whole body of mythology about the Constitution.

This oft-repeated ‘fact’ is wrong, on two counts.

In the first place, under the ‘unwritten’, that is, uncodified, British constitution as it was before 1900, the House of Lords was thought not to possess the power which it attempted to exercise in 1909, and it was believed that that power had been effectively removed over 200 years earlier. According to the first edition of Erskine May’s *Parliamentary Practice*, published in 1844, the powers of the two houses in relation to financial legislation were governed by the resolution of 3 July 1678, which declared that all financial grants were the ‘sole gift’ of the House of Commons, and that house had the sole right to determine all financial legislation. The Lords were usually described as powerless in matters of finance and ultimately powerless in other matters; they were so described by Walter Bagehot in his classic exposition *The English Constitution* (1st edn, 1867). The whole point about the 1909 budget crisis was that the House of Lords attempted to exercise powers which it was long thought not to have; the 1911 Parliament Act simply regularised the ‘unwritten’ constitution as it was thought to be for the previous 200 years. The Act closely reflected Bagehot’s description. If the Australian framers had actually attempted to copy the British Parliament, they could easily have ordained a powerless second chamber by incorporating a version of the resolution of 1678.

Secondly, the Australian framers explicitly chose *not* to follow the British pattern of bicameral relations. The debates in the constitutional conventions are replete with statements to the effect that they were constructing a different kind of parliament, a point conceded by those who would have preferred to follow the British model more closely.

An example is provided by a speech made to the 1897–98 convention on 17 September 1897 by Richard Baker. Describing the House of Lords as approximating ‘a mere gilded ceremony’, he pointed out that, from their earliest decisions, the conventions had decided on a completely different kind of second chamber which would deliver a different system of government. He also made a very telling attack on the British constitution, an attack which could be repeated verbatim with the same accuracy now. What he called ‘the British sham’ of a titular head of state and a supposedly responsible cabinet actually produced rule by autocratic prime ministers only occasionally restrained by feeble parliaments, and two parties agreed on nothing except a desire to turn their rivals out, get themselves in and get their hands on the autocrat’s power. This critique of a degenerate constitution was intended to persuade the convention to abandon every feature of the British model and to adapt better systems exhibited by modern republics. In this he was not successful, but there was no denying his point that the Constitution was not British in its basic structure. The 1911 Act simply confirmed the degeneration Baker identified and emphasised the different character of the Australian design. And Baker, be it noted, was a ‘conservative’ in the conventional political sense. It is even more instructive to read the speeches of the political radicals, like Dr John Cockburn.

So much for the 1911 myth. It will go on being repeated because it is part of a larger mythology, to which the use of the word ‘conservative’ in the library paper alludes.

This is to the effect that the old fogies of the constitutional conventions stupidly and slavishly followed the British model, with some American elements they didn't understand (another myth¹), without anticipating changes which were on the horizon. This picture is painted for the purpose of convincing us that we should now *more* slavishly follow the British model by having a powerless second chamber, an all-powerful prime minister and an artificially adversarial two-party system. Only such a system, it is implied, is truly democratic. By this sleight-of-mind the supposed radicals and anti-monarchists are able to wrap themselves in the Union Jack without most people appreciating the ludicrous spectacle they make. It is never explained why we should now adopt the most outmoded and dysfunctional system of government in the democratic world, which the British themselves are struggling to reform. And it is never revealed that we were warned off doing just that by the framers of our own Constitution.

¹ See 'The other metropolis: the Australian founders' knowledge of America', in *The New Federalist*, no. 2, December 1998.