

A DELICATE BALANCE: THE ACCIDENTAL GENIUS OF AUSTRALIAN POLITICS

A VIEW FROM WASHINGTON

Stanley Bach

Presented in the Occasional Lecture Series of the Department of the Senate, Commonwealth Parliament of Australia; Parliament House, Canberra; 28 February 2003

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When it was suggested that I offer some reflections today on the Commonwealth Parliament as I have begun to learn about it, I was happy to agree. As my time in Canberra begins to approach an end, today's program gives me an opportunity and incentive to sort through some of my impressions and, if you know the expression, to step back from the trees to look at the forest. My understanding of the Australian political system remains very much a work in progress. Let us stipulate that. Also, and inescapably, my interpretations and evaluations of government and politics in Canberra are reflected 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. So let us stipulate that as well.

Let me begin by foreshadowing my general conclusion. In much of what I have read about Australian government and politics, 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, 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.

For more than 30 years, I earned my salary by worrying about the United States Congress, which was, I assure you, a full-time job. And for more than 20 years, my office in Washington was in the James Madison building. Madison, as many of you may 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 a compelling piece of political advocacy, which was their essential purpose.

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In the 51st of those essays, Madison offered a rationale for the U.S. 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 defense 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 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. You will 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 authorities 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 authority of government. The core of legislative authority is assigned to the Congress, but it is shared with the President, primarily through his enormously potent veto power. The core of executive authority 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 executive authority also is shared with the courts that have the authority to invalidate executive actions that are inconsistent with the law or the supreme law of the land, the Constitution. And adjudicative authority is centered 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 government authority that are to be found the checks and balances that provide many of the “auxiliary precautions” to which Madison referred.¹

¹The 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

But Madison then extends his argument in a way that, from today's perspective, is amusing for both its lack of prescience and its lack of application to the Commonwealth Parliament today. First he explains that the protection of individual rights ultimately lies in the competition for power that the Constitution creates between institutions that share the legislative, executive, or judicial authority. 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.” Then he continues:

But it is not possible to give to each department an equal power of self-defense. In republican government, the legislative authority necessarily predominates. The remedy for this inconvenience [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.

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. 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 U.S. Constitution possible.

the most limited government, and especially the most limited central government, that was practical. However, I believe that Sawer (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 Sawer recognized, is posed by the widespread belief that 21st century governments need to be much more powerful, and have a far broader reach, than 18th century governments. This does not mean, however, that the notion of “checks and balances” has become outmoded. To the contrary, they are more essential than ever before. Sawer (1977: 140) argued that a modern democratic government “committed to economic management and a multitude of other 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 again 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. 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 U.S. Constitution prevented an extraordinary expansion of federal powers and activities during the 20th century.

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 to me to be eminently sensible. 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: a system in which a government is chosen through reasonably free and fair elections, but then is able to govern without effective constraints until the next election.

Let me add at this point that this is why you rarely will hear any discussion of prerogative powers in the United States. It also 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 mean the quadrennial presidential nominating extravaganzas. The American political system, as well as its legal system, places great weight on there 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 black letter of the constitution. 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.

I recently read an essay about the “troubles” of 1975 in which two apparently distinguished Australian academics denigrated their 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).² It is difficult to conceive such a statement being made in the United States by analysts of comparable repute. To give 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.

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 21st 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

² 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.

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 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, that will require that the Constitution be amended. I understand that opening a constitution to amendment is the political equivalent of opening Pandora’s Box and that 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.

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 nuanced 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.³ So if I may be permitted this recommendation, I think it would be more in keeping with what I have come to know and admire about 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 our respective approaches to constitutional law. Perhaps Australians have a more positive view of government and a more optimistic view of human nature, so that there is less concern here than in Washington with 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

³Ward (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 to be codified. 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 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 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.

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 earlier when considering the new Commonwealth Constitution and comparing it with its American counterpart.

When that instrument [the U.S. 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 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 (1997: 27), so it is worth taking account of Galligan’s 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.

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 skeptical and suspicious of how governmental powers are exercised, and for whose benefit, than the "public utility" imagery would imply.

You might think I was being coy if, at this point, I asked rhetorically what all of this implies 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 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.

Not incidentally, I may add, he understands parliamentary sovereignty to be a defining characteristic of the "Westminster model" of democratic government. Referring to this doctrine of parliamentary sovereignty, he concludes that "[t]here 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." On this basis alone, we could dismiss contentions that the Commonwealth political system comports with this model, but we know that what most people have in mind when they speak of the "Westminster model" is whatever they think "responsible government" means.

What is important for our purposes here is what had come to worry the good Lord Chancellor because, after all, parliamentary sovereignty was not exactly a modern 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.

And this from the Lord Chancellor of the United Kingdom, who reigned but did not rule over the British Senate. Perhaps his name at birth was James Madison, Jr.

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.

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.

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 elected, are not subject to effective checks and balances. And of course, Lord Hailsham was referring to Great Britain, where party discipline is not nearly as strict as it is in Australia (Evans 1982).

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.⁴ I would not want any Government to 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 impose. 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

⁴My 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, although I am about to express some qualms about the House of Representatives, I would not want these comments to reflect in any way on the skills and dedication of the people who serve it.

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 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, on the other hand, there often is a serious disconnect between elections and governance. Although individual Representatives and Senators are running for re-election continuously, 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 campaigns. Although those campaigns 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 that is admirable—and absent in America.

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 be giving us responsible government without accountable government. In Canberra, the House of Representatives continues to make governments, but I understood that the Government is supposed to be the agent of the Parliament. 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 administer the government on its behalf and only for so long as that 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, if any reminder were necessary, it is only human for those elected to this Parliament to have their own self-interest in mind. So if I were a Member of the House, or the Senate for that matter, first I would understand that my continued service in 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 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, by contrast, 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 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.

Under these circumstances, what does it mean to say that the Government is responsible to the Parliament? 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 this or any other prime minister with undemocratic ambitions, but I do remember another catchphrase of early American history: that the price of liberty is eternal vigilance. 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? If 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 an unlikely, 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 of Representatives, those other interests and views are expressed, to be sure, and often too 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 so-called 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, they would argue. A party presents a clear program to the voters and pledges to enact it; a majority of the voters endorse that program with their votes; and the party then redeems its pledge by promptly moving its program through the parliament. Last month’s campaign manifesto becomes today’s new package of laws. The legislative process is a smooth and efficient assembly line.

Well, perhaps. But perhaps instead 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, I fear, and especially one dominated by two disciplined political parties (or coalitions), 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. 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. When I began to read about the Constitution, I decided that it was a conceptually incoherent document, and I found myself nodding in agreement with that oft-quoted prediction of Winthrop Hackett in 1891 that “either responsible government will kill federation, or federation in the form in which we shall, I hope, be prepared to accept it, 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 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 understand 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. Most generally, I have come to appreciate that the Australian system of government *works*. Even though it is difficult to label, 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 well.

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 manifested 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 1990: 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.

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 not be shocking. What is more interesting, and perhaps more surprising, is the inference that Sharman (1990: 2) identifies: 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 fail to take root at all in others. Now we are witnessing many nations confronting 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.⁵

The House of Representatives remains the site of responsible government and the Senate is becoming more and more the site of accountable government. It is the Senate, with its non-Government majority, that is the only potential source of adequate checks and balances. Responsibility and accountability both are to be valued, and they and the two houses of Parliament can co-exist. This coexistence may never be truly comfortable and without its tensions, but those are prices that are well worth paying.

For me, 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 it is capable of combining responsible government with accountable government. As I have said, it is possible for this combination of responsibility and accountability, centered in the House and Senate respectively, to emerge from an institutional structure that, at its heart, is theoretically contradictory. The Australian polity 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 for the Parliament: the platypus. It may be unusual, it may be implausible, it may be unique, but it works. The fact that no conventional label fits this

⁵I have been told that many Australians admire the U.S. 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 “[t]he Australian Constitution is not a blood-stirring document. Unlike its United States counterpart, 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 decades ago), but even in that case, I would be truly amazed—and equally disappointed—to learn that such bar-rooms actually exist.

Parliament very well must make it more difficult for new Australians to understand how their government works, and more challenging for the House and Senate to explain themselves to the public. So be it.

If I am right in thinking that this is the genius of the Australian political system, then it is an uncertain genius in two respects. First, I do not believe that it really was intended to work this way. I doubt if 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 Parliament holds them accountable. I also have no difficulty accepting the judgments of scholars that the last thing on the mind of the Chifley Government in 1948 was to almost guarantee that future governments would not have "the numbers" in the Senate. Finally and most important, I doubt very much that most of those who inhabit any one of the three parts into which Parliament House is divided would fully accept my appraisal and characterization. Unless and until Australia develops a conventional wisdom about the most constructive role for the Senate and its appropriate relationship with the House of Representatives and the Government, the genius I have described can only be an uncertain genius.

In referring to the uncertain genius of the Australian political system, I also have in mind that 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 than is to be found in the House of Representatives or, for that matter, in perhaps any other upper chamber that is embedded in 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.

My goal is not to transform the Australian Senate into the United States Senate, and certainly not to move the Commonwealth toward a U.S.-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. Ward (2000b: 119) has written in the *Australian Journal of Political Science* 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; Ward 2000a). 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 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. 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.

I have entitled this lecture "a delicate balance." By this I mean three things. 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 those elements 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 elements of one against elements of the other. But third, making the system work to its potential requires a degree of self-restraint and a tolerance for institutional complications and political inconveniences that do not come naturally and easily 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.

Although I have come to admire the Australian regime, I doubt that I would recommend it to anyone else, precisely because of the delicate balance that it entails. Australians have made it work in Australia, however, and I now join in the benign arrogance of the Constitution’s authors by 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—so long as it is my understanding, of course—of what constitutes the problem and what constitutes the potential solution.

I say all this with the greatest of affection for the Australian people and with profound gratitude for their hospitality, and especially the hospitality of so many people who are here today. I hope I have not been more critical than a grateful guest should be. My hope was to be just provocative enough to hold your attention and keep your minds off the happier prospect of lunch.

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